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RIGHTS AS A ZERO-SUM GAME

Rebecca Aviel*

White Americans are increasingly expressing anxiety about anti-white discrimination, with more than half of the respondents in a recent survey embracing the view that it is "as big a problem" as discrimination against people of color. This startling and inaccurate assessment is perhaps best explained by research revealing that many Americans view rights as a zero-sum game, in which advances for some necessarily bring losses for others. This attitude toward rights has enormously troubling implications, and we ought to commit ourselves to understanding it as well as we can. In this Article, I provide a taxonomy of racial attitudes revealed in recent social science research, showing how the zero-sum premise is particularly corrosive to our aspirations for racial justice. I then explore the doctrinal underpinnings of this deeply pessimistic view of rights and racial equality. I show that equal protection jurisprudence reflects and facilitates the zero-sum premise in a number of ways. First, with a few highly consequential doctrinal moves, the Supreme Court has crafted an equal protection landscape that primarily protects white claimants protesting the remedial use of race by government actors, making "discrimination" against whites highly salient and constitutionally significant. Second, the Court's equality jurisprudence has allowed the State to meet its equal-treatment obligations by equalizing down rather than up, choosing the "equality of the graveyard" rather than the "equality of the vineyard." Third, the Court's persistent refusal to interpret the Constitution as providing anything other than a "charter of negative liberties" means that there is no real floor to how far this downward-equalization could go. In combination, these doctrinal principles send the message that equality is something for historically powerful groups to fear.

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* University of Denver, Sturm College of Law. I would like to thank Robin West, Frank Michelman, Andrew Coan, Christopher Schmidt, and the other participants in the National Conference of Constitutional Law Scholars for exceptionally helpful feedback.

INTRODUCTION

A century and a half after the ratification of the Fourteenth Amendment, and two years into the Trump presidency, it is as urgent as ever to try to make sense of American race talk.[1] This Article takes on one dimension of that vast and often baffling undertaking: the growing sense among white Americans that it is *they* who suffer from discrimination in the current sociopolitical landscape. A recent study conducted by the Brookings Institute and the Public Religion Research Institute (PRRI) reveals that more than half of white Americans believe that "discrimination against whites has become *as big a problem today* as discrimination against blacks and other minorities," and the numbers go up to 72% for Republicans and 81% for those who supported Trump in the 2016 election.[2] Other researchers have discovered that white Americans link this perceived threat to improvements they observe in the status of minority communities, revealing a zero-sum attitude toward rights and racial justice that is profoundly troubling to the constitutional order upon which we

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1. Sean McElwee & Jason McDaniel, *Fear of Diversity Made People More Likely to Vote Trump*, THE NATION (Mar. 14, 2017), https://www.thenation.com/article/fear-of-diversity-made-people-more-likely-to-vote-trump/ (finding that racial resentment played a larger role in the 2016 election than economic anxiety, and that fears of growing racial diversity were "uniquely important" in determining support for Trump as compared to previous Republican candidates); *see, e.g.*, Maureen A. Craig & Jennifer A. Richeson, *On the Precipice of a "Majority-Minority" America: Perceived Status Threat From the Racial Demographic Shift Affects White Americans' Political Ideology*, 25 PSYCHOL. SCI. 1189, 1189 (2014); *see also* German Lopez, *The Past Year of Research Has Made it Very Clear: Trump Won Because of Racial Resentment*, VOX (Dec. 15, 2017, 2:40 PM), https://www.vox.com/identities/2017/12/15/16781222/trump-racism-economic-anxiety-study (compiling a year's worth of research with similar findings).

2. *See* ROBERT P. JONES ET AL., HOW IMMIGRATION AND CONCERNS ABOUT CULTURAL CHANGES ARE SHAPING THE 2016 ELECTION 2 (2016), https://www.prri.org/wp-content/uploads/2016/06/PRRI-Brookings-2016-Immigration-survey-report.pdf; Don Gonyea, *Majority of White Americans Say They Believe Whites Face Discrimination*, NPR (Oct. 24, 2017, 1:35 PM), https://www.npr.org/2017/10/24/559604836/majority-of-white-americans-think-theyre-discriminated-against; Paul Waldman, *Why White People Think They're the Real Victims of Racism*, THE WEEK (Oct. 25, 2017), http://theweek.com/articles/732849/why-white-people-think-theyre-real-victims-racism; *You, Me, and Them: Data for Q1 and Q2*, NPR, https://www.npr.org/assets/img/2017/10/23/discriminationpoll-whites-tablesxyz.pdf (last visited Mar. 9, 2019).

stake so much.[3] If Americans truly believe that subordinated groups cannot achieve equality without diminishing the stature of the historically powerful, there is little reason to be optimistic about the future of rights in our multiracial democracy.[4]

Rights continue to enjoy enormous symbolic power in our legal and political culture, even as concerns about judicial overreach in the articulation of rights continue to circulate in popular and academic discourse,[5] and even as scholars have engaged in a thoroughgoing project of rights critique, exposing the ways in which rights legitimize and mask subordination.[6] But if rights are seen as something to battle over in a zero-sum game—if every victory for one group is thought to be a defeat for another—then they are tragic indeed, containing within themselves the fodder for the next battle and perhaps countless others.[7]

This Article sets out to analyze the various ways in which white Americans think about anti-white discrimination, including and especially the zero-sum premise, and to illustrate the surprising ways in which equal protection doctrine reflects and facilitates these different forms of white anxiety. The notion of white victimhood is, of course, a long-standing phenomenon in American politics and

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3. Matthew Fowler, Vladimir E. Medenica & Cathy J. Cohen, *Why 41 Percent of White Millennials Voted for Trump*, WASH. POST: MONKEY CAGE (Dec. 15, 2017), https://www.washingtonpost.com/news/monkey-cage/wp/2017/12/15/racial-resentment-is-why-41-percent-of-white-millennials-voted-for-trump-in-2016/?noredirect=on&utm_term=.a679a3b894bb ("[W]hite millennial Trump voters were likely to believe in something we call 'white vulnerability'—the perception that whites, through no fault of their own, are losing ground to other groups. Second, racial resentment was the primary driver of white vulnerability—even when accounting for income, education level or employment"). In constructing a scale of white vulnerability, the authors asked respondents: "(1) whether whites were 'economically losing ground through no fault of their own'; (2) whether discrimination against whites was 'as big a problem as that against Blacks and other minorities'; and (3) if minorities overtaking whites as the majority of the U.S. population by 2050 would 'strengthen or weaken the country.'" *Id.*

4. I acknowledge that accurate depictions of which groups enjoy political power can be challenging. *See, e.g.*, Paul Horwitz, *Positive Pluralism Now*, 84 U. CHI. L. REV. 999, 1011–12 (2017) ("When we think about contests between religion and LGBTQ equality or women's contraceptive rights, do we refer to an undifferentiated 'powerful Christian majority,' or do we think more specifically about the smaller and increasingly isolated number of Christians who adhere with unpopular firmness to 'traditionalist' positions?").

5. *See, e.g.*, Lino A. Graglia, *Revitalizing Democracy*, 24 HARV. J.L. & PUB. POL'Y 165, 175–77 (2000) (criticizing modern Fourteenth Amendment jurisprudence as illegitimately usurping democratic authority); David Schraub, *Unsuspecting*, 96 B.U. L. REV. 361, 399 (2016) (citing ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16–17 (2d ed. 1986) ("[W]hen the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of representatives of the actual people of the here and now; it exercises control, not on behalf of the prevailing majority, but against it.").

6. *See, e.g.*, Robin L. West, *Tragic Rights: The Rights Critique in the Age of Obama*, 53 WM. & MARY L. REV. 713, 714–21 (2011) (summarizing the critique of rights).

7. McElwee & McDaniel, *supra* note 1 ("Politics in the United States and much of the globe is now defined by the questions of tolerance and diversity. . . . Racial identity and attitudes have further displaced class as the central battleground of American politics.").

culture and has been explored in a rich literature spanning the disciplines of law, history, and political science.[8] As historian Rick Perlstein has explained, detailing the development of the Right's "politics of rage," the storm of racialized resentment has been building for a while.[9] But there is reason to believe that it has become a more potent force in contemporary American politics than was previously understood,[10] and reason to explore the ways in which the very doctrine that should safeguard against these revanchist impulses instead facilitates them.

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8. *See, e.g.*, Linda S. Greene, *Civil Rights at the Millennium—A Response to Bell's Call for Racial Realism*, 24 CONN. L. REV. 499, 501 (1992) ("The now persistent characterization of whites as victims of discrimination, as innocents, is evidence of a powerful conceptual shift that characterizes both legal and political anti-civil rights rhetoric. The conservatives' mobilization of the principles of racial equality in defense of the racial status quo is a great challenge to the current Civil Rights Movement."); ROBIN WEST, RE-IMAGINING JUSTICE: PROGRESSIVE INTERPRETATIONS OF FORMAL EQUALITY, RIGHTS, AND THE RULE OF LAW 87 (2003) ("[T]he last great civil rights revolution—the civil rights movements of the 1950s and 1960s—has indeed become the shell of the reactionary anti-affirmative action movement of the 1980s, 1990s and 2000s."); Ian Haney López, *This Is How Trump Convinces His Supporters They're Not Racist*, THE NATION (Aug. 2, 2016), https://www.thenation.com/article/this-is-how-trump-supporters-convince-themselves-theyre-not-racist/ (querying whether Trump is simply the "latest example in the GOP's long-running tradition of dog whistling—a practice that began with Barry Goldwater's summons of 'states' rights,' morphed into Nixon's 'Southern strategy,' then found new guises in Ronald Reagan's references to 'welfare queens,' George H. W. Bush's 'Willie Horton,' and Mitt Romney's makers and takers'").

9. Rick Perlstein, *I Thought I Understood the American Right. Trump Proved Me Wrong.*, N.Y. TIMES MAG. (Apr. 11, 2017), https://www.nytimes.com/2017/04/11/magazine/i-thought-i-understood-the-american-right-trump-proved-me-wrong.html?_r=0.

10. *See* Diana C. Mutz, *Status Threat, Not Economic Hardship, Explains The 2016 Presidential Vote*, 115 PROC. NAT'L ACAD. SCI. E4330, E4330 (Apr. 23, 2018), https://www.pnas.org/content/pnas/115/19/E4330.full.pdf ("Evidence points overwhelmingly to perceived status threat among high-status groups as the key motivation underlying Trump support."). The study Mutz designed involved "identical questions asked of the same individuals in both October 2012 and October 2016, thus making it possible to examine both whether these opinions weighed more heavily in vote choice in 2016 . . . ." *Id.* at E4332; *see also* Fowler et al., *supra* note 3, (finding that those white millennials with high "white vulnerability" indicators were 74% more likely to vote for Trump); Matthew D. Luttig et al., *Supporters and Opponents of Trump Respond Differently to Racial Cues: An Experimental Analysis*, SAGE JS.: RES. & POL. 1 (Oct.–Dec. 2017), http://journals.sagepub.com/doi/full/ 10.1177/2053168017737411 (arguing that support for Donald Trump appears to serve as a basis for polarized responses to racial cues); Brenda Major et al., *The Threat of Increasing Diversity: Why Many White Americans Support Trump in the 2016 Presidential Election*, 21 SAGE JS.: GROUP PROCESSES & INTERGROUP REL. 931 (2016), https://journals.sagepub.com/doi/pdf/10.1177/1368430216677304 (demonstrating that changing racial demographics in the United States contributed to Trump's success among white voters with a strong sense of ethnic identity); Brian F. Shaffner et al., *Understanding White Polarization in the 2016 Vote for President: The Sobering Role of Racism and Sexism*, 133 POL. SCI. Q. 9, 28 (2018) (finding that racial attitudes factored more heavily in the 2016 election than in the 2012 election); Michael Tesler, *Views About Race Mattered More in Electing Trump Than in Electing Obama*, WASH. POST: MONKEY CAGE (Nov. 22, 2016),

In Part I of this Article, I introduce research that reveals the proliferating view that discrimination against white Americans is a pervasive problem. Parsing the language of the survey instruments, I show that the queries can support a range of possible interpretations for what respondents intended to convey—possibilities that include a recapitulation of the well-worn claim that all instances of race-conscious treatment are equally offensive to moral and constitutional values. This normative premise, which we might call the "moral equivalence" principle, has long been the subject of intense debate and sustained scholarly inquiry.[11] Its very familiarity, in fact, obscures what is a conceptually distinctive possibility: that in embracing the position that discrimination against white Americans is a pervasive problem, white Americans are advancing a *descriptive* claim about our world; not only that discrimination is equally pernicious no matter which way it runs, but also that it is *as likely* to be experienced by white Americans as by people of color.[12] I

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https://www.washingtonpost.com/news/monkey-cage/wp/2016/11/22/peoples-views-about-race-mattered-more-in-electing-trump-than-in-electing-obama/?utm_term=.a83b85185d32 (finding racial resentments more tightly linked to support for Trump in 2016 than support for McCain in 2008 and Romney in 2012).

11. The quoted language is a reference to Justice Thomas's assertion in *Adarand* that there is a "moral and constitutional equivalence" between "laws designed to subjugate a race and those that distribute benefits on the basis of race in order to foster some current notion of equality." Adarand Constructors v. Pena, 515 U.S. 200, 240 (1995). For scholarly commentary on the "moral equivalence" principle and its associated ideas, see, for example, Sumi Cho, *Post-Racialism*, 94 IOWA L. REV. 1589, 1603 (2009); Darren Lenard Hutchinson, *"Unexplainable on Grounds Other Than Race": The Inversion of Privilege and Subordination in Equal Protection Jurisprudence*, 2003 U. ILL. L. REV. 615, 672 (2003); Ian F. Haney López, *"A Nation of Minorities": Race, Ethnicity, and Reactionary Colorblindness*, 59 STAN. L. REV. 985 (2007); Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over Brown*, 117 HARV. L. REV. 1470 (2004).

12. With some trepidation, I sketch out this taxonomy on the assumption that ours is a society that still "disparages overt manifestations of racism." *See* Darren Lenard Hutchinson, *Factless Jurisprudence*, 34 COLUM. HUM. RTS. L. REV. 615, 625 (2003); *see also* Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1136 (1997) ("[S]tudies demonstrate that many white Americans now view overt racism as socially unacceptable and mute expression of their racially biased opinions in public settings—even settings as relatively anonymous as an opinion poll or survey."). I acknowledge, however, that this might be changing in the era of President Trump, a concern that regrettably is supported by ample evidence. *See* Mutz, *supra* note 10, at E4331 (noting the "surprising public acceptance of openly disrespectful statements about women, minorities, and foreigners" during the 2016 election). The Southern Poverty Law Center documented 900 reports of racial harassment, including use of racial slurs, and intimidation in the ten days following Trump's election. *Ten Days After: Harassment and Intimidation the Aftermath of the Election*, S. POVERTY L. CTR. (Nov. 29, 2016), https://www.splcenter.org/20161129/ten-days-after-harassment-and-intimidation-aftermath-election; Ta-Nehisi Coates, *The First White President*, THE ATLANTIC (Oct. 2017), https://www.theatlantic.com/magazine/archive/2017/10/the-first-white-president-ta-nehisi-coates/537909/ (urging us to confront the frightening possibility of a near future "liberated from the pretense of antiracist civility," observing that "Trump moved racism from the euphemistic and plausibly deniable to the overt and freely claimed. . . . Trump's legacy will

describe this premise as the "factual prevalence" position to emphasize that it is an epistemic assertion, noting that it is one that is so deeply at odds with actual social patterns of subordination[13] that we might be tempted to describe it, in contemporary parlance, as little more than "alternative facts."[14] Most troublingly, some of the research suggests that white Americans who believe that they are now the primary victims of discrimination actually attribute that status to the improvements they observe in status for black Americans, revealing a zero-sum attitude about rights that is deeply corrosive to aspirations for racial justice.[15]

In Part II, I demonstrate that there is a doctrinal foundation for each of these forms of race talk in constitutional law. To identify the moral-equivalence concept in current equal protection doctrine is easy to do, as this is more or less the Court's explicit position on race-conscious decision-making.[16] Seeing the connection between the moral-equivalence position and the Court's own treatment of race requires only a quick survey of the equal protection landscape and the accompanying scholarly literature. What is less immediately apparent is how readily one can also make sense of the factual-prevalence position—absurd as it seems to be—by mapping it onto the Supreme Court's equal protection jurisprudence. As has been established (and critiqued) for decades, unconstitutional discrimination happens only when a government actor makes an explicit racial classification or engages in decision-making that was demonstrably intended to burden a racial group.[17] The category of unconstitutional discrimination defined by the Court, therefore, does not

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be exposing the patina of decency for what it is and revealing just how much a demagogue can get away with"); *see also* Lopez, *supra* note 1 (observing that the Trump strategy of appealing to racial prejudice to win voters was "more explicit in its bigotry" than similar previous approaches).

13. Vann R. Newkirk II, *The Myth of Reverse Racism*, THE ATLANTIC (Aug. 5, 2017), https://www.theatlantic.com/education/archive/2017/08/myth-of-reverse-racism/535689/ (explaining that even within the specific context of higher education—one that excludes a number of important metrics—"[f]ears of reverse racism fly in the face of data").

14. The intrinsically nonsensical term "alternative facts" was first imposed on the American consciousness by Kellyanne Conway, defending the false claim made by President Trump and repeated by Sean Spicer regarding the size of the crowd on inauguration day. *See* Rebecca Sinderbrand, *How Kellyanne Conway Ushered in the Era of 'Alternative Facts*,*'* WASH. POST: THE FIX (Jan. 22, 2017), https://www.washingtonpost.com/news/the-fix/wp/2017/01/22/how-kellyanne-conway-ushered-in-the-era-of-alternative-facts/?utm_term=.be3a0e6bacc6; *see also* Susana Martinez-Conde & Stephen L. Macknik, *The Delusion of Alternative Facts*, SCIENTIFIC AMERICAN: ILLUSION CHASERS (Jan. 27, 2017), https://blogs.scientificamerican.com/illusion-chasers/the-delusion-of-alternative-facts/.

15. Michael I. Norton & Samuel R. Sommers, *Whites See Racism as a Zero-Sum Game That They Are Now Losing*, 6 SAGE PERSP. ON PSYCHOL. SCI. 215, 216–17 (2011), http://www.people.hbs.edu/mnorton/norton%20sommers.pdf.

16. *See, e.g.*, Fisher v. Univ. of Tex. at Austin, 136 S. Ct. 2198, 2208 (2016). (applying strict scrutiny to University's affirmative action program).

17. The Court has repeatedly invoked the concept of "societal discrimination" to describe "an amorphous concept of injury that may be ageless in its reach into the past," and that cannot justify a government's choice to provide "race-based relief." *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 497 (1989).

include inadequate and grossly inequitable access to health, wealth, security, political power, or education.[18] It does, however, presumptively include race-conscious strategies for combatting those inequities, such as affirmative action, school assignment, and redistricting. The result is a peculiarly shaped territory that may very well include more white claimants than claimants of color, providing a perverse doctrinal vindication for the otherwise preposterous idea that discrimination against white people is as factually prevalent as discrimination against people of color.

In the last Section of Part II, I show that even the zero-sum thesis, the most troubling and pessimistic view of racial justice among those surveyed, can also be traced to doctrinal principles. First, the Court has been fairly open about its own zero-sum anxieties in race-conscious employment and admissions programs.[19] But the zero-sum messaging goes deeper and broader in equal protection jurisprudence. The Court has repeatedly allowed the government to meet its equal-treatment obligations by equalizing down rather than up, sending a recurring message that equality victories for some will entail losses for others. And because of the Court's persistent refusal to interpret the Constitution as providing anything other than a guarantee of negative liberties, there is no real limit to how low a state may choose to set the floor in response to demands for equality. Part II, in sum, shows that in a series of independent doctrinal moves that were neither logically required nor otherwise inevitable, the Court has crafted an equality jurisprudence that reflects and facilitates all three forms of anxiety about anti-white discrimination: that it is morally equivalent to discrimination against racial minorities; that it is as factually prevalent as discrimination against racial minorities; and that it is indeed caused by the hard-fought progress for communities of color.

In Part III, I address whether we have sufficient evidence of the Court's actual impact on public opinion to draw any kind of meaningful connection between the attitudes revealed in recent research and the doctrinal principles articulated by the Court. Acknowledging the deep and persistent uncertainty about the extent to which the public pays any attention to the Court—much less allows itself to be influenced by it—I propose a few different ways of thinking about this relationship. Even accounting for the tenuous state of our current understanding about the "imperfect and inaudible dialogue" between the Court and the public,[20] it is worth identifying the ways in which equal protection doctrine—with whatever communicative power it speaks to the public—reinforces rather than remedies the idea of rights as a zero-sum game.

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18. Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1050 (1978) ("[A]s surely as the law has outlawed racial discrimination, it has affirmed that Black Americans can be without jobs, have their children in all-black, poorly funded schools, have no opportunities for decent housing, and have very little political power, without any violation of antidiscrimination law.").

19. *See infra* Section II.C.

20. Linda Greenhouse, *Public Opinion & the Supreme Court: The Puzzling Case of Abortion*, 141 DAEDALUS 69, 69 (2012).

I. VARIETIES OF WHITE GRIEVANCE

If the Obama presidency offered up the temptation to embrace a view of American society as "post-racial,"[21] the 2016 election was certainly a corrective.[22] In the years since, political scientists, economists, social psychologists, and other scholars have offered various ways to understand the white resentment—indeed rage—that transformed the political landscape.[23] One of the most important findings, demonstrated consistently across nearly a dozen different studies, has confirmed that the support that drove Trump into office was driven by racial resentment rather than economic anxiety.[24] As one scholar has observed, in driving

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21. *See, e.g.*, Michael Selmi, *Understanding Discrimination in A "Post-Racial" World*, 32 CARDOZO L. REV. 833, 833 (2011) ("The election of Barack Obama as the forty-fourth President of the United States gave pause to all who study discrimination. There was a sense, certainly in the public media, that the election of an African American as President signaled the dawn of a new era, one that marked a significant break from our discriminatory past."); Mario L. Barnes, *Reflection on a Dream World: Race, Post-Race and the Question of Making It Over*, 11 BERKELEY J. AFR.-AM. L. & POL'Y 6, 7 (2009) (explaining how Obama's presidency was used to support the claim that "America has, in fact, substantially overcome the longstanding effects of racism, and perhaps, its national obsession with race"). For discussion and critique of the idea of post-racialism, see OSAGIE K. OBASOGIE, BLINDED BY SIGHT: SEEING RACE IN THE EYES OF THE BLIND 171 (2014) (differentiating between colorblindness and post-racialism as racial constructs: "[W]hile colorblindness offers a normative perspective on how race ought to be treated in law and public policy, post-racialism operates as a descriptive account of where society currently is."); Cho, *supra* note 11, at 1620; Ian F. Haney López, *Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, 98 CALIF. L. REV. 1023, 1068–73 (2010).

22. *See, e.g.*, Shaffner et al., *supra* note 10, at 13 ("Trump's rhetoric frequently violated norms that were supposed to inhibit politicians from making explicitly racist appeals."). For one expression of the idea that Trump's election has indeed ushered in a new era, see Coates, *supra* note 12 ("Trump truly is something new—the first president whose entire political existence hinges on the fact of a black president."). Political scientists have offered additional insight on the relationship between Obama's presidency and the racist appeals that drove Trump into office: Diana Mutz, explaining the force of "racial status threat" in the 2016 election, observes that

> [r]acial status threat makes perfect sense occurring immediately after 8 y[ears] of leadership by America's first African American president. It is not racism of the kind suggesting that whites view minorities as morally or intellectually inferior, but rather, one that regards minorities as sufficiently powerful to be a threat to the status quo. When members of a dominant group experience a sense of threat to their group's position, whether it is the status of Americans in the world at large or the status of whites in a multiethnic America, change in people's sense of their group's relative position produces insecurity.

Mutz, *supra* note 10, at E4332.

23. *See* JOAN C. WILLIAMS, WHITE WORKING CLASS: OVERCOMING CLASS CLUELESSNESS IN AMERICA 59–72 (2017); *see also supra* note 1.

24. Mutz, *supra* note 10, at E4334 ("[C]ontrary to conventional wisdom, there is little to no evidence that those whose incomes declined or whose incomes increased to a lesser extent than others' incomes were more likely to support Trump. Even change in subjective assessment of one's own personal financial situation had no discernible impact on evaluations

the results of elections, "economic hardship does not work by itself. It needs to tap into other grievances, and in the US context these have been related to pent-up hostility towards blacks and immigrants."[25] Other researchers put the point more starkly: economic anxiety isn't driving racial resentment, they find; rather, racial resentment is driving economic anxiety.[26]

This powerful hostility toward racial and ethnic minorities runs headlong into a social norm that, at least for some sliver of recent history, has "disparage[d] overt manifestations of racism,"[27] although that norm seems less durable now than it once did.[28] Expressing anxiety about the threat of discrimination against *white* Americans is a deft maneuver in such a landscape, allowing one to give voice to white grievance while stopping short of the kind of explicit racism that is still mostly disfavored. It is becoming a pervasive and recognizable trope in American race talk.[29]

A number of recent studies have documented this phenomenon, and a close reading of the research allows us to see that the manifestation of white grievance through the expression of concern about anti-white discrimination can take several forms. As will be set forth in detail below, one such form can be described as "moral equivalence," communicating the idea that discrimination against whites is just as *grave* as discrimination against people of color; this idea has a long history in the debate over race-conscious government decision-making, and readers will readily recognize its close relationship to a concept that is often described as

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of Trump or on change in vote choice. Likewise, those who lost a job between 2012 and 2016 were no more likely to support Trump.").

25. Thomas B. Edsall, *Why Is It So Hard for Democracy to Deal With Inequality?*, N.Y. TIMES (Feb. 15, 2018) https://www.nytimes.com/2018/02/15/opinion/democracy-inequality-thomas-piketty.html (quoting Daron Acemoglu).

26. Fowler et al., *supra* note 3.

27. Hutchinson, *supra* note 12, at 625; *see* EDUARDO BONILLA-SILVA, RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN AMERICA 77 (5th ed. 2017) (explaining that because the "normative climate changed dramatically from the Jim Crow to the post-civil rights era, the language of color blindness is slippery, apparently contradictory, and often subtle").

28. Examples are so depressingly plentiful that any compilation would necessarily be partial, almost to the point of randomness, and out of date as soon as proffered. *See, e.g.*, P.R. Lockhart, *Republican Ron DeSantis Says Electing Black Opponent Andrew Gillum Would "Monkey This Up,"* VOX (Aug. 29, 2018, 4:29 PM), https://www.vox.com/policy-and-politics/2018/8/29/17796112/ron-desantis-andrew-gillum-monkey-racism-language-florida-governors-election (Ron DeSantis, Republican candidate for Governor, urged Florida voters not to "monkey this up" by voting for his African-American opponent); *see also* Ta-Nehisi Coates, *My President Was Black*, THE ATLANTIC (Jan./Feb. 2017), https://www.theatlantic.com/magazine/archive/2017/01/my-president-was-black/508793/ (detailing the openly racist attacks on Obama and his family).

29. Katy Waldman, *A Sociologist Examines the "White Fragility" that Prevents White Americans from Confronting Racism*, NEW YORKER (July 23, 2018), https://www.newyorker.com/books/page-turner/a-sociologist-examines-the-white-fragility-that-prevents-white-americans-from-confronting-racism (reviewing *White Fragility* by Robin DiAngelo).

"colorblindness" in legal and popular discourse.[30] Some of the research findings, however, suggest that many white Americans might also support a conceptually different proposition: that discrimination against white people is just as *likely* or *widespread* as discrimination against people of color; this is an epistemic rather than a normative premise that I will describe as the "factual prevalence" view.[31] Lastly, and most consequentially, zero-sum thinking conveys the premise that discrimination against white people is in fact *caused* by advances for communities of color.

In setting out this tripartite taxonomy of racial attitudes, I join a scholarly tradition that has sought to uncover, interrogate, and theorize the various forms of racism and racial ideology that confront us in each age, with an eye toward critiquing the legal doctrines that incorporate and reinforce these ideas.[32] Sketching out a taxonomy of these different views illustrates the profoundly different consequences of what might appear to be closely related forms of white anxiety and lays the groundwork for the doctrinal analysis that follows.

A. Moral Equivalence

In research conducted by National Public Radio, the Robert Wood Johnson Foundation, and the Harvard T.H. Chan School of Public Health, 55% of white Americans surveyed said they believe that discrimination against white Americans exists in the United States today.[33] A journalist reporting on the release of the study

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30. For an exhaustive intellectual and jurisprudential history of reactionary colorblindness, see López, *supra* note 11.

31. See *infra*, Sections I.A & I.B.

32. This scholarly tradition has, *inter alia*, examined the phenomenon of unconscious bias, critiqued the colorblindness trope so pervasive in legal and popular discourse, and explained the ways in which the seemingly "post-racial" discourse of the Obama era drew upon and yet was distinct from the colorblindness discourse that preceded it. *See, e.g.*, OBASOGIE, *supra* note 21, at 171 (differentiating between colorblindness and post-racialism as racial constructs); Mario L. Barnes, *"The More Things Change . . . ": New Moves for Legitimizing Racial Discrimination in A "Post-Race" World*, 100 MINN. L. REV. 2043, 2051 (2016); Barnes, *supra* note 21, at 7 (explaining how Obama's presidency was used to support the claim that "America has, in fact, substantially overcome the longstanding effects of racism, and perhaps, its national obsession with race"); Cho, *supra* note 11, at 1620; Neil Gotanda, *A Critique of "Our Constitution is Color-Blind"*, 44 STAN. L. REV. 1, 7 (1991); Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489 (2005) (applying social cognition research to illustrate the racial dimensions of television broadcasting); Charles R. Lawrence III, *The Id, The Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 329–44 (1987) (explaining unconscious racism and using insights from cognitive psychology to critique the discriminatory-intent requirement in equal protection jurisprudence); López, *supra* note 11 (developing an intellectual history of the concept of colorblindness in popular and legal discourse); Russell K. Robinson, *Perceptual Segregation*, 108 COLUM. L. REV. 1093, 1117 (2008) (developing a theory of "perceptual segregation," which "predicts that blacks and whites, on average, will interpret allegations of racial discrimination through substantially different perceptual frameworks and often will reach different conclusions about whether discrimination has occurred").

33. NPR ET AL., DISCRIMINATION IN AMERICA: EXPERIENCES AND VIEWS OF WHITE AMERICANS 7, tbl.2 (2017), https://cdn1.sph.harvard.edu/wp-

results interviewed a 68-year-old white man from Akron, Ohio who offered, by way of explanation, the following observation: "If you apply for a job, they seem to give the blacks the first crack at it, and, basically, you know, if you want any help from the government, if you're white, you don't get it. If you're black, you get it."[34]

For all its resentful overstatement and inaccuracy, the comment needs only relatively minor restyling to operate as a variant of a familiar position statement in the longstanding debate about race-consciousness in government programs: when people of color receive preference, white people suffer discrimination.[35] With scholars, lawyers, and judges having done the heavy lifting to establish that all instances of group-based or group-salient government decision-making constitute discrimination,[36] the rest of the analytical sequence reflected in the survey and the explanatory comment quoted above are foregone conclusions. If race-conscious hiring exists and constitutes discrimination against white people, then indeed "discrimination against white Americans exists in the U.S. today."[37] This type of thinking has been around for more than a generation,[38] and scholars and advocates are well-practiced (if not a bit fatigued) at challenging the premises of the syllogism.[39]

The implications start to shift, however, with what might initially seem like minor variances in phrasing. In another recent study, conducted in 2016 by the Brookings Institute and the Public Religion Research Institute, researchers

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content/uploads/sites/94/2017/11/NPR-RWJF-HSPH-Discrimination-Whites-Final-Report.pdf (the political-affiliation results in this survey were also notable, with 74% of white Republicans and only 28% of white Democrats affirming the concern about anti-white bias); Gonyea, *supra* note 2; *You, Me, and Them: Data for Q1 and Q2*, *supra* note 2.

34. Gonyea, *supra* note 2.

35. *E.g.*, Jennifer Gratz, *Discriminating Toward Equality: Affirmative Action and the Diversity Charade*, HERITAGE FOUND. (Feb. 27, 2014), https://www.heritage.org/poverty-and-inequality/report/discriminating-toward-equality-affirmative-action-and-the-diversity.

36. *Id*.

37. *See* Gonyea, *supra* note 2.

38. *See, e.g.*, DeFunis v. Odegaard, 416 U.S. 312 (1974); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

39. *See, e.g.*, Erwin N. Griswold, *Some Observations on the DeFunis Case*, 75 COLUM. L. REV. 512, 519 (1975). Griswold, at that time the dean of the Harvard Law School, suggested that it was "easy" to set up a syllogism purporting to demonstrate that a rejected white applicant is constitutionally required to be admitted to the educational institution in question. *Id.* at 518. Griswold then dismantled the syllogism, critiquing as overstated the premise that the Constitution forbids all race discrimination, including remedial measures designed to correct past injustice. *Id.* at 518–19. He observed that

> DeFunis was not denied admission because he was white, *simpliciter*. The problem was much more complicated than that. DeFunis was denied admission because, taking into account a considerable complex of factors, including the fact that he was not a member of a minority group, a judgment was made that the overall structure of the first year class at the University of Washington law school would better apportion the opportunities of legal education and reflect the needs of the community if another were selected rather than he.

Id.

discovered that 49% of Americans believe that "discrimination against whites has become *as big a problem today* as discrimination against blacks and other minorities."[40] As compared to the statement in the study summarized above (discrimination against white people "exists"), this one contains an additional layer of meaning—not only affirming the existence of discrimination against white people but also conveying something about its significance and degree. To say that discrimination against whites has become "as big a problem" as discrimination against any minority group is to go beyond the first premise set forth above—that white people are losing jobs and admissions opportunities to people of color, and that this phenomenon should be described as discrimination. But what exactly did this second set of respondents intend to communicate in affirming the premise that discrimination against whites has become "as big a problem as discrimination against blacks and other minorities"? The inherent limitations of this kind of survey data loom large but also offer an opportunity to think about some possible meanings and their conceptual differences.

Perhaps respondents meant to indicate that discrimination against whites is *just as morally grave* as discrimination against racial and ethnic minorities. The idea being expressed would overlap and intersect with concepts that have been described as "reactionary colorblindness,"[41] the insistence on an anticlassification or antidifferentiation principle,[42] a belief in the evils of "reverse discrimination,"[43] a commitment to "modern-day civil rights,"[44] a component of "post-racialism,"[45] and

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40. JONES ET AL., *supra* note 2, at 2 (emphasis added); *see* Waldman, *supra* note 2; Touré, *Why Do White People Feel Discriminated Against? I Asked Them.*, DAILY BEAST (Nov. 5, 2017, 12:00 AM), https://www.thedailybeast.com/why-do-white-people-feel-discriminated-against-i-asked-them.

41. López, *supra* note 11.

42. *See* Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anti-Classification or Anti-Subordination?*, 58 U. MIAMI L. REV. 9 (2004); *see also* Reva Siegel, *Discrimination in the Eyes of the Law: How "Color Blindness" Discourse Disrupts and Rationalizes Social Stratification*, 88 CALIF. L. REV. 77, 78 (2000) ("[F]amiliar debate between antidiscrimination and anti-subordination principles that for more than two decades has dominated arguments about equality in popular, academic, and judicial fora.").

43. Newkirk, *supra* note 13; Lisa Ryan, *Anti-Diversity Memo Dude Sues Google for Discriminating Against White Men*, THE CUT (Jan. 8, 2018, 3:09 PM), https://www.thecut.com/2018/01/james-damore-google-discrimination-lawsuit-white-men.html (reporting on a discrimination lawsuit filed against Google on behalf of white, conservative men).

44. Jennifer Gratz, the lead plaintiff in the lawsuit challenging the University of Michigan's admissions policy, describes herself as a "modern-day civil rights leader." *Jennifer Gratz Bio*, XIV FOUND. (Apr. 10, 2014), https://www.scribd.com/doc/217511782/Jennifer-Gratz-Bio. Gratz founded and currently serves as CEO of XIV Foundation, an organization named for the Fourteenth Amendment and devoted to the eradication of "race-based policies." *About Us*, XIV FOUND., http://www.xivfoundation.org/?page_id=5 (last visited Aug. 4, 2018).

45. Cho, *supra* note 11, at 1601–03 (positing that post-racialism as an ideology has four central features: (1) Racial Progress; (2) Race-Neutral Universalism; (3) Moral Equivalence; and (4) Distancing Move; and explaining that "post-racialism draws a moral

so on.[46] Although the scholarly literature critiquing this group of concepts has tended to use the term "colorblindness,"[47] I will describe this group of views under the "moral equivalence" heading, because it hews to the syntax of the survey language ("as big a problem") and captures one important possibility for what the survey language meant to those embracing the proposition.[48]

Scholars have labored for years to explain how the "moral equivalence" group of concepts "fosters white racial domination," explaining that a "color-blind interpretation of the Constitution legitimates, and thereby maintains, the social, economic, and political advantages that whites hold over other Americans."[49] As these scholars have observed, to advance a notion of moral equivalence or colorblind constitutionalism is to attempt to isolate the legal treatment of race from its lived and constructed social experience.[50] Appeals to moral equivalence, taken to their logical conclusion, prohibit the use of race-conscious remedies no matter the motive; it is the premise upon which a president might direct the Department of Justice's Civil Rights Division to challenge affirmative action programs similar to those implemented by previous administrations to mitigate pervasive and persistent patterns of exclusion.[51] And yet, so that we can best understand the *other* varieties

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equivalence between 'racialism' under Jim Crow which subordinated racial minorities, and the 'racialism' of the civil-rights era, which sought to remedy minority subordination").

46. To the list we could add other related concepts, including a racial-progress/mission-accomplished/then-and-now approach to race-conscious decision-making. *See, e.g.*, Barnes, *supra* note 32, at 2079.

47. Referencing the language from Justice Harlan's dissent in *Plessy v. Ferguson* that has been so thoroughly appropriated by opponents of race-based remediation that it now more effectively communicates opposition to affirmative action than opposition to segregation. Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

48. *See also* Cho, *supra* note 11, at 1592 (emphasizing the "moral-equivalence soundbyte feature of post-racialism," and offering as a prime example Chief Justice Roberts in his *Parents Involved* opinion "comparing Jim Crow racialism with civil-rights racialism, writing '[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race'").

49. As explained in one groundbreaking work,

> color-blind constitutional analysis ignores this ordinary lived experience of race as a highly charged concept with complex historical and social implications. Hence, the color-blind mode of constitutional analysis often fails to recognize connections between the race of an individual and the real social conditions underlying a litigation or other constitutional dispute.

Gotanda, *supra* note 32, at 7.

50. *Id.* at 63 ("As a socially constructed category with multiple meanings, race cannot be easily isolated from lived social experience.").

51. As was done in a succession of Republican presidencies, including Reagan's, Bush's, and Trump's. *See generally* Charlie Savage, *Justice Dept. to Take On Affirmative Action in College Admissions*, N.Y. TIMES (Aug. 1, 2017), https://www.nytimes.com/2017/08/01/us/politics/trump-affirmative-action-universities.html (reporting on the Trump DOJ investigating Harvard and other universities' affirmative action programs). *See also* Mark S. Brodin, *The Fraudulent Case Against Affirmative Action—the Untold Story Behind* Fisher v. University of Texas, 62 BUFF. L. REV. 237, 246 (2014) (early

of white grievance that social scientists are uncovering, it is important to note that the moral-equivalence perspective is less damaging to prospects for meaningful exchange than those alternatives.

Proponents and critics of the moral-equivalence claim can be in dialogue with one another. Take the debate over race-consciousness in hiring and university admissions, the paradigmatic context in which the moral-equivalence claim is raised. Strange as it might seem at first blush, it is possible to imagine a deep, mostly hidden shared premise from which the opposing views then diverge: that our national history matters when assessing such programs. A defender of the moral-equivalence principle could argue that it is precisely the nation's painful experience with race that compels the aspiration to a world in which race doesn't limit or inhibit, assign or predetermine, or figure at all into any decisions.[52] In response, one might say, in the inimitable clarity of Justice Marshall, that such an idea is several hundred years too late and a few generations too early.[53] The moral-equivalence proponent will say: the way to stop discriminating on the basis of race is to stop discriminating on the basis of race.[54] To which one might respond: "[i]n order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently."[55] And so on. The moves are, by now, quite familiar—the point here is to observe that defenders of the moral-equivalence principle might sometimes anchor their argument in a historical and social context rather than dispute the relevance of it altogether.

Consider, for example, the approach taken by Professor Kent Greenawalt, who described affirmative action as a "painful dilemma,"[56] posing a conflict "between two values that occupy a high place in the liberal conception of justice."[57] In elaboration, he explained: "On the one hand, justice requires that groups that have previously suffered gross discrimination be given truly equal opportunity in American life; on the other, justice precludes the assignment of benefits and burdens on the arbitrary basis of racial and ethnic characteristics."[58] Greenawalt's soft moral

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affirmative action programs were implemented by executive orders issued by Presidents Kennedy and Johnson); Angela Onwuachi-Willig, *Using the Master's "Tool" to Dismantle His House: Why Justice Clarence Thomas Makes the Case for Affirmative Action*, 47 ARIZ. L. REV. 113, 124 (2005) (offering a history of executive branch affirmative action programs); Anthony M. Platt, *The Rise and Fall of Affirmative Action*, 11 NOTRE DAME J.L. ETHICS & PUB. POL'Y 67 (1997).

52. *See generally* López, *supra* note 11 (providing an exhaustive intellectual and jurisprudential history of reactionary colorblindness).

53. *See* Deborah L. Rhode, *Letting the Law Catch Up*, 44 STAN. L. REV. 1259 (1992) (relaying Justice Marshall's rejoinder to the reasoning of colorblindness).

54. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 748 (2007).

55. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 407 (1978) (Blackmun, J., concurring).

56. Kent Greenawalt, *The Unresolved Problems of Reverse Discrimination*, 67 CALIF. L. REV. 87, 87 (1979).

57. *Id*.

58. *Id*.; *see also* Paul Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 17 (1976) (articulating concerns about race-based government

equivalence is expressed by first acknowledging the relevance of history but then allowing the term "arbitrary" to erase some of that recognition.[59] With a particularized history of discrimination properly centered in the analysis, we might not see race as an "arbitrary" means of assigning benefits, and thus affirmative action programs wouldn't implicate the second of the two values so central to conceptions of liberal justice.[60]

The moral-equivalence principle, in sum, itself contains a range of possibilities: although one end of the spectrum is definitely reactionary and revisionist, it is possible to imagine a weaker form of moral equivalence at the other end of the spectrum, one that still takes account of social and historical context. There are versions of the moral-equivalence position that do not obliterate consciousness of actual patterns of subordination,[61] in contrast to the varieties of white grievance we will consider next.

B. Factual Prevalence

Against this backdrop, consider for a moment another explanation for the survey responses set forth above. In agreeing that discrimination against whites has become "just as big a problem" as discrimination against racial and ethnic minorities, what if the respondents meant to convey that it is just as *likely*, or just as *widespread*? What if they are affirming a descriptive account of a society in which race is indeed a vector for discrimination, but it might be experienced *as readily* by whites as by members of racial and ethnic minorities? As a short-hand, we might call this the "factual prevalence" explanation, in part to emphasize the most

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action but also expressing "doubt that 'reverse discrimination' is likely to become so pervasive at any occupational level in our white-dominated society as to cause cumulative harms or frustrations"). The readiness with which Brest acknowledges a lack of symmetry in the social facts most relevant to race-based government action is something missing from the factual-prevalence position and the zero-sum premise examined in the next Sections. *Id. But see* Ian Haney-López, *Intentional Blindness*, 87 N.Y.U. L. REV. 1779, 1789 (2012) (criticizing Brest for being one of the liberal theorists whose scholarship failed to stanch the rise of reactionary colorblindness).

59. Greenawalt, *supra* note 56.

60. *Id.*

61. As one scholar observes, "[I]t is hard to remember a time in recent memory when the problems of racial injustice have been more visible and the need to promote opportunities for people of different racial and ethnic backgrounds has seemed more urgent." Elise C. Boddie, *The Future of Affirmative Action*, 130 HARV. L. REV. F. 38, 38 (2016). She offers as examples:

> videos of police killing unarmed African Americans; reports by the Department of Justice documenting law enforcement's excessive force against, and harassment of, African Americans in Baltimore and Ferguson; xenophobic targeting of American Muslims and Mexican Americans by a presidential candidate; judicial findings of overt minority voter suppression—to say nothing of systemic problems like disproportionately high unemployment and school and housing segregation that have long drained opportunities from communities of color.

Id. at 38–39.

important way in which this claim differs from the moral-equivalence construct: it is a descriptive claim rather than a normative one. That's not to suggest that it is any less consequential—quite the contrary. The factual-prevalence claim posits a world in which racial discrimination as a description of contemporary lived experience is entirely decoupled from our history and from a present that offers ample evidence of continued subordination along specific and highly predictable lines.[62] The factual-prevalence position is radical in its rejection of historical and social context as a mechanism to predict and understand patterns of racial hierarchy.

Consider, by way of contrast, the terms "reverse racism" or "reverse discrimination," which have long been used to protest the sort of race-conscious programs designed to remedy past discrimination. The terms are resentful, reductionist, and reactionary, and there is no shortage of evocative metaphor to illustrate the point. In the pages of a national magazine, one might say that "[r]everse racism is a cogent description of affirmative action only if one considers the cancer of racism to be morally and medically indistinguishable from the therapy we apply to it."[63] In the pages of the United States Reporter, one might say that the term (and the set of concepts it embodies) fails to distinguish "between a 'No Trespassing' sign and a welcome mat."[64]

Nonetheless, the terms necessarily entail a degree of social and historical context that is entirely missing from the factual-prevalence position. When people

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62. These patterns of subordination can be found in the distribution of economic power, political power, or even basic physical security. The latest figures from the U.S. Census Bureau show the median net worth for an African-American family is now $9,000, compared with $12,000 for a Latino family, and $132,000 for a white family. Aaron Glantz & Emmanuel Martinez, *Kept Out: How Banks Block People Of Color From Homeownership*, ASSOCIATED PRESS (Feb. 15, 2018), https://www.apnews.com/ae4b40a720b74ad8a9b0bfe65f7a9c29; *see, e.g.*, CAROL ANDERSON, WHITE RAGE 158 (2016) (describing how "a sense of physical vulnerability is shared across classes in the black community" in the midst of the white rage over Obama's presidency); *see also* Paul Gowder, *Racial Classification and Ascriptive Injury*, 92 WASH. U.L. REV. 325, 369 (2014) (canvassing the many ways that being perceived as black carries with it a wide range of other ascriptions of low status with regards to political power); Nicholas Stephanopoulos, *The False Promise of Black Political Representation*, THE ATLANTIC (Jun. 11, 2015), https://www.theatlantic.com/politics/archive/2015/06/black-political-representation-power/395594/ (describing empirical evidence that "blacks continue to fare worse than whites in converting their policy preferences into law").

63. Stanley Fish, *Reverse Racism, or How the Pot Got to Call the Kettle Black*, THE ATLANTIC (Nov. 1993), https://www.theatlantic.com/past/docs/politics/race/fish.htm.

64. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 245 (1995) (Stevens, J., dissenting) ("The consistency that the Court espouses would disregard the difference between a 'No Trespassing' sign and a welcome mat. It would treat a Dixiecrat Senator's decision to vote against Thurgood Marshall's confirmation in order to keep African-Americans off the Supreme Court as on a par with President Johnson's evaluation of his nominee's race as a positive factor. It would equate a law that made black citizens ineligible for military service with a program aimed at recruiting black soldiers. An attempt by the majority to exclude members of a minority race from a regulated market is fundamentally different from a subsidy that enables a relatively small group of newcomers to enter that market. An interest in 'consistency' does not justify treating differences as though they were similarities.").

use the term "reverse discrimination," they are making a bid to have the mistreatment they perceive be classified as discrimination. The modifier "reverse" communicates a reference point: the default expectation that discrimination runs in a certain direction and replicates certain preexisting patterns. Use of the modifier acknowledges that the phenomenon being described by the speaker inverts the expectation. There's a tacit acknowledgment that the vector of discriminatory treatment tread and retread over history—from a hostile or indifferent white majority to a "discrete and insular minority"—is being reversed.[65] In fact, some opponents of affirmative action now reject the term "reverse discrimination" for that very reason.[66] Using the term "reverse discrimination" at some level acknowledges that there is something inverted, counter-intuitive about the way the concept of discrimination is being deployed in that circumstance. Factual prevalence, on the other hand, lacks this acknowledgment—to assert that discrimination against whites is "as big a problem" as discrimination against blacks and other minorities is to evade and indeed resist this acknowledgment.

An important point remains. Because the factual-prevalence position appears to be a descriptive claim, it is possible to judge its accuracy.[67] At first blush that seems regrettably easy to do—one would draw on the painfully vast array of data revealing differential outcomes for communities of color across a range of metrics including income and wealth, health and life expectancy, and political enfranchisement.[68] But in drawing on this data to conclude that the factual-

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65. United States v. Carolene Products, 304 U.S. 144, 155 n.4 (1938).

66. *See* Joshua Thompson, *What Does "Reverse Discrimination" Mean?*, PAC. LEGAL FOUND. (Feb. 19, 2010), https://pacificlegal.org/what-does-reverse-discrimination-mean/ ("I am often dismayed by opponents of racial preferences (opponents of discrimination), or proponents of equality under the law, when they use the term 'reverse discrimination.' . . . The linguistic problem is that the 'discrimination' definition already covers 'reverse discrimination.'").

67. *See, e.g.*, *Nine Charts About Wealth Inequality in America (Updated)*, URBAN (Oct. 5, 2017), http://apps.urban.org/features/wealth-inequality-charts/.

68. The "Equality Index" offers one way to understand racial disparity across multiple areas by compiling data from across a number of different sectors, including financial security, health, education, and social justice. *See* NAT'L URBAN LEAGUE PROTECT OUR PROGRESS: STATE OF BLACK AMERICA 2017, at 5 (2017), https://wsurban.org/wp-content/uploads/2017/07/State-of-Black-American-SOBA-2017-Exec-Summary_1.pdf (revealing that for 2017, the Equality Index reflected a figure of 72.3% for Black Americans and 78.4% for Hispanic Americans); *see also* BONILLA-SILVA, *supra* note 27, at 2 ("Blacks and dark-skinned racial minorities lag well behind whites in virtually every area of social life; they are about three times more likely to be poor than whites, earn about 40 percent less than whites, and have about an eighth of the net worth that whites have."); Jaeah Lee & Edwin Rios, *7 Charts Explaining Baltimore's Economic and Racial Struggles*, MOTHER JONES (May 6, 2015, 10:20AM), https://www.motherjones.com/politics/2015/05/baltimore-race-economy-charts/ (finding that the life expectancy in 15 Baltimore neighborhoods, including the one where Freddie Gray lived, is shorter than the life expectancy in North Korea; in eight Baltimore neighborhoods, the life expectancy is worse than that in Syria). According to the Atlantic, a 2015 study in Boston found that the wealth of the median white family there was $247,500, while the wealth of the median African-American family was $8. Matthew Stewart, *The 9.9 Percent is the New American Aristocracy*, THE ATLANTIC (June 2018),

prevalence position is falsifiable, almost laughably so, we would be skipping over a fairly important definitional challenge: when respondents were asked to consider "discrimination," did they reflect only upon purposeful mistreatment on the basis of race, of the sort that is either explicit or intentionally concealed? As we shall see when we turn to an examination of equal protection doctrine, it is possible to insist on a definition of discrimination that is so narrow as to exclude many of the forms of inequality and subordination from which communities of color suffer, and to which much of the foregoing data is pertinent.[69]

For now, it is necessary only to observe that the factual-prevalence position, as a lexical matter, is a plausible interpretation of the survey instrument. When someone subscribes to the position that discrimination against whites is "as big a problem" as discrimination against whites and other minorities, the range of interpretations consistent with ordinary usage includes the descriptive possibility considered here.

The factual-prevalence position is, moreover, consistent with the observations made by other researchers. In a 2011 article titled *Whites See Racism as a Zero-Sum Game That They Are Now Losing*,[70] psychologists Michael Norton and Steven Sommers described "a more general mindset gaining traction among Whites in contemporary America: the notion that Whites have *replaced* Blacks as the primary victims of discrimination."[71] This in itself is a startling proposition. And yet, as we will see in the next Section, the full expression of this idea includes a causal dimension that is profoundly and uniquely threatening to the very ideas of ordered liberty and equality under the law that are supposed to form the foundation of our constitutional order.

C. The Zero-Sum Thesis

To understand how their respondents perceived a group's susceptibility to racial discrimination at various stages in recent history, Norton and Sommers asked participants to consider racial discrimination during each decade from the 1950s to the 2000s.[72] Then, using a 10-point scale in which 1 signified "not at all" and 10 signified "very much," respondents were instructed to rate the level of anti-white bias and anti-black bias they would assign to each decade.[73] White respondents, for the most part, viewed the 1950s and 1960s as characterized by high levels of anti-

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https://www.theatlantic.com/magazine/archive/2018/06/the-birth-of-a-new-american-aristocracy/559130/; *see also* Chuck Collins et al., *Report: Ever-Growing Gap*, INST. FOR POL'Y STUD. (Aug. 8, 2016), https://ips-dc.org/report-ever-growing-gap/ (reporting that the racial wealth gap is getting worse, not better).

69. *See* Freeman, *supra* note 18, at 1050.

70. Norton & Sommers, *supra* note 15, at 215.

71. *Id*. (emphasis added). Norton and Sommers note that their research builds upon and is consistent with prior work indicating that "White Americans perceive increases in racial equality as threatening their dominant position in American society, with Whites likely to perceive that actions taken to improve the welfare of minority groups must come at their expense." *Id*. (internal citations omitted).

72. *Id*. at 215–16.

73. *Id.*

black bias, a view shared by black respondents.[74] White respondents, however, perceived the level of anti-black bias to have then declined quickly over the subsequent 50-year period, and the level of anti-white bias to have increased correspondingly, such that sometime in the 1990s the lines cross.[75] White respondents thus indicated that by the 2000s anti-white bias had become *more prevalent* than anti-black bias.[76]

Norton and Sommers offered two points of elaboration that help us understand the significance of their findings. First, they observed no main effects for age or education level.[77] Second, they emphasize a dynamic that is evident from the graph of their results, but worth its own mention here: for the decade of the 1950s, both white and black respondents perceived high levels of anti-black bias and low levels of anti-white bias.[78] While black respondents perceived higher levels of anti-black bias and lower levels of anti-white bias during the 1950s compared to white respondents, white and black respondents shared a "strikingly similar" sense of which was the greater problem in that decade.[79] The divergence in recent decades, Norton and Sommers explain, is thus less likely to be driven by a difference in reference point between racial groups that is stable over time, but rather "recent changes in how bias is conceptualized" by white respondents.[80] Respondents, then, were not only providing insight into their perception of the current landscape but also revealing their own understandings of social and historical change over time. And more specifically, it seems that for the respondents who were white, the observation that things had improved for black Americans was bound up with the sense that there had been some sort of corresponding *loss* for white people.[81]

The authors' concluding remarks drive home the significant differences between their findings and the moral-equivalence conception of "reverse

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74. *Id*. at 216.

75. *Id*.

76. *Id*. While 11% of white respondents assigned the most serious rating to anti-white bias in the decade of the 2000s, only 2% of white respondents assigned the most serious rating to anti-black bias for the same decade. *Id*.

77. *Id*.

78. *Id.*

79. *Id*.

80. *Id*.

81. *Id*. at 215. Writing about their research in the Washington Post in 2016, Norton and Sommers emphasized that aspect of their findings:

> [A]mong whites, there's a lingering view that the American Dream is a "fixed pie," such that the advancement of one group of citizens must come at the expense of all the other groups. Whites told us they see things as a zero-sum game: Any improvements for black Americans, they believe, are likely to come at a direct cost to whites. Black respondents in our surveys, meanwhile, report believing that outcomes for blacks can improve without affecting outcomes for white Americans.

Samuel Sommers & Michael Norton, *White People Think Racism is Getting Worse. Against White People.*, WASH. POST (July 21, 2016), https://www.washingtonpost.com/posteverything/wp/2016/07/21/white-people-think-racism-is-getting-worse-against-white-people/?utm_term=.425004ca0bcb.

discrimination" we considered first. Norton and Sommers summarize their data as suggesting that many white Americans have concluded that "the pendulum has now swung beyond equality in the direction of anti-White discrimination. . . . not only do Whites think more progress has been made toward equality than do Blacks, but Whites also now believe that this progress is linked to a new inequality—at their expense."[82] The last clause suggests yet a third distinctive concept uncovered by recent empirical research on racial attitudes: not only that discrimination is more prevalent against white Americans than against people of color, but also that white Americans infer a causal relationship between that discrimination and the progress they perceive for communities of color. In short, as the title of this Article conveys, that there is a zero-sum quality to racial justice.[83]

The finding that significant numbers of white people feel directly threatened by progress toward racial equality[84]—and respond to that threat by emphasizing the specter of anti-white bias[85]—has also been reported by other researchers. Clara Wilkins and Cheryl Kaiser conducted three separate studies to probe the relationship between exposure to salient markers of racial progress and perceptions of anti-white bias.[86] The authors introduce their discussion by observing that an inversion is taking place in the minds of many white people contemplating patterns of racial discrimination; they go on to explain that evidence of racial progress is one cause:

> For decades, the phrase *victim of racial discrimination* evoked images of racial minorities. Whites were seen as perpetrators, rather than as targets, of racial bias. More recently, an increasing number of Whites in the United States are identifying themselves as victims of racial discrimination. We argue that racial progress, or racial minorities

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82. Norton & Sommers, *supra* note 15, at 217.

83. In an online forum in the *New York Times* exploring the implications of their study, the authors describe the "jockeying for stigma" they detect "among groups in America today"; they go on to observe that "[t]his competition is surprising because being marginalized often equates to being powerless, yet many whites now use their sense of marginalization as a rallying cry toward action." Michael I. Norton & Samuel R. Sommers, *Jockeying for Stigma*, N.Y. TIMES (May 23, 2011, 12:12 PM), https://www.nytimes.com/roomfordebate/2011/05/22/is-anti-white-bias-a-problem/jockeying-for-stigma; *see also* PAULA IOANIDE, THE EMOTIONAL POLITICS OF RACISM: HOW FEELINGS TRUMP FACTS IN AN ERA OF COLORBLINDNESS (2015) (discussing white self-perception as victims, and positing that the political views of the white working class might be more driven by such feelings of oppression than tangible economic factors). As Victoria Plaut observed immediately, the zero-sum finding has several serious implications for antidiscrimination doctrine. Victoria Plaut, *Law and the Zero-Sum Game of Discrimination: A Commentary on Norton and Sommers*, 6 PERSPECTIVES ON PSYCHOL. SCI. 219, 219–21 (2011) ("[T]he landmark cases that are upsetting the structure of anti-discrimination doctrine may in fact reflect a broader sentiment in society.").

84. Norton & Sommers, *supra* note 15, at 215.

85. *Id.*

86. Clara L. Wilkins & Cheryl R. Kaiser, *Racial Progress as Threat to the Status Hierarchy: Implications for Perceptions of Anti-White Bias*, 25 PSYCHOL. SCI. 439, 440 (2014).

> more frequently occupying high-status positions traditionally held by Whites, is one cause of this shift. For Whites who support the status hierarchy, racial progress is an assault on their social standing that causes them to perceive greater amounts of racial bias against Whites.[87]

Political scientist Diana Mutz calls this phenomenon "status threat" and concurs that "when confronted with evidence of racial progress, whites feel threatened and experience lower levels of self-worth relative to a control group. They also perceive greater antiwhite bias as a means of regaining those lost feelings of self-worth."[88] Mutz goes on to demonstrate that status threat was, in fact, the driving force behind Trump's election;[89] as obviously consequential as that has been for any number of issues both domestic and international, the implications of the zero-sum and status-threat findings go far beyond the results of a single presidential election.[90] The idea that there is some irreducible quantum of racial discrimination in our society that simply reverses direction upon challenge is petulant and pessimistic in addition to being inaccurate—it not only misgauges the current landscape but also poisons any prospect for future change. The conviction that progress toward equality for subordinated groups comes at the direct expense of dominant groups is a staggering obstacle to racial justice.

We now are in a position to appreciate the profound differences between the three variations of concern about anti-white discrimination explored above.[91] Someone subscribing to the moral-equivalence view could be said to be making a claim about the ordering of values: that the aspiration for a colorblind society is more important than the remediation of pervasive subordination. Someone adhering to the factual-prevalence position is making a claim about social facts: that whites have in fact *replaced* people of color as the primary victims of racial discrimination. Someone who views rights as a zero-sum game insists that when one group makes progress toward equality another group must suffer—a corrosive, resentful view of racial dynamics that makes progress impossible. The next Part demonstrates that there is a doctrinal foundation for each of these attitudes in the Court's equal protection jurisprudence.

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87. *Id.* at 439.

88. Mutz, *supra* note 10, at E4331; *see also* Wilkins & Kaiser, *supra* note 86. Another phenomenon discovered by social psychologists, described as "last place aversion," is likely also at work. *See* Ilyana Kuziemko & Michael I. Norton, *The "Last Place Aversion" Paradox*, SCI. AMERICAN (Oct. 12, 2011), https://www.scientificamerican.com/article/occupy-wall-street-psychology/.

89. Mutz, *supra* note 10.

90. *Id.*

91. It is important to note, however, that many conversations about reverse discrimination do not distinguish between the moral-equivalence idea and the factual-prevalence one. *See, e.g.*, Touré, *supra* note 40. And it is similarly important to note that these are not mutually exclusive—one could subscribe to all three perspectives, and surely many do.

II. DOCTRINAL COUNTERPARTS

If the premise of the foregoing is true—that increasing numbers of Americans believe that discrimination against white people is not only morally equivalent to but also as factually prevalent as discrimination against people of color, and for many is perceived as the result of zero-sum dynamics in racial justice—what are the implications for the law? Is there a legal dimension to this rising concern about anti-white bias, which is so baffling when stacked against nearly every index of racial inequality that we might think to measure?[92] To be sure, explaining the growing concern about anti-white bias is a project requiring collaboration across a range of different disciplines and methodologies.[93] My goal here, however, is narrower: I want to foreground the role that law has played in the proliferation and legitimation of these attitudes. It is worth making visible how these perceptions are law-informed and law-grounded even in the absence of any explicit reference to legal principles—particularly because the doctrine that offers a parallel for each of the varieties of white grievance explored above is Equal Protection, a body of law that was once animated by concern for minority groups excluded from social and political institutions.[94]

A. Moral Equivalence and the Symmetry Principle

As detailed above, when survey respondents say that discrimination against whites is "as big a problem" as discrimination against people of color, one possible way to understand this response is as a normative claim: that discrimination against whites is as morally grave as discrimination against members of subjugated communities. On this reading, we can readily see a reflection of Justice Thomas's exhortation that there is a "moral and constitutional equivalence" between "laws designed to subjugate a race and those that distribute benefits on the basis of race in order to foster some current notion of equality."[95] While not every member of the

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92. It is worth reiterating, as Norton and Sommers themselves have done, that their research reveals not a "verifiable surge" in anti-white bias but an *increased perception* of anti-white bias. *See* Norton & Sommers, *supra* note 15, at 215.

93. *See, e.g.*, BONILLA-SILVA, *supra* note 27, at 77. In this ground-breaking work on colorblind racism, sociologist Eduardo Bonilla-Silva has explained that new forms of racial discrimination "pose new problems of remedy. They act both at the structural-institutional level focused on by sociologists, and the face-to-face situational level focused on by social psychologists . . . ." *Id.* at 60 (quoting Thomas F. Pettigrew & Joanne Martin, *Shaping the Organizational Context for Black American Inclusion*, 43 J. SOC. ISSUES 41, 42 (1987)). Bonilla-Silva has also identified what he calls the "fallacy of racial pluralism—the false assumption that all racial groups have the same power in the American polity." *Id.* at 73. For another notable work, drawing on the disciplines of both sociology and history, see KAREN E. FIELDS & BARBARA J. FIELDS, RACECRAFT: THE SOUL OF INEQUALITY IN AMERICAN LIFE (2014).

94. Reva B. Siegel, *Foreword: Equality Divided*, 127 HARV. L. REV. 1, 3 (2013) (observing that Equal Protection "began in the aspiration to protect 'discrete and insular minorities'" (citing United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938))).

95. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 240 (1995) (Thomas, J., concurring) (citations omittd); *see also* Fisher v. Univ. of Tex. at Austin, 570 U.S. 297, 326 (2013) ("There is no principled distinction between the University's assertion that diversity

Court expresses the view with such vehemence, the moral-equivalence interpretation nonetheless fits comfortably with the symmetry principle[96] that is now deeply established in equal protection doctrine: where a category has been deemed appropriate for heightened scrutiny—whether it be race, gender, or otherwise—any use of it is suspect, not just the particular applications that perpetuate past patterns of discrimination.[97] So although the Court's initial recognition that gender might be a quasi-suspect class was predicated on the history of discrimination against women and concern regarding women's exclusion from the political process,[98] it took no time at all for the Court to use heightened scrutiny to strike down a law that used a gender classification to burden men.[99] The cases striking down racial preferences in hiring programs or school assignment similarly reflect the idea that the use of race is presumptively pernicious regardless of whether it is intended to correct or perpetuate the discriminatory patterns of the past.[100] As the Court reasoned in *City of Richmond v. Croson*, following a period of fractured decisions on the appropriate standard of review for remedial uses of race by government actors, a plan is constitutionally problematic if it

> denies certain citizens the opportunity to compete for a fixed percentage of public contracts based solely upon their race. To whatever racial group these citizens belong, their "personal rights" to be treated with equal dignity and respect are implicated by a rigid rule erecting race as the sole criterion in an aspect of public decision-making . . . the purpose of strict scrutiny is to "smoke out" illegitimate uses of race by assuring that the legislative body is

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yields educational benefits and the segregationists' assertion that segregation yielded those same benefits.").

96. Bradley A. Areheart, *The Symmetry Principle*, 58 B.C. L. REV. 1085, 1088–89 (2017) ("The symmetry principle mandates that once certain attributes or characteristics are identified as worthy of antidiscrimination protection, all groups within that universal ground must be protected.").

97. For scholarly critiques of this principle, see, for example, Sonu Bedi, *Collapsing Suspect Class with Suspect Classification: Why Strict Scrutiny Is Too Strict and Maybe Not Strict Enough*, 47 GA. L. REV. 301, 303 (2013) (describing the symmetry principle as an "analytical collapse of class and classification").

98. Frontiero v. Richardson, 411 U.S. 677, 682–85 (1973).

99. Craig v. Boren, 429 U.S. 190, 197–99 (1976).

100. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 748 ("The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."). It is important to understand that this was not always the case. As Reva Siegel explains,

> during the first decade after the Court declared in McLaughlin that the Equal Protection Clause enjoined state action that classified on the basis of race, judges generally understood the presumption against racial classification as a race-asymmetric constraint: courts wielded the principle to protect blacks against status-enforcing harm but did not employ it to constrain race-based state action designed to alleviate segregation, even when whites objected that such race-based policies inflicted harm.

Siegel, *supra* note 11, at 1518.

> pursuing a goal important enough to warrant use of a highly suspect tool.[101]

The Court has since held fast to the idea that race-consciousness is a "highly suspect tool," reiterating again and again that any and all uses of race by government actors are subject to the same exacting standard of strict scrutiny.[102] To the extent that the university admissions decisions have been criticized as too deferential to education officials to be fairly characterized as true strict scrutiny,[103] we might offer a few reflections. First, whatever would most accurately characterize the standard of review the Court actually uses in affirmative action cases, it is considerably more demanding than rational basis review: it is a form of heightened scrutiny that places the burden on the government to, among other obligations, show that it had considered race-neutral alternatives.[104] Second, the Court's repeated insistence that remedial uses of race are subject to strict scrutiny arguably has more communicative power than its unacknowledged practice of applying a standard that's somewhat more relaxed in the specific context of higher education.

In sum, it is fairly straightforward to identify the ways in which equal protection doctrine communicates the moral-equivalence perspective. This brief summary is not meant to give short shrift to the enormously rich critique that this principle has engendered,[105] but simply to reflect that few readers will need much review of this aspect of the Court's equal protection jurisprudence. What is essential for present purposes is simply to recognize how clearly discourse and doctrine

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

102. *See* Fisher v. Univ. of Texas at Austin, 136 S.Ct. 2198 (2016); Fisher v. Univ. of Texas at Austin, 570 U.S. 297 (2013); Parents Involved in Cmty. Sch., 551 U.S. 701 (2007); Grutter v. Bollinger, 539 U.S. 306 (2003); Gratz v. Bollinger, 539 U.S. 244 (2003).

103. *See, e.g.*, Lackland H. Bloom, Jr., *Grutter and Gratz: A Critical Analysis*, 41 HOUS. L. REV. 459, 510 (2004) ("Though protesting loudly to the contrary, the Court clearly did not apply anything like strict scrutiny as it has been traditionally understood."); George Rutherglen, *Fisher II: Whose Burden, What Proof?*, 20 GREEN BAG 19, 31 (2016) (asserting that *Fisher v. University of Texas* "distorted rather than clarified principles of substantive law, for instance, on exactly how strict 'strict scrutiny' is").

104. *See, e.g.*, Darren Lenard Hutchinson, *Undignified: The Supreme Court, Racial Justice, and Dignity Claims*, 69 FLA. L. REV. 1, 28 (2017) (observing that "the Court's doctrine subjects race-based remedies to a high degree of skepticism").

105. *See, e.g.*, Angela P. Harris, *Equality Trouble: Sameness and Difference in Twentieth-Century Race Law*, 88 CALIF. L. REV. 1923, 2009 (2000) ("[T]he equation of racial discrimination with racial differentiation fosters the moral absolution of whites for the history of racial domination. . . . the United States has been plagued not with a surfeit of racial classifications as such, but rather with the consistent use of racial classifications to privilege (certain groups of) whites and disadvantage nonwhites."). "The Court's focus on classification itself as the problem, however, makes it possible to equate that history with present white claims of 'reverse discrimination.'" *Id.*; Owen Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 108, 171 (1976) (arguing that the Equal Protection Clause should be understood to prohibit "laws and practices that aggravate the subordinate position of a specially disadvantaged group," rather than simply prohibiting all racial classifications regardless of motive or purpose).

reflect each other when it comes to the sentiment that discrimination against white people is morally equivalent to discrimination against people of color.

B. Equal Protection's Uncouth Polygon

In this Section, we will see how readily the factual-prevalence view, with its utter inversion of social facts, can be rendered coherent and accurate merely by defining discrimination as conduct that would be redressable by recourse to constitutional principles. If we are trying to understand how so many white Americans can believe that they are the primary victims of racial discrimination, it is worth paying close attention to what the Court has been telling them.

We have a rich scholarly tradition to assist us in this regard.[106] As others have so meticulously explained, for constitutional purposes the Court adopted and has adhered to a definition of "discrimination" that is much narrower than the range of meanings reasonably encapsulated by the concept.[107] Most of what the Court is willing to identify as unconstitutional discrimination involves the use of explicit racial classifications by government actors, a category that has more or less collapsed in the years following *Loving v. Virginia*.[108] For plaintiffs who challenge other forms of discrimination, such as the government's use of decisional criteria that foreseeably burdens members of a racial minority in disproportionate ways, the principles developed in *Palmer v. Thompson*,[109] *Washington v. Davis*,[110] and then *Feeney v. Administrator*[111] combine to form a nearly insurmountable obstacle: where a challenged state action is neutral on its face, there is no unconstitutional discrimination unless a government decision-maker maliciously designs the system for that purpose and leaves enough evidence of such intent for the plaintiff to find.[112] The Court doubled down on the concept in *McCleskey v. Kemp*,[113] refusing to strike

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106. *See, e.g.*, Ian Haney López, WHITE BY LAW xv, xvi (2006) (describing how the "overwhelming bulk of law currently constructs race informally, not by directly addressing conceptions of race, but by relying on, promulgating, and giving force (often enough literal physical force) to particular ideas about the nature of race, races, and racism").

107. Siegel, *supra* note 12, at 1132 ("It was in no sense natural, inevitable, or necessary for the Court to interpret the Equal Protection Clause this way.").

108. 388 U.S. 1 (1967). It does, of course, include what are now the exceedingly rare scenarios in which the government uses explicit racial classifications in contexts other than affirmative action. *See, e.g.*, Johnson v. California, 543 U.S. 499 (2005) (requiring that racial segregation of prisoners be subject to strict scrutiny).

109. 403 U.S. 217, 226 (1971) (upholding the decision of City officials in Jackson, Mississippi to close the public pools to avoid integration because the pools were closed "to black and white alike").

110. 426 U.S. 229, 236–37 (1976) (requiring that challengers demonstrate discriminatory intent in addition to disproportionate impact).

111. 442 U.S. 256, 282–83 (1979) (requiring plaintiffs to prove that the challenged government action was adopted because of, and not merely in spite of, its disproportionate impact).

112. And even then, the State gets a chance to show that it would have arrived at the same decision had the improper motive been scrubbed from the scene. *See* Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265–68 (1977).

113. 481 U.S. 279, 297 (1987).

down a death penalty regime infused with racial antagonism[114] even where it might have availed itself of the "death is different" trope for additional support.[115] From criminal sentencing regimes[116] to decisions about where and whether to build affordable housing,[117] vast swaths of government action burdening minority communities in predictable and disproportionate ways are outside of equal protection's domain.[118]

At the same time, by repeatedly insisting that race-conscious hiring,[119] admissions,[120] school assignment,[121] and other remedial programs are presumptively unlawful,[122] triggering the same strict scrutiny as the legal scaffolding upon which Jim Crow was built, the Court has also been developing a definition of "discrimination" that is *broader* than it might have been. A notion of discrimination that was driven by antisubordination values,[123] a commitment to distributive justice,[124] or substantive notions of equal citizenship[125] would not include remedial programs in the category of government action to which we apply equal protection's

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114. Hutchinson, *supra* note 11, at 672 (discussing racial antagonism in *McCleskey*).

115. *See* Jeffery Abramson, *Death-is-Different Jurisprudence and the Role of the Capital Jury*, 2 OHIO ST. J. CRIM. L. 117, 138–39 (2004) (observing that the Court, in refusing to strike down Georgia's death penalty in spite of the data establishing its discriminatory application, "essentially signed off on any real enforcement of Eighth Amendment death-is-different jurisprudence where it was needed most").

116. United States v. Clary, 34 F.3d 709 (8th Cir. 1994); David Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283, 1284 (1995).

117. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 270–71 (1977).

118. The vast majority of challenges to modern decision-making will fail under this extraordinarily demanding standard; the principle is so forceful that it shrinks the set of cases that would even test it. *See* Daniel R. Ortiz, *The Myth of Intent in Equal Protection*, 41 STAN. L. REV. 1105, 1113 (1989) ("Given this standard of specific intent, evidence of disparate effect proves of little help to plaintiffs.").

119. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989); Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 245 (1995) (Stevens, J., dissenting).

120. Fisher v. Univ. of Texas at Austin, 570 U.S. 297 (2013).

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

122. Siegel, *supra* note 12, at 1136 ("[E]specially in the area of race, doctrines of heightened scrutiny are functioning primarily as a check on affirmative action programs. By their terms, doctrines of heightened scrutiny do not apply to facially neutral laws like the sentencing guidelines, decisions concerning education and zoning, or policies concerning spousal assault and child support, whose incidence falls primarily on minorities or women.").

123. Hutchinson, *supra* note 11, at 672 (describing antisubordination principles as an alternative to the Court's anticlassification approach).

124. *Id*. at 623 (citing Frank I. Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 Harv. L. Rev. 7, 13 (1969) and Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1783 (1993)).

125. Hutchinson, *supra* note 11, at 622 (citing David A. Strauss, *Discriminatory Intent and the Taming of Brown*, 56 U. CHI. L. REV. 935, 939–45 (1989) and Kenneth L. Karst, *Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 5–6 (1977)).

most searching scrutiny. This phenomenon has also been exhaustively examined in the scholarly literature and has produced a wealth of piercing critiques,[126] including one observation particularly relevant for understanding the research we examined above: as Professor Kimberly West-Faulcon has posited, "The Court's willingness to treat any and all race-consciousness as capable of resulting in reverse discrimination against whites is a framing that has undoubtedly contributed to the current political climate in which many whites sincerely believe whites suffer greater levels of racial discrimination than nonwhites."[127] This is true, so far as it goes.[128] By treating race-consciousness in admissions and employment as "discrimination" against whites, the Court facilitates a form of public discourse in which whites are thought to suffer discrimination every time race is taken into account.

It is, however, only by assessing the foregoing features of equal protection doctrine *in combination*—the underbreadth and the overbreadth together—that we can truly gauge the landscape, as scholars such as Reva Siegel and Darren Lenard Hutchinson have pointed out.[129] The kind of discrimination for which white claimants might seek relief has been made highly salient and constitutionally significant.[130] The kinds of injustice about which claimants of color might complain are largely outside of Equal Protection's reach.[131] After tracing the carve-outs and

126. *See, e.g.*, Hutchinson, *supra* note 12 (discussing the work of scholars who have advanced such critiques).

127. Kimberly West-Faulcon, *Reversed Protection: A Discrimination Claim Gone Wild in* Fisher v. Texas, 7 U.C. IRVINE L. REV. 133, 136 (2017).

128. Although I note here that other scholars have emphasized that the Court's suspicion of affirmative action programs stems from public opinion opposing them. *E.g.*, Siegel, *supra* note 94, at 44–45 (judges who began to apply strict scrutiny to affirmative action acted in response to citizen objections that the programs were unfair); *see also* Jeffrey Rosen, *Affirmative Action and Public Opinion*, N.Y. TIMES (Sept. 6, 2011, 3:22 PM), https://www.nytimes.com/roomfordebate/2011/05/22/is-anti-white-bias-a-problem/affirmative-action-and-public-opinion (suggesting that the Court follows public opinion on controversial questions such as affirmative action).

129. Hutchinson, *supra* note 11, at 637 ("[C]ontemporary equal protection analysis inverts the concepts of privilege and subordination, such that courts now reserve their most exacting level of scrutiny for laws that 'burden' historically privileged groups but assume the constitutionality of enactments that harm historically disadvantaged groups."); *see also* Siegel, *supra* note 94, at 44–45 (explaining that current equal protection law reflects "a form of judicial review that cares more about protecting members of majority groups from actions of representative government that promote minority opportunities than it cares about protecting 'discrete and insular minorities' from actions of representative government that reflect 'prejudice'").

130. The decisions in *Grutter* and *Fisher* do less to complicate this trend than one might think, especially when seen in their full context. *See, e.g.*, Mark Strasser, *What's Next in Affirmative Action Jurisprudence: Fisher As Temporizing Rather Than Reflecting A New-Found Consensus*, 20 J. GENDER RACE & JUST. 157, 157 (2017) (arguing that *Fisher* "is better understood either as temporizing or as an attempt to limit but not abolish affirmative action").

131. Although, it should be noted, that some of this derives not from the consistent application of articulated doctrinal principles but from simple elision: as Reva Siegel observes, the Court has never explained, for example, why the use of race by law enforcement

inclusions in the Court's understanding of unconstitutional race discrimination, we are left with a shape that I am tempted to call an "uncouth polygon," in homage to *Gomillion v. Lightfoot*.[132] For present purposes, it isn't necessary to conclude, as the Court did in that case, that the boundaries of the terrain we are examining were drawn intentionally to include white citizens and exclude citizens of color.[133] For present purposes, what matters is simply the result itself: with the Court having defined away all but a narrow form of race-conscious decision-making from the scope of the Fourteenth Amendment, it may well be the case that this set is as or more likely to be populated by white claimants as claimants of color. As Professor Reva Siegel put it:

> In the decades after *Brown*, the Court's equal protection docket was populated by minority plaintiffs. But today, the Court's race discrimination cases are almost exclusively brought by white plaintiffs invoking doctrines of strict scrutiny to challenge civil rights laws. This is not accidental. The complexion of the Court's equal protection docket tells us something about the Court's equal protection doctrine. Courts have defined what counts as a group-based classification and what counts as discriminatory purpose in such a way as to make it exceedingly hard for minorities and women to craft equal protection challenges to race- and gender-salient laws.[134]

From here it is easy to discern the distorting message being sent about who suffers from discrimination in American life, and to start to make sense of the supposition that discrimination against white people might be as factually prevalent as discrimination against blacks and other minorities. What appears to be little more than "alternative facts" maps surprisingly well onto the Court's own equal protection jurisprudence—something that is enormously significant for legitimating and justifying this idea. As Darren Lenard Hutchinson has observed, equal protection has "particularized resonance in our legal culture; it implies the implementation of specialized measures designed to assist classes who face social domination. Given this cultural backdrop, the extension of judicial solicitude to privileged classes falsely implies that these groups are politically vulnerable and deserve judicial solicitude like historically oppressed groups."[135] When we examine the Court's development and application of equal protection principles, it isn't hard to find the messaging that might support a factual-prevalence mindset.

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does not constitute a "racial classification." Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278, 1360 (2011).

132. In *Gomillion*, the Court considered a voting district in Tuskegee that had been redrawn to include every white voter in the vicinity and exclude all but four African-American voters; achieving this result required drawing the boundaries of the district in the shape of a 28-sided figure. Gomillion v. Lightfoot, 364 U.S. 339, 340 (1960).

133. *But see* Siegel, *supra* note 94, at 44–45.

134. Siegel, *supra* note 131, at 1360.

135. Hutchinson, *supra* note 11, at 640 ("[T]he Court also explicitly describes whites as politically disadvantaged in its symmetrical application of heightened scrutiny.").

C. Rights as a Zero-Sum Game

If, as the preceding Sections demonstrate, both the moral-equivalence and factual-prevalence positions have counterparts in equal protection doctrine, where might we find the corresponding doctrinal foundation for the zero-sum premise? One answer would be that many of the very same principles reviewed above lay the foundation for the zero-sum mindset. It provides the analytical foundation upon which the affirmative action cases rest: the challenged programs provide some variant of a "plus factor" to under-represented minorities,[136] which is assumed to have a sufficiently direct adverse impact on white applicants so as both to provide standing for individual plaintiffs[137] and constitute the sort of discrimination that triggers strict scrutiny.[138] In a case like *Fisher v. University of Texas*, where the plaintiff would not have merited a seat at the University of Texas regardless of the operation of racial preferences,[139] the zero-sum premise is more fiction than fact, but no less visible in spite of its questionable basis in the actual mechanics of university admissions.[140] The idea that programs designed to enhance minority admissions come at such a direct cost to white applicants so as to constitute discrimination against them contains an unmistakable zero-sum logic.

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136. For detailed description of the mechanics of the university admissions programs, see Strasser, *supra* note 130.

137. For an argument that Abigail Fisher did not have standing to challenge the University of Texas's admissions program, see Adam D. Chandler, *How (Not) To Bring an Affirmative Action Challenge*, 122 YALE L.J. ONLINE 85 (2012).

138. As Professor Goodwin Liu has demonstrated, "the perceived unfairness is more exaggerated than real." Goodwin Liu, *The Causation Fallacy: Bakke and the Basic Arithmetic of Selective Admissions*, 100 MICH. L. REV. 1045, 1046 (2002). Liu goes on to explain that the notion that white applicants are substantially burdened by affirmative action programs:

> is a distortion of statistical truth, premised on an error in logic. . . . To draw such an inference, as opponents of affirmative action routinely do, is to indulge what I call 'the causation fallacy'—the common yet mistaken notion that when white applicants like Allan Bakke fail to gain admission ahead of minority applicants with equal or lesser qualifications, the likely cause is affirmative action.

Id.

139. Osamudia R. James, *White Like Me: The Negative Impact of the Diversity Rationale on White Identity Formation*, 89 N.Y.U. L. REV. 425, 427 (2014) ("[T]he university insisted that Fisher's application would not have merited admission even if the University did not consider race among some of its applications.").

140. *Id.* at 428 (noting that in spite of the University's representations about her candidacy, "Fisher seemed confident that somebody was erroneously granted the spot in UT's entering class that belonged to her"). For an argument that the Court's willingness to entertain Fisher's suit on the merits regardless of actual injury reflects a "process" view of discrimination, see Wendy Parker, *Recognizing Discrimination: Lessons from White Plaintiffs*, 65 FLA. L. REV. 1871, 1874 (2013). It is interesting to note that the *Grutter* opinion was critiqued from the Left for grounding its approval of Michigan's program on a rationale that it benefits white students. *See* Derrick Bell, *Diversity's Distractions*, 103 COLUM. L. REV. 1622, 1622–25 (2003); Tomiko Brown-Nagin, *Elites, Social Movements, and the Law: The Case of Affirmative Action*, 105 COLUM. L. REV. 1436, 1484 (2005).

There are also less visible ways in which the Court has woven into the fabric of equal protection support for the idea that equality victories for some necessarily entail losses for others. It is these distinctive phenomena to which we next turn, examining these other doctrinal contributions to the view of rights as a zero-sum game.

1. The Allowance to Equalize Down

As any student of constitutional rights and remedies quickly comes to understand, a pronouncement by the courts that a constitutional right exists and has been violated is just the beginning. It is with the remedy, mandated by the courts or chosen by the state actor in question, that the right gets translated into social context and lived experience.[141] So it is with every equal protection violation, at a very foundational level. When a state endeavors to correct unequal treatment that violates the Constitution, it has something akin to a binary choice: it may equalize down or equalize up.[142] In the most poetic formulation, a state may choose the equality of the graveyard or the equality of the vineyard.[143] Those in the previously preferential position might be stripped of their advantages, so that they become equal to those who were previously deprived of those advantages. Or those who suffered deprivation in the prior regime might be newly vested with those benefits, so as to become equal to the previously favored class.[144] We can readily see the profoundly

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141. *E.g.*, Jennifer E. Laurin, *Rights Translation and Remedial Disequilibration in Constitutional Criminal Procedure*, 110 COLUM. L. REV. 1002 (2010); Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 858 (1999) ("[R]ights and remedies are inextricably intertwined. Rights are dependent on remedies not just for their application to the real world, but for their scope, shape, and very existence.").

142. This aspect of equal protection jurisprudence has received some attention in the scholarly literature, but perhaps not as much as is warranted for such a pervasive phenomenon. *See, e.g.*, Deborah L. Brake, *When Equality Leaves Everyone Worse Off: The Problem of Leveling Down in Equality Law*, 46 WM. & MARY L. REV. 513, 515 (2004) ("In the canon of equal protection, it is seemingly well-settled that inequality may be remedied either by leveling up and improving the treatment of the disadvantaged class, or by leveling down and bringing the group that is better off down to the level of those worse off," and noting that leveling down hasn't received much attention in the scholarly literature); Vicki C. Jackson, *Constitutional Law in an Age of Proportionality*, 124 YALE L.J. 3094, 3172 (2015).

143. This evocative phrase was originally used in Evan H. Caminker, *A Norm-Based Remedial Model for Underinclusive Statutes*, 95 YALE L.J. 1185, 1186 (1985–86) ("Equality itself is as well pleased by graveyards as by vineyards." (quoting DOUGLAS RAE, EQUALITIES 129 (1981))). Albie Sachs, Chief Justice of the South African Constitutional Court, used the phrase in a landmark opinion requiring the recognition of same-sex marriages in South Africa. Minister of Home Affairs v. Fourie 2006 (1) SA 524 (CC) (S. Afr.) at 580 para. 149.

144. Heckler v. Mathews, 465 U.S. 728, 740, (1984) (quoting Iowa–Des Moines Nat. Bank v. Bennett, 284 U.S. 239, 247 (1931)) ("[W]hen the 'right invoked is that to equal treatment,' the appropriate remedy is a mandate of equal treatment, a result that can be accomplished by withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class."); *see also* Califano v. Westcott, 443 U.S. 76, 89 (1979) ("[A] court may either declare [the statute] a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include

divergent social and political consequences of each alternative, but in either case we might say that formal equality has been achieved.

Over the course of its equal protection jurisprudence, the Court has allowed state actors to meet their equal protection obligations by equalizing down, choosing the equality of the graveyard. "How equality is accomplished," the Court has said, "is a matter on which the Constitution is silent."[145] Take, for paradigmatic example, the case of *Palmer v. Thompson*, in which the Court considered whether the City of Jackson, Mississippi was permitted to comply with a desegregation mandate by closing the City's public pools rather than integrating them.[146] Refusing to invalidate the closure "solely because of the motivations of the men who voted for it," the Court emphasized that "the city has closed the public pools to black and white alike."[147] The Fourteenth Amendment required nothing more, the Court held.[148] In *Palmer*, the Court ratified the leveling-down gambit under circumstances that made it most suspicious, because the intent to avoid integration was so obvious,[149] and most damaging, because the resulting deprivation, shared by all who couldn't afford access to a private pool, was so tangible and traceable to the civil rights litigation.[150]

Since *Palmer*, plaintiffs who manage to surmount the obstacles outlined in the preceding Section—those who can successfully demonstrate that the equal protection guarantee has been violated—face the prospect that their efforts will jeopardize the benefit entirely, not only for themselves but also for those who previously enjoyed it. Correcting an equal protection violation by eliminating rather than extending the benefit has become pervasive, as Professor Deborah Brake

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those who are aggrieved by exclusion." (quoting Welsh v. United States, 398 U.S. 333, 361 (1970))).

145. Levin v. Commerce Energy, Inc., 560 U.S. 413, 426–27 (2010).

146. Palmer v. Thompson, 403 U.S. 217 (1971).

147. *Id*. at 224–26.

148. *Id.* at 226. ("Nothing in the history or the language of the Fourteenth Amendment nor in any of our prior cases persuades us that the closing of the Jackson swimming pools to all its citizens constitutes a denial of 'the equal protection of the laws.'").

149. *Id.* at 241 (White, J., dissenting) ("The circumstances surrounding this action and the absence of other credible reasons for the closings leave little doubt that shutting down the pools was nothing more or less than a most effective expression of official policy that Negroes and whites must not be permitted to mingle together when using the services provided by the city.").

150. *Id.* at 269–70 (quoting Palmer v. Thompson, 419 F.2d 1222, 1236 (5th Cir. 1969) (Wisdom, J., dissenting)) ("[T]he price of protest is high. . . .[Petitioners] now know that they risk losing even segregated public facilities if they dare to protest segregated public parks, segregated public libraries, or other segregated facilities. They must first decide whether they wish to risk living without the facility altogether . . . . It is difficult to measure the extent of this impact, but it is surely present and surely we should not ignore it. The action of the city in this case interposes a major deterrent to seeking judicial or executive help in eliminating racial restrictions on the use of public facilities."). As Deborah Brake explains, "Palmer's acceptance of the pool closure set the tone for future cases by viewing differential treatment as the touchstone of discrimination." Brake, *supra* note 142, at 525.

demonstrates in her insightful and comprehensive treatment of leveling down.[151] Most recently, the Court remedied an equal protection violation in the derivative citizenship statute by eliminating the benefit that had been conferred on women rather than extending it to men who had been burdened by the gender-based classification in the regime.[152] The Court agreed with Mr. Morales-Santana that his right to equal treatment had been violated and then remedied the violation by ensuring that no parent, regardless of gender, would be able to transmit U.S. citizenship to a child according to the process that Morales-Santana had sought to access.[153] To describe this as even a "symbolic victory" for Morales-Santana—whose removal from the United States was therefore permitted to proceed apace[154]—is generous. It is more apt simply to observe, as one commentator does, that "[t]here is not a single human being whose life will be made better because of this opinion, and many people whose lives will be worse."[155]

Eliminating rather than extending a contested benefit has become so commonplace that we can see legislative bodies including an anticipatory leveling-down mechanism as a fallback provision, in the event that the statutory scheme as enacted fails to satisfy equal protection principles.[156] This too the Court has sanctioned. In *Heckler v. Mathews*, for example, the Court considered a fallback provision in the Social Security Act providing that if a particular gender-based classification was found unconstitutional, the remedy would be to impose the challenged dependency requirement on women, who had previously been exempt from it, rather than broaden the exemption to include male beneficiaries.[157] The Court was nonchalant about this feature of the case, observing that "[w]e have frequently entertained attacks on discriminatory statutes or practices even when the government could deprive a successful plaintiff of any monetary relief by withdrawing the statute's benefits from both the favored and the excluded class."[158] The Court hasn't seen this threat of postvictory deprivation as constitutionally troubling, refusing to recognize, as Justice White did in his *Palmer* dissent, that the leveling-down gambit operates as "a major deterrent to seeking judicial or executive help" in remediating inequality.[159] As Justice White understood, the message the Court was sending to equal protection plaintiffs—and indeed the public at large—

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151. Brake, *supra* note 142, at 515–18 (offering examples including a high school canceling an honor-society induction ceremony rather than allowing a pregnant student to participate; abolishing alimony rather than making it gender-neutral; threatening to close down an educational institution rather than admitting those previously excluded).

152. Sessions v. Morales-Santana, 137 S. Ct. 1678, 1698–1701 (2017).

153. *Id.* at 1698.

154. *Id.*

155. Ian Samuel, *Morales-Santana and the "Mean Remedy,"* TAKE CARE (June 12, 2017), https://takecareblog.com/blog/morales-santana-and-the-mean-remedy.

156. *See* Heckler v. Mathews, 465 U.S. 728, 738–40 (1984) (citing five different instances).

157. *Id.* at 741–44.

158. *Id.* at 739; *see also id.* at 740 n.8 ("we have often recognized that the victims of a discriminatory government program may be remedied by an end to preferential treatment for others," and citing four other instances.).

159. Palmer v. Thompson, 403 U.S. 217, 269 (1971).

was that "the price of protest is high,"[160] indeed something akin to a punishment for seeking to enforce the Constitution's equality guarantee.

At times members of the Court have offered, as an explanation, the supposition that this framework is sufficiently protective of constitutional values because the political majority will naturally choose to extend benefits to the disfavored minority rather than impose deprivations on itself. Justice Jackson's concurrence in *Railway Express Agency, Inc. v. New York* is one prominent articulation:

> [E]quality is not merely abstract justice. The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against an arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation.[161]

Quoting this exact passage some fifty years later, Justice O'Connor's concurrence in *Lawrence v. Texas* sounds a similar theme.[162] The only member of the Court to believe that the Constitution prohibited the Texas anti-sodomy statute at issue in *Lawrence* but permitted the Georgia statute upheld in *Bowers*,[163] Justice O'Connor based her position on what she viewed to be a key difference between the two statutes: Texas prohibited homosexual sodomy but allowed heterosexual sodomy.[164] Justice O'Connor explained why this targeted prohibition was constitutionally infirm and then concluded: "I am confident, however, that so long as the Equal Protection Clause requires a sodomy law to apply equally to the private consensual conduct of homosexuals and heterosexuals alike, such a law would not long stand in our democratic society."[165]

The supposition is appealing in its blend of optimism and pragmatism; it assumes that the Court's initial enforcement of a bare-bones equal-treatment rule will bring about a sort of interest convergence between majority and minority communities,[166] which would then be sufficient to ensure just, reasonable, and even-

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160. *Id.* at 253.

161. Railway Express Agency, Inc. v. New York, 336 U.S. 106, 112–13 (1949).

162. Lawrence v. Texas, 539 U.S. 558, 579 (2003) (O'Connor, J., concurring).

163. O'Connor's *Lawrence* concurrence memorably started with the following lines: "The Court today overrules Bowers v. Hardwick, 478 U.S. 186 (1986). I joined Bowers, and do not join the Court in overruling it." *Id.*

164. *Id.* at 581–83.

165. *Id.* at 584–85.

166. Readers will recognize the obvious tribute to Derrick Bell's "interest convergence" thesis, which provides, in his words, that "the interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites." Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93

handed lawmaking cleansed of the original inequality. The problem is that it often turns out to be wrong. Jackson's cheerful prediction, articulated in a context where the cleavage between majority and minority interests formed around the permissibility of hiring trucks to perform advertising functions, doesn't transfer well to more salient, intense, and persistent divisions.[167] It doesn't account for the possibility that hierarchy—racialized, gendered, or otherwise—is itself a cherished good that people might value above the more discrete and tangible goods associated with particular instances of government decision-making.[168]

Justice O'Connor's adoption of the premise to apply to lawmaking associated with sexual identity faced exactly this risk and didn't fare well in retrospect. After the Court held in *Obergefell v. Hodges* that same-sex couples could not be excluded from the institution of marriage,[169] judges and clerks in Alabama and Kentucky refused to issue any marriage licenses at all rather than issue them to same-sex couples.[170] To be clear, these were acts of defiance rather than compliance; as Professor Kenji Yoshino explains, the *Obergefell* ruling was noteworthy precisely because it rested on due process principles in addition to equal protection constraints, foreclosing the level-down gambit as an acceptable response to equality demands in the particular context of same-sex marriage.[171] But while the shutdown on marriage licenses in Kentucky and Alabama didn't have the weight of doctrinal authority behind it, the episode helps illustrate the fundamental predictive error of the Jackson–O'Connor thesis.

When a politically powerful majority is forced to the choice—extend or eliminate—it will in fact sometimes eliminate the contested benefit rather than extend it on equal terms.[172] The spitefulness this evinces manifests the commitment

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HARV. L. REV. 518, 523 (1980). For a discussion of the theory's influence on legal scholarship, and a critique of the theory's shortcomings, see Justin Driver, *Rethinking the Interest-Convergence Thesis*, 105 NW. U. L. REV. 149 (2011). The distinction between Bell's thesis and the Jackson–O'Connor position is crucial: while Bell posited that African-Americans would only obtain legal victories when aligned with the interests of the white majority, Justices Jackson and O'Connor seem confident that majority–minority alignment is a necessary outgrowth of a minimal equal-treatment rule. In other words, Bell posited that interest convergence was necessary; Jackson and O'Connor predict that it is reliable. We might call their version "convergence overconfidence."

167. Railway Express Agency, Inc. v. New York, 336 U.S. 106 (1949).

168. For the foundational work theorizing white racial identity as an especially valuable form of property, see Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1715 (1993) (setting forth the "concept of a protectable property interest in whiteness"); *see also* Nancy Leong, *Racial Capitalism*, 126 HARV. L. REV. 2151, 2154 (2013) ("Whiteness has been a source of value throughout our history, conferring power and privilege on the possessor.").

169. Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

170. Kenji Yoshino, *A New Birth of Freedom?:* Obergefell v. Hodges, 129 HARV. L. REV. 147, 173 (2015).

171. *Id*.

172. As Professor Brake explains, "persons in power may be willing to impose some material cost on themselves in order to stave off attacks on the social order." Brake, *supra* note 142, at 577.

to the original exclusion, reinforcing the challenged hierarchy. The resulting landscape is thereby not only devoid of the contested benefit but also hardly a reflection of equality in any meaningful sense.

In sum, our constitutional framework allows state actors to discharge their equal-treatment obligations by equalizing down, and despite confident judicial predictions to the contrary, they often do.[173] Commentators have spoken lucidly about the effect this has not only on subordinated groups who had been pressing for equal access but also on members of historically powerful groups who are taught to fear equality's mandate.[174] As Justice Albie Sachs of South Africa vividly described the social consequences of equalizing down in the context of same-sex marriage claims:

> [I]magine the results. The straights would protest that they were getting on fine with their marriages until these pesky people came along to mess things up for everybody. Meanwhile, the gay and lesbian couples would lament the fact that just as they were about to reach the mountaintop, their prize was being whisked away. We would have had equality with a vengeance, equality of resentment.[175]

Professor Brake has similarly recognized that the leveling-down decisions have the potential to erode public support for the very idea of equality itself:

> Law and other government actions play a role in "norm management" by functioning to encourage shifts in social norms. To the extent that law shapes norms through its expressive force, equality law's uncritical acceptance of leveling down as a remedy to inequality has the potential to undermine the construction of equality norms and their power to shape behavior.[176]

An equality regime in which symbolic advances for some are accompanied by material losses for others is one that fosters a sense of rights as a zero-sum game.[177]

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173. *But see* United States v. Virginia, 518 U.S. 515, 557 (1996) (quoting historian Richard Morris in characterizing the history of our Constitution as "the story of the extension of constitutional rights and protections to people once ignored or excluded").

174. *See* Justice Albie Sachs, *The Sacred and the Secular: South Africa's Constitutional Court Rules on Same-Sex Marriages*, 102 KY. L.J. 147, 154 (2014).

175. *Id.*

176. Brake, *supra* note 142, at 578–80.

177. Readers familiar with game theory will recognize that the elimination of a benefit altogether, rather than its redistribution from one group to another, more closely resembles a negative-sum game in which everybody loses, rather than a zero-sum game in which wins are equivalent to losses. There are a few ways to think about this. First, we might note that this simply strengthens the essential point—that equal protection doctrine is communicating that equality is something to fear. Or we might posit that the bare-bones equal-treatment rule—writ large or in its specific applications—isn't valueless to the plaintiffs who pursue it, because they benefit symbolically from the vindication of an equal-treatment rule even when it isn't accompanied by successful acquisition of the contested benefit. There is at least a conceptual possibility that the lifting of the stigmatic burden on the plaintiff class offsets the loss to the majority of the contested benefit. Acknowledging that the

2. Negative Liberties and the Missing Floor

To compound the problem, our Constitution, interpreted by the Supreme Court to be no more than a "charter of negative liberties," provides virtually no floor to how far a state may go in its downward leveling. As Professor Robin West describes, drawing on Isaiah Berlin's influential formulation, ours is a regime of negative rather than positive liberty: "It is liberty or freedom from, not liberty or freedom to, which the Bill of Rights protects."[178] And, as West further explains, it protects such incursions from only one source—the State.[179] This aspect of American constitutionalism is so familiar that few readers will need an extensive exposition, but it is worth noting its chief qualities so that we can appreciate its interaction with the other phenomena explored here.

Articulated most prominently in *DeShaney v. Winnebago County*, the conception of the Constitution as a charter of negative liberties requires nothing more of the government than its restraint.[180] The affirmative goods we might value—health,[181] security, shelter, education[182]—are a matter of political grace, having nothing to do with courts.[183] Scholars and advocates have resisted the distinction between positive rights and negative liberties as historically unsound[184] and analytically bankrupt,[185] repeatedly urging the Court to abandon it, but it is exceptionally durable.[186] And it has a profoundly important relationship to the various dimensions of equal protection doctrine that we've explored so far, because

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win to one group (of a symbolic/dignitary nature) is of a very different nature than the loss to the other (of a concrete/tangible nature), we might nonetheless still treat this as a zero-sum game. But as this very discussion reveals, the point is not to assign precise valuations of wins and losses so as to cleanly differentiate between zero- and negative-sum games—in either case, politically powerful majorities are taught that they have something to lose from the pursuit of equality.

178. Robin West, *Reconstructing Liberty*, 59 TENN. L. REV. 441, 446–47 (1992).

179. *Id*. at 448.

180. 489 U.S. 189, 195 (1989).

181. Edward Rubin, *The Affordable Care Act, the Constitutional Meaning of Statutes, and the Emerging Doctrine of Positive Constitutional Rights*, 53 WM. & MARY L. REV. 1639, 1702 (2012) (positing that the Affordable Care Act may be controversial because "people sense its potential for establishing a regime of positive rights").

182. Susan H. Bitensky, *Theoretical Foundations for a Right to Education Under the U.S. Constitution: A Beginning to the End of the National Education Crisis*, 86 NW. U. L. REV. 550, 552 (1992).

183. As I have observed in prior work, anything cast as a request that the government do something rather than refrain from something is bound to fail. *See* Rebecca Aviel, *Compulsory Education and Substantive Due Process: Asserting Student Rights to a Safe and Healthy School Environment*, 10 LEWIS & CLARK L. REV. 201, 204 (2006).

184. *See* Steven J. Heyman, *The First Duty of Government: Protection, Liberty and the Fourteenth Amendment*, 41 DUKE L.J. 507, 509–10 (1991) ("[C]ongressional debates on the Fourteenth Amendment show that establishing a federal constitutional right to protection was one of the central purposes of the Amendment.").

185. *See* Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271, 2279–85 (1990).

186. Daryl Levinson, *The Supreme Court, 2015 Term—Forward: Looking for Power in Public Law*, 130 HARV. L. REV. 31, 132–33 (2016).

it forecloses many possible constitutionally grounded objections to the leveling-down gambit. Vanishingly few of the contested benefits that might be eliminated by a government actor equalizing down are constitutionally guaranteed.

The interaction between equal protection and the negative-liberties constraint has been explored by other scholars in ways that are illuminating for our purposes as well. Professor Daryl Levinson's work on political power connects the Court's equality jurisprudence to its insistence on exclusively negative liberties by noting that courts haven't done much for sociopolitically subordinated groups other than to "eliminate blatantly discriminatory laws and policies," consistently refusing to cast "rights as positive, redistributive claims to social and economic goods" despite scholarly urges to do so.[187] The insight, emerging from a transdoctrinal assessment of whether public law adequately attends to questions of political power, is that even Equal Protection—the doctrine we might expect to be particularly well suited to correcting for political powerlessness—is inattentive to these concerns.[188] His account makes clear that the Court's resistance to positive rights operates as a recurring constraint on the reach and force of the equal protection guarantee.[189]

Professor Kenji Yoshino's work also illuminates the interaction between equal protection and the negative-liberties constraint, albeit from an unusual posture in which the latter was successfully surmounted.[190] Writing about Justice Kennedy's *Obergefell* opinion, Yoshino defended Kennedy's approach against charges of doctrinal incoherence by justifying its admixture of equal protection and due process principles.[191] Yoshino's explanation of why Kennedy was right to rely on both doctrines in ruling for marriage equality is particularly relevant for our purposes. He notes that "in *Obergefell*, a standard equal protection ruling would have permitted the states either to level up by granting both same-sex couples and opposite-sex couples marriage licenses or to level down by refusing to grant licenses to both sets of couples."[192] The Court eliminated the latter option "by basing its ruling on the Due Process Clause (this time in addition to, rather than in lieu of, the Equal Protection Clause)."[193] As Yoshino explains, a refusal to grant marriage licenses to both same-sex and opposite-sex couples would "violate a due process ruling in a way that would not violate an equal protection ruling."[194] That this ensured a durable and substantive victory for marriage equality is something to celebrate, but it is essential to recognize that the *Obergefell* Court's decision to guarantee the "equality of the vineyard" was aberrational.[195] It was available to the Court because of a

187. *Id*. at 133.
188. *Id.* at 132–33.
189. *See id.*
190. Yoshino, *supra* note 170, at 172–73.
191. *Id.* at 173.
192. *Id.*
193. *Id.*
194. *Id*.
195. For an argument that *Obergefell* is part of a pattern of LGBT exceptionalism, see Russell K. Robinson, *Unequal Protection*, 68 STAN. L. REV. 151, 154 (2016). For an argument that *Obergefell* is best understood as reflecting a form of marriage exceptionalism, see Clare Huntington, Obergefell*'s Conservatism: Reifying Familial Fronts*, 84 FORDHAM L.

recurrent willingness to treat freedom to marry as a negative liberty, even though in practice it has considerable attributes of a positive right.[196] Ultimately, Yoshino's vindication of the *Obergefell* ruling confirms that equal protection alone was insufficient for the job.[197] Placing marriage against a larger backdrop of benefits that claimants might demand from the state on an equal basis reveals that marriage is unusual in its ability to transcend the negative-liberty constraint.

Both Levinson and Yoshino shed light on the ways in which equal protection doctrine interacts with the negative-liberty principle. Levinson's point is that the Court has been insensitive to questions of political power even in its equal protection jurisprudence, refusing redistributive claims in the face of palpable evidence that the political process is stacked against subordinated groups.[198] And Yoshino's point is that due process is a necessary companion to equal protection if the majority is to be stymied in responding to equality demands by leveling down.[199] Both focus on equal protection's shortcomings in safeguarding the interests of subordinated minorities, but we should also start to contemplate how this combination of phenomena might contribute to a larger loss of faith in constitutional principles; one that expresses itself as a zero-sum mindset.[200] If a state may respond to equality demands by eliminating rather than extending the contested benefits, and few if any of these benefits are constitutionally guaranteed, then the pursuit of rights may indeed appear to be a zero—or even negative—sum game.

REV. 23 (2015); Serena Mayeri, *Marital Supremacy and the Constitution of the Nonmarital Family*, 103 CALIF. L. REV. 1277 (2015); Melissa Murray, Obergefell v. Hodges *and Nonmarriage Inequality*, 104 CALIF. L. REV. 1207 (2016).

196. This is an under-appreciated distinction between *Loving v. Virginia*, in which the petitioners sought relief from a criminal conviction, and *Obergefell v. Hodges*, in which the plaintiffs were asking for state recognition. For further discussion of the negative-liberty problem in constitutional marriage jurisprudence, see Gregg Strauss, *The Positive Right to Marry*, 102 VA. L. REV. 1691 (2016).

197. *See* Yoshino, *supra* note 170, at 173.

198. Levinson, *supra* note 186, at 133.

199. Yoshino, *supra* note 170, at 173.

200. As was recognized by no less a political talent than Senator Barack Obama, campaigning for President in 2008, we can anticipate that ambivalence about racial equality is going to be particularly pronounced when the lack of a social safety net is most directly relevant. *See* Barack Obama, U.S. Senator, *Address at the National Constitution Center (Mar. 18, 2008), in* THE SPEECH: RACE AND BARACK OBAMA'S "A MORE PERFECT UNION" 242–43 (T. Denean Sharpley-Whiting ed., 2009). Describing anger within "certain segments of the white community," Obama observed:

> [I]n an era of stagnant wages and global competition, opportunity comes to be seen as a zero-sum game, in which your dreams come at my expense. So when they are told to bus their children to a school across town; when they hear an African American is getting an advantage in landing a good job or a spot in a good college because of an injustice that they themselves never committed; when they're told that their fears about crime in urban neighborhoods are somehow prejudiced, resentment builds over time.

Id. at 244.

III. THE IMPERFECT AND OFTEN INAUDIBLE DIALOGUE

Having seen that there is a doctrinal counterpart for each of the varieties of white grievance that social psychologists and political scientists have been documenting in their research, we now need to delve deeper into the nature of the connection. What should we make of the multifaceted correspondence between social discourse and constitutional doctrine? This Part considers the possibility that the particularized legal principles set forth above may be crowding out other, more expansive meanings of "discrimination" and "equality"—not only in the courts but also in the social consciousness of white Americans, in a sort of reverse popular constitutionalism.[201] Any passing reference to a concept as multivalent as "popular constitutionalism" will by necessity be woefully simplified and incomplete. By invoking the idea of popular constitutionalism, I mean simply to locate this discussion in the larger body of work exploring the relationship between judicial decisions and popular opinion, without purporting to offer a comprehensive overview of the literature or the complexity of the processes through which constitutional meaning is developed, disputed, and deployed.[202] If popular constitutionalism describes how "constitutional meanings emerge over time as the products of a wide variety of social practices"[203] then what I am exploring here is the phenomenon in reverse: the possibility that social perceptions, of the sort we cataloged in the first Part, can emerge as a product of constitutional meaning.[204] Is it possible to imagine that the Court's rulings on race have an impact on the way Americans perceive discrimination?

A. Connecting Doctrine and Discourse

We might start by observing that when Americans are invited to reflect upon racial bias and discrimination, without being instructed to limit their assessment to the definitions and parameters reflected in constitutional law, we wouldn't necessarily expect them to self-impose those constraints. It might be perfectly plausible to encounter the opposite—that respondents might tend toward an impressionistic, fluid, and capacious concept of "discrimination," one that covers more territory than that which is cognizable under equal protection doctrine. We could envision a widely shared social understanding of discrimination that, in the

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201. Following Barry Friedman, "it would be neat to identify one mechanism by which judicial opinions coalesce with popular opinion. But things are messy here in the real world." Larry D. Kramer, *Popular Constitutionalism, Circa 2004*, 92 CALIF. L. REV. 959, 1011 n.46 (2004) (describing Siegel's work and observing: "Popular constitutionalism in this conception is more than an inevitable constraint on what courts can accomplish and more than a source of ideas for the Supreme Court to consider as it goes about making law for the rest of us. Popular constitutionalism is the mechanism that mediates between constitutional law and culture. It is how we ensure that the spirit of our Constitution remains consonant with the society it is supposed to govern.").

202. *See id*. at 962–75.

203. Nan D. Hunter, *Varieties of Constitutional Experience: Democracy and the Marriage Equality Campaign*, 64 UCLA L. REV. 1662, 1672 (2017).

204. Kramer, *supra* note 201, at 971 ("[M]ost scholars agree that courts play a significant role in shaping the strategic terms of political debate and that, in certain circumstances, they may even have a part in defining those terms.").

incomparable formulation offered by Professor Morton Horwitz, is attentive to "those who are down and out—the people who received the raw deal, those who are the outsiders, the marginal, the stigmatized."[205] It is possible to imagine a "lay rights consciousness"[206] inspired by this spirit even if the legal principles that comprise the equal protection doctrine do little to scrutinize the terms of the "raw deal."[207]

Consider, as an illustrative counter-example, the readiness with which concerns about "free speech" are invoked in contexts that have no overlap with the territory covered by the First Amendment.[208] Popular understandings of the importance of the free exchange of ideas allow us to debate the virtues and risks of unrestrained expression on college campuses without strictly differentiating between public and private universities, a distinction that is obviously outcome-determinative in a doctrinal sense.[209] Much of this discourse draws inspiration from the First Amendment, as an expression of values important for a democratic society, without actually intending to reshape the law of free speech into one that dispenses with a state action requirement.[210] In this way free speech discourse draws from, but does not strictly retrace, free speech doctrine; we might say that free speech discourse is more expansive than free speech doctrine.[211]

We could similarly imagine a universe in which Americans asked to consider discrimination, unbound by formal legal rules, were able and willing to

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205. Morton J. Horwitz, *The Warren Court and the Pursuit of Justice*, 50 WASH. & LEE L. REV. 5, 10 (1993).

206. The idea of a "lay rights consciousness" is described repeatedly in the work of scholars who study social movements and popular constitutionalism. *See, e.g.*, Risa Goluboff, *Lawyers, Law, and the New Civil Rights History*, 126 HARV. L. REV. 2312, 2325 (2013) (reviewing KENNETH W. MACK, REPRESENTING THE RACE: THE CREATION OF THE CIVIL RIGHTS LAWYER (2012)).

207. *See* Horwitz, *supra* note 205, at 10.

208. *See* Julian E. Zelizer & Morton Keller, *Is Free Speech Really Challenged on Campus?*, THE ATLANTIC (Sept. 15, 2017), https://www.theatlantic.com/education/archive/2017/09/students-free-speech-campus-protest/539673/ (discussing threats to free speech on college campuses without differentiating between public and private institutions or otherwise relying on formal First Amendment doctrinal principles).

209. *See, e.g.*, ERWIN CHEMERINSKY & HOWARD GILLMAN, FREE SPEECH ON CAMPUS 49–62, 65–70 (2017).

210. *See, e.g.*, Zelizer & Keller, supra note 208.

211. On occasion, the public responds to rather than tolerates the Court's refusal to hold that a constitutional right has been violated, using legislative measures to achieve the rights-protective result the Court declined to impose. One notable example is the Pregnancy Discrimination Act (PDA) of 1978, Pub.L. 95–555, 92 Stat. 2076, prohibiting pregnancy discrimination after the Court held in *Geduldig v. Aiello*, 417 U.S. 484 (1974) that discrimination on the basis of pregnancy did not violate the Equal Protection Clause. Another is the Religious Freedom Restoration Act (RFRA), Pub. L. No. 103–141, 107 Stat. 1488 (November 16, 1993), seeking to reinstate strict scrutiny for neutral laws that burden religious exercise after the Court relaxed the standard of review for such claims in *Smith v. Employment Division*, 485 U.S. 660, 670 (1988). RFRA's application to the states was struck down in *City of Boerne v. Flores*, 521 U.S. 507 (1997) as beyond the reach of Congress's power under Section 5 of the Fourteenth Amendment.

envision those forms of "societal discrimination" that the Court has partitioned from view when engaged in constitutional analysis—persistent, pervasive forms of inequality that are difficult to trace to individual state actors with the requisite culpable mental state.[212] Millions of Americans most certainly do consider these disparities in reflecting upon discrimination, and are represented in some capacity by the survey respondents who did *not* agree that "discrimination against whites is as 'big a problem' today as discrimination against blacks and other minorities."[213] As detailed in preceding Sections, however, this group is evenly matched by the 49% that *did* accept the proposition, resting either on a moral-equivalence understanding or a factual-prevalence one.[214] Especially for this latter group, we can infer that their definition of discrimination simply didn't encompass the persistent, pervasive forms of inequality reflected in differential outcomes across multiple sectors.[215] In excluding from view these forms of inequality, the factual-prevalence position retraces this aspect of equal protection doctrine—a fit that needn't be treated as inevitable.[216]

When it comes to matters of race, many white Americans seem to embrace a social meaning of discrimination that has narrowed to the set of affronts that the Court is willing to deem constitutionally cognizable. And the sense that progress for racial minorities has come *at the expense* of the white majority is less at odds with equal protection doctrine than we might initially think: the very logic of the affirmative action cases presupposes this, albeit often counterfactually, and the zero-sum premise finds support in the recurrent remediation of unequal treatment by leveling down, eliminating rather than extending contested benefits to achieve equality of the graveyard rather than equality of the vineyard.[217] The question is not whether these decisions have some sort of effect on the society into which they are released—surely, they have *some*—but rather how much impact, and of what kind?

Although there is a great deal we don't know about the relationship between the Court and the public—an issue to which we will return in the next Section—it seems fair to posit that these decisions do more than just resolve individual disputes: they have communicative power, sending messages about the way discrimination is experienced in American society and who stands to lose when minority groups press for equality. To accept such a premise doesn't at all require us to ignore the evidence that the Court responds to public opinion in addition to shaping it. There can be no doubt that the Court, in deeming race-based remedies "a highly suspect tool," was responding to the objections of people who thought the

212. *See supra* note 211 and accompanying text.

213. *See infra* Section I.B.

214. *See* JONES ET AL., *supra* note 2, at 1, 15–16.

215. *See id*.

216. This will strike some readers as an overly delicate way of saying that it "flies in the face of data," and perhaps that is simply the best way to describe it. Newkirk, *supra* note 13. But for anyone interested in the interaction between law and social norms, it is worth considering the remarkable fact that the factual-prevalence position is consistent with and suggested by equal protection doctrine.

217. *See supra* Subsections II.C.1 and II.C.2.

programs were unfair.[218] But it does no damage to that proposition to observe that the co-construction of social and constitutional meaning is unlikely to simply end there. In an era when it is commonplace to lament the negative effects of ideological "echo chambers,"[219] where we have ready access to the risks of confirmation bias,[220] it is reasonable to consider whether white grievance is not only directed at the Court but also invigorated and further entrenched by the reception it finds there.

If social perceptions of discrimination are indeed being shaped in some way by the Court's pronouncements, it raises profoundly unsettling questions about the possibility of seeking change outside the courts for wrongs the Court views as unredressable by recourse to constitutional law. For all the times the Court has instructed disappointed claimants to look elsewhere for help—to the legislative branches rather than the courts, to their state governments[221]—it has assumed that claimants can take their concerns to the right institution and be met there with whatever reception they might have had if the Court had never spoken at all. The refrain is such a familiar one that numerous examples are available: "McCleskey's arguments are best presented to the legislative bodies," says the Court, without even really meaning to suggest that there was any viable avenue for a death-row inmate such as McCleskey to work in the halls of the Georgia Legislature to reverse his sentence.[222] Viewed in the most charitable light, the Court's repeated instruction to plaintiffs to take their equality concerns elsewhere has offered something like an acknowledgment that there are problems left to solve, but that these are most appropriate for institutions other than the judiciary. This appeal to the representative branches is an important component of what Professor Reva Siegel describes as the antibalkanization approach to race-equality cases, a model that best explains the reasoning and voting of the swing Justices who sometimes vote to uphold and sometimes vote to strike down government programs with elements of race-consciousness.[223] The antibalkanization perspective is "more concerned with social cohesion than with colorblindness,"[224] explains Professor Siegel, and "understands

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218. *See, e.g.*, Siegel, *supra* note 94, at 44–45.

219. *See, e.g.*, David Robert Grimes, *Echo Chambers Are Dangerous—We Must Try to Break Free of Our Online Bubbles*, THE GUARDIAN (Dec. 4, 2017), https://www.theguardian.com/science/blog/2017/dec/04/echo-chambers-are-dangerous-we-must-try-to-break-free-of-our-online-bubbles.

220. Confirmation bias is "the effect that leads us to look for evidence confirming what we already think or suspect, to view facts and ideas we encounter as further confirmation, and to discount or ignore any piece of evidence that seems to support an alternate view." Ben Yagoda, *The Cognitive Biases Tricking Your Mind*, THE ATLANTIC (Sept. 2018), https://www.theatlantic.com/magazine/archive/2018/09/cognitive-bias/565775/. For an introduction to confirmation bias and other cognitive biases, see CAROL TAVRIS & ELLIOTT ARONSON, MISTAKES WERE MADE (BUT NOT BY ME) (2007).

221. *See* Siegel, *supra* note 94, at 20–23 (setting forth the multiple instances in which the Court invoked deference to the representative branches as a reason to rule against equal protection plaintiffs; as Siegel and others have noted, however, the Court's deference to the political branches has been missing in the affirmative action cases).

222. *See* McCleskey v. Kemp, 481 U.S. 279, 319 (1987).

223. Siegel, *supra* note 131, at 1302.

224. *Id.* at 1281.

the repair of racial injustice as fundamentally political, a responsibility of representative institutions of government as well as courts."[225] The role of the representative bodies in redressing racial injustice is thus a recurring theme in the Court's equal protection jurisprudence, and it has its virtues.[226]

The problem is that the Court has been inattentive to the communicative force of its own decisions, undermining the very prospects for change in the representative branches in which it reposes its confidence. The Court's repeated instruction to take equality concerns to the representative branches doesn't account for the possibility that it has been reshaping majority perceptions on what constitutes "discrimination" and who suffers from it. Scholars have described the Court's strict scrutiny of affirmative action as reflecting concern over "the risk of racial resentment that policies of racial rectification engender."[227] But we should at least consider the possibility of a quite distinctive mechanism: that strict scrutiny of affirmative action, along with all the other doctrinal principles set forth above, contributes to rather than mitigates this resentment by sending a message about whom we really ought to worry.[228] Perhaps, by erasing the redressability of multiple forms of discrimination, the Court may have been making them invisible to the majority eye—and in other ways, communicating to the majority that equality is actually something to fear.

B. Examining the Court's Communicative Power

Readers will wonder about the extent to which the claims made herein are empirical ones, positing some sort of direct causal effect that the Court is having on white perceptions of discrimination: is the intent to assert that white people feel aggrieved about anti-white discrimination *because* of the rhetoric or holdings of the Supreme Court? If so, what evidence supports the idea that these beliefs are traceable to Supreme Court doctrine? Why wouldn't we more readily posit that survey respondents, expressing white grievance in various forms, are responding

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225. *Id.* at 1302.

226. At its best, it could be imagined as:

> a framework of equal protection review that recognized the role, and responsibility, of coequal branches of government in vindicating equal protection values—a framework that invited courts to listen to the representative branches of government when they sought legislatively to enforce equal protection values, without abdicating a court's role in guaranteeing to all persons the equal protection of the laws.

Id. at 1362.

227. *Id.* at 1297 ("[T]here has been growing attention to the ways in which the Court's cases constraining the so-called benign uses of race are concerned about the risk of racial resentment . . . .").

228. Professor Reva Siegel addresses precisely this possibility, observing that:

> doctrine undertaking to alleviate racial resentments may in fact stimulate racial resentments. Myriad factors shape promotion and admissions decisions, but a disappointed applicant only can get strict judicial scrutiny if she expresses her aggrievement in racial terms; a strict scrutiny doctrine thus has the capacity to aggravate as well as to diffuse racial balkanization.

Id. at 1353.

directly to the results they see (or think they see) of affirmative action programs, school assignment, and other instances of race-consciousness? Why isn't the correspondence between doctrine and discourse best explained by the Court's well-documented responsiveness to public opinion rather than the other way around?[229] The suggestion here, that discourse may be reflecting doctrine, is not meant to foreclose any of these other mechanisms. The surprising resemblance between discourse and doctrine surely has many causes, and the modest claim I am making here is simply that the expressive force of the Court's pronouncements should be considered among the possibilities.

Understanding the connection between the Supreme Court and public opinion has been such a long-standing and challenging endeavor for legal scholars, political scientists, and historians that we can identify multiple waves of scholarly thinking on these issues. The literature is replete with divergent approaches and different results.[230] In an extensive intellectual history of some of the prominent work in this area, Professor Scott Cummings notes the "political science claim, prominent in court impact studies, that behavior and attitudes are resistant to being influenced by the authority of the court."[231] Other researchers, however, have found evidence for the proposition that Supreme Court decisions do influence public opinion.[232] The authors of one such study take care to explain that the influence rests upon the degree of deference to the Court with which its decisions are reported in the news media.[233] Others emphasize the salience of particular issues, or lack thereof, as important determinants in the connection between the Supreme Court and public opinion.[234] Two of the researchers working in this area, James Gibson and Gregory Caldeira, conclude that the Court enjoys a durable level of support that is

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229. *See, e.g.*, Scott Cummings, *The Social Movement Turn in Law*, 43 L. & SOC. INQUIRY 360 (2018).

230. *See infra* notes 238–244.

231. *See, e.g.*, Cummings, *supra* note 229 at 393.

232. *See, e.g.*, Joseph Daniel Ura & Alison Higgins Merrill, *The Supreme Court and Public Opinion*, *in* THE OXFORD HANDBOOK OF U.S. JUDICIAL BEHAVIOR (Lee Epstein & Stephanie A. Lindquist, eds., 2017); Marvin Ammori, *Public Opinion and Freedom of Speech*, INFO. SOC'Y PROJECT AT YALE L. SCH. (July 14, 2006), https://law.yale.edu/system/files/documents/pdf/Public_Affairs/ISP_PublicOpinion_fos.pdf; *see also* Peter K. Enns & Patrick C. Wohlfarth, *Making Sense of the Supreme Court-—Public Opinion Relationship*, *in* ROUTLEDGE HANDBOOK OF JUDICIAL BEHAVIOR 180 (Robert M. Howard & Kirk Randazzo, eds., 2017); Nicolas Yan, *The Court and the People*, HARV. POL. REV. (Feb. 7, 2017), http://harvardpolitics.com/united-states/the-court-and-the-people/; Evan Tompkins, *The Supreme Court's Countermajoritarianism? What Impact Does Public Opinion Have on the Supreme Court Decisions?* (April 2017) (unpublished B.A. senior thesis, Bemidji State University) (on file at https://www.bemidjistate.edu/academics/departments/political-science/wp-content/uploads/sites/40/2017/08/tompkins-thesis.pdf).

233. Katerina Linos & Kimberly Twist, *The Supreme Court, the Media, and Public Opinion: Comparing Experimental and Observational Methods*, 45 J. L. STUD. 1, 27 (2016).

234. Sejal Singh, *The People's Constitution: How Shifts in Public Opinion Affect the Supreme Court*, COLUM. POL. REV. (Apr. 21, 2015), http://www.cpreview.org/blog/2015/04/the-peoples-constitution-how-shifts-in-public-opinion-affect-the-supreme-court#_ftnref1.

not undermined by the public's exposure to the idea that law is indeterminate and, therefore, subject to manipulation.[235] They explain that most Americans reconcile the indeterminacy thesis with a sense of judicial legitimacy by positing that judges employ a form of principled judicial discretion.[236] To be sure, the finding that most Americans embrace a view of principled judicial discretion is distinct from, and falls short of, a demonstration that American attitudes on particular issues are in fact shaped by the Court's opinions. But it provides support for the supposition that the Court enjoys a measure of authority that might translate into influence over the way that Americans perceive patterns of discrimination.

Part of the challenge stems from the fact that much of the research seems to target what would appear to be the opposite question: to what extent are the Justices responding to public opinion as they deliberate and issue their opinions?[237] But it is actually quite revealing that in some of the work examining the relationship between the Court and the public, the discussion moves fluidly between an assessment of whether public opinion affects the Court, on the one hand, and whether the Court affects public opinion on the other.[238] What seem to be two opposite phenomena are probably best thought of as parts of a whole: a reciprocal, recursive relationship that might be described as the Court's (perhaps only unconscious) "rough alignment with the public mood."[239] As summarized by Linda Greenhouse, "despite efforts over many years by scholars both of the Court and of mass behavior," there is much that "remains obscure" about "the process by which

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235. James L. Gibson & Gregory A. Caldeira, *Has Legal Realism Damaged the Legitimacy of the U.S. Supreme Court?*, 45 L. & SOC'Y REV. 195, 213 (2011).

236. *Id.*

237. *See, e.g.*, Christopher J. Casillas, Peter K Enns & Patrick C. Wohlfarth, *How Public Opinion Constrains the U.S. Supreme Court*, 55 AM. J. POL. SCI. 74 (2011) (explaining that the literature seeking to understand the influence of public opinion on the Justices has offered two alternative and conflicting accounts: the "attitudinal change" hypothesis suggests that the Justices' voting behavior is a product of their own ideological preferences, shaped by the same "social forces that shape public opinion," while the "strategic behavior" hypothesis suggests that the Justices, lacking sword or purse to enforce their decisions, must adjust to "shifts in the public mood"); *see also* Charles H. Franklin & Liane C. Kosaki, *Republican Schoolmaster: The U.S. Supreme Court, Public Opinion, and Abortion*, 83 AM. POL. SCI. REV. 751 (1989) ("There is a long tradition of research dealing with the relationship between public opinion and the courts. Much of this research has focused on the impact of public opinion on the behavior of judges."). The tide may have turned since Franklin and Kosaki's work: a prominent recent study, authored by Lee Epstein and Andrew Martin, characterizes much of the social science literature as concerned with the extent to which the Court moves public opinion. Lee Epstein & Andrew D. Martin, *Does Public Opinion Influence the Supreme Court? Possibly Yes (but We're Not Sure Why)*, 13 U. PA. J. CONST. L. 263, 264–65 (2010). They also offer an exceptionally useful compendium of studies "addressing directly the question of whether the public influences the Court." *Id.*

238. *See, e.g.*, Greenhouse, *supra* note 20, at 71–72 (describing a study that concluded that public opinion does not have a significant direct effect on Court decision-making and explaining that "few people know much about the Court or its work . . . and most Supreme Court decisions pass under the radar of public attention").

239. *Id.* at 71.

the Court and the public engage one another in a highly attenuated dialogue."[240] She goes on to describe the interaction between the public and the Supreme Court as an "imperfect and sometimes inaudible dialogue,"[241] a framing that beautifully captures our uncertainty about the relationship between the public and the Court, our intuition that something worth attending to is, in fact, taking place, and the sense that the communication is bilateral rather than moving exclusively in one direction or the other.

This idea of a dialogue that we can't yet perfectly map but should nonetheless endeavor to understand (and critique) is deeply rooted in legal scholarship. Professor Deborah Hellman, arguing for an expressivist theory of equal protection, has observed:

> We should understand Court rulings on the meaning of governmental actions or practices as one volley, albeit an important one, in an ongoing conversation. . . . their pronouncements are but part of a discourse. It is a discourse to which we can all contribute, which is necessarily ongoing, and from which we, as individuals and as a community, hope to learn over time.[242]

Her argument is a normative one, urging courts to analyze equal protection claims by assessing the expressive content of state action, but the observation is a useful one for present purposes as well. It rests on precisely the sort of widely shared premise about the Court's enduring significance in American life that underlies so much scholarly work and justifies the attention we lavish on that singular institution. We should certainly continue to test the assumption using every instrument at our disposal, but as we contemplate "the imperfect and sometimes inaudible dialogue," there's a risk that we can overstate our uncertainty about the Court's salience in American life. It is "an institution many see as 'the final arbiter of critical political and social issues,'" a sense that is confirmed rather than undermined by the intense criticism of the Court that inevitably follows its most controversial rulings.[243]

Even the most tentative and modest claims about the interchange between the public and the Court support some sense of dialogue and jointly constructed discourse, and some remarkable recent scholarship finds evidence for a much stronger claim. Professor Anthony Michael Kreis, using the campaign for marriage equality as a case study of the role of courts in social-change movements, has found that court rulings "legitimized same-sex marriage" and sparked "a newfound awareness" of marriage equality as a matter of constitutional significance.[244] He concludes that "[j]udicial institutions are well suited for an active, but dialectical role, in mediating social change between the political branches, federal and state

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240. *Id.* at 69.

241. *Id.*

242. Deborah Hellman, *The Expressive Dimension of Equal Protection*, 85 MINN. L. REV. 1, 24 (2000).

243. Levinson, *supra* note 186, at 60.

244. Anthony Michael Kreis, *Stages of Constitutional Grief: Democratic Constitutionalism and the Marriage Revolution*, 20 U. PA. J. CONST. L. 871, 980 (2017) (rev. 2018).

government, and the general public."[245] Professor Kreis, along with other legal scholars working to develop a "new civil rights history," has helped us understand how people develop a "lay rights consciousness"[246] that intersects with court doctrine in ways that are multiple, nonlinear, and recursive, opportunistically borrowing and re-engineering. As this important body of work illuminates, lay rights consciousness is neither simplistically responsive nor hermetically sealed off from court doctrine.

From this vantage point, we can think about the dialogue in a few different ways. First, one might believe that the Court ought to act as a Republican schoolmaster[247] or "teachers to the citizenry"[248] even if we are not sure that the students are paying attention to the lesson.[249] Under this view, a sort of secular Pascal's wager,[250] we might reasonably criticize the Court for the messages it is sending about race even as we await evidence that will confirm, disprove, or (most likely) further complicate our understanding of the Court's actual effect on public opinion. If it is possible that the Court is fostering a sense that discrimination against

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245. *Id.* at 982.

246. Goluboff, *supra* note 206, at 2325; *see also* Risa Goluboff, *The New Constitutional History: Toward a Manifesto* (Mar. 3, 2013) (unpublished manuscript) (on file with the Harvard Law School Library). I acknowledge the irony of drawing upon civil rights history to elucidate the connection between contemporary white grievance and the Supreme Court.

247. Franklin & Kosaki, *supra* note 237, at 752 ("[T]he concern at the founding was not only that the Court should respond to public opinion but that it should also play an important role in educating that opinion. The conception of the Court as republican schoolmaster generally reflects the notion that the Court, through its explication of the law and its high moral standing, may give the populace an example of the way good republicans should behave . . . . This concept has a specific application in the belief that the Court can through its decisions confer legitimacy on the claims of disadvantaged groups.").

248. For a historical account of the idea of the Supreme Court as Republican schoolmaster, see Ralph Lerner, *The Supreme Court as Republican Schoolmaster*, 1967 U. CHICAGO PRESS 127.

249. Franklin & Kosaki, *supra* note 237, at 758 (concluding, in a study of public opinion in the abortion context, "that citizens do listen to the schoolmaster but they also talk in class"); *see also* Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 295 (1957) (asserting that the Court ought to provide leadership on "the basic patterns of behavior required for the operation of a democracy").

250. The 17th century French philosopher Blaise Pascal proffered an argument for believing in God even though God's existence is not provable by human reason. *See* Hájek, Alan, *Pascal's Wager*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY, https://plato.stanford.edu/archives/sum2018/entries/pascal-wager (last updated Sept. 1, 2017).The argument, reduced here to a simplified version, is that a person forming a belief in God should suppose that she is being offered a wager where the costs of erroneous disbelief are infinitely higher than the costs of erroneous belief: if she believes in God but is wrong, she suffers the finite losses associated with the pleasures she has foregone in pursuit of a religious life. *See id.* If she chooses not to believe in a God that does exist, she foregoes the infinite reward of an eternity in heaven and suffers the infinite punishment of an eternity in hell. *See id.* Contemporary philosophers have offered secular versions. *See, e.g.*, IAIN KING, HOW TO MAKE GOOD DECISIONS AND BE RIGHT ALL THE TIME (2008).

white people is as factually prevalent as discrimination against people of color, or communicating that rights are a zero-sum game in which historically powerful groups stand only to lose, we should take heed—especially because this will stifle any prospect of pursuing racial justice in the representative branches to which the Court often urges recourse.

As an alternative to the dialogic model of the relationship between the Court and the public, we might simply observe that "the People" include the Justices, as brilliantly captured by Professors Lee Epstein and Andrew Martin.[251] As Justice Cardozo observed before them (in a passage repeatedly quoted in this literature), "the great tides and currents which engulf the rest of men do not turn aside in their course and pass them by."[252] The Justices are "social beings confronted with the plethora of stimuli emanating from American culture, media, and politics."[253] This is, of course, one of the central premises of the legal realists and the critical legal scholars, who have long been asking us to recognize the human biases baked into the judiciary and therefore into the very enterprise of law.[254]

For one particularly pointed example, we might recall Justice Scalia's intensely personal insistence that his father, as a Sicilian immigrant, never benefitted from slavery, Jim Crow, or other iterations of white supremacy: "My father came to this country as a teenager," Scalia wrote.[255] "Not only had he never profited [from] the sweat of any black man's brow, I don't think he had ever seen a black man."[256] Written three years before Scalia would first be appointed to the federal bench, the passage assumes that immigrants to this country do not benefit from systems of exploitation set in motion before their arrival, and that it is therefore unsound to conceive of obligations that whites, as a group, might have to blacks, as a group. Whatever one might think about this premise, the important point for our purposes is that it requires virtually no effort to translate this personal tale into a normative claim and then a constitutional principle: race-based obligations can only be based on the most concrete and individualized culpability. Ten years later, sitting on the Supreme Court, Justice Scalia would write that in his view the only circumstance in which state actors could use race as a means to "undo the effects of past discrimination" is where "that is necessary to eliminate *their own* maintenance of a system of unlawful racial classification."[257] Offering an example, he said that if "a

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251. Epstein & Martin, *supra* note 237, at 264.

252. BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 168 (1921).

253. Roy B. Flemming & B. Dan Wood, *The Public and the Supreme Court: Individual Justice Responsiveness to American Policy Moods*, 41 AM. J. POL. SCI. 468, 471 (1997).

254. Gibson & Caldeira, *supra* note 235, at 196 ("[N]o serious analyst would today contend that the decisions of the justices of the Supreme Court are independent of the personal ideologies of the judges. In this sense, legal realism has carried the day.").

255. Jeffrey Rosen, *The Leader of the Opposition*, NEW REPUBLIC (Jan. 17, 1993), https://newrepublic.com/article/73757/the-leader-the-opposition-0 (citing Antonin Scalia, *The Disease as Cure: "In Order to Get Beyond Racism, We Must First Take Account of Race,"* 1979 WASH. U. L. Q. 147).

256. *Id.*

257. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 524 (1989).

state agency has a discriminatory pay scale compensating black employees in all positions at 20% less than their nonblack counterparts, it may assuredly promulgate an order raising the salaries of 'all black employees' to eliminate the differential."[258]

Whether we think of the people and the Court as one and the same or engaged in some sort of imperfect dialogue, the doctrinal foundations for the varieties of white grievance cataloged here are worth attention. The connections shown here have enormous implications for the rich and enduring debate about the people's role in constitutional interpretation and the development of constitutional meaning.[259] Both for those who argue that the people should have a role,[260] and for those who assert that we already do,[261] the prospect of the Court and the people recursively reinforcing a view of rights as a zero-sum game should present a grave concern. It suggests not only that the Court has a "majoritarian difficulty," in the sense that it "is insufficiently counter-majoritarian to protect minority rights when they are really threatened,"[262] but also that it is exacerbating the threat to minority interests by fostering an inaccurate sense of who suffers from discrimination and who suffers when discrimination is challenged.[263]

CONCLUSION

During Judge Robert Bork's confirmation hearings in 1987, he sat for five days and answered questions about his constitutional philosophy.[264] One of the questions was whether he agreed that "when 'a court adds to one person's constitutional rights, it subtracts from the rights of others.'"[265] Bork said yes,

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258. *Id*.

259. Just as we've benefitted immensely from seeing the connection between the Court and the public when this resonance pushes rights in a positive, expansive direction—Siegel's account of the de facto ERA being a prime example, *see* Reva B Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de facto ERA*, 94 CALIF. L. REV. 1323 (2006), and the numerous fine examples that chronicle the same-sex marriage movement, *see e.g.*, Hunter, *supra* note 203, at 1673—we'll want to pay attention as the Court and the people push each other toward a regressive, revanchist view of rights.

260. LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 242–43 (2004).

261. *See* Corinna Barrett Lain, *Soft Supremacy*, 58 WM. & MARY L. REV. 1609, 1688 (2017).

262. "In all cases, and especially in cases involving the most vulnerable civil liberties and civil rights claims, courts appear to be ill-equipped to play their most basic constitutional function." Michael C. Dorf, *The Majoritarian Difficulty and Theories of Constitutional Decision Making*, 13 U. PA. J. CONST. L. 283, 285–88 (2010) (citing others who have used the term and explored these issues).

263. There is a pervasive optimism underlying much of the literature on social movements and popular constitutionalism. As Scott Cummings notes, "the background assumption within the process literature is that such change is forthcoming—it is only a matter of time until political, economic, and social factors coalesce to produce the attitudinal shifts that prepare the court to validate the new consensus." Cummings, *supra* note 229, at 394.

264. BARRY FRIEDMAN, THE WILL OF THE PEOPLE 317–19 (2009).

265. *Id.* at 319.

describing it as "a matter of plain arithmetic."[266] Linda Greenhouse, covering the hearings for the *New York Times*, focused on this "zero-sum" view, describing it as "sharply at variance with the vision put forth by [the judge's] opponents," who "spoke of the Constitution in organic rather than arithmetical terms, as a system elastic enough so that that adding to the rights of some did not necessarily diminish the rights of others."[267] For some scholars, Bork's downfall serves as an example of the public's influence on the Supreme Court and constitutional meaning[268]—if that's true, then his commitment to a zero-sum view of rights surely had something to do with it.

Some 22 years later, this same clash of visions emerged in another confirmation battle. This time, pressing Justice Sotomayor on her decision as a Second Circuit judge in *Ricci v. DeStefano*,[269] Senator Sessions asserted vehemently that "[e]mpathy for one party is always prejudice against another."[270] Unlike Bork, Sotomayor was easily confirmed, but it is Bork's view of the matter that now seems ascendant—for white Americans, that is. Significant numbers of white Americans believe that it is they who are now the primary victims of racial discrimination and that this is in fact *caused* by the progress that has been made toward racial equality by communities of color. This Article has shown that there's support for these corrosive ideas where we should least expect to find it: in the Court's equal protection jurisprudence.

As detailed above, the Court has crafted an equal protection landscape that primarily protects white claimants protesting the remedial use of race by government actors, making "discrimination" against whites highly salient and constitutionally significant. In another series of decisions, the Court has developed an equality jurisprudence that allows a state to meet its equal-treatment obligations by equalizing down rather than up, choosing the "equality of the graveyard" rather than the "equality of the vineyard." And because of the Court's persistent refusal to interpret the Constitution as providing anything other than a "charter of negative liberties," there's no real floor to how far a state may choose to equalize down. In combination, these doctrinal principles send the message that equality is something for historically powerful groups to fear—and it seems clearer and clearer that they most certainly do.

This is alarming under any view of the relationship between the public and the Court. One can harbor a healthy skepticism about whether the Court actually functions as a "Republican schoolmaster to the citizenry" and still be concerned about the Court's contribution to a sense among the public that historically

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266. *Id.*
267. *Id.*
268. *Id.*
269. 530 F.3d 87 (2nd Cir. 2008).
270. *Opening Statement: Sen. Jeff Sessions*, NPR: SONIA SOTOMAYOR'S SUPREME COURT NOMINATION (July 13, 2009, 11:02 AM), https://www.npr.org/templates/story/story.php?storyId=106540813; *see also* Kathryn Abrams, *Empathy and Experience in the Sotomayor Hearings*, 36 OHIO N.U. L. REV. 263 (2010).

subordinated groups cannot achieve equality without threatening the prospects of the politically powerful. Resisting this zero-sum premise—first by acknowledging its proliferation, and then by doggedly continuing to articulate robust alternative visions of equality—is essential to any hopes we might foster about working toward racial justice.[271] In light of recent evidence that intolerant white Americans withdraw their support for democratic institutions when they perceive that people of color will share in the benefits those institutions provide, it appears that nothing less is at stake than the future of our democracy.[272]

271. This latter step must await further installments.

272. Noah Berlatsky, *The Trump Effect: New Study Connects White American Intolerance and Support for Authoritarianism*, NBC NEWS: THINK (May 27, 2018, 10:22 AM), https://www.nbcnews.com/think/opinion/trump-effect-new-study-connects-white-american-intolerance-support-authoritarianism-ncna877886 (discussing Steven V. Miller & Nicholas T. Davis, *White Outgroup Intolerance and Declining Support for American Democracy*, GITHUB, https://github.com/svmiller/woi/blob/master/woi.pdf (forthcoming) (last visited Mar. 20, 2019) (finding that "when intolerant white people fear democracy may benefit marginalized people, they abandon their commitment to democracy")).