

THE SUPREME COURT AND RACIAL PROGRESS*

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The Supreme Court has had a dismal record on issues of race throughout American history. The Court enforced the institution of slavery, upheld “separate but equal,” and consistently failed to deal with systemic racism and racial inequalities. The current Court is the most conservative since the mid-1930s and is unlikely to advance racial equality. Quite the contrary, it is likely to impose restrictions on what governments can do to advance racial equality. But there remains hope for positive change through other institutions, such as state constitutions, state courts, and the political process at all levels of government.

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INTRODUCTION

The Supreme Court has been a dismal failure in dealing with issues of race throughout American history.¹ I fear that the foreseeable future with six conservative justices offers little basis for believing that the Court will be a force for racial justice. Indeed, I see a likelihood in the immediate future of just the opposite. However, I am hopeful that other institutions can, and will, act. The racial reckoning in the United States that began last May after the tragic death of George Floyd saw protests for racial justice in all fifty states.² I am very hopeful that they will be the impetus for real change.

It is understandable why so many people look to the Supreme Court to advance racial justice because the political process has often failed.³ Americans want the Court to give meaning to the majestic language of the Declaration of Independence and to the constitutional guarantee of equal protection. We take heart and encouragement from when this occurred, most notably from cases like *Brown v. Board of Education*.⁴ We know to a certainty that elected Southern legislators and judges would not have ended segregation in 1954, or for a long time after, without the Court giving meaning to such guarantees.⁵

Today, legislators and elected officials are still systematically disenfranchising minority voters.⁶ Americans expect the judiciary to enforce the

1. I develop this point in ERWIN CHEMERINSKY, *THE CASE AGAINST THE SUPREME COURT* 21–53 (2014) [hereinafter CHEMERINSKY, *THE CASE AGAINST THE SUPREME COURT*]. See generally ERWIN CHEMERINSKY, *PRESUMED GUILTY: HOW THE SUPREME COURT EMPOWERED THE POLICE AND SUBVERTED CIVIL RIGHTS* (2021) [hereinafter CHEMERINSKY, *PRESUMED GUILTY*] (describing the Supreme Court's history concerning race and policing).

2. Janie Haseman, Karina Zaiets, Mitchell Thorson, Carlie Procell, George Petras & J. Sullivan, *Tracking Protests Across the USA in the Wake of George Floyd's Death*, USA TODAY (June 3, 2020, 7:47 AM), <https://www.usatoday.com/in-depth/graphics/2020/06/03/map-protests-wake-george-floyds-death/5310149002/> [https://perma.cc/7VW9-EQN7].

3. The reality is that the political process failed to eliminate slavery, created and maintained Jim Crow laws, failed to control racialized policing, and historically and now has adopted laws with the purpose and effect of disenfranchising voters of color. See Abril Castro, Connor Maxwell & Danyelle Solomon, *Systemic Inequality and American Democracy*, CTR. FOR AM. PROGRESS (Aug. 7, 2019), <https://www.americanprogress.org/article/systemic-inequality-american-democracy/> [https://perma.cc/JU93-SWVZ]; CHEMERINSKY, *PRESUMED GUILTY*, *supra* note 1, at ch. 3 (explaining the failure of the political process to regulate racist policing); see *Voting Laws Roundup*, BRENNAN CTR. FOR JUST. (Oct. 4, 2021), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-october-2021> [https://perma.cc/6NNJ-9L4J] (listing restrictive voting laws that disproportionately burden voters of color).

4. 347 U.S. 483 (1954).

5. See *The Southern Manifesto and "Massive Resistance" to Brown*, NAACP LEGAL DEF. & EDUC. FUND, <https://www.naacpldf.org/ldf-celebrates-60th-anniversary-brown-v-board-education/southern-manifesto-massive-resistance-brown/> [https://perma.cc/B8F6-CESN].

6. For example, in 2021, nineteen states adopted laws to restrict voting. See *Voting Laws Roundup*, *supra* note 3.

Constitution and move our society towards greater equality. This Article addresses three questions. Looking back and looking across time and issues, Part I asks and then analyzes how the Supreme Court has done regarding racial justice. Part II explores what we can expect to see from the Court in the foreseeable future. And perhaps most importantly, Part III explores the answer to the question of who will pursue advances in racial justice if not the Court and provides suggested institutions to fulfill this role.

I. ASSESSING THE SUPREME COURT'S RECORD ON RACIAL ISSUES

Looking back across time and issues, the Supreme Court has a terrible record concerning race and ending discrimination. This part provides a summary of such failed record. Though the Court's failure to end racial discrimination is familiar to most, it is important to view the Court's record in light of American history. Simply put, the sum is much worse than the parts.

A. *Pre-Civil War*

From 1787 until the adoption of the Thirteenth Amendment in 1865, a period of seventy-eight years, the Court did nothing to further abolition. During this time period, the Court upheld the institution of slavery by protecting slave owners. For example, in *Prigg v. Pennsylvania*,⁷ in 1842, the Court enforced the Fugitive Slave Clause and declared unconstitutional a state law that prohibited removing an escaped slave in Pennsylvania by force or violence.⁸ We celebrate Justice Joseph Story as one of the greatest jurists in Supreme Court history, but we cannot do that unless we overlook his tragically wrong decision in *Prigg v. Pennsylvania*.

In *Dred Scott v. Sandford*,⁹ in 1857, the Supreme Court held that slaves are pieces of property, not citizens, even if they are born in the United States.¹⁰ The Supreme Court declared the Missouri Compromise unconstitutional because it was an impermissible taking of property of slaves from their owners.¹¹ The Court should not be excused for these abhorrent decisions because the Court could have—and should have—done much better in bringing about the end of slavery. It certainly could have upheld laws like Pennsylvania's that protected fugitive slaves and it could have upheld the Missouri Compromise.¹² At the very

7. 41 U.S. (16 Pet.) 539 (enslaved person at issue).

8. *Id.* at 539–43.

9. 60 U.S. (19 How.) 393 (enslaved party), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

10. *Id.* at 393–94.

11. *Id.* at 395–96.

12. In reality, the Supreme Court struck down state laws designed to protect escaped slaves. For example, in *Prigg v. Pennsylvania*, the Court held that the Fugitive Slave Act of 1793 preempted Pennsylvania's personal liberty law, which criminalized the kidnapping of escaped slaves. 41 U.S. (16 Pet.) at 625–26.

least, it could have handed down decisions that undermined, rather than continually upheld, slavery.

B. “*Separate but Equal*”

From 1896 to 1954, the Supreme Court articulated and enforced apartheid—the doctrine of separate but equal—which of course was separate and always unequal. The Supreme Court enforced the Jim Crow laws that segregated every aspect of life in southern states and many border states. In 1896, *Plessy v. Ferguson*¹³ famously upheld separate but equal.¹⁴ But we should not forget the cases that followed *Plessy*. In *Cumming v. Board of Education*,¹⁵ in 1899, the Supreme Court held that the government could maintain a whites-only high school when no high school was available for Black students.¹⁶ In *Berea College v. Kentucky*,¹⁷ in 1908, the Court held that Kentucky could prohibit a private college from admitting Black students.¹⁸ In *Gong Lum v. Rice*,¹⁹ in 1927, the Court ruled that Mississippi could exclude Chinese students from white schools.²⁰

C. *The Warren Court*

For fifty-eight years, the Warren Court aggressively upheld Jim Crow laws despite being the model for advancing racial equality. The Warren Court was far superior to the courts that preceded and followed it, but on reflection, it is arguably less admirable than it seems. Even still, the importance of the Warren Court’s efforts should not be entirely deprecated. It did finally overrule *Plessy*.²¹ It also struck down the laws that created apartheid in every aspect of life, but there are some other aspects of the Warren Court that should not be overlooked.

First, *Brown* itself was written narrowly, and the Court never explained why segregation was inconsistent with equal protection. Chief Justice Warren’s opinion focused solely on how separate schools hurt the education of Black children.²² What the Court did not explain was why segregation was

13. 163 U.S. 537.

14. *Id.* at 537–38.

15. 175 U.S. 528.

16. *Id.* at 528–29.

17. 211 U.S. 45.

18. *Id.* at 45–46.

19. 275 U.S. 78.

20. *Id.* at 78.

21. *Brown v. Bd. of Educ.*, 347 U.S. 483, 494–95 (1954).

22. *Id.* at 494 (“Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to (retard) the educational and mental development of negro children and to

inconsistent with the very essence of equal protection under the Constitution. Subsequently, the Supreme Court struck down other laws opposing segregation without issuing opinions. For example, in *Mayor and City Council of Baltimore City v. Dawson*,²³ the Supreme Court, in a memorandum disposition without an opinion, affirmed a lower court decision declaring unconstitutional a law requiring segregation in the use of public beaches and bathhouses.²⁴ The Court did the same thing in *Holmes v. City of Atlanta*²⁵ by declaring segregation of municipal golf courses unconstitutional;²⁶ in *Gayle v. Browder*²⁷ by declaring the segregation of a municipal bus system unconstitutional;²⁸ in *Johnson v. Virginia*²⁹ by declaring segregation of courtroom seating unconstitutional;³⁰ and in *Turner v. City of Memphis*³¹ by declaring segregation of public restaurants unconstitutional.³²

But the Supreme Court never wrote an opinion explaining that equal protection is inherently meant to repudiate the idea of subordination of race. Laws requiring segregation are based on that subordination. They were explicitly based on the superiority of one race and the inferiority of another. There never was an illusion that separate was equal. The Court could have and should have said this explicitly.

Second, even in education, *Brown* did little to bring about equality or end segregation in reality. When *Brown* was decided on May 17, 1954, it did not indicate the remedies to be imposed to end segregated schools. The Court had the case reargued the next year on the question of remedies. And then in *Brown II*,³³ the Court did not impose timetables for achieving desegregation or outline the steps to be taken.³⁴ Instead, the Supreme Court told the lower courts to bring about desegregation with “all deliberate speed.”³⁵ As I always tell my students, the phrase “all deliberate speed,”³⁶ is an oxymoron. Many years later, Justice John Paul Stevens said that he believed that the Court made a mistake in choosing unanimity over imposing a remedy for segregation.³⁷ The result was

deprive them of some of the benefits they would receive in a racial(ly) integrated school system.” (quoting Findings of Fact ¶ 8, *Brown v. Bd. of Educ.*, 98 F. Supp. 797 (D. Kan. 1951) (No. T-316)).

23. 350 U.S. 877 (1955) (mem.) (per curiam).

24. *Id.*

25. 350 U.S. 879 (1955) (mem.) (per curiam).

26. *Id.* at 879.

27. 352 U.S. 903 (1956) (mem.) (per curiam).

28. *Id.* at 903.

29. 373 U.S. 61 (1963) (per curiam).

30. *Id.* at 61–62.

31. 369 U.S. 350 (1962) (per curiam).

32. *Id.* at 351–54.

33. 349 U.S. 294 (1955).

34. *See id.* at 301.

35. *Id.*

36. *Id.*

37. JOHN PAUL STEVENS, FIVE CHIEFS: A SUPREME COURT MEMOIR 100–01 (2011).

that in the South in 1964—a decade after *Brown*—just 1.2% of Black school children were attending school with white school children.³⁸ In South Carolina, Alabama, and Mississippi, not one Black child attended a public school with a white child during the 1962–1963 school year.³⁹ In North Carolina, only one-fifth of one percent—or 0.026%—of Black students attended desegregated schools in 1961, and the figure did not rise above one percent until 1965.⁴⁰ Similarly, in Virginia in 1964, only 1.63% of Blacks were attending desegregated schools.⁴¹

Third, it is often forgotten that it was the Warren Court that was responsible for greatly expanding racialized policing in *Terry v. Ohio*⁴² in 1968.⁴³ In *Terry*, the Supreme Court held that the police could stop and search individuals without probable cause.⁴⁴ The Supreme Court said that only “reasonable suspicion” was required.⁴⁵ To this day, the Supreme Court has never defined what is enough for reasonable suspicion. As recently as 2020, the Supreme Court has said only that it is more than a hunch, but less than probable cause.⁴⁶ But study after study has shown how the relaxed and ambiguous standard of reasonable suspicion has fostered racialized policing.⁴⁷ *Terry* has made it too easy for police to stop individuals solely for being Black or Brown. Statistics in every major jurisdiction—whether it’s where I live in California or North Carolina, where this Article is being published—show that Black and Brown people are disproportionately stopped and frisked by the police.⁴⁸ This was entirely foreseeable in 1968. At the time, the NAACP Legal Defense Fund wrote a stunning brief to the Supreme Court explaining how adopting a standard like reasonable suspicion would reinforce and expand racialized policing.⁴⁹ It stated: “The evidence is weighty and uncontradicted that stop and frisk power is employed by the police most frequently against the inhabitants of our inner cities, racial minorities and the underprivileged.”⁵⁰

38. Michael J. Klarman, *Brown, Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7, 9 (1994).

39. *Id.*

40. *Id.*

41. *Id.*

42. 392 U.S. 1.

43. See CHEMERINSKY, PRESUMED GUILTY, *supra* note 1, at 93 (detailing how the Warren Court expanded police power).

44. *Terry*, 392 U.S. at 2–3.

45. *Id.* at 37 (Douglas, J., dissenting).

46. *Kansas v. Glover*, 140 S. Ct. 1183, 1187 (2020).

47. See CHEMERINSKY, PRESUMED GUILTY, *supra* note 1, at 62–63 (describing studies showing racial disparities in police stops).

48. *Id.*

49. Brief for the N.A.A.C.P. Legal Def. & Educ. Fund, Inc. as Amicus Curiae at 3, *Sibron v. New York*, 932 U.S. 40 (1968) (Nos. 63, 74, 67).

50. *Id.*

Terry v. Ohio was an eight-to-one decision.⁵¹ Only Justice William O. Douglas dissented.⁵² It came down from the most liberal Supreme Court we have ever had in American history. The majority opinion was written by Chief Justice Earl Warren,⁵³ the author of *Brown v. Board of Education*.⁵⁴ The majority included, among others, liberal giants William Brennan and Thurgood Marshall.⁵⁵ It is interesting to speculate why the Warren Court handed down a decision like this. In part, the Supreme Court may have been reacting to the intense criticism of its other decisions protecting criminal defendants in the 1960s, such as *Mapp v. Ohio*⁵⁶ and *Miranda v. Arizona*.⁵⁷ The Court likely did not want to be seen as further limiting the police in investigating and preventing crime.

It also must be remembered that *Terry* was decided in 1968 during a time when there were many riots in major cities⁵⁸: Los Angeles, Detroit, Newark, Chicago, and many others.⁵⁹ It was a time when there was great concern over crime control. As we applaud the Warren Court for all that it did, we must not forget *Terry* and its tragic effects as to how policing is done in the United States.

The Warren Court did more to advance racial justice than any other Court in history and more than all of the Courts that preceded it combined. But it is also striking that the political reaction against the Warren Court led to its decision in *Terry* that furthered racialized policing in the United States.

D. *The Burger Court*

The Burger Court that followed the Warren Court had a devastating effect on many key aspects of racial equality. In the area of public schools, the combination of *San Antonio Independent School District v. Rodriguez*,⁶⁰ in 1973, and *Milliken v. Bradley*,⁶¹ in 1974, effectively institutionalized separate and unequal schools in virtually every metropolitan area in the United States.

51. 392 U.S. 1, 1 (1968).

52. *Id.* at 35.

53. *Id.* at 4.

54. 347 U.S. 483, 486 (1954).

55. *Terry*, 392 U.S. at 4.

56. 367 U.S. 643 (1961) (applying the exclusionary rule to the states).

57. 384 U.S. 436 (1966).

58. See *Tears of America: The Riots of 1968*, U.S. NAT'L ARCHIVES (July 25, 2018), <https://artsandculture.google.com/exhibit/tears-of-america-the-riots-of-1968-u-s-national-archives/AQKiS4WGYdtMjg?hl=en> [<https://perma.cc/5A3P-VRRM>].

59. See generally NAT'L ADVISORY COMM'N ON CIV. DISORDERS, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS (1968) (discussing the riots that occurred during the 1960s, and concluded that “[o]ur nation is moving toward two societies, one black, one white—separate and unequal”). See also Dylan Matthews, *How Today's Protests Compare to 1968, Explained by a Historian*, VOX (June 2, 2020, 1:30 PM), <https://vox.com/identities/2020/6/2/21277253/george-floyd-protest-1960s-civil-rights> [<https://perma.cc/ND4E-QD9A>].

60. 411 U.S. 1.

61. 418 U.S. 717.

Rodriguez was a challenge to the Texas system of funding public schools, which was largely done through local property taxes.⁶² The result was that poor areas had to tax at a high rate of assessed valuation but still had relatively little to spend on schools.⁶³ Wealthy areas with large property tax bases could tax at a low rate of assessed valuation and had far more to spend on schools.⁶⁴ Even in a single metropolitan area like San Antonio where there were many different school districts, there was a huge disparity in funding for education.⁶⁵ I grew up in Chicago. I went to Chicago Public Schools and the difference in the funding then and now between, say, the Chicago Public Schools and the suburban New Trier and the Glenbrook Public Schools is dramatic.⁶⁶ But the Supreme Court in a five-to-four decision upheld the Texas system for funding schools.⁶⁷

Justice Lewis Powell who had been appointed by President Richard Nixon, wrote the majority opinion, which was joined by Warren Burger, Harry Blackmun, and William Rehnquist—all of whom had been appointed by Nixon—and also by Potter Stewart, who had been appointed by President Dwight Eisenhower.⁶⁸ Justice Powell's majority opinion said that education is not a fundamental right under the Constitution.⁶⁹ He said that education is not explicitly mentioned and it is not implicitly protected.⁷⁰ The Court also said that poverty is not a suspect classification so that discrimination against the poor gets only rational basis review.⁷¹ This, I think, is one of the most tragically wrong Supreme Court decisions in all of American history. If ever the United States will be a more equal society, it must be through education. The Court's decision that education is not a fundamental right and that poverty is not a suspect classification dramatically limited the powers of the courts to be a force for equality in society.

A year later, the Court decided *Milliken v. Bradley*.⁷² The case arose in the Detroit area and it was an attempt by the federal court to desegregate its public schools.⁷³ Detroit, like cities throughout the country, was a city that was predominantly minority students surrounded by suburbs that were

62. *Rodriguez*, 411 U.S. at 4–6.

63. *Id.* at 6–16.

64. *Id.*

65. *Id.* at 11–14.

66. See generally JONATHAN KOZOL, SAVAGE INEQUALITIES (1991) (describing the differences in funding of schools).

67. *Rodriguez*, 411 U.S. at 2–3.

68. *Id.* at 4; see also *Supreme Court Nominations (1789–Present)*, U.S. SENATE, <https://www.senate.gov/legislative/nominations/SupremeCourtNominations1789present.html> [<https://perma.cc/P4QN-7DBQ>].

69. *Rodriguez*, 411 U.S. at 35.

70. *Id.*

71. *Id.* at 25.

72. 418 U.S. 717 (1974).

73. *Id.* at 717.

predominantly white students.⁷⁴ The federal judge formulated a desegregation plan that would involve taking some of the students from the white suburbs and bringing them into the city and taking some from the city and moving them to the suburbs.⁷⁵ The Supreme Court, again in a five-to-four decision and with the four Nixon appointees in the majority, held that there generally cannot be such interdistrict remedies for segregation.⁷⁶ In other words, desegregation orders generally cannot cross school district lines. But with most cities having public schools that are eighty to ninety percent students of color, there were not enough white students to achieve desegregation.

These two cases resulted in city schools serving predominately students of color having far less to spend on education compared to predominately white, suburban schools. These two cases institutionalized and exacerbated the separate and unequal schools that continue to exist to this day.

The second set of tragic decisions from the Burger Court regarding race concerned the requirement for proof of discriminatory intent. In *Washington v. Davis*,⁷⁷ in 1976, the Supreme Court held that equal protection violations require proof that the government acted with the intent to discriminate.⁷⁸ The case involved a Washington D.C. requirement that in order to be a police officer, an individual had to pass a test.⁷⁹ Statistics showed that Black Americans failed the test significantly more often than whites and a constitutional challenge was brought.⁸⁰ But the Supreme Court, in an opinion by Justice Byron White, held that equal protection is meant to deal with purposeful discrimination.⁸¹ Discriminatory impact is not enough to prove race discrimination.⁸² In fact, discriminatory impact isn't enough to trigger more than rational basis review; it is not enough to shift the burden of proof to the government to demonstrate that there is a nonracial justification for its actions.⁸³

The Court has continually reaffirmed the need for proof of discriminatory intent to demonstrate a racial classification. For example, in *McCleskey v. Kemp*,⁸⁴ the Supreme Court said that proof of a racially disparate impact in imposing the death penalty was not enough to prove an equal protection violation.⁸⁵ The Court found that unless it could be shown in Georgia, where

74. See *id.* at 739 (discussing how Detroit is “overwhelmingly black” and surrounded by suburbs which are “overwhelmingly white”).

75. *Id.* at 717–18.

76. *Id.* at 720, 752.

77. 426 U.S. 229.

78. *Id.* at 239–45.

79. *Id.* at 234.

80. *Id.* at 235.

81. *Id.* at 231, 240–41.

82. *Id.* at 240–41.

83. *Id.* at 242.

84. 481 U.S. 279 (1987).

85. *Id.* at 291–99.

the case arose, that the legislature adopted the death penalty for a discriminatory purpose, or that the particular jury had a discriminatory intent, there was no basis for finding a constitutional violation.⁸⁶ In *Mobile v. Bolden*,⁸⁷ the Supreme Court said that proof of a discriminatory impact with regard to an election scheme is not enough to establish a violation of the Fourteenth or Fifteenth Amendments.⁸⁸ The importance of these decisions in limiting the reach of equal protection cannot be overstated.

The Burger Court also made it very difficult to prove discriminatory intent. In *Personnel Administrator of Massachusetts v. Feeney*,⁸⁹ the Supreme Court held that it is not enough to show that the government acted with knowledge that there would be a discriminatory impact.⁹⁰ It must be proven that the government took the action with the desire to bring about the discriminatory result.⁹¹ In *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,⁹² the Court identified very limited ways in which there could be evidence to prove discriminatory intent.⁹³ These decisions greatly narrowed the reach of equal protection and the ability of courts at any level of government to remedy the racial discrimination that exists.

When we think of the Burger Court and race, we often focus on affirmative action which at that time appeared to offer a triumph for racial justice. In 1978, in *Regents of the University of California v. Bakke*,⁹⁴ the Supreme Court, in a splintered five-to-four decision, upheld the ability of colleges and universities to engage in affirmative action.⁹⁵ Subsequent cases like *Grutter v. Bollinger*⁹⁶ and *Fisher v. University of Texas at Austin (Fisher II)*⁹⁷ have reaffirmed that diversity in higher education is a compelling government interest and that colleges and universities may use race as one factor among many in admissions decisions.⁹⁸

However, *Bakke* was less of a victory than it may seem. *Bakke* held that affirmative action is permissible *only* for the sake of enhancing diversity. The

86. *Id.* at 292–99.

87. 446 U.S. 55 (1980).

88. *Id.* at 70.

89. 442 U.S. 256 (1979).

90. *Id.* at 278–80.

91. *Id.* at 279 (“‘Discriminatory purpose,’ however, implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group.” (citation omitted)).

92. 429 U.S. 252 (1977).

93. *Id.* at 266–68.

94. 438 U.S. 265.

95. *Id.* at 267–72.

96. 539 U.S. 306 (2003).

97. 136 S. Ct. 2198 (2016).

98. *Id.* at 2210; *Grutter*, 539 U.S. at 325.

Court rejected then and has ever since rejected what affirmative action is really about: remedying the long history of discrimination and ensuring equal opportunity and an equal playing field.⁹⁹ When the Court says that affirmative action is allowed only for the sake of diversity, is it not really saying that affirmative action is allowed because it benefits white students who are able to learn in a diverse classroom?¹⁰⁰ Doesn't the Court then set up the criticism that later came from Justice Clarence Thomas that it is really an aesthetic, that it makes us feel better to look out at a classroom with a diversity of faces that are there?¹⁰¹ I do not mean to lessen the importance of diversity in the classroom. I have been a law professor for forty-one years. I have taught courses like constitutional law and criminal procedure in classrooms that are almost all white and in classrooms with a significant number of students of color. The education for all students is better when there is diversity. But I think that the Court made a serious mistake in rejecting what affirmative action is really about—righting the wrongs of a long history of deeply embedded racism—and focusing just on diversity.

E. *The Rehnquist and Roberts Courts*

The Rehnquist and the Roberts Courts have continued down the path begun by the Burger Court. In many ways, the Rehnquist and Roberts Courts have set back the quest for racial justice. I will mention just a few quickly. First, the Rehnquist and the Robert Courts have limited the ability of the government to deal with school segregation. For example, in *Board of Education v. Dowell*,¹⁰² in 1991, the Supreme Court said that effective desegregation orders must end once they succeed.¹⁰³ In other words, an effective desegregation order in the public schools has to cease as soon as it's achieved, even though ending the court order will mean the resegregation of public schools. In 2007, the Supreme Court in *Parents Involved in Community Schools v. Seattle School District No. 1*¹⁰⁴ said that

99. See, e.g., *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 267–68 (1986) (rejecting remedying historical discrimination as a sufficient justification for affirmative action).

100. See Osamudia R. James, *White Like Me: The Negative Impact of the Diversity Rationale on White Identity Formation*, 89 N.Y.U. L. REV. 425, 426 (2014) (“[T]he diversity rationale does not promote progressive thinking about race and identity. Rather, it perpetuates an old story—a story about using black and brown bodies for white purposes on white terms, a story about the expendability of those bodies once they are no longer needed.”); see also Leah Shafer, *The Case for Affirmative Action*, HARV. GRADUATE SCH. EDUC. (July 11, 2018), <https://www.gse.harvard.edu/news/uk/18/07/case-affirmative-action> [https://perma.cc/4RAM-PKZW] (positing that by rarely mentioning issues of inequality out of a fear of incurring legal liability, colleges are engaging in a “diversity bargain,” in which “white students see the purpose of affirmative action as to benefit *them*, through a diverse learning environment”).

101. See, e.g., *Grutter*, 539 U.S. at 355 (Thomas, J., concurring in part and dissenting in part).

102. 498 U.S. 237.

103. *Id.* at 238.

104. 551 U.S. 701.

public school boards for K-12 cannot use race as a factor in assigning students to schools unless they meet strict scrutiny.¹⁰⁵ Chief Justice Roberts wrote the opinion for the Court and concluded his opinion by saying “[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”¹⁰⁶ He emphasized his view that the Constitution requires the government to be colorblind. The effect of these and other cases from the Rehnquist and Roberts Courts means that our public-school systems are ever more segregated.¹⁰⁷

1. Racialized Policing

A second effect of the Rehnquist and Roberts Courts is that they further empowered racialized policing.¹⁰⁸ For one example, consider *Whren v. United States*¹⁰⁹ in 1996.

On the night of June 10, 1993, plainclothes vice-squad officers of the District of Columbia Metropolitan Police Department were patrolling what the Court called a “high drug area” of the city in an unmarked car.¹¹⁰ The Court said that the officers’ suspicions were aroused when they passed a dark Pathfinder truck with temporary license plates and youthful occupants waiting at a stop sign.¹¹¹ The driver was looking down into the lap of the passenger at his right.¹¹² What made the police officers suspicious? The Court said that the “truck remained stopped at the intersection for what seemed an unusually long time—more than 20 seconds.”¹¹³

The unmarked police car made a U-turn to follow the truck, only for the truck to turn right without signaling.¹¹⁴ The police pulled up to the car and the officers directed the car to stop.¹¹⁵ The officers then looked into the car and saw two plastic bags of what appeared to be crack cocaine.¹¹⁶ The defendants were charged with drug possession and moved to have the evidence excluded.¹¹⁷ The defendants argued that the officer’s grounds for stopping the vehicle—“to give

105. *Id.* at 702.

106. *Id.* at 748.

107. See Erwin Chemerinsky, *The Segregation & Resegregation of American Public Education: The Courts’ Role*, 81 N.C. L. REV. 1597, 1620–21 (2003).

108. See CHEMERINSKY, PRESUMED GUILTY, *supra* note 1, at 210 (“[T]he Supreme Court has contributed enormously to the problem of policing, and race-based policing in the United States.”).

109. 517 U.S. 806.

110. *Id.* at 808.

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.* at 808–09.

117. *Id.* at 809.

the driver a warning concerning traffic violations”—was pretextual.¹¹⁸ Undercover officers in D.C. were not allowed to enforce traffic laws.¹¹⁹ The defendants argued that the stop was entirely to enforce drug laws, but there was no reasonable suspicion, let alone probable cause, to justify a stop for that crime.¹²⁰ Stopping the car because of a minor traffic violation obviously was just an excuse by the police to look for drugs.

The Court recognized that “[t]emporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a ‘seizure’ of ‘persons’” under the Fourth Amendment.¹²¹ Therefore, the Court said it was clearly established that the Constitution requires an automobile stop to be reasonable under the circumstances.¹²² What is required for this? The Court said that “the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred.”¹²³ The Court said that there was probable cause for the stop in this case: the police observed the car break a traffic law by turning without a signal.¹²⁴

The traffic stop in this case clearly was a pretext; the officers had no authority to enforce traffic laws and no interest in doing so. The Court said that did not matter.¹²⁵ The actual motivation of the officers is irrelevant.¹²⁶ So long as the officer had probable cause, or even reasonable suspicion, that a traffic law had been violated, the officer could stop the vehicle.¹²⁷

Practically speaking, this decision empowers the police to stop anyone at any time. If police officers follow anyone long enough, they will observe a driver changing lanes or making a turn without a signal, or the car exceeding the speed limit by a mile or two an hour, or—and this is the easiest for the police officer—the car not stopping long enough, or too long, at a stop sign. With the Court’s holding in *Whren*, it is now completely irrelevant for Fourth Amendment purposes that the officer’s actual motivation for the stop had nothing to do with traffic enforcement.

Once the car is pulled over, the police can order the driver and the passenger out of the car.¹²⁸ The police can then search the passenger

118. *Id.*

119. *Id.* at 815.

120. *Id.* at 809.

121. *Id.* at 809–10.

122. *Id.* at 810.

123. *Id.*

124. *Id.*

125. *Id.* at 813.

126. *Id.*

127. *Id.* at 806.

128. *Pennsylvania v. Mimms*, 434 U.S. 106, 106 (1977) (per curiam) (holding that police can order driver out of the car when there has been a traffic stop); *Maryland v. Wilson*, 519 U.S. 408, 408 (1997) (holding that police can order passengers out of the car).

compartment of the car, including all containers within it.¹²⁹ The Court explained that this is to protect the officers and to be sure that there is not a weapon that the individual might reach.¹³⁰ The result is that the police can stop and search virtually anyone, almost any time they want. And this power is inevitably used in a racially discriminatory manner.

2. Racial Discrimination in Voting

A final example concerning civil rights in the Rehnquist and the Roberts Courts is how they struck down crucial civil rights laws. In 2013, *Shelby County v. Holder*¹³¹ was the first time that the Court struck down a civil rights law since the nineteenth century.¹³²

Section 2 of the Voting Rights Act prohibits voting practices or procedures that discriminate on the basis of race or against certain language minority groups.¹³³ Under the 1982 amendments to Section 2, the Act is violated when state or local laws have the effect of disadvantaging minority voters.¹³⁴ Lawsuits can be brought to challenge state or local actions that are alleged to violate Section 2.¹³⁵

But Congress, in adopting the Voting Rights Act, concluded that allowing lawsuits to challenge election procedures was not adequate to stop discrimination in voting.¹³⁶ Such litigation is expensive and time consuming.¹³⁷ Congress was also aware that Southern states often invented new ways of disenfranchising minority voters. The arcade game “whack-a-mole” is an apt analogy to what went on in many states. A law would be adopted to limit voting by racial minorities; it would be challenged and struck down, only to be replaced

129. *New York v. Belton*, 453 U.S. 454, 454 (1981). Subsequently, the Court said that this ability to search the car does not apply to situations where the car was already pulled over before the officer approached it and where the driver and passenger were not near the vehicle. *See Arizona v. Gant*, 556 U.S. 332, 343 (2009).

130. *Belton*, 453 U.S. at 457.

131. 570 U.S. 529.

132. *Id.* at 530.

133. Voting Rights Act of 1965, Pub. L. No. 89-110, § 2, 79 Stat. 437, 437 (codified as amended at 52 U.S.C. § 10301).

134. Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 2(b), 96 Stat. 131, 131 (codified as amended at 52 U.S.C. § 10303).

135. The Court recently made it much more difficult to prove a violation of Section 2. *See Brnovich v. Ariz. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2325 (2021) (holding that two challenged Arizona election laws were not enacted with racially discriminatory purposes); § 3, 96 Stat. at 134 (codified as amended at 52 U.S.C. § 10301).

136. *Shelby County*, 570 U.S. at 561 (Ginsburg, J., dissenting).

137. *Id.*

by a new voting restriction.¹³⁸ Section 5 of the Voting Rights Act was adopted to prevent such actions.¹³⁹

Section 5 applies to jurisdictions with a history of race discrimination in voting and requires that there be preapproval—termed “preclearance”—of any attempt to change “any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting” in any “covered jurisdiction.”¹⁴⁰ The preapproval must come either from the Attorney General of the United States, through an administrative procedure in the Department of Justice, or from a three-judge federal court in the District of Columbia through a request for a declaratory judgment.¹⁴¹

In *South Carolina v. Katzenbach*,¹⁴² the Supreme Court upheld the constitutionality of Section 5 of the Voting Rights Act and spoke of the “blight of racial discrimination in voting.”¹⁴³ The Court found that Section 5 was a constitutional exercise of Congress’s power to enforce the Fifteenth Amendment’s prohibition of race discrimination in voting.¹⁴⁴ Section 4(b) of the Act determines which jurisdictions are required to get preclearance.¹⁴⁵

Congress has repeatedly extended Section 5, including for five years in 1970, seven years in 1975, and twenty-five years in 1982.¹⁴⁶ In 1982, Congress revised the formula in Section 4(b), determining which jurisdictions were required to obtain preclearance before changing their election systems.¹⁴⁷ After each reauthorization, the Court again upheld the constitutionality of Sections 4(b) and 5.¹⁴⁸

These provisions were scheduled to expire again in 2007.¹⁴⁹ In 2005–2006, the House and Senate Judiciary Committees held twenty-one hearings, listened

138. See *Voter Suppression: Election Strategy*, BRITANNICA, <https://www.britannica.com/topic/voter-suppression> [<https://perma.cc/5D3B-HY2E>].

139. *Shelby County*, 570 U.S. at 562 (Ginsburg, J., dissenting).

140. Voting Rights Act of 1965, Pub. L. No. 89-110, § 5, 79 Stat. 437, 439 (codified as amended at 52 U.S.C. § 10304).

141. *Shelby County*, 570 U.S. at 562 (Ginsburg, J., dissenting).

142. 383 U.S. 301 (1966).

143. *Id.* at 308.

144. *Id.*

145. *Shelby County*, 570 U.S. at 576.

146. *History of Federal Voting Rights Laws*, U.S. DEP’T JUST. (July 28, 2017), <https://www.justice.gov/crt/history-federal-voting-rights-laws> [<https://perma.cc/PF6U-GL4K>].

147. *Id.*

148. See *Georgia v. United States*, 411 U.S. 526, 526–27 (1973); *City of Rome v. United States*, 446 U.S. 156, 158 (1980), *superseded by statute*, Voting Rights Act Amendments of 1982, § 2(b), 96 Stat. 131, 131 (codified as amended at 24 U.S.C. § 10303)); *Lopez v. Monterey County*, 525 U.S. 266, 267 (1999).

149. See *History of Federal Voting Rights Laws*, *supra* note 146.

to ninety witnesses, and compiled a record of over 15,000 pages.¹⁵⁰ Representative Sensenbrenner, a Republican from Wisconsin and then-Chair of the House Judiciary Committee, described this record as “one of the most extensive considerations of any piece of legislation that the United States Congress has dealt with in the 27 1/2 years that I have been honored to serve as a Member of this body.”¹⁵¹

Congress then voted overwhelmingly—98–0 in the Senate and 390–33 in the House—to extend Section 5 for twenty-five years.¹⁵² However, the bill that passed did not change Section 4(b) or Section 5. Congress expressly concluded that voting discrimination persists in the covered jurisdictions, and that without Section 5, “minority citizens will be deprived of the opportunity to exercise their right to vote, or will have their votes diluted, undermining the significant gains made by minorities in the last 40 years.”¹⁵³

Despite this, in *Shelby County*, the Supreme Court in a five-to-four decision, declared Section 4(b) of the Voting Rights Act unconstitutional.¹⁵⁴ As explained above, this is the provision which determines which jurisdictions need to get preclearance. Without Section 4(b), Section 5 is meaningless; no jurisdictions need to get preclearance.

Shelby County, Alabama, which is south of Selma, is a jurisdiction located in a state with a long history of race discrimination in voting. Because of this history, it is a jurisdiction covered by Section 5 and it challenged the constitutionality of these provisions of the Voting Rights Act. It lost in both the district court and the federal court of appeals. The U.S. Court of Appeals for the District of Columbia Circuit, in a two-to-one decision, concluded that Congress found “widespread and persistent racial discrimination in voting in covered jurisdictions” and that Section 5’s “disparate geographic coverage is sufficiently related to the problem it targets.”¹⁵⁵

But the Supreme Court in a five-to-four decision, held Section 4(b) unconstitutional and thereby effectively nullified Section 5 because it applied only to jurisdictions covered under Section 4(b).¹⁵⁶ Chief Justice Roberts wrote for the Court and stressed that the formula in Section 4(b), last modified in

150. Laleh Ispahani, *Three Myths About the Voting Rights Act*, OPEN SOC’Y FOUNDS. (Mar. 1, 2013), <https://www.opensocietyfoundations.org/voices/three-myths-about-voting-rights-act> [https://perma.cc/Y2L6-7R5A].

151. 152 CONG. REC. H5143 (daily ed. July 13, 2006) (statement of Rep. Sensenbrenner).

152. Carl Hulse, *By a Vote of 98-0, Senate Approves 25-Year Extension of Voting Rights Act*, N.Y. TIMES (July 21, 2006), <https://www.nytimes.com/2006/07/21/washington/21vote.html> [https://perma.cc/JC5P-K8HV (dark archive)].

153. 154 CONG. REC. H5178 (daily ed. July 13, 2006).

154. *Shelby County v. Holder*, 570 U.S. 529, 530 (2013).

155. *Shelby County v. Holder*, 679 F.3d 848, 864, 873 (D.C. Cir. 2012), *rev’d*, 570 U.S. 529 (2013).

156. *Shelby County*, 570 U.S. at 530.

1982, rests on data from the 1960s and 1970s and that race discrimination in voting has changed since then.¹⁵⁷ The Court declared:

Nearly 50 years later, things have changed dramatically. Shelby County contends that the preclearance requirement, even without regard to its disparate coverage, is now unconstitutional. Its arguments have a good deal of force. In the covered jurisdictions, “[v]oter turnout and registration rates now approach parity. Blatantly discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented levels.” The tests and devices that blocked access to the ballot have been forbidden nationwide for over 40 years.¹⁵⁸

Thus, “[c]overage today is based on decades-old data and eradicated practices.”¹⁵⁹

The Court stressed the intrusion on the covered states as they could not exercise the power to choose how to hold elections, but instead “[s]tates must beseech the Federal Government for permission to implement laws that they would otherwise have the right to enact and execute on their own, subject of course to any injunction in a § 2 action.”¹⁶⁰ The Court also emphasized that Sections 4(b) and 5, by requiring only some states to get preclearance, violated the principle of equal state sovereignty.¹⁶¹ The Court stated: “Not only do States retain sovereignty under the Constitution, there is also a ‘fundamental principle of *equal* sovereignty’ among the States. . . . [D]espite the tradition of equal sovereignty, the Act applies to only nine States (and several additional counties).”¹⁶²

Justice Ginsburg wrote a dissent joined by Justices Breyer, Sotomayor, and Kagan.¹⁶³ The dissent stressed that race discrimination in voting remains and was documented by Congress.¹⁶⁴ The dissent argued that the Court should be deferential to this judgment and the exercise of power by Congress.¹⁶⁵

There is no doubt that the invalidation of preclearance has had an effect on voting rights. States put into effect laws that had been denied preclearance and have continued to adopt laws restricting voting that will have a racially disparate effect. In the most recent case, *Brnovich v. Democratic National Committee*,¹⁶⁶ Justice Kagan noted,

157. *Id.* at 531.

158. *Id.* at 547 (citation omitted).

159. *Id.* at 551.

160. *Id.* at 544.

161. *Id.* at 544–45.

162. *Id.* at 544.

163. *Id.* at 559.

164. *Id.* at 576–80 (Ginsburg, J., dissenting).

165. *Id.*

166. 141 S. Ct. 2321 (2021).

Although causation is hard to establish definitively, those post *Shelby County* changes appear to have reduced minority participation in the next election cycle. The most comprehensive study available found that in areas freed from Section 5 review, white turnout remained the same, but “minority participation dropped by 2.1 percentage points”—a stark reversal in direction from prior elections. The results, said the scholar who crunched the numbers, “provide early evidence that the *Shelby* ruling may jeopardize decades of voting rights progress.”¹⁶⁷

All of this explains why the Supreme Court has a poor record on issues of race throughout its history. The crucial question is whether it is likely to be any better in the foreseeable future. Unfortunately, with the makeup of the current Court it appears the poor record on racial issues will only continue in the future.

II. WHAT NOW FROM THE SUPREME COURT?

Having painted a bleak picture of the past, I fear it is going to get worse with the six conservative justices on the current Court. This part hypothesizes what we might expect in the foreseeable future from the Supreme Court regarding issues of race.

A. *Narrow Interpretation of Civil Rights Laws*

First, I foresee a narrow interpretation of civil rights laws. For example, consider the Supreme Court’s decision a year ago in *Comcast v. National Ass’n of African American-Owned Media*.¹⁶⁸ At the outset, I should disclose that I was the losing attorney in the Supreme Court, having argued for the National Association of African American Owned Media.

Byron Allen is a businessman, performer, and owner of many cable channels, including the Weather Channel. The *Comcast* litigation involved seven channels that he owns. They are carried on most cable and satellite services, such as Verizon FIOS, AT&T U-verse and DirecTV. Comcast and Charter Communications, though, do not carry these channels.

Allen alleged that his company, Entertainment Studios, went to both Comcast and Charter Communications and was told the steps necessary for carriage. He claimed that he spent hundreds of thousands of dollars to meet these requirements, only to be told that the cable companies had no bandwidth for his channels. Allen alleged that each of the companies nonetheless added dozens of channels owned by white individuals. Allen’s complaint alleged that a Comcast executive candidly told Entertainment Studios why it refused to contract: “We’re not trying to create any more Bob Johnsons.” Bob Johnson is

167. *Id.* at 2355 n.2 (Kagan, J., dissenting) (citations omitted).

168. 140 S. Ct. 1009 (2020).

the African American founder of Black Entertainment Television (“BET”), a groundbreaking network that was eventually sold to Viacom for \$3 billion.

Allen sued Comcast and Charter Communications pursuant to 42 U.S.C. § 1981, which prohibits race discrimination in contracting. Adopted as part of the Civil Rights Act of 1866, § 1981 provides that “[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens.”¹⁶⁹

Although the Ninth Circuit ruled in favor of Allen, the Supreme Court unanimously reversed and remanded the case back to the Ninth Circuit.¹⁷⁰ Justice Neil Gorsuch wrote for the Court. The Court held that a plaintiff must allege and prove but-for causation in order to prevail in a suit under § 1981, declaring: “It is ‘textbook tort law’ that a plaintiff seeking redress for a defendant’s legal wrong typically must prove but-for causation. . . . Under this standard, a plaintiff must demonstrate that, but for the defendant’s unlawful conduct, its alleged injury would not have occurred.”¹⁷¹ The Court said that nothing in the statutory language or history of § 1981 provides a basis for concluding that other than but-for causation is required.

The Court was explicit that this causation requirement must be met at the pleading stage, as well as ultimately at summary judgment or trial: “Here, a plaintiff bears the burden of showing that race was a but-for cause of its injury. And, while the materials the plaintiff can rely on to show causation may change as a lawsuit progresses from filing to judgment, the burden itself remains constant.”¹⁷²

Most importantly, the Court’s decision means for § 1981—and for that matter all federal civil rights laws that do not have specific language to the contrary—that but-for causation must be alleged and proved. Previously, the Supreme Court required but-for causation only for statutes that use words such as “because,” “because of,” or “based on.” For example, in *Gross v. FBL Financial Services, Inc.*,¹⁷³ the Court said that but-for causation was required for disparate treatment claims under the Age Discrimination in Employment Act because the statute prohibits discrimination “because of such individual’s age.”¹⁷⁴ The Court said, “The words ‘because of’ mean ‘by reason of: on account of.’ . . . Thus, the ordinary meaning of the ADEA’s requirement that an employer took adverse action ‘because of’ age is that age was the ‘reason’ that the employer decided to act.”¹⁷⁵

169. 42 U.S.C. § 1981(a).

170. *Comcast*, 140 S. Ct. at 1011–12.

171. *Id.* at 1014 (citations omitted).

172. *Id.* at 1014–15.

173. 557 U.S. 167 (2009).

174. *Id.* at 176.

175. *Id.*

However, prior to *Comcast*, the Court never held that all civil rights laws are interpreted to require but-for causation unless the text specifies otherwise. Proving but-for causation is undoubtedly a much harder standard to meet than showing that race is a “motivating factor.” A simple example is illustrative. Imagine a person goes to a hotel to rent a room and the desk clerk says: “Sorry we have no availability. Besides we don’t rent to Black people.” If it is enough to allege that race is a motivating factor, those facts would be enough to withstand a motion to dismiss, allowing the case to proceed to discovery and, ultimately, to summary judgment or trial. But if race must be the but-for cause of the denial of the contract, the plaintiff cannot withstand a motion to dismiss on these facts. Under the but-for test, it is likely that many potentially meritorious claims will be dismissed at the pleading stage.

B. *Ending Affirmative Action*

Second, in the near future, I fear that we will see the end of affirmative action. Are there five possible votes on the Court to reaffirm *Bakke*, *Grutter*, and *Fisher*? I think there are now likely six votes on the Court—Roberts, Thomas, Alito, Gorsuch, Kavanaugh and Barrett—who will say that *Bakke*, *Grutter*, and *Fisher* were wrongly decided. I hope I am wrong. I believe that affirmative action is crucial to remedying past discrimination and achieving diversity, but I do not see any indication from anything these six Justices have ever said or written that they would vote to uphold affirmative action programs.

My hope was that the Supreme Court would not take the affirmative action case involving Harvard University.¹⁷⁶ But since the Court has taken the case, I fear for the end of affirmative action by colleges and universities. It is simply impossible to count five votes on the current Supreme Court to uphold affirmative action programs. Chief Justice Roberts and Justices Thomas and Alito have repeatedly urged the end of all race-conscious programs to benefit people of color.¹⁷⁷ There seems little doubt as to how the three conservative Trump appointees—Justices Gorsuch, Kavanaugh, and Barrett—will vote on this.

176. See *Students for Fair Admissions v. President of Harv. Coll.*, 980 F.3d 157, 204 (1st Cir. 2020) (holding that “Harvard did not intentionally discriminate against Asian Americans”). On January 24, 2022, the Court granted certiorari in both the Harvard and University of North Carolina affirmative action cases. Order Granting Petition for Certiorari in *Students for Fair Admissions v. Harvard*, 142 S. Ct. 895 (2021) (mem.); Order Granting Petition for Certiorari in *Students for Fair Admissions, Inc. v. Univ. of N.C.*, 142 S. Ct. 896 (2022).

177. See, e.g., *Fisher II*, 136 S. Ct. 2198, 2221 (2016) (Alito, J., dissenting) (“[D]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people.” (quoting *Rice v. Cayetano*, 528 U.S. 495, 517 (2000))); *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297, 315 (2013) (Thomas, J., concurring) (“[A] State’s use of race in higher education admissions decisions is categorically prohibited by the Equal Protection Clause.”).

C. *Threatening Disparate Impact Liability*

Third, statutes that allow for disparate impact liability are at risk under the current Supreme Court. As explained earlier, the Supreme Court has held that for equal protection, disparate impact is not sufficient to prove a racial classification. But the Court has held that statutes can allow for disparate impact liability. In 1971, in *Griggs v. Duke Power Co.*,¹⁷⁸ the Supreme Court held that disparate impact is sufficient under Title VII with regard to employment discrimination.¹⁷⁹ In 2015, in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*,¹⁸⁰ the Supreme Court held in a five-to-four decision that disparate impact liability is permissible under the Fair Housing Act of 1968.¹⁸¹ It is far easier to prove disparate impact than it is to show a discriminatory intent. Rarely do government officials express a racially discriminatory reason for their actions. But I worry that the conservative Justices on the Court might go so far in the future as to say that disparate impact liability denies equal protection. Justice Scalia, in a concurring opinion, in *Ricci v. DeStefano*¹⁸² outlined this.¹⁸³ He said disparate impact liability requires that decision makers take account of race in order to avoid liability. He said for the government to require decision-makers to take account of race is inconsistent with the Constitution, which he believes requires color blindness. I am concerned that with the current conservative majority on the Court this view poses a real threat to disparate impact liability under statutes.¹⁸⁴

Notably, the current conservative Court is likely to last a long time. At the time she was confirmed, Amy Coney Barrett was forty-eight years old. If she remains on the Court until she is eighty-seven—the age at which Justice Ginsburg died—Barrett will be a justice until the year 2059. At the time of Barrett’s confirmation, Neil Gorsuch was fifty-three, Brett Kavanaugh fifty-five, John Roberts sixty-five, Samuel Alito seventy, and Clarence Thomas seventy-two. I have long thought that the best predictor of a long lifespan is being confirmed for a seat on the Supreme Court. Justice Stevens did not retire until he was ninety years old. So, it is possible to imagine that five or six of these justices will be together for another decade or two.

178. 401 U.S. 424.

179. *Id.* at 424.

180. 576 U.S. 519.

181. *Id.* at 2510.

182. 557 U.S. 557 (2009).

183. *Id.* at 594 (Scalia, J., concurring).

184. *See, e.g., Tex. Dep’t of Hous. & Cmty. Affs.*, 576 U.S. at 547–57 (Thomas, J., dissenting) (arguing that the Fair Housing Act does not support disparate impact liability); *Ricci*, 557 U.S. at 594–96 (Scalia, J., concurring) (“Title VII’s disparate-impact provisions place a racial thumb on the scales, often requiring employers to evaluate the racial outcomes of their policies, and to make decisions based on (because of) those racial outcomes. That type of racial decisionmaking is, as the Court explains, discriminatory.”).

III. WHAT ARE THE ALTERNATIVE WAYS TO ACHIEVE RACIAL JUSTICE?

Parts I and II admittedly painted a very depressing picture about the Supreme Court and race. I cannot find any basis for optimism for the foreseeable future. But there are other paths to achieve racial justice, not focusing on the Supreme Court or the federal judiciary.

A. *Other Institutions*

Institutions of all sorts and levels of government can work to achieve diversity and remedy discrimination. At the institutional level, it will still be possible to continue to pursue diversity, even if the Supreme Court overrules *Bakke* and *Grutter* and *Fisher*. I can speak here from experience, having been part of the University of California system for the last thirteen years. In 1996, California voters adopted an initiative commonly referred to as Proposition 209, that ended affirmative action in the state. The initiative said that state and local governments cannot discriminate or give preference on the basis of race or sex in education, contracting or employment.

Initially, this had a devastating effect on diversity at schools such as UCLA and Berkeley. The statistics are stunning in terms of the precipitous drop in Black and Latinx students. But over time, schools like UCLA and Berkeley have discovered ways to achieve diversity consistent with the end of affirmative action. At Berkeley Law, for example, fifty percent of the students are students of color. In the time that I have been Dean at Berkeley Law, we have increased from twelve African American students in the first-year class to twenty-eight African American students to thirty-three, to this year having forty-three African American students in our first-year class. We have done this completely consistently with the decisions of the California Supreme Court and Proposition 209. We accomplished this, in large part, through outreach and communications after students have been accepted. We did not change our admissions standards in any way, but we did engage in much more aggressive efforts to encourage accepted students to come.

UCLA and other UC schools have done this as well. California is not the only state where these initiatives prohibiting affirmative action have been implemented. Schools in these states also have found ways to achieve diversity consistent with the law.¹⁸⁵ So, the overruling of *Bakke*, *Grutter*, and *Fisher* need

185. See Halley Potter, *What Can We Learn from States That Ban Affirmative Action?*, CENTURY FOUND. (June 26, 2014), <https://tcf.org/content/commentary/what-can-we-learn-from-states-that-ban-affirmative-action/?session=1&session=1> [<https://perma.cc/D897-S4GK>] (examining how schools in states where affirmative action is prohibited are promoting diversity). See generally WILLIAM C. KIDDER & PATRICIA GÁNDARA, TWO DECADES AFTER THE AFFIRMATIVE ACTION BAN: EVALUATING THE UNIVERSITY OF CALIFORNIA'S RACE-NEUTRAL EFFORTS (Oct. 2015), https://www.ets.org/Media/Research/pdf/kidder_paper.pdf [<https://perma.cc/6ZLD-Q9LP>] (examining a

not mean the end of diversity and the end of remedies for discrimination. My great fear is that overruling these cases will have an immediate adverse consequence, as occurred in California. I worry also that it will let administrators who do not really care about diversity and remedying racial inequalities to throw up their hands and say there is nothing they can do. Nevertheless, a difference must be made at the institutional level, no matter what the Supreme Court decides.

B. *Looking to the States*

Second, we must increasingly turn to state courts and state constitutions. In 1977, Justice William Brennan wrote a famous article in the *Harvard Law Review* encouraging the use of state constitutions to protect constitutional rights.¹⁸⁶ Brennan argued that state constitutions “are a font of individual liberties.”¹⁸⁷ In part, this was a former state supreme court justice—Brennan had been a justice on the New Jersey Supreme Court—extolling the virtues of state courts and state constitutions. But it was more than that. By 1977, Brennan had seen the retrenchment of constitutional rights by the Burger Court, especially in the area of criminal procedure. His frustration was palpable in seeing Warren Court precedents narrowed and sometimes overruled. Brennan urged the use of state constitutions as an alternative in light of the failures of the Supreme Court in protecting federal constitutional rights.

Justice Brennan could not foresee how long this trend would last or how conservative the Court would become, but he urged an alternative in turning to the state constitutions and state courts. We must do this in numerous areas to achieve racial justice, and there are plenty of areas where it has worked.

Marriage equality is a stunning example of this. In the *Goodridge v. Department of Public Health*¹⁸⁸ decision in 2003, the Massachusetts Supreme Judicial Court found that it violated the Massachusetts Constitution to keep gay people from marrying.¹⁸⁹ This is an example of how lawyers responsible for the strategy to create the right of marriage equality for gays and lesbians wisely began in state courts challenging state constitutions. They did not bring any federal claims because had they done so, the case could be removed from state to federal court. They filed only claims under state constitutions.

case study of the efforts and outcomes of the race-neutral alternatives developed and implemented by the University of California in the “wake of the loss of affirmative action”).

186. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 489 (1977). For an excellent recent advocacy of the development of state constitutional law see JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 82–83 (2018).

187. Brennan, *supra* note 186, at 491.

188. 798 N.E.2d 941 (Mass.).

189. *Id.* at 969.

Litigation then ensued in other states. It failed in New York.¹⁹⁰ It succeeded in Iowa.¹⁹¹ It succeeded in California.¹⁹² There were initiatives and momentum built. Had this gone to the Supreme Court in 2003, there is no way that the Supreme Court would have found a right to marriage equality. But this strategy, beginning with state courts and state constitutions, meant that within a dozen years, in 2015, in *Obergefell v. Hodges*,¹⁹³ the Supreme Court could find a federal constitutional right to marriage equality everywhere in the country.¹⁹⁴

Or as another example, just a few years ago, the Washington State Supreme Court found that the state death penalty violated the state constitution.¹⁹⁵ The Washington Supreme Court's decision focused on the racial disparities with regard to the administration of the death penalty.

Another example here concerns policing. Many state supreme courts have found that certain police conduct violates state constitutions even where the Supreme Court has held that it does not offend the U.S. Constitution. As discussed earlier, *Whren* is one of the Supreme Court decisions that has most expanded the power of the police to stop almost anyone at any time. The Court held that the motivations of an officer are irrelevant in evaluating the legality of a stop or a frisk or a search. An officer can use a minor traffic violation—driving through a yellow light, changing lanes without a signal, not stopping long enough at a stop sign—as a pretext for the police easily to engage in racial profiling. But several state supreme courts have rejected *Whren* and held that pretextual stops violate their state constitutions.¹⁹⁶ They have expressly repudiated the Supreme Court's approach and taken the opposite approach.

C. Legislative Action

A third avenue for change is state and federal legislation. Congress, state legislators, and local city councils can do so much to advance racial justice. Congress can adopt federal civil rights laws to fix bad decisions like that in *Comcast*. Congress can amend federal civil rights statutes to say that it is sufficient to show that race is a motivating factor and that but-for causation is not required. Congress, and for that matter state legislatures, can expand the ability to find violations based on disparate impact liability. Unless and until the Supreme Court says it is not allowed, statutes can create disparate impact liability and they need to do so. Congress needs to reform the voting and the

190. *Hernandez v. Robles*, 855 N.E.2d 1, 22 (N.Y. 2006), *abrogated by* *Obergefell v. Hodges*, 576 U.S. 644 (2015).

191. *Varnum v. Brien*, 763 N.W.2d 862, 907 (Iowa 2009).

192. *In re Marriage Cases*, 183 P.3d 384, 453 (Cal. 2008).

193. 576 U.S. 644.

194. *Id.* at 681.

195. *State v. Gregory*, 427 P.3d 621, 627 (Wash. 2018).

196. *See, e.g., State v. Sullivan*, 74 S.W.3d 215, 222 (Ark. 2002); *State v. Ladson*, 979 P.2d 833, 842 (Wash. 1999).

political process, including adopting legislation to overcome *Shelby County* and reinstitute a form of preclearance when a jurisdiction with a history of race discrimination changes its election systems.

Congress and state legislators can do so much to reform and change policing in the United States. They can outlaw practices like the use of the chokehold, racial profiling, and no-knock warrants that lead to abuses and deaths. Congress by statute can change the standard of qualified immunity, which has provided protection for so many police officers who engage in excessive force, including that which leads to death. Congress can expand liability of local governments to give them the incentive to oversee policing and make a change. After the death of George Floyd and the national protests about police violence, I was optimistic that Congress would act. A bill to reform policing passed in the House but stalled in the Senate. I am skeptical as to whether such a law can be enacted until there are other catastrophic events attracting national attention or a change in the composition of Congress.

The protests for racial justice in every one of the fifty states represent an impetus for this reform, and it is our responsibility to continue that pressure.

CONCLUSION

Though this Article paints a bleak picture with regard to the Supreme Court, there can be tremendous advances for racial justice through other avenues, such as the ones discussed in Part III. If these other avenues for change are used, there is enormous hope and optimism for the future.

Over the course of American history, there have been tremendous advances in our society with regard to equality and liberty. There, of course, is tremendous work to be done to solve the great racial inequities that remain in American society. But no one can deny that there has been progress. I was born in 1953 at a time when every southern state was segregated by law. There is an enormous way to go with regard to progress in terms of sex equality, but there has certainly been great progress in all of our lives. With regard to sexual orientation, it was just six years ago that the Supreme Court held that state laws prohibiting same-sex marriage violate equal protection and deny due process. There also has been a tremendous growth in individual freedom over the course of American history.

Dr. Martin Luther King, Jr. got it exactly right when he said, “The arc of the moral universe is long, but it bends towards justice.”¹⁹⁷

197. Rev. Dr. Martin Luther King, Jr., Commencement Address for Oberlin College (June 1965), in OBERLIN COLL. ARCHIVES, <https://www2.oberlin.edu/external/EOG/BlackHistoryMonth/MLK/CommAddress.html> [<https://perma.cc/3FHR-FUQZ>].

