
THE GOOD KIND OF DISCRIMINATION

HOW TO REMEDY PAST INJUSTICES AMIDST DEMANDS FOR A
COLORBLIND CONSTITUTION

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Abstract

This paper asks what are the conditions for a justified “positive discrimination” program and to what extent does this allow for injuring non-beneficiaries, if necessary? Positive discrimination is a term this research defines as discrimination implemented with the goal of remedying historical and present-day injustices. This is not limited to affirmative action, but can, rather, encompass school integration efforts and voter apportionment. However, the Supreme Court, increasingly swayed by conservative jurisprudence, has utilized a “colorblind” interpretation of the Constitution to prevent government bodies from classifying citizens by race to remedy past and present racial injustices. Oddly enough, this is the same colorblind interpretation of the Constitution that liberals from the 19th and early 20th century used to promote slave abolishment or civil rights. This research explores the extent to which the Framers of the 14th Amendment intended the Constitution to be colorblind, investigates a redistributive theory of racial equality, then uses these theories to develop a set of imagined principles for justifying positive discrimination programs. These principles are then tested against case studies of real positive discrimination programs limited by the Supreme Court’s colorblind decision-making and demonstrate which of these Court-imposed legal limitations should be shifted.

I. Introduction

On March 3rd, 2021 the United States Senate approved the American Rescue Plan Act, a bill which aims to relieve Americans among various personal and business domains from the distresses caused by the Coronavirus pandemic.¹ Although, at face value, this bill is an inarguable necessity, it did not go unchallenged, particularly due to a provision devoting \$5 million in funding specifically for disadvantaged farmers of color. The provision addresses goals laid out in the Emergency Relief for Farmers of Color Act- thus far introduced to the Senate- which aims to address the long history of injurious discrimination against Black farmers, largely perpetuated by the government itself.²

A majority of senators backed the bill, including Senator Raphael Warnock, Democrat of Georgia, who specified the need for such a provision, not only due to the detrimental impact of the Coronavirus pandemic, but to finally address past discrimination against Black farmers perpetuated by the United States Department of Agriculture.³ Other senators, however, wholeheartedly opposed the provision, believing it, as claimed by Senator Patrick Toomey, Republican of Pennsylvania, simply to be another instance of the left “[enacting] a liberal wish-list for years into the future...irrespective of [farmers’] earnings, wealth or effects from COVID, and exclusively for ethnic minorities or immigrants.”⁴ On the one side, though this bill falls short of popular conceptualizations of reparations, there is at least a recognition for the government’s objective, even obligation, to remedy past racial injustices. On the other side, there

¹ "H.R.1319 - American Rescue Plan Act of 2021," <https://www.congress.gov/bill/117th-congress/house-bill/1319>.

² Laura Reiley, "Relief Bill is Most Significant Legislation for Black Farmers Since Civil Rights Act, Experts Say," Business, *The Washington Post* 2021, <https://www.washingtonpost.com/business/2021/03/08/reparations-black-farmers-stimulus/>.

³ Khristopher J. Brooks, "Coronavirus Relief Funding Includes \$5 Billion for Farmers of Color," *CBS News* 2021, <https://www.cbsnews.com/news/black-farmers-covid-relief-stimulus-bill-american-rescue-plan/>.

⁴ Reiley, "Relief Bill is Most Significant Legislation for Black Farmers Since Civil Rights Act, Experts Say."

is a seemingly irreconcilable aversion to any legal favoring of protected minorities at the expense of non-beneficiaries, or in other words, white Americans.

The fundamental disagreement brought to center stage by the Emergency Relief for Farmers of Color Act is at the core of decades of unresolved debate over the extent to which the government is constitutionally permitted, or even obliged, to remedy a long American history of past racial injustices. A central question remains unanswered: under what conditions is positive racial discrimination justified as a means for rectifying past and present injustices? Moreover, does this endeavor validate injuring non-beneficiaries of positive discrimination, if necessary?

Before tackling these questions, it is first necessary to define positive discrimination, which is a term that, for many, may sound paradoxical. After all, discrimination is commonly conceived to be an illicit practice, likely due to the seemingly conflicting demands of the Equal Protection Clause enclosed in the Fourteenth Amendment of the Constitution. However, many misunderstand the Equal Protection Clause in regard to discrimination. Despite its connotations, discrimination is not always a malicious practice. Take, for example, two definitions of discrimination according to the Oxford English Dictionary: first discrimination is, “[u]njust or prejudicial treatment of a person or group, esp. on the grounds of race, gender, sexual orientation...” or second, “favourable treatment of a person or group, in order to compensate for disadvantage or lack of privilege.”⁵ Although discrimination has a negative connotation in popular American discourse, it can serve as a very intentional practice aiming to yield positive outcomes. Positive discrimination, thus, aligns with this second sense of discrimination. For the purposes of this research, I specifically define positive discrimination as discrimination implemented for the sake of remedying past and present-day injustices, whether they be social or

⁵Oxford English Dictionary, “discrimination, n.,” in *Oxford English Dictionary* (Oxford University Press). <https://www.oed.com/view/Entry/54060?redirectedFrom=discrimination&#>;

economic. This is not just limited to affirmative action, but encompasses school integration efforts, voter apportionment, and initiatives such as the Emergency Relief for Farmers of Color Act. Positive discrimination can favor certain groups, and, in the process, it *may* injure non-beneficiaries, but it will never *only* discriminate against or injure non-beneficiaries. Moreover, positive discrimination is not a practice limited to governmental legislation – as it can be implemented by private actors- and is considerably expansive in terms of what area of society it impacts and at what level. For the sake of clarity, this research focuses on race-conscious discrimination implemented by governmental actors, as the ethical considerations pertaining to race in the law and colorblindness apply most directly to them.

In juxtaposition with positive discrimination, however, is the growing prevalence of colorblind ideology on the question of the role of race in the law. While positive discrimination argues for the instrumentalization of race with the goal of remedying past injustices, colorblind ideology argues, as Chief Justice John Roberts stated in *Parents Involved v. Seattle*, that “[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”⁶ In reference to the Fourteenth Amendment of the Constitution with its embedded Equal Protection Clause, colorblind ideologists on the Supreme Court have made increasingly advanced arguments against racial categorization in the law. This poses a serious threat to the legal status of positive racial discrimination in years to come.

While constitutional colorblindness seems justifiable at first intuition, it fails acknowledge the continued work necessary to promote racial equity. There is still a pressing need for the government to confront the legacy of past racial discrimination. This, need however, fundamentally conflicts with the desire not to discriminate against non-marginalized groups.

⁶Theodore R. Johnson, "How Conservatives Turned the 'Color-Blind Constitution' Against Racial Progress," *The Atlantic*, 2019, <https://www.theatlantic.com/ideas/archive/2019/11/colorblind-constitution/602221/>.

Choosing to abide by one commitment at the expense of the other inevitably results in an unsatisfying outcome. For instance, if the government chooses to implement positive racial discrimination, this usually attracts complaints from non-marginalized groups potentially negatively impacted by such action. This phenomenon is exemplified by the dozens of lawsuits argued before the Supreme Court- several of which will be discussed in this paper- initiated by white parties aggrieved by positive racial discrimination programs. On the other hand, inaction on the part of the government in regard to remedying racial injustices leaves racial minorities uncompensated. Thus, there is an ever-increasing need to establish an appropriate balance that accounts for both commitments of the government. Moreover, this political and ethical obligation requires delineating the boundaries of a justified positive discrimination program.

The large bodies of literature on either side of this debate, which have now seeped into popular American discourse, demonstrate a public desire to approach a solution. However, both scholarly and political discussions of positive racial discrimination fall short of reconciling the theoretical underpinnings on either side of the dilemma. Most arguments only concern why certain action should or shouldn't be taken by the government without addressing the legitimate theoretical concerns underlying the opposing argument. For instance, plenty of scholars call for the government, not only to implement programs of positive racial discrimination, but to commence a plan for reparations which is necessitated, as argued by Ta-Nehasi Coates in "The Case for Reparations", by the distinct nature of Black poverty as caused by systemic discrimination⁷. However, this does not address how such obligations may fundamentally

⁷Ta-Nehasi Coates, "The Case for Reparations," *The Atlantic*, 2014, <https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631/>. See also "H.R. 40 Is Not a Symbolic Act. It's a Path to Restorative Justice.," American Civil Liberties Union, 2020, <https://www.aclu.org/news/racial-justice/h-r-40-is-not-a-symbolic-act-its-a-path-to-restorative-justice/>. The need for a "national reckoning" of past racial injustices has reentered the congressional stage when House Representative Sheila Jackson Lee decided to sponsor the HR 40 bill, seeking to create a commission to study and evaluate potential reparations solutions.

conflict with the constitutional limitations embodied in the Equal Protection Clause which potentially limit the government's ability to racially categorize its citizens. In the other hand, proponents of a colorblind interpretation of the Constitution recognize these limits imposed by the Equal Protection Clause. Colorblind ideologists on the bench uphold a strict judicial scrutiny of all racial categorization in the law, arguing that there is no way to ensure that such categorization is "benign".⁸ However, these arguments do not consider that the theoretical obligations of the Equal Protection Clause may simultaneously behoove the government to remedy its own perpetuation of racial inequality. Most importantly, so long as proponents of redistributive justice lack a principled argument for justifying positive discrimination program, colorblind jurisprudence in the coming years may dismantle these programs.

Thus, this research attempts to take a crucial next step in this debate by establishing a principled legal and theoretical argument for outlining what should be the boundaries of a justified positive discrimination program. Undertaking this task, first, requires a constitutionally-based and philosophical evaluation of the role racial rectification in the law: why it is justified, the problems it may pose, and whether and why these problems are worth undertaking such an effort. This research also requires a consolidation of the current legal status of positive discrimination programs as determined by judicial precedent, largely influenced by the increasing colorblind ideological trend. The debate surrounding the Emergency Relief for Farmers of Color Act, which does not, in fact, bar non-beneficiaries from any constitutionally protected rights, demonstrates just how confusing the rectification responsibilities of the government remain. In addressing both the theoretical goals and legal limitations of positive

⁸Adarand Constructors, Inc. v. Peña, Secretary Of Transportation, et al., 515 U.S. 200, No. 93-1841 (1995).

discrimination, however, some further steps can be taken towards reconciling the fundamental disagreement over the role of race in the law.

In the first section of this paper, I establish a theoretical framework. This is first done using a constitutional originalist approach and establishing the limits of the Equal Protection Clause as determined by the Fourteenth Amendment Framers of the Constitution. Next, I investigate other philosophical considerations of the role of racial redistribution in the law. Finally, using these theoretical foundations, I imagine four theoretical principles that any positive discrimination program should align with; these are that such programs should aim to remedy a past injustice with present impact, avoid systemic discrimination against any group, increase public welfare, and be impermanent. In the next section of this paper, I review the legal limitations of positive racial discrimination programs as determined by Supreme Court decisions. In the third section, I evaluate three positive discrimination case studies including the aforementioned Emergency Relief for Farmers of Color Act, the Small Business Act “8(a) program”, and Seattle District No.1’s school assignment tiebreaker scheme. For each case study, I, first, measure the program against the imagined theoretical principles and, using these principles, I second, evaluate which Court-imposed practical boundaries for positive discrimination programs should be shifted and by how much. Thus, it is important to note, here, that I do not take judicial precedent as fact. On the contrary, I challenge the boundaries that have been imposed by the Court for establishing a new framework for positive racial discrimination programs founded in normative theory. Finally, based on my findings, I conclude and briefly evaluate the policy implications of justified positive discrimination programs.

II. Theoretical Framework: How to Justify the Good Kind of Discrimination

The theoretical underpinnings of arguments on either side of the positive discrimination debate convey that the debate is ultimately one of morals. Both sides recognize the moral impetus for delineating the limits of a positive discrimination program; their difference lies in which moral obligations should take precedence. Colorblind ideologists ascribe to the ethical primacy of universalist equality while positive discrimination theorists promote a redistributionist or need-based understanding of equality.⁹ It's important to weigh the importance of both these ethical duties before conceptualizing the limits of an appropriate positive discrimination. This section, thus, first assess a constructed theory of racial equality as promoted by the Framers of the 14th Amendment, then evaluates the extent to which constitutional colorblindness holds true, and, additionally, presents a theory for redistributive racial equality. The two theories- that of the 14th Amendment Framers and the racial redistributive justice theory- will come together to clarify what should be principles underpinning any positive discrimination program.

a. Fourteenth Amendment Framers' theory of racial equality

As do most legal theorists in addressing questions of equality in America, I, first, defer to the intentions of the Framers of the Fourteenth Amendment. This amendment is the first instance that the Constitution acknowledges equality before the law. Understanding how the Framers understood and defined equality is relevant for aims of this study and of practical importance,

⁹ Stephen Devereux, "Is targeting ethical?," *Global Social Policy* 16, no. 2 (2016), <https://doi.org/10.1177/1468018116643849>, <https://journals.sagepub.com/doi/abs/10.1177/1468018116643849>. 'Redistributionist' in the context of this research refers to an understanding of equality based on need. Stephen Devereux discusses a "need principle" under the umbrella of redistributive justice, which is the idea that people who have less should receive more support than the "better-off."

considering Supreme Court justices use originalist arguments to de-constitutionalize positive discrimination programs. Deferring to the intentions of the Framers is a common judicial practice- especially utilized by conservative jurists- but doing so here can, alternatively, provide constitutional backing for positive discrimination programs. With limited access to the Framers' debates or other contemporaneous writings, I rely on secondary sources to construct what was the Framers' theory of racial equality before the law. Central to this construction is William E. Nelson's legal and historical analysis of the intentions of Fourteenth Amendment Framers.

The first section of the Fourteenth Amendment is of most importance for evaluating what was the Framers' theory of racial equality before the law. Section 1 reads: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."¹⁰

A discussion of the Framers' theory of racial equality in the law as exemplified by this section of the 14th Amendment will ultimately convey that colorblind ideologists have overemphasized how much the Framers' intended the law to be entirely absent of racial categorization. Such a theory can, in fact, support *either* a redistributionist or colorblind theory of race in the law. The next essential step, however, for understanding the limitations of a justified positive discrimination program is to understand the extent to which a colorblind theory is ideologically *required* by the framers of the 14th Amendment. Nelson asserts in *The Fourteenth Amendment: from Political Principle to Judicial Doctrine*, that the Framers' theory

¹⁰ U.S. Const. amend. XIV. Sec. 1.

of racial equality in the law is inevitably limited in its ability to answer contemporary questions.¹¹ He asserts the difficulty in establishing the precise legal limitations of the Fourteenth Amendment by asking “anachronistic” questions as is typical of contemporary legal scholars and Supreme Court justices.¹² Eric Foner, in *The Second Founding* elaborates this idea, describing how, “[c]ongress built future interpretation and implementation into the amendments. But this ran the risk that their purposes could be defeated by narrow judicial construction...”¹³ Thus, an understanding of the Framers’ intentions and racial theory of equality in the law as circumscribed by the historical realities of their time, has a considerably broad application.

The political and public discourse of the Antebellum period promoted both by slavery proponents and abolitionists (but especially the latter) are largely responsible for developing the Framers’ ideological intentions behind the Fourteenth Amendment. The main principles backing the 14th Amendment, passed in 1866, were that all citizens possessed constitutionally protected fundamental individual rights and that all citizens are entitled to equal protection of these rights. The former principle is useful for better understanding the latter principle and, thus, for evaluating what the Framers’ theory of racial equality before the law entailed. Though surprising given the judicial doctrine that followed over the next century and a half, the Framers did not believe these principles conflicted with the American tradition of federalism, which is the belief in states’ legislative autonomy against federal intervention. In outlining such broad principles, the Framers’ goal was not to create a precise doctrinal framework for establishing which rights in particular should be protected or how equality should be enforced, but rather to affirm these

¹¹William E. Nelson, *The Fourteenth Amendment: from Political Principle to Judicial Doctrine* (Cambridge, Mass.: Harvard University Press, 1988). <https://hdl-handle-net.yale.idm.oclc.org/2027/heb.00490>.

¹² Nelson, *The Fourteenth Amendment: from Political Principle to Judicial Doctrine*, 7.

¹³Eric Foner, *The Second Founding How the Civil War and Reconstruction Remade the Constitution* (W. W. Norton & Company, 2019), 16. <https://yaleuct.libraryreserve.com/10/50/en/MyAccount.htm?PerPage=40>.

principles of liberty and equality before the American public during a period of significant social change. Moreover, the Framers neglected to outline specific definitions of individual liberty or equality in order to satisfy both the desires of a supermajority in Congress necessary for adopting the amendment and the divergent desires of the American public. For instance, it remained unclear whether the Framers' theory of racial equality before the law rendered segregation illegal or which rights were protected under the Fourteenth Amendment Due Process Clause.

The Framers of the Fourteenth Amendment ascribed to the principle that all citizens possessed certain fundamental or unalienable individual rights that were constitutionally protected. This belief was evidenced, not only by records of congressional debates surrounding the adoption of the Fourteenth Amendment, but by letters sent to U.S. representatives from ordinary laypeople, as well newspapers published across American cities. Congressional debates surrounding the adoption of the Fourteenth Amendment convey that that Reconstruction Republicans applied this principle to the anti-slavery movement. For instance, the Framers believed that existence of fundamental rights implied the transfer of such rights to emancipated Black Americans. This suggested the establishment of equal citizenship for emancipated slaves. It remained, unclear, however, exactly which and what kinds of rights the Framers believed should be protected under citizenship, as not all of these rights are specifically enumerated in the 14th Amendment.¹⁴

Republicans at the time conceptualized four kinds of rights: natural, civil, political, and social. They, moreover, assumed that slave emancipation should afford black Americans natural and civil rights- essentially the rights to liberty and property. However, the uncertainty over which of these rights they understood to be fundamental rights confuses the meaning of equal

¹⁴Nelson, *The Fourteenth Amendment: from Political Principle to Judicial Doctrine*.

protection of the laws. The Civil Rights Act of 1866, which served as a blueprint for the 14th Amendment, more explicitly defined the right to property, the right to sue, and the right to participate in economy, amongst other rights. By 1870, Congress understood the rights protected by the 14th Amendment to also include all rights protected under the Bill of Rights. Moreover, during his proposal of section 1 of the 14th Amendment to Congress, Senator Jacob Howard cited *Corfield v. Coryell* to suggest that rights protected under the privileges and immunities clause included the right to interstate travel, the right to a writ of *habeas corpus*, and the right to property, but that the full extent of these rights could not be precisely defined. It was ultimately within states' jurisdiction to determine the specifics of which rights they would protect.¹⁵ Moreover, congressional debates suggest that Republicans at the time did not conceptualize social rights in either the private or public realm as protected by the 14th Amendment. Therefore, they denied any obligation to recognize the right to interracial marriage or to attend integrated schools. Congressmen were also split on whether the right to vote, as a political right, was fundamentally protected by the 14th Amendment.¹⁶ This constructed hierarchy of fundamental and non-fundamental rights leaves one wondering how much equal protection these various rights demanded.

Moreover, a principle of equality also underpinned the Framers' intentions for the Fourteenth Amendment. Congressional debates convey that the Framers often conflated natural rights protected by a higher divine law with citizen's constitutionally protected fundamental rights. The assertion of either kind of right, however, was used to confirm the government's obligation to equally protect them. Congressional debates show that Republicans during the

¹⁵ Paul Brest et al., *Processes of Constitutional Decisionmaking*, 7 ed., Aspen Casebook Series, (New York: Wolters Kluwer, 2018). See also Nelson, *The Fourteenth Amendment: from Political Principle to Judicial Doctrine*.

¹⁶ Foner, *The Second Founding How the Civil War and Reconstruction Remade the Constitution*.

Reconstruction era would often appeal to the Declaration of Independence to justify a principle of equality before the law. For instance, when Ohioan representative John Bingham and drafter of section 1 of the 14th Amendment, presented the 14th Amendment to Congress, he asserted that the purpose of the Constitution was to ensure equal rights and equal justice for all men. When it came to racial equality, Republicans promoted the equal protection of fundamental rights for both black and white men. For this reason, John Bingham asserted that Congress has the authority to pass any law that is necessary and proper for the protection of equal rights. For the first time, the Constitution afforded citizens protection against state action at the behest of federal intervention.¹⁷

As with the preceding principles, however, the Framers left a lot unsaid. They neglected to outline a precise definition of equality before the law and, particularly, racial equality before the law, which left some questions without conclusive answers. For instance, does the equal protection of the law demand that the government take affirmative action to equally protect rights among citizens? Is the equal protection of all kinds of rights, civil, political, and social, alike, necessary? Evidence suggests that the answer to either of these questions is not necessarily. For example, Radical Republican, Thaddeus Stevens' proposition for the 14th Amendment read: "All national and State laws shall be equally applicable to every citizen, and no discrimination shall be made on account of race and color." While this might suggest that the Framers' supported a colorblind interpretation of the equal protection *all* rights, Congress rejected this text in favor of what was actually written in order to accommodate the wishes of

¹⁷ The Court later found in *Bolling v. Sharpe* that the Fifth Amendment also demands the equal protection under the law against federal intervention. Thus, although federalist obligations aren't of significance in this case, the general principles underlying the Fourteenth Amendment as determined by the Framers can be applied for understanding the obligations of local, state, and federal governments alike implementing positive discrimination programs. See "Amdt5.4.5.2.6 Equal Protection as a Substantive Component of Due Process Clause," Congress.gov, https://constitution.congress.gov/browse/essay/amdt5_4_5_2_6/.

more moderate congressmen.¹⁸ Thus, the Framers took a measured step away from requiring either a colorblind or affirmative equal protection of the law.

While the aforementioned principles, are imprecise, the Framers recognized the importance of mediating them with anti- federalist commitments in the American legal tradition. These commitments, to a certain extent, helped define the limitations of the principles underlying the Fourteenth Amendment especially in their development of the Framers' theory of racial equality in the law. Concerning the principles of God-given or constitutionally protected rights, the Framers of Fourteenth Amendment did not conceptualize these rights to be absolute. Alternatively, they believed that states possessed the power to regulate them. Congressional debates convey, for example, that some congressmen believed that states could regulate voting rights to the extent they pleased, so long as they did not treat any class or group unequally in the process. Thus, even if a state only afforded the right to vote to one tenth of its population, this tenth had to be representative of all groups within society. Other Republicans who did not agree with this argument did so on the premise that voting rights could not be restricted from any citizen, even on a non-discriminatory basis as is the case within this example.¹⁹

This lack of consensus concerning which rights were substantive and unable to withstand state intervention underlay the lack of consensus over which rights required equal protection. Evidence suggests that Reconstruction Republicans did not understand the concept of equal protection of the law to require equal wealth or equal social rights, or in other words, the equality of non-fundamental rights not enumerated in the Constitution. Moreover, in accordance with the principle of federalism, congressmen deferred to states for determining the extent to which they would grant certain rights or equally protect them. Congressional debate over the status of voting

¹⁸ Brest et al., *Processes of Constitutional Decisionmaking*.

¹⁹ Nelson, *The Fourteenth Amendment: from Political Principle to Judicial Doctrine*.

rights, again, shows that Reconstruction Republicans had not resolved the question of whether voting rights, a right not enumerated within the Constitution, required equal protection between Black and white citizens.²⁰ Some Republicans asserted the need to establish equal voting rights for Black Americans as demanded by their equal intelligence and capabilities to white citizens. Others, simply believed that the necessity lied in the fact that voting rights are fundamental and, therefore, should be afforded to all Americans regardless of race for any conception of equal protection under the law to hold true. Then there was an unfortunate camp of Framers that seemed to believe that states were authorized to discriminate against Black Americans in the protection of voting rights, if not by race, then by a factor closely linked to race. In response, section 2 of the 14th Amendment punishes states for disenfranchising citizens by reducing their representation in Congress. Thus, as Jeffery Rosen describes, the Framers of the 14th Amendment, particularly as evidenced by section 2, “tacitly acknowledged that states were free to use race as the ‘predominant purpose’ in denying or abridging the vote, as long as they were willing to pay the penalty.”²¹ This, presumably in response to Southern states that disenfranchised Black voters, reflects this unfinished decision concerning the equal protection of voting rights.

Altogether, this evidence suggests that the Framers conceptualized the protection individual rights, not as positive rights requiring proactive protection or enforcement by the government, but as negative rights establishing a protection *against* the inhibition of these liberties. Accordingly, equal protection of the law did not require a positive and absolute enforcement of equality, but, rather, protection against undue discrimination. Essentially, Nelson

²⁰ These debates, taking place in the year of 1866, occurred before the adoption of the Fifteenth Amendment which does, in fact, assert the equal protection of voting rights. U.S. Const. amend. XV. Sec. 1.

²¹ Jeffrey Rosen, "The Color-Blind Court," *The New Republic*, 1995, <https://newrepublic.com/article/74158/the-color-blind-court>.

describes that the Framers theoretically accepted all state legislation that was not “arbitrary or unreasonable.”²² It unclear what exactly arbitrary and unreasonable entails, however it certainly did not comprise of all forms of racial categorization or discrimination in the law. What remains true is that the Framers believed that *certain* rights prohibited any state intervention and required absolute equal protection of the law under all circumstances. Any infringement on these rights or their equal protection could be deemed arbitrary or unreasonable. Though this selection of rights is not enumerated in the 14th Amendment, the Civil rights Act of 1866 provides some insight, as it explicitly required the equal protection of the rights to sue, to enforce contract, and to sell or purchase property, to name a few²³. In contrast, other rights- non fundamental rights- could be regulated and did not require absolute equal protection under the law; the standard for unreasonable regulation or unequal protection was more relaxed in these circumstances. In any case, the Framers broadly believed that no right could be arbitrarily or unreasonably hindered or arbitrarily or unreasonably appropriated in a discriminatory manner.

b. Why not colorblindness?

Inasmuch as a theory of racial equality before the law as defined by the Framers of the Fourteenth Amendment is imprecise, it is important to acknowledge the extent to which a colorblind theory imposes mandatory limitations on the existence of positive discrimination programs. Ultimately, I find that the colorblind ideal, in demanding a narrower standard of racial equality in the law, is permitted but not necessitated by the intentions of the 14th Amendment Framers. For this reason and given the goals of this research, I recognize, but I do not rely upon

²²Nelson, *The Fourteenth Amendment: from Political Principle to Judicial Doctrine*, 10.

²³Ilan Wurman, *The Second Founding: An Introduction to the Fourteenth Amendment* (Cambridge University Press, 2020), Cambridge University Press, <https://www-cambridge-org.yale.idm.oclc.org/core/books/second-founding/616A124DD13B6A172681A18CA2A3F9AF>, <https://doi.org/10.1017/9781108914956>.

colorblind ideology for determining what should be the theoretical principles underlying any positive discrimination program.

Colorblind ideology extrapolates that, because the Equal Protection Clause of the Fourteenth Amendment enforces equal protection against state intervention (and against federal intervention as enforced by the Fifth Amendment), all racial discrimination, regardless of intent, is objectionable.²⁴ Interestingly, racial progressives of the 19th and 20th were once the fiercest advocates of colorblindness in their efforts to promote slave abolition or the dismantle Jim Crow laws. For instance, Thurgood Marshall relied heavily on the colorblind ideal to promote school integration in *Brown v. Board of Education*. Over the course of the 20th century, however, colorblind ideology evolved to become reactionary tool used by conservatives to protect white Americans from more proactive positive discrimination efforts.²⁵ As demonstrated by the 2007 *Parents Involved v. Seattle* decision- one of the best representations of colorblind rhetoric- colorblind ideologists on the bench include the late Justice Antonin Scalia, Justice Clarence Thomas, Justice Samuel Alito, Justice Anthony Kennedy and Chief Justice John Roberts. In justifying their claims, these justices reference Justice Harlan's famous dissent in *Plessy v. Ferguson* in which Harlan declared that the Constitution is colorblind and cannot "[tolerate] classes among citizens". They argue that government bodies should avoid racial categorization in the law because the underlying intent may not be unquestionably "benign", but rather the introduction of illegitimate racial theories or racial politics into the law.²⁶

²⁴ Tanya Kateri Hernandez, "Multiracial Discourse: Racial Classifications in an Era of Color-blind Jurisprudence," *Md. L. Rev.* 57 (1998), https://heinonline-org.yale.idm.oclc.org/HOL/Page?collection=journals&handle=hein.journals/mlr57&id=148&men_tab=srchresults#

²⁵ Johnson, "How Conservatives Turned the 'Color-Blind Constitution' Against Racial Progress."

²⁶R. Shep Melnick, "Is the Constitution colorblind? Debating Antonin Scalia's Record on Race and Education," Essay, *Education Next* 17 (2017), <https://link-gale-com.yale.idm.oclc.org/apps/doc/A505741962/OVIC?u=29002&sid=OVIC&xid=c9a6f552>. See also *Parents Involved in Community Schools v. Seattle School District No. 1 et al.*, 551 U.S. 701 (2007).

Therefore, according to colorblind ideology, even positive discrimination programs may unjustifiably threaten the equal protection of the law. This research, however, refutes this idea. Colorblind ideologists extrapolate two main arguments from the Framers' theory of racial equality; they then rely on these extrapolations to justify a suspicion of all racial discrimination in the law. These deductions are that the Equal Protection Clause (in either the 14th or the 5th Amendments) forbids all kinds of racial discrimination and that the Equal Protection Clause is meant to protect individuals rather than groups. However, this research presents evidence indicating that, although the Framers may have considered such interpretations, they certainly did not require them.

Colorblind ideologists suspect that all racial classification in the law is bound to be arbitrary or unreasonable regardless of what kinds of individual rights it impacts. This is demonstrated by how the Supreme Court has decided in cases dealing with positive discrimination programs ranging from university admissions schemes to federal grants distribution. The Equal Protection Clause, however, does not necessarily protect all kinds of rights, and the Framers did not all agree that all kinds of rights demand equal protection. Jeffery Rosen, in "The Color-Blind Court", for instance, makes an example out of *Miller v. Johnson* to convey this. This is a case in which white plaintiffs petitioned against a Georgia state voter district apportionment aiming to reduce Black voters' underrepresentation in Congress. Rosen argues how the white plaintiffs failed to make constitutionally-based claims because no individual has the right to district apportionments that increase the likelihood of their preferred candidate winning.²⁷ Consider a simpler example: a woman who sues a Catholic church for refusing her the right to become a priest. This woman would have a difficult time justifying her

²⁷ Rosen, "The Color-Blind Court."

claim using the Equal Protection Clause, because, after all, not everyone has the right to become a priest, and, moreover, this right is not explicitly protected by the 14th or 5th Amendments. Likewise, not everyone has the right to admission into a university and not every business has the right to receive a federal grant. Even Justice Harlan's venerated dissent in *Plessy* is limited in its promotion of a colorblind protection of all rights. Harlan, himself, was a fervent white supremacist and even stated in his famous dissent that the white race was the dominant race in the United States. He, however, championed a colorblind interpretation of *civil* rights which he believed encompassed the right to sit in a public railcar alongside white Americans. When it came to other social rights, however, Justice Harlan rejected the idea that Americans of all races were entitled to equal protection.

Of course, however, the fact that some rights are not fundamental rights does not allow for their unequal protection in an arbitrary or unreasonable manner. The key here is the level of unreasonableness. Colorblind ideologists seem to think that racial classification itself is always inclined to be arbitrary and unreasonable. The Framers, however, left this line of arbitrariness or unreasonableness up to interpretation. My research attempts to draw the line of what constitutes as arbitrary or unreasonable in light of both the moral goals of a positive discrimination program and the concerns of colorblind ideologists.

Secondly, colorblind ideologists argue that the Equal Protection Clause is meant to protect individuals rather than groups and, moreover, forbids the categorization of citizens into groups. In 1990, Justice Kennedy declared in the *Metro Broadcasting Inc. v. FCC* decision, that "[a]t the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial,

religious, sexual or national class.”²⁸ This claim was, in subsequent cases, upheld as precedent such that Court came to agree on, “the basic principle that the Fifth and Fourteenth Amendments protect persons, not groups.”²⁹ Congressional debates surrounding the adoption of the 14th Amendment, however do not indicate that the Framers upheld this interpretation of the Equal Protection Clause. These debates made countless of references to Americans as members of groups- Black Americans or white Americans- and contemplated which groups were afforded what kinds of rights. It is also worth noting, as Eric Foner suggests in *The Second Founding*, that the Civil Rights Act of 1866, which guided the drafting of the 14th Amendment, explicitly calls for all citizens, regardless of race, to have the same rights ““as is enjoyed by white citizens.””³⁰ Thus, it is not unreasonable to suggest that the drafters of the 14th Amendment recognized white Americans as a group and, moreover, intended to use the privileges of this group as a baseline for establishing the rights of other groups. As Foner suggests, the 14th Amendment likely does not mention race explicitly so that it could be applicable for the protection of Americans of any race, rather than just Black Americans.³¹

For these reasons, the Framers’ theory of racial equality in the law, precisely because it was incomplete, does not require a colorblind interpretation of the Constitution nor the reasons used to justify it.

²⁸ *Metro Broadcasting, Inc. v. Federal Communications Commission*, 547 U.S. 497 (1990).

²⁹ *Adarand Constructors*, 515 U.S.

³⁰ Foner, *The Second Founding How the Civil War and Reconstruction Remade the Constitution*, 74. See also An Act to protect all Persons in the United States in their Civil Rights, and furnish the Means of their Vindication., Statutes at Large 14. Stat. 27, 39th Congress, 1st Session 31 27-30 (1866).

³¹ Foner, *The Second Founding How the Civil War and Reconstruction Remade the Constitution*.

c. Redistributive theory for racial equality in the law

As already mentioned, the question of what place the use of race and positive discrimination programs have in the law is a moral one. To the extent that the Framers' theory of racial equality in the law is incomplete, this research seeks to complete this theory in a way that coincides with the moral goals of this research and unburdened by the limitations imposed by judicial decision-making since the adoption of the 14th Amendment. This theorization requires a clearer conceptualization of what actually constitutes as arbitrary or unreasonable. It has been established that the Framers' theory of racial equality in the law *allows* for positive discrimination, however it does not clarify what is *required* of positive discrimination programs. There is a lot left to interpretation and even room to move beyond the limits of legal theory to provide support for a more expansive understanding of racial equality before the law.

To what extent, however can one theoretically bridge a gap between the Framers' intentions and more focused theories for resolving persistent societal issues? Alexander Bickel addresses this dilemma in a 1955 Harvard Law Review article, describing how, despite the Framers' narrow intentions for which rights are protected under the Equal Protection Clause, the 14th Amendment can still be read expansively enough to justify the school desegregation efforts of his time. Unlike a statute, a constitutional amendment does not necessarily forbid action beyond the scope of congressional intent or purpose.³² Bickel continues to propose that, "[o]ne inquiry should be directed at the congressional understanding of the immediate effect of the enactment on conditions then present. Another should aim to discover what if any thought was given to the long-range effect, under future circumstances, of provisions necessarily intended for

³² Alexander M. Bickel, "The Original Understanding and the Segregation Decision," *Harvard Law Review* 69 (1955), https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=4958&context=fss_papers.

permanence.”³³ In *The Fourteenth Amendment*, Nelson responds directly to this latter proposition and describes the futility in asking “anachronistic” questions regarding the Framers’ intent.³⁴ This predicament demonstrates the difficulty in relying solely on original intent regarding contemporaneous issues to solve contemporary problems.

I, thus, argue that, because the Framers did not solve the question of how to justify positive discrimination in the law, it is appropriate to apply outside theories for solving this question, so long as they do not conflict with original intent regarding contemporaneous issues. To the extent that this allows for the adaptation of the role of the Constitution in the American legal system and whether this is justified are questions beyond the scope of this paper. Nonetheless, there is no evidence that positive discrimination or theories of redistribution conflict with the Framers’ original intent. To the contrary, the same congressmen who championed the equal protection of the law backed several pieces of legislation passed during the Reconstruction era that initiated social welfare programs exclusively benefiting Black Americans.³⁵ Therefore, this evidence strongly indicates, at the very least, that the Framers in no way opposed positive discrimination or expected the Fourteenth Amendment to prohibit it. However, it is still impossible to rely on original intent to entirely delineate the boundaries of positive discrimination, as this would be, as Nelson suggests, an anachronistic endeavor.

Leif Wenar’s “forward-looking” reparations theory as modified by Thom Brooks provides a useful example of a redistributive theory of racial equality in the law. I utilize this theory in combination with the Framers’ ideas to theorize a more complete justification for positive discrimination. One aspect that renders this theory unique, and the reason I have chosen

³³ Bickel, "The Original Understanding and the Segregation Decision," 59.

³⁴ Nelson, *The Fourteenth Amendment: from Political Principle to Judicial Doctrine*, 7.

³⁵ Eric Schnapper, "Affirmative Action and the Legislative History of the Fourteenth Amendment," *Virginia Law Review* 71, no. 5 (1985), <https://doi.org/10.2307/1073012>, <http://www.jstor.org/stable/1073012>.

to incorporate it into this theoretical framework, is that it is founded in principles that limit it in scope. This limited approach provides valuable insight for how to limit a positive discrimination program that abides by both moral boundaries and the legal boundaries imposed by the Fourteenth Amendment. It is important to note, however, that Wenar limits the scope of his theory based on his definition of reparations. In his view, the claim for restoration to a previous, uninjured position both defines and morally justifies reparations. The need to remedy past injustices is founded in the idea that doing so would return to aggrieved groups what they lost. For this reason, Wenar discusses that his theory of reparations does not expand to classes of individuals born into oppressive conditions (such as black Americans born into slavery or the oppressive regimes that followed), for “[o]ne cannot repair what was never whole.”³⁶ Wenar’s definition can be confusing, as the common understanding of reparations in America- which my conception of positive discrimination is expansive enough to include- expressly argues for the redistribution resources to individuals born into oppressive conditions. Alternatively, Wenar, himself, claims that for individuals born into oppressive conditions, the perpetuation of past injustices constitutes moral support for claims to payment or “special rights”. Such claims, though, are forms of distributive justice, not reparative justice- the latter which, as Wenar asserts, circumscribes reparations.

I argue, however, that the principles backing Wenar’s reparations theory can still apply to programs of positive discrimination. Rather than the need the need to repair what was once whole, moral justification for such programs simply lies in the need to address past wrongs and assist unequally aggrieved classes of peoples.

³⁶ Leif Wenar, "Reparations for the Future," Article, *Journal of Social Philosophy* 37, no. 3 (Fall2006 2006), <https://doi.org/10.1111/j.1467-9833.2006.00344.x>, <https://search.ebscohost.com/login.aspx?direct=true&db=aph&AN=22226898&site=ehost-live&scope=site>.

Wenar's unmodified theory of reparations establishes, first, that reparations should not derive its justification from past injurious events, and second, that reparations be equal in value to what was lost but should not require from the aggressor more than what can be gained from the aggrieved. Although this first principle is modified by political philosopher, Thom Brooks, as will later be discussed, it is still useful to evaluate Wenar's intentions behind it. Wenar claims that "backward-looking" reparations that derive their entire justification from past injurious events are conceptually limited for a couple reasons. First, they make it confusing how much payment is owed, which necessitates speculating how much the aggrieved would have had the past injustice not been perpetuated. This can hardly be done with any kind of specificity. Secondly, they fail to answer the extent to which reparations can restore proper conditions particularly for the descendants of injured groups still impacted by past injustices. For instance, how much is owed to a descendant of a slave claiming they would have been better off had slavery not existed, if their entire existence was made possible because slavery had existed? Essentially, it is difficult to establish a counterfactual for determining how much is owed- though something is undoubtedly owed- to these groups, because their identity is rooted in oppression. For this reason, Wenar excludes these groups from his theory of reparations. Moreover, this condition establishes that remedying past injustices is not a sufficient condition for reparations. To this point, Wenar asks us to, "imagine... that only whites are in the worst-off group. Would you then require that these worst-off white citizens be made still worse off, so as to better the situation of better-off blacks? If not, then you do not believe that such reparative claims have significant force of their own, separate from their overlap with principles of just distribution."³⁷ In a similar vein, Wenar argues that the aggrieved groups must still be presently impacted by the

³⁷ Wenar, "Reparations for the Future."

past injustice in order to have a claim to reparations. This means that in the perfect hypothetical world where black Americans are just as well off as white Americans, they would no longer have a justified claim to reparations.

Secondly, Wenar also argues that, because beneficiaries of reparations should have a baseline for their status before harm was perpetuated, reparations should simply equal in value what was lost which does not require the construction of counterfactuals. Additionally, under the assumption that privileged classes must pay what is owed to aggrieved classes, reparations should never require that the former group loses more than what the latter group can gain from the transfer.³⁸ Thus, this solves one of the difficulties surrounding backward-looking theories of reparations in that it clarifies how much exactly should be afforded to aggrieved classes: either a value equal to what was lost, or an amount that does not impose higher costs than it affords benefits- whichever comes first. In this sense, Wenar's theory is "forward-looking" because it establishes a deadline for reparations programs. Reparations are, by nature, impermanent.

Wenar's theory, on its own, has several limitations which leave some questions unanswered regarding what a justified positive discrimination program should entail. First, because Wenar's definition of reparations is so narrow, his theory does not perfectly establish a moral justification for a positive discrimination program. While Wenar does assert that past injuries provide support for distributive claims, he does not clarify what is enough to morally justify such claims. What exactly does a positive discrimination program aim to achieve that justifies its implementation? Secondly, it does not entirely answer what should be the end goal of a positive discrimination program. Because his theory addresses individuals not born into oppressive conditions, the end goal of reparations is simply to restore in value what was lost. Its

³⁸ Ibid.

scope is limited to injuries inflicted during one's lifetime. A positive discrimination program in the United States, however, responds to several classes of individual born into unequal and oppressive conditions. How much is owed to these individuals? When has a positive discrimination program reached its goal? I will attempt to parse out answers to these questions in the following section.

As for Wenar's modified reparations theory, Thom Brooks makes a clarifying contribution. In "A Two-Tiered Reparations Theory: A Reply to Wenar," Brooks makes one major modification, which is that, because reparations aim to repair past injury, they are inevitably backward-looking. He asserts that, although a past injury is not a sufficient condition for justifying a program of reparations, it is a *necessary* condition. Thus, the infliction of a past harm is the necessary moral justification before the implementation of an affirmative action program is justified on its whole. After such a condition is reached, forward-looking concerns determine what establishes the *sufficient* conditions for reparations. These conditions, as Wenar asserts, include the requirements that the aggrieved group receiving reparations must be presently impacted by the past injury, and that their payment cannot cost more than it affords. In this way, Brooks asserts that Wenar's theory is actually a "two-tiered" reparations theory- one that brings joins together both backward-looking and forward-looking concerns to justify a program of reparations.³⁹

³⁹Thom Brooks, "A Two-Tiered Reparations Theory: A Reply to Wenar," *Journal of Social Philosophy* 39, no. 4 (2008), <https://doi.org/10.1111/j.1467-9833.2008.00449.x>, <https://onlinelibrary-wiley-com.yale.idm.oclc.org/doi/full/10.1111/j.1467-9833.2008.00449.x#citedby-section>.

d. Imagined principles for a positive discrimination program

First it is important to emphasize, that just because there is no baseline for establishing how much is owed to aggrieved classes in America, this does not mean that nothing can or should be afforded. While Wenar and Brooks' theory of reparations fall short in answering this, plenty of literature sheds light on what constitutes a moral justification for positive discrimination. In *When Affirmative Action Was White*, Ira Katznelson discusses this moral impetus which is reflected in President Lyndon B. Johnson's speech at Howard University during the Civil Rights era. President Johnson asserted, "We seek not just legal equity but human ability, not just equality as a right and theory but equality as a fact and equality as a result," and that "...equal opportunity is essential, but not enough."⁴⁰ Katznelson mentions that LBJ's justification for righting past wrongs did not rely on the Constitution or other American "liberal traditions of equal treatment", but rather in history and past discrimination itself.⁴¹ In discussing reparations, Ta-Nehasi Coates further affirms a moral impetus for distributive justice that is rooted in the past. He asserts that "[a]n America that asks what it owes its most vulnerable citizens is improved and humane. An America that looks away is ignoring not just the sins of the past but the sins of the present and the certain sins of the future."⁴² Thus, I contend that the simple reality of past wrongs inflicted upon certain classes of people constitutes moral justification for positive discrimination programs. It should not be necessary to quantify exactly what is owed before such moral justification can be established and, moreover, not quantifying what is owed does not mean that positive discrimination programs are aimless. An

⁴⁰ Ira Katznelson, *When Affirmative Action was White* (New York: W. W. Norton, 2005), 7, 10, <https://archive.org/details/whenaffirmativea00katz>.

⁴¹ Katznelson, *When Affirmative Action was White*, 10.

⁴²Coates, "The Case for Reparations."

obvious goal of these programs is to assist the aggrieved classes presently impacted by injuries inflicted upon them in the past.

In light of this and drawing from both the Framers' and Wenar and Brooks theories of racial equality, I propose four main principles establishing the conditions for a justified positive discrimination program and to what extent they allow for injuring non beneficiaries. These principles contend the following: *the program must aim to remedy past and present injustices, the program should avoid systemic discrimination against any particular group, the program should increase public welfare, and the program should aim to be impermanent.* These principles, together, should circumscribe a legally and ethically justified positive discrimination program that is neither arbitrary nor unreasonable.

The first principle requires that positive discrimination programs should aim to remedy past and present injustices. I draw from Wenar and Brooks' theory of reparations and affirm that a moral justification based in the perpetuation of past harm is a necessary condition for the implementation of positive discrimination programs. This principle guarantees that positive discrimination programs are never arbitrary, as remedying historical injustices is a clear ambition which aspires for the moral advancement of society. To clarify, injustice in this context can refer to either economic or social harm. Moreover, I reaffirm Wenar's contention that the potential beneficiaries of positive discrimination programs must be presently impacted by past harms in order to justify implementing the program. These conditions together ensure that government bodies can never implement positive discrimination programs with malicious intent.

The second principle requires that positive discrimination programs should not impose systemic discrimination against any particular group. Taking into account that positive discrimination is a program of discrimination, one cannot always guarantee that it will never

injure non-beneficiaries, as colorblind ideologists demand. While benefiting one group does not always necessitate injuring members in another group, it may sometimes. The goal of this principle is, thus, to minimize such injury in the instances that it is inevitable. This also draws from the Framers' theory of racial equality by acknowledging that while some instances of discrimination are allowable, they are never acceptable to the extent of unreasonableness or arbitrariness. There is a difference between a positive discrimination program that negatively impacts one individual, versus a program that systemically injures an entire group. For instance, many white Americans have petitioned against positive discrimination programs, claiming the programs were not benign because they violated their equal protection of the law. However, this does not mean that in each of these cases the program at hand was unreasonable. A positive discrimination program that systemically impacts a class of individuals, on the other hand, is unreasonable. For example, quota systems do not simply impact individuals, but they impact entire categories of people in a systemic manner and, for this reason, cannot suffice as justified positive discrimination programs. This principle holds even more weight consideration of certain intersections of race and class. Wenar and Brooks' theory discusses that benefiting well-off Black Americans should not come at the expense of injuring worse-off white Americans. In this context, only economic well-being is in consideration. As I have posited, however, injustice can be either social or economic, therefore, even economically privileged Black Americans can benefit from positive discrimination programs due to their socially disadvantaged status. Nonetheless, in order to prevent the development of less just distributive conditions, this second principle holds extra weight in consideration of less privileged non-beneficiaries. Under no circumstances should a positive discrimination program systemically injure any group, but especially not economically disadvantaged groups.

The third principle requires that a positive discrimination program should increase public welfare. This principle works together with the second principle to ensure that positive discrimination programs never unreasonably prevent the equal protection of rights. Wenar and Brooks' theory inspired this principle in claiming that reparations should never cost more from the aggressor than can be gained from the aggrieved. This can be conceptualized as a simple economic cost-benefit analysis which requires that a positive discrimination program increase to the entire size of the "pie" shared by everyone. While a positive discrimination program demanding full "payment" for what was lost due to past injustices would require an immeasurable transfer of resources, this principle places a cap on such a transfer. This cap guarantees that positive discrimination programs never transition from serving as a social benefit to a social cost.

Finally, the fourth principle requires that positive discrimination programs are impermanent. Ira Katznelson conceptualizes a useful example of a temporary affirmative action program that targets specific historical injustices and is implemented *until* its goals have been met.⁴³ However, how does one know when these goals have been met? Perhaps when the historical injustice in question has been resolved? One way to overcome this predicament is to conceptualize positive discrimination programs as a treatment rather than the cure to the perils of systemic inequality as caused by historical injustices. As a treatment, positive discrimination programs provide assistance for the groups most impacted by inequality. They are no longer needed when other structural societal changes render the need for such assistance obsolete.⁴⁴ In any case, once the present-day syndromes of historical injustices subside, positive discrimination

⁴³ Katznelson, *When Affirmative Action was White*.

⁴⁴ Unfortunately, a cure for inequality and the vestiges of American slavery is beyond the scope of this paper. Perhaps a cure to inequality requires a shift to a welfarist or socialist system, or a switch to a pluralist democracy.

programs should be abandoned. At this point of hypothetical equality, a conception of racial equality in the law as promoted by colorblind ideology is ultimately ideal, as the continuance of positive discrimination programs in these conditions might diminish public welfare. Thus, even though the amount owed to aggrieved groups is arguably unquantifiable and boundless in many cases, positive discrimination programs can still have an expiry which is important for its practical application.

Still, even with these four principles in mind, what fundamentally distinguishes positive discrimination programs from other forms of arbitrary or unreasonable discrimination (malicious discrimination, for instance)? *Korematsu vs. United States* is one case that provides insight. *Korematsu*, decided in 1944, was the first case to introduce the concept of a strict scrutiny test for evaluating the constitutionality of racially discriminatory legislation. Despite this strict scrutiny standard, however, the Court upheld President Roosevelt's executive order requiring Japanese Americans to relocate to internment camps. The *Korematsu* decision now faces severe criticism for upholding racism itself. In his dissent, Justice Murphy argued, "[t]he exclusion order necessarily must rely for its reasonableness upon the assumption that all persons of Japanese ancestry may have a dangerous tendency to commit sabotage and espionage and to aid our Japanese enemy in other ways... I dissent, therefore, from this legalization of racism."⁴⁵ It is interesting to note how Justice Murphy returns to this consideration of unreasonableness. He posits that the discrimination in question was unreasonable due to its basis in racial typecasting. The intent behind the piece of legislation relied on racist assumptions, rendering it unjustifiable. Although the Court did not align with Justice Murphy's opinion, his reasoning provides useful wisdom. For the purposes of this research, unreasonable programs can be conceptualized as

⁴⁵ *Korematsu v. United States*, 323 U.S. 214 (1944), quoted in Brest et al., *Processes of Constitutional Decisionmaking*.

programs that either go too far in barring the equal protection of the laws, or programs that are based in unreasonable intentions. What distinguishes positive discrimination programs from other forms of discrimination, after all, is that its function aligns perfectly with its intent which is to atone for historical injustices. So long as the sole aim of positive discrimination programs is limited to this purpose, positive discrimination programs can never rely on assumptions rendering them arbitrary or unreasonable.

III. Limitations Imposed by the Court: Colorblindness within Judicial Decision-making

Over the past several decades, the Supreme Court has grown increasingly intolerant of positive discrimination programs, especially as implemented by government actors. While I have established that the Constitution does not necessitate colorblindness, the Court, guided by conservative jurisprudence, has imposed narrow limitations on positive discrimination programs based on this presupposition. Several cases work in combination to establish the legal boundaries for such programs, including *Wygant v. Jackson Board of Education* (1986), *Adarand Constructors v. Peña* (1995), *City of Richmond v. Croson* (1989), *Grutter v. Bollinger* (2003), *Gratz v. Bollinger* (2003), and *Fisher v. University of Texas* (2016). These cases answer several major questions pertaining to the legal limitations of race in the law including how strictly such use must be scrutinized in court, what standards exist for establishing a compelling government interest in racially classifying citizens, how narrowly tailored positive discrimination programs must be to remain constitutional, how these requirements shift depending on which civil rights such programs impact, and which party holds the burden of proof for determining the constitutionality of the positive discrimination program.

The Court utilizes varying levels of scrutiny when evaluating the constitutionality of laws. When it comes to whether legislation withstands the Equal Protection Clause, the Court has decided that there are certain kinds of classifications that are inherently “suspect” such as national origin, religion, and race, and, moreover, that these classifications demand strict scrutiny.⁴⁶ Cases like *Loving v. Virginia*, in which the Court struck down a Virginian anti-miscegenation law, convey why the Court is inherently skeptical of racial classification in the law- it is not always clear, at face value, that such classification is benign in intent.⁴⁷ When it comes to racial classification of the kind discussed in this research- that is with the goal of remedying past injustices- the Court eventually decided that such classification must also withstand a strict scrutiny test. *Wygant v. Jackson Board of Education* is one of the first cases to implement a strict scrutiny evaluation of a positive discrimination program. This level of scrutiny requires the government to justify racial classification in the law by, first, having a compelling governmental interest for classifying in this way and, second, ensuring that the classifying program is narrowly tailored for achieving its goal. The Court does not necessarily define these requirements in explicit terms, but their decisions regarding various positive discrimination programs clarify their standards for meeting either requirement. In this context, a compelling interest can be understood as a necessary or indispensable impetus for the positive discrimination program. Narrow tailoring can be understood as restricting the extent of positive discrimination measures as much as possible to prevent the inhibition of anyone’s individual rights or their equal protection. For the purposes of this research, it is useful, in general, to consider a compelling interest as determining whether a program is arbitrary and narrow tailoring as determining whether a program is unreasonable.

⁴⁶ "Strict Scrutiny," https://www.law.cornell.edu/wex/strict_scrutiny.

⁴⁷ *Loving v. Virginia*, 388 U.S. 1 (1967).

a. *Strict scrutiny standard in the business context*

Wygant deals with a local board of education's agreement with a teachers' union to keep the proportion of minority teachers impacted by future layoffs consistent with the proportion of minority teachers already employed in the school district -- apart from the most senior teachers, who would be retained⁴⁸. This plan resulted in the laying off of a larger proportion of nonminority teachers which led to the lawsuit. In response to the compelling interest standard, defendants argued that such a program aimed to remedy past injurious discrimination against minority teachers who struggled to get hired in the Jackson School District. Defendants even cited the *Brown v. Board of Education* decision which declared that every "vestige of racial segregation and discrimination" in schools should be eliminated.⁴⁹ The Court decided, however, that due to the discordant obligations imposed by the 14th Amendment Equal Protection Clause regarding racial discrimination, there must be a higher standard of evidence for justifying a compelling government interest. Moreover, the Court decided that regardless of whether a compelling governmental interest had been established in this case, the positive discrimination program was not narrowly tailored enough to remain constitutional. The Court reasoned that a layoff policy, unlike a hiring policy, places the "entire burden of achieving racial equality on particular individuals..."⁵⁰ While a hiring policy might selectively discriminate in favor of minorities, the layoff program relied on discriminating *against* non-beneficiaries for pursuing its goal. In this case, moreover, a layoff policy was not necessary for achieving the school board's goal. Thus, the *Wygant* decision demonstrates the strict scrutiny framework for evaluating positive discrimination programs. First, a compelling governmental interest must be supported

⁴⁸ *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986).

⁴⁹ *Wygant*, 476 U.S. at 267.

⁵⁰ *Wygant*, 476 U.S. at 277.

by sufficient evidence of past racial injury. Second, a narrowly tailored program is limited by how much it burdens non-beneficiaries. For both standards, it is up to the Court to determine how much evidence is sufficient evidence and how much of a burden is too much of a burden. Several cases, soon to be discussed, convey where the Court has decided to draw these lines.

Adarand Constructors v. Pena confirms the necessity of a strict scrutiny test for evaluating racial classification in the law and confirms that such a test must be applied to all levels of government. When it comes to safeguarding citizens' rights against federal government intervention, the 5th Amendment, rather than the 14th Amendment, affords protection. However, the *Adarand* decision defers to the precedent set in *Buckley v. Valeo*, in which the Court read the same equal protection standards into the 5th Amendment as exists under the 14th Amendment. Thus, the Court upheld this precedent to assert that positive discrimination programs implemented by the federal government must still withstand a strict scrutiny test.⁵¹

Moreover, in *City of Richmond v. Croson*, the Supreme Court demonstrated the evidentiary standard necessary for establishing a compelling governmental interest for positive discrimination programs as well as the standard for how narrowly tailored such programs should be. This case dealt with a piece of local legislation requiring prime contractors hired under city construction contracts to devote 30% of the dollar value of subcontracts to minority-owned businesses. Regarding the establishment of a compelling interest for the program, the Court suggested that the low percentage of minority-owned businesses with contracts in the city's construction industry did not constitute sufficient evidence. The Court argued that this figure could have been the result of educational discrimination or some other economic challenge such as a lack of capital or a lack of education on bidding procedures. In other words, it is not within

⁵¹ *Adarand Constructors*, 515 U.S.

the government's power to use a positive discrimination program to address *de facto* inequities- however relevant they are to the program- if certain actors, in particular, did not actively perpetuate these inequities. Without establishing a compelling interest, the program in question becomes an unconstitutional instance of racial preference. In response to the defendants' appeal to *Fullilove v. Klutznick*, which upheld a congressional program setting aside 10% of federal construction grants for minority-owned businesses, the Court cited Congress's unique enforcement power enumerated in 14th Amendment. The Court reasoned that, unlike Congress, lower levels of government do not explicitly possess the power to enforce the equal protection as enumerated by the 14th Amendment, and, thus, have a higher standard for establishing a compelling government interest for positive discrimination programs.

In addition, the Court was unsatisfied with the defendants' claim that there was a nationwide history of discrimination against minorities within the construction industry. The Court requested a higher evidentiary standard for establishing a compelling interest which at least established a history of discrimination against minority contractors by the city's own construction industry. This suggests that establishing a compelling interest requires evidence of past discrimination that occurred at the same geographic level that the positive discrimination program operates within. The Court, furthermore, argued that the city government could not appeal to a generalized history of discrimination for determining "the precise scope of the injury it seeks to remedy [which would render] race-based decision-making essentially limitless in scope and duration."⁵² This request for a specific scope or end goal demands that establishing a compelling interest for a positive discrimination program (in the business context) requires evidence of past discrimination that can conceivably be reversed. Thus, sufficient evidence for

⁵² *City of Richmond v. J. A. Croson Company*, 488 U.S. 469 (1989). at 470.

constituting a compelling interest, in this context, must include instances of industry-specific discrimination perpetuated by particular actors within the relevant industry.

In addition, the Court decided in *Croson* that the piece of legislation in question, which established a quota for contracts granted to minority-owned businesses, was not narrowly tailored enough to withstand strict scrutiny. The contracting plan afforded absolute preference—that is, a setting aside of contracts—for minorities. Thus, it placed too high a burden on non-beneficiaries by entirely barring this group from access to a considerable share of a limited amount of contracts. Moreover, the *Croson* decision concludes that the program was not narrowly tailored because the city government failed to consider other plausible, race-neutral means for increasing access to city contracts. The Court reasoned that the government could have implemented a race-neutral policy without any compelling interest requirement which could have benefitted, not only minority-owned businesses, but all contractors.⁵³

b. Strict scrutiny standard in the higher education context

The remainder of cases discussed in this section are particularly notable for demonstrating the unique standards the Court has instituted for positive discrimination programs within the context of higher education.

Grutter v. Bollinger deals with the University of Michigan Law school's admissions policy, which aimed to increase student body diversity. The program included an evaluation of student's academic performance in addition to other relevant experiences and skills. In addition, The University reviewed applications holistically and applications typically included letters of recommendation, personal essays, undergraduate GPAs, and LSAT scores.⁵⁴ In weighing

⁵³ *Croson*, 488. U.S.

⁵⁴ *Grutter v. Bollinger*, 539 U.S. 306 (2003).

diversity in admissions, the University did not only consider race or ethnicity, but rather, gave “substantial weight” to any type of diverse factor which contributed to a student’s application.⁵⁵ With diversity in mind, the University took special interest in Black, Hispanic, and Native-American students who were likely to be underrepresented in the student body population, and aimed to establish a “critical mass” of these underrepresented populations. The Court, as with the previous cases, subjected this program to a strict scrutiny test.

In order to determine whether the University established a justified compelling interest, the Court, first, upheld Justice Powell’s opinion in *Regents of the University of California v. Bakke*, in which he affirmed that the goal of increasing student body diversity constitutes a compelling interest for considering race in admissions. Powell distinguished between diversity, which ideally takes several different kinds of characteristics and experiences into consideration, and racial balancing which demands the maintenance of a specific percentage of various races or ethnicities within a student body. The Court in *Grutter* decided to endorse Powell’s opinion although it is unclear whether it constitutes binding precedent. A compelling interest for considering race in admissions or establishing a “critical mass” of minority students is, thus, acceptable when it aims to pursue the benefits of multifaceted diversity. These diversity benefits are ideally central to the goals of the university, whether they be to facilitate cross-racial relations between students, to better prepare students for a work force which increasingly values exposure to diverse people and ideas, or to enable students of all races to access a pathway leading to the nation’s most important leadership positions. Thus, the compelling interest standard for universities is unique in that diversity itself is relevant enough to the goals institutions of higher education to constitute such an interest.

⁵⁵ *Grutter*, 539 U.S. at 306.

When it comes to what constitutes a narrowly tailored program, the Court decided that the University of Michigan Law School's program did meet this standard for several reasons, all of which ensured that non-minorities were not unduly burdened by the program. Unlike the program considered in *Crosby* the admissions scheme was not a quota system, which would have rendered it unconstitutional. The University also considered each applicant as individuals and evaluated them under the same standards. As the Court emphasized, "there [was] no policy, either *de jure* or *de facto*, of automatic acceptance or rejection based on any single "soft" variable."⁵⁶ Thus, race was never a determinative factor, meaning that the University never weighed race heavily enough to effectively bar non-minorities from a spot in the admitted class.

The Court, moreover, affirmed that the University considered race-neutral means for increasing student body diversity, but that the existence of a race-neutral alternative did not negate compliance with the narrow tailoring standard. This was especially decided to be the case when race-neutral alternatives, such as lowering the LSAT score requirements for admissions, would require the University to sacrifice certain standards of excellence. Thus, the Court decided, here, that narrow tailoring can be defined in relation to the other essential goals of the institution impacted by such tailoring.

Lastly, the Court maintained that universities, ideally, should limit the duration of race-conscious admissions programs and aim to replace these programs with race-neutral alternatives once their goals are reached. The Court estimated that the University of Michigan Law School's race-conscious program, for instance, could conceivably be replaced in 25 years.⁵⁷

Gratz v. Bollinger, moreover, does a similar job in outlining the unique compelling interest standards for higher education institutions. In contrast, however, it exemplifies an

⁵⁶ *Grutter*, 539 U.S. at 309.

⁵⁷ *Grutter*, 539 U.S.

admissions program that did not satisfy the narrow tailoring standard. The Office of Undergraduate Admissions for the University of Michigan considered several factors in its admissions process including “high school grades, standardized test scores, high school quality, curriculum strength, geography, alumni relationships, leadership, and race.”⁵⁸ When it came to increasing diversity, the University aimed to give special consideration to underrepresented minorities including Black Americans, Hispanics, and Native Americans. Therefore, out of a possible 100 points that could be awarded to any applicant, the program awarded 20 points for an applicant’s minority status alone. This resulted in the acceptance of all qualified applicants of Black, Hispanic, or Native origin. Essentially, race and ethnicity were the only diversity factors that the office admissions significantly weighed in the admissions process⁵⁹.

As had been established in *Grutter*, the Court affirmed that diversity constitutes a compelling interest for considering race in the admissions process. The program in question, however, did not pass the narrow tailoring standard, because it placed an undue burden on non-minorities who did not benefit from the program. Because the program admitted all minimally qualified minority applicants, it was, *de facto* a quota system, which is unconstitutional. As decided in *Bakke* and affirmed in *Grutter*, it is acceptable to use race or ethnicity as a “plus” in considering an applicant’s acceptance.⁶⁰ The key lies in whether each applicant is considered as an individual and on generally equal footing. The admissions program, in this case, crossed a line in the extent to which it discriminated applicants. If it were not for the point system, the University would have admitted the plaintiff, because he was qualified in all aspects unrelated to his race: the plaintiff’s race directly hindered his consideration as an individual during the

⁵⁸ *Gratz v. Bollinger*, 539 U.S. 244 (2003). at 244.

⁵⁹ *Gratz*, 539 U.S.

⁶⁰ *Gratz*, 539 U.S. at 256.

application process. The Court asserted that race cannot be so decisive a factor in admissions, which rendered the University's point system- or all other programs akin to quota systems- unable to satisfy a narrow tailoring standard.

Finally, *Fisher v. University of Texas*, decided in 2016, is one of the most recent cases utilizing colorblind rhetoric. In *Fisher*, the Court applied a strict scrutiny test to the University of Texas's admissions program which considered race and decided in its favor. In doing so, the Court established controlling principles, initially announced *Fisher I* and reaffirmed in *Fisher II*, regarding the constitutionality of race-conscious admissions programs. First, a race-conscious admissions program must withstand a strict scrutiny test. Second, the Court is owed partial judicial deference for determining whether diversity constitutes a compelling interest for the consideration of race in admissions. This means that, while a University possesses the expertise to testify on the educational benefits of a diverse student body, the Court can determine how diversity is defined in this context. For instance, it has been established that diversity must be multi-faceted and should never involve racial balancing. Third, universities hold the burden for proving whether their race-conscious admissions program is narrowly tailored, and no deference is given to the University on this front.⁶¹ A university must, thus, prove that no reasonable race-neutral approaches could have sufficed for attaining its goals, of course admitting for the exception set in *Grutter*, that universities do not have to sacrifice “reputation for excellence” for the sake of race neutrality.⁶² Therefore, not every conceivable race-neutral program must have been attempted, but a university implementing a race-conscious admissions program should have put reasonable consideration into such alternatives. Together, these principles show that the burden of proof for establishing the constitutionality of positive discrimination programs falls

⁶¹ *Fisher v. University of Texas at Austin et al.*, 579 U.S. 1 (2016).

⁶² *Fisher*, 579 U.S. at 7.

upon the implementing institution. Moreover, this decision shows that the Court, generally, does not accept the constitutionality of race-conscious admissions programs if the implementing university is not equipped with the specific, enumerated goals its program aims to achieve and the knowledge of various ways such goals could be reached without considering race.

The cases reviewed in this section answer several essential questions regarding where the Court draws the line for acceptable versus unacceptable positive discrimination programs implemented by the government. *Wygant* and *Aderand* confirm that the Court must evaluate any positive discrimination program considering race at *all* levels of government against a strict scrutiny test. *Croson* elaborates on the demands of strict scrutiny and sheds light on what constitutes a compelling interest or narrow tailoring. The Court has decided that a compelling interest aiming to remedy past discrimination necessitates a considerably high evidentiary standard such that government actors are often entirely incapable of implementing positive discrimination programs. Evidence must demonstrate instances of past racial injury perpetuated at a narrow enough geographic level and, moreover, specific actors must have perpetuated such injury in a *de jure* manner and within the relevant industry. Furthermore, the Court decided that a narrowly tailored program must treat citizens as individuals rather than reducing them categories and, consequently, can never involve a quota system. In addition, positive discrimination programs are justifiably narrowly tailored only after race-neutral options are first considered for achieving the relevant goals.

Grutter and *Gratz* clarify how the compelling interest and narrow tailoring standards shift uniquely within the context of higher education. In this context, the Court decided that diversity itself constitutes a compelling interest for a race-conscious admissions program if diversity is central to the goals of the university in question. Moreover, the Court affirmed that universities

need not attempt every race-neutral alternative to satisfy narrow tailoring, especially if doing so risks a university's interest in maintaining a high standard of academic excellence.

IV. Case Studies and Analysis: Shifting the Practical Boundaries

This research imagines four principles that outline the theoretical conditions for positive discrimination programs. At this point, it is necessary to test whether these principles can be used to delineate the more practical conditions of justified positive discrimination programs. While the Court has drawn the legal boundaries of a constitutional positive discrimination program largely based on the assumption that the Constitution is colorblind, these boundaries can be shifted and tested against the new set of imagined principles. The following case studies exemplify positive discrimination programs that vary in how well they conform to the limitations imposed by the Court. Weighing these programs against the imagined theoretical principles will serve to clarify which legal limitations imposed by the Court should be shifted and by how much.

a. Emergency Relief for Farmers of Color Act

The Emergency Relief for Farmers of Color Act and its ensuing bill serve as a useful case study for exemplifying the “ideal” positive discrimination program. This case study neither conflicts with the imagined theoretical principles for justifying positive discrimination programs nor with the legal limitations imposed by Supreme Court decision-making. The Emergency Relief for Farmers of Color Act partially provided impetus for a 2021 \$1.9 trillion federal relief bill. This bill sets aside \$10.4 billion to support farming from which \$5 million is devoted specifically to assist disadvantaged farmers. The Farm Bureau, furthermore, estimates that about

a quarter of disadvantaged farmers are black. This program primarily constitutes debt relief, but also provides grants, education and training, as well as land acquisition support⁶³. Bolstering these efforts is the formation of a racial equity commission in the USDA to mitigate systemic racism. In addition, the bill promises funding for HBCUs and land grant universities to be used towards research and education⁶⁴. Like most positive discrimination programs, there is historical impetus for this focus on minority beneficiaries. This particular program responds to historical discrimination perpetuated against Black farmers: over the past 100 years, this group has lost over 12 million acres of farmland and about 90% of their farmland since 1910. These losses were largely the product of systemic racism including government policies with disparate impact in combination with anti-Black business and social practices in the economy. For instance, the Federal Homestead Acts exclusively and arbitrarily subsidized land for white farmers, leaving Black farmers entirely without assistance. Even programs as recent as Trump's \$28 billion bailout disparately supported white farmers over Black farmers⁶⁵.

As mentioned, this case study both satisfies the set of imagined principles for positive discrimination programs and abides by the legal limitations imposed by the Court. With regard to the set of imagined principles, the relief bill, first, establishes moral justification in addressing instances of past discrimination against Black farmers which still has present-day impact. Moreover, the program does not systemically discriminate against non-beneficiaries, which renders it benign in both intent and in effect. In addition, the program increases public welfare because it benefits beneficiaries without costing anything from non-beneficiaries. Lastly, the program is impermanent in that it affords a finite provision of resources to beneficiaries.

⁶³ Reiley, "Relief Bill is Most Significant Legislation for Black Farmers Since Civil Rights Act, Experts Say."

⁶⁴ *A Bill To require the Secretary of Agriculture to provide assistance for socially disadvantaged farmers and ranchers and socially disadvantaged groups, and for other purposes.* , 117th Congress, 1st Session, S. 278. (2021).

⁶⁵ Reiley, "Relief Bill is Most Significant Legislation for Black Farmers Since Civil Rights Act, Experts Say."

In measuring the program against the limitations imposed by judicial decision-making it is useful to note that this relief bill for farmers is benign. The Supreme Court generally understands benign in reference to the intent of positive discrimination programs. However, this relief bill is benign not only in intent, but in effect, because it does not “injure” nonbeneficiaries (in this case, white farmers). Therefore, I argue that, even if the program withstands a strict scrutiny test, a strict scrutiny test is not warranted for positive discrimination programs with benign effect. As mentioned, the Supreme Court established in *Adarand Constructors v. Peña* that a strict scrutiny test is required for evaluating the constitutionality federal policies that involve racial categorization. This test demands that the implementing institution must provide a compelling government interest for the positive discrimination program and demonstrate that the program is narrowly tailored enough to minimize damage to nonbeneficiaries⁶⁶. However, because this relief bill for farmers is benign in effect, it does not inflict “damage” on nonbeneficiaries at all. Inasmuch as the program unreasonably restricts the equal protection of the laws, it is useful to again consider how it measures against the second imagined principle. This program does not discriminate against non-beneficiaries on either an individual or systemic basis in that it still grants all American farmers shared access to the \$10.4 billion set-aside. Within other forms of positive discrimination, by contrast, affording special rights to minorities may entirely bar access to non-beneficiaries from more discrete benefits such as contracts or university admissions slots.

Justice Murphy’s dissent in *City of Richmond v. Croson* reflects the viewpoints of a minority faction of justices, which is that positive discrimination programs with benign intent only warrant an intermediate scrutiny test rather than a strict scrutiny test.⁶⁷ An intermediate

⁶⁶ *Adarand Constructors*, 515 U.S.

⁶⁷ Brest et al., *Processes of Constitutional Decisionmaking*.

scrutiny test requires that a piece of legislation under question must, first, pursue an important government interest and, second, achieve such through means that are closely related to this interest.⁶⁸ Murphy's reasoning in *Croson* suggests that establishing an important government interest within an intermediate scrutiny test does not demand so high an evidentiary standard as does the strict scrutiny test. In utilizing the strict scrutiny test, the majority opinion required institutions to provide evidence of industry-specific discrimination perpetuated at the relevant geographic level in order to establish a compelling interest. Murphy, on the other hand, argued that present-day inequities within the relevant industry were enough to indicate the existence of some form of past discrimination at the public or private level. He did not, however, clarify whether this past discrimination must have been perpetuated within the relevant industry.⁶⁹ Thus, under this more relaxed evidentiary standard, institutions must simply provide evidence of some form of past discrimination- public or private- which resulted in present-day inequities.

For positive discrimination programs with, not only benign intent, but benign effect, this lower evidentiary standard seems reasonable. First, this standard is entirely consistent with the first imagined theoretical principle requiring that positive discrimination programs must aim to remedy past injustices with present-day impact. Moreover, inasmuch as positive discrimination programs with benign effect do not discriminate against non-beneficiaries, placing such a high evidentiary burden of proof on institutions seeking to affirmatively assist minorities seems arbitrary. It is not certain, for instance, that the Emergency Farmers Relief Act could withstand the evidentiary standard of a strict scrutiny test, even though the program does not discriminate

⁶⁸"Intermediate Scrutiny,"

https://www.law.cornell.edu/wex/intermediate_scrutiny#:~:text=Intermediate%20scrutiny%20is%20a%20test,to%20determine%20a%20statute's%20constitutionality.&text=To%20pass%20intermediate%20scrutiny%2C%20the,substantially%20related%20to%20that%20interest.

⁶⁹ *Croson*, 488 U.S. See also Brest et al., *Processes of Constitutional Decisionmaking*.

against non-beneficiaries. Thus, this research supports a looser evidentiary standard for establishing a compelling interest.

It also seems reasonable that positive discrimination programs with benign effect should not be subject to a narrow tailoring requirement, as positive discrimination programs that directly assist minorities without injuring non-minorities are already sufficiently narrowly tailored. Therefore, the remaining concern, as demanded by an intermediate scrutiny test, lies in whether the program is related enough to its goals to be effective.

When measured against the set of imagined theoretical principles, programs like the Emergency Relief for Farmers of Color Act demonstrate that a strict scrutiny test is not necessary for positive discrimination programs that are benign in effect. Enforcing such a high standard of scrutiny in these cases may discourage government bodies from implementing positive discrimination programs which would only arbitrarily serve to prevent the transfer of much needed resources to minorities.

b. Small Business Act, “8(a) program”

Section 8(a) of the Small Business Act (SBA) is another positive discrimination program currently in effect which provides technical support, training, and contracting provisions to small businesses. In contrast to the preceding case study, the 8(a) program is not benign in effect and has potential to “injure” nonbeneficiaries. Eligibility is limited to small businesses owned by economically and socially disadvantaged citizens. The SBA considers socially disadvantaged groups to include members of minority racial and ethnic groups, however, for the purposes of this program, non-minorities can also petition for eligibility if they can prove they are socially

disadvantaged.⁷⁰ The program specifically defines socially disadvantaged individuals as those who have been “subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities.”⁷¹ Moreover, economically disadvantaged individuals are defined as “socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged.”⁷² For the purposes of this program, this is limited to individuals with a net worth of \$750,000 or less.

The provision of set-aside contracting is the most significant aspect of the 8(a) program for the purposes of evaluating the limits of a positive discrimination program. Only certain subcontractors, including 8(a)-eligible firms, are eligible for certain subcontracts awarded by contractors employed by federal agencies. These subcontracts are usually subsidized by the federal government to incentivize contractors to subcontract with minority-owned businesses and increase their participation in the economy. This is encompassed within the larger goal that 8(a) firms receive 5% of all federal dollars awarded to small businesses eligible for federal contracts at a government-wide level.

Unlike the relief bill for farmers, which is accessible to farmers of all races, federal contracting regulations under the 8(a) program has the potential to entirely bar small construction business owners from acquiring federal subcontracts. Nonetheless, the program meets all the demands of the imagined theoretical principles, which demonstrates that, under the right circumstances, positive discrimination programs can justifiably injure nonbeneficiaries. First, in

⁷⁰ Congressional Research Service, *SBA's "8(a)": Program: Overview, History, and Current Issues* (Congressional Research Service, 2020), <https://fas.org/sgp/crs/misc/R44844.pdf>.

⁷¹ Service, *SBA's "8(a)": Program: Overview, History, and Current Issues*, 5.

⁷² Service, *SBA's "8(a)": Program: Overview, History, and Current Issues*, 7.

targeting economically or socially disadvantaged business owners, the program addresses the present-day impacts of past economic discrimination. Moreover, the program does not systemically discriminate against non-beneficiaries, as non-minority business owners compete alongside disadvantaged business owners for subcontracts. Meanwhile, contracting firms simply perform their own cost-benefit analysis for deciding whether to grant a subsidized subcontract to a disadvantaged business, or a regular contract. Thus, race is not a determinative factor in the granting of contracts and small businesses are never solely denied contracts on account of their race. In addition, this program also, arguably, increases public welfare. For the sake of simplicity, the economic value of contracts awarded to beneficiaries can be thought of as equaling the lost potential value of contracts not awarded to non-beneficiaries. However, while there is very little social cost to already privileged businesses who cannot acquire contracts, there is a significant social benefit to disadvantaged businesses who are awarded contracts and, as a result, exposed to new social opportunities. Finally, the 8(a) program is impermanent in that limits program eligibility to nine years maximum for any participating business.⁷³

As for how the 8(a) program measures against the limitations established by judicial decision-making, *Adarand Constructors v. Pena* again provides guidance. *Adarand* directly dealt with the 8(a) program and evaluated it using a strict scrutiny test⁷⁴. A Washington D.C. federal district court case, *Dynatlastic Corp. v. U.S. Department of Defense*, moreover, evaluated the constitutionality of set-aside contracts administered in the simulation and training industry, in particular. In the latest memorandum opinion decided in this latter case, the court found that there is, at large, a compelling government interest for the set-aside contracts distributed under the 8(a) program as a whole. Congress has performed several studies establishing that minority

⁷³ Service, *SBA's "8(a)": Program: Overview, History, and Current Issues*.

⁷⁴ *Adarand Constructors*, 515 U.S.

businesses have faced barriers in procuring federal contracts due to past discrimination, that there are barriers to minority business development which increase difficulty for procuring contracts due to discrimination, and that even qualified minority-owned businesses are less frequently awarded contracts. The court, however, decided that when it came to the 8(a) program *as applied* (set-aside contracts distributed within the simulation and training industry) the government had not established a compelling government interest for remedying past discrimination, because it lacked specific evidence of discrimination in this industry. This decision was made using *City of Richmond v. Croson* as precedent⁷⁵.

I first posit that this program should not be subject to such a high evidentiary standard for establishing a compelling government interest as required by the strict scrutiny test. This should be the case, even if the program has the potential to injure non-beneficiaries. The Supreme Court, in general, has weighed the requirements of a compelling interest standard against how narrowly tailored a given positive discrimination program is. For instance, in *Croson*, the program in question required local companies to reserve 30% of the value subcontracts to minority-owned businesses, which was proclaimed to be unconstitutional⁷⁶. The Supreme Court decided in many other cases that quotas and reserving seats on a racial basis are decisively unconstitutional, because they are not narrowly tailored enough so as not to unreasonably injure non-minorities. Thus, it makes sense that the less narrowly tailored a program is, the higher the standard for establishing a compelling government interest must be. In the case of the 8(a) program, however, the concept of disadvantage is flexible enough to prevent it from systemically discriminating against non-beneficiaries, as required by the second imagined principle. For example, non-minorities can petition to prove their own social disadvantage for establishing eligibility for the

⁷⁵ *Dynalantic Corp. v. U.S. Dep't of Defense*, 885 F. Supp. 2d 237 (D.D.C. 2012).

⁷⁶ *Croson*, 488 U.S.

program. Moreover, they can refute the eligibility of minority-owned businesses and push against this conceptualization of social advantage defined by race. In addition, a firm's eligibility for the 8(a) program requires proof of both economic and social disadvantage, meaning that the program resists assisting economically privileged minority-owned businesses at the expense of excluding underprivileged businesses that do not qualify. Unlike a quota system, this program allows business owners of all races to compete alongside each other. Contractors evaluate sub-contract applicants on individual bases and are never incentivized to bar applicants on the basis of race alone, as prohibited in *Grutter*. For these reasons, the SBA 8(a) program is reasonably narrow enough to relieve it of such a high evidentiary standard for establishing a compelling interest. This, again, would ensure that establishing such an interest is not too burdensome for government bodies implementing positive discrimination programs.

Secondly, I argue that government bodies need not consider race-neutral alternatives for meeting the narrow tailoring standard as is required by the *Adarand*, *Croson*, *Grutter*, and *Gratz* decisions amongst others. The first imagined principle for positive discrimination programs requires that such programs aim to remedy past injustices with present-day effects. Although race-neutral proxies guarantee against injuring non-beneficiaries, such proxies can only go so far in constructing focused and targeted redress for the injustices uniquely perpetuated against racial minorities. So, in order to effectively pursue its central goal, positive discrimination programs may necessitate injuring non-beneficiaries. However, such efficacy is worth pursuing so long as such injury remains limited and reasonable. To this end, the second and third imagined principles together ensure that positive discrimination programs never unreasonably prevent the equal protection of rights for non-beneficiaries. Positive discrimination programs will never

systemically discriminate against non-beneficiaries, and they will never cost more from non-beneficiaries than what can be gained from beneficiaries.

c. Seattle School District No. 1 racial “tiebreaker” scheme

This case study to exemplifies a positive discrimination program in the educational context that both fails to meet the theoretical principles established in this paper and the standards imposed by the Supreme Court. Because the Court decided that this racial “tiebreaker” scheme and all positive discrimination programs of its sort are unconstitutional, it is no longer legally in effect. Nonetheless, as a relatively recent case study, it is still worth studying for delineating the appropriate boundaries for positive discrimination programs today and in the coming years.

In 1998, the Seattle School District No. 1 began to utilize race in its school assignment plans and classified students as either white or nonwhite. The school district, moreover, required its ten public schools to match a predetermined range of white to nonwhite students within their respective student bodies. The Seattle School District No. 1 school assignment program allowed rising ninth graders to rank any number of the district’s high schools according to their preference. Naturally, since some schools were more sought after than others, the most highly ranked schools among rising ninth graders often became oversubscribed. In this scenario, the district utilized multiple “tiebreakers” to determine which students could take the remaining open spots. These tiebreakers, in order of importance, included whether a student had a sibling at the oversubscribed school, the race of the student alongside the racial composition of the oversubscribed school, and the geographic proximity of the student’s place of residence to the oversubscribed school. As for the racial tiebreaker, the school district recognized that the overall

racial composition of the school district comprised of 41% white students and 59% nonwhite students.⁷⁷ Thus, if an oversubscribed school's racial composition did not lie within 10 percentage points of these figures, a student's race would count as an "integration positive".⁷⁸ This meant that if a student could bring a school's composition closer to the predetermined range, regardless of whether they were white or nonwhite, they would be given preference in admissions.

This tiebreaker scheme fails to meet the first imagined principle for positive discrimination programs because its aim was to achieve a particular racial balance within its schools rather than to target historical injustices. The program also failed to satisfy the second principle which requires that positive discrimination programs do not systemically discriminate against any group. Requiring the public schools to maintain a particular racial balance within their student bodies- which was essentially a quota system- sequestered entire shares of the schools' admissions slots from entire classes of individuals. Rather than assigning students on an individual bases, the program discriminated against everyone in a systemic manner. Moreover, because this program does not satisfy the first two principles, it is difficult to evaluate whether it does the third principle. The cost-benefit analysis is best performed under the assumption that benefits flow expressly to beneficiaries of the program, which is not always the case within a racial balancing system. Similarly, it is difficult to evaluate whether this program satisfies the fourth theoretical principle, as there is little evidence for whether the Seattle School District No. 1 projected a date to terminate or re-evaluate the program.

As for how this tiebreaker scheme measures against Court-imposed limitations, *Parents Involved v. Seattle* directly dealt with this program. In this case, the Court decided against the

⁷⁷ *Parents Involved*, 551 U.S.

⁷⁸ *Ibid.* at 712.

program's constitutionality, first, because the Seattle School District No. 1 did not establish a justifiable compelling interest for using race in its school assignment program. The Court outlined two compelling interests that the school district potentially could have had for implementing its tiebreaker scheme: first, to remedy past discrimination and, second to promote diversity among its schools. Regarding the first potential interest, the Seattle school district hoped the school assignment program would soften the impact of the city's racially segregated housing demographics on school demographics. In the 2000-2001 school year, most of the oversubscribed schools (oversubscribed meaning that most students ranked these schools as their top choice for admissions) were in the northern part of town which housed predominantly white residents. In addition, white students were overrepresented at these schools during the previous school year. However, the Court decided that because there was no established history of *de jure* school segregation in Seattle, the school district did not have standing to establish this type of compelling interest.⁷⁹ This, again, reaffirms the Court's viewpoint that, in order to implement programs aiming to remedy instances of past discrimination, evidence of such discrimination must be sufficiently narrow in scope and maliciously perpetuated by the relevant actors. For this reason, the government, as determined by the Court, is not entitled to address instances of *de facto* school segregation.

As for the second potential compelling interest, the Court affirmed that an interest in pursuing the benefits of student diversity- to expose students to new cultures and ideas or to facilitate cross-racial understanding- is unique to the context of higher education. The Court decided that such an interest does not expand to admissions for public primary and secondary schools with regards to student assignment. Recognizing that the tiebreaker scheme did not

⁷⁹ *Parents Involved*, 551 U.S.

consider students as individuals and weighed race so heavily, the Court decided that it was not a promotion of multifaceted diversity.

In considering whether the tiebreaker scheme withstood the narrow tailoring test, the Court decided against the constitutionality of the program. First, the program made race a determinative factor in admissions, such that white and nonwhite students vying for the same spot in oversubscribed schools were not considered on equal footing. Once race was considered, it was the decisive factor in a student's admission. Secondly, the Court reasoned that because the Seattle School District No. 1 had not provided evidence that it considered reasonable race-neutral alternatives for establishing its goals, it failed to narrowly tailor its school assignment program for achieving its goals.⁸⁰

According to the imagined theoretical principles outlined earlier in this paper, the tiebreaker scheme in the Seattle school district does not necessarily fail because there was not enough evidence to constitute a compelling interest. Rather, I contend that the program fails because pursuing diversity or racial balancing itself should not constitute a compelling interest for such a program. Thus, I agree in part and disagree in part with the Court's reasoning.

First, for the aforementioned reasons, I dissent that the evidentiary standard for establishing a compelling interest should be so burdensome, especially if the program in question is narrowly tailored. This tiebreaker scheme was not narrowly tailored, which renders it unjustifiable. However, the *Parents* decision revealed that government bodies, in any case, are not constitutionally entitled to utilize race to remedy *de facto* school segregation in the absence of specific evidence of *de jure* segregation. This limitation is inconsistent with the first imagined principle this research establishes. In making this decision, the Court assumed *a priori* that

⁸⁰ Ibid.

because school segregation was largely the result of residential segregation, it was beyond the scope of targeted government intervention. In the Seattle school district, however, a history of residential segregation resulted in the overrepresentation of white students at various oversubscribed or more sought-after schools. Residential segregation, at the national scale, is the result of targeted discrimination by the government exemplified by racist housing policy and the discriminatory implementation of the GI bill, for instance.⁸¹ Therefore, this is enough to constitute a past injustice (residential discrimination) with present-day impact (school segregation), as required by the first imagined principle. The institution implementing a positive discrimination program need not provide evidence of past injuries inflicted on its own or by a narrow set of relevant actors in order to establish a compelling interest.

Second, I agree with the Court's decision that diversity or racial balancing cannot, themselves, constitute a compelling interest for a positive discrimination program. The Court does not apply this restriction in the context of higher education; however, I argue that this should always be the case. While this may seem counterproductive, establishing a compelling interest pursuant of diversity is insufficient according to the first imagined principle for positive discrimination programs. To clarify why this is the case, consider the scenario in which a wealthy white student is admitted into a high school over an underprivileged student of color because they help the school reach a particular racial balance mirroring that of the overall school district. One could hardly argue that this is a just redistribution of resources. Pursuing diversity itself can often have unfocused or even counterproductive effects and can fail to address the particular needs of communities that most benefit from positive discrimination programs. As Ta-Nehasi Coates mentions in "A Case for Reparations", the goals for affirmative action even in the

⁸¹ Katznelson, *When Affirmative Action was White*.

context of higher education are not precise and do not directly address the unique issues pertaining to Black Americans that the government is ethically obliged to acknowledge.⁸²

Positive discrimination programs that aim to remedy past and present injustices are also protected against relying on unreasonable assumptions based in racial stigmatization. Diversity programs, of course, do not always racially stigmatize; however, there is no guarantee they will not. Colorblind ideologists raise this concern in contending that there is no way to ensure that racial categorization in the law is benign (in intent). Although Clarence Thomas opposes any instrumentalization of race in the law, his dissent in *Grutter* provides a useful contribution regarding the shortfalls of positioning diversity as a compelling interest. He argues that it becomes increasingly absurd to apply such an interest to non-educational contexts, because doing so suggests that a “critical mass” of minorities can always better contribute to central goals of various institutions than can non-minorities. It is this idea that a critical mass of minorities can best promote a better workforce or even a better citizenry that is inherently incompatible with the ideas behind the 14th Amendment. Although this argument does not address the many potential benefits of diversity, it demonstrates that using diversity as a compelling interest can be too unfocused. There is, after all, a possibility that broad-based efforts towards diversity could also compel institutions to favor non-minorities, or any quality entirely unrelated to the experience of Black Americans or other minority groups. The Court, certainly, would then have to reevaluate the constitutionality of this development. When it comes to fulfilling its ethical goals under the 14th Amendment Equal Protection clause, perhaps the government should focus on remedying past injustices, which can simultaneously have the effect of increasing diversity. Not only would

⁸² Coates, "The Case for Reparations."

this shift efforts towards more impactfully supporting various aggrieved groups, but this would also reduce room for error in terms of delving into constitutionally questionable territory.

As for the narrow tailoring requirement, the Court's decision is consistent with the requirements of the second imagined principle requiring that positive discrimination programs do not systemically discriminate against any group. For the aforementioned reasons, however, this is not due to the fact that the Seattle school district did not first consider race-neutral alternatives. Rather, because the district required schools to match a pre-determined racial balance within its student bodies, the school assignment program could not occur on a wholistic manner. Students were not assigned to schools on an individual basis, but rather, their race was often sole factor barring them from access to a spot in an oversubscribed school. Because this could impact students of any race, this aspect of the program essentially discriminated against students of all races on a systemic basis.

V. Conclusion: Resisting the Status Quo and Keeping the Conversation Alive

Drawing from the theoretical insights of the Fourteenth Amendment Framers and Leif Wenar and Thom Brook's modified theory for reparations, this research imagines four principles outlining the theoretical conditions for any justified positive discrimination program. These principles establish that positive discrimination programs must aim to remedy a past injustice with present impact, they should avoid systemic discrimination against any group, they should increase public welfare, and they should aspire to be impermanent. Moreover, establishing the practical conditions for a justified positive discrimination program, first, demands evaluating what boundaries the Court has imposed over such programs, then utilizing a case study analysis to determine which of these boundaries can be shifted.

The case study analysis demonstrates that a new set of theoretical conditions for positive discrimination programs, in fact, can be used to parse out the practical boundaries of such programs on grounds that support their existence. In any case, these limitations ensure that if injuring non-beneficiaries is necessary, such injury is narrowly tailored and never unreasonable. In analyzing the three aforementioned cases, I find that the set of imagined principles support a lower standard of scrutiny for positive discrimination programs with benign effect, a looser evidentiary requirement (but otherwise more focused standard) for establishing a compelling interest, and a looser standard for achieving narrow tailoring.

To better understand why this is the case, it is helpful to re-conceptualize positive discrimination as a treatment rather than a cure to the perils of systemic inequality. Consider, for example, the Seattle District case study: so long as residential segregation negatively impacted the minority students in the school district, the school district was justified in utilizing school assignment policy to ameliorate the situation of these negatively impacted students. Such policy need not act as a direct “cure” to past *de jure* segregation implemented by the same school district. In light of this, a reevaluation of Court-imposed boundaries for positive discrimination programs is necessary. While an intermediate scrutiny test is more appropriate for positive discrimination programs with benign effect, a strict scrutiny test is justified for positive discrimination programs that injure or discriminate against non-beneficiaries on an individual basis. However, establishing a compelling interest within the strict scrutiny test should not require a burdensome evidentiary standard. These unnecessary burdens include proving that the past injustice occurred within a particular business industry and at a narrow geographic level, or that such injustice was intentionally perpetuated by the same institution implementing the positive discrimination program, or that the injustice transgressed the same rights that the

positive discrimination program addresses. The simple reality of a past injustice with present impact should be enough to establish a compelling interest, as required by the first imagined principle. Diversity, on the other hand, is not, in itself, sufficient for establishing a compelling interest for positive discrimination programs. Departing from diversity as a compelling interest, however, should not dissuade institutions from implementing positive discrimination programs so long as the evidentiary standard for establishing past injustice is lowered. Finally, a narrowly tailored positive discrimination program should not first require the consideration of race-neutral alternatives. Altogether, these conditions support positive discrimination programs with broad applicability but restrained or narrowly tailored approach.

The case study analysis, however, does not answer all questions regarding the practical limitations of positive discrimination or the role of race in the law, more broadly. Several theoretical dilemmas remain. First, this research does not determine the status of reparations programs that do not grant any resources to non-minorities. Unlike, the Emergency Relief for Farmers of Color Act, these programs exclusively distribute resources to minorities. Is the absolute insulation of resources away from non-minorities a form of systemic discrimination against non-minorities? Does the obligation to narrowly tailor a reparations program decrease if the compelling interest is to correctively repay minorities what they are owed rather than simply provide targeted assistance? These matters hold considerable importance for the status of more directed reparations programs demanding overdue attention from policy makers. Secondly, although the Court decided in favor of diversity constituting a compelling interest in the context of higher education, this research does not establish theoretical justification for such. If the compelling interest is to increase diversity, then the program in question is not a positive discrimination program as defined by this research. If the compelling interest is to remedy past

injury against minorities, then the program is indeed a positive discrimination program and this research outlines theoretical principles for establishing its justification. I do not make this distinction to negate the promising benefits of diversity, but, rather, to acknowledge that diversity programs are not insulated from underlying racist or stigmatizing assumptions. This research does not answer what should be the standard of scrutiny for diversity programs, taking into account the need to protect against this risk of stigmatization. For instance, is this risk enough to justify a stricter standard of scrutiny in Court?

The findings of this research do, however, support positive discrimination programs addressing the particular needs of racial minorities, and more specifically, programs with broad applicability but restrained or narrowly tailored approach. Nevertheless, the legal limitations imposed by the Supreme Court restrict the applicability of relevant policy implications. So long as the majority of justices sitting on the bench align themselves with conservative ideology, it is unlikely that the Supreme Court will roll back on its advancement of colorblind ideology. I must emphasize, however, that these limitations do not negate the importance of this kind of imaginative research. It is important to maintain a dialogue cultivating principled support for positive discrimination and a conception of race in the law that pushes against the norm. This dialogue will not only re-energize this perspective of race in the law within the American public but prepare judicial decisionmakers to redirect the debate over constitutional colorblindness once eventually possible. In the meanwhile, this research provides support for a broad array of policies that get as close as possible to providing direct assistance to minority groups. When race can be instrumentalized directly, programs like the Small Business Act 8(a) program do best by providing targeted support to minority-owned businesses. When race cannot be instrumentalized

directly, programs do best by using proxies for race such as socioeconomic status, while still positioning racial equity as the goal.

Although imperfect, Minneapolis Public School's recent redistricting proposal exemplifies one way to use proxies to remedy a broad array of past racial injustices but in a focused manner. Rather than positioning diversity or racial balancing itself as the sole aim, the proposal explicitly positions racial equity as one of its goals. In efforts to achieve such, the proposal redraws district lines to reduce racial isolation and narrow racial academic disparities. In addition, it prioritizes income status and educational need in the placement of students among its schools.⁸³

It is imperative that policymakers, judicial decisionmakers, and American laypeople, alike, remember that, when it comes to racial equality, the job is not done. Nikole Hannah Jones denounces this assumption underlying colorblind ideology in her long form New York Times Article, "What is Owed". She reminds readers:

This remarkable imperviousness to facts when it comes to white advantage and architected black disadvantage is what emboldens some white Americans to quote the passage from Martin Luther King's 1963 "I Have A Dream" speech about being judged by the content of your character and not by the color of your skin. It's often used as a cudgel against calls for race-specific remedies for black Americans — while ignoring the part of that same speech where King says black people have marched on the capital to cash "a check which has come back marked 'insufficient funds.'"⁸⁴

Many Americans engage in a collective memory loss of perpetuated racial disparities which underpins their calls for universalist equality. However, this choice to co-opt Dr. King's calls for equality while simultaneously engaging in such collective memory loss, gravely misses the point.

In presuming that equality has already been achieved, colorblindness falls significantly short in

⁸³"Read Minneapolis Public Schools' Final Redistricting Proposal," Local, *StarTribune* 2020, <https://www.startribune.com/read-minneapolis-public-schools-final-redistricting-proposal/569170121/?refresh=true>. See also Ryan Faircloth, "Minneapolis Public Schools' Final Redistricting Proposal Packed with Changes," Minneapolis, *StarTribune* 2020, <https://www.startribune.com/minneapolis-public-schools-unveils-final-redistricting-proposal/569163152/?refresh=true>.

⁸⁴ Nikole Hannah-Jones, "What is Owed," *The New York Times Magazine*, 2020, <https://www.nytimes.com/interactive/2020/06/24/magazine/reparations-slavery.html>.

advancing it. The conversation surrounding racial equality in the law is, thus, far from over, and so long as historical and present injustices remain persistent matters, the law must examine how to provide proactive relief.

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