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## Hope Dies Last: The Progressive Potential and Regressive Reality of the Antibalkanization Approach to Racial Equality

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# HOPE DIES LAST: THE PROGRESSIVE POTENTIAL AND REGRESSIVE REALITY OF THE ANTIBALKANIZATION APPROACH TO RACIAL EQUALITY

David Simson\*

This Article relies on Critical Race Theory concepts and social science research to make an important and timely contribution to a debate in law and public policy that is both long-standing and of immense current importance: What is the relationship between social cohesion on the one hand, and racial equality progress on the other? Events over the last two years have put this question into sharp relief. On the one hand, portions of the general public and at least some policymakers have signaled support for the demands of racial justice activists to reduce and eliminate systemic racism after too many tragedies of police brutality against the Black community have made painfully obvious that such systemic racism continues.<sup>1</sup> At the same time, the country is perhaps more politically divided than ever before, the racial dimensions of this division are evident, and events since the 2020 election have shown that appetite for racial reform is by no means universal. In this environment, calls to “unify” and take time to “heal” as well as to “root out systemic racism” are made at the same time. Can these calls be realistically pursued at the same time or is there a need to prioritize one over the other? This is not just a question of policy but also of constitutional law. Over the last four decades, the Supreme Court’s equal protection jurisprudence on governmental race-consciousness has answered with an “antibalkanization approach” which prioritizes social cohesion. Indeed, this approach views

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<sup>1</sup> It is the policy of the *William & Mary Bill of Rights Journal* to capitalize indicators of race such as “Black” and “White” in accordance with current journalistic standards. For more on why the *Journal* follows this policy see Ann Thúy Nguyễn & Maya Pendleton, *Recognizing Race in Language: Why We Capitalize “Black” and “White”*, CTR. STUDY SOC. POL’Y (Mar. 23, 2020), <https://cssp.org/2020/03/recognizing-race-in-language-why-we-capitalize-black-and-white/>.

social cohesion as a prerequisite for racial equality progress. It considers racial hostility and resentment among White Americans as the most important racial equality obstacle and polices governmental race-consciousness in an attempt to minimize such hostility and resentment. It believes that this is the only way to reach the constitutional ideal of racial equality. Many policymakers in the past have agreed. This Article posits that while this approach appears to be well-meaning and cares about some of the right kinds of considerations, it is ultimately flawed because it misunderstands the dynamics of racial inequality and racial hierarchy. The antibalkanization approach attempts to solve a structural problem with a “bad apple” approach—what Critical Race Theory scholars have called a perpetrator perspective. This Article goes in depth to illustrate both the inner workings of the antibalkanization approach and how social science research on the sociological and social psychological dimensions of racial hierarchy shows it to be flawed. The approach ought to be replaced by a more accurate model of racial equality progress that would view White racial hostility and resentment not as an obstacle but as a likely inevitable side effect of the path of structural change that is necessary for achieving *both* racial equality *and* social cohesion over the long term. Adopting such a structural understanding of racial hostility and resentment would have important implications for both policymakers and for the Court.

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## INTRODUCTION

Events over the last two years have put the following into sharp relief: (1) Americans are polarized and divided over what is right and wrong, and they view members of “the other side” with hostility;<sup>2</sup> and (2) race remains a major factor in those divisions and hostilities,<sup>3</sup> and racism and racial inequality fail to abate.<sup>4</sup> Unsurprisingly,

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<sup>2</sup> See, e.g., *Sharp Divisions on Vote Counts, as Biden Gets High Marks for His Post-Election Conduct*, PEW RSCH. CTR. (Nov. 20, 2020), <https://www.pewresearch.org/politics/2020/11/20/sharp-divisions-on-vote-counts-as-biden-gets-high-marks-for-his-post-election-conduct/> [<https://perma.cc/F95R-MMDN>]; *Partisan Antipathy: More Intense, More Personal*, PEW RSCH. CTR. (Oct. 10, 2019), <https://www.pewresearch.org/politics/2019/10/10/partisan-antipathy-more-intense-more-personal/> [<https://perma.cc/N5LN-H5UQ>].

<sup>3</sup> To name just two of the most visible manifestations: first, the outwardly racialized nature of the 2020 presidential election campaign suggests that the Republican Party and Donald Trump believe that racist appeals will be rewarded by large numbers of (mostly White) Americans at the polls. See, e.g., John Fritze, David Jackson & Michael Collins, *Critics Slam Trump ‘Suburban Housewife’ Tweet as Racist, Sexist ‘Dog Scream’ Play for White Voters*, USA TODAY (Aug. 12, 2020, 3:13 PM), <https://www.usatoday.com/story/news/politics/elections/2020/08/12/trump-critics-see-tweet-the-suburban-housewife-sexist-racist/3348444001/> [<https://perma.cc/VC2U-RKW3>]. Second, the continuity of significant racial polarization in actual voting for Democrats versus Republicans as suggested by exit polls after the November election suggests that Republicans are at least partially right. *National Results 2020 President Exit Polls*, CNN, <https://www.cnn.com/election/2020/exit-polls/president/national-results> [<https://perma.cc/F9P6-G323>] (last visited Mar. 28, 2022) (reporting that 87% of Black voters, 65% of Latinx voters, and 61% of Asian American voters supported Biden, but only 41% of White voters). As Ian Haney López has explained, coded racial appeals to White voters have formed the backbone of Republican electoral strategy since the 1960s. IAN HANEY LÓPEZ, *DOG WHISTLE POLITICS: HOW CODED RACIAL APPEALS HAVE REINVENTED RACISM AND WRECKED THE MIDDLE CLASS* 18 (2014). Second, racial resentments also appear to have played an important role in the storming of the Capitol by supporters of President Trump on January 6, 2020. See Thomas B. Edsall, *White Riot*, N.Y. TIMES (Jan. 13, 2021), <https://www.nytimes.com/2021/01/13/opinion/capitol-riot-White-grievance.html> [<https://perma.cc/PRS4-NGXN>]. Third, the ongoing agitation against (inaccurate portrayals of so-called) “Critical Race Theory” ideas that originated in the former Trump administration’s Executive Order on Combating Race and Sex Stereotyping and has since inspired copycat legislation at the state level illustrates deep divisions over whether racial inequality persists, what its roots are, and whether it should even be discussed in educational programs, corporate trainings, and elsewhere. For an analysis of anti-Critical Race Theory state legislation, see, e.g., African American Policy Forum, *Welcome to the #TruthBeTold Campaign*, AAPF—THE AFRICAN AMERICAN POLICY FORUM, <https://www.aapf.org/truthbetold> (last visited Mar. 28, 2022). For an example of the

then, in his speech after his election victory president-elect Joe Biden spoke about the need to address both issues and suggested that his administration would pursue the following solutions: As to (1) seek “not to divide but unify” by “put[ting] away the harsh rhetoric, lower[ing] the temperature,” and finding “time to heal”;<sup>5</sup> and (2) wage a “battle to achieve racial justice and root out systemic racism.”<sup>6</sup> He has repeated similar themes in various contexts since then.<sup>7</sup>

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acrimony involved in some of these debates, see, e.g., Nicquel Terry Ellis & Boris Sanchez, *Turmoil Erupts in School District After Claims that Critical Race Theory and Transgender Policy Are Being Pushed*, CNN (June 24, 2021, 5:33 PM), <https://www.cnn.com/2021/06/24/us/loudoun-county-school-board-meeting/index.html> [<https://perma.cc/E99W-JPEL>].

<sup>4</sup> While there are many ways to make this point, two illustrations were particularly prominent in 2020: First, seemingly never-ending police brutality against Black Americans. See, e.g., Osagie K. Obasogie, *Police Killing Black People Is a Pandemic, Too*, WASH. POST (June 5, 2020), [https://www.washingtonpost.com/outlook/police-violence-pandemic/2020/06/05/e1a2a1b0-a669-11ea-b619-3f9133bbb482\\_story.html](https://www.washingtonpost.com/outlook/police-violence-pandemic/2020/06/05/e1a2a1b0-a669-11ea-b619-3f9133bbb482_story.html) [<https://perma.cc/9TUR-6H5D>]. Second, racialized health care, economic, and other social disparities have exposed communities of color to disproportionate harm and suffering as a result of the coronavirus pandemic. *Health Equity Considerations and Racial and Ethnic Minority Groups Centers for Disease Control and Prevention*, CDC (Apr. 19, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/community/health-equity/race-ethnicity.html> [<https://perma.cc/ME55-JLEY>].

<sup>5</sup> Amber Phillips, *Joe Biden’s Victory Speech, Annotated*, WASH. POST (Nov. 7, 2020, 9:56 PM), <https://www.washingtonpost.com/politics/2020/11/07/annotated-biden-victory-speech/> [<https://perma.cc/U96N-9LSK>].

<sup>6</sup> *Id.*

<sup>7</sup> For example, Biden noted the apparent disparity in police treatment of protesters (many of which were people of color) during racial justice protests over the summer of 2020 and the mob (essentially all-White) that stormed the Capitol on January 6 and noted that this difference in treatment was both undeniable and “totally unacceptable.” See Annie Linskey, Chelsea Janes & Amy B. Wang, *Biden Denounces Racial Inequities in Blasting Capitol Riot*, WASH. POST (Jan. 7, 2021, 8:37 PM), [https://www.washingtonpost.com/politics/biden-racial-inequity-capitol-mob/2021/01/07/07d5961e-5112-11eb-b96e-0e54447b23a1\\_story.html](https://www.washingtonpost.com/politics/biden-racial-inequity-capitol-mob/2021/01/07/07d5961e-5112-11eb-b96e-0e54447b23a1_story.html) [<https://perma.cc/RMD2-6CQT>]. But he has also separately reiterated his “overarching objective . . . to unify this country.” *Joe Biden Introduces Economics & Labor Nominees Speech Transcript*, REV (Jan. 8, 2021), <https://www.rev.com/blog/transcripts/joe-biden-introduces-economics-labor-nominees-speech-transcript> [<https://perma.cc/8QD4-7FL9>]. More recently, Biden has criticized new voting restrictions that have been passed by Republican-led state legislatures and often predominantly burden voters of color as a type of “[twenty-fir]st century Jim Crow assault” that his administration would challenge. See *Remarks by President Biden on Protecting the Sacred, Constitutional Right to Vote*, THE WHITE HOUSE (July 13, 2021), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/07/13/remarks-by-president-biden-on-protecting-the-sacred-constitutional-right-to-vote/> [<https://perma.cc/7DVD-S6SJ>]. At the same time, Biden has explained that his objections to eliminating the Senate filibuster to pass broad federal voting rights legislation are partially grounded in the belief that such a strategy would be inconsistent with his objective of “trying to bring the country together.” Chris Cillizza, *Joe Biden (Still) Doesn’t Want to Get Rid of the Filibuster*, CNN (July 22, 2021, 6:35 PM), <https://www.cnn.com/2021/07/22/politics/biden-filibuster-senate/index.html> [<https://perma.cc/AN2F-E8D6>].

Both goals—(1) avoiding division, conflict, and hostility, and (2) remedying systemic racism—seem eminently reasonable and important, especially in the current climate. But are they necessarily compatible? Or may pursuing one goal potentially clash with, and perhaps require limits on, the pursuit of the other?<sup>8</sup> If the goals clash, choices about which goal to prioritize will have to be made. Racial justice activists have demanded loudly and clearly that systemic change toward racial justice must finally be prioritized.<sup>9</sup> In various ways, Biden has signaled that he is sympathetic to such demands.<sup>10</sup> However, history suggests that the perceived need for avoiding or curing disagreements among White Americans is usually prioritized over stated commitments to eradicating systemic racism when they clash.<sup>11</sup> Will America's

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<sup>8</sup> See, e.g., HANEY LÓPEZ, *supra* note 3, at 31–32, 198–204 (describing the “backlash” theory popular among Democratic Party establishment since at least the 1990s which suggests that if government “push[es] too fast with civil rights and the extension of liberal programs . . . a hostile eruption ineluctably follows” and thus counsels against decisive civil rights intervention, as well as similar views adopted under the banner of “post-racialism” during the Obama administration).

<sup>9</sup> See, e.g., The Movement for Black Lives, *Vision for Black Lives*, M4BL, <https://m4bl.org/policy-platforms/> [<https://perma.cc/3YPK-REQH>] (last visited Mar. 28, 2022) (“In recent years, we have taken to the streets, launched massive campaigns, and impacted elections, but our elected leaders have failed to address the legitimate demands of our Movement. We can no longer wait.”).

<sup>10</sup> For example, in his post-election victory speech, Biden explicitly recognized that overwhelming support from those most harmed by racial inequality, the Black community was indispensable to his election and called for reciprocal support from him: “[T]he African American community stood up again for me. You’ve always had my back, and I’ll have yours.” Phillips, *supra* note 5. Biden also signed an executive order titled “Advancing Racial Equity and Support for Underserved Communities Through the Federal Government” that specifically notes “the unbearable human costs of systemic racism” and calls on all agencies across the federal government to assess whether their policies impose systemic barriers for people of color and other underserved groups and to address those barriers. See Exec. Order 13985, 86 F.R. 7009 (2021).

<sup>11</sup> Famously, Derrick Bell proposed that in American society a “principle of ‘interest convergence’” is at work according to which “[t]he interests of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites.” Derrick A. Bell Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980). At least in part because of this fact, some in the Black community remain skeptical of Biden’s asserted commitments to rooting out systemic racism until tangible proof is provided. See, e.g., John Eligon & Audra D.S. Burch, *Black Voters Helped Deliver Biden a Presidential Victory. Now What?*, N.Y. TIMES (Dec. 24, 2020), <https://www.nytimes.com/2020/11/11/us/joe-biden-black-voters.html> [<https://perma.cc/S68C-24Y9>]. Because of the stalling or scaling back of various racial justice proposals ranging from voting to infrastructure to police reform, some of this skepticism continues. See, e.g., Lauren Gambino, *Biden Vowed to Make Racial Justice the Heart of His Agenda—Is It Still Beating?*, THE GUARDIAN (Sep. 8, 2021), <https://www.theguardian.com/us-news/2021/sep/08/joe-biden-racial-justice-voting-rights> [<https://perma.cc/GVD9-F6WG>].

checkered racial justice history continue to repeat itself<sup>12</sup> as some signs seem to be indicating,<sup>13</sup> or will things be different this time?

This Article argues that close evaluation of the Supreme Court's constitutional racial equality jurisprudence of the last four decades offers important lessons that need to be learned and implemented—both by policymakers and by the Court itself—for things to be different this time. This jurisprudence has revolved precisely around the relationship between avoiding social division and conflict on the one hand, and eradicating America's legacy of racism on the other. Specifically, an “antibalkanization” approach<sup>14</sup> has driven the Court's doctrinal answers<sup>15</sup> to perhaps

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<sup>12</sup> See Devon W. Carbado, Afterword, *Critical What What?*, 43 CONN. L. REV. 1593, 1607–08 (2011) (describing “reform/retrenchment dialectic” in the history of American race relations).

<sup>13</sup> See, e.g., Gambino, *supra* note 11.

<sup>14</sup> That this approach exists and is a separate approach to race-related equal protection cases from the traditionally recognized “anticlassification” and “antisubordination” approaches was first proposed by Reva Siegel in 2011. Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278 (2011); see also Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIA. L. REV. 9, 10–11 (2003) (describing the relationship between traditionally recognized approaches). Recognition of the antibalkanization approach was an important development in equal protection scholarship because it can help better explain certain features of current doctrine. For example, despite the assertiveness of claims to colorblindness and anticlassification in the opinions of many conservative Justices, certain types of affirmative action programs in higher education that explicitly rely on race as well as the practice of race-conscious redistricting remain constitutionally permissible. See, e.g., *Fisher v. Univ. of Tex. (Fisher II)*, 136 S. Ct. 2198 (2016) (affirmative action in higher education); *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 797 (2017) (redistricting); see also Neil S. Siegel, *Race-Conscious Student Assignment Plans: Balkanization, Integration, and Individualized Consideration*, 56 DUKE L.J. 781, 812 (2006) (“Colorblindness is not a reasonable interpretation of the case law because it collapses the context-sensitive continuum defined by the Court's decisions.”). At the same time, and inconsistent with an antisubordination approach, the Supreme Court has made clear that *all* governmental uses of race, no matter who is benefitted or harmed by them, are subject to the most stringent judicial review in the form of strict scrutiny. See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 224 (1995). While some have proposed that these doctrinal features may simply reflect compromise between anticlassification and antisubordination in certain cases, others have argued that they are better explained by the existence of a freestanding antibalkanization approach. Compare, e.g., Samuel R. Bagenstos, *Bottlenecks and Antidiscrimination Theory*, 93 TEX. L. REV. 415, 417 (2014) (suggesting that “antibalkanization may be best understood as a pragmatic set of ad hoc compromises between anticlassification and antisubordination, rather than a theory on which to build antidiscrimination law”), with Derrick Darby & Richard E. Levy, *Postracial Remedies*, 50 U. MICH. J.L. REFORM 387, 484 (2016) (“[T]he pragmatism reflected in race moderates is a principled normative commitment to social cohesion, not merely a strategic one of negotiating a middle path between conservatives and progressives.”). I agree that antibalkanization is a freestanding approach and that in-depth analysis of its features holds critical insights for how to best accomplish the Constitution's promise of racial equality.

<sup>15</sup> While historically only a small number of Justices have used this approach, it is fair

the most controversial question of constitutional racial equality law: Are government actors permitted to rely on race as a factor when deciding how to distribute resources and opportunities in pursuit of racial equality—for example, via affirmative action programs, race-conscious redistricting, voluntary school desegregation programs, and the like—and if so, to what extent?<sup>16</sup> The antibalkanization approach's answer is an ambivalent “sometimes” and when the answer is yes versus no is fundamentally based on its proponents' views about the relationship between racial conflict and racial equality progress.

Broadly speaking, the approach is built on the tension between its acknowledgment that racial inequality is a continuing problem that representative government should be empowered to address,<sup>17</sup> and its conviction that “social cohesion is a prerequisite for equality.”<sup>18</sup> In resolving this tension, the approach holds that the goals of avoiding racial conflict and eradicating racial inequality are not only compatible, but that achieving the goal of eradicating racial inequality essentially requires avoiding or minimizing race-based social conflict where possible.<sup>19</sup> Because America's history has made race an explosive topic and racial solidarity an existing but fragile phenomenon,<sup>20</sup> minimizing race-based social conflict, in turn, requires extremely careful handling of governmental reliance on race as a distributive criterion: “Too much” emphasis on race must generally be prohibited because it is too likely to create counterproductive racial hostility and resentment, in particular among White Americans.<sup>21</sup> More modest consideration of race that downplays its social importance, on

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to say that the approach has driven the doctrinal answers of “the Court.” These Justices' crucial position in the middle of the Court's ideological spectrum has generally allowed them to cast the decisive vote in the most controversial cases and to write the opinions that set out relevant doctrine as it continues to govern. *See generally infra* Section I.E. For a discussion of which Justices apply the approach, see, e.g., Blake Emerson, *Affirmatively Furthering Equal Protection: Constitutional Meaning in the Administration of Fair Housing*, 65 BUFF. L. REV. 163, 199–203 (2017) (discussing Justices Kennedy and O'Connor); Siegel, *supra* note 14, at 1282, 1303 (identifying “race moderates” as proponents, specifically Justices Powell, O'Connor, and Kennedy). As described below, Justice Stevens is another important proponent, though the existing literature has so far failed to identify him as such. *See infra* Part III.

<sup>16</sup> *See, e.g.*, Siegel, *supra* note 14, at 1302 (“[T]he antibalkanization perspective emerged in answer to the question of whether courts would allow representative government to rectify race inequality.”).

<sup>17</sup> *See infra* Section I.A.

<sup>18</sup> Siegel, *supra* note 14, at 1350.

<sup>19</sup> *See infra* Section I.C.

<sup>20</sup> *See infra* Section I.B.

<sup>21</sup> For the approach's focus on White Americans, see *infra* notes 44–47 and accompanying text. In this Article, I use terms like “White,” “Black,” or “racial minority” to describe racial group membership or broad groups of people. This should not be read to imply that there is anything fixed or essential about such groups, or that they exist in some uncontroversially identifiable way. Race and racial groups “exist” not as unchanging biological facts, but as social and legal constructs that structure how people think of themselves, and how they are



the other hand, is less likely to create racial hostility and resentment among Whites, and therefore is sometimes permitted.<sup>22</sup> The overarching role that the antibalkanization approach sees for the Court is that of drawing the complex doctrinal “boundary lines”<sup>23</sup> that allow the government to address the ongoing problem of racial inequality while preventing the government from creating counterproductive racial conflict and tension while doing so.<sup>24</sup>

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treated by others, including the law. There is instability, change, conflict, and confusion in how race as a construct has operated depending on contexts of time and space. *See, e.g.*, Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 7 (1994) (“Race is neither an essence nor an illusion, but rather an ongoing, contradictory, self-reinforcing process subject to the macro forces of social and political struggle and the micro effects of daily decisions.”). But there is also stability in that (1) race has consistently been used as a marker of social difference; (2) racial groupings that distinguish those considered “White” from those that are not have long been cognizable in American society; (3) these groupings have been used to construct and defend oppressive social hierarchies built around ideas of white supremacy; and (4) these hierarchies have consistently distributed social benefits based on perceived degrees of separation from “pure” Whiteness at the top and Blackness at the bottom. *See, e.g.*, Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1736 (1993) (“[M]ainly whiteness has been characterized, not by an inherent unifying characteristic, but by the exclusion of others deemed to be ‘not white.’”). It is this stability and history that makes it meaningful to talk about race, racial groups, race-based interests, etc., as general phenomena, while keeping in mind that these phenomena always include exceptions, complications, and changes over time. Thus, when I discuss research about “Whites” and the general interests and sentiments Whites as a group tend to demonstrate in Part II, my point is not to describe any essential or inherent characteristic or viewpoint that automatically attaches to any particular person outside of complicated social dynamics. But lack of mathematical precision does not make those phenomena any less “real” or influential, and thus they are properly the focus of in-depth analysis.

<sup>22</sup> Such more modest consideration might include programs that consider race as only one factor among many others or programs that are race-conscious but facially race-neutral. *See infra* Section I.D; *see also* Emerson, *supra* note 15, at 199–203 (discussing role of salience in the antibalkanization approach); Yuvraj Joshi, *Racial Indirection*, 52 U.C. DAVIS L. REV. 2495, 2528–29 (2019) (discussing use of “racial indirection” in the antibalkanization perspective).

<sup>23</sup> *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 318 (1978) (“A boundary line [. . .] is none the worse for being narrow.” (internal quotation marks omitted) (quoting *McLeod v. Dilworth*, 322 U.S. 327, 329 (1944))).

<sup>24</sup> *See infra* Section I.D. Since the formal recognition of the antibalkanization approach, numerous articles have incorporated aspects of it in their analyses of doctrine in a wide range of contexts. *See, e.g.*, Camille Gear Rich, *Contracting Our Way to Inequality: Race, Reproductive Freedom, and the Quest for the Perfect Child*, 104 MINN. L. REV. 2375 (2020) (reforms to current practices in Assisted Reproductive Technology market); Katharine T. Bartlett, *Affirmative Action and Social Discord: Why Is Race More Controversial than Sex?*, 52 U.C. DAVIS L. REV. 2305 (2019) (controversy over affirmative action in context of race versus gender); Jessica A. Clarke, *Protected Class Gatekeeping*, 92 N.Y.U. L. REV. 101 (2017) (practice of “protected class” gatekeeping in discrimination doctrine); Darby & Levy, *supra* note

Using insights from Critical Race Theory (CRT) and social science research, this Article argues that the antibalkanization approach exhibits a “frustrating duality”<sup>25</sup> as a strategy for achieving greater racial equality: It has progressive potential, but, as actually implemented, it is decidedly regressive.<sup>26</sup>

The approach’s progressive potential lies in the fact that its reasoning process incorporates many of the right considerations,<sup>27</sup> and that it speaks to Justices who seem to apply this reasoning process with at least somewhat of an open mind.<sup>28</sup> The

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14 (evaluation of “postracial” remedies for racial inequality); Reva B. Siegel, *Race-Conscious but Race-Neutral: The Constitutionality of Disparate Impact in the Roberts Court*, 66 ALA. L. REV. 653 (2015) (relationship between disparate impact liability and equal protection doctrine); Lawrence Rosenthal, *Saving Disparate Impact*, 34 CARDOZO L. REV. 2157 (2013) (examining disparate impact liability and equal protection doctrine); Roy G. Jr. Spece & David Yokum, *Scrutinizing Strict Scrutiny*, 40 VT. L. REV. 285 (2015) (strict scrutiny doctrine); Osamudia R. James, *White Like Me: The Negative Impact of the Diversity Rationale on White Identity Formation*, 89 N.Y.U. L. REV. 425 (2014) (identity development of White students as result of the Court’s diversity jurisprudence); Julie C. Suk, *Quotas and Consequences: A Transnational Re-evaluation*, in PHILOSOPHICAL FOUNDATIONS OF DISCRIMINATION LAW 396 (Deborah Hellman & Sophia Moreau eds., 2013) (use of quotas in equality interventions); Janine Young Kim, *Postracialism: Race After Exclusion*, 17 LEWIS & CLARK L. REV. 1063 (2013) (analysis of different conceptions of race over time); Robin Charlow, Batson “Blame” and Its Implications for Equal Protection Analysis, 97 IOWA L. REV. 1489 (2012) (peremptory challenges of jurors on the basis of race).

<sup>25</sup> This quote alludes to Justice Kennedy’s reference to the “frustrating duality” of the Equal Protection Clause, but the “frustrating duality” this Article contemplates is quite different. Cf. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 787 (2007) (Kennedy, J., concurring) (“The idea that if race is the problem, race is the instrument with which to solve it cannot be accepted as an analytical leap forward. And if this is a frustrating duality of the Equal Protection Clause it simply reflects the duality of our history and our attempts to promote freedom in a world that sometimes seems set against it.”).

<sup>26</sup> See Reva B. Siegel, *The Supreme Court, 2012 Term—Foreword: Equality Divided*, 127 HARV. L. REV. 1, 43 n.211 (2013) (suggesting that antibalkanization reasoning may reflect “an instance of preservation through transformation” of existing status hierarchy); Darren Lenard Hutchinson, *Preventing Balkanization or Facilitating Racial Domination?: A Critique of the New Equal Protection*, 22 VA. J. SOC. POL’Y & L. 1, 9 (2015) (arguing that the Court’s equal protection jurisprudence “facilitates racial domination” in part because of how it incorporates concerns about balkanization).

<sup>27</sup> That is, at a very general level, the approach considers many of the same dynamics in race relations that progressive scholars of equal protection also consider highly relevant to the proper pursuit of racial equality—for example, stereotyping, stigma, and racial division—and it does so in ways that do not seem disingenuous or purely results-driven. See *infra* Sections I.C, I.F.

<sup>28</sup> That is, proponents show a seeming willingness to learn about the realities of race over their career and to take persistent racial inequality seriously beyond simplistic *a priori* ideological commitments. See *infra* Section I.F. While this willingness appears to be limited and to have gone down in extent with more recently appointed antibalkanization Justices, it does differentiate the approach from the anticlassification approach, whose proponents also

latter is demonstrated by proponents' willingness to support race-conscious racial equality initiatives later in their careers when their prior jurisprudence did not require them to do so.<sup>29</sup> Through this willingness, antibalkanization proponents have preserved important constitutional space for race-conscious racial equality initiatives in a period of the Court's history generally characterized by ascendant and aggressive colorblindness ideology.<sup>30</sup>

And yet, the approach's regressive reality lies in the fact that this progressive potential has been compromised by the approach's flawed baseline assumptions about the nature and dynamics of racial inequality.<sup>31</sup> These flawed assumptions, in turn, lead the approach to put in place flawed prescriptions for how to facilitate racial equality progress.<sup>32</sup> Specifically, the approach proceeds from a version of what CRT scholars have called the "perpetrator perspective" of racial discrimination,<sup>33</sup> which has three basic characteristics: (1) a baseline view that absent strong evidence to the contrary in a particular context, American society is presumptively racially egalitarian; (2) a conviction that deviations from racial equality are primarily caused by the specific actions of blameworthy individual actors who are violating this shared norm; and (3) a conclusion that therefore the main purpose of racial equality law is to police and prevent the inappropriate behavior of such perpetrators.<sup>34</sup> CRT scholars have criticized this perspective because (1) it misrepresents actual baseline realities

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include some of the same racial equality dynamics in their reasoning, but the way in which they do so makes it hard to resist the conclusion that they are merely justifying pre-existing ideological objections to race-conscious racial equality efforts. *See id.*

<sup>29</sup> *See id.* The existing literature has not yet uncovered this internal progression in the jurisprudence of antibalkanization proponents. It thus misses this aspect of the approach's progressive potential.

<sup>30</sup> *See generally* Ian Haney López, *Intentional Blindness*, 87 N.Y.U. L. REV. 1779 (2012).

<sup>31</sup> *See infra* Part II.

<sup>32</sup> *See infra* Part III.

<sup>33</sup> For the classic formulation of this perspective and an argument that it underlies constitutional discriminatory intent doctrine, see Alan David Freeman, *Legitimizing Racial Discrimination through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978). For an application in the Fourth Amendment context, see Devon W. Carbado, *(E)racing the Fourth Amendment*, 100 MICH. L. REV. 946 (2002).

<sup>34</sup> *See, e.g.,* Freeman, *supra* note 33, at 1054 ("From [the perpetrator] perspective, the law views racial discrimination not as a social phenomenon, but merely as the misguided conduct of particular actors. It is a world where, but for the conduct of these misguided ones, the system of equality of opportunity would work to provide a distribution of the good things in life without racial disparities and where deprivations that did correlate with race would be 'deserved' by those deprived on grounds of insufficient 'merit.' . . . [T]he task of antidiscrimination law is to separate from the masses of society those blameworthy individuals who are violating the otherwise shared norm."); Carbado, *supra* note 33, at 968 (Fourth Amendment doctrine "reflects a perpetrator perspective in the sense that race becomes doctrinally relevant only to the extent that the presumption of race neutrality and colorblindness can be rebutted by specific evidence that a particular police officer exhibits overtly racist behavior—in other words, is obviously a perpetrator of racism.").

of deep racial inequality;<sup>35</sup> (2) this inequality is perpetuated to a significant extent by deep-seated structural forces that operate independently of blameworthy conduct by specific ill-intentioned actors; and (3) racial equality law must thus incorporate structural interventions if it is to be effective.<sup>36</sup>

In trying to navigate the relationship between racial conflict and race-conscious government action, the antibalkanization approach replicates the basic characteristics of the perpetrator perspective and thus is subject to similar critiques. This Article sets out both aspects in detail.

As for replicating the perpetrator perspective, the approach (1) assumes as a baseline view that white Americans are committed to racial equality progress (if in a fragile way) and will generally accept racial equality interventions without hostility and resentment (so long as the government structures them properly);<sup>37</sup> (2) reasons that racial hostility and resentment among white Americans results primarily from overzealous or sloppy reliance on race by the government—i.e., when the government acts as a “racial hostility perpetrator”;<sup>38</sup> and (3) as a result, strictly restricts race-conscious equality initiatives to those in which it considers the government not to be acting as such a perpetrator.<sup>39</sup> The approach is particularly restrictive toward initiatives with a remedial purpose, which it views as especially likely to cause racial hostility and resentment.<sup>40</sup>

However: (1) As social science research illustrates, a baseline assumption that white Americans will accept racial equality interventions without hostility and resentment is not justified.<sup>41</sup> (2) This is because White racial hostility and resentment is to a significant extent a structural phenomenon that is tied to the dynamics of racial hierarchy. It is triggered by threats to the dominant position of Whites in the hierarchy and is not dependent on any governmental perpetrator.<sup>42</sup> (3) Thus, if part of the goal

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<sup>35</sup> See, e.g., Devon W. Carbado & Cheryl I. Harris, *The New Racial Preferences*, 96 CALIF. L. REV. 1139, 1200 (2008) (noting “racial asymmetr[ies]” in the ways in which distributions of social benefits and burdens “are already stacked in ways that prefer whites and disadvantage blacks”); David Simson, *Fool Me Once, Shame on You; Fool Me Twice, Shame on You Again: How Disparate Treatment Doctrine Perpetuates Racial Hierarchy*, 56 HOUS. L. REV. 1033, 1067–71 (2019) (discussing “baseline errors” about existing racial inequality that underlie employment discrimination doctrine).

<sup>36</sup> See, e.g., Devon W. Carbado & Daria Roithmayr, *Critical Race Theory Meets Social Science*, 10 ANN. REV. L. SOC. SCI. 149, 159 (2014) (explaining CRT position that “racial disparities cannot be fully reduced to or predicted from individual behavior and are instead a function of structural forces” and noting that “[t]he effects of remedial approaches that focus on individuals can be quite pernicious”); Haney López, *supra* note 21, at 8 (“Because race exists as an integral, structural component of social reality and human relations, racial remediation is impossible except in the company of wide-ranging social reform and human advancement.”).

<sup>37</sup> See *infra* Section I.B.

<sup>38</sup> See *infra* Section I.C.

<sup>39</sup> See *infra* Section I.D.

<sup>40</sup> See *infra id.*

<sup>41</sup> See *infra* Sections II.A, II.C.

<sup>42</sup> See *infra* Sections II.A, II.B.

of equal protection doctrine is to facilitate movement toward a society that features *both* racial equality *and* social cohesion, it should incorporate more discretion, not less, for government actors pursuing structural changes to the conditions of racial hierarchy. Most prominently, this includes programs with a remedial rationale.<sup>43</sup>

Laying bare the frustrating duality of the antibalkanization approach helps strengthen existing critiques of the approach. The most notable existing critiques are (1) a racial partiality critique based on the fact that the Court has applied its concerns about cohesion only to issues that create possible resentments among *White* Americans;<sup>44</sup> and (2) a critique that as a result of its focus on reducing the salience of race in racial equality policymaking, the approach is in conflict with democratic principles of transparency and accountability.<sup>45</sup> The analysis offered in this Article gives these critiques and their proposed solutions a firmer theoretical foundation. With respect to racial partiality, understanding that the approach is grounded in a flawed perpetrator perspective makes clear that, as currently formulated, the approach fails *even* in its analysis of *White* resentment. It also suggests that a willingness to adopt the proposed solution to this partiality—also applying the approach to issues of concern to racial minorities<sup>46</sup>—is analytically dependent on a prior willingness to replace the perpetrator perspective with its opposite: a “victim perspective.”<sup>47</sup>

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<sup>43</sup> See *infra* Part III.

<sup>44</sup> I call these issues the approach’s “core territory.” This territory covers contexts in which the government voluntarily uses racial minority group membership as a positive factor in resource distributions, such as in affirmative action programs; or in a way meant to ensure that the interests of racial minority group members are adequately protected, such as in race-conscious districting. See Siegel, *supra* note 14, at 1359 (noting that currently “anti-balkanization opinions [seem to] focus exclusively . . . on the constitutionality of civil rights laws and initiatives”). One might distinguish this “core territory” from the approach’s broader hypothetical “logical territory” that would include *all* government uses of race that may cause resentment, including among racial minorities, such as racial profiling. See, e.g., Joshi, *supra* note 22, at 2529–31; Siegel, *supra* note 26, at 42–50, 93; Siegel, *supra* note 14, at 1359. A related racial partiality critique is that in its balkanization-based arguments, the Court has inappropriately adopted the specific viewpoints of White Americans over conflicting viewpoints of people of color on important issues in equal protection doctrine. See Hutchinson, *supra* note 26, at 48–55.

<sup>45</sup> See Emerson, *supra* note 15, at 208–10. While discussing the approach only briefly, Kiel Brennan-Marquez similarly argues that it mistakenly elevates form over substance and may be perceived as disingenuous or dishonest as a result. Kiel Brennan-Marquez, *Magic Words*, 23 WM. & MARY BILL RTS. J. 759, 782–83 (2015).

<sup>46</sup> See, e.g., Siegel, *supra* note 14, at 1362–65 (criminal suspect descriptions); Siegel, *supra* note 26, at 93–94 (stop and frisk and suspect apprehension).

<sup>47</sup> See, e.g., Carbado, *supra* note 33, at 970 (advocating shift from perpetrator to victim perspective to ensure that Fourth Amendment law, including with respect to racial profiling, becomes sensitive to the fact that “people of color often experience their race as a crime of identity” and to “the coercive and disciplinary ways in which race structures the interaction between police officers and nonwhite persons”).

With respect to the approach's transparency deficit, the ability to convince anti-balkanization proponents to accept more open engagement with issues of race in policymaking<sup>48</sup> is dependent on making a strong case that the approach's focus on reducing the salience of race has failed not because of poor implementation, but because it is mistaken in its fundamental assumptions.<sup>49</sup> This Article makes that case.

Perhaps more importantly, recognizing the approach's frustrating duality uncovers important implications for actors with an interest in contributing to racial equality progress.<sup>50</sup> Most broadly, understanding the flaws of the approach's perpetrator perspective undermines the assumption "that social cohesion is a prerequisite for equality."<sup>51</sup> It suggests instead that while racial solidarity and social cohesion are valuable *long-term* goals for American society, reaching these goals will likely require accepting short-term racial tension as a necessary corollary of the path of structural change that needs to be traveled.<sup>52</sup> For policymakers such as the Biden administration, this means that progress toward truly accomplishing the goal of "root[ing] out systemic racism"<sup>53</sup> will require a break from the past practice of prioritizing white harmony over decisive structural intervention in the hopes that racial equality progress will organically materialize on its own over time.<sup>54</sup> The prospect of reactionary white racial hostility and resentment, in other words, should not cause a pulling back from decisive structural interventions.

For the Court, a number of lessons seem clear, though their likelihood of being adopted will depend on the Court's ideological rigidity, especially after its most recent changes in composition.<sup>55</sup> Most directly related to this Article's analysis, the Court should adjust equal protection doctrine to give more discretion to government actors who voluntarily implement race-conscious programs with a remedial rationale.<sup>56</sup> This change is of urgent importance: Pushed by social movement activism as part of the ongoing reckoning over race and policing, government actors around

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<sup>48</sup> See Emerson, *supra* note 15, at 223–31 (calling for administrative law approach to equal protection); Brennan-Marquez, *supra* note 45, at 783 (calling for approach to equal protection that focuses on substance rather than form of race-conscious intervention).

<sup>49</sup> Cf. Emerson, *supra* note 15, at 207–08 (noting correctly that "[i]n the years since [the] approach has been embraced, racial tensions have not abated" but not investigating in depth why this has been so).

<sup>50</sup> See *infra* Part III.

<sup>51</sup> Siegel, *supra* note 14, at 1350.

<sup>52</sup> Social science research on the "irony of harmony" supports this point. See *infra* Part III.

<sup>53</sup> See Phillips, *supra* note 5.

<sup>54</sup> See *supra* notes 8, 11.

<sup>55</sup> See, e.g., Joshi, *supra* note 22, at 2560–61 (projecting the "prospect of a durable conservative majority on the Supreme Court" and suggesting that "[t]he question is no longer whether but when and how a post-Kennedy Court will break with the constitutional precedent established in *Bakke* and its progeny"). Since Joshi's projection, the Court tilted even further in the conservative direction with Justice Barrett's replacement of the late Justice Ginsburg.

<sup>56</sup> See *infra* notes 349–78 and accompanying text.

the country may be both motivated to implement such remedial programs and yet deterred by the Court's restrictive jurisprudence. At a minimum, members of the Court's conservative majority who share the antibalkanization approach's willingness to learn about the dynamics of race should vote to preserve the fragile status quo that permits some race-consciousness in higher education and redistricting as new challenges to these practices return to the Court.<sup>57</sup> If, as is perhaps most likely, the Court will pull back from race-consciousness instead, this Article makes plain the deleterious consequences of such a choice for both long-term racial equality and social cohesion.<sup>58</sup> If it is true that to protect its own legitimacy the Court often tries to predict and stay in line with society's long-term values,<sup>59</sup> both social activism and legal scholarship have a role to play in describing what those values could and should be and how legal doctrine could effectively be reconciled with them. This has been a project of CRT for three decades now.<sup>60</sup> Will these calls be heard when it matters most? Scholars such as Derrick Bell have raised grave doubts.<sup>61</sup> But as a saying in my native German language goes: "Die Hoffnung stirbt zuletzt." Hope dies last. This Article suggests that there are some reasons for hope, small as they may be. Fueling this hope and holding those who could take it up but refuse to do so accountable should be a worthwhile endeavor in legal scholarship.<sup>62</sup>

This Article proceeds in three main parts. Part I describes the antibalkanization approach in depth to uncover both parts of its frustrating duality: its regressive

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<sup>57</sup> Indeed, the Supreme Court recently decided to take up a challenge to Harvard's use of race in its college admissions system, consolidated alongside a similar affirmative action suit against the University of North Carolina. Adam Liptak & Anemona Hartocollis, *Supreme Court Will Hear Challenge to Affirmative Action at Harvard and U.N.C.*, N.Y. TIMES (Jan. 24, 2022), <https://www.nytimes.com/2022/01/24/us/politics/supreme-court-affirmative-action-harvard-unc.html>. For a detailed analysis, see Jonathan P. Feingold, *SFFA v. Harvard: How Affirmative Action Myths Mask White Bonus*, 107 CALIF. L. REV. 707 (2019).

<sup>58</sup> See *infra* Part II.

<sup>59</sup> See, e.g., Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 383 (2007) ("It is a commonplace of history and political science that . . . in the long run, our constitutional law is plainly susceptible to political influence.").

<sup>60</sup> See CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT xiii (Kimberle Crenshaw et al. eds., 1995) ("Although Critical Race scholarship differs in object, argument, accent, and emphasis, it is nevertheless unified by two common interests. The first is to understand how a regime of White supremacy and its subordination of people of color have been created and maintained in America, and, in particular, to examine the relationship between that social structure and professed ideals such as 'the rule of law' and 'equal protection.' The second is a desire not merely to understand the vexed bond between law and racial power but to *change* it.").

<sup>61</sup> See generally Derrick Bell, *Racial Realism*, 24 CONN. L. REV. 363 (1992) [hereinafter Bell, *Racial Realism*]; DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* (1992).

<sup>62</sup> Bell, *Racial Realism*, at 378 ("Continued struggle can bring about unexpected benefits and gains that in themselves justify continued endeavor. The fight in itself has meaning and should give us hope for the future.").

grounding in a perpetrator perspective but also the component parts of its progressive potential. Part II turns to social science research to demonstrate the flaws of the approach's perpetrator perspective and to illustrate the structural dimensions of White racial hostility and resentment. Part III discusses implications.

#### I. ANTIBALKANIZATION ASSUMPTIONS—RACE-CONSCIOUSNESS AND THE GOVERNMENT AS A RACIAL HOSTILITY PERPETRATOR

This Part describes in greater detail than prior scholarship the multistep logic of the antibalkanization approach to uncover its “frustrating duality.” To situate this analysis, a brief terminological point: The name “antibalkanization” approach might suggest that the approach's main concern is racial *division*.<sup>63</sup> While racial division is a significant concern for the approach, it is only one among others, including: stereotyping; “racial politics”; stigmatization; and, most crucially, racial hostility and resentment.<sup>64</sup> To fully understand the approach it is important to see how the approach views these issues as connected in what I call a “bias cascade.”<sup>65</sup> The approach attends to this cascade closely because it views it as the major obstacle (though one that can sometimes be overcome) to the accomplishment of its underlying racial equality goal.

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<sup>63</sup> This risk is closest to the epistemological origin of the term balkanization, which alludes to the violent break-up of Yugoslavia (a former nation state in the region of the world often called the “Balkans”) into multiple states and the tragic ethnic conflict that accompanied it. Justices have warned that a similar risk of racial division is associated with governmental uses of race and have made specific reference to the term “balkanization” in the context of race-conscious redistricting. See Pamela S. Karlan, *Our Separatism? Voting Rights as an American Nationalities Policy*, 1995 U. CHI. LEGAL F. 83, 92 (1995). As described below, however, the Court has warned of the risk of racial division in other doctrinal contexts as well.

<sup>64</sup> Many of these concepts have been analyzed by strict scrutiny literature as potential “constitutional harms” that the Court has used to both justify its conclusion that racial classifications by the government must be analyzed under strict scrutiny, and to evaluate when a government's use of race is sufficiently important and precise to survive strict scrutiny. See, e.g., Elizabeth S. Anderson, *Integration, Affirmative Action, and Strict Scrutiny*, 77 N.Y.U. L. REV. 1195 (2002); Peter J. Rubin, *Reconnecting Doctrine and Purpose: A Comprehensive Approach to Strict Scrutiny after Adarand and Shaw*, 149 U. PA. L. REV. 1 (2000); Kim Forde-Mazrui, *The Constitutional Implications of Race-Neutral Affirmative Action*, 88 GEO. L.J. 2331 (2000); Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427 (1997); Michael J. Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 COLUM. L. REV. 1023 (1979). But this literature tends to analyze these harms as individual and independent concerns, whereas this Part illustrates how the antibalkanization approach is most concerned with their interaction in a “bias cascade.”

<sup>65</sup> My use of this term is loosely derived from Cass Sunstein's analysis of the related phenomenon of “backlash” and its influence on judicial decision-making. See generally Cass R. Sunstein, *If People Would Be Outraged by Their Rulings, Should Judges Care?*, 60 STAN. L. REV. 155 (2007) (discussing relevance of systemic bias and informational cascades); Cass R. Sunstein, *Backlash's Travels*, 42 HARV. C.R.-C.L. L. REV. 435 (2007).



*A. The Racial Equality Goal: Substantive Equal Opportunity*

The antibalkanization approach pursues as its stated end-goal an ideal of racial equality that is comparatively progressive. It goes beyond the vision of equal protection generally associated with the anticlassification approach, which demands mere formal equal treatment.<sup>66</sup> Instead, it pursues a genuine equal opportunity society—that is, “a Nation of equal citizens in a society where race is irrelevant to personal opportunity and achievement.”<sup>67</sup> Different Justices have formulated this goal in different ways depending on the circumstances,<sup>68</sup> but the formulations all share similarities with the goal expressed in 1978 by perhaps the foremost proponent of antisubordination on the Court, Justice Marshall: “a fully integrated society, one in which the color of a person’s skin will not determine the opportunities available to him or her.”<sup>69</sup> I call this end goal “substantive equal opportunity.”<sup>70</sup>

Crucially, antibalkanization Justices are clear about their conviction that American society has not yet reached this end-goal. It is “a society . . . in which race unfortunately still matters,”<sup>71</sup> and in which it is an “unfortunate fact that irrational racial

<sup>66</sup> This vision of equality is encapsulated in the often-quoted syllogism of Chief Justice Roberts that “[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race.” *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007).

<sup>67</sup> *Richmond v. J. A. Croson Co.*, 488 U.S. 469, 505–06 (1989).

<sup>68</sup> Justice Kennedy, for example, has spoken of the nation’s “moral and ethical obligation to fulfill its historic commitment to creating an integrated society that ensures equal opportunity for all of its children” in the school desegregation context. *Parents Involved*, 551 U.S. at 797 (Kennedy, J., concurring). Justice Stevens has expressed his desire for a “time when race will become a truly irrelevant, or at least insignificant, factor” in determining people’s business success in the context of public contracting. *Fullilove v. Klutznick*, 448 U.S. 448, 545 (1980) (Stevens, J., dissenting). Both Justices O’Connor and Kennedy have noted the “goal of a political system in which race no longer matters—a goal that the Fourteenth and Fifteenth Amendments embody, and to which the Nation continues to aspire,” in the voting rights context. *Shaw v. Reno*, 509 U.S. 630, 657 (1993) (opinion of O’Connor, J.); *Miller v. Johnson*, 515 U.S. 900, 912 (1995) (opinion of Kennedy, J.). Similarly, Justice O’Connor has noted that “[a]s a Nation we aspire to create a society untouched by [America’s] history of exclusion, and to ensure that equality defines all citizens’ daily experience and opportunities as well as the protection afforded to them under law.” *Metro Broad., Inc. v. F.C.C.*, 497 U.S. 547, 611 (1990) (O’Connor, J., dissenting).

<sup>69</sup> *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 401 (1978) (opinion of Marshall, J.).

<sup>70</sup> One can, of course, question whether Justices are ultimately pursuing the goals that they state in their opinions. *See, e.g.*, Rubinfeld, *supra* note 64, at 451 (arguing that the way in which strict scrutiny has been applied by the Court suggests that the Court is not pursuing the purposes it says underlie the doctrine). For purposes of this Article, I take the Justices’ proclamations at face value to inquire whether their doctrinal choices, and the justifications for those choices, are well-designed to accomplish their stated end-goal.

<sup>71</sup> *Grutter v. Bollinger*, 539 U.S. 306, 333 (2003); *see also Parents Involved*, 551 U.S. at 787 (Kennedy, J., concurring) (“The enduring hope is that race should not matter; the reality is that too often it does.”).

prejudice—along with its lingering effects—still survives.”<sup>72</sup> Thus, the question whether government actors may rely on race in efforts that try to overcome this persisting racial inequality is squarely raised. The antibalkanization approach has developed its own unique answer—dissatisfied with both anticlassification Justices’ claim that the only sure way to guarantee racial equality is to immediately cease all reliance on race; and antidisubordination Justices’ claim that “[i]n order to get beyond racism, we must first take account of race. . . . [a]nd in order to treat some persons equally, we must treat them differently.”<sup>73</sup> In this unique answer, ideas about how governmental racial equality interventions cause people to relate to each other—either positively in ways that foster social cohesion or negatively in ways that foster racial hostility and resentment—take center stage. The way in which the approach implements these ideas can only be understood fully, however, in the context of basic assumptions the approach makes about American democracy and about how progress toward greater racial equality can and cannot be achieved within it.

### *B. Basic Assumptions About Race Relations and Democracy*

Proponents of the approach understand American democracy as one in which “[t]he enduring hope is that race should not matter” but “the reality is that too often it does.”<sup>74</sup> Still, the approach views American democracy as a “responsible, functioning”<sup>75</sup> one with “the capacity—and the duty—to learn from its past mistakes; to discover and confront persisting biases.”<sup>76</sup> In this democracy, well-meaning people will “by respectful, rational deliberation . . . rise above those flaws and injustices”<sup>77</sup> if only they are put into the right (or at least not into the wrong) environments by the government through its laws. In other words, American democracy is at a stage of development where there is a basic commitment to racial equality, including by White Americans,<sup>78</sup> but because of the country’s difficult racial history, this commitment

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<sup>72</sup> *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 260 (1995) (Stevens, J., dissenting).

<sup>73</sup> *Bakke*, 438 U.S. at 407 (opinion of Blackmun, J.).

<sup>74</sup> *Parents Involved*, 551 U.S. at 787 (Kennedy, J., concurring).

<sup>75</sup> *Schuette v. Coal. to Def. Affirmative Action*, 572 U.S. 291, 312 (2014).

<sup>76</sup> *Id.* at 313.

<sup>77</sup> *Id.* See also *id.* (“It is demeaning to the democratic process to presume that the voters are not capable of deciding an issue of this sensitivity on decent and rational grounds.”); see also Joshua S. Sellers, *Election Law and White Identity Politics*, 87 *FORDHAM L. REV.* 1515, 1560 (2019) (noting that the decision in *Schuette* was grounded in a view of the anti-affirmative action referendum at issue being “the manifestation of a healthy democracy” and more generally noting that “optimism pervades election law jurisprudence”).

<sup>78</sup> This commitment is reflected in the approach’s view that “it is appropriate to presume that [antidiscrimination] law has generally been obeyed.” *Fullilove v. Klutznick*, 448 U.S. 448, 538, 540 (1980) (Stevens, J., dissenting); see also *Richmond v. J. A. Croson Co.*, 488 U.S. 469, 501 & n.3 (rejecting “unsupported assumption that white prime contractors simply will not hire minority firms” and noting that the government had “point[ed] to no evidence that its prime contractors ha[d] been violating [a pre-existing] antidiscrimination ordinance”).

is perpetually fragile. There is a “race-consciousness” that is generally only “latent,” but which also sits ready to be “stimulate[d]” at any time.<sup>79</sup>

In this context, the way in which the government employs its lawmaking power in the service of racial equality plays a crucial role in either supporting or obstructing the ability of American “society . . . to continue to progress as a multiracial democracy.”<sup>80</sup> This is because, if well-executed, “the law dispels fears and preconceptions respecting racial attitudes” “[b]y the dispassionate analysis which is its special distinction.”<sup>81</sup> But if poorly executed, it can “foster intolerance and antagonism,”<sup>82</sup> “exacerbate rather than reduce racial prejudice,” and thereby “delay the time when race will become a truly irrelevant, or at least insignificant, factor.”<sup>83</sup> Thus, the stakes for judicial evaluation of government interventions into the racial equality process are high. Racial harmony is conducive to racial equality progress, but racial conflict is not<sup>84</sup>—indeed, such conflict “is at war with the democratic ideal.”<sup>85</sup> The key to racial equality progress, then, is to prevent the government from becoming a “racial hostility perpetrator” that subverts the basic but fragile equality commitments of white Americans via poorly designed and off-putting racial equality measures. The approach thus sees its duty as that of “channeling” government action toward interventions that ensure racial harmony, and away from interventions that cause racial conflict.<sup>86</sup> Its overall goal is to ensure that the government puts well-meaning people into harmonious environments that jumpstart the process toward greater racial equality instead of reigniting the racial antagonisms that have poisoned race relations in the past.

As described below, in pursuing this goal, antibalkanization proponents follow a reasoning process that incorporates many issues that progressive scholars of equal protection also consider highly relevant to the proper pursuit of racial equality—including stereotyping, stigmatization, and racial division. But they fail to incorporate these issues into a structural approach, instead remaining trapped in a flawed perpetrator perspective of what causes racial hostility and resentment among White

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<sup>79</sup> *Shaw v. Reno*, 509 U.S. 630, 643 (1993) (quoting *United Jewish Orgs. Inc. v. Carey*, 430 U.S. 144, 173 (1977)).

<sup>80</sup> *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 630 (1991).

<sup>81</sup> *Id.* at 631.

<sup>82</sup> *Fullilove*, 448 U.S. at 546 (Stevens, J., dissenting).

<sup>83</sup> *Id.*

<sup>84</sup> *See Schuette v. Coal. to Def. Affirmative Action*, 572 U.S. 291, 310 (2014) (“In the realm of policy discussions the regular give-and-take of debate ought to be a context in which rancor or discord based on race is avoided, not invited.”).

<sup>85</sup> *Shaw v. Reno*, 509 U.S. 630, 648–49 (1993) (quoting *Wright v. Rockefeller*, 376 U.S. 52, 66–67 (1964) (Douglas, J., dissenting)).

<sup>86</sup> Siegel, *supra* note 14, at 1302–33 (“Antibalkanization vindicates constitutional values by authorizing representative institutions to promote equality, while imposing on courts responsibility for constraining the form of political interventions so as to ameliorate resentments they may engender. Antibalkanization thus understands the judicial role not as mandating or managing, but as channeling constitutional politics that vindicate equality values.”).

Americans. As a result, the approach falls short in identifying those legal interventions that are necessary to effectively combat America's persistent racial hierarchy and create a true equal opportunity society—indeed, it undermines the constitutionality of such interventions.

### *C. How to Be a Racial Hostility Perpetrator*

#### 1. The Source of All Problems: Classifications and Equivalents

The key starting point of the approach is its ambivalent position on racial classifications. On the one hand, proponents believe that the government should not be completely prohibited from taking race into consideration when distributing benefits and burdens.<sup>87</sup> The approach recognizes the long-standing history of race-based discrimination against racial minorities that has created problems which government actors should not be required to ignore.<sup>88</sup>

At the same time, this history has also created an environment in which calling attention to race comes with certain risks and encourages biased behaviors, explained in more detail below, that make it particularly likely that when the government relies on race it will become a “racial hostility perpetrator.” Antibalkanization proponents therefore conclude that there should be deep judicial “skepticism”<sup>89</sup> whenever the government uses race “too much” in distributing benefits and burdens.<sup>90</sup>

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<sup>87</sup> See, e.g., *Schuette*, 572 U.S. at 300 (recognizing “the principle that the consideration of race in admissions is permissible, provided that certain conditions are met”); *Shaw*, 509 U.S. at 642 (“This Court never has held that race-conscious state decisionmaking is impermissible in *all* circumstances.”).

<sup>88</sup> See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237 (1995) (“The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it.”).

<sup>89</sup> *Id.* at 223.

<sup>90</sup> “Too much” in this context could mean too “extensively” to the exclusion of other relevant factors, a problem which scholars have called “value reductionism.” See, e.g., Richard H. Pildes & Richard G. Niemi, *Expressive Harms*, “*Bizarre Districts*,” and *Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 MICH. L. REV. 483, 500 (1993) (“When decisions reflect value reductionism, policymakers have transformed a decision process that ought to involve multiple values—as a matter of constitutional law—and reduced it to a one-dimensional problem. They have permitted one value to subordinate all other relevant values.”). It could also mean too “obviously.” See, e.g., Emerson, *supra* note 15, at 199–202 (arguing that the key concern is whether the use of race is “too obvious and transparent to the affected public”). As Neil Siegel suggests, both concerns circulate in the case law. Neil S. Siegel, *Race-Conscious Student Assignment Plans: Balkanization, Integration, and Individualized Consideration*, 56 DUKE L.J. 781, 805 (2006) (Relevant case law “insists that government not overuse race: it must not treat individuals ‘too much’ as members of racial groups, whether by literally overusing race or by needlessly impressing upon them and others that it is treating them in part as members of racial groups” and the

This concern is most decisively triggered when the government relies on explicit racial classifications—a notoriously vague concept that at a general level means that the government uses racial categories as part of its explicitly stated decision-making criteria.<sup>91</sup> Racial classifications that are applied on an individual by individual basis are considered to be particularly problematic.<sup>92</sup> However, the Court has also raised similar concerns when governmental decision-making is facially race-neutral but viewed by the Court as the *equivalent* of an explicit classification because of the extent to which it is influenced by racial considerations.<sup>93</sup> This is the case when race becomes the “predominant factor” in governmental decision-making.<sup>94</sup>

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“key consideration” in determining what is too much “is the Court’s judgment about how government’s use of race is likely to impact racial balkanization in America over the long run.”).

<sup>91</sup> See, e.g., *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 289 (1978) (“The special admissions program is undeniably a classification based on race and ethnic background. To the extent that there existed a pool of at least minimally qualified minority applicants to fill the 16 special admissions seats, white applicants could compete only for 84 seats in the entering class, rather than the 100 open to minority applicants. Whether this limitation is described as a quota or a goal, it is a line drawn on the basis of race and ethnic status.”). The Court has not clearly defined the concept or given it consistent meaning. See, e.g., Siegel, *supra* note 14, at 1361–62 (noting that “to date, the Court has never defined what a racial classification is”); Samuel R. Bagenstos, *Disparate Impact and the Role of Classification and Motivation in Equal Protection Law after Inclusive Communities*, 101 CORNELL L. REV. 1115, 1158 n.222 (2016) (noting “ambiguity in what constitutes a ‘classification’”). The broad definition I use here is not intended to take a position on any “true” meaning of the term, but simply to capture the Court’s usage.

<sup>92</sup> See, e.g., *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 795 (2007) (Kennedy, J., concurring) (“Reduction of an individual to an assigned racial identity for differential treatment is among the most pernicious actions our government can undertake.”).

<sup>93</sup> Stephen Rich calls this “inferred classifications,” which he defines as facially race-neutral actions that the Court believes threaten the same constitutional equality values as an explicit racial classification. See Stephen M. Rich, *Inferred Classifications*, 99 VA. L. REV. 1525, 1531–32, 1560 (2013).

<sup>94</sup> The use of race as a “predominant factor” has been a particular issue in the redistricting context, where the Court has recognized that in drawing facially race-neutral district lines, “legislatures will . . . almost always be aware of racial demographics.” *Miller v. Johnson*, 515 U.S. 900, 915 (1995); see also Pamela S. Karlan, *Easing the Spring: Strict Scrutiny and Affirmative Action After the Redistricting Cases*, 43 WM. & MARY L. REV. 1569, 1602 (2002) (noting that redistricting is “formally race neutral in the sense that the lines on the map contain no racial references at all”). However, once race becomes the “predominant factor” in the process, the Court considers it a “racial gerrymander” to which it must apply strict scrutiny (and often strike it down). *Miller*, 515 U.S. at 912, 916; see also *Shaw v. Hunt*, 517 U.S. 899, 905 (1996) (“The constitutional wrong occurs when race becomes the ‘dominant and controlling’ consideration.”). Still, antibalkanization opinions have raised similar concerns in other contexts as well. See, e.g., *Gutter v. Bollinger*, 539 U.S. 306, 392–93 (2003) (Kennedy, J., dissenting) (“[A]n educational institution must ensure, through sufficient procedures, that each applicant receives individual consideration and that race does not become a predominant factor in the admissions decisionmaking.”).

The initial doctrinal consequence of a finding that the government used an explicit racial classification or its facially race-neutral equivalent is that the Court will apply “strict scrutiny,” the most difficult-to-meet constitutional test.<sup>95</sup> Whether a particular use of race is truly “*too much*,” in the sense that it becomes unconstitutional, is then determined by applying strict scrutiny. The specific way in which the approach applies strict scrutiny is discussed in more detail below.<sup>96</sup> For now, the takeaway is that under the approach everything turns on whether the government uses race “too much.” When it does, the government becomes a presumptive racial hostility perpetrator by starting the bias cascade described below that ultimately prevents progress toward substantive equal opportunity by causing counterproductive racial hostility and resentment. Therefore, unless the government can overcome this presumption<sup>97</sup> by showing that it was *not* such a perpetrator in a given instance—because it structured its use of race carefully in a way that interrupts the cascade before it leads to racial hostility and resentment—the use of race must be prohibited in the name of racial equality itself. When no classification or equivalent is used, by contrast, a more deferential test applies<sup>98</sup> because the government is viewed as unlikely to be stimulating racial hostility and resentment.

## 2. Internal Bias: The Government’s Own Stereotyping and “Racial Politics”

Why would the mere fact that the government used a racial classification presumptively turn the government into a racial hostility perpetrator? At the most basic level, antibalkanization proponents believe that “[b]ecause racial characteristics so seldom provide a relevant basis for disparate treatment,”<sup>99</sup> their use is inherently

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<sup>95</sup> See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (“[A]ll racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny.”); *Miller*, 515 U.S. at 919–20 (“Race was . . . the predominant, overriding factor [in redistricting]. As a result, Georgia’s congressional redistricting plan cannot be upheld unless it satisfies strict scrutiny.”).

<sup>96</sup> See *infra* Section I.D.

<sup>97</sup> To be clear, antibalkanization opinions do not explicitly reason in terms of such a presumption. My use of the term is as an analogy.

<sup>98</sup> See, e.g., *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 789 (2007) (Kennedy, J., concurring) (stating that where school integration “mechanisms are race conscious but do not lead to different treatment based on a classification . . . it is unlikely [that they] would demand strict scrutiny to be found permissible”); *Bush v. Vera*, 517 U.S. 952, 959 (1996) (“For strict scrutiny to apply, the plaintiffs must prove that other, legitimate districting principles were ‘subordinated’ to race.”).

<sup>99</sup> *Fullilove v. Klutznick*, 448 U.S. 448, 533–35 (1980) (Stevens, J., dissenting); see also *Metro Broad., Inc. v. F.C.C.*, 497 U.S. 547, 604 (1990) (O’Connor, J., dissenting) (approvingly citing this language). This assumption has been challenged, especially from Justices following an antisubordination approach. See, e.g., *Fullilove*, 448 U.S. at 519 (Marshall, J., concurring) (“Because the consideration of race is relevant to remedying the continuing effects of past racial discrimination, and because governmental programs employing racial classifications

suspicious. Proponents have supported this conclusion with a variety of reasons, including that constitutional equality rights are individual, personal rights, and thus the only relevant considerations for government decisions should be individual attributes rather than group-level characteristics like race;<sup>100</sup> that race has no relationship to individual merit, which ought to be the basis for governmental decision-making;<sup>101</sup> that race is immutable and therefore reliance on race is unfair;<sup>102</sup> and that the problematic history of race suggests that the government generally cannot be trusted to use race responsibly.<sup>103</sup>

Why would a government actor make the problematic decision to use race anyway? The approach suggests that the likely answer is that the government is acting

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for remedial purposes can be crafted to avoid stigmatization, . . . such programs should not be subjected to conventional ‘strict scrutiny.’”).

<sup>100</sup> See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003) (“Because the Fourteenth Amendment ‘protect[s] *persons*, not *groups*,’ all ‘governmental action based on race—a *group* classification long recognized as in most circumstances irrelevant and therefore prohibited—should be subjected to detailed judicial inquiry to ensure that the *personal* right to equal protection of the laws has not been infringed.”) (quoting *Adarand*, 515 U.S. at 227). As Neil Siegel pointed out, this argument is not particularly convincing because providing individualized consideration to a person based on their personal attributes “is perfectly consistent with the consideration of group characteristics, including race. Government cannot govern through generally applicable laws without distinguishing among individuals based on group characteristics; the criteria—any criteria—are defined by groups.” Siegel, *supra* note 90, at 789. Instead, the “task is to decide *which* criteria are relevant to government’s choices among individuals.” *Id.* at 790 (emphasis added). I mention this argument not because I agree with it, but to illustrate the bases antibalkanization proponents have raised for their suspicion against racial classifications.

<sup>101</sup> See, e.g., *Rice v. Cayetano*, 528 U.S. 495, 518 (2000) (“One of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities.”); *Metro Broad.*, 497 U.S. at 619 (O’Connor, J., dissenting) (rejecting as “utterly irrational” “the ‘premise that differences in race, or in the color of a person’s skin, reflect real differences that are relevant to a person’s right to share in the blessings of a free society’”) (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 316 (1986) (Stevens, J., dissenting)). For an insightful counterargument that race and merit are related in complex ways, see, e.g., Devon W. Carbado, Kate M. Turetsky & Valerie Purdie-Vaughns, *Privileged or Mismatched: The Lose-Lose Position of African Americans in the Affirmative Action Debate*, 64 UCLA L. REV. DISC. 174 (2016).

<sup>102</sup> See, e.g., *Fullilove*, 448 U.S. at 496 (Powell, J., concurring) (“Racial classifications must be assessed under the most stringent level of review because immutable characteristics, which bear no relation to individual merit or need, are irrelevant to almost every governmental decision.”). For a more complex understanding of race, see, e.g., Neil Gotanda, *A Critique of “Our Constitution is Color-Blind”*, 44 STAN. L. REV. 1 (1991).

<sup>103</sup> See, e.g., *Miller v. Johnson*, 515 U.S. 900, 922 (1995) (“The history of racial classifications in this country suggests that blind judicial deference to legislative or executive pronouncements of necessity has no place in equal protection analysis.”) (quoting *Richmond v. J. A. Croson*, 488 U.S. 469, 501 (1989)).

on its own racial bias by engaging in racial stereotyping,<sup>104</sup> which is likely to shade into undesirable “racial politics.” The approach’s concern about stereotyping is multifaceted and discussed further below. But the first important worry is that reliance on the group-level category of race indicates that the government is making improper *generalizations* about the individuals affected by its policies<sup>105</sup>: the government is treating citizens “as the product of their race, evaluating their thoughts and efforts—their very worth as citizens—according to a criterion barred to the Government by history and the Constitution.”<sup>106</sup> In other words, the government’s use of race suggests that it assumes that all members of a particular racial group are alike in a given context<sup>107</sup> when in reality “[t]he racial generalization inevitably does not apply to certain individuals, and those persons may legitimately claim that they have been judged according to their race rather than upon a relevant criterion.”<sup>108</sup> This general concern about government stereotyping is not necessarily disingenuous, and progressive scholars have also raised it as a potential racial equality obstacle in contexts that are in the approach’s core territory.<sup>109</sup> The perhaps clearest example is the critique of “negative action” against Asian Americans in university admissions that may result from such stereotyping.<sup>110</sup> My point here is limited. It is

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<sup>104</sup> See, e.g., *Fullilove*, 448 U.S. at 552–53 (Stevens, J., dissenting) (warning about “[t]he risk that habitual attitudes toward classes of persons, rather than analysis of the relevant characteristics of the class, will serve as a basis for a legislative classification”).

<sup>105</sup> See, e.g., *Metro Broad.*, 497 U.S. at 619 (O’Connor, J., dissenting) (noting that “essential equal protection principles . . . prohibit racial generalizations”); see also Forde-Mazrui, *supra* note 64, at 2355 (“By stereotypes, the Court seems to have in mind generalizations about a person or group of people based on their race.”).

<sup>106</sup> *Metro Broad.*, 497 U.S. at 604; see also *Miller*, 515 U.S. at 912 (approvingly quoting this language).

<sup>107</sup> See, e.g., *Miller*, 515 U.S. at 911–12 (“When the State assigns voters on the basis of race, it engages in the offensive and demeaning assumption that voters of a particular race, because of their race, ‘think alike, share the same political interests, and will prefer the same candidates at the polls.’”) (internal citation omitted); *Metro Broad.*, 497 U.S. at 632 (Kennedy, J., dissenting) (criticizing “the step, which itself should be forbidden, of enacting into law the stereotypical assumption that the race of owners is linked to broadcast content”).

<sup>108</sup> *Metro Broad.*, 497 U.S. at 620 (O’Connor, J., dissenting); see also *Schuetz v. Coal. to Def. Affirmative Action*, 572 U.S. 291, 308 (2014) (“It cannot be entertained as a serious proposition that all individuals of the same race think alike.”).

<sup>109</sup> There are, of course, many examples of governmental stereotyping that disadvantage racial minority groups outside of the core territory of the approach. The internment of Japanese Americans during World War II based on wholesale stereotyping of possible race-based “disloyalty” is a particularly infamous example. See, e.g., Sumi Cho, *Redeeming Whiteness in the Shadow of Internment: Earl Warren, Brown, and a Theory of Racial Redemption*, 40 B.C. L. REV. 73 (1998).

<sup>110</sup> See, e.g., Jerry Kang, *Negative Action Against Asian Americans: The Internal Instability of Dworkin’s Defense of Affirmative Action*, 31 HARV. C.R.-C.L. L. REV. 1, 3, 41 (1996) (defining negative action as “unfavorable treatment based on race, using the treatment of Whites as a basis for comparison” and discussing how negative action could arise in university admissions based on negative stereotyping of Asian Americans grounded in the



not that all governmental uses of race *are* the result of negative stereotyping,<sup>111</sup> but simply that it need not be disingenuous for well-meaning antibalkanization Justices to be worried about governmental stereotyping in the approach's core territory.

Why might the government behave in such a sloppy and problematic way? The approach assumes that there is a large risk that the reason is another type of bias: "racial politics," meaning an attempt by members of particular racial groups to circumvent merit-based decision-making and "to negotiate 'a piece of the action' for its members."<sup>112</sup> Because racial politics embodies racial preference for its own sake,<sup>113</sup> the Court must vigilantly guard against it.<sup>114</sup> Most importantly for purposes of this Article, this is particularly the case because stereotyping and "racial politics" practiced by the government (or the appearance thereof) cascade onward into society more broadly and poison the intergroup harmony that the approach thinks is necessary for progress toward racial equality.

### 3. External Bias: Stereotyping by Others, Racial Division, Stigmatization

The approach worries that the actions of the government signal powerfully what kinds of thoughts and behaviors are right or wrong for people at large, and thus can

"model minority" myth); Gabriel J. Chin et al., *Beyond Self-Interest: Asian Pacific Americans Toward a Community of Justice, a Policy Analysis of Affirmative Action*, 4 UCLA ASIAN PAC. AM. L.J. 129, 159 (1996) ("[I]n cases of proven racial disparities between APA and White admission rates, the causes have been either stereotypical treatment of APA applicants or other preferences, such as that for alumni children, who tend to be predominantly White.").

<sup>111</sup> Indeed, scholars who have critiqued negative action have made clear that such a critique does not necessitate opposing the government's use of race in affirmative action programs. Kang, *supra* note 110, at 44–46; Chin et al., *supra* note 110, at 159–60.

<sup>112</sup> *Fullilove v. Klutznick*, 448 U.S. 448, 539 (1980) (Stevens, J., dissenting); *see also* *Richmond v. J. A. Croson*, 488 U.S. 469, 511 (1989) (approvingly citing this language).

<sup>113</sup> *See, e.g., Metro Broad.*, 497 U.S. at 615 (O'Connor, J., dissenting) (warning about the risk of "naked preferences for members of particular races" when racial classifications are used); *Fullilove*, 448 U.S. at 497 (Powell, J., concurring) ("[I]f [a race-based] set-aside merely expresses a congressional desire to prefer one racial or ethnic group over another, [it] violates the equal protection component in the Due Process Clause of the Fifth Amendment.").

<sup>114</sup> One of the most consistently cited quotes from an antibalkanization opinion is Justice O'Connor's admonition in *Croson* that:

Absent searching judicial inquiry into the justification for . . . race-based measures, there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics. Indeed, the purpose of strict scrutiny is to 'smoke out' illegitimate uses of race.

488 U.S. at 493; *see also* *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 783 (2007) (Kennedy, J., concurring) (quoting same language approvingly); *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 226 (1995); *Shaw v. Reno*, 509 U.S. 630, 642–43 (1993); *Metro Broad.*, 497 U.S. at 609 (O'Connor, J., dissenting).

generate downstream social effects that go far beyond the government's own direct sphere of influence. This concern is based partly on the idea noted above that the problematic history of race has created a "latent race consciousness"<sup>115</sup> in American society. When the government calls attention to race through its actions, this consciousness can easily move from "latent" to "actual," with problematic repercussions. Antibalkanization proponents believe that racial stereotyping and politicking by the government encourages people in general to also think of themselves and others in racial terms when they otherwise might not.<sup>116</sup> That is, when the government uses race in its decision-making, this "endorse[s] race-based reasoning"<sup>117</sup> and "reinforce[s] habitual ways of thinking in terms of classes instead of individuals."<sup>118</sup> And not only does it encourage such thinking, it legitimates it as well by "suggesting the utility and propriety of basing decisions on a factor that ideally bears no relationship to an individual's worth or needs."<sup>119</sup> In other words, the government's use of race turns it into a racial bias perpetrator by perpetuating and legitimating racial stereotyping in society at large. Again, this is not necessarily a disingenuous concern. Scholars have pointed to social science research that suggests that making race more salient may indeed at times call forth, reinforce, and/or perpetuate stereotypes of racial minority groups.<sup>120</sup> This point is again limited, as many countervailing considerations are at play.<sup>121</sup> But an antibalkanization Justice with an interest in "getting right" their racial equality jurisprudence could genuinely be concerned about the possible reinforcing of stereotypes when race is relied on in the distribution of resources and opportunities.

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<sup>115</sup> *Shaw*, 509 U.S. at 643.

<sup>116</sup> *Fullilove*, 448 U.S. at 532 (Stevens, J., dissenting).

<sup>117</sup> *Metro Broad.*, 497 U.S. at 603 (O'Connor, J., dissenting).

<sup>118</sup> *Fullilove*, 448 U.S. at 547 (Stevens, J., dissenting); see also *Shaw*, 509 U.S. at 647 (Race-conscious redistricting "*reinforces* the perception that members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidates at the polls.") (emphasis added).

<sup>119</sup> *Shaw*, 509 U.S. at 643.

<sup>120</sup> See, e.g., Linda Hamilton Krieger, *Civil Rights Perestroika: Intergroup Relations after Affirmative Action*, 86 CALIF. L. REV. 1251, 1263–71 (1998); Linda R. Tropp, Amy E. Smith & Faye J. Crosby, *The Use of Research in the Seattle and Jefferson County Desegregation Cases: Connecting Social Science and the Law*, 7 ANALYSES SOC. ISSUES & PUB. POL'Y 93, 101–04 (2007).

<sup>121</sup> For example, race-consciousness may simultaneously be necessary to create environments that facilitate the *undoing* of stereotypes. See, e.g., *id.* at 104–05; Elise C. Boddie, *Critical Mass and the Paradox of Colorblind Individualism in Equal Protection*, 17 U. PA. J. CONST. L. 781, 799 (2015). Similarly, the possibility that race-consciousness may reinforce stereotypes may not outweigh the fact that eliminating race-consciousness would be highly counterproductive to racial equality goals in the absence of more effective alternatives. Krieger, *supra* note 120, at 1276–1329.

The antibalkanization approach's concern with stereotyping, moreover, is not put forth for its own sake. Instead, it is the foundation for worries that such cognitive biases have deeper implications by encouraging a vision of society that the approach otherwise sees in the past and prefers to keep there: a society characterized by racial division. As Justice Kennedy has put it: "Government action that classifies individuals on the basis of race . . . carries the danger of perpetuating the very racial divisions the polity seeks to transcend."<sup>122</sup> The approach is concerned that when people think about themselves and others in racial terms—as encouraged by the government—they consequently also conceive of society as separated into different racial "blocs"<sup>123</sup> and define their interests and allegiances primarily at the racial bloc-level rather than at the narrower individual level or at a broader, societal level.<sup>124</sup> This divided perception of society (produced by the government's use of race)—which again progressive equality scholars have also identified as potentially problematic<sup>125</sup>—in turn risks taking stereotyping to the next, more pernicious, level of stigmatization.

Stigmatization pushes overbroad *generalizations* into the even more problematic territory of *harmful social meanings* ascribed on the basis of group identity.<sup>126</sup> While

<sup>122</sup> *Schuetz v. Coal. to Def. Affirmative Action*, 572 U.S. 291, 308 (2014); *see also* *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 797 (2007) (Kennedy, J., concurring) ("Governmental classifications that command people to march in different directions based on racial typologies can cause a new divisiveness.").

<sup>123</sup> *See, e.g., Miller v. Johnson*, 515 U.S. 900, 927 (1995) (raising concern about "carving electorates into racial blocs"); *Metro Broad., Inc. v. F.C.C.*, 497 U.S. 547, 603 (1990) (O'Connor, J., dissenting) (Racial classifications "endorse race-based reasoning and the conception of a Nation divided into racial blocs.").

<sup>124</sup> This concern has been made particularly explicit in the voting context, where opinions have warned that racial gerrymandering sends a "pernicious" message to elected representatives "that their primary obligation is to represent only the members of [a particular racial] group, rather than their constituency as a whole." *Shaw*, 509 U.S. at 648. These opinions emphasize that electoral systems that send such messages are "a divisive force in a community, emphasizing differences between candidates and voters that are irrelevant in the constitutional sense" and threaten that "the multiracial, multireligious communities that our Constitution seeks to weld together as one become separatist." *Id.* (quoting *Wright v. Rockefeller*, 376 U.S. 52, 66–67 (1964) (Douglas, J., dissenting)). But the concern has also been raised in other contexts. *See, e.g., Schuetz*, 572 U.S. at 308–09 (rejecting interpretation of "political process" doctrine that would turn on whether issues "inur[e] primarily to the benefit of [a racial] minority" because such doctrine would risk "the creation of incentives for those who support or oppose certain policies to cast the debate in terms of racial advantage or disadvantage" and "[r]acial division would be validated, not discouraged").

<sup>125</sup> *See, e.g., Kenji Yoshino, The New Equal Protection*, 124 HARV. L. REV. 747, 751 (2011) (discussing how group-based equality approaches may have contributed to "pluralism anxiety," i.e., "apprehension of and about [the country's] demographic diversity" that in turn may be responsible for a constricted development of equality law and arguing that more universal "dignity"-based arguments could lead to greater progress). *But see* Hutchinson, *supra* note 26, at 10 (critiquing Yoshino's argument and supporting literature).

<sup>126</sup> *See, e.g., Kang, supra* note 110, at 25 (defining stigma as "a mark signifying that the

there have been differing conceptualizations of the meaning of “stigma” on the Court at various times,<sup>127</sup> what is most relevant for this Article is that antibalkanization proponents believe that government uses of race stigmatize *everyone* who is affected by them—both their “beneficiaries” and those who are “disadvantaged,”<sup>128</sup> albeit in different ways. The main beneficiaries of programs in the approach’s core territory are members of racial minority groups.<sup>129</sup> One might think that such beneficiaries are therefore the recipients of racial “preferences”<sup>130</sup>—and thus perhaps on first sight would simply be advantaged. But antibalkanization proponents worry that such preferences might in fact be based on, and encourage others to adopt, long-standing *negative* social meanings that associate racial minorities with “notions of racial inferiority”<sup>131</sup> and “hold[] that certain groups are unable to achieve success without special protection.”<sup>132</sup> Significantly, according to the approach, once the government uses race “too much” it is likely to encourage such stigmatization *regardless* of whether the government itself holds these negative views or intends to promote them.<sup>133</sup>

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disadvantaged are members of a group worthy of prejudice, in forms ranging from antipathy to selective indifference”). For a seminal work on racial stigma, see R. A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 N.Y.U. L. REV. 803 (2004).

<sup>127</sup> Lenhardt, *supra* note 126, at 864–75 (discussing different conceptualizations of stigmatic harms in case law, such as citizenship harm, psychological harm, reputational harm, and notions of racial otherness).

<sup>128</sup> See, e.g., *Metro Broad.*, 497 U.S. at 604 (O’Connor, J., dissenting) (“Racial classifications, whether providing benefits to or burdening particular racial or ethnic groups, may stigmatize those groups singled out for different treatment.”).

<sup>129</sup> See *supra* note 44 and accompanying text. My use of the term “main beneficiary” is limited. It simply refers to the Court’s view of whose interests are primarily benefitted by such programs. Many such uses of race also benefit White people and society as a whole in many important ways. See, e.g., *infra* notes 394–97 and accompanying text.

<sup>130</sup> The notion that governmental uses of race that promote greater racial equality involve “racial preferences” is both popular and problematic. As Devon Carbado and Cheryl Harris have demonstrated, for example, racial preference arguments are based on questionable “baseline assumptions” about the status quo of racial inequality and overlook many “racial asymmetr[ies]” in the ways in which distributions of social benefits and burdens “are already stacked in ways that prefer whites and disadvantage blacks.” Carbado & Harris, *supra* note 35, at 1200; see also Simson, *supra* note 35, at 1100–03 (connecting preference rhetoric to psychological preferences for racial hierarchy).

<sup>131</sup> *Richmond v. J. A. Croson*, 488 U.S. 469, 493 (1989); see also *id.* at 516–17 (Stevens, J., concurring) (warning that race-based legislation “actually imposes a greater stigma on its supposed beneficiaries” than on the “disadvantaged class”); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 229 (1995) (approvingly quoting same language).

<sup>132</sup> *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 298 (1978) (opinion of Powell, J.); see also *Croson*, 488 U.S. at 494 (approvingly quoting same language).

<sup>133</sup> See, e.g., *Fullilove v. Klutznick*, 448 U.S. 448, 545 (1980) (Stevens, J., dissenting) (“[E]ven though it is not the actual predicate for this legislation, a statute of this kind inevitably is perceived by many as resting on an assumption that those who are granted this special preference are less qualified in some respect that is identified purely by their race.”)

Importantly for the approach's racial hostility and resentment conclusions, these stigmatization fears are compounded by concerns that those who are "disadvantaged" by governmental uses of race—i.e., Whites, in the approach's core territory<sup>134</sup>—are *also* stigmatized in various ways. When the governmental use of race is justified on remedial grounds—i.e., when the government uses race to counteract the past and/or present effects of racial discrimination against racial minorities—the concern is that Whites are stigmatized by disregard of their "innocence."<sup>135</sup> That is, Whites are stamped "with the unproven charge of past racial discrimination."<sup>136</sup> In other words, the government does not merely treat all White Americans as if they are the same (stereotyping), but it treats them as if they are all perpetrators or beneficiaries of discrimination against racial minorities (stigmatization).<sup>137</sup> When the governmental use of race is justified on forward-looking grounds, by contrast—for example, when the government uses race to ensure greater diversity of backgrounds, viewpoints, etc., in a given context—the concern is that Whites are stigmatized by the implication that their contributions, regardless of their individual circumstances, are considered not as valuable as those of racial minorities based on their race.<sup>138</sup>

Here, again, the approach's general concern about the possibility of racial stigmatization and its further exacerbation of negative stereotypes is consistent with concerns of progressive scholars,<sup>139</sup> some of which have argued that constitutional

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(emphasis added); *see also Adarand*, 515 U.S. at 229 (approvingly quoting same language); *Croson*, 488 U.S. at 517 (Stevens, J., concurring) (same).

<sup>134</sup> The framing of Whites as "disadvantaged" by governmental uses of race is the flip side of the rhetoric that racial minority beneficiaries receive "racial preferences" and thus is subject to the same critique. *See supra* note 130. While recent anti-affirmative action litigation has been brought on behalf of Asian American plaintiffs and the public narrative surrounding those challenges has at times portrayed Asian Americans as the "victims" of affirmative action programs for other racial minority groups, on closer inspection the plaintiffs' claims are actually that Asian Americans are disadvantaged by discrimination *in favor of Whites* (i.e., negative action) separate from Harvard's affirmative action program. *See Feingold, supra* note 57.

<sup>135</sup> *See, e.g., Freeman, supra* note 33, at 1055.

<sup>136</sup> *Croson*, 488 U.S. at 516 (Stevens, J., concurring); *see also Adarand*, 515 U.S. at 229 (approvingly quoting this language); *Metro Broad. Inc. v. F.C.C.*, 497 U.S. 547, 636 (1990) (Kennedy, J., dissenting) (same). For a detailed analysis of the problematic influence of White innocence reasoning on equal protection doctrine more generally, *see David Simson, Whiteness as Innocence*, 96 DENV. L. REV. 635, 677–88 (2019).

<sup>137</sup> Simson, *supra* note 136, at 646–50 (explaining perpetrator-based and beneficiary-based conceptions of White innocence).

<sup>138</sup> *See, e.g., Metro Broad.*, 497 U.S. at 619 (O'Connor, J., dissenting) (criticizing federal licensing program pursuing greater diversity in broadcasting content as based on the problematic view that "[i]ndividuals of unfavored racial and ethnic backgrounds are unlikely to possess the unique experiences and background that contribute to viewpoint diversity").

<sup>139</sup> *See, e.g., Lenhardt, supra* note 126, at 830–36 (discussing mutually reinforcing relationship between racial stigma and negative racial stereotypes, though not in the context of programs

racial equality questions should centrally turn on the question of stigmatization.<sup>140</sup> Again also, the point is limited. Many (likely most) such scholars will not agree with the way in which stigma is mobilized in specific antibalkanization opinions,<sup>141</sup> especially as it pertains to the stigmatization of whites.<sup>142</sup> But the approach's concern about racial stigmatization itself need not be disingenuous, even if it is only somewhat informed.

#### 4. The Ultimate Racial Equality Obstacle: White Racial Hostility and Resentment

If the government's decision to use a racial classification or its equivalent is the hazardous starting point for a bias cascade that infuses racial stereotyping into people's thinking, divides society, and encourages the proliferation of harmful stigmatic messages about everyone and anyone, wouldn't it be logical for those disadvantaged by such bias to be upset and resentful? Wouldn't this resentment, grounded as it is in negative racial meanings and divisions with a dark history, prevent even well-meaning people with a commitment to racial equality from engaging each other in a harmonious way that would spur progress toward substantive equal opportunity? And wouldn't it make sense to lay responsibility for such counterproductive hostility and resentment at the feet of the government perpetrator? The antibalkanization approach emphatically answers yes to all of the above.

Notably, the approach does not view the possibility of racial hostility and resentment as just another problematic aspect of racial classifications. It specifically sees such hostility and resentment as the *culmination* of the bias cascade laid out above and as the ultimate obstacle on the path toward substantive equal opportunity. As an illustration of this point as well as the approach's internal logical progression and consistency over time and across Justices who have applied it, consider the

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that benefit racial minority group members); David Simson, *Exclusion, Punishment, Racism, and Our Schools: A Critical Race Theory Perspective on School Discipline*, 61 UCLA L. REV. 506, 535–49 (2014) (discussing relevance of stigma in context of racial disparities in school discipline).

<sup>140</sup> See, e.g., Lenhardt, *supra* note 126, at 890–96; Kang, *supra* note 110, at 24–30.

<sup>141</sup> For example, the concern that governmental efforts to promote greater racial equality are, in reality, bad for their racial minority beneficiaries has a troubled history which provides many reasons to be deeply skeptical about accepting such arguments at face value. See generally Jill Elaine Hasday, *Protecting Them from Themselves: The Persistence of Mutual Benefits Arguments for Sex and Race Inequality*, 84 N.Y.U. L. REV. 1464 (2009).

<sup>142</sup> Lenhardt, *supra* note 126, at 877 (“In far too many cases, the analysis employed by the Court has been ahistorical and willfully ignorant of relevant contexts, and, thus, necessarily incomplete.”); Kang, *supra* note 110, at 44–46 (acknowledging that from the perspective of a White challenger of an affirmative action program, such a program may broadcast a message of “antipathy and selective indifference” but ultimately arguing that when this concern is reconciled with other perspectives “the objective social meaning of affirmative action programs in general is not strongly stigmatic”); see also generally Simson, *supra* note 136 (critiquing reliance on ideology of “white innocence” in race-conscious remedies jurisprudence).

following three examples from three different Justices and in three different contexts (though all in the approach's core territory).

Take as a first example Justice Stevens' dissent in *Fullilove*, in which the Court upheld a Congressional affirmative action program in public contracting that had the remedial purpose of addressing the effects of prior race discrimination in such contracting.<sup>143</sup> Stevens' starting point for his opinion, which he grounded in the dark history of government "monopoly privileges,"<sup>144</sup> was suspicion toward racial classifications: "Because racial characteristics so seldom provide a relevant basis for disparate treatment, and because classifications based on race are potentially so harmful to the entire body politic, it is especially important that the reasons for any such classification be clearly identified and unquestionably legitimate."<sup>145</sup> This suspicion was based on the risk that such classifications often embody a "stereotyped reaction [that] may have no rational relationship—other than pure prejudicial discrimination—to the stated purpose for which the classification is being made."<sup>146</sup> Indeed, what he perceived as the poorly tailored, "slapdash" nature of the program<sup>147</sup> suggested to Stevens that what really motivated Congress was "racial politics," i.e., minority groups negotiating "a piece of the action"<sup>148</sup> for themselves. The problem with such governmental stereotyping, in turn, was that it encouraged others to stereotype as well, leading to stigmatization: Congress "fostered" an "assumption" that "many" people might be willing to make when prodded, namely "that those who are granted this special preference are less qualified in some respect that is identified purely by their race,"<sup>149</sup> thus "imply[ing] to some the recipients' inferiority and especial need for protection."<sup>150</sup> Under such circumstances, the "preference" program would "inevitably . . . engender resentment on the part of competitors excluded"<sup>151</sup> and indeed "only exacerbate

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<sup>143</sup> See *Fullilove v. Klutznick*, 448 U.S. 448, 473 (1980) (setting out remedial purpose of program at issue). Justice Stevens's dissent in *Fullilove* is a particularly important example because it is repeatedly cited with approval in later decisions by antibalkanization Justices as accurately setting out the constitutional problems posed by government racial classifications.

<sup>144</sup> *Id.* at 532–33 (Stevens, J., dissenting).

<sup>145</sup> *Id.* at 533–35.

<sup>146</sup> *Id.* at 534 n.4; see also *id.* at 552–53 ("The risk that habitual attitudes toward classes of persons, rather than analysis of the relevant characteristics of the class, will serve as a basis for a legislative classification is present when benefits are distributed as well as when burdens are imposed.").

<sup>147</sup> *Id.* at 539.

<sup>148</sup> *Id.* at 542.

<sup>149</sup> *Id.* at 545.

<sup>150</sup> *Id.* at 545 n.17; see also *id.* at 545 (Preferential treatment will cause "skepticism on the part of customers and suppliers aware of the statutory classification."). As noted above, Justice Stevens believed that these negative meanings would follow "even though [they were] not the actual predicate for this legislation." *Id.*

<sup>151</sup> *Id.*; see also *id.* at 532–33 ("History teaches us that the costs associated with a sovereign's grant of exclusive privileges often encompass more than the high prices and shoddy workmanship that are familiar handmaidens of monopoly; they engender animosity and discontent as well.").

rather than reduce racial prejudice.”<sup>152</sup> Therefore, the program would “delay the time when race will become a truly irrelevant, or at least insignificant, factor,”<sup>153</sup> could not “be defended as an appropriate method of reducing racial prejudice,”<sup>154</sup> would “disserve the goal of equal opportunity,”<sup>155</sup> and therefore should be held unconstitutional.

Take as another example Justice Kennedy’s dissent in *Metro Broadcasting*, which upheld a federal licensing program that had the *forward-looking* purpose of pursuing greater diversity in broadcasting content through various mechanisms designed to increase racial minority station ownership.<sup>156</sup> Kennedy started his dissent by invoking *Plessy v. Ferguson*<sup>157</sup> to situate the case in the troubling history of the government’s use of racial classifications for ostensible racial equality purposes.<sup>158</sup> Kennedy then criticized the government for its own stereotyping—for “enacting into law the stereotypical assumption that the race of owners is linked to broadcast content,”<sup>159</sup> and basing its program “on the demeaning notion that members of the defined racial groups ascribe to certain ‘minority views’ that must be different from those of other citizens.”<sup>160</sup> Worried that this would encourage similar stereotyping by others, shading quickly into the stigmatization of the program’s “supposed beneficiaries,” Kennedy warned that “[s]pecial preferences . . . can foster the view that members of the favored groups are inherently less able to compete on their own.”<sup>161</sup> Turning to the stigmatization of the “disadvantaged group,” Kennedy pointed to “the danger that the ‘stereotypical thinking’ that prompts policies such as the FCC rules here ‘stigmatizes the disadvantaged class with the unproven charge of past racial discrimination.’”<sup>162</sup> This was “not a proposition that the many citizens, who to their knowledge ‘have never discriminated against anyone on the basis of race’

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<sup>152</sup> *Id.* at 545; *see also, e.g.,* *Richmond v. J. A. Croson Co.*, 488 U.S. 469, 520 (1989) (Kennedy, J., concurring in part and concurring in the judgment) (arguing that because local ordinance implementing race-based set-asides in contracting was “not a remedy, but . . . itself a preference [it] will cause the same corrosive animosities that the Constitution forbids in the whole sphere of government, and that our national policy condemns in the rest of society as well”).

<sup>153</sup> *Fullilove*, 448 U.S. at 545 (Stevens, J., dissenting).

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* at 548; *see also* *Rice v. Cayetano*, 528 U.S. 495, 517 (2000) (“The law itself may not become the instrument for generating the prejudice and hostility all too often directed against persons whose particular ancestry is disclosed by their ethnic characteristics and cultural traditions.”).

<sup>156</sup> *See Metro Broad., Inc. v. F.C.C.*, 497 U.S. 547, 632 (1990) (Kennedy, J., dissenting).

<sup>157</sup> 163 U.S. 537 (1896).

<sup>158</sup> *Metro Broad.*, 497 U.S. at 631–32 (Kennedy, J., dissenting) (arguing that majority “exhumed *Plessy*’s deferential approach to racial classifications”).

<sup>159</sup> *Id.* at 632.

<sup>160</sup> *Id.* at 636.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* (quoting *Richmond v. J. A. Croson Co.*, 488 U.S. 469, 516 (1989) (opinion of Stevens, J.)).



will find easy to accept.”<sup>163</sup> What would all of this lead to consequently? “[I]ntolerance and antagonism against the entire membership of the favored classes,”<sup>164</sup> “animosity and discontent,”<sup>165</sup> and “the seeds of race hate . . . planted under the sanction of law.”<sup>166</sup> Kennedy closed with a warning that allowing such bias cascades to fester would have the ultimate negative consequence of hindering the achievement of racial equality by subverting racial harmony—and thus was unconstitutional:

Though the racial composition of this Nation is far more diverse than the first Justice Harlan foresaw, his warning in dissent is now all the more apposite: “The destinies of the two races, in this country, are indissolubly linked together, and *the interests of both require that the common government of all shall not permit the seeds of race hate to be planted under the sanction of law.*” . . . Perhaps the tolerance and decency to which our people aspire will let the disfavored rise above hostility and the favored escape condescension. But history suggests much peril in this enterprise, *and so the Constitution forbids us to undertake it.*<sup>167</sup>

Take as a final example Justice O’Connor’s opinion for the Court in the *voting rights/redistricting* context in *Shaw v. Reno*. Proceeding from the basic starting point that “[r]acial classifications of any sort pose the risk of lasting harm to our society” because “[t]hey reinforce the belief, held by too many for too much of our history, that individuals should be judged by the color of their skin,”<sup>168</sup> O’Connor worried that racial gerrymanders—in crude fashion—lumped together “individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin.”<sup>169</sup> Whatever the government’s motivations for doing so, this would “reinforce[] the perception that members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidates at the polls . . . [i.e.,] impermissible racial stereotypes.”<sup>170</sup> Such stereotyping risked

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<sup>163</sup> *Id.* at 637 (quoting *Croson*, 488 U.S. at 516 (opinion of Stevens, J.)).

<sup>164</sup> *Id.* at 636 (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 547 (1980) (Stevens, J., dissenting)).

<sup>165</sup> *Id.* at 637.

<sup>166</sup> *Id.* (quoting *Plessy v. Ferguson*, 163 U.S. 537, 560 (1896) (Harlan, J., dissenting)).

<sup>167</sup> *Id.* (emphasis added) (internal citation omitted). Another clear example of Justice Kennedy applying the approach is his plurality opinion in *Schuetz*, written 24 years after his dissent in *Metro Broad*.

<sup>168</sup> *Shaw v. Reno*, 509 U.S. 630, 657 (1993).

<sup>169</sup> *Id.* at 647.

<sup>170</sup> *Id.*

creating racial divisions, emphasizing that loyalty is properly race-based,<sup>171</sup> leading in turn to “antagonisms . . . at war with the democratic ideal.”<sup>172</sup> In other words:

[r]acial classifications with respect to voting carry particular dangers. Racial gerry-mandering, even for remedial purposes, *may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters*—a goal that the Fourteenth and Fifteenth Amendments embody, and to which the Nation continues to aspire. *It is for these reasons* that race-based districting by our state legislatures demands close judicial scrutiny.<sup>173</sup>

One could continue throughout the opinions cited for the constituent parts of the antibalkanization logic outlined above. While not all cases always employ all of the reasoning steps explicitly and in order, once one understands the underlying antibalkanization approach and logic as laid out above, one can see its through-line across four decades, multiple different Justices, and across contexts.

#### *D. Racial Hostility Perpetrator or Equality Contributor: Antibalkanization’s Strict Scrutiny*

Lest the above suggests that antibalkanization proponents are no different from colorblind anticlassificationists who simply mobilize plausible concerns about government uses of race to oppose *all* racial classifications, it is important to remember that antibalkanization proponents are clear that they do *not* reject all uses of race.<sup>174</sup>

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<sup>171</sup> *Id.* at 648 (by perpetuating stereotypes, “a racial gerrymander may exacerbate . . . racial bloc voting” and will serve “as a divisive force in a community”); *see also id.* at 650 (Racial gerrymandering “reinforces racial stereotypes and threatens to undermine our system of representative democracy by signaling to elected officials that they represent a particular racial group rather than their constituency as a whole.”).

<sup>172</sup> *Id.* at 648–49; *see also* *Schuetz v. Coal. to Def. Affirmative Action*, 572 U.S. 291, 309 (2014) (suggesting that when racial division is “validated, not discouraged,” “racial antagonisms and conflict tend to arise”).

<sup>173</sup> *Shaw*, 509 U.S. at 657 (emphasis added).

<sup>174</sup> Justice Stevens made clear as early as *Fullilove* that “I am not convinced that the [Equal Protection] Clause contains an absolute prohibition against any statutory classification based on race.” 448 U.S. 448, 548 (1980). Justice Powell took a similar position. *See id.* at 496 n.1 (“Although racial classifications require strict judicial scrutiny, I do not agree that the Constitution prohibits all racial classification.”). Similarly, Justice O’Connor called the petitioners in *Shaw* “wise” for making the concession “that race-conscious redistricting is not always unconstitutional.” 509 U.S. at 642. Justice Kennedy has said that while the colorblindness “axiom” of Justice Harlan’s dissent in *Plessy* should “command our assent” “as an aspiration,” “[i]n the real world, it is regrettable to say, it cannot be a universal constitutional

It is also important to remember that the approach does not worry about racial hostility and resentment for their own sake, for example because it simply would prefer a society without such hostility and resentment. Rather, it views them as decisive obstacles on the path to the racial equality end-goal of substantive equal opportunity within its vision of American democracy. That such hostility and resentment are rooted in a bias cascade triggered by the government's initial decision to rely on race "too much" is key. In the approach's view, it is this decision that threatens to turn well-meaning Whites into racially divided backlashers and antagonists who are no longer willing to engage in dialogue and action in the service of racial equality when they otherwise would be. This, in turn, obstructs progress toward substantive equal opportunity.

The conclusion that the anticlassification approach draws from this is that this danger is so great and problematic that one should stay away from it entirely and prohibit racial classifications (and perhaps any consideration of race) categorically.<sup>175</sup> The antibalkanization approach rejects this categorical conclusion and instead grounds its constitutional judgments in a "racial hostility perpetrator" analysis. Within this analysis, the above logic supports a strong presumption that the government acts unconstitutionally whenever it uses race "too much" because of the likelihood that doing so triggers the bias cascade and leads to the ultimate racial equality obstacle of White racial resentment and hostility. But antibalkanization proponents also recognize that the government should not be entirely "disqualified from acting in response to" "[t]he unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups. . . ."<sup>176</sup> Accordingly, the key constitutional question is not whether the government relied on race as such, but whether it used race without becoming a racial hostility perpetrator. Because the approach believes that White racial hostility and resentment is the end-result of multiple steps in a bias cascade, it recognizes that it is possible (though difficult) for the government to structure a race-conscious program in a way that prevents this cascade from unfolding in full.<sup>177</sup> If the government does so, but only then, the approach will consider the race-conscious action conducive to the achievement of substantive equal opportunity and permit it.

Antibalkanization proponents have chosen strict scrutiny as the vehicle for channeling government actors toward appropriately structured uses of race and away from inappropriate ones. The bias cascade influences the approach's application of strict

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principle." *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 788 (2007) (Kennedy, J., concurring).

<sup>175</sup> See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 240 (1995) (Thomas, J., concurring in part) ("As far as the Constitution is concerned, it is irrelevant whether a government's racial classifications are drawn by those who wish to oppress a race or by those who have a sincere desire to help those thought to be disadvantaged.").

<sup>176</sup> *Id.* at 237; see also *supra* Section I.A.

<sup>177</sup> See also *supra* notes 65–66 and accompanying text.

scrutiny consistently from beginning—what triggers strict scrutiny—to middle—what government purposes are permissible—to end—what counts as sufficient tailoring of governmental means to its purposes.

With respect to triggers, what matters for antibalkanization proponents is the nature of the process through which the government pursues racial equality, as well as the impact this process has on how Whites and racial minority group members relate to each other.<sup>178</sup> The approach pursues something akin to a “reverse” representation-reinforcement approach.<sup>179</sup> Rather than policing the political process to prevent systematic disadvantaging of vulnerable minorities, the approach polices the political process so that it reinforces what the approach perceives as the basic good intentions of most participants (especially Whites) in American democracy and prevents retriggering the racial antagonism, hostility, and resentment that is the real obstacle on the path toward substantive equal opportunity. A logical starting point is an inquiry into whether the government has relied “too much” on race. When a governmental action “cannot be understood as anything other than”<sup>180</sup> based on race, it is highly likely that it will be perceived by Whites as based on governmental stereotyping and racial politics in favor of racial minorities. This, in turn, is likely to trigger the remainder of the bias cascade and a social environment that is likely to turn from well-meaning to antagonistic and resentful.<sup>181</sup> When race is used in such a way, the government is a presumptive racial hostility perpetrator and the approach turns to strict scrutiny to determine whether the government can overcome the presumption by showing that it sufficiently mitigated the bias cascade through the specifics of its program.

By contrast, the approach assumes that Whites will not perceive programs in which the government’s reliance on race is more diffuse as based on crude stereotyping and racial politics and thus the bias cascade is less likely to unfold.<sup>182</sup> In such

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<sup>178</sup> See Siegel, *supra* note 14, at 1301 (“[T]he antibalkanization perspective thinks about equal protection purposively and structurally: it assesses the constitutionality of government action by asking about the kind of polity it creates.”).

<sup>179</sup> Representation-reinforcement theory is credited to John Hart Ely and argues that “exacting judicial review is an instrument of process perfection, invalidating laws when the people’s representatives ‘chok[e] off the channels of political change’ to benefit entrenched majorities or ‘systematically disadvantag[e] some minority out of simple hostility or a prejudiced refusal to recognize commonalities of interest.’” Rich, *supra* note 93, at 1532 n.30 (quoting JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 103 (1980)).

<sup>180</sup> *Shaw v. Reno*, 509 U.S. 630, 650 (1993).

<sup>181</sup> See *supra* Section I.C.

<sup>182</sup> Cf. Richard A. Primus, *Of Visible Race-Consciousness and Institutional Role: Equal Protection and Disparate Impact after Ricci and Inclusive Communities*, in *TITLE VII OF THE CIVIL RIGHTS ACT AFTER 50 YEARS: PROCEEDINGS OF THE NEW YORK UNIVERSITY 67TH ANNUAL CONFERENCE ON LABOR* 295, 313 (2015) (“[I]f the race-conscious aspect [of a government intervention] is visible and given a divisive social meaning, the [program] causes a further harm at the societal level. The problem then is not just the particular individual’s

cases, the government is unlikely to be a racial hostility perpetrator and thus should receive more leeway in addressing continued racial inequality. This is perhaps the best explanation for Justice Kennedy's distinction in *Parents Involved* between presumptively permissible race-conscious "general policies" that would be "unlikely" to be subject to strict scrutiny—such as "strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race"<sup>183</sup>—and his subjection to strict scrutiny of plans based on explicit classifications telling "each student he or she is to be defined by race[.]"<sup>184</sup> The former type of policy, because it was structured less decisively and exclusively around the perceived interests of racial minority group members, presented concerns about the bias cascade to a "lesser degree."<sup>185</sup>

Similar concerns also influence how the approach structures the actual application of strict scrutiny.<sup>186</sup> For example, proponents are more likely to view a government interest as "compelling"<sup>187</sup> if they perceive its pursuit as less likely to involve broad stereotyping or racial politics by the government, or if its pursuit is likely to interrupt the cascade before it reaches racial hostility or resentment. They view an interest as less/not compelling if it does the opposite. This is illustrated by the willingness to accept as compelling a university's interest in achieving the educational benefits of a diverse student body. Justice O'Connor affirmed the permissibility of using race as an explicit factor in university admissions in *Grutter* because she thought that the pursuit of a diverse student body did not require the government to rely on racial stereotyping,<sup>188</sup> and that therefore such uses of race would *not* encourage

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loss of [an opportunity] but the exacerbation of race as a source of tension and ill-feeling in the polity at large.").

<sup>183</sup> *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 788–89 (2007) (Kennedy, J., concurring). Kennedy noted that school districts should be permitted to employ such policies "with candor," which would make sense if they were unlikely to trigger the bias cascade and most well-meaning White people could be expected to accept them. *Id.* at 789.

<sup>184</sup> *Id.* at 789.

<sup>185</sup> *Id.* at 797. As Stephen Rich has noted, Kennedy's use of terms such as "unlikely" and "lesser degree" suggests that if the types of policies Kennedy cited approvingly were designed in a way that their racially neutral aspects were too close of a proxy for race, i.e., if race was used "too much" after all, a future Court may well apply strict scrutiny. Rich, *supra* note 93, at 1583–85. This would be consistent with the antibalkanization logic.

<sup>186</sup> Siegel, *supra* note 26, at 43 (noting "new form of strict scrutiny" devised by antibalkanization proponents).

<sup>187</sup> See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (Strict scrutiny can only be met by "narrowly tailored measures that further compelling governmental interests.").

<sup>188</sup> *Grutter v. Bollinger*, 539 U.S. 306, 333 ("The Law School does not premise its need for critical mass on 'any belief that minority students always (or even consistently) express some characteristic minority viewpoint on any issue. . . .' To the contrary, diminishing the force of such stereotypes is both a crucial part of the Law School's mission, and one that it

stereotyping by others, and perhaps even reduce stereotyping if properly implemented.<sup>189</sup> Similarly, pursuing this interest does not require judgments about White innocence,<sup>190</sup> and thus also involves less risk of stigmatizing Whites. Furthermore, because the pursuit of diversity is an interest in which Whites can also see themselves represented,<sup>191</sup> well-meaning Whites could be expected to accept an appropriately structured program as “taken in the service of the goal of equality itself,”<sup>192</sup> rather than as racial politics.

The victims of this way of thinking about compelling interests, however, have been programs that pursue a remedial interest. Even though remedying the effects of systemic racial discrimination throughout society, in the past and present, has long been what many people see as a “principal justification for racial affirmative action,”<sup>193</sup> antibalkanization proponents have strictly limited the boundaries of what counts as a compelling remedial interest. Specifically, they have rejected the interest in remedying “societal discrimination” and instead demand “identified” discrimination by the government actor at issue.<sup>194</sup> This is largely because proponents believe that approving a broader interest in remedying societal discrimination would be too likely to permit the government to engage in wholesale stereotyping and racial politics.<sup>195</sup> As a result, pursuit of such an interest would be likely to encourage others

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cannot accomplish with only token numbers of minority students.”). Instead, using race in pursuit of diversity accurately recognized that “[b]y virtue of our Nation’s struggle with racial inequality, [underrepresented minority] students are both likely to have experiences of particular importance to the Law School’s mission, and less likely to be admitted in meaningful numbers on criteria that ignore those experiences.” *Id.* at 338.

<sup>189</sup> *Id.* at 330 (“[T]he Law School’s admissions policy promotes ‘cross-racial understanding,’ helps to break down racial stereotypes, and ‘enables [students] to better understand persons of different races.’”); see also *Fisher II*, 136 S. Ct. 2198, 2210 (2016) (approvingly quoting this language).

<sup>190</sup> Simson, *supra* note 136, at 664; Elise C. Boddie, *The Sins of Innocence in Standing Doctrine*, 68 VAND. L. REV. 297, 335–36 (2015).

<sup>191</sup> See *Grutter*, 539 U.S. at 338 (“The Law School frequently accepts nonminority applicants with grades and test scores lower than underrepresented minority applicants,” demonstrating that it “seriously weighs many other diversity factors besides race that can make a real and dispositive difference for nonminority applicants as well.”).

<sup>192</sup> *Id.* at 342 (citing *Richmond v. J. A. Croson Co.*, 488 U.S. 469, 510 (1989)).

<sup>193</sup> RANDALL KENNEDY, FOR DISCRIMINATION: RACE, AFFIRMATIVE ACTION, AND THE LAW 192 (2013).

<sup>194</sup> See, e.g., *Bush v. Vera*, 517 U.S. 952, 982 (1996) (“A State’s interest in remedying discrimination is compelling when two conditions are satisfied. First, the discrimination that the State seeks to remedy must be specific, identified discrimination; second, the State must have had a strong basis in evidence to conclude that remedial action was necessary.”) (internal quotation marks omitted); *Croson*, 488 U.S. at 511 n.1 (opinion of Stevens, J.) (“Unless the legislature can identify both the particular victims and the particular perpetrators of past discrimination . . . a remedial justification for race-based legislation will almost certainly sweep too broadly.”).

<sup>195</sup> See, e.g., *Croson*, 488 U.S. at 510 (Absent findings of discrimination, “there is a danger

to stereotype in similar fashion, leading to the stigmatization of racial minorities as inferior and of whites as wholesale perpetrators of racial discrimination, or, at least, undeserving beneficiaries of racial privilege.<sup>196</sup> This is not something that the many white Americans who don't see themselves this way "will find easy to accept,"<sup>197</sup> leading to "animosity and discontent" and the perpetuation of prejudice, perhaps even "the seeds of race hate," all of which obstruct racial equality progress.<sup>198</sup> In other words, pursuit of such an interest turns the government into a counterproductive racial hostility perpetrator. By contrast, the approach assumes that well-meaning Whites would be less likely to react in the same ways to programs based on identified findings of prior discrimination because such programs would be perceived to be based not on stereotypes but actual status as victim or perpetrator / beneficiary of discrimination and thus be "taken in the service of the goal of equality itself."<sup>199</sup>

The narrow tailoring requirement ensures that the government does not subvert the promise of a compelling interest by triggering the bias cascade via unsophisticated implementation. In doing so, the approach gives more deference if the government pursues a compelling interest with a lower risk of triggering the bias cascade, and vice versa. Thus, in their decisions upholding universities' pursuit of student body diversity in *Grutter* and *Fisher*, Justices O'Connor and Kennedy noted that narrow tailoring "does not require exhaustion of every conceivable race-neutral alternative"<sup>200</sup> but only of those that are "workable."<sup>201</sup> They also showed deference in evaluating the universities' implementation efforts, which was promptly criticized

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that a racial classification is merely the product of unthinking stereotypes or a form of racial politics."); *id.* at 516 n.9 (Stevens, J., concurring in part) (arguing that apparent stereotyping underlying remedial ordinance suggested the possibility that the ordinance was "nothing more than a form of patronage . . . racial patronage"); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 310 (plurality opinion) (approving remediation of societal discrimination as compelling "would be to convert a remedy heretofore reserved for violations of legal rights into a privilege that all institutions throughout the Nation could grant at their pleasure to whatever groups are perceived as victims of societal discrimination.").

<sup>196</sup> See, e.g., *Croson*, 488 U.S. at 515–17 (Stevens, J., concurring in part) (arguing that because the remedial ordinance was not limited to victims of prior discrimination and assumed inappropriately that "every white contractor covered by the ordinance shares in [the] guilt" of prior discrimination, there was "a special irony" in that the ordinance thus stigmatized White people with the "unproven charge of past racial discrimination" and its beneficiaries with the perception that they "are less qualified in some respect that is identified purely by their race").

<sup>197</sup> See *supra* note 165 and accompanying text.

<sup>198</sup> See *supra* Section I.C.4.

<sup>199</sup> *Croson*, 488 U.S. at 510; cf. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280–81 (1986) ("As part of this Nation's dedication to eradicating racial discrimination, innocent persons may be called upon to bear some of the burden of the remedy. 'When effectuating a limited and properly tailored remedy to cure the effects of prior discrimination, such a "sharing of the burden" by innocent parties is not impermissible.'" (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 484 (1980))).

<sup>200</sup> *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003).

<sup>201</sup> *Fisher II*, 136 S. Ct. 2198, 2208 (2016).

by the more conservative Justices as an “abandoning” of strict scrutiny.<sup>202</sup> Within the approach, however, such deference makes sense. Since pursuing the diversity interest generally tends to counteract the bias cascade and the government is less likely to be a racial hostility perpetrator, it is appropriate to grant the government deference unless it can be shown that the government did, in fact, fail to mitigate the bias cascade through excessive or sloppy uses of race in a particular situation.<sup>203</sup>

Justice O’Connor’s decision to switch sides and strike down a race-conscious admissions system in *Gratz*,<sup>204</sup> the companion case to *Grutter*, is best explained by her view that she saw the admissions program at issue—which gave an automatic, and comparatively large, number of points to underrepresented minority applicants in a process in which a certain number of points guaranteed admission<sup>205</sup>—as an example of the latter. Some scholars have suggested that the deciding factor for O’Connor may have been that the greater “opaqueness” of the program in *Grutter* would lead to less balkanization.<sup>206</sup> The antibalkanization logic set out above suggests instead that what was critical for Justice O’Connor was that the use of race in *Gratz* was “mechanical,” i.e., that it assigned the same amount of points to each minority applicant in a way that was “automatic” and “predetermined.”<sup>207</sup> The combination of a large and automatic point award would communicate to (even a well-meaning) white observer that the program was based on stereotyping, designed to ensure racial minority applicants a “piece of the action,” and thus would kick off the bias cascade.<sup>208</sup> Having their college experience framed by such an admissions system, students would be likely to relate to each other in ways that perpetuated racial divisions and a sense of antagonistic group competition, thus undermining rather than facilitating the racial harmony necessary for progress toward racial equality. A holistic and more flexible system as in *Grutter*, by contrast, would communicate that race was taken

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<sup>202</sup> Notably, in *Grutter*, this charge was made by Justice Kennedy himself. 539 U.S. at 387 (Kennedy, J., dissenting). As I suggest below, this could be partially explained by Justice Kennedy’s willingness to soften his stance on race-conscious equality efforts at least somewhat over time. See *infra* Section I.F. In *Fisher II*, the charge was made by Justice Alito. 136 S. Ct. at 2215 (Alito, J., dissenting).

<sup>203</sup> This was, in effect, Justice Kennedy’s charge in *Grutter*. Rather than objecting to the use of race as such, Kennedy thought the record established that the university had “mask[ed] its attempt to make race an automatic factor in most instances.” 539 U.S. at 389 (Kennedy, J., dissenting). Because this reflected the opposite of individualized review, i.e., governmental stereotyping and racial politics, “[t]he unhappy consequence [would] be to perpetuate the hostilities that proper consideration of race is designed to avoid.” *Id.* at 394.

<sup>204</sup> *Gratz v. Bollinger*, 539 U.S. 244, 277 (2003).

<sup>205</sup> *Id.* at 279–80.

<sup>206</sup> See, e.g., Ian Ayres & Sydney Foster, *Don’t Tell, Don’t Ask: Narrow Tailoring after Grutter and Gratz*, 85 TEX. L. REV. 517, 569–70 (2007) (stating and criticizing this possibility); Siegel, *supra* note 90, at 798–800 (describing argument as made by various scholars).

<sup>207</sup> *Gratz*, 539 U.S. at 280.

<sup>208</sup> It would not much matter under the antibalkanization approach whether this was the “actual predicate” of the program. See *supra* note 133.



into account the same way that other characteristics were considered, i.e., when, and to the extent that, it contributed to a productive learning environment. Because such a process would create a productive forum for harmonious interaction between well-meaning participants, it would be “taken in the service of the goal of equality itself”<sup>209</sup> and whites “would have no basis to complain of unequal treatment under the Fourteenth Amendment.”<sup>210</sup> Thus, it would make sense to provide some deference to a university if it used a holistic program, but not if it used a “mechanical” one.

Similar considerations can explain why antibalkanization proponents have been less deferential when race is used for remedial purposes.<sup>211</sup> Indeed, the Court has not upheld a remedial program since 1987.<sup>212</sup> Superficially, this is curious because even conservative Justices agree that remedying past discrimination and its effects is a compelling (to them, perhaps the only compelling) government interest.<sup>213</sup> Moreover, this interest is most closely related to the troubling history of race that underwrites the antibalkanization approach’s willingness to allow the government to consider race in the first place.<sup>214</sup> From the standpoint of managing the bias cascade and racial hostility perpetrators, however, this lack of deference makes more sense. Remedying discrimination, especially when discrimination itself is understood from a perpetrator perspective that many Whites hold,<sup>215</sup> requires judgments about discriminator/beneficiary and victim status that Whites are likely to perceive as based on broad stereotypes and stigmatic “unproven charges”<sup>216</sup> absent specific evidence to the contrary. When the

<sup>209</sup> *Grutter v. Bollinger*, 539 U.S. 306, 342 (2003).

<sup>210</sup> *Id.* at 341.

<sup>211</sup> Justice Stevens has been most explicit about this lack of deference, noting that “a remedial justification for race-based legislation will almost certainly sweep too broadly.” *Richmond v. J. A. Croson Co.*, 488 U.S. 469, 511 n.1 (1989) (Stevens, J., concurring); *see also* *Hutchinson*, *supra* note 26, at 49 (“[T]he Court has made remedying racial discrimination the most difficult basis for using affirmative action.”).

<sup>212</sup> *See United States v. Paradise*, 480 U.S. 149 (1987) (upholding judicially imposed race-based promotional quota in response to egregious discriminatory conduct by the Alabama Department of Public Safety). Even in *Paradise*, Justice Powell concurred separately that his vote was based on the limited nature of the race-conscious decree and its “relatively diffuse” impact on “innocent white troopers.” *Id.* at 188–89. Justice O’Connor dissented based on her view that the decree was based on inappropriate stereotyping and the district court’s refusal to consider race-neutral alternatives. *See id.* at 197, 201.

<sup>213</sup> *See, e.g., Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2014) (plurality opinion) (Past decisions recognize “the compelling interest of remedying the effects of past intentional discrimination.”); *Shaw v. Hunt*, 517 U.S. 899, 909 (1996) (“A State’s interest in remedying the effects of past or present racial discrimination may in the proper case justify a government’s use of racial distinctions.”).

<sup>214</sup> *See supra* Section I.C.1.

<sup>215</sup> *See, e.g., Russell K. Robinson, Perceptual Segregation*, 108 COLUM. L. REV. 1093, 1126–31 (2008) (discussing disagreement between Whites and people of color about the definition of discrimination and noting that Whites are likely to view racial discrimination as “evident primarily when there is overt evidence of racial hostility”).

<sup>216</sup> *See supra* note 136 and accompanying text.

government thus creates a process in which Whites and racial minorities interact around a remedial aim, the approach's logic suggests that the government is highly likely to create a bias cascade that dead-ends in counterproductive racial conflict and antagonism rather than racial harmony. This will occur unless the program at issue is very carefully tailored to make clear that the government is, in fact, responding only to clear instances of prior wrongdoing rather than using race as a rough proxy and vehicle for racial politics.<sup>217</sup>

Judgments about the government as a racial hostility perpetrator, in other words, pervade the antibalkanization approach's use of strict scrutiny and its judgments about the constitutionality of government race-consciousness under the Equal Protection Clause.

### *E. Antibalkanization Approach Rex*

When the above analysis is taken as a whole, one sees the result of a 40-year jurisprudential effort to make concerns about racial balkanization central to constitutional racial equality jurisprudence. This effort has largely succeeded, driving not only the choice of doctrinal tests but also the specifics of their implementation. The opinions cited above as support for the different steps of the antibalkanization approach have either become governing doctrine over time, remain good law today, or represent the leading opinions in areas where the Court is splintered. In the context of affirmative action in higher education, for example, Justice Powell's opinion in *Bakke* which used antibalkanization concerns to justify the application of strict scrutiny, the determination of which government interests were compelling, and how a permissible program should be implemented, was reaffirmed first by the majority opinion of Justice O'Connor in *Grutter* and most recently by Justice Kennedy in *Fisher*.<sup>218</sup> In the context of affirmative action in government contracting at the state level, Justice O'Connor's opinion in *Croson* remains good law today. At the federal level, Justice Stevens's dissent in *Fullilove* animated further dissents by Justices O'Connor and Kennedy in *Metro Broadcasting* that eventually found majority

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<sup>217</sup> This explains why antibalkanization proponents often focus on whether remedial programs provide waivers. Compare, e.g., *Richmond v. J. A. Croson Co.*, 488 U.S. 469, 508 (1989) (rejecting remedial program in part because waivers would have provided a less rigidly race-conscious alternative), with *Fullilove v. Klutznick*, 448 U.S. 448, 514 (1980) (opinion of Powell, J.) (approving remedial program in part because the existing waiver provision prevented the program from being applied too "rigidly").

<sup>218</sup> *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 298–99 (1978) (plurality opinion) ("Disparate constitutional tolerance of [racial] classifications well may serve to exacerbate racial and ethnic antagonisms rather than alleviate them."); *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003) (plurality opinion); *Fisher v. Univ. of Tex. (Fisher I)*, 570 U.S. 297, 307 (2013) (taking *Bakke* and *Grutter* "as given for purposes of deciding this case" and relying on those opinions in setting out legal principles to be considered by lower court remand); *Fisher II*, 136 S. Ct. 2198, 2207–08 (2016) (relying on controlling principles from *Fisher I* in upholding affirmative action program at issue).

expression in *Adarand*, which essentially overruled both *Fullilove* and *Metro Broadcasting* and remains good law today.<sup>219</sup> In the voting rights/redistricting context, Justice O'Connor's opinion in *Shaw* that relied on antibalkanization concerns in its decision to permit White voters to bring a new type of constitutional claim challenging racial gerrymandering was further developed in cases like *Miller* and *Shaw v. Hunt* and remains good law today.<sup>220</sup> In the context of public school desegregation, Justice Kennedy's separate concurrence in *Parents Involved* is currently the leading opinion on the issue,<sup>221</sup> as is Justice Kennedy's plurality opinion in *Schuette* in the context of the "political process" doctrine.

*F. Justices Willing to Learn (to Some Extent)*

While the above analysis shows the consistency and influence of the anti-balkanization approach, it does not quite yet show the aspect of the approach that justifies a tepid judgment that it has some progressive potential: the approach appears to appeal specifically to Justices with a certain willingness to take the reality of continued racial inequality seriously beyond *a priori* ideological commitments, and to learn about its complexities over time. To be sure, these Justices remain committed to the basic antibalkanization logic throughout their career, and as I describe below, this fact defines the regressive reality of the approach. At the same time, it is important to uncover how antibalkanization proponents soften their application of that logic over time. They start out with significantly more race conservative views—i.e., they are significantly more hostile to race-conscious government efforts to address racial inequality—and become more supportive of such efforts over time. This softening seems to reflect not growing doubts about antibalkanization as the correct jurisprudential approach, but rather a growing sophistication and willingness to learn about the intricacies of different steps of the bias cascade. It also represents the reason why governmental race-consciousness in pursuit of racial equality remains permissible in certain circumstances even though it has been assailed for decades by a powerful camp of anticlassification proponents.

Perhaps the clearest example of this softening is Justice Stevens, who joined the Court in 1975 and whose 1980 dissent in *Fullilove* became the go-to citation for later Justices who (at earlier stages of their own career) relied on the antibalkanization approach to demand significant limits on race-conscious government decision-making.<sup>222</sup> Indeed, in her 1995 majority opinion in *Adarand*, Justice O'Connor

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<sup>219</sup> See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227–28 (1995).

<sup>220</sup> See, e.g., *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 802 (2017) ("The Court's holding in this case is controlled by precedent. The Court reaffirms the basic racial predominance analysis explained in *Miller* and *Shaw II*.").

<sup>221</sup> Brennan-Marquez, *supra* note 45, at 778 (noting that Kennedy's opinion "effectively states the law").

<sup>222</sup> See *supra* Section I.C.4. Thus, Stevens's *Fullilove* opinion is frequently cited above.

liberally cited Stevens' *Fullilove* dissent<sup>223</sup> to ward off a strongly worded dissent by Stevens himself, who charged that the majority's decision to apply strict scrutiny to a Congressional affirmative action program in contracting (a position that one could read into Stevens' *Fullilove* opinion) was the equivalent of "disregard[ing] the difference between a 'No Trespassing' sign and a welcome mat."<sup>224</sup> Notably, Stevens's switch was not based on a retraction of his *Fullilove* opinion or the general antibalkanization approach it contained.<sup>225</sup> Rather, it was based on a more sophisticated understanding that race is not always irrelevant and thus reliance on race need not involve stereotyping by the government;<sup>226</sup> that arguments about the potential stigma imposed by affirmative action programs on minority beneficiaries, while a real concern, had to be made in context and preferably by the allegedly stigmatized themselves rather than by Whites;<sup>227</sup> and that in most affirmative action programs, there is only an "indirect burden on the majority."<sup>228</sup> More generally, toward the end of his career Justice Stevens had become a consistent vote on the Court supporting race-conscious racial equality interventions of various kinds in a way that someone reading his opinions in the 1970s and early 1980s would not have been able to predict.<sup>229</sup>

A similar, though more muted, point can be made about Justice O'Connor regarding her switch in votes between *Metro Broadcasting* and *Grutter*. In *Metro*, O'Connor wrote a scathing dissent that was deeply steeped in a non-contextual application of the antibalkanization logic that on first glance could have been taken to embody an anticlassification sentiment.<sup>230</sup> Notably, she rejected as "clearly not a compelling interest" (indeed not even an important one) the government's asserted interest in increasing the diversity of broadcasting viewpoints because the pursuit of such an interest could only lead to "generalizations impermissibly equating race with thoughts and behavior."<sup>231</sup> She did so even though the majority opinion discussed empirical evidence suggesting that the program was not based on stereotyping and indeed was likely to counteract stereotyping of racial minorities and to

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<sup>223</sup> *Adarand*, 515 U.S. at 228–31.

<sup>224</sup> *Id.* at 245 (Stevens, J., dissenting).

<sup>225</sup> See *id.* at 258 ("I continue to believe that the *Fullilove* case was incorrectly decided.").

<sup>226</sup> See, e.g., *id.* at 261 (noting that the program was "designed to overcome the social and economic disadvantages that are often associated with racial characteristics"); *id.* at 248 n.5 ("In enacting affirmative-action programs, a legislature intends to remove obstacles that have unfairly placed individuals of equal qualifications at a competitive disadvantage.").

<sup>227</sup> *Id.* at 247 n.5 (arguing that "white-owned business" had no "standing to advance" a stigma argument on behalf of minority beneficiaries and noting that "[n]o beneficiaries of the specific program under attack today have challenged its constitutionality—perhaps because they do not find the preferences stigmatizing").

<sup>228</sup> *Id.* at 253 n.7.

<sup>229</sup> See also Haney López, *supra* note 30, at 1874–77 (lauding Stevens's "exceptional willingness to learn about racism . . .").

<sup>230</sup> However, the steps of the antibalkanization approach are clearly visible when laid out as above.

<sup>231</sup> *Metro Broad., Inc. v. F.C.C.*, 497 U.S. 547, 612–15 (1990) (O'Connor, J., dissenting).

provide wider access to important leadership positions.<sup>232</sup> These are, of course, the very arguments that O'Connor mobilized later on in her majority opinion in *Grutter* to support the proposition that diversity *was* a compelling governmental interest in university admissions.<sup>233</sup> This proposition was by no means set in stone when *Grutter* was decided<sup>234</sup> and would have been rejected had O'Connor voted in line with her intimations in *Metro*. While there are certainly many possible explanations for O'Connor's change in views, one plausible explanation is that it was based at least in part on O'Connor's willingness to learn and take seriously the large number of sophisticated *amicus* briefs in *Grutter*. These briefs showed how pursuing racial diversity via racial classifications was not necessarily an exercise in stereotyping or racial politics; would not necessarily lead to the encouragement of stereotyping, stigmatization, and racial hostility and resentment; and instead reflected the careful pursuit of important and real goals in a diverse society that remains deeply shaped by race.<sup>235</sup> This switch was available to O'Connor from *within* the antibalkanization approach and seemed to reflect her sentiment that based on the university's careful efforts to bring students together across racial lines rather than to divide them, the government had overcome its presumptive racial hostility perpetrator status.

Justice Kennedy's switch to upholding a university affirmative action program in *Fisher* was perhaps even more surprising. He had dissented in both prior diversity-related cases, *Metro* and *Grutter*.<sup>236</sup> There was also a clear opportunity to reject the particular program in *Fisher*, had Kennedy been so inclined, on the basis that the "Top Ten Percent Plan" that governed most admissions decisions at the university produced sufficient racial diversity.<sup>237</sup> But Kennedy voted to uphold the program.<sup>238</sup> To be sure, he warned that racial classifications could not be used in a

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<sup>232</sup> *Id.* at 581–82 (majority opinion).

<sup>233</sup> *Grutter v. Bollinger*, 539 U.S. 306, 332–33 (2003) (praising affirmative action program for providing visibly open access to training for important leadership positions and for helping diminish racial stereotypes).

<sup>234</sup> Indeed, it had been explicitly rejected by the Fifth Circuit in *Hopwood v. Tex.*, 78 F.3d 932 (5th Cir. 1996).

<sup>235</sup> See *Grutter*, 539 U.S. at 330–33 (discussing *amicus* briefs). Justice O'Connor's move over time toward a more complex understanding of the operation of race in American society is arguably also reflected by her decision to switch from the bloc of Justices that had consistently rejected race-conscious redistricting efforts after O'Connor's own opinion in *Shaw v. Reno*, 509 U.S. 630 (1993) to join the majority opinion by Justice Breyer in *Easley v. Cromartie*, 532 U.S. 234 (2001). *Easley* overturned a "predominant factor" finding by the lower court as clearly erroneous based on an arguably more nuanced understanding of the relationships between race, party identification, and politics than the prior post-*Shaw* cases had displayed; see also Haney López, *supra* note 30, at 1862 n.371 (noting O'Connor's shift in *Easley*).

<sup>236</sup> Indeed, the dissent in *Fisher* seemed to go out of its way to cite Kennedy's own opinions in prior cases dealing with governmental race-consciousness. See, e.g., *Fisher II*, 136 S. Ct. 2198, 2220–22 (2016) (Alito, J., dissenting).

<sup>237</sup> See *id.* at 2211–12 (majority opinion) (noting but rejecting this argument).

<sup>238</sup> *Id.* at 2214–15.

“divisive manner” and otherwise cabined the reach of the case.<sup>239</sup> But he seemed more willing than in prior cases to accept that the university, after a careful review<sup>240</sup> which had identified clear problems of racial isolation and feelings of loneliness among minority students,<sup>241</sup> had used racial classifications in a way that was not based on mere stereotypes and instead would help to counter them and provide the kind of forum in which well-meaning people would interact harmoniously and in ways that would further the goal of substantive equal opportunity.<sup>242</sup>

There are a few important takeaways from these examples. First, the examples illustrate how the antibalkanization approach is not reducible to either anticlassification or antisubordination and that it is analytically useful to parse out its logic in terms of the bias cascade. More importantly, these examples illustrate that the approach speaks to Justices who are not disingenuous about their stated intentions to take the continued reality of racial inequality seriously and who are willing to learn about it to some extent. This internal growth dimension has preserved some space for race-conscious racial equality efforts that would otherwise no longer be available. Antibalkanization proponents voted for such efforts in situations where they were not constrained to do so by their prior jurisprudence and could expect to be heavily criticized (often in their own words) by their colleagues. There is progressive potential in a jurisprudence that allows its proponents to prioritize intellectual engagement over ideology in those ways. In this way, at least, antibalkanization proponents have prevented constitutional law from becoming a simple vehicle for “intentional blindness” toward racial inequality.<sup>243</sup>

At the same time, it is important to emphasize the limits of these points. For one, the space carved out for race-conscious equality programs by the above examples is slim and perpetually precarious.<sup>244</sup> Even in higher education, where antibalkanization

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<sup>239</sup> See *id.* at 2209 (noting the “artificial basis” upon which the case was litigated because the plaintiff did not challenge the Top Ten Percent plan and that this “may limit [the decision’s] value for prospective guidance”).

<sup>240</sup> *Id.* at 2211 (noting a “thoughtful review” by the university before implementing the race-conscious program).

<sup>241</sup> *Id.* at 2212.

<sup>242</sup> *Id.* at 2211 (accepting as “concrete and precise” the university’s goals of pursuing “the destruction of stereotypes, the promotion of cross-racial understanding, the preparation of a student body for an increasingly diverse workforce and society, and the cultivat[ion of] a set of leaders with legitimacy in the eyes of the citizenry”). Similar to Justice O’Connor, Justice Kennedy also seemed to soften somewhat in his redistricting jurisprudence later in his career. For example, he joined Justice Breyer’s opinion for a slim five-Justice majority in *Ala. Legis. Black Caucus v. Alabama*, 575 U.S. 254 (2015), which allowed some discretion in race-conscious redistricting for legislatures as part of narrow tailoring; and he wrote the majority opinion himself in *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788 (2017), which applied this discretion to uphold a race-conscious district.

<sup>243</sup> See generally Haney López, *supra* note 30.

<sup>244</sup> The next challenge to affirmative action in higher education is already before the court.

decisions have most clearly preserved the possibility for affirmative action, Justice Kennedy's decision in *Schuette* mobilized the antibalkanization logic to uphold an anti-affirmative action referendum because he believed that the democratic process that produced it represented the kind of well-meaning debate and decision-making in pursuit of racial equality (just in the form of a prohibition on affirmative action) that the approach wants to call forth.<sup>245</sup> This conclusion was not only problematic on the facts of that case,<sup>246</sup> but it also facilitates future challenges to affirmative action programs at universities.<sup>247</sup>

Furthermore, while the examples illustrate a willingness to grow *within* the antibalkanization approach, they do not show a willingness to question its fundamental baseline assumptions and its perpetrator perspective. Justice Stevens' progression over time shows how much change true willingness to learn about the complexities of race can generate, but it also shows the limits of containing such willingness within a perpetrator perspective. Stevens never repudiated his dissent in *Fullilove*, thus making it easier for its strong language to be mobilized restrictively later by those with a similarly limited vision of racial inequality as his own at the time. More importantly, even later in his career, Stevens did not relinquish the approach's basic "skepticism" toward racial classifications<sup>248</sup> and reiterated his conviction that remedial reliance on race was especially likely to be inappropriate.<sup>249</sup> In this regard, it is important to remember that while by the mid-1980s Justice Stevens had made clear his willingness to accept forward-looking uses of race,<sup>250</sup> he

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*See supra* note 57. More broadly, the softening of views described here appears to have become less substantial with Justices appointed later in time. As Russell Robinson has shown, for example, Justice Kennedy's overall constitutional jurisprudence in race cases is predominantly race-conservative. Russell K. Robinson, *Unequal Protection*, 68 STAN. L. REV. 151, 198–204 (2016) (Empirical study of Kennedy's votes in constitutional cases dealing with claims based on race, sex, and sexual orientation between 1988 and 2015 shows that in nonunanimous cases Kennedy's votes can be described as "liberal" in only one-third of the cases).

<sup>245</sup> *Schuette v. Coal. to Def. Affirmative Action*, 572 U.S. 291, 314 (2014) (noting that "[t]he electorate's instruction to governmental entities not to embark upon the course of race-defined and race-based preferences was adopted, we must assume, because the voters deemed a preference system to be unwise, on account of what voters may deem its latent potential to become itself a source of the very resentments and hostilities based on race that this Nation seeks to put behind it").

<sup>246</sup> *See generally* Samuel Weiss & Donald Kinder, *Schuette and Antibalkanization*, 26 WM. & MARY BILL RTS. J. 693 (2017) (demonstrating empirically that proponents of referendum were motivated by racial resentment, not by desire for social cohesion).

<sup>247</sup> For a broader critique of *Schuette*, see Robinson, *supra* note 244, at 215–26.

<sup>248</sup> *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 242 (Stevens, J., dissenting). Indeed, notwithstanding his otherwise strongly worded dissent in *Adarand*, Stevens "welcome[d] the renewed endorsement" of this skepticism. *Id.*

<sup>249</sup> *See, e.g., Parents Involved Cmty. Schls. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 800 n.4 (Stevens, J., dissenting).

<sup>250</sup> *See, e.g., Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 313 (Stevens, J., dissenting)

voted to strike down the remedial affirmative action program in *Croson* in 1989 in full reliance on the antibalkanization logic.<sup>251</sup> He also joined the portion of Justice O'Connor's opinion for the Court in *Croson* which denied that there was a sufficient evidentiary basis for the program at issue by disaggregating a compelling mosaic of devastating minority under-representation in the local construction industry into a series of individual pieces and repudiating each piece separately without acknowledging their interrelation.<sup>252</sup> *Croson*, in turn, became the basis for the extension of strict scrutiny to federal remedial legislation in *Adarand*.<sup>253</sup> The resulting doctrinal landscape ensures that today, no matter what the level of government and the perceived urgency for enacting a remedial race-based program, decisionmakers will think twice before implementing such a program and inviting an inevitable (likely fatal) lawsuit.<sup>254</sup>

Shining through even Stevens' journey to the progressive edges of the antibalkanization approach, then, is a commitment to the traditional perpetrator perspective baseline view<sup>255</sup> of American democracy: well-meaning whites are willing to participate in well-crafted racial equality programs and respond with hostility and resentment to governmental race-consciousness not because of a vested interest in the status quo of racial stratification, but because they have been prodded to do so by sloppy government work. To exaggerate perhaps a little, this is a view under which we would all be better served if we just "got over the past," set aside the difficulties and hostilities that come with working out how much the past has affected the present, and worried only about what positive things we can accomplish together in the future.

A desire to work together harmoniously for a better future is, of course, appropriate. But as Part II suggests, simply expecting this to unfold in a society deeply grounded in racial hierarchy is to pretend to be living in a different world than the one that actually exists. Focusing less on race because doing so may stimulate racial hostility and resentment may well be logical in the world as assumed by the antibalkanization approach. However, it is neither logical nor productive in the world

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("Rather than analyzing a case of this kind by asking whether minority teachers have some sort of special entitlement to jobs as a remedy for sins that were committed in the past, I believe that we should first ask whether the Board's action advances the public interest in educating children for the future.").

<sup>251</sup> See generally *Richmond v. J. A. Croson Co.*, 488 U.S. 469, 511–20 (1989).

<sup>252</sup> *Id.* at 498–506.

<sup>253</sup> Even in his *Adarand* dissent, Stevens noted that the Congressional program at issue was acceptable to him because while perhaps "in part a remedy for past discrimination," it was "most importantly a forward-looking response to practical problems faced by minority subcontractors." *Adarand*, 515 U.S. at 261–62 (Stevens, J., dissenting).

<sup>254</sup> Moreover, by suggesting that remedial uses of race are the least likely to be appropriate, these decisions fortify the self-perception of White people as presumptively innocent of any involvement in or benefit from the troubling history of race that antibalkanization Justices are willing to acknowledge in the abstract. See Simson, *supra* note 136, at 693–94.

<sup>255</sup> See *supra* note 34 and accompanying text.



that actually is. Based on this disconnect, the antibalkanization approach downplays and discourages a focus on the continuing influence of white supremacy in everyday life and makes it more difficult to address this influence through law.<sup>256</sup> This is the regressive reality of the antibalkanization approach.

## II. ANTIBALKANIZATION ACTUALITIES—RACIAL HIERARCHY AND THE STRUCTURAL DIMENSIONS OF RACIAL RESENTMENT

Absent from the antibalkanization approach's perpetrator-perspective-based explanation of what causes racial hostility and resentment among whites is the elephant in the room: America's long-standing racial hierarchy that is grounded in notions of white supremacy. The regressive reality of the approach can be traced to the fact that it overlooks the structural influence of this hierarchy on racial dynamics generally, and on white racial hostility and resentment specifically. In this hierarchy, whites, as a group, continue to occupy a preferred position across all important aspects of social life<sup>257</sup> and the privileges of whiteness confer important psychic and status benefits to all who can access them,<sup>258</sup> regardless of how privileged they may be on other indicators.<sup>259</sup> As a result, whites as a group have a deep-seated interest

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<sup>256</sup> My use of the term "white supremacy" reflects a broad and structural definition, summarized powerfully by Frances Lee Ansley:

By 'white supremacy' I do not mean to allude only to the self-conscious racism of white supremacist hate groups. I refer instead to a political, economic and cultural system in which whites overwhelmingly control power and material resources, conscious and unconscious ideas of white superiority and entitlement are widespread, and relations of white dominance and non-white subordination are daily reenacted across a broad array of institutions and social settings . . . . The term 'white supremacy' is emphatically *not* used here to inflate rhetoric, or to deny that some forms of white supremacy are more virulent than others . . . . On the other hand, I fail to see how Americans can avoid recognizing that we still live in a white supremacist system.

Frances Lee Ansley, *Stirring the Ashes: Race Class and the Future of Civil Rights Scholarship*, 74 CORNELL L. REV. 993, 1024 n.129 (1989).

<sup>257</sup> See, e.g., Victoria C. Plaut, *Diversity Science: Why and How Difference Makes a Difference*, 21 PSYCH. INQUIRY 77, 79–80 (2010) (giving examples related to wealth and employment, criminal justice, education, and health).

<sup>258</sup> See, e.g., DAVID R. ROEDIGER, *THE WAGES OF WHITENESS: RACE AND THE MAKING OF THE AMERICAN WORKING CLASS* (rev. ed. 2007). The classic reference that such benefits constitute a kind of "public and psychological wage" of Whiteness that has long hindered the development of racial solidarity is W.E.B. DUBOIS, *BLACK RECONSTRUCTION IN AMERICA* 700 (1935) (The Free Press 1998).

<sup>259</sup> L. Taylor Phillips & Brian S. Lowery, *The Hard-Knock Life? Whites Claim Hardships in Response to Racial Inequity*, 61 J. EXPERIMENTAL SOC. PSYCH. 12, 12 (2015) ("Whites enjoy privileges due to their race, regardless of the difficulty or ease of their particular life

in maintaining this racial hierarchy.<sup>260</sup> This Part argues that this interest in protecting a dominant hierarchy position, and responding to a perception of threats to it, are the most likely sources of white racial hostility and resentment in response to government racial equality efforts—not a bias cascade that is triggered by the government using race “too much.”<sup>261</sup> Social science research from numerous contexts supports this argument.

### *A. Racial Hierarchy and Threats in the Social Psychology of Race*

Social scientists have found the concept of racial hierarchy crucial for accurately describing race relations and the social psychology of race in the United States. For example, Social Dominance Theory (SDT) has built a broad research program around explaining the mechanisms by which group-based hierarchies—of which racial hierarchy is the most prominent example<sup>262</sup>—develop and remain remarkably stable over time.<sup>263</sup> Among the important and consistent findings of SDT is that members of dominant racial groups (including whites in the United States), on the whole, “will be more supportive of group-based hierarchy than . . . racial minorities,”<sup>264</sup> in large part because the re-creation of group-based hierarchy is most in their self-interest.<sup>265</sup> As a result, they are more likely to engage in a wide range of behaviors, have policy preferences, stereotypes, and attitudes, and support ideologies that are likely to maintain or enhance existing racial hierarchy.<sup>266</sup> In other words, because white Americans benefit from America’s racial hierarchy, they are motivated to protect it. Most importantly for this Article, a number of studies in the

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circumstances. Whites suffer hardships, and sometimes greater hardships than particular minorities; however, Whites’ non-racial hardships are irrelevant to racial privilege.”).

<sup>260</sup> See, e.g., Cho, *supra* note 109, at 122 (“Logically, . . . whites have a vested interest in retaining advantageous racial hierarchies, structures and cultures—the property value of whiteness—and may be expected to defend political and material advantages over peoples of color.”). The relevance for law of social science research describing this social dominance interest has improperly been ignored by most legal scholarship and should be analyzed in greater depth. See generally Simson, *supra* note 35.

<sup>261</sup> See also Bartlett, *supra* note 24 (exploring role of threat in explaining why current law is more hostile to race-based than to gender-based affirmative action programs).

<sup>262</sup> JIM SIDANIUS & FELICIA PRATTO, SOCIAL DOMINANCE: AN INTERGROUP THEORY OF SOCIAL HIERARCHY AND OPPRESSION 61 (1999) (“[F]or most of U.S. history, race . . . has been and remains the primary basis of social stratification.”).

<sup>263</sup> For a detailed discussion of Social Dominance Theory and related research, as well as an application to employment discrimination doctrine, see Simson, *supra* note 35.

<sup>264</sup> *Id.* at 1050. In the terminology of SDT, this means that they have a higher “social dominance orientation” (SDO), which is an individual difference variable that measures people’s relative support and preference for group inequality and for social systems to be structured as group-based hierarchies. *Id.* at 1048–49.

<sup>265</sup> *Id.* at 1057–58.

<sup>266</sup> See generally *id.* at 1047–62.

SDT tradition suggest that white Americans become especially protective of racial hierarchy when it is perceived to be under threat.<sup>267</sup> While SDT is not specifically focused on the role of threats in race relations, its findings on the connection between hierarchy threats and hierarchy-protective behavior of white Americans are consistent with the predictions of other sociological and social psychological theories that are more directly concerned with the role of threat.

For example, according to group position theory, race relations, and in particular the attitudes and behavior of whites vis-à-vis racial minorities, are driven to a significant extent by a sense of dominant group position.<sup>268</sup> In this view, the behavior and views of whites, the dominant group, are influenced not only by feelings of white superiority, ideas about minorities as different and alien, and white claims to priority access to certain rights, resources, and status, but also by “a perception of threat from members of a subordinate group who harbor a desire for a greater share of dominant group members’ prerogatives.”<sup>269</sup> When whites perceive such a threat to their group position, they will often react with fear, apprehension, anger, and resentment and act to protect their dominant group position.<sup>270</sup>

Even more specifically, intergroup threat theory has developed a comprehensive account of the ways in which different kinds of threats affect intergroup relations, including race relations.<sup>271</sup> According to this theory, there are both “realistic threats,” which “refer to concerns about physical harm or a loss of power and/or resources”,<sup>272</sup> and “symbolic threats,” which “refer . . . to [ ] concern[s] about the integrity or validity of the ingroup’s meaning system.”<sup>273</sup> Both types of threats play the important role

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<sup>267</sup> See, e.g., Eric D. Knowles et al., *On the Malleability of Ideology: Motivated Construals of Color Blindness*, 96 J. PERSONALITY & SOC. PSYCH. 857 (2009) (explaining how under threat, White people with higher preferences for group-based hierarchy construe colorblindness as procedural justice rather than distributive justice mandate because doing so protects existing hierarchy to a greater extent); Kimberly Rios Morrison & Oscar Ybarra, *The Effects of Realistic Threat and Group Identification on Social Dominance Orientation*, 44 J. EXPERIMENTAL SOC. PSYCH. 156 (2008) (finding that under threat, White people can exhibit higher levels of hierarchy preference).

<sup>268</sup> See, e.g., Lawrence D. Bobo, *Prejudice as Group Position: Microfoundations of a Sociological Approach to Racism and Race Relations*, 55 J. SOC. ISSUES 445 (1999).

<sup>269</sup> *Id.* at 449.

<sup>270</sup> *Id.* at 450; see also Michelle Adams, *Intergroup Rivalry, Anti-Competitive Conduct and Affirmative Action*, 82 B.U. L. REV. 1089, 1096–1109 (2002) (relying on SDT and group position theory, as well as social identity theory and realistic group conflict theory in analyzing race relations as a form of intergroup competition).

<sup>271</sup> See, e.g., Walter G. Stephan, Oscar Ybarra & Kimberly Rios, *Intergroup Threat Theory*, in HANDBOOK OF PREJUDICE, STEREOTYPING, AND DISCRIMINATION 255 (2d ed. 2015).

<sup>272</sup> *Id.* at 257.

<sup>273</sup> *Id.* at 256. Both realistic and symbolic threats, moreover, exist both at the individual and at the group level, so that in total the theory posits “four basic types of intergroup threat: realistic group threats, symbolic group threats, realistic individual threats, and symbolic individual threats.” *Id.* at 258.

of mediating how different aspects of existing relationships between racial groups, including differences in “group power, relative status, group size, and prior intergroup conflict” can lead to negative intergroup outcomes, including whites experiencing negative emotions such as fear, anger, and resentment;<sup>274</sup> whites endorsing negative stereotypes of racial minorities as well as negative attitudes toward them and policies meant to benefit them;<sup>275</sup> and whites engaging in negative behavior such as discrimination against racial minorities.<sup>276</sup>

Taken together, these research projects suggest that the behavior, feelings, and emotions of whites with regard to the distribution of societal resources is driven to a significant extent by a combination of the desire to protect their dominant position in the existing racial hierarchy and the sense of threat to this dominant position that whites experience in a given situation.<sup>277</sup>

At first glance, these points may seem mundane and self-evident. But on closer inspection, they undermine the basic foundations of the antibalkanization approach—and thus of current equal protection law on race-conscious governmental equality efforts. For one, they call into question the approach’s baseline view that most white Americans can generally be assumed to be well-meaning participants in shared efforts to accomplish greater racial equality so long as those efforts are properly structured by the government. After all, if white Americans as a group are motivated to protect *racial hierarchy* and ward off threats to it, it seems equally, if not more, reasonable to assume that the default response to progress toward racial equality will be resistance rather than cooperation.<sup>278</sup> Moreover, if it is the loss of

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<sup>274</sup> *Id.* at 264.

<sup>275</sup> *Id.* at 269–70.

<sup>276</sup> *Id.* at 271.

<sup>277</sup> See, e.g., Nour S. Kteily & Kaylene J. McClanahan, *Incorporating Insights About Intergroup Power and Dominance to Help Increase Harmony and Equality Between Groups in Conflict*, 33 CURRENT OP. PSYCH. 80, 81 (2020) (noting that “[f]aced with threat to the status quo, advantaged group members adopt a series of perceptions, attitudes, and behaviors that bolster the hierarchy” and providing illustrations); Ryan M. Quist & Miriam G. Resendez, *Social Dominance Threat: Examining Social Dominance Theory’s Explanation of Prejudice as Legitimizing Myths*, 24 BASIC & APPLIED SOC. PSYCH. 287 (2002) (interaction of social dominance orientation and four different measures of threat predicted White stereotypical beliefs and prejudicial attitudes toward Black people).

<sup>278</sup> This is not meant to be a simplistic point that White Americans are “bad people” or riven by racial animus. From a critical perspective, it seems “understandable” that many White people would have the described sentiments given basic self-interest and the history and power relations of race in the United States. Members of other groups in dominant positions often also exhibit similar hierarchy-related interests. See, e.g., Kteily & McClanahan, *supra* note 277, at 80 (“Despite individual variability, advantaged groups are typically more supportive of hierarchy, threatened by changes to the status quo, and motivated to protect the privileges associated with their continued dominance.”). But regardless of whether they are “understandable” or not, the social psychological findings discussed in this Part are inconsistent with the assumptions of the antibalkanization approach and thus must be taken seriously in

race-based status and position in the racial hierarchy as such that is threatening to whites and causes stereotyping, anger, hostility, and resentment, it would seem erroneous to attach as much significance as the antibalkanization approach does to whether race is being used too much or too explicitly in a particular government intervention. After all, even interventions that don't explicitly rely on race as well as broad changes in race relations generally should be expected to cause the same sentiments so long as they are perceived to be threatening the racial hierarchy.<sup>279</sup> The following sections show how this indeed seems to be the case.

I discuss two different sets of research. The first set on the anticipated demographic shift of the United States from a majority-white to a "majority-minority" nation and related studies on "racial progress" shows that it does not take race-conscious intervention by the government at all to generate white racial hostility and resentment. Rather, it takes a threat to, and perceived possible interference with, the dominant hierarchy status of whites. This is so even if this threat is fairly impersonal, non-individualized, and still quite far off into the future. The second set of research shows that even when race-conscious government action in pursuit of greater racial equality is involved, white racial hostility and resentment is to a significant extent a response to hierarchy-related threats, not to whether the government used race "too much."

*B. Racial Threat, Hostility, and Resentment Without Government Action:  
Research on the "Majority-Minority Nation" and Racial Progress*

In 2008, the Census Bureau projected that by the middle of the twenty-first century the United States would move from a majority-white to a "majority-minority" nation.<sup>280</sup> I refer to this projection as the "majority-minority shift." In a country in

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the analysis of racial equality law. This is not, and should not be, an exercise in racial essentialism. *See supra* note 21. My discussion is not meant to suggest, and social science research would not support, that all White Americans will automatically think and behave in a particular way. But there are patterns in thought and behavior that social science has shown to be connected to racial group membership in important ways and that must be considered carefully.

<sup>279</sup> Cf. Samuel R. Bagenstos, *Universalism and Civil Rights (with Notes on Voting Rights after Shelby)*, 123 YALE L.J. 2838, 2864–65 (2014) (questioning universal accuracy of argument "that if a law specifically treats people differently based on their group status . . . then it will send the message that group status matters, but if a law is not specifically framed in group-based or targeted terms, then it will not send such a message" because while plausible, "it is just as plausible that many laws will have a social meaning that does not turn on such formalities," for example because "the public understands universalist approaches as really focusing their benefits on particular groups" even if this is not done in explicit terms).

<sup>280</sup> Maureen A. Craig & Jennifer A. Richeson, *More Diverse Yet Less Tolerant? How the Increasingly Diverse Racial Landscape Affects White Americans' Racial Attitudes*, 40 PERSONALITY & SOC. PSYCH. BULL. 750, 750 (2014). This projection remains current. *See* Jonathan Vespa, Lauren Median & David M. Armstrong, DEMOGRAPHIC TURNING POINTS FOR THE

which citizenship was for long periods explicitly restricted to Whites,<sup>281</sup> and in which immigration has also often been heavily regulated by race in favor of White ethnic groups,<sup>282</sup> the projection of such a shift was a major development. A detailed social science research program has developed to investigate its consequences. Of particular importance to this Article, this research program has uncovered that making whites aware of the shift creates a perceived threat to whites' dominant position in the existing racial hierarchy.<sup>283</sup> In turn, the experience of this threat leads Whites to respond in numerous ways that might protect their position—including bias, hostility, anger, and resentment toward other racial groups.

At the most basic level, researchers have found that when whites are told about the majority-minority shift, they express greater racial bias, both explicit and implicit, against racial minorities. Thus, in a set of studies by Craig and Richeson, Whites who were told about the shift expressed greater preferences for their own racial group and discomfort with other racial groups on an explicit survey, and greater implicit bias against racial minorities on the Implicit Association Test, compared to control populations.<sup>284</sup> Importantly, the authors found that it was the perceived threat to their societal status that explained whites' greater expression of racial bias toward racial minorities when exposed to the demographic shift information.<sup>285</sup>

In isolation, this result might suggest that finding out about an increase in the racial minority population might simply reflect an increase in the perceived salience of racial minorities, leading to a strengthening of pre-existing biases and negative

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UNITED STATES THE UNITED STATES CENSUS BUREAU 7, U.S. Census Bureau, <https://www.census.gov/library/publications/2020/demo/p25-1144.html> [<https://perma.cc/S5KA-YR3B>] (last visited Mar. 28, 2022).

<sup>281</sup> See Simson, *supra* note 136, at 641 n.30.

<sup>282</sup> See, e.g., Cho, *supra* note 109, at 87 and n.64 (collecting sources).

<sup>283</sup> See, e.g., Craig & Richeson, *supra* note 280, at 752 (conceptualizing demographic shift as creating “group status threat”). Different studies have named and conceptualized the threats involved somewhat differently, but in general the conceptualizations revolve around a threat to the dominant position of Whites in the existing racial hierarchy. See also H. Robert Outten et al., *Majority Group Members' Negative Reactions to Future Demographic Shifts Depend on the Perceived Legitimacy of Their Status: Findings from the United States and Portugal*, 9 FRONT. PSYCH. (2018) (conceptualizing threat involved as “intergroup threat”); Felix Danbold & Yuen J. Huo, *No Longer “All-American”? Whites' Defensive Reactions to Their Numerical Decline*, 6 SOC. PSYCH. & PERSONALITY SCI. 210 (2015) (conceptualizing threats as “prototypicality threat” as well as realistic and symbolic threats).

<sup>284</sup> Craig & Richeson, *supra* note 280, at 752–54; see also Allison L. Skinner & Jacob E. Cheadle, *The “Obama Effect”? Priming Contemporary Racial Milestones Increases Implicit Racial Bias among Whites*, 34 SOC. COGNITION 544, 548–49 (2016) (finding greater anti-Black implicit bias among Whites after being primed with majority-minority shift).

<sup>285</sup> Craig & Richeson, *supra* note 280, at 757; see also Maureen A. Craig & Jennifer A. Richeson, *More Diverse Yet Less Tolerant? How the Increasingly Diverse Racial Landscape Affects White Americans' Racial Attitudes*, 40 PERSONALITY & SOC. PSYCH. BULL. 750 (2014) (reporting updated results after discovering weighting errors in original studies but reconfirming role of group status threat as only significant mediator for bias findings).

evaluations of these groups independent of concerns for the position of Whites in the racial hierarchy. However, additional research shows that this is not the case. Becoming aware of the majority-minority shift not only increases negative evaluations of racial minorities, it also increases *positive* evaluations of whites and concerns about their future position in American society.<sup>286</sup> This suggests that what drives the reaction of Whites to this fundamental change in the structure of American society is not simply negative feelings or stereotypes about racial minorities in the abstract that are triggered in response to their projected growth in numbers. Rather, the reaction of whites to this shift represents an effort to respond to a threat to the dominant position of whites in the existing racial hierarchy and a desire to protect that position.

For example, research has found that making Whites aware of the majority-minority shift leads Whites to expect higher levels of anti-White discrimination in the future,<sup>287</sup> indeed possibly leading Whites to expect “that antiwhite discrimination in the future would be strikingly more than in the present.”<sup>288</sup> Going against the assumptions of the antibalkanization approach, moreover, whites in these studies expected greater anti-White discrimination in the future even if they were told that in a future majority-minority nation “individuals and institutions will *not* consider racial category information” in their distributive decisions.<sup>289</sup> Threat to the dominant position of whites in the racial hierarchy appeared to play an important role in driving these reactions. Interestingly, the threat that seemed to be driving whites’ concern about future anti-white discrimination was not a threat to their dominance in material status, such as in terms of income and wealth, but rather a threat to their dominant cultural position as the prototypical representative of American culture—what researchers have termed “prototypicality threat.”<sup>290</sup> When told that in the future majority-minority America minorities would “appreciate and conform to the mainstream culture,” Whites no longer expected greater anti-white discrimination.<sup>291</sup>

This is consistent with other research findings that “prototypicality threat” leads whites who either perceive, or are told about, white population decreases in the future to express significantly greater support for the idea that racial minorities

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<sup>286</sup> Craig & Richeson, *supra* note 280, at 757.

<sup>287</sup> See Maureen A. Craig & Jennifer A. Richeson, *Majority No More? The Influence of Neighborhood Racial Diversity and Salient National Population Changes on Whites’ Perceptions of Racial Discrimination*, 4 RSF: RUSSELL SAGE FOUND. J. SOC. SCI. 141 (2018); Maureen A. Craig & Jennifer A. Richeson, *Information about the US Racial Demographic Shift Triggers Concerns about Anti-White Discrimination Among the Prospective White “Minority,”* 12 PLOS ONE (2017), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5617190/> [<https://perma.cc/M3UH-EJFU>].

<sup>288</sup> Craig & Richeson, *supra* note 287, at 152.

<sup>289</sup> Craig & Richeson, *supra* note 287, at 11.

<sup>290</sup> *Id.* at 13. This is consistent with the idea that White supremacy has both material and cultural dimensions, see *supra* note 256, and that threats to White racial status and position in the racial hierarchy can be both material and symbolic. See *supra* notes 269, 271–72.

<sup>291</sup> Craig & Richeson, *supra* note 287, at 14–15.

should assimilate to the mainstream culture (a culture currently dominated and represented prototypically by Whites); and to express significantly lower endorsement for the idea that racial diversity should be valued and encouraged.<sup>292</sup> Similarly, researchers have found that telling whites about the majority-minority shift leads them to express greater sympathy toward their own racial group (but not toward racial minorities),<sup>293</sup> and that this increased sympathy is a function of, and response to, perceived intergroup threat.<sup>294</sup> Moreover, the threat of increasing demographic diversity appears to affect the political preferences of whites and shift them in a more racially conservative direction as well.<sup>295</sup>

Finally, and of most direct application for this Article, multiple studies have found that exposing whites to a decline in their numerical majority status in the future leads such whites to exhibit greater anger and fear toward minorities, and that this relationship is connected to a significant extent to perceptions of threat. In separate studies in 2012 and 2018, Outten and colleagues found that exposing white Americans to information about the majority-minority shift led those whites to express significantly more anger and fear toward racial minorities than whites in a control group.<sup>296</sup> Moreover, the 2018 studies confirmed what was only an indirect prediction

<sup>292</sup> Danbold & Huo, *supra* note 283, at 213–16.

<sup>293</sup> H. Robert Outten et al., *Feeling Threatened About the Future: Whites' Emotional Reactions to Anticipated Ethnic Demographic Changes*, 38 PERSONALITY & SOC. PSYCH. BULL. 14, 16–17 (2012).

<sup>294</sup> *Id.* at 20. In this research project, the mediating role of intergroup threat (measured as perceptions of threat as well as perceptions of loss of influence generated by increased diversity) was only measured in the second of two studies, which used White Canadian subjects, and not in the first study, which used White American subjects. *Id.* at 16. However, given the generally identical nature of the relevant findings, and the general role of threats in driving White Americans' reactions to demographic decline discussed in this section, it is fair to assume that a similar mediating role of threat underlies the results in the American sample as well.

<sup>295</sup> In relation to the 2016 election, for example, Major and colleagues found that exposing White people to the majority-minority shift increased perceived group status threat, and that group status threat served as a mediator explaining greater positivity toward, and likelihood of voting for, Donald Trump, greater support for anti-immigration policies, and greater opposition to political correctness for White people who were highly identified with their Whiteness. Brenda Major, Alison Blodorn & Gregory Major Blascovich, *The Threat of Increasing Diversity: Why Many White Americans Support Trump in the 2016 Presidential Election*, 21 GRP. PROCESSES & INTERGRP. RELS. 931, 934–37 (2018); *see also* Diana C. Mutz, *Status threat, not economic hardship, explains the 2016 presidential vote*, 115 PNAS E4330 (2018). Researchers have also found different types of threats to the racial status of White people to predict racial resentment and consequent support for the conservative “Tea Party” movement. *See* Robb Willer, Matthew Feinberg & Rachel Wetts, *THREATS TO RACIAL STATUS PROMOTE TEA PARTY SUPPORT AMONG WHITE AMERICANS* (2016), <https://papers.ssrn.com/abstract=2770186> [<https://perma.cc/Y3AB-9438>].

<sup>296</sup> *See* Outten et al., *supra* note 283, at 6–7 (2018 study); Outten et al., *supra* note 293 (2012 study). In both studies, “anger” was conceptualized as a composite measure of feelings of anger, annoyance, and resentment.



in the 2012 studies<sup>297</sup>: that perceptions of intergroup threat and increased amounts of anger and fear toward minorities go together when whites consider the implications of their predicted numerical decline. Whites exposed to the majority-minority shift perceived both larger amounts of intergroup threat<sup>298</sup> and felt an increased amount of anger and fear toward minorities, though only if they perceived the current status of whites as legitimate.<sup>299</sup> Summing up their 2012 studies, the authors concluded:

[T]he results of these two studies provide convincing evidence that merely thinking about impending ethnic demographic changes can have important psychological consequences for Whites in North America. . . . [G]rowing ethnic diversity is experienced as threatening to Whites, and this heightened sense of threat can increase negative feelings toward ethnic minorities and increase the degree to which Whites identify with their race and feel sympathy toward their ingroup.<sup>300</sup>

These dynamics, moreover, are not limited to the particular demography-related threats represented by the majority-minority shift. Similar research that has investigated the reaction of white Americans to racial “milestones,” or indications of racial progress in general, confirms the above patterns. For example, research by Wilkins and colleagues found a similar effect on whites’ perceptions of anti-white discrimination as that discussed above when the threat to the dominant status of whites was represented by perceptions of racial progress in general.<sup>301</sup> In their study, both whites who independently perceived there to be greater racial progress<sup>302</sup> and whites who were told about racial progress as part of the experiment<sup>303</sup> perceived greater

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<sup>297</sup> Similar to the point noted above regarding sympathy, see *supra* note 294 and accompanying text., in their 2012 studies, Outten and colleagues did not investigate the role of threat in their American sample, but did find that threat mediated the increased levels of anger in the Canadian sample. Outten et al., *supra* note 293, at 20.

<sup>298</sup> Intergroup threat was operationalized in this study as a combination of worry about the future place of White people in the United States, threats experienced by growing diversity, and ideas that White people will not benefit from growing diversity. Outten et al., *supra* note 283, at 4.

<sup>299</sup> Because the focus of the 2018 study was on the role of perceived status legitimacy as a moderator of anger, fear, and threat, the authors did not conduct a separate analysis of intergroup threat as a mediator of the relationship between reading about White numerical decline and expressions of anger and fear. Outten et al., *supra* note 283, at 2.

<sup>300</sup> Outten et al., *supra* note 293, at 23.

<sup>301</sup> Clara L. Wilkins & Cheryl R. Kaiser, *Racial Progress as Threat to the Status Hierarchy: Implications for Perceptions of Anti-White Bias*, 25 PSYCH. SCI. 439 (2014).

<sup>302</sup> Participants rated their agreement with various items such as whether Black people are now better off than before, and whether the election of the first Black president showed strides toward racial equality. *Id.* at 441.

<sup>303</sup> Participants “read about high-status racial minorities in traditionally White positions

levels of anti-white bias in society<sup>304</sup> so long as they believed in the legitimacy of the current social system.<sup>305</sup> While the authors did not directly measure whether racial progress specifically represented a threat to such whites, they found that affirming the participants' sense of self (and thus alleviating a possible threat to the sense of self) eliminated the effect of racial progress on perceived anti-white bias.<sup>306</sup> Thus, they concluded that their results were "consistent with the perspective that racial progress is threatening to individuals with stronger [system-legitimacy] endorsement and that this threat corresponds to greater perceptions of anti-White bias."<sup>307</sup> In a follow-up study, Wilkins and colleagues moreover found that exposure to racial progress threatens whites' sense of self as measured implicitly via indications of self-worth.<sup>308</sup> Similarly, research by Skinner and Cheadle found that exposing whites to threats to their political power by priming the historic importance of the election of Barack Obama led Whites to exhibit greater implicit bias against Black people,<sup>309</sup> just like exposure to the majority-minority shift did in other studies.

This social science research strongly suggests that what ultimately drives negative reactions by whites to potential changes in race relations, including anger and resentment toward racial minorities, is an acute sense of dominant group position in America's racial hierarchy and perceptions of threat to this position and its privileges—including by impersonal forces such as demographic changes or broad notions of "racial progress." This suggests that in adopting a perpetrator perspective, the antibalkanization approach underestimates the structural influence and power of the interests that a long-standing social regime of racial hierarchy based on an ideology of white supremacy creates and nurtures. It also suggests that the approach misunderstands how much progress toward substantive equal opportunity can be achieved by trying to avoid white racial resentment and hostility through requirements that equality interventions don't focus "too much" on race. Additional research connecting white racial hostility and resentment more directly to government programs that benefit racial minorities further supports this claim.

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(e.g., Barack Obama, Condoleezza Rice) and further read that social mobility is generalized to racial minorities in the United States (e.g., progress in college enrollment and income)." *Id.* at 442.

<sup>304</sup> Participants rated their agreement with various items such as whether prejudice and discrimination against White people was on the rise, and whether reverse racism was pervasive. *Id.* at 441.

<sup>305</sup> *Id.* at 441–43.

<sup>306</sup> *Id.* at 444.

<sup>307</sup> *Id.*

<sup>308</sup> Clara L. Wilkins et al., *The Threat of Racial Progress and the Self-Protective Nature of Perceiving Anti-White Bias*, 20 GRP. PROCESSES & INTERGRP. RELS. 801, 808 (2017) (finding that study results are "consistent with our argument that racial progress threatens the status hierarchy and thus, Whites—who traditionally occupy dominant positions in society").

<sup>309</sup> Skinner & Cheadle, *supra* note 284, at 548–49.

*C. Racial Threat, Hostility, and Resentment, and Government Actions in Pursuit of Racial Equality*

Research that investigates the views and reactions of whites to actual racial equality programs also suggests that racial hierarchy, and perceived threats to the dominant position of whites within it, are the key drivers of white racial hostility and resentment related to such programs—not the extent to which race is invoked as such. This is illustrated both by research on programs that explicitly consider race as a factor—such as affirmative action programs—and programs that are perceived as primarily benefitting racial minorities without explicitly relying on race—such as welfare programs.<sup>310</sup>

With respect to affirmative action programs, a useful starting point for analysis is that there is an “American racial hierarchy in views of affirmative action.”<sup>311</sup> That is, the views of members of different racial groups on whether affirmative action programs are likely to have negative societal effects, and their relative levels of support for the practice, tend to track the general position of those groups in the racial hierarchy of the United States: Whites consistently evaluate affirmative action most negatively and support it least, Black Americans evaluate it least negatively and support it most, and Latinx and Asian Americans are usually somewhere in-between.<sup>312</sup> This relationship persists even if other explanatory variables for views on affirmative action (for example, general conservatism or individualism) are taken into account,<sup>313</sup> and generally widens as affirmative action programs become “stronger” in nature (i.e., use race more decisively) and thus more directly intervene in existing resource and status allocations.<sup>314</sup> In other words, when it comes to views on affirmative action as a general matter, “race matters,”<sup>315</sup> those who have most to

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<sup>310</sup> Cf. Lawrence Bobo, *Race, Interests, and Beliefs About Affirmative Action: Unanswered Questions and New Directions*, 41 AM. BEHAV. SCIENTIST 985, 999–1000 (1998) (“[A]ffirmative action is about the place racial groups should occupy in American society . . . . Despite all the high, abstract, and moralizing rhetoric, affirmative action is about concrete matters of who gets what.”).

<sup>311</sup> *Id.* at 991.

<sup>312</sup> See, e.g., *id.* at 993 (views on perceived negative effects of affirmative action); David A. Harrison et al., *Understanding Attitudes Toward Affirmative Action Programs in Employment: Summary and Meta-Analysis of 35 Years of Research*, 91 J. APPLIED PSYCH. 1013, 1021 (2006) (results of meta-analysis of 35 years of research on affirmative action programs in employment show that White people have least positive attitudes, Black people most positive attitudes, and Hispanic Americans attitudes that fall somewhere in-between).

<sup>313</sup> Bobo, *supra* note 310, at 993–95.

<sup>314</sup> See, e.g., Harrison et al., *supra* note 312, at 1021, 1027 (“When moderation does exist, more prescriptive AAPs (e.g., preferential treatment for those in a particular demographic category) tend to widen the attitudinal divide across races and genders, as well as accentuate the effects of personal self-interest, beliefs about discrimination suffered by the target group, and racism.”).

<sup>315</sup> Bobo, *supra* note 310, at 995.

lose in terms of their position in the racial hierarchy are most likely to reject intervention, and they do so in relation to the severity of that intervention.

As a result, it should not come as a surprise that research on threats has found a connection between the views of whites on affirmative action and threats to their material and symbolic status as the dominant group in the racial hierarchy. Consider the research of Renfro and colleagues, which investigated how perceptions of threat relate to the views of whites on both affirmative action as a policy, and on the beneficiaries of affirmative action.<sup>316</sup> In an initial study, they found that whites' responses to survey questions that framed affirmative action in terms of threats to the material and symbolic/cultural interests of whites<sup>317</sup> significantly predicted whether study participants supported affirmative action as a policy as well as their views on the beneficiaries of affirmative action. Specifically, perceptions of realistic threat were strong predictors of whites rejecting affirmative action as a policy, and symbolic threats were strong predictors of negative attitudes of whites toward the beneficiaries of affirmative action.<sup>318</sup> These threats, moreover, mediated the significant influence of "personal relevance" (i.e., agreement with the notion that affirmative action would have detrimental effects on a participants' own chances or of those close to them such as family and friends) on participants' attitudes toward affirmative action and its beneficiaries.<sup>319</sup> A second study not only replicated these basic results, but also showed that perceptions of threat mediated the effects of overt racism, negative affect toward Black people, and political conservatism on opposition to affirmative action.<sup>320</sup> In other words, consistent with the research discussed

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<sup>316</sup> C. Lausanne Renfro et al., *The Role of Threat in Attitudes Toward Affirmative Action and Its Beneficiaries*, 36 J. APPLIED SOC. PSYCH. 41, 41, 46, 51 (2006).

<sup>317</sup> For example, realistic threat questions asked respondents to rate their agreement with statements such as whether affirmative action leads to costly lawsuits that hurt businesses and hostility directed at White people. *Id.* at 46. Symbolic threat questions asked respondents to rate their agreement with statements such as whether affirmative action poses threats to the cultural practices of the majority and whether beneficiaries of affirmative action have the same work values as the majority. *Id.* at 47.

<sup>318</sup> Renfro et al., *supra* note 316, at 50–51. In this study, the authors measured negative stereotypes as a separate racial threat category, which was also predictive of negative attitudes toward the beneficiaries of affirmative action. *Id.* Since the study, threat theorists have reconceptualized stereotypes as subcomponents of realistic or symbolic threats, depending on whether the stereotypes at issue concern the potential for actual harm to the ingroup (in which case they would function as realistic threats) or the potential to undermine the values and beliefs of the ingroup (symbolic threats). See Stephan, Ybarra, & Rios, *supra* note 271, at 257–58. In the Renfro study, the stereotypes at issue (lazy, competent, unfriendly, resilient (strong), unreliable, compassionate, arrogant, selfish, opportunistic, intelligent, and hardworking) are mostly value-based and thus it makes sense that they exhibited a greater influence on White attitudes toward affirmative action beneficiaries, in conjunction with the "symbolic threat" measure used in the study.

<sup>319</sup> Renfro et al., *supra* note 316, at 51–53.

<sup>320</sup> See *id.* at 62–64.

in the previous section, perceptions of threat to the material and symbolic dominance of whites in the American racial hierarchy drives whites' rejection of affirmative action as a policy, and their negative views of the people who benefit from it, to a significant extent.<sup>321</sup>

Importantly, and closer to the specific point made in this Article, recent research has convincingly suggested that a governmental program need not be explicitly or predominantly based on race in how it distributes benefits or opportunities for racial threats to operate and to generate white racial resentment and white opposition. Even in non-race-based programs, racial threats and racial resentment can operate as "complementary accounts of white Americans' racial attitudes."<sup>322</sup> Consider Wetts and Willer's recent investigation into the sources of white support for, or opposition to, welfare programs. Their study of welfare programs is particularly instructive because such programs are "formally race-blind"<sup>323</sup> and have not been put in place with race as the "predominant factor" in determining who gets to benefit from them. Therefore, they are not the kind of program that the antibalkanization approach conceives of as a likely source of white racial hostility and resentment. However, welfare programs are "perceived in racialized terms" in that racial minorities are perceived to be the prototypical beneficiary of such programs.<sup>324</sup> Thus, they are a proxy for the more "diffuse" types of race-conscious but facially race-neutral racial equality programs that some antibalkanization proponents have proposed as preferable solutions over explicitly race-based interventions.<sup>325</sup>

What Wetts and Willer found in a series of studies about the relationship between racial threat, racial resentment, and support for welfare programs illustrates all of the pieces summarized in this Part put together: Whites care about their dominant position in the racial hierarchy; when there is a perceived threat to this position, even if quite diffuse, Whites respond negatively, including by showing heightened racial resentment; this response to the threat drives Whites' negative reactions to the source of

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<sup>321</sup> A similar finding made by Social Dominance Theory researchers is that people with higher levels of social dominance orientation (SDO) may be comparatively more likely to support "stronger" types of affirmative action programs, including quota policies, than people with a lower SDO, but only if they expect that the beneficiaries of the policy will remain on the bottom of the hierarchy in a particular context—that is, when they do not threaten a change in existing hierarchy. Geoffrey C. Ho & Miguel M. Unzueta, *Antiegalitarians for Affirmative Action? When Social Dominance Orientation Is Positively Related to Support for Egalitarian Social Policies*, 45 J. APPLIED SOC. PSYCH. 451, 453 (2015). The authors in this study used a multiracial pool of participants because their focus was on the operation of SDO and not on the specific views of Whites. However, as noted above, Whites generally have higher levels of SDO and thus should be particularly likely to exhibit this kind of reasoning.

<sup>322</sup> Rachel Wetts & Robb Willer, *Privilege on the Precipice: Perceived Racial Status Threats Lead White Americans to Oppose Welfare Programs*, 97 SOC. FORCES 793, 797 (2018).

<sup>323</sup> *Id.*

<sup>324</sup> *Id.*

<sup>325</sup> See *supra* Section I.D.

the threat, including racial equality programs; this is the case even if the source of the threat does not involve an explicit or “predominant” use of race by the government.

In their first study, Wetts and Willer investigated the relationship between threat, resentment, and welfare support by analyzing the nationally representative American National Election Studies surveys held in each presidential election year from 2000 through 2012. They found that White racial resentment rose significantly between 2004 and 2008, as well as between 2008 and 2012—which the authors suggest is in part driven by the “increased racial status threat” of perceived rising racial minority electoral power as represented most prominently by the candidacy and election of Barack Obama.<sup>326</sup> And while they did not find a significant absolute increase in White opposition to welfare during this period, this was likely because the onset of the 2008 financial crisis intervened, temporarily buoyed relative support for welfare programs as often happens in times of economic crisis, and thus suppressed what would otherwise have been a significant absolute increase in White opposition to welfare as a result of racial status threat.<sup>327</sup> This is illustrated by the fact that *relative* levels of welfare opposition between Whites and racial minorities diverged significantly, such that minorities became more supportive of welfare as the crisis began, Whites did not increase their absolute support for welfare as is otherwise common in economic downturns and even marginally decreased it, and this decrease was partially mediated by higher levels of racial resentment.<sup>328</sup>

In two follow-up experiments, Wetts and Willer provided additional evidence for the causal relationships involved. First, they found that exposing participants to threat via information about the majority-minority shift (discussed in depth above) led White participants to express both significantly higher levels of racial resentment and significantly greater opposition to welfare compared to a control group; and that the increased racial resentment mediated the effect of status threat on welfare opposition.<sup>329</sup> Second, the authors tested in more detail the significance of White perceptions of who would benefit from a particular welfare program. They found that exposing Whites to threat by presenting projections that the racial income gap was closing led White participants to express significantly greater opposition to welfare programs, but only if such programs were described as largely benefitting racial minorities rather than largely benefitting Whites.<sup>330</sup> Accordingly, Wetts and Willer concluded that

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<sup>326</sup> Wetts & Willer, *supra* note 322, at 802.

<sup>327</sup> *Id.* at 804–05.

<sup>328</sup> *Id.*

<sup>329</sup> *Id.* at 808–10.

<sup>330</sup> *Id.* at 812–14. The study design provides especially strong support for the conclusion that it was precisely the racial composition of the welfare recipients that mattered: Each participant rated their support for two different programs (Temporary Assistance for Needy Families (TANF) and unemployment insurance) of which one was described as primarily benefitting minorities and the other was described as primarily benefitting White people. The descriptions were then randomly varied between participants. *Id.* at 812.

“[w]hile white Americans often engage in impression management to appear color-blind, such efforts did not overcome the effect of racial status threat on participants’ willingness to voice heightened opposition to programs that benefit minorities.”<sup>331</sup>

### III. HOPE DIES LAST—REVIVING REMEDIAL RACIAL JUSTICE APPROACHES

To summarize the main insights from the above, Part I of this Article showed how the antibalkanization approach replicates the three basic characteristics of a perpetrator perspective of racial inequality and discrimination: (1) a baseline view of American society as presumptively racially egalitarian; (2) a conviction that blame-worthy perpetrators who interfere with this baseline are the main racial equality problem; and (3) a resulting doctrinal focus on policing the inappropriate behaviors of such perpetrators. Part II then reviewed social science research that challenges attributes (1) and (2) by suggesting that the structural influence of racial hierarchy on the interests, perceptions, and behaviors of White Americans makes it questionable to assume their commitment to a shared racial equality destination; and that White racial hostility and resentment is a phenomenon that unfolds in response to hierarchy threats and is not dependent on the existence of a government racial hostility perpetrator that focuses on race “too much.” This Part now challenges attribute (3) and suggests implications for how both policymakers and the Court might transcend the regressive reality of the antibalkanization approach and build on its progressive potential.

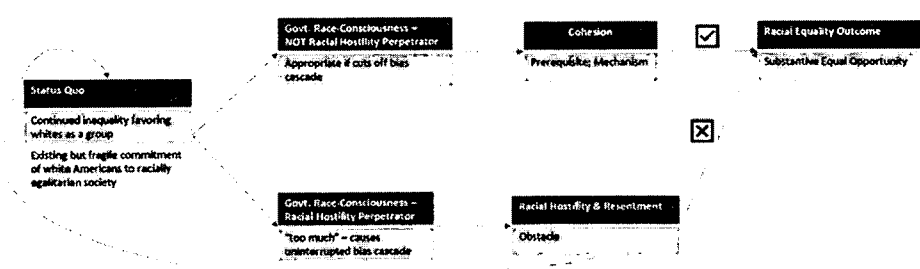
Perhaps the most important general takeaway for both policymakers and the Court is that the antibalkanization approach and the research discussed in Part II suggest different models for the relationship between governmental race-consciousness, social cohesion, and racial hostility and resentment on the path from a status quo of continued racial inequality to a desired end-state that features *both* racial equality *and* social cohesion. As illustrated in simplified form by Figure 1, the antibalkanization approach proceeds from the underlying assumption that “social cohesion is a prerequisite for equality.”<sup>332</sup>

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<sup>331</sup> *Id.* at 816. As Sam Bagenstos has noted, a similar dynamic likely underwrote the immediate and stark opposition by White people to race-neutral efforts to integrate suburban housing during the Nixon administration “precisely because racial minorities were understood as their principal beneficiaries.” Bagenstos, *supra* note 279, at 2853–55.

<sup>332</sup> Siegel, *supra* note 14, at 1350.

Figure 1. Antibalkanization Approach



**The path to racial equality if social cohesion is a prerequisite.<sup>333</sup>**

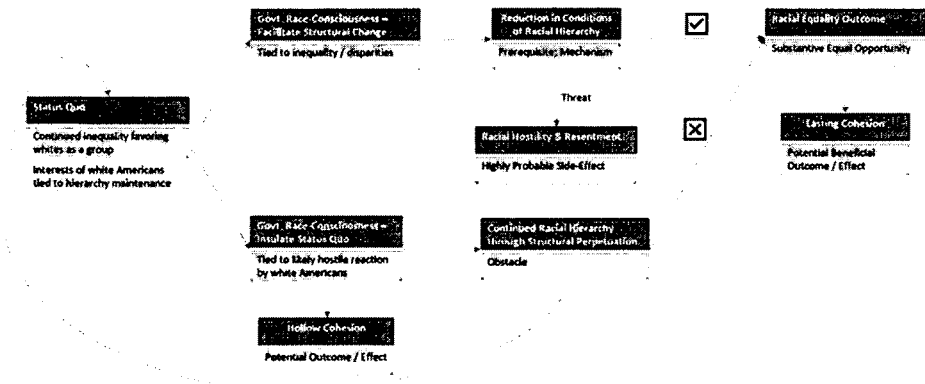
This model views social cohesion as a *mechanism* for achieving racial equality progress that must logically *precede* the achievement of substantive equal opportunity. Racial hostility and resentment, by contrast, is viewed as a (perhaps the) major *obstacle* to the achievement of substantive equal opportunity and leads to the perpetuation of the unequal status quo instead. The impact of governmental race-consciousness on racial equality progress in this model is tied to the bias cascade. If the use of race is such that it cuts off or avoids the full course of the cascade (i.e., the government is *not* a racial hostility perpetrator), it is consistent with enabling social cohesion and thus supportive of racial equality progress. Such uses of race are compatible with the existing but fragile commitment of White Americans to a racially egalitarian society. But if the use of race is “too much” such that it allows the bias cascade to run its full course (i.e., the government *is* a racial hostility perpetrator), it subverts this commitment, destroys social cohesion, and thus prevents racial equality progress.

As illustrated by Figure 2 and based on the research described in Part II, a hierarchy-aware approach suggests instead that both social cohesion and racial hostility and resentment may be better thought of as *effects* of different stages of the racial equality process rather than as mechanism and obstacle, respectively.

<sup>333</sup> Figures created by the author for use in this Article. Copyright David Simson 2021.



Figure 2. Hierarchy-Aware Approach



**The path to equality if structural conditions of racial hierarchy, or hierarchy aware approach, is assumed.**<sup>334</sup>

In this model, both racial hostility and resentment and social cohesion are still important components, but the primary drivers of the model are the structural *conditions* of racial hierarchy.<sup>335</sup> As even antibalkanization proponents acknowledge, the current status quo of American race relations is characterized by racial hierarchy: “The enduring hope is that race should not matter” but “the reality is that too often it does.”<sup>336</sup> Achievement of the end-goal of substantive equal opportunity will thus require reducing the extent of this hierarchy.<sup>337</sup> And as Part II suggests, because the self-understanding and interests of White Americans as a group are significantly tied to their dominant group position in this hierarchy, they will perceive such reductions as a threat and react with racial hostility and resentment.<sup>338</sup>

<sup>334</sup> *Id.*

<sup>335</sup> This focus on structural conditions is consistent with calls by CRT scholars for replacing a perpetrator perspective with a victim perspective. *See, e.g.,* Freeman, *supra* note 33, at 1053 (“The victim, or ‘condition,’ conception of racial discrimination suggests that the problem will not be solved until the conditions associated with it have been eliminated.”).

<sup>336</sup> *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 787 (2007) (Kennedy, J., concurring); *see also supra* notes 71–72 and accompanying text.

<sup>337</sup> This is quasi-definitional. If substantive equal opportunity means “a society where race is irrelevant to personal opportunity and achievement,” *Richmond v. J. A. Croson Co.*, 488 U.S. 469, 505–06 (1989), and racial hierarchy means that members of some racial groups, i.e., Whites, predictably have access to greater opportunity and achievement, *see* Ansley, *supra* note 256, then progress toward substantive equal opportunity requires reducing (and eventually eliminating) racial hierarchy.

<sup>338</sup> *See also* Wetts & Willer, *supra* note 322, at 818 (“Because status rank is hierarchical and zero-sum, any increases in economic or political power of lower-status groups can be

Racial hostility and resentment is thus an essentially inevitable short-term *side effect* of racial equality progress, not an *obstacle* to it.

In a hierarchy-aware model, social cohesion may or may not be conducive to racial equality progress. As social science research on the “irony of harmony”<sup>339</sup> shows, under conditions of group inequality, advantaged and disadvantaged groups are more likely to interact harmoniously when they focus on commonalities between them, such as a shared “common identity” (e.g., “American”).<sup>340</sup> Such harmonious commonality-based interactions can, in turn, improve the attitudes of advantaged and disadvantaged groups toward each other. However, they may simultaneously reduce both groups’ perception of how much inequality and discrimination against the disadvantaged group actually exists, and thus reduce each group’s motivation to change the unequal status quo.<sup>341</sup> In other words, if it results from not confronting intergroup inequality, intergroup harmony may exist, but only as “a hollow and potentially unstable form of harmony.”<sup>342</sup> The development of *productive* and *lasting* social cohesion, by contrast, likely requires first addressing unequal power relations and changing the conditions of structural inequality, along with the short-term tension that will accompany this process.<sup>343</sup>

Accordingly, in a hierarchy-aware model, the impact of governmental race-consciousness on racial equality progress is tied to whether it facilitates or obstructs structural change to the racial hierarchy, not to whether it involves a racial hostility perpetrator. Race-consciousness that reduces the conditions of racial hierarchy (e.g., significant disparities in important life outcomes) is supportive of racial equality progress even if it leads to racial hostility and resentment because it threatens the hierarchy interests of White Americans.<sup>344</sup> On the other hand, limiting race-consciousness to

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interpreted as a threat to the relative standing of dominant group members. Thus, any progress toward equality may provoke resentment on the part of dominant group members.”).

<sup>339</sup> Tamar Saguy et al., *The Irony of Harmony: Intergroup Contact Can Produce False Expectations for Equality*, 20 PSYCH. SCI. 114 (2009).

<sup>340</sup> Advantaged groups prefer for interactions with disadvantaged groups to be based on such a single common identity in part because this commonality focus sidesteps within-group differences, “typically reflects the characteristics, norms, and values of the majority group,” and allows to “distract[] attention away from the advantages enjoyed by the majority group.” John F. Dovidio et al., *Included but Invisible? Subtle Bias, Common Identity, and the Darker Side of “We,”* 10 SOC. ISSUES & POL’Y REV. 6, 17 (2016).

<sup>341</sup> See, e.g., Tamar Saguy, *Downside of Intergroup Harmony? When Reconciliation Might Backfire and What to Do*, 5 POL’Y INSIGHTS BEHAV. & BRAIN SCI. 75, 76–78 (2018) (summarizing research); Dovidio et al., *supra* note 340, at 16–26.

<sup>342</sup> Dovidio et al., *supra* note 340, at 31.

<sup>343</sup> See, e.g., John F. Dovidio, Tamar Saguy & Nurit Shnabel, *Cooperation and Conflict within Groups: Bridging Intragroup and Intergroup Processes*, 65 J. SOC. ISSUES 429, 438 (2009) (noting that “conflict can . . . represent a healthy developmental stage on the societal or group level”).

<sup>344</sup> Cf. Hutchinson, *supra* note 26, at 36 (“If the Supreme Court truly believes that its doctrines should promote social cohesion, then it should vigorously utilize the Equal Protection

only those forms that are unlikely to lead to White racial hostility and resentment, while possibly leading to hollow social cohesion, would permit only those interventions that interfere minimally with the hierarchy and would thus broadly perpetuate the status quo. This latter approach closely resembles the antibalkanization approach as currently practiced by the Court.

What are the implications for policymakers and the Court? For policymakers with stated racial justice commitments such as the Biden administration, the most important implication is that if they are serious about “root[ing] out systemic racism,”<sup>345</sup> they will need to fully commit to pursuing decisive structural intervention even if their efforts are likely to conflict to some extent with a desire to “unify,” “lower the temperature,” and find “time to heal.”<sup>346</sup> Doing so will require a break from much of past practice. In this context, it is important to remember that the Supreme Court is not the only relevant actor that has embraced a perpetrator-perspective-based antibalkanization approach to racial equality progress over the last few decades. As Derrick Bell has pointed out, prioritizing White harmony over structural racial change is a recurring phenomenon throughout American history.<sup>347</sup> Similarly, as Ian Haney López has shown, such an approach has also guided the views of liberal pundits and high-level decisionmakers in the Democratic Party establishment since at least the early 1990s and through the Obama administration.<sup>348</sup>

What will be required instead is a conviction that “ameliorating racial inequality is a precondition to ending racial politics” and that “[c]orrecting gross racial inequalities is necessary to make good on our social obligation to get beyond racism.”<sup>349</sup> Such a conviction will be critical because it is eminently predictable that many of Biden’s proposed racial justice initiatives will trigger strong reactions as a result of the dynamics described in this Article. Take as one example Biden’s charge to forcefully implement the Fair Housing Act’s mandate to affirmatively further fair housing by taking “actions that undo historic patterns of segregation and other types of discrimination and that afford access to long-denied opportunities.”<sup>350</sup> As Blake

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Clause to help eradicate group-based inequities; these inequities cause more social division than diversity alone.”).

<sup>345</sup> See Phillips, *supra* note 5.

<sup>346</sup> See Phillips, *supra* note 5.

<sup>347</sup> Bell, *Racial Realism*, *supra* note 61, at 372; Bell, *supra* note 11.

<sup>348</sup> See *supra* note 8; see also HANEY LÓPEZ, *supra* note 3, at 228 (“Already we see some leading liberals suggesting that Democrats must continue to ‘moderate[] their economic and social message,’ the better to avoid rekindling the ‘widespread popular disgust with the extremes to which liberal Democrats and New Left movements had gone in the late sixties and the seventies.’ Arguments like these merely reinvigorate the advice Democratic pundits have been offering since the 1970s: flee from race and flee from liberalism and the middle class too.”) (quoting JOHN JUDIS & RUY TEIXEIRA, *THE EMERGING DEMOCRATIC MAJORITY* 3 (2002)).

<sup>349</sup> HANEY LÓPEZ, *supra* note 3, at 221 (emphasis omitted).

<sup>350</sup> See *Memorandum on Redressing Our Nation’s and the Federal Government’s History of Discriminatory Housing Practices and Policies*, THE WHITE HOUSE (Jan. 26, 2021),

Emerson has analyzed in detail, if implemented forcefully, this rule has the potential to support deep structural changes to the many aspects of policymaking that have historically created residential segregation and racial inequality tied to housing.<sup>351</sup> A big part of the reason is that the rule forces an explicitly race-conscious engagement with structural racial inequality in housing and empowers the victims of racial discrimination to have a voice in a process that aims for transformative and racially equitable solutions.<sup>352</sup> But precisely for this reason, given the deep and multifaceted ways in which housing discrimination is connected to racial hierarchy,<sup>353</sup> it will trigger the same “immense social confrontation” that issues of housing integration have long triggered historically.<sup>354</sup> Policymakers in the past have pulled back in response to such hostility and resentment—and widespread housing segregation continues as a result.<sup>355</sup>

For things to be different this time, the Biden administration would need to supercharge the progressive potential of the antibalkanization approach. It would need to go beyond exhibiting a basic willingness to learn about the realities of race and to support a bit more race-consciousness over time. It would also need to replace the approach’s perpetrator perspective with a structural view of racial inequality. The current antibalkanization approach would view White racial hostility and resentment resulting from changes to the racial hierarchy of housing as counterproductive to long-term equality progress, and as the result of the government moving too fast or “too much” toward racial equality. It would slow down interventions in response. A hierarchy-aware approach, by contrast, would understand based on both historical evidence<sup>356</sup> and social science research<sup>357</sup> that this hostility and resentment is a response to hierarchy threat which realistically *cannot* be avoided on the path

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<https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/26/memorandum-on-redressing-our-nations-and-the-federal-governments-history-of-discriminatory-housing-practices-and-policies/> [https://perma.cc/PE84-2NTP].

<sup>351</sup> See Emerson, *supra* note 15, at 204 (“The issues HUD asks . . . participants to consider . . . and open up for public discussion, cover a vast terrain of local policy issues, from zoning regulation, to the placement of schools, to access to public services.”); see also *id.* at 174–78, 203–07.

<sup>352</sup> *Id.* at 188, 203–04 (noting that the rule calls for input from “the public, including individuals historically excluded because of characteristics protected by the Fair Housing Act,” and aims to “empower program participants and to foster diversity and strength of community by overcoming historic patterns of segregation, reducing racial or ethnic concentrations of poverty, and responding to identified disproportionate housing needs”).

<sup>353</sup> See, e.g., RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* (2017); Emerson, *supra* note 15, at 167 (“Housing policy lies at the foundation of the racial hierarchies that permeate society, determining access to employment, education, and wealth.”).

<sup>354</sup> Emerson, *supra* note 15, at 204.

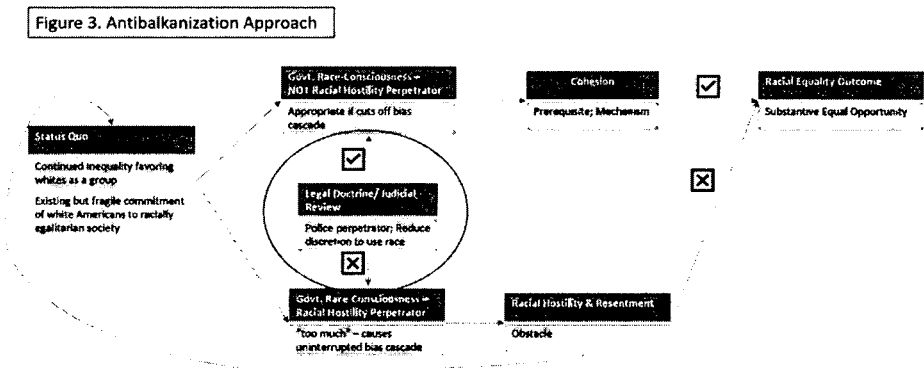
<sup>355</sup> See generally CHRISTOPHER BONASTIA, *KNOCKING ON THE DOOR: THE FEDERAL GOVERNMENT’S ATTEMPT TO DESEGREGATE THE SUBURBS* (2006).

<sup>356</sup> See, e.g., Bagenstos, *supra* note 279, at 2853–55.

<sup>357</sup> See Ryan D. Enos, *What the Demolition of Public Housing Teaches Us about the Impact of Racial Threat on Political Behavior*, 60 AM. J. POL. SCI. 123, 123–24 (2016).

toward meaningful racial equality. It would also recognize that this hostility and resentment analytically *need not* be avoided even if lasting social cohesion is part of the long-term goal. In other words, if the administration's goal is truly to "root out systemic racism," it would need to commit to sustained and vigorous policy implementation even if this was incompatible with "lower[ing] the temperature" in the short term.

With respect to the Court, the analysis in this Article suggests the need for a shift in the Court's understanding of the role of judicial review in the antibalkanization approach's core territory. As illustrated in Figure 3, the Court's current approach views the role of judicial review as that of policing governmental racial hostility perpetrators.



### The Court's remedial approach focuses on specific government actors rather than societal discrimination.<sup>358</sup>

As part of this role-understanding, the Court has particularly severely cabined the discretion of government actors to rely on race in pursuit of remedial goals. For fear that broader programs cause counterproductive racial hostility and resentment, the Court allows only those programs that precisely remedy identified discrimination by a specific government actor, but not those that respond to "societal discrimination."<sup>359</sup> Such an approach is understandably tempting. It promotes the Court to the elevated position of protecting racial equality progress from the misguided actions of representative government—a position the Court has claimed for itself since at least *Brown v. Board of Education*.<sup>360</sup>

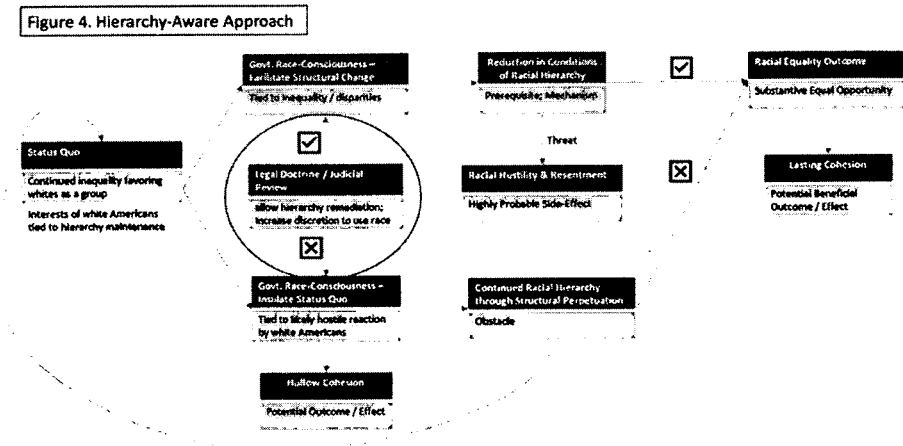
However, it also ignores the reality of American racial dynamics. As illustrated in Figure 4, a hierarchy-aware approach would recognize that to facilitate achieving

<sup>358</sup> Simson, *supra* note 333.

<sup>359</sup> See *supra* Sections I.D and F.

<sup>360</sup> 347 U.S. 483 (1954).

the goal of substantive equal opportunity, legal doctrine and judicial review need to support, or at a minimum not undermine, structural changes to the conditions of racial hierarchy.



### A hierarchy-aware approach employs judicial review to support structural conditions of racial hierarchy.<sup>361</sup>

This, in turn, has very different implications for remedial race-conscious equality interventions, in particular those pursuing an interest in remedying “societal discrimination.” From a structural standpoint, remedying societal discrimination is an especially compelling interest. Properly understood, societal discrimination refers to the multiple ways in which people and institutions instantiate racial hierarchy in their daily interactions across the many domains of social life. It is evidenced by significant racial disparities in life outcomes, which in turn are inextricably connected to disparities in access to opportunity.<sup>362</sup> Thus, in a hierarchy-aware model, government actors who choose to reduce such disparities in their sphere of influence through race-conscious means should have significant discretion in how to go about doing so, regardless of whether there is evidence of prior “identified discrimination” by themselves.

The antibalkanization approach objects to such discretion because it believes that absent proof of identified discrimination (1) such remedies necessarily involve improper governmental stereotyping about the causal role of race (as opposed to,

<sup>361</sup> Simson, *supra* note 333.

<sup>362</sup> For examples of the inextricably interconnected nature of racial disparities and equal opportunity in the context of housing, economic opportunity, and democratic participation, see, e.g., Anderson, *supra* note 64, at 1199–1207.

say, choice<sup>363</sup>) in creating the disparities;<sup>364</sup> and (2) such stereotyping then starts the bias cascade and obstructs racial equality progress by causing counterproductive racial hostility and resentment.<sup>365</sup>

But both beliefs are flawed. Regarding (2), as noted above, the hostility and resentment that is generated by programs that remedy societal discrimination is better understood not as the product of governmental stereotyping and the bias cascade it initiates, but as an essentially inevitable side effect of the fact that such programs represent the ultimate threat to racial hierarchy and thus will be resisted by those with an interest in protecting their dominant position in it.<sup>366</sup> Regarding (1), as Noah Zatz has suggested, significant racial disparities in life outcomes are causally related to race to some extent—when such disparities exist and a distributive decision-making process ignores them, some members of the disadvantaged group lose out on opportunities simply because of their race.<sup>367</sup> This does not mean that *all* members of the disadvantaged group necessarily do so,<sup>368</sup> nor that the specific governmental actor whose distributive decisions are at issue is necessarily *responsible* for creating this injury.<sup>369</sup> But it does mean that significant disparities reliably indicate the presence of a race-based injury for which a race-conscious remedy is the most appropriate and effective response.<sup>370</sup> Contra the antibalkanization approach, the fact that the government actor who has an opportunity to remedy the disparity is not responsible for its existence does not minimize the propriety of the remedy.<sup>371</sup> “To hold otherwise is like holding that a victim of a knife wound may not receive surgical treatment, except at the hands of the assailant.”<sup>372</sup>

At a very minimum, this Article’s analysis shows that the accuracy and implications of these contested assumptions are subject to what Rick Hills has called “reasonable and deep disagreement” (RADD).<sup>373</sup> As Hills suggests, in a federalist

<sup>363</sup> See, e.g., *Richmond v. J. A. Croson Co.*, 488 U.S. 469, 507 (1989) (criticizing “completely unrealistic assumption that minorities will choose [a particular trade] in lockstep proportion to their representation in the local population”).

<sup>364</sup> See *supra* note 195.

<sup>365</sup> See *supra* notes 196–98.

<sup>366</sup> See *supra* note 277 and accompanying text.

<sup>367</sup> Noah D. Zatz, *Disparate Impact and the Unity of Equality Law*, 97 B.U. L. REV. 1357, 1397–99 (2017).

<sup>368</sup> *Id.* at 1395–96, 1408–10.

<sup>369</sup> *Id.* at 1406–08.

<sup>370</sup> Anderson, *supra* note 64, at 1243–44 (“[W]hen the state’s purpose is explicitly race-conscious—for example, when it aims to remedy the disadvantages that black businesses suffer due to the continuing legacies of White supremacy—its use of racial means is not only clearly relevant to its purpose, *but more narrowly tailored to that purpose than race-neutral means could be.*”).

<sup>371</sup> *Id.* at 1260–66 (explaining how proceeding otherwise would essentially impose a duty to perpetuate injustice on governmental actors).

<sup>372</sup> *Id.* at 1262.

<sup>373</sup> Roderick M. Hills, Jr., *Federalism, Democracy, and Deep Disagreement: Decentralizing Baseline Disputes in the Law of Religious Liberty*, 69 ALA. L. REV. 913, 916 (2018).

system like the United States, one resolution to such a RADD that shows “equal concern and respect” for the contending sides is *not* to impose a broad national resolution of the contested question—like the Supreme Court has done by constitutionalizing its strict limits on race-consciousness—but instead to “devolve the choice” between available reasonable alternatives “to subnational governments.”<sup>374</sup> Such an approach would involve a more deferential constitutional review standard that would allow different state actors to make different reasonable baseline assumptions, including the hierarchy-aware assumptions outlined above, about the causes of persistent racial inequality and the need for race-conscious responses to address them.<sup>375</sup> State actors would not be *mandated* to make and act upon hierarchy-aware assumptions.<sup>376</sup> But they would be *permitted* to do so and to thereby show “equal concern and respect” for the views of those who believe that a purely perpetrator-based approach to solving racial inequality is bound to fail and that a victim-based approach ought to be implemented.<sup>377</sup> As Hills notes, a decentralizing approach to constitutional RADDs such as that over the sources of, and solutions to, persistent racial inequality may actually be a more likely “basis for social peace and civil discourse” than a one-size-fits-all solution imposed by the Court,<sup>378</sup> even setting aside the Court’s mistaken factual assumptions about the social dynamics of racial equality discussed above.

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<sup>374</sup> *Id.* at 950.

<sup>375</sup> *Cf. id.* at 963–64 (explaining how such an approach would apply to discretionary religious accommodations).

<sup>376</sup> Of course, strong arguments can be made, and have been made by CRT scholars, that a national resolution in favor of a structural, hierarchy-aware view of the Equal Protection Clause that includes a mandate for race-conscious remediation might also be appropriate. *See, e.g.,* Charles Lawrence III, *Unconscious Racism Revisited: Reflections on the Impact and Origins of the Id, the Ego, and Equal Protection*, 40 CONN. L. REV. 931, 944 (2008) (discussing view “that the 13th, 14th, and 15th Amendments embody a moral and constitutional duty to act affirmatively to disestablish the practices, institutional structures, and ideology of slavery and white supremacy”). But a discussion of those arguments is beyond the scope of this Article and my point here is more limited.

<sup>377</sup> *See, e.g.,* Carbado, *supra* note 33; Freeman, *supra* note 33. Such a victim-centered approach is certainly sufficiently present “in the American legal tradition” to count as a “reasonable” option for subnational actors to implement in Hills’s framework. Hills, *supra* note 373, at 950. For example, while not actually adopting a victim-centered view in his controlling *Parents Involved* opinion, Justice Kennedy still felt the need to explicitly address the reasonableness of such a view. *See Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 795 (2007) (Kennedy, J., concurring). Similarly, Justice Brennan’s concurrence for four Justices in *Bakke* relied upon a victim-centered perspective to justify greater discretion for state actors to engage in voluntary race-conscious equality initiatives than permitted by the strict scrutiny analysis of Justice Powell that eventually became the governing approach. *See Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 368, 372 (1978) (opinion of Brennan, J.). For discussions of the historical pedigree of something like a victim-centered perspective, see generally, e.g., James Gray Pope, *Section 1 of the Thirteenth Amendment and the Badges and Incidents of Slavery*, 65 UCLA L. REV. 426 (2018); Mark A. Graber, *The Second Freedmen’s Bureau Bill’s Constitution*, 94 TEX. L. REV. 1361 (2016).

<sup>378</sup> Hills, *supra* note 373, at 949.



These considerations suggest that the objections by antibalkanization Justices that loosening the strictures imposed on remedial programs would force the judiciary to adjudicate “inherently unmeasurable claims of past wrongs”<sup>379</sup> and create constantly shifting “judicial rankings” of who is entitled to preferential consideration (which “does not lie within the judicial competence”<sup>380</sup>) are a red herring in the core territory of the approach. This territory does not involve issues in which the *judiciary mandates* that other government actors use race to remedy societal discrimination in a particular way.<sup>381</sup> Rather, “questions of constitutional *permission* predominate.”<sup>382</sup> In this context, the question for judicial review is whether the government has acted within the level of discretion that the nature of its activity entitles it to. Once one accepts the view that more discretion is appropriate, whether based explicitly on the persuasiveness of a structural view of racial inequality or based on a preference for decentralization of deep disagreements under Hills’s approach,<sup>383</sup> the task of judicial review ceases to involve the treacherous enforcement of a highly precise boundary line.<sup>384</sup> Instead, it becomes more one of keeping governmental actors inside a band of possibilities within which these difficult choices can be made through negotiation by the affected groups themselves.<sup>385</sup> The judiciary’s lack of confidence in its own ability to make such choices should not prevent other actors from voluntarily protecting racial equality rights more strongly.<sup>386</sup> Moreover, to the extent that remedial programs face difficult political obstacles due to the very racial hierarchy interests of Whites in what remains a majority-White nation,<sup>387</sup> the fear that permitting greater discretion for such programs would lead to a “mosaic of shifting preferences”<sup>388</sup> for “almost any . . . racial group with the political strength to negotiate ‘a piece of the action’”<sup>389</sup> seems overblown.

With more discretion at their disposal, government actors who set out to remedy societal discrimination could act as the kind of “laboratories for experimentation to

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<sup>379</sup> *Richmond v. J. A. Croson Co.*, 488 U.S. 469, 506 (1989).

<sup>380</sup> *Bakke*, 438 U.S. at 297.

<sup>381</sup> See *supra* notes 44, 376 and accompanying text.

<sup>382</sup> Siegel, *supra* note 14, at 1302 (emphasis added).

<sup>383</sup> See *supra* notes 379–84 and accompanying text.

<sup>384</sup> See *supra* note 381 and accompanying text.

<sup>385</sup> Cf. Hills, *supra* note 373, at 981 (“Perhaps we will converge onto a common view. Until then, our willingness to let the other side have its share of policy-making space is a mark of our tolerance and respect for our fellow citizen.”).

<sup>386</sup> See Joy Milligan, *Religion and Race: On Duality and Entrenchment*, 87 N.Y.U. L. REV. 393, 462–63 (2012) (“[C]onstraints on judicial enforcement should not stop other government actors from enforcing constitutional concerns more broadly[.]”).

<sup>387</sup> See Siegel, *supra* note 14, at 1353 (“The race-conscious civil rights laws that moderates strike down are often adopted by fragile coalitions negotiating under severe political constraints; once invalidated, the policies may never be reenacted or implemented in the form race moderates recommend or permit.”).

<sup>388</sup> *Richmond v. J. A. Croson Co.*, 488 U.S. 469, 506 (1989).

<sup>389</sup> *Fullilove v. Klutznick*, 448 U.S. 448, 539 (1980) (Stevens, J., dissenting).

devise various solutions where the best solution is far from clear” that antibalkanization proponents have endorsed when such actors *restrict* race-conscious government action.<sup>390</sup> As such laboratories, willing government actors could then more fully address the antibalkanization approach’s valid concerns about stereotyping, stigma, racial politics, division, and racial hostility and resentment. With respect to stereotyping, for example, research shows that reducing under-representation and segregation is often necessary to successfully counteract stereotypes.<sup>391</sup> Similarly, while there is no easy way to avoid racial division, there are good reasons to think that more race-conscious engagement, not less, would help make people less susceptible to the power of divisive racial appeals over time.<sup>392</sup> Such “policy innovations” should be given an opportunity to prove their potential for success and to perhaps even become “contagious.”<sup>393</sup>

Importantly, working toward a more structural form of racial equality would also benefit White Americans in deep and important ways. As Angela Onwuachi-Willig has argued, our legal system’s approach to racial equality has always ignored that racial discrimination and a racial hierarchy grounded in White supremacy do not just harm people of color, but Whites as well.<sup>394</sup> They have a dehumanizing effect on Whites by creating a false sense of racial superiority that underwrites a feeling of entitlement to racial privilege and justifies the mistreatment and neglect of those viewed as racially inferior.<sup>395</sup> This sense of superiority “is particularly dangerous to a society that seeks racial equality” because it justifies a zero-sum view of racial equality based on which Whites feel “deprived of the material benefits and privileges that their ancestors had when Blacks were denied all privileges and rights by law.”<sup>396</sup>

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<sup>390</sup> See *Grutter v. Bollinger*, 539 U.S. 306, 342 (2003) (suggesting that universities “can and should draw on the most promising aspects of . . . race-neutral alternatives as they develop” in various states) (citing *United States v. Lopez*, 514 U.S. 549, 581 (Kennedy, J., concurring)); see also *Schuette v. Coal. to Def. Affirmative Action*, 572 U.S. 291, 301 (2014) (plurality opinion by Kennedy, J.).

<sup>391</sup> For a powerful narrative description of this point, see Forde-Mazrui, *supra* note 64, at 2379–81; see also Anderson, *supra* note 64, at 1270 (“Invidious racial stereotypes will be widespread as long as segregation and unconscious stereotype-based discrimination perpetuates the apparent evidential basis for them[.]”); Boddie, *supra* note 121, at 781–82. Antibalkanization proponents have already found such reasoning persuasive in the context of university admissions programs that pursue the educational benefits of student body diversity. See *supra* Section I.D.

<sup>392</sup> See, e.g., HANEY LÓPEZ, *supra* note 3, at 226 (“The research is clear that colorblindness does not help us overcome racism; on the contrary, colorblindness as a strategy (rather than as a goal) forms part of the problem. . . . [A]verting one’s eyes to how race might be operating only makes one more susceptible to dog whistle manipulation.”).

<sup>393</sup> Hills, *supra* note 373, at 980.

<sup>394</sup> Angela Onwuachi-Willig, *Reconceptualizing the Harms of Discrimination: How Brown v. Board of Education Helped to Further White Supremacy*, 105 VA. L. REV. 343, 361 (2019).

<sup>395</sup> *Id.* at 360–62.

<sup>396</sup> *Id.* at 361.

Thus, building a more lasting form of social cohesion and solidarity will require challenging this sense of superiority by working to dismantle “the very structures and institutions that work to perpetuate racial inequality.”<sup>397</sup>

The urgency of the need for such a transformation in the Court’s approach is clear. The powerful social movement activity of groups like Black Lives Matter in response to the many racial tragedies that continue to haunt American society is succeeding at least in some places to shift the conversation from a focus on individual perpetrators to structural injustice. Based on the regressive current version of the antibalkanization approach, however, constitutional law is much more likely to deter or undermine any policy victories that might be won by such activism than to support them.<sup>398</sup> The analysis in this Article suggests that this is not inevitable, even if the concerns raised by the antibalkanization approach are taken seriously. But it will take an adjustment to the Court’s basic assumptions about the nature of American race relations for things to change. If, but only if, a majority of the Court is willing to honestly question its baseline assumptions could the Court help turn the small progressive potential of the last few decades of its racial equality jurisprudence into progressive reality.

Given the recent changes in the composition of the Court, of course, it seems highly unlikely that the Court will actually do so in the near term. It is difficult to know whether there remain members in the conservative majority on the Court that may be willing to continue to apply even the “traditional” antibalkanization approach with all of its flaws. While long-standing efforts to put predictable partisans onto the Supreme Court have not fully succeeded in eliminating swing votes on the Court in cases with social justice dimensions,<sup>399</sup> there are no clear indications that racial justice is a clear priority for occasional swing voters. Perhaps the best that one could expect, then, is that a combination of Justices who are comparatively willing to follow precedent and/or who are somewhat willing to learn and challenge their priors on race will vote to preserve the fragile status quo that permits some governmental

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<sup>397</sup> *Id.*

<sup>398</sup> For one example, see *Vitolo v. Guzman*, 999 F.3d 353, 360–62 (6th Cir. 2021), which issued a preliminary injunction against part of the federal coronavirus relief fund legislation because the legislation relied on race-conscious presumptions of social disadvantage in structuring access to relief funds, and the court believed that such presumptions could not be constitutionally justified by the government’s asserted compelling interest in remedying societal discrimination.

<sup>399</sup> See, e.g., Noah Feldman, *Brett Kavanaugh Is About to Get a Lot More Powerful*, BLOOMBERG OPINION (Oct. 28, 2020, 6:30 AM), <https://www.bloomberg.com/opinion/articles/2020-10-28/brett-kavanaugh-is-about-to-get-a-lot-more-powerful> [<https://perma.cc/2ABH-BVEL>]; Giovanni Russonello, *Roberts Sides With the Liberals, Again*, N.Y. TIMES (June 30, 2020), <https://www.nytimes.com/2020/06/30/us/politics/supreme-court-abortion-roberts.html> [<https://perma.cc/N97R-XDCB>]; Mark Joseph Stern, *How Neil Gorsuch Became the Supreme Court’s Most Unpredictable Justice*, SLATE MAG. (July 15, 2020, 1:36 PM), <https://slate.com/news-and-politics/2020/07/neil-gorsuch-supreme-court-swing-vote.html> [<https://perma.cc/TB7Z-96X3>].

race-consciousness in higher education and redistricting as new challenges to these practices return to the Court.

If, as is perhaps more likely, the Court will pull back on race-consciousness instead, this Article hopes to have made at least a small contribution to the project of holding the Court accountable for its choices and planting the seeds for a more transformative jurisprudence in the future. In the hopes that over the long term the Court might become more receptive to rigorous analyses of complex and often ugly racial dynamics, it will be critical to have laid the groundwork. History provides many reasons to be pessimistic about the likelihood of such a future. But hope dies last, after all.

### CONCLUSION

Recognition of the antibalkanization approach to equal protection has improved our understanding of the Supreme Court's racial equality jurisprudence of the last four decades. Driven by the views of a small number of Justices in the middle of the Court, questions of "balkanization," and in particular of social cohesion and racial hostility and resentment, have taken center stage. Antibalkanization Justices have developed a consistent jurisprudence around these questions and have based it on relevant racial equality concerns. But they have developed this jurisprudence from within a world that, while plausible, does not reflect the actual world of race relations in the United States. Their jurisprudence remains trapped in a perpetrator perspective that overlooks the crucial structural influence of racial hierarchy and White supremacy. Programs that aim to remedy the continuing effects of this hierarchy have been the approach's primary victims. A more transformative jurisprudence requires incorporating a more realistic understanding of American race relations into legal doctrine and policymaking. A willingness to take these steps in the near future seems elusive and unlikely. But hope gains strength from the collective efforts of those demanding a more just future. And hope dies last. We shall see where it will be able to take us.

