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Majority Politics and Race Based Remedies

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Political scientists and sociologists who study the interaction of law and society have demonstrated that the law is an important component of social movement activity.[1] Political activists target legal actors because legal institutions play a central role in articulating and executing policies that impact the substance of social movement activity.[2] Participants in "identity politics," for example, direct arguments toward legal institutions because the law regulates and constructs race, gender, sexual orientation, and class relations.[3] Environmentalists, disability rights advocates, pro-choice supporters, and other leaders of important social movements also rely upon legal strategies as an important component of their reform agendas.

The ability of social movements to exert influence upon important social institutions corresponds with the existence of "political opportunities," which, in turn, develop from courses of actions that realign political commitments, making change more readily attainable.[4] For example, the Civil Rights Movement created opportunities for statutory and doctrinal transformation in racial jurisprudence by

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1. *See* Paul Burstein, *Legal Mobilization as a Social Movement Tactic: The Struggle for Equal Employment Opportunity*, 96 AM. J. SOC. 1201, 1204 (1991) ("It is . . . impossible to understand the American struggle for equal opportunity without focusing on the courts and on activities intended to influence judicial decisions."); *see generally* Darren Lenard Hutchinson, *The Majoritarian Difficulty: Affirmative Action, Sodomy, and Supreme Court Politics*, 23 LAW & INEQ. 1, 73-77 (2005) (discussing social movement theory).

2. *See* William N. Eskridge, Jr., *Channeling: Identity-Based Social Movements and Public Law*, 150 U. PA. L. REV. 419, 424-59 (2001) (discussing the role of law in fortifying social movement activity in antiracist, feminist, and gay, lesbian, bisexual, and transgender contexts).

3. *See id.*

4. *See* DOUG MCADAM, POLITICAL PROCESS AND THE DEVELOPMENT OF BLACK INSURGENCY, 1930-1970 41 (2d ed. 1999) (arguing that "any event or broad social process that serves to undermine the calculations and assumptions on which the political establishment is structured occasions a shift in political opportunities").

placing antiracism in an international context, creating a unity of interest between persons of color and the United States government.[5] The United States sought to portray itself as a guardian of liberty in the "Third World"—an image undermined by graphic media displays of brutality against and subjugation of persons of color in the domestic context. Geopolitical imperatives thus created a political opportunity for the attainment of formal racial equality.[6]

Theorists have also studied "countermovement activity," the responses by oppositional movements to perceived, or actual, gains of a particular social movement.[7] For example, in response to the Supreme Court's decision in *Lawrence v Texas*,[8] conservative social forces organized to challenge legal recognition of same-sex marriage, which they believed the decision's constitutional analysis would compel.[9] Some commentators believe that Republican exploitation of organized opposition to gay rights—through, for instance, a proposed constitutional amendment banning same-sex marriage—led to a surge in the number of conservative voters in the 2004 presidential election, thus securing a victory for President Bush.[10] Given the reality of countermovements, political opportunity is fluid, shifting, and tentative. In the absence of political opportunity, theorists predict that social movements will choose from a variety of survival strategies, including the advancement of more moderate political platforms or even the curtailment, or cessation, of political activity.[11]

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5. *See* MARY DUDZIAK, COLD WAR AND CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICA DEMOCRACY (2002).

6. *See* Derrick A. Bell, Jr., Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 524 (1980) (arguing that Brown "helped to provide immediate credibility to America's struggle with Communist countries to win the hearts and minds of emerging third world peoples" and that "this argument was advanced by lawyers for both the NAACP and the federal government"); Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61, 64-65 (1988) (discussing Justice Department brief in *Brown* linking desegregation to anticommunist foreign policy and describing media reaction to the decision which described it as undermining communism).

7. *See* David S. Meyer & Suzanne Staggenborg, *Movements, Countermovements and the Structure of Political Opportunity*, 101 AM. J. SOC., 1628, 1631-33 (1996) (discussing concept of "countermovement").

8. Lawrence v. Texas, 539 U.S. 558 (2003).

9. *See* Hutchinson, *supra* note 1, at 84-85.

10. *See* Michael Klarman, Brown *and* Lawrence *(and* Goodridge*)*, 104 MICH. L. REV. 431, 467 (2005) (discussing role of backlash against same-sex marriage in mobilizing conservatives to re-elect President Bush).

11. *See* ANNE N. COSTAIN, INVITING WOMEN'S REBELLION 120 (1992) (discussing feminist response to defeat of Equal Rights Amendment); SIDNEY TARROW, POWER IN MOVEMENT 113 (1994) ("And at times, to win policy success that supporters demand or authorities proffer, leaders move from confrontation to cooperation."); Verta Taylor, *Social Movement Continuity: The*

This Essay applies the principles of social movement theory and analyzes the legal status of race-based remedies. Many scholars have debated the constitutionality and efficacy of affirmative action, the appropriateness of race-consciousness (from legal and social perspectives) and the legitimacy of structural judicial remedies for various types of discrimination. This paper will add to this literature by demonstrating the influence of conservative race politics and ideology on Court doctrine concerning affirmative action and other race-based remedies. In particular, this Essay will demonstrate that, consistent with broader political trends, the Court disfavors governmental usage of race as a remedy for discrimination but embraces affirmative action for diversity purposes. Yet, as ongoing litigation demonstrates, the countermovements to antiracism that oppose affirmative action seek to dismantle race conscious state action altogether, and given recent personnel changes on the Court, this more "palatable" justification for affirmative action, having escaped judicial invalidation in *Grutter v Bolinger*,[12] faces judicial invalidation once again.[13]

Part I highlights the Court's opposition to racial remedies and its acceptance of diversity in affirmative action litigation. Part I also discusses developments in judicial remedies law as an additional basis for demonstrating the Court's hostility to racial redress and its alignment with mainstream political forces. Part II discusses the response of contemporary antiracist actors to judicial conservatives—particularly the proposals by several Critical Race Theorists that seek to de-emphasize race as a vehicle for navigating the political and legal landscape that opposes race-based remedies. Part III offers direction for future antiracist advocacy in a conservative political opportunity structure.

Women's Movement in Abeyance, 54 AM. SOC. REV. 761, 761-62 (1989) (discussing submergence of feminist politics in reaction to hostile opportunity structure).

12. Grutter v. Bolinger, 539 U.S. 306 (2003).

13. Erwin Chemerinsky, *The Future of Constitutional Law*, 34 CAP. U. L. REV. 647, 654 (2006) ("Few, I think, would disagree that there are now five votes on the Court-Chief Justice Roberts, and Justices Scalia, Kennedy, Thomas, and Alito-to overrule Grutter and abolish affirmative action in higher education. Lest there be doubts about Justice Kennedy here, it must be remembered that he has voted against affirmative action in every case raising the issue since he joined the Supreme Court."). *But see* Jack Balkin & Sanford Levinson, *The Processes of Constitutional Change: From Partisan Entrenchment to the National Surveilance State*, 75 FORDHAM L. REV. 489, 513-14 (2006) (making a more moderate prediction concerning the Roberts Court and affirmative action).

I. Race, Remedies, and Conservative Politics

Many scholars have documented the Court's opposition to race-based remedies for past and current discrimination.[14] The most striking aspect of this jurisprudence is the judicial invalidation of efforts to remedy the impact of "societal discrimination" or broader social marginalization that people of color experience due to pervasive practices of racial discrimination. Court doctrine defines social discrimination as too expansive a concept to remedy through the usage of race.[15] In *Richmond v. Croson*,[16] for example, the Court held that state governments could remedy their own discrimination or private discrimination that had a close connection to a state program, but that they could not utilize race to remedy broader categories of discrimination to which persons of color are vulnerable.[17] Justice Powell first articulated this vision of Equal Protection in the landmark *Bakke*[18] decision.

> The State certainly has a legitimate and substantial interest in ameliorating, or eliminating where feasible, the disabling effects of identified discrimination. The line of school desegregation cases, commencing with *Brown*, attests to the importance of this state goal and the commitment of the judiciary to affirm all lawful means toward its attainment. In the school cases, the States were required by court order to redress the wrongs worked by specific instances of racial discrimination. That goal was far more focused than the remedying of the effects of "societal discrimination," an amorphous concept of injury that may be ageless in its reach into the past.[19]

Having conceded the existence of societal discrimination, Powell dismisses the constitutionality of remedies to address this persistent social problem,[20] but affirms the use of race to achieve intellectual

14. *See, e.g.*, Girardeau Spann, *Affirmative Action and Discrimination*, 39 How. L.J. 1 (1995).

15. *See, e.g.*, City of Richmond v. J.A. Croson, 488 U.S. 469, 498-99 (1989) (holding that societal discrimination is not a valid justification for race-based affirmative action).

16. *Id.* at 469.

17. *See id.* at 491-92, 509-10.

18. Regents of the Univ. of Calif. v. Bakke, 438 U.S. 265 (1978).

19. *Id.* at 307.

20. Powell observes that:

> [T]he purpose of helping certain groups whom the faculty of the Davis Medical School perceived as victims of "societal discrimination" does not justify a classification that imposes disadvantages upon persons like respondent, who bear no responsibility for whatever harm the beneficiaries of the special admissions program are thought to have suffered. To hold otherwise 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. That is a step we have never approved.

diversity in higher education, so long as such usage meets the narrow tailoring requirements of the Court's strict scrutiny analysis.[21] Powell's opposition to race as a remedy, but preference for racial diversity, remains a defining aspect of the Court's affirmative action jurisprudence.

The Court's treatment of race in its affirmative action jurisprudence mirrors the view of race among the dominant culture. Although constitutional law scholars have long viewed the judicial review as antimajoritarian, a large body of literature within the field of political science demonstrates the Court's tendency to align its rulings with known public opinion.[22] Opinion polls, for example, indicate that a majority of Whites oppose affirmative action and other remedies to redress past or present harms, while persons of color embrace it as a necessary device to repair the impact of racial discrimination.[23] Related to this data, polling evidence also demonstrates that Whites tend to believe that racial discrimination no longer exists or is aberrational, while persons of color think that racial discrimination occurs pervasively and impedes their access to important economic and social resources.[24] The same political and economic forces that shape public opinion also inform Court rulings.[25] The involvement of the political branches in the selection of federal judges, along with the Court's own concern for legitimacy, ensures that politics will continue to have an impact on judicial decisions.[26] So long as majoritarian opinion—shaped by social movements, countermovements, culture, history, economics, and ideology—disfavors race-based remedies, the

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Id. at 310.

21. *Id.* at 311-20.

22. *See generally* TERRI JENNINGS PERITTI, IN DEFENSE OF A POLITICAL COURT (1999) (discussing politicized nature of Supreme Court decisionmaking).

23. Stephen M. Feldman, *The Rule of Law or the Rule of Politics? Harmonizing the Internal and External Views of Supreme Court Decision Making*, 30 LAW & SOC. INQUIRY 22, n.38 (discussing public opinion on affirmative action).

24. Barbara J. Flagg, *"Was Blind, But Now I See": White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 988 (1993) ("The requirement of discriminatory intent also legitimates unconscious race discrimination by reinforcing a popular white story about progress in race relations. The central theme of this story is that our society has an unfortunate history of race discrimination that is largely behind us."); JOHN J. HELDRICH CTR. FOR WORKFORCE DEV., RUTGERS UNIV., A WORKPLACE DIVIDED: HOW AMERICANS VIEW DISCRIMINATION AND RACE ON THE JOB 8 (2002) (reporting that 10% of Whites versus 50% of Blacks believe that Blacks experience workplace discrimination, although only 64% of Whites reported working in environments with Blacks).

25. *See* William Mishler & Reginald Sheehan, *Popular Influence on Supreme Court Decisions*, 88 AM. POL. SCI. REV. 716, 717 (1994).

26. Helmut Norpoth & Jeffrey A. Segal, *Popular Influence on Supreme Court Decisions*, 88 Am. Pol. Sci. Rev. 711, 716 (1994) (linking judicial majoritarianism with appointments process).

Court will likely maintain its current doctrinal opposition to remedial usages of race.

The Court's invalidation of racial consciousness also extends to the judicial remedies context. While the Court has invalidated legislative affirmative action on the grounds that lawmakers have failed to "identify" racial victims, when identifiable victims of racism successfully challenge discrimination, the Court nevertheless maintains its conservative approach to remedies. Developments in structural reform litigation demonstrate the Court's reluctance to validate race-based remedies in the adjudicative process.

In *Missouri v. Jenkins*,[27] for example, the Court invalidated an extensive judicial remedy for intentional school segregation in Kansas City, Missouri. The *Jenkins* litigation began over 20 years after the *Brown* decision, at which time the State of Kansas and the local district continued to engage in intentional racial segregation.[28] Kansas schools had been officially segregated since the conclusion of the Civil War, when state law first permitted the education of Black children.[29] Earlier rulings by the District Court found that the defendants' intentional discrimination impacted the academic achievement of Black students.[30] Accordingly, the court issued a comprehensive remedy aimed at addressing racial achievement gaps.

The remedy required the defendants to make substantial capital improvements to the school district facilities, to provide higher salaries to teachers in order to attract more competent instructors to the area, to reduce class sizes, to offer tutoring and after-school programs, and to institute curriculum reform, including the development of "magnet schools."[31] The court used national achievement scores as benchmarks to measure the success of its remedies.[32] Furthermore, the court held that the remedy should achieve "desegregative attractiveness"[33] and "suburban comparability."[34] In other words, the court designed the remedy to improve the conditions of the schools and reverse White flight to suburban or private schools.[35]

27. 510 U.S. 70 (1995).
28. *Id.* at 139-40 (Souter, J. dissenting).
29. *Id.* at 140 n.1.
30. *Id.* at 141.
31. *Id.* at 75-80 (majority opinion).
32. *Id.* at 100.
33. *Id.* at 91.
34. *Id.*
35. *Id.* at 92.

In a 5-4 decision, the Supreme Court invalidated ongoing judicial supervision. Although the Court did not reverse the finding of racial discrimination, it held that the District Court failed to tailor the remedy to the violation, thus violating a fundamental maxim of remedies law.[36] The Court held that the District Court's comparison of innercity and suburban achievement indicators, as a vehicle for measuring the efficacy of its remedies, along with the remedial goal of making innercity schools comparable to suburban ones, constituted an "interdistrict remedy" in violation of the landmark ruling in *Miliken v. Bradley*.[37]

According to *Miliken*, a judicial remedy for school segregation can only extend to the jurisdiction in which formal segregation occurred.[38] *Miliken*, however, includes an exception to the general bar on interdistrict remedies in circumstances where segregation in one district had a segregative impact upon another district.[39] *Jenkins* expansively interpreted *Miliken* and held that the mere usage of national and suburban achievement and attractiveness as benchmarks of comparison constituted an impermissible interdistrict remedy, despite the fact that the ruling had no concrete impact on the ability of local authorities to exercise control of suburban schools.[40] Furthermore, although the Court usually gives the factual findings of lower courts substantial deference, *Jenkins* invalidated the lower court's conclusion that de jure segregation caused White flight into suburban and private schools.[41] With this finding reversed and *Miliken* expansively construed, the Court found that the judicial remedy exceeded the scope of the violation.[42]

Many scholars have argued that *Jenkins* has imperiled judicial monitoring of school desegregation, thus ensuring that students of color will continue disproportionately to receive education in underfunded and racially isolated schools.[43] Regardless, a discussion of *Jen-*

36. *Id.* at 101.

37. 418 U.S. 717 (rejecting interdisctrict remedy for segregation within Detroit); *see also id.* at 92-99 (construing injunction as an impermissible "interdistrict" remedy in violation of *Miliken*).

38. *Id.* at 744-45.

39. *Id.*

40. *Id.* at 167-75 (Souter, J., dissenting); *see also* Bradley W. Joondeph, Missouri v. Jenkins *and the De Facto Abandonment of Court-Enforced Desegregation*, 71 WASH. L. REV. 597 (1996).

41. *Jenkins*, 515 U.S. at 94-96.

42. *Id.* at 102-103.

43. *See generally* Joondeph, *supra* note 40 (arguing that Jenkins will severely hinder judicially enforced desegregation).

kins, alongside affirmative action jurisprudence, further demonstrates the Court's opposition to remedying racism through either adjudicative or legislative structures. Although the Court cautions lawmakers that strict scrutiny prohibits broader remedies for racial harm in the affirmative action context, when confronted by discrete policies to counter racial harm, the Court has invoked remedies doctrine as a barrier to progressive social change.[44] The doctrinal treatment of judicially imposed civil rights remedies mirrors the Court's hostile stance towards legislation designed to ameliorate the effects of racial injustice and, similarly, reflects majoritarian sentiment disfavoring such remedies.

II. Responses to Judicial Intolerance of Racial Remedies

Many scholars have critically assessed the Court's stance toward race-based remedies. A large body of work criticizes the Court's colorblind jurisprudence as being inconsistent with original intent,[45] for failing to distinguish affirmative action from racial oppression,[46] and for invading legislative judgment concerning the need for affirmative action.[47] Other scholars, including some Critical Race Theorists, have argued that progressive social movements should develop strategies that acquiesce in the societal and judicial opposition to racial remedies. Many of these scholars concede the pervasiveness of racial inequality but argue that antiracism movements have missed opportunities to advance racial justice by linking their claims with broader movements for social change. Lani Guinier and Gerald Torres, for example, argue in *The Miner's Canary*, that room exists for antiracist theorists and activists to frame their arguments around class inequality in order to generate broader political support for their agendas.[48] Guinier and Torres also embrace "colorblind" solutions to the difficulty of creating racial diversity in admissions to higher education.[49] Guinier and Torres support "Ten-Percent" plans that exist in

44. *See supra* text accompanying notes 27-42.

45. *See* Melissa L. Saunders, *Equal Protection, Class Legislation, and Colorblindness*, 96 MICH. L. REV. 245, 269 (1997) (arguing that "the framers and ratifiers of the Fourteenth Amendment did not understand or intend its Equal Protection Clause to call into constitutional question any and all forms of race-conscious action").

46. *See generally* Spann, *supra* note 14.

47. *Id.* at 76-90.

48. LANI GUINIER AND GERALD TORRES, THE MINER'S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY (2002).

49. *Id.*

states such as Florida and Texas, which guarantee college admission to students who graduate among the top of their high school classes.[50]

Other scholars have suggested that class analyses supplant all racial theorizing. Richard Kahlenberg, for example, has argued that class-based affirmative action could overcome the Court's rigid application of strict scrutiny to race-conscious remedies and would remedy the material consequences of racial inequality.[51] One group of Critical Race Theorists, moreover, advocates a wholesale rejection of race—rather than using alternative approaches for strategic purposes.[52] These "progressive race-blindness scholars" contend that the history of racial injustice makes race a peculiar foundation for people of color to construct their identities.[53] One of these scholars has even argued that the embrace of race consciousness among persons of color causes and replicates racialized poverty, a conclusion similar to that of an earlier generation of "culture of poverty" theorists.[54]

Some of these approaches seek to deal with a restricted opportunity structure that disfavors open appeals to racial injustice. Guinier, for example, does not discount the prevalence of racial injustice; instead, she embraces colorblind approaches for strategic reasons.[55] Many proponents of class-based affirmative action make similar strategic calculations. These scholars seek to avoid judicial invalidation of affirmative action measures by grounding such policies on class or economic status, which does not receive heightened judicial scrutiny.[56]

These responses to the Court's invalidation of racial remedies, however, are not without complications. Ten-percent plans, for example, achieve diversity in colleges because they draw students from racially isolated schools.[57] Furthermore, acceptance of these plans as "race-neutral" alternatives legitimizes the harmful intent standard in

50. *Id.*

51. *See* Richard D. Kahlenberg, *Class-Based Affirmative Action*, 84 CAL. L. REV. 1037 (1996).

52. *See* Darren Lenard Hutchinson, *Progressive Race Blindness? Individual Identity, Group Politics, and Reform*, 49 UCLA L. REV. 1455 (2002) (discussing this literature).

53. *See generally id.*

54. *See* Reginald Leamon Robinson, *The Underclass and the Role of Race Consciousness: A New Age Critique of Black Wealth/White Wealth and American Apartheid*, 34 IND. L. REV. 1377, 1432 (2001).

55. *See generally* Lani Guinier, *Admissions Rituals as Political Acts: Guardians at the Gates of Our Democratic Ideals*, 117 HARV. L. REV. 113 (2003).

56. *See generally* Kahlenberg, supra note 51.

57. *See, e.g.*, Michelle Adams, *Isn't it Ironic? The Central Paradox at the Heart of "Percentage Plans"*, 62 OHIO ST. L.J. 1729 (2001).

equal protection jurisprudence.[58] Although the plans have the intent of racially diversifying institutions of higher education, advocates treat them as nonracial.[59]

Class-based affirmative action discounts noneconomic harms associated with racism,[60] fails to appreciate the racialization of poverty and its unique impact upon poor persons of color,[61] and legitimizes the Court's refusal to apply anything other than an ordinary rational basis analysis to economic discrimination.[62] Finally, the wholesale discarding of race as an identity or political tool would deprive persons of color of a powerful method of political organization and render impossible political efforts to identify and remedy racism.[63]

An additional deficiency of these survival strategies inheres in legal mobilization as a tool of social movement activity—these strategies, if successful, will only provide moderate, costly, and sluggish alterations in the social structure.[64] Court doctrine responds to majoritarian politics that opposes more invasive social change. Litigation remedies provide relief in very discrete contexts, and the Court has used doctrines such as remedies law and federalism to curtail the availability of even these pointed avenues of redress.[65] Although leg-

58. *See* Hutchinson, *supra* note 1, at 88.

59. *See* Brief of Amici Curiae on Behalf of a Committee of Concerned Black Graduates of ABA Accredited Law Schools : Vicky L. Beasley, Devon W. Carbado, Tasha L. Cooper, et al., in Support of Respondents, Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-241), *reprinted in* 9 MICH. J. RACE & L. 5, 23 (2003) (disputing race-neutrality of percentage plans).

60. *See* Peggy Cooper Davis, *Law as Microaggression*, 98 YALE L. J. 1559 (1989) (discussing noneconomic dimensions of racism).

61. *See generally* WILLIAM JULIUS WILSON, THE TRULY DISADVANTAGED: THE INNER CITY, THE UPPER CLASS, AND PUBLIC POLICY (1987).

62. Rodriguez v. San Antonio Ind. Sch. Dist., 411 U.S. 1 (1973).

63. *See* Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Indentity, Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1297 (1991). ("At this point in history, a strong case can be made that the most critical resistance strategy for disempowered groups is to occupy and defend a politics of social location rather than to vacate and destroy it."); Darren Lenard Hutchinson, *Beyond the Rhetoric of "Dirty Laundry": Examining the Value of Internal Criticism within Progressive Social Movements and Oppressed Communities*, 5 MICH. J. RACE & L. 185, 196 (1999) ("Members of oppressed communities often rally around their socially constructed identities in order to challenge the oppression and discrimination mediated by these categories."); Chris K. Iijima, *Race as Resistance: Racial Identity as More than Ancestral Heritage*, 15 TOURO L. REV. 497, 509 (1999) ("At least for Asian Pacific Americans, how we define ourselves is intimately tied to the political purpose of our racial identity."); Chris K. Iijima, *The Era of We-Construction: Reclaiming the Politics of Asian Pacific American Identity and Reflections on the Critique of the Black/White Paradigm*, 29 COLUM. HUM. RTS. L. REV. 47, 55 (1997) ("In short, political resistance to racial oppression is the content of racial identity, and progressive people of color must reclaim the terms of the debate about what constitutes it.").

64. *See* Tomiko Brown-Nagin, *Elites, Social Movements and the Law: The Case of Affirmative Action*, 105 Colum. L. Rev. 1436, 1489 (2005).

65. *See supra* text accompanying notes 14-47.

islation can potentially address broader patterns of inequality, in the context of racial justice, such legislation must comply with the Court's suspicion of race-conscious remedies. Thus, while legal mobilization continues to serve an important role in social movement activity, overemphasis on law can limit the achievements of social movement advocacy.[66]

III. Racial Remedies and the Future of Antiracist Social Movement Activity

Political support for race-based remedies is very tenuous. Countermovements to antiracism have very successfully appropriated the liberal framework of race neutrality advocated by civil rights activists, divorced it from its historical context, and made impassioned appeals that equate racial remedies with racism itself.[67] In addition, despite their support for "equal opportunity," the majority of white Americans believe that racism is aberrational[68] and that affirmative action policies inappropriately supplant merit in favor of racial identity, which in turn departs from colorblindness thus harming more qualified whites in order to advance racial equality.[69]

The equating of racial justice with the mistreatment or punishment of Whites suggests a deeper barrier to racial progress. The conceptualization of racial remedies as unfair treatment seems rational only if we do not view racial justice as a public good. If racial justice is a private benefit, rather than a public good, then race remedies are handouts that divert limited societal resources to an undeserving class. This transforms racial equality into a zero-sum equation that sacrifices White entitlement to political, social, and economic privileges.[70]

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66. *See* Brown-Nagin, *supra* note 64, at 1510.

67. *Id.* at 1446-1447.

68. *See* JOHN J. HELDRICH CTR. FOR WORKFORCE DEV., *supra* note 24, at 8 (reporting that 10% of whites versus 50% of blacks believe that blacks experience workplace discrimination); Flagg, *supra* note 25, at 981 (arguing that "whites tend to adopt the 'things are getting better' story of race relations, which allows us to suppose that our unfortunate history of socially approved race discrimination is largely behind us").

69. *See* Brown-Nagin, *supra* note 64, at 1450-1452.

70. *See* Christopher Bracey, *The Cul de Sac of Race Preference Rhetoric*, 79 S. Cal. L. Rev. 1231, 1244-45 (2006) ("The zero-sum conception of racial progress continues to resonate in the affirmative action context despite arguments that the benefits of diversity accrue to everyone and in the face of evidence that very few whites have their educational opportunities negatively impaired by such policies"); John E. Morrison, *Colorblindness, Individuality, and Merit: An Analysis of the Rhetoric Against Affirmative Action*, 79 Iowa L. Rev. 313, 355 (1994) (Only proponents of affirmative action currently break the zero-sum assumption, arguing that affirmative action produces greater benefits for all.").

Given the widespread belief in a post-racist United States and the juxtaposition of White interests and racial equality, contemporary racial discourse evinces a societal weariness with ongoing demands for racial justice. Court doctrine has reflected this majoritarian sentiment. In *Grutter*, for example, the Court expresses its hope that, in "25 years," schools would no longer need to engage in affirmative action.[71] Additionally, the Court's colorblind doctrine treats claims regarding the persistence of racism with a high degree of suspicion. In *Croson*, for example, the Court held that the conclusion that racism existed among private contractors in Richmond was "sheer speculation."[72] Similarly, the Court's discriminatory intent doctrine rests on the notion that society has transcended racism,[73] so that neutral policies, that have a negative racial impact, are mere statistical discrepancies.[74] While earlier courts treated such patterns as invalid under a constitutional analysis,[75] contemporary jurisprudence treats these patterns as benign and not warranting remediation.[76]

America's weariness toward racial justice has longstanding historical roots. As early as Reconstruction, Whites challenged the necessity of remedies for racial justice and portrayed these policies as ignoring Whites' interests. President Johnson's veto messages of the Freedman's Bureau legislation and the Civil Rights Act of 1866,[77] for example, demonstrate the historical currency that White frustration over racial redress has enjoyed in political efforts to oppose or limit antiracism.[78] Nineteenth-Century Court doctrine also powerfully captures the sentiment that racial remedies are redundant. In the *Civil Rights Cases*,[79] for example, the Court, in language similar to *Grutter's* closing passage, warns that Blacks must stop being "special favorites of the laws" since they have now "emerged" from slavery.[80] This legacy provides some interesting possibilities for future antiracism discourse.

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71. *Grutter*, 539 U.S. at 343.

72. City of Richmond v. J.A. Croson, 488 U.S. 469, 499 (1989).

73. *See* Flagg, *supra* note 24, at 968-69.

74. McCleskey v. Kemp, 481 U.S. 279, 312 (1987) ("At most, the Baldus study indicates a discrepancy that appears to correlate with race. . . .")

75. *See, e.g.*, Yick Wo v. Hopkins, 118 U.S. 356 (1886).

76. *See generally*, Flagg *supra* note 24.

77. Civil Rights Act of 1866, 42 U.S.C. §§ 1982-1992 (2000).

78. ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED BUSINESS 1863-1877 247-51 (1988).

79. 109 U.S. 3 (1883).

80. *Id.* at 24-25.

Placing majoritarian discomfort with the continuation of racial justice efforts in an historical context opens up possibilities for teasing out the political dimensions of society's purported exhaustion from racial remedies. If such pleas historically supported repressive political agendas, then their modern equivalents should not enjoy a presumption of objectivity and good faith. Although racial discourse and White supremacist activism have not been linear over time, the striking parallel between contemporary and historical objections to racial redress seem to present fertile ground for progressive racial discourse, particularly given the appeal of this rhetoric in countermovements to antiracism.

In navigating the restricted opportunity structure available for the advancement of racial justice, social movement participants could choose to deconstruct judicial and political demands for a "stopping point" to racial justice efforts. From the very inception of sustained legalized efforts to counter racial oppression, White supremacists expressed frustration with racial justice measures, and, as early as Reconstruction, Whites were tired of antiracist mobilization.[81] They viewed civil rights measures as special benefits for Blacks rather than as appropriate remediation for past wrongs or as a public good that benefits the greater society as well as oppressed communities.[82] Exposing these linkages could strengthen efforts of antiracist movements to demonstrate the ongoing need for racial redress.

CONCLUSION

Contemporary antiracism movements operate in a very constricted opportunity structure. Majoritarian politics, Court doctrines which disfavor racial redress and a powerful counternarrative portray a deep frustration toward demands for racial remedies among Whites. Antiracists have reasonably attempted to modify their strategies to survive within this limited structure by seeking race neutral alternatives to the problem of inequality and constructing arguments within a narrow model of legal mobilization. Political opportunity arises, however, from a series of disruptive events that shift political commitments of powerful social institutions. Contemporary antiracists have failed to make concerted efforts to challenge countermovement discourse that portrays a fictional America grown weary from a pro-

81. FONER, *supra* note 78, at 247-51.
82. *Id.*

tracted fight against racial injustice. Contrary to this pervasive rhetoric, Whites have continually questioned the necessity of racial remediation, and the portrayal of such measures as taxing the the nation's resources and patience has a long pedigree. Deconstructing this rhetoric may offer some promise to antiracists as they continue to devise mobilization strategies that advance racial equality in an increasingly conservative political climate.