

Racial Justice in the Age of Diversity

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It is a special honor to be here with Owen Fiss, my first-year small group professor at Yale Law School. Among the many giants of the legal academy at Yale, it is fair to say that none more powerfully motivated me to probe the law's relationship to justice.

A defining experience of my legal education was having Professor Fiss as my teacher for civil procedure or, as he would call it, just "procedure." From him, I learned several things about pedagogy.

The first is the importance of wait time. When a professor poses a question to a class, it is not uncommon to get silence in return. In that situation, the professor feels the urge to speak again, to offer a clue or restate the question. Professor Fiss never did that; he would wait, and wait, and wait, until someone raised a hand. He understood that silence is uncomfortable and is therefore a source of tension, which causes students to think and to take responsibility for their own learning. Then, after a student would answer a question, Professor Fiss often would not respond. He would let the student's answer sit, with more silence, thereby letting us know it was *our* job to evaluate what our classmate had said and not to expect him to spoon-feed us the answers.

Another thing I learned from Professor Fiss is that less is more. As teachers, we often feel there's not enough time in a semester to cover all the topics we want, and we squeeze as much as we can into the syllabus. Imagine learning virtually all of civil procedure through just five questions: (1) Did the state of California unconstitutionally execute Robert Alton Harris?¹ (2) What process should John Kelly have received from Jack Goldberg, the New York City Commissioner of Social Services, before his welfare benefits were terminated?² (3) Who had standing to object to the state of Utah's execution of Gary Gilmore

DOI: <https://doi.org/10.15779/Z38CF9J675>

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1. Professor Fiss asked us to interrogate, among other things, the legal basis of the Supreme Court's terse order on the eve of Harris's execution prohibiting any federal court, except the Supreme Court itself, from issuing any further stay of execution. *See Vasquez v. Harris*, 503 U.S. 1000 (1992).

2. *See Goldberg v. Kelly*, 397 U.S. 254 (1970).

after Gilmore waived his appeals?³ (4) What kind of notice did the Central Hanover Bank have to give to beneficiaries of a common trust before obtaining a judicial settlement of its accounts?⁴ And (5) in the Coney Island school desegregation case, what persons or entities other than the school district did U.S. District Judge Jack Weinstein have authority to join as necessary parties to a remedial order?⁵ Those five questions (two of which had nothing to do with civil procedure) are what I learned in law school about civil procedure, which made the bar exam challenging. But through those questions, Professor Fiss taught us what we needed to know to understand legal rules and doctrines, while always asking how the law can better approximate justice.

And so it is with Professor Fiss's article here, which addresses how the law can help purge the vestiges of slavery and segregation, and bring the Constitution's promise of equal citizenship closer to a living truth. As Professor Fiss explains, there was a time when the law was animated by the theory of cumulative responsibility, but that theory no longer has constitutional stature. *Washington v. Davis* held that the gravamen of an equal protection violation is a public entity's "racially discriminatory purpose" and not its mere passivity in perpetuating the effects of intentional discrimination by others.⁶ The rule was stated most starkly in *McCleskey v. Kemp*, where the Court said: "[D]iscriminatory purpose' . . . implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."⁷

There is no question that *Davis* disabled constitutional law from being a potent force in remedying the systematic subjugation of black Americans. But to some extent, the Court's rejection of an effects-based antistatutory principle in favor of an intent-based antidiscrimination principle can be understood as judicial restraint. The Court worried that a constitutional disparate impact rule "would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white."⁸ The Court echoed this concern in *McCleskey*, stating that if unexplained racial disparities were sufficient to trigger judicial scrutiny under the Equal Protection Clause, it would undermine sentencing

3. See *Gilmore v. Utah*, 429 U.S. 1012 (1976). Gilmore, the subject of Norman Mailer's 1979 book, *The Executioner's Song*, was the first person executed in the United States after the death penalty was reinstated in 1976.

4. See *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306 (1950).

5. See *Hart v. Cmty. Sch. Bd. of Brooklyn*, N.Y. Sch. Dist. No. 21, 383 F. Supp. 699 (E.D.N.Y. 1974).

6. *Washington v. Davis*, 426 U.S. 229, 239 (1976).

7. *McCleskey v. Kemp*, 481 U.S. 279, 298 (1987) (quoting *Pers. Admin. of Mass. v. Feeney*, 422 U.S. 256, 279 (1979)).

8. *Davis*, 426 U.S. at 248.

discretion and “throw[] into serious question the principles that underlie our entire criminal justice system”⁹—to which Justice Brennan famously replied, “Taken on its face, such a statement seems to suggest a fear of too much justice.”¹⁰

Thus, *McCleskey* and *Davis* can be read as cases that reject the theory of cumulative responsibility because of institutional concerns about judicial restraint, workable standards, and legislative and sentencing discretion. But neither case offers much explanation of why, as a matter of substantive principle, the theory of cumulative responsibility is not a proper entailment of the Fourteenth Amendment understood in light of its original purpose and our Nation’s racial history.

The Court’s pivot away from an antistatutory theory of equal protection is more deeply theorized by a judicial opinion briefly mentioned by Professor Fiss but worth closer attention—namely, Justice Powell’s opinion in *Regents of the University of California v. Bakke* and, in particular, his examination of “our Nation’s constitutional and demographic history.”¹¹

The issue of affirmative action, as it came to the Court in *Bakke* in 1978, implicated the same sociological premises that animated the Court in *Griggs v. Duke Power Co.*¹² Applicants to the University of California, Davis Medical School in 1973 and 1974, the years Allan Bakke applied, were in all likelihood born before *Brown v. Board of Education*.¹³ Given the lack of enforcement and outright defiance of *Brown* throughout the 1950s and into the 1960s, one can infer that many black and Hispanic students who applied to medical school in the early 1970s had been afforded inferior educational opportunities earlier in their lives. The University of California made precisely this point, arguing in its opening brief that “[m]inority students entering medical schools in the 1970’s are from the generation of minority students who have seen the hope but not the promise of *Brown*.”¹⁴ In that context, the consideration of race in university admissions seemed readily justified by the theory of cumulative responsibility.

Why, then, did Justice Powell reject this approach in *Bakke*? In explaining why racial and ethnic distinctions are inherently suspect, Justice Powell began by citing the Court’s observation in the *Slaughter-House Cases* that the “one pervading purpose” of the Fourteenth Amendment was “the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had

9. *McCleskey*, 481 U.S. at 314.

10. *Id.* at 339 (Brennan, J., dissenting).

11. 438 U.S. 265, 291 (1978) (opinion of Powell, J.).

12. 401 U.S. 424 (1971).

13. 347 U.S. 483 (1954).

14. Brief for Petitioner at 17, *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1977) (No. 76-811), 1977 WL 187977; see also Brief for the United States as Amicus Curiae at 42–43, *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1977) (No. 76-811), 1977 WL 189477 (making similar point).

formerly exercised unlimited dominion over him.”¹⁵ Justice Powell then acknowledged that despite this purpose, “the Equal Protection Clause . . . was ‘[v]irtually strangled in infancy by post-civil-war judicial reactionism.’”¹⁶ Only after the demise of substantive due process and the foundation laid by *United States v. Carolene Products Co.* did the Equal Protection Clause come to life.¹⁷ “By that time,” Justice Powell said, “it was no longer possible to peg the guarantees of the Fourteenth Amendment to the struggle for equality of one racial minority.”¹⁸

Justice Powell then made his crucial sociological move. “During the dormancy of the Equal Protection Clause, the United States had become a Nation of minorities,” he wrote, citing the massive influx of immigrants to America during the late 19th and early 20th centuries.¹⁹ “Each had to struggle,” he said, “and, to some extent, struggles still—to overcome the prejudices not of a monolithic majority, but of a ‘majority’ composed of various minority groups of whom it was said—perhaps unfairly in many cases—that a shared characteristic was a willingness to disadvantage other groups.”²⁰ Here he cited, among other things, a 1977 federal regulation stating that “[m]embers of various religious and ethnic groups, primarily but not exclusively of Eastern, Middle, and Southern European ancestry, such as Jews, Catholics, Italians, Greeks, and Slavic groups, continue to be excluded from executive, middle-management, and other job levels because of discrimination based upon their religion and/or national origin.”²¹

“As the Nation filled with the stock of many lands,” Justice Powell continued, “the reach of the Clause was gradually extended to all ethnic groups seeking protection from official discrimination.”²² Here he cited cases recognizing the “Chinese,” the “Japanese,” and “Mexican-Americans” as groups protected by the Clause.²³ “The guarantees of equal protection,” Justice Powell said, “are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality.”²⁴

He acknowledged that *Brown*, *Shelley v. Kraemer*,²⁵ and other landmark cases addressed the exclusion of blacks from the mainstream of American society. But he said it was no longer tenable to posit a “two-class theory of the

15. Slaughter-House Cases, 83 U.S. 36, 71 (1873) (quoted in *Bakke*, 438 U.S. at 291).

16. *Bakke*, 438 U.S. at 291 (quoting Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 381 (1949)).

17. 304 U.S. 144 (1938).

18. *Bakke*, 438 U.S. at 292.

19. *Id.*

20. *Id.*

21. *Id.* at 292 n.32 (citing 41 C.F.R. § 60-50.1(b) (1977)).

22. *Id.* at 292.

23. *Id.*

24. *Id.* at 292-93 (quoting *Yick Wo v. Hopkins*, 118 U.S. 359 (1886)).

25. 334 U.S. 1 (1948).

Fourteenth Amendment” that treats our society as comprised solely of a white majority and black minority.²⁶ Explaining that “[t]he concepts of ‘majority’ and ‘minority’ necessarily reflect temporary arrangements and political judgments,”²⁷ he wrote:

[T]he white ‘majority’ itself is composed of various minority groups, most of which can lay claim to a history of prior discrimination at the hands of the State and private individuals. . . . There is no principled basis for deciding which groups would merit ‘heightened judicial solicitude’ and which would not. Courts would be asked to evaluate the extent of the prejudice and consequent harm suffered by various minority groups. Those whose societal injury is thought to exceed some arbitrary level of tolerability then would be entitled to preferential [treatment] at the expense of individuals belonging to other groups. . . . As these preferences began to have their desired effect, and the consequences of past discrimination were undone, new judicial rankings would be necessary. The kind of variable sociological and political analysis necessary to produce such rankings simply does not lie within the judicial competence—even if they otherwise were politically feasible and socially desirable.²⁸

Justice Powell’s rejection of the black-white paradigm and corresponding embrace of ethnic pluralism have been criticized, most notably by Ian Haney López.²⁹ The “ethnic analysis” of race, according to Professor Haney López, understands America as comprised of “not dominant and subordinate races but a welter of ‘ethnically fungible’ groups.”³⁰ The treatment of race as ethnicity permits the disaggregation of whites into discrete ethnicities, many of which faced prior discrimination, and in this manner, whites and blacks as well as Asians, Hispanics, and all other ethnic groups are put on the same constitutional plane. This “erase[s] whites as a dominant group,”³¹ Professor Haney López argues, and “excise[s] subjugation from the story of twentieth century American race relations.”³²

I agree it is problematic to draw a parallel between the enslavement and subjugation of blacks and the historical discrimination suffered by white ethnic groups. “The subjugation of a historically disadvantaged group,” Professor Fiss says, “is the product of policies that cut across all walks of life.”³³ It is no accident that Professor Fiss focuses on the plight of black Americans, for whom the term “racial caste” bears painful and continuing relevance. Assimilating race

26. *Bakke*, 438 U.S. at 295.

27. *Id.*

28. *Id.* at 295–97.

29. Ian F. Haney López, “*A Nation of Minorities*”: Race, Ethnicity, and Reactionary Colorblindness, 59 STAN. L. REV. 985 (2007).

30. *Id.* at 1037.

31. *Id.* at 1040.

32. *Id.* at 1039.

33. Owen Fiss, *The Accumulation of Disadvantages*, 106 CALIF. L. REV. 1945 (2018).

to ethnicity ignores the systematic and intergenerational maintenance of racial hierarchy between African Americans and other groups.

This is not to deny that other groups, including white ethnic groups, have experienced past discrimination. But the theory of cumulative responsibility is not a theory of compensatory justice; it does not aim to sort out who owes what to whom with the aim of recreating the world as it would be in the absence of past discrimination (if that were even possible). Instead, the theory is one of equal citizenship, and it requires institutions to be structured not necessarily to remedy past discrimination, but to ensure that past discrimination does not translate into an ongoing condition of racial subjugation.³⁴ That challenge is the particularly pernicious legacy of slavery and Jim Crow.

It is questionable, however, whether affirmative action policies, disparate impact liability, or equal protection jurisprudence today can be entirely premised on the particular history of blacks in America. For one thing, the term “black” elides some important distinctions. A recent study of nearly 700 black alumni of Harvard Law School from the past fifty years found that nearly one in five reported their primary racial identity as something other than black or African American; the most common alternatives were Caribbean, African, or multiracial.³⁵ Whereas older respondents were more likely to identify as black or African American, over 25 percent of those who went to Harvard after the year 2000 identified as something other than black or African American.³⁶ These data suggest that when collecting demographic data, we may need two boxes: one for how society typically identifies you, and another for how you identify yourself.

The Harvard Law School study is consistent with findings by Lani Guinier and Henry Louis Gates that a majority of Harvard’s black undergraduates are “West Indian and African immigrants or their children,” or they are “children of biracial couples.”³⁷ They estimate that only one-third of black students at Harvard are from families in which all four grandparents were descendants of slaves, prompting Harvard sociologist Mary Waters to question the aims of affirmative action: “If it’s about getting black faces at Harvard, then you’re doing fine. If it’s about making up for 200 to 500 years of slavery in this country and its aftermath, then you’re not doing well.”³⁸ Of course, Harvard is not

34. See Kenneth L. Karst, *The Supreme Court, 1976 Term—Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1 (1977); Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107 (1976).

35. DAVID B. WILKINS & BRYON FONG, HARVARD LAW SCHOOL REPORT ON THE STATE OF BLACK ALUMNI II, 2000–2016, at 35 (2017).

36. *Id.* at 35–37.

37. Sara Rimer & Karen W. Arenson, *Top Colleges Take More Blacks, But Which Ones?*, N.Y. TIMES (June 24, 2004), <https://www.nytimes.com/2004/06/24/us/top-colleges-take-more-blacks-but-which-ones.html> [<https://perma.cc/D87P-W3Z8>].

38. *Id.*; see also Kevin Brown & Jeannine Bell, *Demise of the Talented Tenth: Affirmative Action and the Increasing Underrepresentation of Ascendant Blacks at Selective Higher Educational Institutions*, 69 OHIO ST. L.J. 1229, 1231 (2008) (“[B]lacks whose predominate racial and ethnic

representative of institutions generally, but it is significant that Justice Powell in *Bakke* cited Harvard's admissions plan as a key exemplar of constitutionally valid affirmative action.³⁹

Another Harvard sociologist, Orlando Patterson, has argued that affirmative action "should exclude all immigrants and be confined to African-Americans, Native Americans and most Latinos. [And it] should include an economic means test. Only those who are poor or grew up in deprived neighborhoods should benefit. At the same time, poor whites from deprived neighborhoods should be phased into the program"⁴⁰ This proposal echoes comments by President Obama, who suggested in 2008 that affirmative action should include poor whites and should not benefit people like his daughters, who "have had a pretty good deal" in life.⁴¹

It is worth noting, in this regard, that the UC Davis affirmative action program at issue in *Bakke* did not benefit blacks, Chicanos, Asians, and American Indians solely by virtue of their race or ethnicity. Applicants from those groups only benefited if they were found to be "economically and/or educationally disadvantaged."⁴² Moreover, the program did not formally exclude disadvantaged white applicants; about a quarter of applicants to the special program were white. But the university did not admit any white students through the special program.⁴³

Although Professor Fiss often refers to blacks as a group, his main concern is what he calls "the Black underclass," a group that "continues to bear the burden of our past" in the form of "inadequate educational opportunities and strikingly high rates of unemployment." Members of this class "remain isolated in inner-city ghettos, and are often deprived of essential public services and are subject to almost unimaginable levels of violence at the hands of both police and gangs."⁴⁴ The question for public policy and constitutional law is how to operationalize this focused concern. In defining the groups to be benefited by affirmative action or protected by disparate impact liability, should we consider not just race but also the quality of a person's educational opportunities during childhood, the extent of segregation in schools and neighborhoods, family wealth and income, or the degree of economic mobility across generations?

heritage is traceable to the historical oppression of blacks in the U.S. are far more underrepresented than administrators, admissions committees, and faculties realize.").

39. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 316–17, 321–24 (1978) (opinion of Powell, J.).

40. Orlando Patterson, *Affirmative Action: The Sequel*, N.Y. TIMES (June 22, 2003), <https://www.nytimes.com/2003/06/22/opinion/affirmative-action-the-sequel.html> [https://perma.cc/7HR9-6KJ3].

41. Rachel L. Swarns, *Delicate Obama Path on Class and Race Preferences*, N.Y. TIMES (Aug. 3, 2008), <https://www.nytimes.com/2008/08/03/us/politics/03affirmative.html> [https://perma.cc/9KDH-WTF3].

42. *Bakke*, 438 U.S. at 272 n.1, 274–75 & n.4 (opinion of Powell, J.).

43. *Id.* at 274–276 & n.5.

44. Fiss, *supra* note 33, at 1971.

Whatever the sociological facts were a mere generation after *Brown*, it is becoming clear today that race alone is not enough to identify those burdened by historical subjugation. Just as ethnic pluralism should not be permitted to mask race as a relevant category, race as a category should not be permitted to mask socioeconomic status or ethnic or cultural pluralism—for that too can result in a dilution. Due to black immigration⁴⁵ and the success of affirmative action and other policies that have expanded the black middle class as well as the black elite,⁴⁶ blackness is no longer itself a marker of membership in an underclass to the extent it was at the time of *Brown* or *Bakke*. What Professor Fiss calls “the Black underclass” is today defined by race together with socioeconomic status, geographic isolation, and ethnicity understood as immigrant background (voluntary versus involuntary⁴⁷).

This understanding has implications for how institutions collect and report demographic data. Sound policy-making will require not only the usual racial and ethnic categorizations, but also cross-tabulations with socioeconomic and other variables. This understanding also has implications for our discourse on race. Ever since *Bakke*, we have conflated concepts of justice with concepts of diversity. This conflation may be understood as a response to the law’s endorsement of diversity-based rationales over remedial rationales for race-conscious decision-making.⁴⁸ But it has come at a cost. Diversity rationales greatly expand the number of groups entitled to claim preference or special protection, and they are an awkward fit as justifications for policies designed to address entrenched patterns of racial subordination.⁴⁹ Too often we speak of

45. See MONICA ANDERSON, PEW RESEARCH CTR., A RISING SHARE OF THE U.S. BLACK POPULATION IS FOREIGN BORN (2015), <http://www.pewsocialtrends.org/2015/04/09/a-rising-share-of-the-u-s-black-population-is-foreign-born/> [https://perma.cc/WSG8-WD54].

46. See BART LANDRY, THE NEW BLACK MIDDLE CLASS IN THE TWENTY-FIRST CENTURY (2018); KARYN LACY, BLUE-CHIP BLACK: RACE, CLASS, AND STATUS IN THE NEW BLACK MIDDLE CLASS (2007); MARY PATTILLO-MCCOY, BLACK PICKET FENCES: PRIVILEGE AND PERIL AMONG THE BLACK MIDDLE CLASS (1999).

47. See Douglas S. Massey et al., *Black Immigrants and Black Natives Attending Selective Colleges and Universities in the United States*, 113 AM. J. EDUC. 243 (2007); John U. Ogbu & Herbert D. Simons, *Voluntary and Involuntary Minorities: A Cultural-Ecological Theory of School Performance with Some Implications for Education*, 29 ANTHROPOLOGY & EDUC. Q. 155 (1998). “Voluntary (immigrant) minorities are those who have more or less willingly moved to the United States because they expect better opportunities (better jobs, more political or religious freedom) than they had in their homelands or places of origin.” Ogbu & Simons, *supra* at 164. “Involuntary (nonimmigrant) minorities are people who have been conquered, colonized, or enslaved. Unlike immigrant minorities, the nonimmigrants have been made to be a part of the U.S. society permanently *against their will*.” *Id.* at 165.

48. See *Fisher v. Univ. of Tex. at Austin*, 136 S. Ct. 2198 (2016); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

49. See *Fisher*, 136 S. Ct. at 2227–30 (Alito, J., dissenting) (criticizing the University of Texas’s affirmative action policy for prioritizing blacks and Hispanics while ignoring Asian Americans, and for ignoring diversity among Asian Americans); *Grutter*, 539 U.S. at 380–83 (Rehnquist, C.J., dissenting) (criticizing the University of Michigan Law School’s affirmative action policy for applying the concept of “critical mass” differently to different racial or ethnic groups).

diversity when our real concern is racial justice.⁵⁰ And, as the data on Harvard's demographics illustrate, we must be careful not to overstate the extent to which policies designed to achieve diversity succeed in overcoming historical injustice.

In suggesting a broader sociological frame for addressing race, I recognize there are aspects of racial hierarchy that are intrinsic to race itself, independent of ethnicity or socioeconomic class. The most prominent and troubling of these aspects is the disparate treatment of black people by law enforcement, a phenomenon that cuts across socioeconomic and immigrant status. Just ask Senator Tim Scott, tennis star James Blake, or (if he were alive to tell) West African immigrant Amadou Diallo.⁵¹ Whether or not race is an adequate marker of ongoing subordination in certain educational or employment settings, it is *by itself* a salient marker of social subordination in domains like law enforcement.

Consider also the powerful sense of uplift that the election and reelection of Barack Obama gave to countless black people across America, even though he was born to a white mother and Kenyan father and grew up in Hawaii.⁵² It may be that the advancement of black people of whatever background to elite schools or positions of leadership potentially yields benefits for the black underclass. But this thesis has always been controversial,⁵³ and we should not lose sight of the need for more direct interventions to aid the black underclass, such as reforming the criminal justice system, improving public education, and expanding access to good jobs.

Throughout his life's work, Professor Fiss has spoken with eloquence and moral clarity about the unfinished work of America's First and Second Reconstructions. He has focused his scholarship on the group for whom the Constitution's promise of equal citizenship was written but remains unfulfilled.⁵⁴

50. See Patterson, *supra* note 40.

51. See Laura Barrón-López, *Black GOP Senator Talks About Being Pulled Over by Police 7 Times in One Year*, HUFFINGTON POST (July 15, 2016), https://www.huffingtonpost.com/entry/tim-scott-pulled-over_us_5786bffe4b08608d332eaa0 [<https://perma.cc/X723-SPFZ>]; Benjamin Mueller et al., *James Blake's Arrest Brings Swift Apologies From New York Officials*, N.Y. TIMES (Sept. 10, 2015), <https://www.nytimes.com/2015/09/11/nyregion/james-blake-new-york-police-officer.html> [<https://perma.cc/8EVX-8F62>]; Michael Cooper, *Officers in Bronx Fire 41 Shots, and an Unarmed Man Is Killed*, N.Y. TIMES (Feb. 5, 1999), <https://www.theatlantic.com/magazine/archive/2014/05/segregation-now/359813> [<https://perma.cc/8EVX-8F62>].

52. See, e.g., Ta-Nehisi Coates, *My President Was Black*, ATLANTIC (Jan./Feb. 2017), <https://www.theatlantic.com/magazine/archive/2017/01/my-president-was-black/508793> [<https://perma.cc/EUC9-237W>]; David Marx et al., *The "Obama Effect": How a Salient Role Model Reduces Race-Based Performance Differences*, 45 J. EXPERIMENTAL SOC. PSYCH. 953 (2009).

53. See, e.g., William A. Darity, Jr., *How Barack Obama Failed Black Americans*, ATLANTIC, (Dec. 22, 2016), <https://www.theatlantic.com/politics/archive/2016/12/how-barack-obama-failed-black-americans/511358> [<https://perma.cc/2624-2W2Z>]; Brown & Bell, *supra* note 38, at 1240 n.34 ("Years after [W.E.B.] Du Bois proposed the Talented Tenth solution, the concept was attacked and criticized as being elitist.").

54. See Fiss, *supra* note 33; OWEN FISS, A WAY OUT: AMERICA'S GHETTOS AND THE LEGACY OF RACISM (2003); OWEN M. FISS, THE CIVIL RIGHTS INJUNCTION (1978); Owen M. Fiss, *The Forms of Justice*, 93 HARV. L. REV. 1 (1979); Owen M. Fiss, *Dombrowski*, 86 YALE L.J. 1103 (1977); Owen

Few legal scholars today write the way Professor Fiss does, and his voice is an inspiration—a reminder of why I chose law—every bit as much now as it was over twenty years ago in our first-year small group.

I have suggested that a significant challenge for constitutional doctrine and public policy is how to address our Nation's most paradigmatic racial inequality in the context of a racially and ethnically diverse society. Although it is a mistake to analogize race to ethnicity, it is also a mistake to fixate on race without regard to ethnicity or socioeconomic status. The black-and-white history of race in America remains a strong undertow, but the task of eradicating racial hierarchy has become more complicated as a result of immigration and economic mobility. We need a more nuanced approach, one that is sensitive to evolving differences between and within groups, and to differences in the significance of race from one domain to another. It is fitting that we attend to these contingencies, for ultimately it must be our shared goal not to reify the categories that defined racial hierarchy in the past, but to disrupt those categories and that hierarchy in order to become the Nation that our Constitution says we must become.

M. Fiss, *Racial Imbalance in the Public Schools: The Constitutional Concepts*, 78 HARV. L. REV. 564 (1965).