(HOW) CAN LITIGATION ADVANCE MULTIRACIAL DEMOCRACY?

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INTRODUCTION

Can rights litigation meaningfully advance social change in this moment? Many progressive or social justice legal scholars, lawyers, and advocates would argue "no." Constitutional decisions issued by the U.S. Supreme Court thwart the aims of progressive social movements. Further, contemporary social movements often decenter courts as a primary domain of social change. In addition, a new wave of legal commentary urges progressives to de-emphasize courts and constitutionalism, not simply tactically but as a matter of democratic survival.

This Essay considers the continuing role of rights litigation, using the litigation over race-conscious affirmative action as an illustration. Courts are a key location in which rights and social policies are contested and elaborated upon, even when progressive social justice groups may not choose the domain. Given this reality, there is value in determining what role courts can and should still play, while being attentive to movement lawyering and democratic critiques of litigation reliance. In Part I, this Essay begins by examining the current skeptical commentary on the role of courts and constitutionalism in progressive social justice advocacy. Part II considers the example of current affirmative action litigation, which illustrates the

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challenges that progressive racial justice movements face in advancing their conception of equal protection from a defensive litigation posture, as well as the profound stakes of such litigation. Part III sketches potential avenues for pursuing litigation that engage social movements and fill in litigation's potential democratic deficits.

I. COURTS AGAINST DEMOCRACY

The predominant narrative in progressive commentary reflects skepticism of courts as an engine of social change and, more broadly, of constitutionalism. The claim is not simply that courts lack efficacy to advance racial or social justice—a key lament of prior generations of progressive commentators[1]—but that a focus on courts and litigation is an affirmative obstacle to true progressive social reform.[2] Judicial review in the American system gives courts the power to declare unconstitutional the output of legislatures, blocking off more democratic and inclusive avenues for social reform. Further, commentators emphasize that federal courts, particularly the Supreme Court, tend to enact elite preferences.[3] The dearth of former "movement lawyers" and "movement judges"[4] on the federal judiciary and the types of nominees that can get through the gauntlet of the nomination process significantly perpetuate the accountability problem. Their lengthy terms might make individual judges less politically and

1. *See, e.g.*, Scott L. Cummings, *Movement Lawyering*, 27 IND. J. GLOB. LEGAL STUD. 87, 94 (2020) (describing the first generation of criticism of public interest lawyering that centered on the "*efficacy* of social reform," including, in particular, the "difficulty of enforcing new rights pronounced by courts" and litigation's effect of sidelining actors in social movements) [hereinafter Cummings, *Movement Lawyering*]. *See generally* Scott L. Cummings, *Rethinking the Foundational Critiques of Lawyers in Social Movements*, 85 FORDHAM L. REV. 1987 (2017) [hereinafter Cummings, *Rethinking the Foundational Critiques of Lawyers in Social Movements*]. For examples of first-generation critiques, see generally GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991); STUART A. SCHEINGOLD, THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE (2d ed., Univ. of Mich. Press 2004) (1974). I discuss below more current critiques that move beyond criticism of the limited efficacy of courts to examine how social movements shape law and the work of lawyers more broadly. *See infra* notes 17–25 and accompanying text. For examples of these critiques, see generally Amna A. Akbar, Sameer M. Ashar & Jocelyn Simonson, *Movement Law*, 73 STAN. L. REV. 821 (2021).

2. *See, e.g.*, Ryan D. Doerfler & Samuel Moyn, *Democratizing the Supreme Court*, 109 CALIF. L. REV. 1703 (2021) (arguing for disempowering reforms of the Supreme Court); Nikolas Bowie & Daphna Renan, *The Supreme Court Is Not Supposed to Have This Much Power*, ATLANTIC (June 8, 2022), https://www.theatlantic.com/ideas/archive/2022/06/supreme-court-power-overrule-congress/661212/ [https://perma.cc/N3P3-6HQH].

3. *See* Aziz Rana, *Why Americans Worship the Constitution*, PUB. SEMINAR (Oct. 11, 2021), https://publicseminar.org/essays/why-americans-worship-the-constitution/ [https://perma.cc/6XQZ-DUG2] (noting that the federal Constitution "[a]t worst, . . . entrenches the interests of a wealthy and white minority coalition within the Republican party, a coalition that enjoys a veto power well beyond its actual public support"). *See generally* ADAM COHEN, SUPREME INEQUALITY: THE SUPREME COURT'S FIFTY-YEAR BATTLE FOR A MORE UNJUST AMERICA (2020).

4. *See* Brandon Hasbrouck, *Movement Judges*, 97 N.Y.U. L. REV. 631, 633–35 (2022) (describing "movement judges," who bring lived experiences at the margins, a "serious commitment to preserving democratic processes," and the ability to "actualize abolition democracy" as a necessary "counterweight to the conservative legal project's influence").

ethically accountable to the public, and their cloistering from public life may leave them disconnected from contemporary problems.[5]

This commentary, dour about the transformative power of courts and litigation, is in part due to the current Supreme Court—a Court that seems not merely "conservative" but increasingly "right-wing" and "imperial"[6] in how it seems to relish weakening or overturning long-standing precedent.[7] Progressive losses in the Supreme Court are racking up on issues such as racial justice,[8] abortion rights,[9] gun control,[10] LGBTQ rights,[11] the right to organize,[12] and campaign finance reform.[13] Additionally, originalism—a crucial methodology that the Court relies on to arrive at its outcomes—gives undue power to current members sitting on the Court, allowing them to decide contemporary disputes surrounding documents written by long-dead men,[14] which are inconsistently or disingenuously interpreted to achieve conservative outcomes.[15] These Court decisions sometimes overturn the work of legislatures, and the Court's actions often run contrary to public opinion.[16]

The critique, for many, is not just that progressives are losing; rather, the concern is that the outsized role of the American judiciary is a problem for

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5. *See* Rosalind Dixon, *Why the Supreme Court Needs (Short) Term Limits*, N.Y. TIMES (Dec. 31, 2021), https://www.nytimes.com/2021/12/31/opinion/supreme-court-term-limits.html [https://perma.cc/8PL8-6TLD] (arguing for 12-year term limits for the Supreme Court to "encourage regular turnover on a court and the renewal of democratic consent" and "discourage the appointment of young, hyperideological judges").

6. Mark A. Lemley, *The Imperial Supreme Court*, 136 HARV. L. REV. F. 97, 97 (2022) (arguing that the Court "has begun to implement the policy preferences of its conservative majority in a new and troubling way: by simultaneously stripping power from every political entity *except* the Supreme Court itself").

7. *See* @LeahLitman, X (June 23, 2022, 3:38 PM), https://twitter.com/LeahLitman/status/1540056781870600198?lang=en [perma.cc/ZP42-LZ45].

8. *See* Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141, 2154 (2023); Shelby Cnty. v. Holder, 570 U.S. 529, 535 (2013).

9. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2240 (2022).

10. *See* N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2122 (2022).

11. *See* 303 Creative LLC v. Elenis, 143 S. Ct. 2298, 2307–08 (2023). *But see* Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1737 (2020).

12. *See* Janus v. Am. Fed'n of State, Cnty. & Mun. Emps., Council 31, 138 S. Ct. 2448, 2459–60 (2018).

13. *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 339–40 (2010).

14. *See* Madiba Dennie, *Originalism Is Going to Get Women Killed*, ATLANTIC (Feb. 9, 2023), https://www.theatlantic.com/ideas/archive/2023/02/originalism-united-states-v-rahimi-women-domestic-abuse/672993/ [https://perma.cc/UR8M-Z9KW].

15. *See, e.g.*, Reva B. Siegel, *Memory Games: Dobbs's Originalism as Anti-democratic Living Constitutionalism—and Some Pathways for Resistance*, 101 TEX. L. REV. 1127 (2023).

16. *See, e.g.*, Aliza Forman-Rabinovici & Olatunde C.A. Johnson, *Political Equality, Gender, and Democratic Legitimation in* Dobbs, 46 HARV. J.L. & GENDER 81, 102–11 (2023) (detailing the divergence of public opinion on abortion from judicial rulings and state legislative decision-making). The public is more divided on race-conscious affirmative action, though polling results depend tremendously on the framing of the question. *See* Mark Mellman, *Mellman: Pro or Con on Affirmative Action?*, HILL (June 28, 2023), https://thehill.com/opinion/4071065-mellman-pro-or-con-on-affirmative-action/ [https://perma.cc/442G-QZ6Z] (noting more support for "affirmative action" in college admissions than for consideration of race as a factor in admissions).

our democracy. Reforms such as term limits, which make courts more democratically responsive to popular elections, and more predictable appointments would help. But for some commentators, these changes would not cure the problem entirely. For these commentators, asking how to reform the Supreme Court is the wrong question; the goal is to get the Supreme Court "out of the way of progressive reform."[17] Instead, progressives should build coalitions to promote and advance the substantive and democratic reforms to voting systems, elections, and governance systems that deepen, strengthen, and entrench democracy.[18]

Some progressive commentators also critique American constitutionalism as a form of self-government. One problem is that the U.S. Constitution contains multiple antidemocratic provisions such as the design of the Senate and the Electoral College, as well as the difficult process for amending the Constitution required by Article V.[19] Others argue that the problem inheres in American constitutionalism, which emphasizes the review of governmental action through "abstract principles," thus enhancing the role of judges and shifting questions of social progress to the constitutional domain.[20] The United States is particularly vulnerable to this type of overreliance on constitutionalism because of its "constitutional culture" and tendency to venerate the Constitution.[21] Those who want to resist change are the most likely to depend on such veneration because it keeps the Constitution frozen in a less equal time. Progressives tend to overvalue the Constitution as well, which will result in the success of short-term programs but not the satisfaction of long-term aspirations. An emphasis on litigation and constitutionalism affects the behavior of progressive lawyers. When those who define themselves as progressive or as seeking to advance social

17. *See* Doerfler & Moyn, *supra* note 2, at 1708.

18. Michael J. Klarman, *Foreword: The Degradation of American Democracy—and the Court*, 134 HARV. L. REV. 1, 231, 243 (2020). Note that there are differing conceptions of "democracy." *Compare* Amna A. Akbar, *Demands for a Democratic Political Economy*, 134 HARV. L. REV. F. 90, 97 (2020) (advancing a conception of democracy as a "bottom-up" project and laying out a "more capacious vision of democracy" that centers not on elections but on the "pursuit of 'non-reformist reforms' . . . to move us toward a democratic political economy where people possess the agency and power to self-determine the conditions of their lives"), *with* ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY 34 (1956) (associating democracy with "political equality, popular sovereignty, and rule by majorities").

19. *See* Jonathan S. Gould, Kenneth A. Shepsle & Matthew C. Stephenson, *Democratizing the Senate from Within*, 13 J.L. ANALYSIS 502, 502–03 (2021) (describing the Senate as an "undemocratic institution" due to malapportionment and the cloture rule); Vicki C. Jackson, *The Democratic Deficit of United States Federalism?: Red State, Blue State, Purple?*, 46 FED. L. REV. 645, 650–53 (2018) (describing the effects of Senate malapportionment). *See generally* David E. Pozen & Thomas P. Schmidt, *The Puzzles and Possibilities of Article V*, 121 COLUM. L. REV. 2317 (2021).

20. MARTIN LOUGHLIN, AGAINST CONSTITUTIONALISM 48 (2023) (arguing primarily that the American Constitution's emphasis on separation of powers is "unsuited" to addressing contemporary political problems).

21. *See* Rana, *supra* note 3 (linking modern American veneration of the Constitution to a project of American legitimation of the United States' rise from "regional power to the world's dominant global force, in the context especially of World War II, international decolonization, and Cold War conflict" and arguing that the "rise of veneration has also undermined efforts to seriously question the text's many limitations").

justice and inclusive democracy advance solutions that center on courts, they spend energy that would be better spent on organizing and on other forms of broad-scale or movement-focused mobilization.

There are, of course, progressive commentators who seek to salvage the efficacy of courts and constitutionalism. They argue for different forms of constitutional review that are less "zero sum" and leave more space for democratic input, such as proportionality,[22] or for more frequent amendments to make the Constitution more responsive to contemporary democracy or social movements.[23] Some commentators emphasize that social movements (progressive and nonprogressive) inevitably shape the Constitution through both formal amendment and interpretation.[24] Additionally, some argue that those seeking economic or racial justice should embrace progressive constitutional arguments inside and outside of the courts by imitating periods of history—the populist period of the 1850s or the Reconstruction period—in which social movements imbued the Constitution with progressive meaning.[25] There are persuasive suggestions, but the strong mood in progressive commentary today seems to be one skeptical of courts and constitutionalism.

II. LITIGATION AND RACIAL CONTESTATION

The debate over the role of litigation and the courts, as described above, has implications for the work of progressive lawyers. Yet, these democratic critiques of courts often seem to proceed on their own track, disconnected

22. *See, e.g.*, Jamal Greene, *The Supreme Court 2017 Term Foreword: Rights as Trumps?*, 132 HARV. L. REV. 28, 32 (2018).

23. *See* Richard Albert, *The World's Most Difficult Constitution to Amend*, 110 CALIF. L. REV. 2005, 2005 (2022) (contending that "America's frozen constitution could well be the world's most difficult to amend" and this "rigidity is cause for alarm"); Kate Shaw & Julie C. Suk, *It's Time to Reacquaint Americans with the Possibility of Changing the Constitution. Here's Where to Begin*, N.Y. TIMES (May 2, 2023), https://www.nytimes.com/2023/05/02/opinion/equal-rights-amendment-constitution.html [https://perma.cc/2S9D-YYBR] (arguing that the current fight for the Equal Rights Amendment "should serve as a reminder that constitutional amendment is possible"); Jill Lepore, *The United States' Unamendable Constitution*, NEW YORKER (Oct. 26, 2022), https://www.newyorker.com/culture/annals-of-inquiry/the-united-states-unamendable-constitution [https://perma.cc/K72S-VQ5F].

24. *See, e.g.*, Robert Post & Reva B. Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 379–85 (2007); Reva B. Siegel, *Constitutional Culture, Social Movement Conflict, and Constitutional Change: The Case of the De Facto ERA*, 94 CALIF. L. REV. 1323, 1326–27 (2009).

25. *See, e.g.*, JOSEPH FISHKIN & WILLIAM E. FORBATH, THE ANTI-OLIGARCHY CONSTITUTION: RECONSTRUCTING THE ECONOMIC FOUNDATIONS OF AMERICAN DEMOCRACY 423–24 (2022); GANESH SITARAMAN, THE CRISIS OF THE MIDDLE-CLASS CONSTITUTION: WHY ECONOMIC INEQUALITY THREATENS OUR REPUBLIC 274–96 (2017). *See also* Dorothy E. Roberts, *The Supreme Court 2018 Term Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 7–10 (2019) (describing "abolition constitutionalism" as a method to guide constitutional interpretation and social movement action); Jessica Bulman-Pozen & Olatunde C.A. Johnson, *Federalism and Equal Citizenship: The Constitutional Case for D.C. Statehood*, 110 GEO. L. J. 1269, 1313–24 (2022) (making constitutional arguments to Congress that D.C. statehood is constitutionally required under the Citizenship Clause); Brandon Hasbrouck, *The Antiracist Constitution*, 102 B.U. L. REV. 87, 141 (2022).

from the complex realities and empirical accounts of how lawyers engage with social movements.[26] A key assumption underlying the appeal to progressive lawyers to abandon the courts is that progressive lawyers are centering too much of their energy on litigating constitutional claims. Although "too much" is subjective, there is reason to doubt the assumption that a significant part of the progressive legal movement is dedicated to asserting new constitutional claims in court. Democracy-based arguments against court-centeredness, after all, operate alongside conventional arguments that investing in social change strategies outside of litigation will ultimately be more successful and transformative. The field of progressive lawyering has likely internalized some version of the critique of overreliance on litigation, particularly the argument that litigation has a "tendency . . . to migrate from tactics to strategic centrality."[27] To be a racial justice lawyer today, for instance, is not simply to bring legal campaigns like the campaign against segregated education that resulted in *Brown v. Board of Education*[28]—it is also to engage in movement lawyering strategies in which litigation does not serve as an endpoint but as part of a strategy toward a broader social justice goal.[29] Racial justice legal organizations use mixed strategies, including community organizing, narrative storytelling, communications, and policy advocacy.[30] They adopt theories of change that decenter courts and focus on building power to achieve freedom as well as full democratic participation. They use litigation to support social

26. *Cf.* Cummings, *Rethinking the Foundational Critiques of Lawyers in Social Movements*, *supra* note 1, at 1989 (noting that the scholarship by legal academics interested in social movements has "been largely disconnected from scholarship within constitutional law but has important resonances with it").

27. Lani Guinier & Gerald Torres, *Changing the Wind: Notes Toward a Demosprudence of Law and Social Movements*, 123 YALE L.J. 2740, 2756 (2014); *see also* Susan P. Sturm, *The Legacy and Future of Corrections Litigation*, 142 U. PA. L. REV. 639, 642 (1993) (writing, in the 1990s, that "advocates, scholars, and financial supporters of public interest litigation are struggling to define the proper role of litigation in future efforts to achieve social reform"); Catherine Albiston, *The Dark Side of Litigation as a Social Movement Strategy*, 96 IOWA L. REV. BULL. 61, 64 (2011) (contending that litigation can demobilize advocacy groups).

28. 347 U.S. 483 (1954).

29. *See* Scott L. Cummings, *Movement Lawyering*, 2017 U. ILL. L. REV. 1645, 1652 (2017) ("The new wave of movement lawyering, although building on models of the past, represents a distinct professional response to changing political circumstances. Ongoing skepticism of courts among progressives, combined with a more general blurring of traditional boundaries of expertise, has reoriented lawyers toward multidimensional problem-solving strategies, further fueled by the spread of new technologies.").

30. *See, e.g.*, *Mission and Vision*, ADVANCEMENT PROJECT, https://advancementproject.org/about-advancement-project/ [https://perma.cc/5GHW-LQQX] (last visited Feb. 9, 2024) ("We provide direct, hands-on support for organized communities in their struggles for racial and social justice, providing legal, communications and campaign organizing resources for on-the-ground efforts. On the national level, we help weave movements and create context for breakthroughs on race. We serve as a convener to build momentum beyond place, creating a space to learn from one another and work together across space. We use narrative strategy to influence public opinion on issues of race, democracy and justice, creating an opening for local change to occur.").

movements such as the Movement for Black Lives.[31] Even the legacy civil rights organizations—such as the NAACP Legal Defense Fund (LDF) and the Lawyers' Committee for Civil Rights Under Law—rely on communications, mobilization, policy advocacy, and legislative advocacy in addition to court-centered strategies of social change.[32]

If courts remain a salient means of achieving reform, it is not due to progressive attempts to center social change strategies on courts, but rather on a concerted, well-resourced, and at times quite effective conservative mobilization of courts and litigation to advance a different conception of social change and the public (or private) good.[33] These varied groups mobilize courts, legislatures, and administrative agencies against racial equity, environmental regulation, abortion rights, LGBTQ rights, and more.[34] Although they mobilize the political arena in strategic ways,[35] the effect of this mobilization is that progressive lawyers today find themselves in court on terms that are defensive and highly constrained—particularly in constitutional cases—but in which much remains at stake. These developments threaten both traditional forms of progressive rights litigation as well as some of the more transformative social change strategies that decenter courts. Progressive groups do not always get to choose the role that courts will play in a particular contestation.

Take for instance the issue of affirmative action. Civil rights and racial justice groups found themselves engaging courts not primarily to advance

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31. *See* Amanda Alexander, *Nurturing Freedom Dreams: An Approach to Movement Lawyering in the Black Lives Matter Era*, 5 HOW. HUM & C.R. L. REV. 101, 107–08 (2021); Akbar et al., *supra* note 1.

32. *See Promoting Full, Equal and Active Participation*, NAACP LEGAL DEF. FUND, https://www.naacpldf.org/ldf-mission/political-participation/ [https://perma.cc/58VZ-PZPW] (last visited Feb. 9, 2024); *Mission*, LAWS. COMM. FOR C.R. UNDER L., https://www.lawyerscommittee.org/mission/ [https://perma.cc/MC3R-CBDL] (last visited Feb. 9, 2024).

33. *See, e.g.*, Robert L. Tsai & Mary Ziegler, *Abortion Politics and the Rise of Movement Jurists*, 57 U.C. DAVIS L. REV. (forthcoming 2024) (describing the concerted multidecade campaign of anti-abortion rights groups to control the courts).

34. *See* MICHAEL AVERY & DANIELLE MCLAUGHLIN, THE FEDERALIST SOCIETY: HOW CONSERVATIVES TOOK THE LAW BACK FROM LIBERALS 21–25 (2013) (describing the Federalist Society's successful efforts to control judicial appointments to the Supreme Court and the federal appeals courts); JEFFERSON DECKER, THE OTHER RIGHTS REVOLUTION: CONSERVATIVE LAWYERS AND THE REMAKING OF AMERICAN GOVERNMENT 96–122 (2016) (describing a conservative shift from rejecting judicial power over school prayer and abortion, to embracing a judicial strategy to advance religious and economic liberty); AMANDA HOLLIS-BRUSKY, IDEAS WITH CONSEQUENCES: THE FEDERALIST SOCIETY AND THE CONSERVATIVE COUNTERREVOLUTION 48, 57, 94 (2015) (detailing how the Federalist Society created the "intellectual capital" and network to advance claims to expand gun rights and state sovereignty and to limit federal regulatory power over the environment and campaign finance); *see also* Reva B. Siegel, *Memory Games:* Dobbs*'s Originalism as Anti-democratic Living Constitutionalism—and Some Pathways for Resistance*, 101 TEX. L. REV. 1127, 1144–61 (2023) (detailing the conservative legal movement's efforts to create and advance "originalism" to secure legal and policy outcomes, including in the area of reproductive rights).

35. *See generally, e.g.*, Olatunde C.A. Johnson, *The Future of Labor Localism in an Age of Preemption*, 74 ILR REV. 1179 (2021) (describing how both progressive and conservative groups deploy state and local efforts to advance or preempt labor law and policy).

their claims of equal protection, but to defend—as intervenors or amici—against claims that universities' admissions practices, which were intended to increase the representation of Black and Latine students, among others, were unconstitutional.

Of course, defending or participating in these cases is a choice that racial justice groups have made. Participation might divert resources from more affirmative strategies (inside and outside of courts) that seek to build power, connect to allies, and advance economic and educationally inclusive programs and policies. And, in the short term, racial justice groups do not appear to be winning. In June 2023, the Court held in *Students for Fair Admissions v. University of North Carolina* and *Students for Fair Admissions v. President & Fellows of Harvard College*[36] that the Equal Protection Clause and Title VI of the Civil Rights Act of 1964[37] forbid colleges from considering race and ethnicity as factors in admissions to advance diversity.[38] The Court's decision weakens—or by some accounts overturns[39]—the 2003 ruling in *Grutter v. Bollinger*.[40] This result was achieved after a decades-long focus by some conservative groups on getting rid of race-conscious affirmative action programs that racial justice wins in neither *Grutter* nor *Fisher v. University of Texas at Austin*[41] seemed to abate. Instead, the groups opposing race-conscious affirmative action shifted their legal strategy, bringing claims centered on the argument that Asian-American applicants were harmed by universities' race-conscious policies.[42]

Even before the current discourse over the democratic limitations of courts, one could question whether racial justice groups should spend energy defending race-conscious affirmative action. Race-conscious affirmative action has consequences primarily in highly selective colleges and benefits students who are more advantaged relative to the general population of students of color.[43] Further, by 2023, nine states had already abolished or

36. 143 S. Ct. 2141 (2023).

37. 42 U.S.C. §§ 2000d to 2000d-7.

38. *See* 143 S. Ct. at 2175–76. The plaintiffs brought separate lawsuits against Harvard and the University of North Carolina (UNC). *See id.* at 2157. The district courts in both cases concluded after trial that both admissions programs were permissible, and the U.S. Court of Appeals for the First Circuit affirmed the district court's ruling in the Harvard case. *Id.* The Court granted certiorari for the Harvard case, and it granted certiorari in the UNC case before the U.S. Court of Appeals for the Fourth Circuit issued a judgment. *Id.*

39. *See generally* Bill Watson, *Did the Court in* SFFA *Overrule* Grutter*?*, 99 NOTRE DAME L. REV. REFLECTION 113 (2023) (arguing that *Students for Fair Admissions* at least partially overturned *Grutter* and the Court's failure to acknowledge this forthrightly should trouble us).

40. 539 U.S. 306 (2003).

41. 579 U.S. 365 (2016).

42. *See* Sarah Hinger, *Meet Edward Blum, the Man Who Wants to Kill Affirmative Action in Higher Education*, ACLU RACIAL JUST. PROGRAM (Oct. 18, 2018), https://www.aclu.org/news/racial-justice/meet-edward-blum-man-who-wants-kill-affirmative-action-higher [https://perma.cc/5C96-AUUL] (describing the group's tactical strategies).

43. *See, e.g.*, Tomiko Brown-Nagin, *Rethinking Proxies for Disadvantage in Higher Education: A First Generation Students' Project*, 2014 U. CHI. LEGAL F. 433, 434–35 (contending that affirmative action has been beneficial in integrating students of color into

greatly curtailed race-conscious affirmative action programs in college admissions.[44] Even as the 2003 *Grutter* decision preserved race-conscious affirmative action and emphasized that racial and ethnic diversity were key to building a pluralistic and inclusive democratic society,[45] it also suggested that the consideration of race as a "plus factor" would no longer be necessary in twenty-five years.[46]

Additionally, the terms of the constitutional debate over affirmative action are not the ones set by racial justice legal organizations. Although race-conscious affirmative action is rooted in protest and advocacy by students of color seeking access to higher education,[47] the diversity rationale relied on by Justice Louis F. Powell, Jr. in his famous plurality opinion in *Regents of the University of California v. Bakke*[48] was not the rationale urged by racial justice groups. As described by Professor Theodore M. Shaw, former head of the NAACP LDF, the *Bakke* decision "was a devastating loss" for Black students because a narrow 5-4 majority "rejected arguments that the 14th Amendment, primarily enacted to bring Black Americans to full and equal citizenship, allowed colleges and universities to take deliberate steps aimed at remedying the effects of centuries of slavery and segregation."[49] Indeed, the diversity rationale was advanced by the most selective institutions and allowed for the consideration of race as simply one of several student body characteristics along with geographic origin or the ability to play a musical instrument.[50]

Thus, there has been a consistent progressive critique that race-conscious affirmative action in higher education that is tied to the diversity rationale does not provide the legal and normative foundations necessary to advance racial equity in higher education.[51] Moreover, the focus on in-classroom

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elite institutions but, as practiced by some institutions, has left behind the most disadvantaged students of color).

44. *See* Stephanie Saul, *9 States Have Banned Affirmative Action. Here's What That Looks Like*, N.Y. TIMES (Oct. 31, 2022), https://www.nytimes.com/2022/10/31/us/politics/affirmative-action-ban-states.html [https://perma.cc/MA7E-25KT].

45. *See* Grutter v. Bollinger, 539 U.S. 306, 331–32 (2003).

46. *Id.* at 343.

47. *See, e.g.*, CHARLES R. LAWRENCE III & MARI J. MATSUDA, WE WON'T GO BACK: MAKING THE CASE FOR AFFIRMATIVE ACTION (1997) (describing social movement origins of affirmative action programs).

48. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 306 (1978) (plurality opinion).

49. Theodore M. Shaw, *Race Still Matters*, WASH. POST (Mar. 1, 2003), https://www.washingtonpost.com/archive/opinions/2003/03/01/race-still-matters/26ff18ff-dab1-487b-86c5-e5301ab5458f/ [https://perma.cc/AKD5-W2EF].

50. *See* Brief of Columbia Univ., Harvard Univ., Stanford Univ. & the Univ. of Pa. as Amici Curiae at 13, 16, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (No. 76-811) (arguing that "diversity makes the university a better learning environment" and that it is "essential" that racial diversity serve as one factor that universities "consider[] in choosing a student body").

51. *See, e.g.*, Charles R. Lawrence III, *Two Views of the River: A Critique of the Liberal Defense of Affirmative Action*, 101 COLUM. L. REV. 928, 931 (2001) ("I argue that as diversity has emerged as the dominant defense of affirmative action in the university setting, it has pushed other, more radical substantive defenses to the background.").

educational pluralism promoted by the diversity rationale prevents more transformative arguments centered on the need to "remedy past discrimination, address present discriminatory practices, and reexamine traditional notions of merit and the role of universities in the reproduction of elites."[52]

Yet the stakes of this legal contestation are not just about elite education; they are also about the meaning of the Equal Protection Clause. Specifically, the question is whether the clause should be denuded to serve as a guarantee of formal neutrality, or instead allow the government and educational institutions the capacity to promote meaningful integration, remedy past discrimination, address present discriminatory practices, and more. The *Students for Fair Admissions* majority, although conceding that diversity was "commendable,"[53] interpreted the Equal Protection Clause in ways that made it more difficult to advance meaningful racial equity in contexts beyond elite education. These areas include economic and racial integration programs in elementary and secondary schools,[54] employment and economic equity,[55] reparations for Black land loss and housing segregation,[56] and environmental justice remedies.[57] This interpretation threatens efforts at redistribution and repair, as well as the basis for ordinary civil rights laws that seek to prevent unfair disparate impacts.[58]

A narrow reading of the Fourteenth Amendment can serve to constrain the progressive efforts of more democratically responsive bodies and institutions

52. *Id.*; *see also* Asad Rahim, *Diversity to Deradicalize*, 108 CALIF. L. REV. 1423, 1426 (2020) (tracing the origins of Justice Powell's diversity rationale to his desire to promote intellectual diversity on college campuses and weaken the power of left-wing campus groups).

53. Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141, 2166 (2023) ("How is a court to know whether leaders have been adequately 'train[ed]'; whether the exchange of ideas is 'robust'; or whether 'new knowledge' is being developed?").

54. *See* Petition for Writ of Certiorari, Coalition for TJ v. Fairfax Cnty. Sch. Bd., No. 23-170 (Aug. 23, 2023) (petition for certiorari before the Supreme Court arguing that a formally race-neutral program adopted to provide more socioeconomically equitable admissions to selective high school violates the Equal Protection Clause).

55. *See, e.g.*, Ultima Servs. Corp. v. U.S. Dep't of Agric., No. 20-CV-00041, 2023 WL 4633481, at *3 (E.D. Tenn. July 19, 2023) (finding, post–*Students for Fair Admissions*, that a federal program's rebuttable presumption that racially disadvantaged groups are "socially and economically disadvantaged" for purposes of receiving contracting awards violates the Equal Protection Clause).

56. *See, e.g.*, Miller v. Vilsack, No. 21-11271, 2022 WL 851782, at *3–4 (5th Cir. Mar. 22, 2022) (per curiam) (remanding equal protection challenge by white farmers to American Rescue Plan loan program which grants preferred loans to "socially disadvantaged farmer[s]," including "American Indians or Alaskan Natives; Asians; Blacks or African Americans; Native Hawaiians or other Pacific islanders; and Hispanics or Latinos").

57. *See, e.g.*, Complaint, Louisiana v. Env't Prot. Agency, No. 23-CV-00692 (W.D. La. Jan. 23, 2024), ECF No. 1. (litigation challenging Environmental Protection Agency enforcement action as exceeding constitutional and statutory authority); Kristoffer Tigue, *How the Affirmative Action Ban Affects Environmental Justice Policies*, MOTHER JONES (July 12, 2023), https://www.motherjones.com/environment/2023/07/supreme-court-affirmative-action-ruling-environmental-justice-impacts/ [https://perma.cc/W2UZ-J5UV] (describing potential effects of the *Students for Fair Admissions* decision on the Biden administration's "Justice 40" program, which directs a percentage of funds for combatting environmental and climate harms to communities of color).

58. *See, e.g.*, Complaint, *supra* note 57.

such as legislatures, school boards, and administrative agencies. For that reason, this judicial interpretation complicates the democratic arguments against a focus on litigation. The Court's affirmative action decisions risk disabling the efforts of more democratic branches and institutions of civic society to address discrimination. For those who care about advancing racial equality, it is important for legislatures, schools, and other public and private institutions not to yield to the Court's narrow vision of racial discrimination.[59] Indeed, *Students for Fair Admissions* might be read as a decision about the limits of judicial capacity, not the capacity of other institutions. The Court rests its opinion not on the worthiness of advancing diversity in education, but on whether this rationale is "sufficiently coherent for purposes of strict scrutiny."[60] The Court's decision carves out exceptions for individualized consideration of race and leaves room for equity strategies that do not use race as an explicit factor.

The broader point, however, is that the Court's pronouncements on the Fourteenth Amendment in *Students for Fair Admissions* and the larger litigation and policy agenda of anti–affirmative action groups[61] potentially narrow the democratic space in which to address racism and racial inequity.

III. REENLISTING RIGHTS LITIGATION

Although courts may not be the ideal location for the realization of progressive dreams due to both their inefficiency and often antidemocratic nature, at least in the short (and likely medium) term they will be the location of important contestations. A critical question then is how to litigate and engage with courts in ways that do not simply replicate the classic problem of sidelining social movements.[62]

Developing a framework for the role of litigation means grappling with the realization that how groups can and should engage with courts depends on context. We might litigate to help catalyze the claims of the most politically disempowered groups or to protect key tools of building power such as the Voting Rights Act of 1965[63] and the capacity of unions, workers, and tenants

59. *See* Olatunde C.A. Johnson, *The Supreme Court's Decision on Affirmative Action Must Not Be the Final Word*, TIME (June 29, 2023, 4:07 PM), https://time.com/6291410/supreme-court-affirmative-action-final-word/ [https://perma.cc/PQR8-FC3A] (arguing that institutions still have a duty grounded in law and democratic fairness to address the "unjust distribution of educational opportunity and access on the basis of race, ethnicity, and class").

60. Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141, 2166 (2023).

61. *See* Letter from Att'ys Gen. of 13 States to Fortune 100 CEOs (July 13, 2023), https://www.tn.gov/content/dam/tn/attorneygeneral/documents/pr/2023/pr23-27-letter.pdf [https://perma.cc/HDS4-BP8R].

62. Olatunde C.A. Johnson, Andres Estevez, Theodore M. Shaw, Ashok Chandran & Alexis J. Hoag-Fordjour, *Through the Gale Ep1: Civil Rights Lawyering in the Age of Abolition*, THROUGH GALE (Aug. 8, 2022), https://scholarship.law.columbia.edu/through_the_gale/3/ [https://perma.cc/XSJ9-6TZQ].

63. Pub. L. No. 89-110, 79 Stat. 437 (codified as amended in scattered sections of 42 and 52 U.S.C.).

to organize.[64] Some litigation establishes rights that are relatively easy to enforce, thus making courts more immediately impactful. Other litigation, such as long-term institutional reform litigation, requires more sustained work to achieve the meaningful implementation of remedies. It may be too obvious to emphasize, but this context matters when we reflect on the potential role of courts as a tool for social change.

The broader question of an overreliance on constitutionalism is not easy to resolve given the reality that, short of amending the Constitution, courts will remain a site of contestation. Progressive groups alone cannot determine whether courts have this power. Thus, in the foreseeable future, if the United States is to have a Constitution, progressive groups will understandably focus on ensuring that it incorporates basic rights for those whom it purports to govern. These are the framework rights that enable broader forms of democratic participation and bring legitimacy to the democratic governance regime. How much time and energy to invest in protecting these constitutional rights will be a question for any particular social justice group, but the instinct that some rights seem essential to democracy (and are perhaps even pre-constitutional or pre-political) is part of why groups spend energy defending racial equality or bodily autonomy using whatever tactics they can—litigation, organizing, democratic change, or constitutional change.[65]

One can also construct litigation in ways that create possibilities for transformation. Commentators have documented how lawyers on the ground interact with community-based and political movements and have noted that lawyers can build a bridge between traditional impact litigation and movement advocacy.[66] Representing organized groups brings these groups' capacity to organize and engage with different modes of policy advocacy, mobilization, and narrative storytelling to the litigation process.[67] Mobilized groups can also, at least partially, help keep lawyers and litigation accountable, even if they cannot fully solve all lawyer-client conflicts. Group involvement can facilitate the often necessary organizing for victories in court, while also developing the political conditions necessary to sustain deep reforms.

This approach can be brought even into defensive litigation. This is evident from the important shift in the client representation model undertaken

64. *See, e.g.*, Kate Andrias & Benjamin I. Sachs, *Constructing Countervailing Power: Law and Organizing in an Era of Political Inequality*, 130 YALE L.J. 546, 555 (2021) (examining how "law could be used explicitly and directly to enable low- and middle-income Americans to build their own social-movement organizations for political power").

65. *See generally, e.g.*, JULIE C. SUK, WE THE WOMEN: THE UNSTOPPABLE MOTHERS OF THE EQUAL RIGHTS AMENDMENT (2020) (providing account of the history of social movements to create the Equal Rights Amendment and the role of this effort in advancing constitutional and social equality).

66. *See generally* PENDA D. HAIR, LOUDER THAN WORDS: LAWYERS, COMMUNITIES AND THE STRUGGLE FOR JUSTICE (2001).

67. *See* GERALD P. LOPEZ, REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE 11 (1992) (describing group representation as a partial solution to the "regnant" lawyer); *see also* Cummings, *Movement Lawyering*, *supra* note 1, at 100–01 (explaining the role of "mobilized clients" in contemporary legal advocacy).

by racial justice litigators in *Grutter*, *Students for Fair Admissions v. University of North Carolina*, and *Students for Fair Admissions v. President & Fellows of Harvard College*. In *Grutter*, the defendant-intervenors represented by the civil rights organizations were primarily individual students applying to law school.[68] In the *Students for Fair Admissions* cases, individual students and student groups, alumni organizations, educational equity organizations, and activist student organizations all participated as amici and intervenors.[69] The litigation included those directly affected by the policies being challenged and those who had a story to share with the courts and the larger public.[70] Although Students for Fair Admissions (SFFA) purported to be a membership organization, individual students claiming racial discrimination did not testify at trial.[71] By contrast, the racial justice groups populated the trial record with actual student and activist voices.[72]

These individuals and groups provided accounts of resilience in the face of challenges, modes of learning across racial and ethnic differences, their campus experiences of racism or discrimination, and continued barriers to higher education.[73] At the trial court level, this participation shaped the court's rulings in the University of North Carolina (UNC) and Harvard cases that race-conscious affirmative action was constitutionally permitted.[74] The student and alumni groups also offered arguments for consideration of race as a factor that framed the diversity interests more broadly than is often articulated by courts.[75] In addition, they sought to counter arguments that

68. Grutter v. Bollinger, 539 U.S. 306, 317 (2003).

69. *See, e.g.*, Motion to Participate as Amici Curiae at 1–2, Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141 (2023) (No. 20-1199).

70. *Id.* at 2.

71. *See* Colleen Walsh, *Judge Upholds Harvard's Admissions Policy*, HARVARD GAZETTE (Oct. 1, 2019), https://news.harvard.edu/gazette/story/2019/10/judge-upholds-harvards-admissions-policy/ [https://perma.cc/CMV7-AG37] (noting that "SFFA did not call any student to the witness stand to testify").

72. *See* Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 397 F. Supp. 3d 126, 133 (D. Mass. 2019), *aff'd*, 980 F.3d 157 (1st Cir. 2020), *rev'd*, 143 S. Ct. 2141 (2023) (noting, at the district court level, that Harvard admissions officers, students, and alumni testified about the benefits of diversity at trial).

73. *See, e.g.*, Brief of Amici Curiae Students, Alumni & Prospective Students of Harvard Coll. Supporting Defendant-Appellee & Supporting Affirmance at 6–12, 13–14, Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 980 F.3d 157 (1st Cir. 2020) (No. 19-2005); Amended Amici Curiae Brief of Coal. for a Diverse Harvard in Support of Defendant-Appellee & Affirmance, *Students for Fair Admissions*, 980 F.3d 157 (No. 19-2005); Defendant-Intervenors' Brief in Response to Plaintiff's Motion for Summary Judgment at 1–4, Students for Fair Admissions, Inc. v. Univ. of N.C., 567 F. Supp. 3d 580 (M.D.N.C. 2021) (No. 14-CV-954) (describing, inter alia, UNC's history of racial segregation).

74. *See, e.g.*, *Students for Fair Admissions*, 397 F. Supp. 3d at 137 (crediting the testimony of Harvard's witnesses).

75. *See* Defendant-Intervenors' Brief in Response to Plaintiff's Motion for Summary Judgment, *supra* note 73, at 2 (arguing that a critical mass of students of color promotes academic success for students of color and counters campus racism, as well as that race-conscious admissions serve as a corrective to an admissions system that fails to properly appraise the potential of underrepresented students of color).

consideration of race and ethnicity as a factor inevitably leads to racial stereotyping.[76]

For instance, in the Harvard case, although the district court did not permit students and student groups to intervene as defendants in the litigation, it did allow students to participate throughout the litigation as amici, and it considered the testimony of students and alumni as amici at trial.[77] This group of amici, represented by LDF,[78] defended race-conscious affirmative action for reasons similar to Harvard but also directly challenged SFFA's claim about Asian-American students with Asian-American voices.[79] Eight current or former Harvard students, including three current Asian-American students, testified at trial.[80] At trial, LDF's amicus group was comprised of over two dozen student and alumni affinity organizations.[81] Asian-American students who testified challenged the notion that race-consciousness in admission inevitably led to racial stereotyping of Asian Americans, discussing instead how "they believed they benefited from having their ethno-racial identities recognized rather than being harmed by Harvard's holistic admissions policy," for instance through consideration of their immigrant or refugee identity.[82]

Student groups were permitted to intervene in the UNC case and made arguments for race-conscious affirmative action that differed in emphasis from the diversity-centered case presented by the university.[83] In particular, they described the history of racial segregation and discrimination at UNC and claimed that the university over-relied on test scores and grades in ways that were not fully predictive of the academic success of underrepresented students of color.[84] They also included declarations from students themselves showing how race "is a unique, significant part of a person's experience" and that ensuring and increasing racial diversity on UNC's campus is essential to the success of students of color.[85] The district court credited the student-intervenors' testimony in its decision to uphold UNC's race-conscious affirmative action program.[86]

In the end, these arguments did not sway six members of the Supreme Court, a result that may have been predictable no matter the involvement of

76. *See Students for Fair Admissions*, 397 F. Supp. 3d at 157 (refuting SFFA's argument that admissions officers' references to Asian-American applicants as "quiet" or "flat" were evidence of stereotyping because of the applicants' race).

77. *See* Motion to Participate as Amici Curiae, *supra* note 69, at 3–5.

78. *Id.* at 5.

79. *See id.* at 3, 5.

80. Cara McClellan, *When Claims Collide:* Students for Fair Admissions v. Harvard *and the Meaning of Discrimination*, 54 LOY. U. CHI. L.J. 1, 30 (2023).

81. *Id.* at 30 n.163.

82. *Id.* at 30.

83. *See* Defendant-Intervenors' Brief in Response to Plaintiff's Motion for Summary Judgment, *supra* note 73, at 2–3.

84. *Id.* at 1–4.

85. *Id.* at 6–10.

86. Students for Fair Admissions, Inc. v. Univ. of N.C., 567 F. Supp. 3d 580, 593–94 (M.D.N.C. 2021) ("Student-Intervenors also testified credibly and compellingly about the importance of racial and ethnic diversity to their educations while at the University").

student and alumni voices. But the arguments, testimony, and mobilization by these groups have created the necessary scaffolding for post–*Students for Fair Admissions* approaches that will take place inside and outside of courts. Despite the *Students for Fair Admissions* decision, there is evidence of continued mobilization of student and alumni groups, both to safeguard racial and economic equity at UNC and Harvard and to tie their efforts to broader campaigns focused on advancing educational equity and multiracial democracy.[87] Educational equity and racial justice groups have built on the coalitions assembled for *Students for Fair Admissions*, as well as on the public's interest in educational equity, to identify non-litigation strategies to advance racial justice in higher education.[88]

The broader lesson lies in how one might construct defensive litigation in a manner that builds for the future.[89] As anti–affirmative action groups attack a wider range of equity practices beyond high-stakes college admissions,[90] it will be vital to defend these policies in collaboration with those most affected. This will involve a multipronged strategy that includes litigation as one component but also seeks to engage the public, institutions, and legislators when appropriate. Those affected by the relevant policies—in particular those who purport to benefit from race-conscious programs—should be engaged in this strategy. If groups and engaged community members cannot be found, lawyers will need to reflect on who is served by the challenged policy and on whose behalf the policy is worth defending. This is not to elide the difficult questions of lawyer-client or internal community conflict that often accompany any type of advocacy campaign—rather, it is to encourage incorporating community-building and movement-reflective practices into more traditional forms of rights-based lawyering.

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87. *See In an Alarming Departure from Long-Settled Precedent, U.S. Supreme Court Holds Harvard and UNC's Admissions Practices Unconstitutional*, LEGAL DEF. FUND (June 29, 2023), https://www.naacpldf.org/press-release/in-an-alarming-departure-from-long-settled-precedent-u-s-supreme-court-holds-harvard-and-uncs-admissions-practices/ [https://perma.cc/R35E-DYYL] (statement of Jane Sujen Bock, board member of Coalition for a Diverse Harvard) ("This case was never just about who goes to Harvard. It's about who has the freedom to learn and to vote and to thrive in our multiracial democracy. Regardless of the Supreme Court's ruling, we will continue to fight for educational equity and diverse and inclusive American institutions.").

88. *See* NAACP LEGAL DEF. FUND, LAWS.' COMM. FOR C.R. UNDER L., ASIAN AMS. ADVANCING JUST., AM. C.L. UNION, LATINOJUSTICE PRLDEF & ASIAN AM. LEGAL DEF. & EDUC. FUND, AFFIRMATIVE ACTION IN HIGHER EDUCATION, THE RACIAL JUSTICE LANDSCAPE AFTER THE *SFFA* CASES 26–31 (2023), https://www.naacpldf.org/wp-content/uploads/2023_09_29-Report.pdf [https://perma.cc/FHD2-K2ZR] (detailing changes to promote racial inclusion involving admissions, financial aid, K–12, recruitment, and campus climate).

89. *See generally* Douglas NeJaime, *Winning Through Losing*, 96 IOWA L. REV. 941 (2011) (showing how sophisticated advocates can use litigation loss to mobilize constituents and appeal to other state actors through reworked non-litigation and litigation tactics).

90. *See, e.g.*, Hinger, *supra* note 42.

CONCLUSION

To return to the initial question: can rights litigation meaningfully advance social change at this moment? From the progressive perspective, the answer may be "no." This is true both because of the specific composition of courts and because of their institutional limitations. Although this question is the subject of much recent commentary,[91] it is perhaps the wrong question. Litigation in court continues, regardless of the aspirations of progressives, and is often in direct conflict with their goals. Given this, one might instead ask how even this defensive litigation might lead to productive forms of mobilization that engage constituents and institutions outside of the courts. Further, one must also ask the even more difficult question of how to advance non-litigation and litigation strategies that are not simply about continual zero-sum contestation over seemingly scarce resources.[92] The *Students for Fair Admissions* case serves as a reminder that affirmative action cases were never just about who gets into elite colleges, but how we determine access to important social goods necessary for full democratic participation and self-governance. Behind the seemingly narrow rights contestation of litigation lies the reality of the democratic stakes.

91. *See supra* Part I.

92. *See generally* HEATHER MCGHEE, THE SUM OF US: WHAT RACISM COSTS EVERYONE AND HOW WE CAN PROSPER TOGETHER (2021).