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ARTICLE

COLORING IN THE FOURTH AMENDMENT

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CONTENTS

INTRODUCTION 1535
I. RACE-ING AND (E)RACE-ING SEIZURES 1540
A. The Reasoning of Courts that Do Not Consider Race 1542
B. The Reasoning of Courts that Consider Race 1544
II. PORTING COLORBLINDNESS TO THE FOURTH AMENDMENT 1548
A. The Incessant Invocation of Justice Harlan's Dissent 1548
1. Colorblindness in the Wings: Concurrences and Dissents 1550
2. Colorblindness Center Stage: Parents Involved & Students for Fair Admissions 1552
B. The Underbelly of Colorblind Constitutionalism 1555
1. Anticlassification & the Framers' Intent 1555
2. The Moral Harms and Prudential Concerns of Racial Classifications 1557
C. Extending Colorblind Constitutionalism to the Fourth Amendment 1560
1. On Stereotyping & Stigma 1561
2. On Administrability 1561
3. On Discrimination 1562
III. THE FOURTH AMENDMENT, IN FULL COLOR 1564
A. The Raced Reasonable Person in the Face of Colorblindness 1565
1. Against Stereotyping & Stigma Concerns 1565
2. Against Administrability Concerns 1568
3. Against Discrimination Concerns 1572
B. The Already Raced Fourth Amendment 1575
C. Guarding Against Case Law Creep 1580
CONCLUSION 1582

COLORING IN THE FOURTH AMENDMENT

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For decades, a question has simmered in criminal procedure: Can the Fourth Amendment seizure analysis account for a suspect's race? Scholars have long advocated for courts to consider race when resolving Fourth Amendment questions, but to date, the Supreme Court has not provided a definitive answer.

The question has now bubbled to the surface. With calls for advocates to raise race when litigating Fourth Amendment questions, and with more and more advocates heeding those calls, courts are being asked to contemplate how race factors into deciding whether a person has been seized. When the question is explicitly asked, courts have answered differently, with many refusing to consider race as part of the seizure analysis.

It is easy to think that it is only a matter of time before the Supreme Court holds that race has no place in the Fourth Amendment, especially given its muscular articulation of colorblindness in the recent affirmative action cases. Indeed, the lower courts that have held that race cannot be considered as part of a seizure analysis have couched their decisions in the same rhetoric and reasoning found in the Supreme Court's colorblind rulings.

As this Article explains, when scrutinized, colorblind constitutionalism is an illogical fit for the Fourth Amendment. In fact, the analytical underpinnings of colorblindness are consistent with race being considered as part of the seizure free-to-leave analysis. That race can be relevant to a seizure is reinforced when considered against the broader backdrop of Fourth Amendment law and all of the many ways it implicitly and explicitly recognizes race. This Article therefore clarifies that it is permissible to consider the racial identity of the Fourth Amendment's "reasonable person."

But the insights of this Article extend beyond the Fourth Amendment, because at bottom, it is a warning against "case law creep" — where case law is imported from one context to another to advance a specific ideological mission without interrogating whether the case law supports the cause in that context. It is a reminder that the law should not be an unyielding wrecking ball that swings from jurisprudence to jurisprudence, smashing any hope of progress. Thus, ultimately, this Article seeds hope that the law can catch up to our pluralistic society and learn to recognize a multitude of experiences.

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INTRODUCTION

[D]eeming race irrelevant in law does not make it so in life.

— Ketanji Onyika Brown Jackson, the first Black woman to serve on the Supreme Court of the United States (2023)¹

At the turn of the twentieth century, Justice John Marshall Harlan famously declared in his *Plessy v. Ferguson*² dissent that “[o]ur Constitution is color-blind.”³ Of course, Justice Harlan said this in a very particular context. The Supreme Court was deciding whether a law that segregated people by race was constitutional.⁴ And in one of its anticanonical opinions,⁵ the Court held that the law was constitutional, so long as the segregated facilities were “separate but equal,”⁶ a concept farcical on its face.

Fast-forward one hundred years. *Plessy* would not only be overruled,⁷ but also Justice Harlan’s now-famous line about the Constitution being “color-blind” would be wrenched from its historical context and used in service of a conservative legal movement.⁸ “By the 1990s, the U.S. Supreme Court had adopted ‘colorblind conservatism’ as its reigning ideology. In majority opinions for successive cases regarding affirmative action in education and employment, the Court extolled race neutrality as the dominant value in equality jurisprudence.”⁹

At the same time colorblindness gained steam came a rapid realization of the pervasive racialization of the American criminal legal system, a realization quickened by the War on Crime. Comprehensive data on the racial disparities in policing, prosecution, and punishment started to embed in the wider collective consciousness as visuals of police

¹ *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141, 2277 (2023) (Jackson, J., dissenting).

² 163 U.S. 537 (1896).

³ *Id.* at 559 (Harlan, J., dissenting). What exactly Justice Harlan meant by this declaration “remains a matter of bitter contestation; indeed, much of the controversy surrounding his dissent sources from the many different (and incompatible) interpretations of those fateful words.” Phillip Hutchison, *The Harlan Renaissance: Colorblindness and White Domination in Justice John Marshall Harlan’s Dissent in Plessy v. Ferguson*, 19 J. AFR. AM. STUD. 426, 427 (2015). Some argue that Justice Harlan’s dissent was really motivated by his view of white racial superiority. See, e.g., Jamelle Bouie, Opinion, *No One Can Stop Talking About Justice John Marshall Harlan*, N.Y. TIMES (July 7, 2023), <https://www.nytimes.com/2023/07/07/opinion/harlan-thomas-roberts-affirmative-action.html> [<https://perma.cc/7BPE-L8UB>]. That aspect of Justice Harlan’s legacy is beyond the scope of this Article.

⁴ *Plessy*, 163 U.S. at 540.

⁵ See Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 380 (2011).

⁶ *Plessy*, 163 U.S. at 552 (Harlan, J., dissenting); see *id.* at 551 (majority opinion).

⁷ See *Brown v. Bd. of Educ.*, 347 U.S. 483, 494–95 (1954).

⁸ See T. Alexander Aleinikoff, *Re-reading Justice Harlan’s Dissent in Plessy v. Ferguson: Freedom, Antiracism, and Citizenship*, 1992 U. ILL. L. REV. 961, 961.

⁹ Ariela Gross, *A Grassroots History of Colorblind Conservative Constitutionalism*, 44 LAW & SOC. INQUIRY 58, 58–59 (2019) (footnote omitted).

misconduct simultaneously hit mainstream airwaves.¹⁰ This awakening crested in the summer of 2020, when the United States experienced a mass racial reckoning, spurred by a police officer snuffing out the life of an unarmed Black man in the middle of the day for the whole world to see.¹¹

Despite the ascendance of colorblind constitutionalism,¹² one area where colorblindness has yet to catch fire, at least through explicit rhetoric, is in the Court's criminal procedure precedents, including its Fourth Amendment policing jurisprudence and, as relevant here, the free-to-leave¹³ seizure analysis. Sure, the Court rarely acknowledges the influence of race in its criminal procedure decisions, much to the chagrin of many legal scholars.¹⁴ Still, the Court has never explicitly held that race *cannot* be considered when resolving Fourth Amendment questions. In fact, as this Article explains, the Court has explicitly condoned the consideration of race when it comes to police building suspicion.¹⁵

The dueling phenomena — the push for colorblindness and awareness of racialized policing and punishment — are coming to a head in criminal procedure. As courts across the country have pledged to

¹⁰ By the late 1990s and early 2000s, terms such as the “prison industrial complex,” “carceral state,” and “mass imprisonment” were in relatively common use. See Lawrence D. Bobo & Victor Thompson, *Unfair by Design: The War on Drugs, Race, and the Legitimacy of the Criminal Justice System*, 73 SOC. RSCH. 445, 447, 456 (2006); Felicia Angeja Viator, Opinion, *Video of the Police Assault of Rodney King Shocked Us. But What Did It Change?*, WASH. POST (Mar. 3, 2021, 6:00 AM), <https://www.washingtonpost.com/outlook/2021/03/03/video-police-assault-rodney-king-shocked-us-what-did-it-change/> [<https://perma.cc/E5E2-7NQQ>] (describing the public outcry after the release of the Rodney King video).

¹¹ See, e.g., Jelani Cobb, *An American Spring of Reckoning*, NEW YORKER (June 14, 2020), <https://www.newyorker.com/magazine/2020/06/22/an-american-spring-of-reckoning> [<https://perma.cc/E4L9-55X8>]; Ibram X. Kendi, *Is This the Beginning of the End of American Racism?*, THE ATLANTIC (Sept. 2020), <https://www.theatlantic.com/magazine/archive/2020/09/the-end-of-denial/614194/> [<https://perma.cc/9NFT-2U6S>].

¹² As explained in more detail in Part II, colorblind constitutionalism is the philosophy that “the Constitution protects individuals, not groups, and so bars all racial classifications, except as a remedy for specific wrongdoing.” Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278, 1281 (2011).

¹³ See *United States v. Mendenhall*, 446 U.S. 544, 554 (1980) (opinion of Stewart, J.) (“We conclude that a person has been ‘seized’ within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.” (footnote omitted)).

¹⁴ See, e.g., Daniel S. Harawa, *Whitewashing the Fourth Amendment*, 111 GEO. L.J. 923, 937 (2023); I. Bennett Capers, *Rethinking the Fourth Amendment: Race, Citizenship, and the Equality Principle*, 46 HARV. C.R.-C.L. L. REV. 1, 12 (2011); Paul Butler, *The White Fourth Amendment*, 43 TEX. TECH L. REV. 245, 246–47 (2010); Devon W. Carbado, *(E)racing the Fourth Amendment*, 100 MICH. L. REV. 946, 969 (2002); Tracey Maclin, “Black and Blue Encounters” — *Some Preliminary Thoughts About Fourth Amendment Seizures: Should Race Matter?*, 26 VAL. U. L. REV. 243, 248 (1991).

¹⁵ See, e.g., *United States v. Brignoni-Ponce*, 422 U.S. 873, 886–87 (1975) (calling Mexican ancestry a “relevant factor” in the suspicion analysis).

address the racial inequities in the legal system,¹⁶ and as scholars and litigators call for the adoption of more race-conscious litigation strategies,¹⁷ courts are being asked to answer a question left open by the Supreme Court: Can a Fourth Amendment seizure analysis account for a person's race?

Courts have answered this question differently. Some courts have willingly considered race when deciding whether a person was free to terminate a police encounter. These courts have taken what can be described as a realist approach.¹⁸ They often cite statistics and anecdotes showing the disparate ways in which people of color are policed, and then they assert that this information is relevant to whether a reasonable person of the defendant's race would feel free to terminate an encounter with a police officer.¹⁹

Other courts have held that a person's race cannot be considered as part of a seizure analysis. These courts borrow from the colorblind constitutionalist playbook. They assert that considering race would be methodologically unsound, practically unworkable, and potentially unconstitutional.²⁰ So far, the Supreme Court has refused to wade into the debate.²¹

This Article clarifies the role race should play in a Fourth Amendment seizure analysis. It explains that, to the extent one believes that colorblind constitutionalism is a legitimate theory, it is analytically unfit for a Fourth Amendment analysis. In the Fourth Amendment context, the normative foundations of colorblind constitutionalism are more *consistent* with race being considered as part of the seizure analysis rather than it being outright ignored.

This view is vindicated when one steps back and takes a broader view of the Court's Fourth Amendment jurisprudence. Modern Fourth Amendment law accounts for race in both overt and coded ways. The Court has explicitly allowed for the consideration of race and ethnicity

¹⁶ See Daniel S. Harawa, *The False Promise of Peña-Rodriguez*, 109 CALIF. L. REV. 2121, 2159 & n.249 (2021) (noting the phenomenon of state supreme courts vowing to address racial injustice in the summer of 2020).

¹⁷ See, e.g., Harawa, *supra* note 14, at 964; Robin Walker Sterling, *Defense Attorney Resistance*, 99 IOWA L. REV. 2245, 2264–71 (2014); Anthony V. Alfieri, *Lynching Ethics: Toward a Theory of Racialized Defenses*, 95 MICH. L. REV. 1063, 1103–04 (1997); Jonathan A. Rapping, *Implicitly Unjust: How Defenders Can Affect Systemic Racist Assumptions*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 999, 1018 (2013); see also *About Us*, BLACK PUB. DEF. ASS'N, <http://black-defender.org/about-us/> [<https://perma.cc/4KB4-JQUB>].

¹⁸ I use "realism" here "in its everyday sense — not in the sense that it bears in discussions of the school of legal thought known as 'legal realism.'" Richard A. Posner, *The Supreme Court, 2004 Term — Foreword: A Political Court*, 119 HARV. L. REV. 32, 32 n.2 (2005).

¹⁹ See *infra* section I.B, pp. 1544–48.

²⁰ See *infra* section I.A, pp. 1542–44.

²¹ See Petition for a Writ of Certiorari at i, *Knights v. United States*, 142 S. Ct. 709 (2021) (mem.) (No. 21-198) (asking, as the first question presented, "[w]hether a court analyzing if a Fourth Amendment seizure has occurred is categorically barred from considering a person's race"); *Knights*, 142 S. Ct. at 709 (order denying certiorari).

when policing immigration crimes and when creating criminal profiles.²² A police officer can engage in race-based pretextual stops consistent with the Fourth Amendment.²³ An officer can consider the characteristics of a neighborhood, including characteristics that are racially coded, when determining whether they have reasonable suspicion to stop someone.²⁴ And an officer *must* consider the threat posed by someone when deciding to use force, which also allows for thinly veiled racial considerations.²⁵ The Fourth Amendment as conceived by the Court is hardly race-neutral. Rather, Fourth Amendment doctrines generally incorporate a racial perspective based on the experiences of white people.²⁶

It is illogical to think that under Fourth Amendment law, race can be used to build suspicion under the Fourth Amendment, but the fact that people of different races experience police differently is totally irrelevant. Thus, to bring coherence to Fourth Amendment law, advocates should continue to push courts to consider race when resolving seizure questions, and courts must consider these requests seriously, rather than relying on colorblind talking points that have no logical place in Fourth Amendment jurisprudence. This Article is timely in a world where the Court is actively pressing an aggressive colorblind agenda, including its recent ruling holding Harvard's and the University of North Carolina's (UNC) admissions programs unconstitutional.²⁷ It is also timeless in that it is a broader warning to guard against "case law

²² See, e.g., *United States v. Brignoni-Ponce*, 422 U.S. 873, 887 (1975).

²³ Stephen Rushin & Griffin Edwards, *An Empirical Assessment of Pretextual Stops and Racial Profiling*, 73 STAN. L. REV. 637, 649–50 (2021) (describing how the Court's holding that pretextual stops do not violate the Fourth Amendment has led to racial profiling); Gabriel J. Chin & Charles J. Vernon, *Reasonable but Unconstitutional: Racial Profiling and the Radical Objectivity of Whren v. United States*, 83 GEO. WASH. L. REV. 882, 884 (2015) (explaining that the Supreme Court's Fourth Amendment jurisprudence is "notorious for its effective legitimization of racial profiling in the United States").

²⁴ See, e.g., Lincoln Quillian & Devah Pager, *Black Neighbors, Higher Crime? The Role of Racial Stereotypes in Evaluations of Neighborhood Crime*, 107 AM. J. SOCIO. 717, 717 (2001) (explaining that racial stereotypes influence perceptions of neighborhood crime levels); Ben Grunwald & Jeffrey Fagan, *The End of Intuition-Based High-Crime Areas*, 107 CALIF. L. REV. 345, 345 (2019) (same).

²⁵ See, e.g., Frank Rudy Cooper, *Intersectionality, Police Excessive Force, and Class*, 89 GEO. WASH. L. REV. 1452, 1473–75 (2021) (describing the racial critiques of the Court's excessive force jurisprudence); see also *Graham v. Connor*, 490 U.S. 386, 396 (1989).

²⁶ Cf. Carbedo, *supra* note 14, at 968 ("[T]he Court conceptualizes race primarily through the racial lens of colorblindness. In this sense, the race and Fourth Amendment problem is not just a function of the fact that the Court ignores race. It is also, and perhaps more fundamentally, a function of the Court's underlying investment in a particular conception of race: race neutrality or colorblindness." (footnotes omitted)); Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1379–80 (1988) (discussing the false presumption of race neutrality); Alexis Hoag-Fordjour, *White is Right: The Racial Construction of Effective Assistance of Counsel*, 98 N.Y.U. L. REV. 770, 783–84 (2023) ("[I]t is easy to believe that the law's norms and starting points are neutral and not racialized. Yet, our social and legal reality reveals otherwise." *Id.* at 784.).

²⁷ *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141, 2175 (2023).

creep,” where doctrines and methodologies are uncritically ported from one context to another, especially given the different interests at stake between civil disputes and criminal prosecutions.²⁸ At its core, this Article is a reminder that it’s important to chart a progressive view of the law even in the face of an unabashedly conservative Supreme Court.²⁹ This Article makes its case over the course of three parts.

Part I catalogues the debate brewing in the lower courts. It provides a descriptive account of how courts that have considered whether race can factor into a Fourth Amendment seizure analysis have reached different outcomes, categorizing the reasons courts have given for why race must be addressed or excluded.

Part II then explains how the reasons courts give for refusing to consider race sound in the register of colorblind constitutionalism. But before it does that, it sets forth the conservative theory of colorblind constitutionalism and lays out its analytical framings.

Finally, Part III argues that, even assuming (a massive assumption) colorblind constitutionalism has merit as a theory in the equal protection context, it has no place in the Fourth Amendment context. Indeed, when one conducts a broader survey of Fourth Amendment law, heeding race makes coherent sense given that Fourth Amendment law already considers race in myriad ways.

Before proceeding, it is important to recognize that there are various forms of colorblindness.³⁰ There is *judicial* colorblindness, in which judges do not consider race when deciding Fourth Amendment doctrine questions. There is *doctrinal* colorblindness, in which Fourth Amendment doctrine is constructed in a way that fails/refuses to account for race. And there is *operational* colorblindness, in which police attempt to avoid racial considerations when performing their functions (for instance, rejecting associations of Blackness with criminality). This Article focuses primarily on *judicial* colorblindness, where judges refuse

²⁸ Professor David Sklansky made a similar, inverted argument, when discussing equal protection challenges to the crack-cocaine sentencing disparities. Sklansky argued that courts rigidly applied existing equal protection doctrine to race-based challenges to the crack-cocaine disparity, and that by insisting on simplistic reasoning, courts avoided important issues of racial injustice. David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283, 1284 (1995). Thus, the related lesson from Sklansky is that courts should not woodenly apply doctrine in a “universalist” way that works to blind the courts from injustice. *Id.*

²⁹ ERWIN CHERMERINSKY, WE THE PEOPLE: A PROGRESSIVE READING OF THE CONSTITUTION FOR THE TWENTY-FIRST CENTURY 233 (2018) (“Progressives cannot give up on the Constitution or constitutional law. We must criticize . . . the harmful decisions of the Supreme Court. We must develop and defend an alternative vision.”); Khiara M. Bridges, *The Supreme Court, 2021 Term — Foreword: Race in the Roberts Court*, 136 HARV. L. REV. 23, 131 (2022) (describing the Court’s “current iteration as the most conservative Supreme Court since the *Lochner* era”).

³⁰ Many thanks to David Sklansky for crystallizing this point for me and for helping to define these categories. Also, perhaps racial considerations should factor into other seizure questions, for example, whether a seizure is reasonable. This Article does not answer this question, although I hope to explore it in future work.

to consider race, and it attempts to stave off *doctrinal* colorblindness, where the Fourth Amendment seizure doctrine is construed in such a way that it is impermissible to consider race. *Operational* colorblindness is largely beyond the scope of this Article, although as other scholars have noted, police should not be able to consider race (or racial proxies) when building constitutional suspicion.³¹

Next, a disclaimer. This Article understands that, “from a racial justice perspective, the Roberts Court’s jurisprudence is ghastly.”³² This disclaimer may cause you to scratch your head and ask, “What’s the point?” First, should the Court hold that a Fourth Amendment seizure analysis cannot account for race based on an extension of its colorblind heuristic, this Article will reveal how doctrinally dishonest such a ruling would be. Second, and just as importantly, this Article thinks beyond the Supreme Court to the state and lower federal courts that will need to grapple with this and similar questions in the near future. And third, this Article strikes a cautionary note, warning courts, scholars, and advocates to interrogate the logics of legal theories before uncritically extending them. But it also strikes a positive note, envisioning a version of the law that is bold enough to view everyone as their full selves, race and all.³³

I. RACE-ING AND (E)RACE-ING SEIZURES

One summer day in 1985, Terrance Bostick boarded a Greyhound bus in Miami heading to Atlanta.³⁴ He was lying down in the back of the bus when it made a pit stop in Fort Lauderdale.³⁵ While there, two armed officers boarded the bus.³⁶ After surveying the passengers, the officers approached Mr. Bostick and asked him for his identification and ticket.³⁷ Mr. Bostick gave them both.³⁸ Unsatisfied, the officers asked Mr. Bostick if they could search his luggage.³⁹ And with or without

³¹ See *infra* notes 287 and 290.

³² Bridges, *supra* note 29, at 31.

³³ See Brandon Hasbrouck, *The Antiracist Constitution*, 102 B.U. L. REV. 87, 107 (2022) (“Our Constitution contains tools sufficient to accomplish a sweeping, antiracist reimagining of the law but requires a Court that believes in that possibility.”); Dorothy E. Roberts, *The Supreme Court, 2018 Term — Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 122 (2019) (urging us to “demand[] that the Reconstruction Constitution live up to the liberation ideals fought for by abolitionists, revolutionaries, and generations of ordinary black people”); Daniel S. Harawa, *Lemonade: A Racial Justice Reframing of the Roberts Court’s Criminal Jurisprudence*, 110 CALIF. L. REV. 681, 739 (2022) (“[U]rging a reimagination of . . . what good can be done with the case law from a Court that is hostile to racial justice.”).

³⁴ See Initial Brief of Petitioner at 3, *Bostick v. State*, 554 So. 2d 1153 (Fla. 1989) (No. 70996); Brief of Respondent at 1, *Florida v. Bostick*, 501 U.S. 429 (1991) (No. 89-1717), 1990 WL 505714, at *1.

³⁵ Initial Brief of Petitioner, *supra* note 34, at 3.

³⁶ Brief of Respondent, *supra* note 34, at 1.

³⁷ See *id.* at 4.

³⁸ *Id.*

³⁹ *Bostick*, 554 So. 2d at 1154.

consent (the point was initially contested), they searched his bag and found cocaine.⁴⁰

The question was whether the officers violated Mr. Bostick's Fourth Amendment rights by unlawfully "seizing" him at the moment they searched his bag.⁴¹ The officers did not have reasonable articulable suspicion or probable cause to believe Mr. Bostick had committed a crime.⁴² The case turned on whether the encounter could be considered "consensual," thus bringing the encounter outside the ambit of the Fourth Amendment.⁴³

The Supreme Court "doubt[ed]" whether Mr. Bostick had been seized.⁴⁴ The doubt hinged on the Court having previously held that "no seizure occurs when police ask questions of an individual, ask to examine the individual's identification, and request consent to search his or her luggage — so long as the officers do not convey a message that compliance with their requests is required."⁴⁵ In light of this precedent, the Court strongly suggested that a reasonable person in Mr. Bostick's position would have felt "free to decline the officers' request or otherwise terminate the encounter," but remanded the case to the Florida courts to make that finding in the first instance.⁴⁶ The Florida Supreme Court got the hint and summarily upheld the search of Mr. Bostick's bag as constitutional.⁴⁷

Notably missing from the factual picture painted above is Mr. Bostick's race — he was Black.⁴⁸ Mr. Bostick's race is missing from the above vignette because it was missing from the Supreme Court's opinion, too. Scholars have long criticized the Supreme Court for not acknowledging Mr. Bostick's race and the impact it would have had on whether he felt free to terminate the encounter or refuse the officers' requests.⁴⁹ But as I have previously pointed out, Mr. Bostick's *own lawyers* did not ask the Supreme Court to consider his race as part of the seizure analysis.⁵⁰ Thus, while we may have a very good idea of what the Supreme Court's response would likely have been to any such request, because of litigation choices, we are left to speculate.

⁴⁰ See Brief of Respondent, *supra* note 34, at 4 & n.3.

⁴¹ See *id.* at 8.

⁴² See *Bostick*, 554 So. 2d at 1158.

⁴³ *Florida v. Bostick*, 501 U.S. 429, 433–34 (1991).

⁴⁴ *Id.* at 437.

⁴⁵ *Id.*

⁴⁶ See *id.* at 436–37.

⁴⁷ See *Bostick v. State*, 593 So. 2d 494, 495 (Fla. 1992) (per curiam).

⁴⁸ I. Bennett Capers, *On Justitia, Race, Gender, and Blindness*, 12 MICH. J. RACE & L. 203, 218 (2006).

⁴⁹ See, e.g., *id.* at 220 (criticizing *Bostick*'s lack of attention to race); Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333, 339 (1998) (same); Dwight L. Greene, *Justice Scalia and Tonto, Judicial Pluralistic Ignorance, and the Myth of Colorless Individualism in Bostick v. Florida*, 67 TUL. L. REV. 1979, 2029–30 (1993) (same).

⁵⁰ See Harawa, *supra* note 14, at 939.

But we are left to speculate no longer. Litigation strategies are starting to change, with advocates now explicitly asking courts to consider their clients' race as part of the Fourth Amendment seizure analysis.⁵¹ And courts that are being asked the question are answering it differently.

In an attempt to make sense of the competing approaches, this Part identifies some of the common threads woven throughout these two camps of cases.⁵² As will become apparent, the courts that have considered race as part of the seizure analysis have done so in order to ensure the law reflects real life. They looked to the facts on the ground, including the racial disparities and racialized differences in policing, and reasoned that *of course* race makes a difference in how a "reasonable person" may react to a police encounter. Meanwhile, the courts that refused to consider race grounded their reasoning in feasibility concerns alongside the idea that the Constitution must be colorblind.

A clear-eyed understanding of the methodological moves courts are making when answering whether race can be considered during a seizure analysis provides the groundwork to later answer whether race can be considered as part of the Fourth Amendment reasonable person analysis.

A. *The Reasoning of Courts that Do Not Consider Race*

There are a few courts that have held that it is impermissible to consider race as part of the seizure analysis. First out the gate, the Fourth Circuit refused to consider race by stating that to consider a person's race would be to consider their "subjective beliefs" and "[t]o agree that [a person's] subjective belief that he was not free to terminate the encounter was objectively reasonable because relations between police and minorities are poor."⁵³ The Court believed that such an approach would result "in a rule that all encounters between police and minorities are seizures."⁵⁴

⁵¹ Brief Amicus Curiae on Behalf of the National Association of Criminal Defense Lawyers at 12–16, *Knights v. United States*, 142 S. Ct. 709 (2021) (mem.) (No. 21-198), 2021 WL 4173586, at *12–16 (identifying over 200 hundred times when defense counsel asked courts to consider their clients' race when determining whether a seizure occurred and providing a sampling of the arguments).

⁵² Professor Aliza Hochman Bloom helpfully provides a detailed account of many of the cases that have confronted whether race can be considered as part of a seizure analysis. I do not wish to repeat her comprehensive work. Instead, I commend her article. Aliza Hochman Bloom, *Objective Enough: Race is Relevant to the Reasonable Person in Criminal Procedure*, 19 STAN. J. C.R. & C.L. 1 (2023). Hochman Bloom also concludes that race should be considered as part of the seizure analysis. *Id.* at 2. Her conclusion, however, is primarily reached by analogizing to other criminal procedure contexts. *Id.* at 4. But beyond this positivist case, it is also important to explain, as this Article attempts, why the contrary conclusion is wrong as a matter of doctrinal principle, should courts find the analogies unpersuasive.

⁵³ *Monroe v. City of Charlottesville*, 579 F.3d 380, 386–87 (4th Cir. 2009).

⁵⁴ *Id.* at 387.

The Tenth Circuit similarly reasoned that considering race would “inject the objective reasonable person analysis with subjective considerations.”⁵⁵ Expanding on the Fourth Circuit, the court gave a practical reason for its holding, asserting that “[r]equiring officers to determine how an individual’s race affects her reaction to a police request would seriously complicate Fourth Amendment seizure law” given that “there is no easily discernable principle to guide consideration of race in the reasonable person analysis” and there “is no uniform life experience for persons of color.”⁵⁶ The court then gave a purportedly Constitution-based reason for not factoring in race. Said the court: “[A] seizure analysis that differentiates on the basis of race raises serious equal protection concerns if it could result in different treatment for those who are otherwise similarly situated.”⁵⁷ In true colorblind fashion, the court “reject[ed] any rule that would classify groups of [people] according to gender, race, religion, national origin, or other comparable status.”⁵⁸

The Eleventh Circuit used similar reasoning and rhetoric when holding it was impermissible to consider race as part of the seizure analysis.⁵⁹ That court, too, thought race does not “lend [itself] to objective conclusions.”⁶⁰ But the court then took it a step further and said that even if it did, there is “no workable method to translate general attitudes towards the police into rigorous analysis of how a reasonable person would understand his freedom of action in a particular situation.”⁶¹ The Eleventh Circuit also believed that it “could not apply a race-conscious reasonable-person test without running afoul of the Equal Protection Clause.”⁶²

The idea underlying these opinions — that an objective person has no race — raises plenty of questions. Who said race is necessarily a “subjective” characteristic that does not come with any generalizable experiences?⁶³ Why would a reasonable person who is raced be impossible

⁵⁵ *United States v. Easley*, 911 F.3d 1074, 1081 (10th Cir. 2018).

⁵⁶ *Id.* at 1082.

⁵⁷ *Id.*

⁵⁸ *Id.* at 1081 (quoting *United States v. Little*, 18 F.3d 1499, 1505 (10th Cir. 1994) (en banc)).

⁵⁹ *United States v. Knights*, 989 F.3d 1281, 1288 (11th Cir. 2021).

⁶⁰ *Id.*

⁶¹ *Id.* at 1288–89.

⁶² *Id.* at 1289 (citing *Easley*, 911 F.3d at 1082). Other courts have pointed to these decisions to summarily conclude that race is not a factor in a Fourth Amendment seizure analysis. *See, e.g., United States v. Sanders*, No. 20-CR-00201-1, 2021 WL 4876230, at *7 (W.D. Mo. Oct. 19, 2021) (“The reasonable person standard is an objective one, taking into account how a reasonable and innocent person would feel, not how the particular suspect felt. . . . The race of a suspect is thus not a factor in a seizure analysis.” (footnote omitted) (citing *Knights*, 989 F.3d at 1288; *Easley*, 911 F.3d at 1081–82)); *State v. K.F.*, 333 So. 3d 362, 364 (Fla. Dist. Ct. App. 2022) (“[W]e conclude that race was not a relevant factor in determining whether a reasonable person in Appellee’s situation would have felt free to leave or terminate the encounter.” (citing *Knights*, 989 F.3d at 1288–89)).

⁶³ The Washington Supreme Court has rejected the notion that the injection of race into a seizure analysis necessarily transforms the inquiry into a subjective one. *See State v. Sum*, 511 P.3d 92, 103 (Wash. 2022).

for a court to imagine? Why would it be too much to ask of police officers to account for race when performing their duties? And where do these courts get the idea that race-ing a reasonable person would itself be unconstitutional?⁶⁴

B. *The Reasoning of Courts that Consider Race*

On the other hand, a few state supreme courts and lower federal courts have held (or suggested) that it is appropriate to consider race as part of a seizure analysis. Some courts just declare it so, announcing with no analysis that race can be considered as part of the free-to-leave calculus.⁶⁵ Others conduct a methodological two-step. First, they discuss national statistics on racial disparities in policing alongside events and data on police misconduct in the relevant community.⁶⁶ Then, they assert this information is relevant (or not irrelevant) to how a reasonable person of color perceives the police.⁶⁷ These courts make declarations like: “As is known from well-publicized and documented examples, an African-American man facing armed policemen would reasonably be especially apprehensive.”⁶⁸ And: “We do not deny the relevance of race in everyday police encounters with citizens in Milwaukee and around

⁶⁴ While Part II endeavors to answer these questions, before moving on, it’s also worth pointing out that the idea that Fourth Amendment doctrine is wholly “objective” is inaccurate. Or, as Professor Orin Kerr argues, the objectivity “façade” of Fourth Amendment analyses has begun to “crack.” Orin S. Kerr, *The Questionable Objectivity of Fourth Amendment Law*, 99 TEX. L. REV. 447, 447 (2021). As he explains, much of modern Fourth Amendment doctrine, including modern seizure doctrine, is infused with subjectivity. *Id.* at 454–55. As support for this claim in the seizure context, Kerr points to the Supreme Court’s decision in *Brower v. County of Inyo*, 489 U.S. 593 (1989), a case involving the question of whether police seized a driver when they erected a roadblock that the driver crashed into. *Id.* at 594. There, the Court held that a seizure requires “an intentional acquisition of physical control.” *Id.* at 596. Thus, as Kerr concluded after doing a more comprehensive review, “Fourth Amendment doctrine relies increasingly on a mix of objective and subjective tests.” Kerr, *supra*, at 466. And while Kerr did not make this point in the specific context of a free-to-leave analysis, it is worth pondering why, assuming race is a “subjective” characteristic, courts are willing to mingle objective and subjective inquiries in other Fourth Amendment contexts, but somehow in the seizure context, race — again, assuming it is “subjective” — is off limits.

⁶⁵ See, e.g., *State v. Jones*, 235 A.3d 119, 126 (N.H. 2020) (“Although we reach our conclusion irrespective of the defendant’s race, we observe that race is an appropriate circumstance to consider in conducting the totality of the circumstances seizure analysis.”); see also *United States v. Hill*, No. 18-458, 2019 WL 1236058, at *3 (E.D. Pa. Mar. 11, 2019) (considering the “tension” with police “as both real and as a meaningful consideration on the part of any person of color stopped as a suspect”); *Doe v. City of Naperville*, No. 17-cv-2956, 2019 WL 2371666, at *4 (N.D. Ill. June 5, 2019) (framing the inquiry as whether a “twelve-year-old, African American child” would have felt free to leave).

⁶⁶ See, e.g., *Dozier v. United States*, 220 A.3d 933, 944 & n.16 (D.C. 2019); cf. *Sum*, 511 P.3d at 103 (“Statistical evidence and media reports may increase the weight that should be given to race or ethnicity in a particular seizure analysis, but the lack of such evidence does not make a person’s race or ethnicity irrelevant.”).

⁶⁷ See, e.g., *Dozier*, 220 A.3d at 944. The Massachusetts Supreme Judicial Court was noncommittal about whether race can factor into the seizure analysis. See *Commonwealth v. Evelyn*, 152 N.E.3d 108, 121 (Mass. 2020). When the South Carolina Supreme Court was asked to factor race into a seizure analysis, it held that the issue was not preserved. *State v. Spears*, 839 S.E.2d 450, 461 (S.C. 2020).

⁶⁸ *Dozier*, 220 A.3d at 944.

the country. Nor do we ignore empirical data demonstrating the existence of racial profiling, police brutality, and other racial disparities in the criminal justice system.⁶⁹ These decisions reflect a realism about race and policing and a commitment to ensuring that the law rises to meet various lived experiences.⁷⁰

In many ways, these courts, wittingly or not, draw from and build upon decades of critical race scholarship. Scholars have long called for Fourth Amendment reasonableness questions to account for race and the strained relationships communities of color may have with police. A leading voice in this area has been Professor Devon Carbado's.⁷¹ He maintains that "with respect to how people experience law enforcement officials — which is (or should be) what the free-to-leave test is all about — race does matter."⁷² In fact, Carbado has explained that "[f]ocusing on everything but race is tantamount to discrimination based on race" because "people who are especially vulnerable to police encounters because of their race are systematically disadvantaged in comparison to people who are not."⁷³

But beyond the work of critical race theorists, courts wishing to account for race as part of the seizure analysis could have also found doctrinal support in the Supreme Court's other criminal procedure precedents. For example, as Professor Aliza Hochman Bloom persuasively points out, in *United States v. Mendenhall*,⁷⁴ the Court acknowledged the defendant's race (she was Black) when deciding whether she voluntarily accompanied officers to a Drug Enforcement Agency office

⁶⁹ *United States v. Smith*, 794 F.3d 681, 688 (7th Cir. 2015).

⁷⁰ Professor Jonathan Simon explains this form of realism is not foreign to the judicial conception of criminal law, but also warns that judicial realism in this area can entrench pernicious racialized tropes and understandings. Jonathan Simon, "The Criminal Is to Go Free": *The Legacy of Eugenic Thought in Contemporary Judicial Realism About American Criminal Justice*, 100 B.U. L. REV. 787, 787–88 (2020).

⁷¹ See Carbado, *supra* note 14, at 1000–04. See generally Devon W. Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 CALIF. L. REV. 125 (2017) [hereinafter Carbado, *From Stopping Black People to Killing Black People*]; Devon W. Carbado, *From Stop and Frisk to Shoot and Kill: Terry v. Ohio's Pathway to Police Violence*, 64 UCLA L. REV. 1508 (2017). For a comprehensive treatment of Carbado's groundbreaking work on race and the Fourth Amendment, see DEVON W. CARBADO, UNREASONABLE: BLACK LIVES, POLICE POWER, AND THE FOURTH AMENDMENT (2022). Indeed, at least one court explicitly cited Professor Carbado's work. See *Dozier*, 220 A.3d at 944 n.14 (citing Devon W. Carbado, *Blue-on-Black Violence: A Provisional Model of Some of the Causes*, 104 GEO. L.J. 1479, 1480 (2016)).

⁷² Carbado, *supra* note 14, at 1002.

⁷³ *Id.* at 1003. There is a rich line of literature making similar points. See, e.g., Maclin, *supra* note 49, at 340 (arguing that race should be considered as part of a seizure analysis); Randall S. Susskind, *Race, Reasonable Articulable Suspicion, and Seizure*, 31 AM. CRIM. L. REV. 327, 349 (1994) (same); Cynthia Lee, *Reasonableness with Teeth: The Future of Fourth Amendment Reasonableness Analysis*, 81 MISS. L.J. 1133, 1150 (2012) (same); Kristin Henning, *The Reasonable Black Child: Race, Adolescence, and the Fourth Amendment*, 67 AM. U. L. REV. 1513, 1518–19 (2018) (same); Christy E. Lopez, *The Reasonable Latinx: A Response to Professor Henning's The Reasonable Black Child: Race, Adolescence, and the Fourth Amendment*, 68 AM. U. L. REV. F. 55, 58 (2019) (urging consideration of Latinx identity).

⁷⁴ 446 U.S. 544 (1980).

in the airport.⁷⁵ That the Court acknowledged her race “suggests that race is relevant to the voluntariness of consent.”⁷⁶ Another example Hochman Bloom provides⁷⁷ is *J.D.B. v. North Carolina*,⁷⁸ where the Court held that it is permissible to consider age when determining whether a minor is in custody for Fifth Amendment purposes.⁷⁹ As Hochman Bloom explains, it would be reasonable for a court to conclude that given the “important commonalities”⁸⁰ between voluntariness determinations (like in *Mendenhall*), Fifth Amendment custody questions (like in *J.D.B.*), and Fourth Amendment seizure analyses, a seizure analysis must also be capacious enough to consider at least *some* “personal characteristics”⁸¹ of the suspect, one of which could be race.⁸²

As more support for considering race, substantive criminal law and private law have long considered various “personal characteristics” when applying objective standards. For instance, courts have considered gender when evaluating claims of self-defense (and, as others have argued, there’s nothing stopping juries from implicitly considering race when evaluating self-defense claims).⁸³ Courts consider the perspective

⁷⁵ Hochman Bloom, *supra* note 52, at 15, 24; *see Mendenhall*, 446 U.S. at 557–58.

⁷⁶ Hochman Bloom, *supra* note 52, at 15.

⁷⁷ *Id.* at 39–40.

⁷⁸ 564 U.S. 261 (2011).

⁷⁹ *Id.* at 265.

⁸⁰ Hochman Bloom, *supra* note 52, at 42.

⁸¹ *Id.* at 40 (citing *J.D.B.*, 564 U.S. at 264–65).

⁸² *Id.* at 41–44. Hochman Bloom argues that the Court seems to have backed off from the consideration of personal characteristics like those condoned in *Mendenhall*, and argues that those precedents are on “shaky ground.” *Id.* at 24–25, 27. In support of this assertion, Hochman Bloom points to two cases: *Florida v. Jimeno*, 500 U.S. 248 (1991), and *Illinois v. Rodriguez*, 497 U.S. 177 (1990). *Jimeno* dealt with the “reasonableness of third-party consent,” and *Rodriguez* involved the “reasonable scope of consent to a search.” Hochman Bloom, *supra* note 52, at 26. Hochman Bloom argues that the Court’s “demand for ‘objective reasonableness’ seems to undermine *Schneekloth*’s acknowledgment that an individual’s personal characteristics are relevant to the determination of voluntariness of consent.” *Id.* (quoting *Jimeno*, 500 U.S. at 252).

I see it slightly differently. As should be made clear throughout the Article, I do not view “personal characteristics” and “objective reasonableness” as dichotomous. Instead, there are certain “personal characteristics” from which you can draw objectively reasonable conclusions — a point Hochman Bloom implicitly makes by labeling race “objective enough.” *See id.* at 17. Moreover, as I have previously urged, before ascribing motives to the Court, it is important to look at how the cases are presented. *See Harawa, supra* note 14, at 927. And the defendants in many of the cases Hochman Bloom cites in support of her thesis did not focus on their own “personal characteristics” when arguing that their Fourth Amendment rights were violated. *See Respondents’ Brief on the Merits* at 2–5, *Jimeno*, 500 U.S. 248 (No. 90-622), 1991 WL 11007827, at *2–5; Brief for the Respondent, *Rodriguez*, 497 U.S. 177 (No. 88-2018), 1990 WL 512432, at *4–12; Harawa, *supra* note 14, at 950–51 (discussing the briefing in *United States v. Drayton*, 536 U.S. 194 (2002)).

⁸³ *See, e.g., State v. Wanrow*, 559 P.2d 548, 558–59 (Wash. 1977); *Gentry v. State*, 441 S.E.2d 249, 250 (Ga. Ct. App. 1994); *see also* Jonathan Markovitz, “A Spectacle of Slavery Unwilling to Die”: *Curbing Reliance on Racial Stereotyping in Self-Defense Cases*, 5 U.C. IRVINE L. REV. 873, 888 (2015) (arguing that a “consequence of the lack of clarity in stand your ground implementation” is the discretion to consider race when deciding what’s reasonable); L. Song Richardson & Phillip Atiba Goff, *Self-Defense and the Suspicion Heuristic*, 98 IOWA L. REV. 293, 318–20 (2012)

of the victim when applying objective standards in the employment discrimination context.⁸⁴ And they've considered gender and age when applying objective standards in the tort law context.⁸⁵

In all, there's a growing body of directly relevant case law, along with analogous case law and prescient critical race scholarship, that supports factoring race into the seizure analysis.⁸⁶

It is important to reflect on what the infusion of race into the seizure analysis actually looks like. Critically, when courts consider race, they are not just citing a few national statistics about disparities in policing and holding that because of their race, a defendant was seized.⁸⁷ Quite the opposite. They methodically go through all of the more routine factors that we have come to expect in the seizure analysis (location, number of officers, brandishing of weapons, etc.), and then consider race in light of the specific racial dynamics of the area in question.⁸⁸ These courts are not engaging in a subjective analysis.⁸⁹ They are *contextualizing* the reasonable person, and deciding whether race matters in that particular context. It is this contextualized, textured, 3D reasonable person that this Article imagines as the ideal version of the Fourth Amendment seizure analysis. One that recognizes that a person's identity matters, in addition to all of the other well-established factors that may make a person feel as if they are not free to terminate a police encounter.

This leads to the question, why have some courts drawn a hard line against considering race in the seizure context? To gain some answers,

(exploring how implicit biases can affect the consideration of what's reasonable in the self-defense context). See generally Bennett Capers, *Evidence Without Rules*, 94 NOTRE DAME L. REV. 867 (2018) (explaining how juries may implicitly consider race in a variety of contexts).

⁸⁴ See, e.g., *Fuller v. Idaho Dep't of Corr.*, 865 F.3d 1154, 1161 (9th Cir. 2017); see also *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998) ("We have emphasized, moreover, that the objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position . . .").

⁸⁵ *Denver & R.G.R. Co. v. Lorentzen*, 79 F. 291, 293 (8th Cir. 1897) (gender); *Roberts v. Ring*, 173 N.W. 437, 438 (Minn. 1919) (age).

⁸⁶ To summarize, the cases that have considered race in the seizure analysis are: *United States v. Smith*, 794 F.3d 681, 688 (7th Cir. 2015); *United States v. Washington*, 490 F.3d 765, 773–74 (9th Cir. 2007); *United States v. Hill*, No. 18-458, 2019 WL 1236058, at *3 (E.D. Pa. Mar. 11, 2019); *Doe v. City of Naperville*, No. 17-cv-2956, 2019 WL 2371666, at *4 (N.D. Ill. June 5, 2019); *State v. Sum*, 511 P.3d 92, 103 (Wash. 2022); *State v. Jones*, 235 A.3d 119, 126 (N.H. 2020); *Dozier v. United States*, 220 A.3d 933, 944 (D.C. 2019).

The cases that have refused to consider race are: *United States v. Knights*, 989 F.3d 1281, 1288 (11th Cir. 2021); *United States v. Easley*, 911 F.3d 1074, 1082 (10th Cir. 2018); *Monroe v. City of Charlottesville*, 579 F.3d 380, 386–87 (4th Cir. 2009); *United States v. Sanders*, No. 20-CR-00201-1, 2021 WL 4876230, at *7 (W.D. Mo. Oct. 19, 2021); *State v. K.F.*, 333 So. 3d 362, 364 (Fla. Dist. Ct. App. 2022).

⁸⁷ See *supra* notes 65–70 and accompanying text.

⁸⁸ See *supra* notes 65–70 and accompanying text.

⁸⁹ As others have pointed out, the attempt to distinguish between objective and subjective standards can be futile and lead to incoherence. See, e.g., R. George Wright, *Objective and Subjective Tests in the Law*, 16 U.N.H. L. REV. 121, 124 (2017). Thus, if the idea of a raced reasonable person is incomprehensible, perhaps it's worth moving away from an objective standard altogether.

we must leave the Fourth Amendment context and turn to the Supreme Court's more recent Equal Protection Clause jurisprudence.

II. PORTING COLORBLINDNESS TO THE FOURTH AMENDMENT

Over the past few decades, the Supreme Court has aggressively advanced the idea that our Constitution is colorblind. As Professor Ariela Gross explains, the colorblind Constitution “was a powerful tool in the hands of racial liberals at mid-twentieth century, wielded to strike down statutes mandating racial segregation as well as judicial enforcement of racially restrictive housing covenants and a host of other forms of discrimination.”⁹⁰ But, as Gross continues, “in the 1970s and 1980s, conservative judges began to invoke the colorblind constitution to invalidate programs to redress racial injustice through law to protect white plaintiffs from any form of racial classification.”⁹¹ This Part explores the colorblind constitutionalist ideology, including the utilization of Justice Harlan's *Plessy* dissent. It then excavates the major themes that recur in the Court's colorblind opinions. Finally, this Part explains how Fourth Amendment seizure case law that holds race has no part in the analysis sounds in the same colorblind principles that have animated the Court's equal protection case law.

A. *The Incessant Invocation of Justice Harlan's Dissent*

The story of modern-day colorblind constitutionalism is one of adverse possession.⁹² At first, Justice Harlan's famous line from his *Plessy* dissent — “Our Constitution is color-blind, and neither knows nor tolerates classes among citizens”⁹³ — was a rallying cry for the Civil Rights Movement.⁹⁴ As civil rights litigators challenged laws that segregated people by race, they urged courts to adopt Justice Harlan's colorblind view of the Constitution. As then-leading litigator (and later first Black Supreme Court Justice) Thurgood Marshall wrote in a *Brown v. Board of Education*⁹⁵ brief: “That the Constitution is color blind is our

⁹⁰ Gross, *supra* note 9, at 58.

⁹¹ *Id.*

⁹² See Blake Emerson, *Dialectic of Color-Blindness*, 39 PHIL. & SOC. CRITICISM 693, 693–94 (2013) (“The concept of *color-blindness* has had a dialectical history. In 1896 Justice John Marshall Harlan declared that ‘our constitution is color-blind’ in his dissenting opinion in *Plessy v. Ferguson*. Justice Harlan invoked the principle of color-blindness to protest the legal enforcement of segregation in Louisiana. A half-century later, Thurgood Marshall championed the same principle as a civil rights lawyer in his efforts to dismantle Jim Crow. After the elimination of *de jure* segregation, however, the mantle of color-blindness was taken up by the opponents of integration and racial remedy. The critical edge of the color-blind principle then turned into its opposite — a reactionary mandate for the preservation of the status quo of racial inequality.” (footnotes omitted)).

⁹³ *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

⁹⁴ See Emerson, *supra* note 92, at 702.

⁹⁵ 347 U.S. 483 (1954).

dedicated belief.”⁹⁶ Civil Rights Queen⁹⁷ Constance Baker Motley (the first Black woman appointed to the federal bench) would later recall that “Marshall had a ‘Bible’ to which he turned during his most depressed moments. The ‘Bible’ would be known in the legal community as the first Mr. Justice Harlan’s dissent in *Plessy . . .*”⁹⁸ And shades of colorblindness featured in some of the Supreme Court’s hallmark racial justice cases from the mid-twentieth century.⁹⁹

The push for colorblindness in the age of racial segregation was not relegated to legal briefs. One of the most famous invocations of colorblindness came from Dr. Martin Luther King, Jr., when in his aspirational “I Have a Dream” speech, King longed for the day when his children would “not be judged by the color of their skin but by the content of their character.”¹⁰⁰ In the view of the Civil Rights Movement, a colorblind Constitution meant that the Constitution would not tolerate state-sanctioned discrimination.¹⁰¹ That did not mean, however, that the Constitution also would not tolerate color-conscious remedies to redress the long-lingering effects of legally endorsed racial discrimination.¹⁰²

Over the past few decades, however, the conservative legal movement has co-opted the Constitution-is-colorblind line of argument to rail *against* color-conscious policies designed to ensure full and equal citizenship, like affirmative action.¹⁰³ It has been successful. Today, the

⁹⁶ Brief for Appellants in Nos. 1, 2 and 4 and for Respondents in No. 10 on Reargument at 65, *Brown*, 347 U.S. 483 (Nos. 1, 2, 3 & 5); *The Legacy of Black Judges in America*, LEGAL DEF. FUND, <https://www.naacpldf.org/black-judges-history/> [<https://perma.cc/CX6X-A2YP>].

⁹⁷ TOMIKO BROWN-NAGIN, CIVIL RIGHTS QUEEN: CONSTANCE BAKER MOTLEY AND THE STRUGGLE FOR EQUALITY (2022).

⁹⁸ *Memorial to Thurgood Marshall*, C-SPAN, at 20:32 (Nov. 15, 1993), <https://www.c-span.org/video/?52457-1/memorial-thurgood-marshall> [<https://perma.cc/YU5B-Y24H>]; LEGAL DEF. FUND, *supra* note 96.

⁹⁹ See, e.g., *Shelley v. Kraemer*, 334 U.S. 1, 20–21 (1948) (holding that judicial enforcement of racially restrictive housing covenants is unconstitutional); *Brown*, 347 U.S. at 493 (holding that segregated schools violate the Fourteenth Amendment); *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954) (holding the Fifth Amendment prohibited the District of Columbia from maintaining segregated schools); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (holding that anti-miscegenation laws violated the Fourteenth Amendment).

¹⁰⁰ Martin Luther King, Jr., I Have a Dream Speech at the Lincoln Memorial (Aug. 28, 1963) (transcript available at <https://www.npr.org/transcripts/122701268> [<https://perma.cc/AM6Q-49TL>]).

¹⁰¹ See Emerson, *supra* note 92, at 701–02.

¹⁰² As Justice Marshall later wrote: “It is because of a legacy of unequal treatment that we now must permit the institutions of this society to give consideration to race in making decisions about who will hold the positions of influence, affluence, and prestige in America.” *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 401 (1978) (opinion of Marshall, J.); see also MARTIN LUTHER KING, JR., *WHY WE CAN’T WAIT* 127 (1963) (arguing for “special, compensatory measures” as a remedy for chattel slavery).

¹⁰³ See Theodore R. Johnson, *How Conservatives Turned the “Color-Blind Constitution” Against Racial Progress*, THE ATLANTIC (Nov. 19, 2019), <https://www.theatlantic.com/ideas/archive/2019/11/colorblind-constitution/602221/> [<https://perma.cc/CTF6-YWSM>]. As Professor Randall

idea that the Constitution is colorblind features across three primary areas of the Court's case law: voting rights, education, and government contracting, with the argument being deployed *against* policies designed to remediate past discrimination; *against* policies hoping to ensure equal political participation; and *against* policies meant to guarantee diversity in educational institutions and workplace industries. As this Part shows, while the forceful articulation of colorblindness used to be relegated to separate opinions on behalf of one or two Justices, it has now become the centerpiece of the Court's equal protection jurisprudence.¹⁰⁴

1. *Colorblindness in the Wings: Concurrences and Dissents.* — Conservative justices first invoked Justice Harlan's dissent to argue against programs designed to promote racial diversity in *Fullilove v. Klutznick*.¹⁰⁵ There, the Court rejected a constitutional challenge to the "minority business enterprise" provision of the Public Works Employment Act, which set aside ten percent of funding for minority-owned businesses.¹⁰⁶ Justice Stewart, joined by then-Justice Rehnquist, dissented.¹⁰⁷ Opening with Justice Harlan's famous line, Justice Stewart thought the Court's decision was wrong "for the same reason that *Plessy v. Ferguson* was wrong."¹⁰⁸ He pointed to Jim Crow-era civil rights cases, many litigated by Justice Marshall, to argue that "the Constitution is wholly neutral in forbidding . . . racial discrimination, whatever the race may be of those who are its victims."¹⁰⁹ He warned that the Court's decision would require the law to classify and define people by race,¹¹⁰ which in turn would "reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth" and "implicitly teach[] the public that the apportionment of rewards and penalties can

Kennedy explains: "The Harlan declaration becomes an oft-used rhetorical weapon . . . deployed against affirmative action policies." Randall Kennedy, *Colorblind Constitutionalism*, 82 *FORDHAM L. REV.* 1, 5 (2013). Or as Professor Brandon Hasbrouck describes, the Justice Harlan *Plessy* "dissent was little used in Supreme Court jurisprudence until opponents of affirmative action latched onto it as a bludgeon against race-conscious remedies." Hasbrouck, *supra* note 33, at 115.

¹⁰⁴ As Professor Reva Siegel notes, at one point, the Court contained "race moderates" (Justice Kennedy in particular) who adopted an "antibalkanization" approach, which understood "that race-conscious, facially neutral interventions may promote social cohesion by promoting equal opportunity." See Siegel, *supra* note 12, at 1282–83. After *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, 143 S. Ct. 2141 (2023), the "race moderate" appears to be a figure of the past. See *id.* at 2161.

¹⁰⁵ 448 U.S. 448 (1980); see Hasbrouck, *supra* note 33, at 115 & n.217.

¹⁰⁶ *Fullilove*, 448 U.S. at 454, 492.

¹⁰⁷ *Id.* at 522 (Stewart, J., dissenting).

¹⁰⁸ *Id.* at 522–23.

¹⁰⁹ *Id.* at 524.

¹¹⁰ *Id.* at 531.

legitimately be made according to race — rather than according to merit or ability.”¹¹¹

The Court soon backtracked in *City of Richmond v. J.A. Croson Co.*,¹¹² when it struck down Richmond’s “Minority Business Utilization Plan,”¹¹³ a plan modeled after the program the *Fullilove* Court had just blessed a decade earlier.¹¹⁴ In a concurrence, Justice Scalia parroted the same colorblind logic articulated by Justices Stewart and Rehnquist in their *Fullilove* dissent. He, too, invoked Justice Harlan’s *Plessy* dissent¹¹⁵ and declared it “fatal to [the] Nation . . . to classify and judge men and women on the basis of their country of origin or the color of their skin.”¹¹⁶

Justice Thomas has also trotted out Justice Harlan’s dissent in a series of separate opinions in voting rights cases. In *Holder v. Hall*,¹¹⁷ Justice Thomas wrote that “[t]he assumptions upon which [the Court’s] vote dilution decisions have been based should be repugnant to any nation that strives for the ideal of a color-blind Constitution.”¹¹⁸ In *Alabama Legislative Black Caucus v. Alabama*¹¹⁹ and *Bethune-Hill v. Virginia State Board of Elections*,¹²⁰ he bristled at the notion of majority-minority districts because, to his mind, they rested on the idea that “members of [a] racial group must think alike,”¹²¹ a concept “fundamentally at odds with our ‘color-blind’ Constitution.”¹²² Recently, in *Allen v. Milligan*,¹²³ Justice Thomas invoked Justice Harlan to dissent from the Court’s holding that an Alabama redistricting plan was an unconstitutional racial gerrymander in violation of the Voting Rights Act.¹²⁴

Justice Thomas, joined by Justice Scalia, also invoked Justice Harlan’s dissent in the affirmative action context. First, in *Grutter v. Bollinger*,¹²⁵ Justice Thomas dissented in response to the Court’s holding that the University of Michigan Law School’s holistic admissions program, which considered race, did not violate the Equal Protection

¹¹¹ *Id.* at 531–32. For a longer discussion of Justice Stewart’s dissent, see Neil Gotanda, *A Critique of “Our Constitution Is Color-Blind,”* 44 STAN. L. REV. 1, 5–6 (1991).

¹¹² 488 U.S. 469 (1989).

¹¹³ *Id.* at 477, 505.

¹¹⁴ *Id.* at 528 (Marshall, J., dissenting).

¹¹⁵ *Id.* at 521 (Scalia, J., concurring in the judgment).

¹¹⁶ *Id.* at 520.

¹¹⁷ 512 U.S. 874 (1994).

¹¹⁸ *Id.* at 905–06 (Thomas, J., concurring in the judgment).

¹¹⁹ 575 U.S. 254 (2015).

¹²⁰ 580 U.S. 178 (2017).

¹²¹ *Ala. Legis. Black Caucus*, 575 U.S. at 298 (Thomas, J., dissenting) (alteration in original) (quoting *Holder*, 512 U.S. at 906 (Thomas, J., concurring in the judgment)).

¹²² *Bethune-Hill*, 580 U.S. at 204 (Thomas, J., concurring in the judgment in part and dissenting in part) (quoting *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)).

¹²³ 143 S. Ct. 1487 (2023).

¹²⁴ *Id.* at 1519 (Thomas, J., dissenting); see *id.* at 1498 (majority opinion).

¹²⁵ 539 U.S. 306 (2003).

Clause.¹²⁶ He exclaimed: “The Constitution abhors classifications based on race, not only because those classifications can harm favored races or are based on illegitimate motives, but also because every time the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all.”¹²⁷

Going further in *Fisher v. University of Texas at Austin*,¹²⁸ a case concerning the use of race as a factor in the University of Texas’s admissions program,¹²⁹ Justice Thomas explicitly situated himself alongside the *Brown* plaintiffs (and by extension, Justice Marshall, who litigated *Brown* before he joined the Court), declaring: “My view of the Constitution is the one advanced by the plaintiffs in *Brown*: ‘[N]o State has any authority under the equal-protection clause of the Fourteenth Amendment to use race as a factor in affording educational opportunities among its citizens.’”¹³⁰ To Justice Thomas: “The Equal Protection Clause strips States of all authority to use race as a factor in providing education.”¹³¹ In his view, affirmative action programs “stamp[] blacks and Hispanics with a badge of inferiority . . . taint[ing] the accomplishments of all those who are admitted as a result of racial discrimination.”¹³²

2. *Colorblindness Center Stage: Parents Involved & Students for Fair Admissions.* — While Justices Scalia and Thomas¹³³ most regularly invoked Justice Harlan to emphasize their unyielding view that the Constitution is colorblind, it would be a mistake to think that colorblindness has not taken center stage in the Supreme Court’s equality jurisprudence.¹³⁴ Indeed, perhaps the two most forceful opinions promoting colorblindness came from Chief Justice Roberts in *Parents Involved in Community Schools v. Seattle School District No. 1*¹³⁵

¹²⁶ *Id.* at 349 (Thomas, J., concurring in part and dissenting in part); *id.* at 343 (majority opinion).

¹²⁷ *Id.* at 353 (Thomas, J., concurring in part and dissenting in part).

¹²⁸ 570 U.S. 297 (2013).

¹²⁹ *Id.* at 300–01.

¹³⁰ *Id.* at 326–27 (Thomas, J., concurring) (alteration in original).

¹³¹ *Id.* at 327.

¹³² *Id.* at 333 (citation omitted). In another affirmative action–related case involving a Michigan state constitutional amendment designed to eliminate race-sensitive admissions programs, Justice Scalia, joined by Justice Thomas, again invoked Justice Harlan’s *Plessy* dissent. *Schuetz v. Coal. to Def. Affirmative Action, Integration & Immigrant Rts. & Fight for Equal. by Any Means Necessary (BAMN)*, 572 U.S. 291, 332 (2014) (Scalia, J., concurring in the judgment); *id.* at 299 (majority opinion).

¹³³ Justice Thomas has also invoked Justice Harlan in a separate opinion concerning whether residents of Puerto Rico were eligible for Supplemental Security Benefits. *United States v. Vaello Madero*, 142 S. Ct. 1539, 1551 (2022) (Thomas, J., concurring); *id.* at 1541 (majority opinion).

¹³⁴ See generally Elise C. Boddie, *Critical Mass and the Paradox of Colorblind Individualism in Equal Protection*, 17 U. PA. J. CONST. L. 781 (2015) (discussing the Court’s “low tolerance for group-based distinctions in equal protection,” *id.* at 787).

¹³⁵ 551 U.S. 701 (2001).

(*Parents Involved*) and *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*¹³⁶ (*SFFA*).

In *Parents Involved*, the Court struck down a Seattle school district's plan to diversify its schools.¹³⁷ Writing for a plurality, Chief Justice Roberts made his colorblind views clear: "Government action dividing us by race is inherently suspect because such classifications promote 'notions of racial inferiority and lead to a politics of racial hostility,'"¹³⁸ and "distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality."¹³⁹ The Chief Justice closed with the now infamous line: "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."¹⁴⁰

However, it would not be until 2023, when the Supreme Court struck down Harvard's and the University of North Carolina's race-conscious admissions programs,¹⁴¹ that Justice Harlan's *Plessy* dissent would feature prominently in a Supreme Court majority opinion.¹⁴² There, the Chief Justice, writing for his conservative colleagues, cemented the current Court's view that the Constitution is colorblind. And like Justice Thomas before him, he relied on civil rights litigation strategies challenging de jure segregation to make his point.¹⁴³

In *SFFA*, the Chief Justice castigated the universities' admissions programs as "pick[ing] winners and losers based on the color of their skin."¹⁴⁴ As the majority saw it, beyond finding the goal of "diversity" impossible to judicially measure (never mind that it was the Court that said diversity in education is a compelling state interest¹⁴⁵), the admissions programs failed "to comply with the twin commands of the Equal Protection Clause that race may never be used as a 'negative' and that

¹³⁶ 143 S. Ct. 2141 (2023). We got a flavor of the Chief Justice's commitment to colorblindness early in his tenure when he declared in a redistricting case that "[i]t is a sordid business, this divvying us up by race." *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 511 (2006) (Roberts, C.J., concurring in part, concurring in the judgment in part, and dissenting in part).

¹³⁷ 551 U.S. at 710–11.

¹³⁸ *Id.* at 746 (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989)).

¹³⁹ *Id.* at 745–46 (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 214 (1995)).

¹⁴⁰ *Id.* at 748. Once again, Justice Thomas invoked Justice Harlan's dissent and the *Brown* litigation strategy to advance his colorblind views. *See id.* at 772–73 (Thomas, J., concurring). Professor Khiara Bridges presaged the outcome in *SFFA*, arguing that we should understand the decision "as not only the Roberts Court's installation of the view that the Constitution demands colorblindness of the nation's institutions, but also the Roberts Court's expanded readiness to provide redress for the racial injuries that aggrieved white people have claimed to experience." Bridges, *supra* note 29, at 135.

¹⁴¹ *SFFA*, 143 S. Ct. at 2175.

¹⁴² Justice Harlan's dissent was quoted parenthetically in *Johnson v. California*, 543 U.S. 499, 513 (2005), a case involving the segregation of incarcerated persons by race, *id.* at 502.

¹⁴³ Justice Thomas's concurrence, which also invoked colorblindness and Justice Harlan, will be discussed in the next Part.

¹⁴⁴ 143 S. Ct. at 2175.

¹⁴⁵ *See Grutter v. Bollinger*, 539 U.S. 306, 325 (2003).

it may not operate as a stereotype.”¹⁴⁶ In support of the first point, the Court reasoned that “[c]ollege admissions are zero-sum,” and as such, a “benefit provided to some applicants but not to others necessarily advantages the former group at the expense of the latter.”¹⁴⁷ Elucidating the second point, the Court reasoned that the admissions programs caused dignitary harm because they engage “in the offensive and demeaning assumption that [students] of a particular race, because of their race, think alike,” and in so doing, further “stereotypes that treat individuals as the product of their race, evaluating their thoughts and efforts — their very worth as citizens — according to a criterion barred to the Government by history and the Constitution.”¹⁴⁸ Thus, as a seeming update of his *Parents Involved* line, the Chief Justice concluded that “[e]liminating racial discrimination means eliminating all of it,”¹⁴⁹ which, to him and his conservative colleagues, requires a colorblind view of the Constitution.¹⁵⁰

Perhaps the most striking part of *SFFA*’s forceful articulation of colorblindness was its recasting of *Brown* and the *Brown* litigation strategy as supporting this colorblind view of the Constitution. What was once a theory relegated to Justice Thomas’s separate writings now migrated to a Supreme Court majority opinion. The Chief Justice’s opinion quoted the *Brown* oral argument and the *Brown* briefing as being “unmistakably clear: the right to a public education ‘must be made available to all on equal terms.’”¹⁵¹ According to the Chief Justice, *Brown* marked a turning point in the Court’s Equal Protection Clause jurisprudence, standing for the proposition that “[t]he time for making distinctions based on race had passed.”¹⁵²

As this section shows, at least as far as the Supreme Court’s Fourteenth Amendment Equal Protection Clause jurisprudence goes, the concept that the Constitution must be colorblind, once found in separate opinions, is now part of the dominant constitutional discourse.

¹⁴⁶ *SFFA*, 143 S. Ct. at 2166–68.

¹⁴⁷ *Id.* at 2169. But as the dissent responded, “[t]hat is not the role race plays in holistic admissions” — “[r]ace is only one factor out of many.” *See id.* at 2249 (Sotomayor, J., dissenting).

¹⁴⁸ *Id.* at 2170 (majority opinion) (alteration in original) (quoting *Miller v. Johnson*, 515 U.S. 900, 912 (1995)). But as the dissent responded:

It is not a stereotype to acknowledge the basic truth that young people’s experiences are shaded by a societal structure where race matters. Acknowledging that there is something special about a student of color who graduates valedictorian from a predominantly white school is not a stereotype. Nor is it a stereotype to acknowledge that race imposes certain burdens on students of color that it does not impose on white students.

Id. at 2252 (Sotomayor, J., dissenting).

¹⁴⁹ *Id.* at 2161 (majority opinion).

¹⁵⁰ *See id.* at 2164.

¹⁵¹ *See id.* at 2160 (quoting *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954)).

¹⁵² *Id.* The dissent took umbrage to this recasting of *Brown*, responding that the “Court’s re-characterization of *Brown* is nothing but revisionist history and an affront to the legendary life of Justice [Thurgood] Marshall, a great jurist who was a champion of true equal opportunity, not rhetorical flourishes about colorblindness.” *Id.* at 2232 (Sotomayor, J., dissenting).

The next section explores the logics underpinning colorblind constitutionalism.

B. The Underbelly of Colorblind Constitutionalism

Distilling the above, the Supreme Court justifies its colorblind Fourteenth Amendment jurisprudence by concluding that the Equal Protection Clause has embedded within it an “anticlassification” principle demanding people be treated as individuals and not as part of some broader caste.¹⁵³ This mandate, claims the Court, stems from both the text of the Equal Protection Clause and the intent of its Framers. And there are related moral justifications, with the Court and commentators claiming that classifying people by race and then distributing burdens or benefits accordingly stereotypes and stigmatizes the people who are supposedly the beneficiaries of such programs and necessarily discriminates against those who are excluded.¹⁵⁴

i. Anticlassification & the Framers’ Intent. — The Fourteenth Amendment’s Equal Protection Clause declares that no state shall “deny to any person within its jurisdiction the equal protection of the laws.”¹⁵⁵ Justices in support of colorblindness look to this language and note that “[a]lthough many of the Framers of the Fourteenth Amendment conceived of its primary function as bridging the vast distance between members of the Negro race and the white ‘majority,’ the Amendment itself was framed in universal terms, without reference to color, ethnic origin, or condition of prior servitude.”¹⁵⁶ For these Justices, “[a]t the heart of the Constitution’s guarantee of equal protection lies the simple command that the Government must treat citizens as *individuals*, not as simply components of a racial, religious, sexual or national class.”¹⁵⁷

The Justices in support of colorblindness also have claimed that their anticlassification vision of the Fourteenth Amendment is the one that the Framers intended. As told by the Chief Justice, “[t]o its proponents, the Equal Protection Clause represented a ‘foundation[al] principle’ — ‘the absolute equality of all citizens of the United States politically and civilly before their own laws.’”¹⁵⁸ This meant to them, said the Chief Justice, that the Constitution “‘should not permit any

¹⁵³ See *infra* section II.B.1, pp. 1555–57.

¹⁵⁴ See *infra* section II.B.2, pp. 1557–60.

¹⁵⁵ U.S. CONST. amend. XIV, § 1.

¹⁵⁶ *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 293 (1978) (opinion of Powell, J.) (citation omitted) (citing *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 71 (1873)).

¹⁵⁷ *Parents Involved*, 551 U.S. 701, 730 (2007) (opinion of Roberts, C.J.) (alteration in original) (emphasis added) (quoting *Miller v. Johnson*, 515 U.S. 900, 911 (1995)).

¹⁵⁸ *SFFA*, 143 S. Ct. 2141, 2159 (2023) (alterations in original) (quoting CONG. GLOBE, 39th Cong., 1st Sess. 431 (1866) (statement of Rep. John Bingham)).

distinctions of law based on race or color' because any 'law which operates upon one man [should] operate *equally* upon all.'"¹⁵⁹

It's worth spending a moment on Justice Thomas's "originalist defense of the colorblind Constitution" from *SFFA*.¹⁶⁰ Justice Thomas first started with the Civil Rights Act of 1866¹⁶¹ — Congress's "attempt to pre-empt the Black Codes."¹⁶² Pointing to the text of the Act,¹⁶³ Justice Thomas claimed that the "text of the provision left no doubt as to its aim: All persons born in the United States were equal citizens entitled to the same rights and subject to the same penalties as white citizens in the categories enumerated."¹⁶⁴ But when the constitutionality of the Act came into question, the need for additional constitutional amendments became clear. And pointing to the drafting and ratification history of the Fourteenth Amendment and the text of section 1, Justice Thomas declared that the Fourteenth Amendment was designed to "establish the full constitutional right of all persons to equality before the law and would prohibit legal distinctions based on race or color."¹⁶⁵ Post-ratification history "clear[ly]" supported this view, Justice Thomas went on, pointing to statements from lawmakers surrounding the passage of the Civil Rights Act of 1875.¹⁶⁶ As did the Court's early Fourteenth Amendment case law, Justice Thomas continued, which "made clear that the Fourteenth Amendment's equality guarantee applied to members of *all* races . . . ensuring all citizens equal treatment under law."¹⁶⁷ This history (which the dissent would argue was incomplete) led Justice Thomas to reject "an 'antisubordination' view of the

¹⁵⁹ *Id.* (alteration in original) (citations omitted) (quoting Supp. Brief for United States on Reargument at 41, *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (Nos. 1, 2, 4, 8 & 10); CONG. GLOBE, 39th Cong., 1st Sess. 2459 (1866) (statement of Rep. Thaddeus Stevens)).

¹⁶⁰ *Id.* at 2177 (Thomas, J., concurring).

¹⁶¹ Ch. 31, 14 Stat. 27 (codified as amended in scattered sections of 42 U.S.C.).

¹⁶² *SFFA*, 143 S. Ct. at 2178 (Thomas, J., concurring).

¹⁶³ The Civil Rights Act of 1866 declared, in pertinent part:

That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.

Civil Rights Act of 1866 § 1.

¹⁶⁴ *SFFA*, 143 S. Ct. at 2178 (Thomas, J., concurring) (citing Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 958 (1995)).

¹⁶⁵ *Id.* at 2182 (quoting Supp. Brief for United States on Reargument, *supra* note 159, at 65).

¹⁶⁶ *See id.* at 2183.

¹⁶⁷ *Id.* at 2184 (referencing *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873)).

Fourteenth Amendment,” meaning a view that “the Amendment forbids only laws that hurt, but not help, blacks.”¹⁶⁸

2. *The Moral Harms and Prudential Concerns of Racial Classifications.* — Even if one adopts an “anticlassification” view of the Fourteenth Amendment, what exactly does that mean? To answer that question, it’s necessary to look beyond the label. Once one does, it is clear that with colorblind constitutionalism comes a series of moral and pragmatic claims of concern with state-sanctioned racial classifications.¹⁶⁹ These claims can be largely divided along three lines: stereotype, administrability, and discrimination.

First, there’s the stereotype claim. This claim rests on the notion that the government classifying people “on the basis of race . . . engages in the offensive and demeaning assumption that [people] of a particular race, because of their race, think alike.”¹⁷⁰ This in turn “demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities.”¹⁷¹ Or as put by Justice Thomas, “[m]embers of the same race do not all share the exact same experiences and viewpoints,” and yet “racial policies suggest that racial identity ‘alone constitutes the being of the race or the man.’”¹⁷² Thus, to avoid this invidious stereotyping, the government must treat a person “based on his or her experiences as an individual — not on the basis of race.”¹⁷³

¹⁶⁸ *Id.* at 2185. Of course, the dissenting Justices disagreed with Justice Thomas’s view of history. The dissent, looking at much the same history, believed “history makes it ‘inconceivable’ that race-conscious college admissions were unconstitutional,” *see id.* at 2229–30 (Sotomayor, J., dissenting) (quoting *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 398 (1978) (opinion of Marshall, J.)), as the contemporaneous legislative history leaves “no doubt that the Equal Protection Clause permits consideration of race to achieve its goal,” *id.* at 2228.

¹⁶⁹ Professor Jerome Culp argues that “the colorblind principle is not a moral requirement, but rather a policy argument resting on several invalid assumptions” that favors leaving in place a “racialized status quo that leaves black people and other racial minorities in an unequal position.” Jerome McCristal Culp, Jr., Essay, *Colorblind Remedies and the Intersectionality of Oppression: Policy Arguments Masquerading as Moral Claims*, 69 N.Y.U. L. REV. 162, 166–67 (1994).

¹⁷⁰ *SFFA*, 143 S. Ct. at 2170 (quoting *Miller v. Johnson*, 515 U.S. 900, 911–12 (1995)).

¹⁷¹ *Id.* (quoting *Rice v. Cayetano*, 528 U.S. 495, 517 (2000)).

¹⁷² *Id.* at 2202 (Thomas, J., concurring) (quoting JACQUES BARZUN, *RACE: A STUDY IN MODERN SUPERSTITION* 114 (1937)); *see also* *Holder v. Hall*, 512 U.S. 874, 906 (1994) (Thomas, J., concurring in the judgment).

¹⁷³ *SFFA*, 143 S. Ct. at 2176 (majority opinion). The dissenting Justices responded to the stereotype argument by asserting that the majority’s “course reflects its inability to recognize that racial identity informs some students’ viewpoints and experiences in unique ways. . . . It is not a stereotype to acknowledge the basic truth that young people’s experiences are shaded by a societal structure where race matters.” *Id.* at 2252 (Sotomayor, J., dissenting). As Professor Elise Boddie argues, it is colorblindness that “demeans persons who embrace racial identity by denying their agency over how they present themselves to — and consequently are understood by — the state.” Elise C. Boddie, *The Indignities of Color Blindness*, 64 UCLA L. REV. DISCOURSE 64, 67 (2016); *see also* Osamudia R. James, *Valuing Identity*, 102 MINN. L. REV. 127, 161 (2017) (“The concept of dignity encompasses the idea that every human being possesses an intrinsic worth by virtue of

Related to the stereotype claim is a stigma claim historically voiced by Justice Thomas.¹⁷⁴ According to Justice Thomas, race-conscious programs “stamp minorities with a badge of inferiority and may cause them to develop dependencies or to adopt an attitude that they are ‘entitled’ to preferences.”¹⁷⁵ There are two distinct elements to Justice Thomas’s stigma claim. On one hand, he thinks race-conscious programs “taint[] the accomplishments of all those who are admitted as a result of racial discrimination.”¹⁷⁶ But beyond that, at least in the affirmative action context, he thinks that the programs also taint the accomplishment of “all those who are the same race as those admitted as a result of racial discrimination” because “no one can distinguish those students from the ones whose race played a part in their admission.”¹⁷⁷ As Justice Thomas sees it, “[w]hen blacks and Hispanics take positions in the highest places of government, industry, or academia, it is an open question whether their skin color played a role in their advancement.”¹⁷⁸ Put another way, the mere existence of government racial preferences to Justice Thomas means that *all* racial minorities are “tarred as undeserving.”¹⁷⁹

Second, there’s the administrability claim, closely related to the stereotype claim, that surfaced most prominently in *SFFA*. For instance, Justice Thomas openly wondered whether race-based programs are even administrable given that “race is a social construct,” with these

being human, and that some ways of treating humans are either inconsistent with, or integral to, respect for the intrinsic worth of humans. Although the idea of dignity can certainly be contemplated independently of racial identity, acknowledging and respecting the intrinsic worth of human beings requires acknowledging that their humanity has been shaped by their identity and accompanying experiences. This is especially important for minoritized identities, who, unlike Whites, are not permitted to understand their humanity through a lens uninformed by racial identity.” (footnote omitted).

¹⁷⁴ See generally Tomiko Brown-Nagin, *The Transformative Racial Politics of Justice Thomas?: The Grutter v. Bollinger Opinion*, 7 U. PA. J. CONST. L. 787 (2005) (discussing Justice Thomas’s focus on stigmatic harm); Christopher A. Bracey, *The Cul de Sac of Race Preference Discourse*, 79 S. CAL. L. REV. 1231, 1278–79 (2006) (same).

¹⁷⁵ *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 241 (1995) (Thomas, J., concurring in part and concurring in the judgment).

¹⁷⁶ *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297, 333 (2013) (Thomas, J., concurring).

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 334 (alterations omitted) (quoting *Grutter v. Bollinger*, 539 U.S. 306, 373 (2003) (Thomas, J., concurring in part and dissenting in part)).

¹⁷⁹ *Grutter*, 539 U.S. at 373 (Thomas, J., concurring in part and dissenting in part). Along with the idea of stigma comes the concept of mismatch, with Justice Thomas arguing that affirmative action programs “sort at least some blacks and Hispanics into environments where they are less likely to succeed academically relative to their peers.” *SFFA*, 143 S. Ct. 2141, 2197 (2023) (Thomas, J., concurring) (citing THOMAS SOWELL, *AFFIRMATIVE ACTION AROUND THE WORLD: AN EMPIRICAL STUDY* 145–46 (2004)). As the dissent explained, this theory “was debunked long ago.” *Id.* at 2256 (Sotomayor, J., dissenting). In fact, a study done by Professors Angela Onwuachi-Willig, Emily Houh, and Mary Campbell found that “students of color are no more likely to report experiences of stigma in schools with affirmative action programs than in schools without affirmative action programs,” and thus the argument Justice Thomas asserted that affirmative action leads to students of color suffering stigmatic harm is “not supported by [their] data.” Angela Onwuachi-Willig et al., *Cracking the Egg: Which Came First — Stigma or Affirmative Action?*, 96 CALIF. L. REV. 1299, 1339 (2008).

“ephemeral, socially constructed categories” shifting over time.¹⁸⁰ Justice Gorsuch thought that racial “classifications rest on incoherent stereotypes,” and “attempts to divide us all up into a handful of groups have become only more incoherent with time.”¹⁸¹ Chief Justice Roberts expressed that the use of racial categories are sometimes “plainly overbroad,” at other times are “arbitrary or undefined,” and yet “still other categories are underinclusive.”¹⁸² The underlying sentiment of these statements is clear: given the complexities and malleability of race, race-conscious admissions programs (at least the ones Harvard and UNC used) are impossible to administer in a constitutional fashion.¹⁸³

Finally, there’s the discrimination claim based on a “zero-sum” logic: when “benign” racial classifications benefit one race, they necessarily harm another race. Justice Scalia made this claim early in his time on the Court with regard to white people, positing that so-called “benign” race-based government programs “have individual victims, whose very real injustice we ignore whenever we deny them enforcement of their right not to be disadvantaged on the basis of race.”¹⁸⁴ As Justice Scalia saw it, it’s not “worth” “making . . . right” an “injustice rendered in the past to a black man . . . by discriminating against a white.”¹⁸⁵ And in *SFFA* we saw this reasoning reprised with a twist, with the argument being that Asian Americans are the ones harmed by affirmative action programs, and the Court reasoning that “[a] benefit provided to some applicants but not to others necessarily advantages the former group at the expense of the latter.”¹⁸⁶

As Professor Benjamin Eidelson explains, at the “core” of the Court’s colorblind jurisprudence is the idea “that race-based state actions show a fundamental kind of disrespect for each person’s standing as an autonomous, self-defining individual.”¹⁸⁷ To the Court, the focus on individualism is rooted in the Fourteenth Amendment’s text — after all,

¹⁸⁰ *SFFA*, 143 S. Ct. at 2201 (Thomas, J., concurring).

¹⁸¹ *Id.* at 2210–11 (Gorsuch, J., concurring).

¹⁸² *Id.* at 2167–68 (majority opinion).

¹⁸³ *See, e.g., id.* at 2175.

¹⁸⁴ *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 527 (1989) (Scalia, J., concurring in the judgment) (citing *Johnson v. Transp. Agency*, 480 U.S. 616, 677 (1987) (Scalia, J., dissenting)).

¹⁸⁵ *Id.* at 528.

¹⁸⁶ 143 S. Ct. at 2169. Scholars have responded to this by arguing that the Court is relying on a “vision of race as unconnected to the historical reality of Black oppression,” Gotanda, *supra* note 111, at 37, which in turn “insulates patterns of racial exclusion while linking Jim Crow and affirmative action,” Ian F. Haney López, “A Nation of Minorities”: *Race, Ethnicity, and Reactionary Colorblindness*, 59 STAN. L. REV. 985, 1062 (2007). As Professor Haney López starkly concludes: “As it currently stands, constitutional race law is a disaster. It approaches the problem of race in our society exactly backwards, almost invariably striking down efforts to respond to racial hierarchy while insulating from more than cursory review state policies that disproportionately harm minorities.” *Id.* at 1061; *see also* J. Skelly Wright, *Color-Blind Theories and Color-Conscious Remedies*, 47 U. CHI. L. REV. 213, 213–14 (1980) (making similar arguments).

¹⁸⁷ Benjamin Eidelson, *Respect, Individualism, and Colorblindness*, 129 YALE L.J. 1600, 1604 (2020).

the Equal Protection Clause protects “person[s],”¹⁸⁸ not groups.¹⁸⁹ And it’s rooted in an “intuitive ‘[r]evulsion [that] starts up at the instant the state reduces a person to her race in deciding how to treat her.’”¹⁹⁰

Until recently, the “colorblindness doctrine developed in the Court’s affirmative action cases has been extended only to a limited number of contexts outside of affirmative action, most notably to race-based primary school assignments and to race-based redistricting.”¹⁹¹ However, as the next section shows, while not explicitly calling their jurisprudence colorblind, the courts that have refused to consider race in the Fourth Amendment seizure context have done so by adopting the very same reasoning that underlies the Court’s colorblind equal protection jurisprudence.

C. *Extending Colorblind Constitutionalism to the Fourth Amendment*

The Supreme Court has never explicitly incorporated colorblindness into its Fourth Amendment jurisprudence.¹⁹² Instead, rather than openly embracing colorblindness, the Court’s criminal procedure jurisprudence reveals “a praxis of constitutional colorblindness evinced by how rarely race is discussed.”¹⁹³ Yet the courts that have held that race has no place in a Fourth Amendment seizure analysis have borrowed from the colorblind constitutionalist playbook.

Return to the Tenth Circuit’s decision in *United States v. Easley*¹⁹⁴ and the Eleventh Circuit’s decision in *United States v. Knights*,¹⁹⁵ the two federal appellate decisions that have squarely rejected the use of

¹⁸⁸ U.S. CONST. amend. XIV, § 1 (“No State shall . . . deny to any person . . . the equal protection of the laws.”).

¹⁸⁹ See *McCabe v. Atchison, Topeka & Santa Fe Ry. Co.*, 235 U.S. 151, 161 (1914); Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 231 (1991) (“Beginning with *McCabe*, though, the Court consistently dismissed such arguments with the rhetorically resonant, but analytically unsatisfying, maxim that the Equal Protection Clause guarantees ‘personal,’ not group, rights.”). As Professor Thomas Crocker persuasively argues, however, “person” is not the same as “individual,” and “[p]ersons obtain and sustain their identities within thick social and political relations with others,” while “the individual is a central figure who is opposed to collectives.” Thomas P. Crocker, *Equal Dignity, Colorblindness, and the Future of Affirmative Action Beyond Grutter v. Bollinger*, 64 WM. & MARY L. REV. 1, 23 (2022). Thus, a “Supreme Court that sees its role as treating procedural ‘individuals’ will respond differently to the claims brought before it than one that sees its role as treating substantively complex ‘persons.’” *Id.* at 26.

¹⁹⁰ Eidelson, *supra* note 187, at 1604 (alterations in original) (quoting Frank I. Michelman, *Reflection*, 82 TEX. L. REV. 1737, 1747 (2004)).

¹⁹¹ Katie Eyer, *Constitutional Colorblindness and the Family*, 162 U. PA. L. REV. 537, 539 n.5 (2014) (giving other examples where colorblindness does not feature as explicitly, including family law).

¹⁹² See Carbado, *supra* note 14, at 969 (“Significantly, the Supreme Court has not explicitly articulated colorblindness as a guiding principle of Fourth Amendment law. This ideology has to be excavated.”).

¹⁹³ Osagie K. Obasogie & Zachary Newman, *The Futile Fourth Amendment: Understanding Police Excessive Force Doctrine Through an Empirical Assessment of Graham v. Connor*, 112 NW. U. L. REV. 1465, 1496 (2018).

¹⁹⁴ 911 F.3d 1074 (10th Cir. 2018).

¹⁹⁵ 989 F.3d 1281 (11th Cir. 2021).

race in a Fourth Amendment seizure analysis in detailed opinions.¹⁹⁶ As this section shows, both courts deploy the reasoning found in the Supreme Court’s colorblind equal protection opinions.

I. On Stereotyping & Stigma. — The first reason the courts give for not considering race as part of the seizure analysis is a lack of objectivity: “There is no uniform life experience for persons of color, and there are surely divergent attitudes toward law enforcement officers among members of the population.”¹⁹⁷ As such, given these differences, these courts hold that race does “not lend [itself] to objective conclusions.”¹⁹⁸

If this reasoning sounds familiar, it should: it pervades the Supreme Court’s colorblindness precedents. In the affirmative action context, the Court has used the idea that there is no “uniform experience” of persons of color to argue against race-based admissions programs because they demean an applicant’s individuality by relying on stereotype.¹⁹⁹ And in the vote-dilution context, Justices have voiced skepticism (if not outright hostility) about the ideas of majority-minority districts and cracking and packing because they operate under the assumption that “members of the same racial group . . . think alike.”²⁰⁰

Here, these courts extend this thinking to a different end. Now, because all people of color do not have the same life experiences, and because all people of color do not necessarily think alike, there is no such thing as an “objective” person of color. Notably, when making this jurisprudential move, the courts do not cite any precedent (other than the Eleventh Circuit citing back to the Tenth Circuit),²⁰¹ though on the surface, the reasoning is similar to the Court’s Fourteenth Amendment jurisprudence.²⁰² Instead, these courts intuitively believe that race is inconsistent with an objective perspective.

2. On Administrability. — The second reason the courts give for not considering race as part of the seizure analysis was a lack of administrability: “[W]e have no workable method to translate general attitudes towards the police into rigorous analysis of how a reasonable person would understand his freedom of action in a particular situation.”²⁰³ These courts explained that a “chief benefit[]” of the objective seizure test is “the ability it gives law enforcement to know ex ante what

¹⁹⁶ See *id.* at 1288 (“We may not consider race to determine whether a seizure has occurred.”); see also *Easley*, 911 F.3d at 1081 (“We reject . . . [the] argument that we should consider . . . race as a part of our reasonable person analysis . . .”). The Fourth Circuit’s analysis in *Monroe v. City of Charlottesville*, 579 F.3d 380, 386–87 (4th Cir. 2009), was much more truncated.

¹⁹⁷ *Easley*, 911 F.3d at 1082.

¹⁹⁸ *Knights*, 989 F.3d at 1288.

¹⁹⁹ See, e.g., *SFFA*, 143 S. Ct. 2141, 2169–70 (2023); *Schuetz v. Coal. to Def. Affirmative Action, Integration & Immigrant Rts. & Fight for Equal. by Any Means Necessary*, 572 U.S. 291, 308 (2014) (plurality opinion).

²⁰⁰ See, e.g., *Shaw v. Reno*, 509 U.S. 630, 647 (1993).

²⁰¹ See *Knights*, 989 F.3d at 1288–89 (citing *Easley*, 911 F.3d at 1082).

²⁰² See, e.g., *SFFA*, 143 S. Ct. at 2169–70.

²⁰³ *Knights*, 989 F.3d at 1289.

conduct implicates the Fourth Amendment.”²⁰⁴ The injection of race into the calculus undermines this benefit because there is no “systematic way” to factor in race “short of assuming that all interactions between police officers and black individuals are seizures.”²⁰⁵

This concern, too, is not all that different from the concern animating the Court’s colorblind equal protection jurisprudence. Part of what makes race-conscious college admissions programs unconstitutional, reasoned the Court in *SFFA*, is the idea that race-based admissions programs are hard (if not impossible) to administer fairly.²⁰⁶ As the Court saw it, race is too amorphous and malleable, making any categorization by race inherently suspect.²⁰⁷ Therefore, in the Court’s words, the race-conscious admissions programs at issue were not sufficiently “measurable,” “focused,” “coherent,” or “concrete.”²⁰⁸

Again, the courts that have held that a Fourth Amendment reasonable person cannot be raced have used this same line of thought (without citing the case law),²⁰⁹ but have extended it to an entirely novel context. Instead of race being too slippery to form a small part of a broader holistic program, it is too inchoate to consider when determining how a reasonable person of a certain race would perceive their interactions with police.²¹⁰ Thus, these courts, again citing no clear precedent, reject the idea of courts (and police) being able to discern how a person’s race may affect their reasonable beliefs.

3. *On Discrimination.* — While the above two concerns articulated by the courts for not considering race as part of the seizure analysis resemble the arguments made by the Supreme Court in the Fourteenth Amendment context, the final argument the courts make against considering race cites the Fourteenth Amendment explicitly. These courts believed that they could not consider race because “a seizure analysis that differentiates on the basis of race raises serious equal protection concerns if it could result in different treatment for those who are otherwise similarly situated.”²¹¹

²⁰⁴ *Easley*, 911 F.3d at 1082.

²⁰⁵ *Knights*, 989 F.3d at 1289. The Fourth Circuit said something similar, stating that a holding that a Black person’s “subjective belief that he was not free to terminate the encounter was objectively reasonable because relations between police and minorities are poor would result in a rule that all encounters between police and minorities are seizures.” *Monroe v. City of Charlottesville*, 579 F.3d 380, 386–87 (4th Cir. 2009).

²⁰⁶ See *SFFA*, 143 S. Ct. at 2166.

²⁰⁷ See *id.*

²⁰⁸ *Id.* at 2166, 2168, 2175.

²⁰⁹ See *Easley*, 911 F.3d at 1082 (relying on the assertion that “there are surely divergent attitudes toward law enforcement officers among [people of color]”); *Knights*, 989 F.3d at 1288 (citing David K. Kessler, *Free to Leave? An Empirical Look at the Fourth Amendment’s Seizure Standard*, 99 J. CRIM. L. & CRIMINOLOGY 51, 77 & n.151 (2009)).

²¹⁰ See *Easley*, 911 F.3d at 1082; *Knights*, 989 F.3d at 1288.

²¹¹ *Easley*, 911 F.3d at 1082; see *Knights*, 989 F.3d at 1289 (“And even if we could devise an objective way to consider race, we could not apply a race-conscious reasonable-person test without running afoul of the Equal Protection Clause.”).

This reasoning is the same discrimination concern found in the Court's colorblind equal protection jurisprudence. In the affirmative action and government set-aside cases, the colorblind Justices thought that race-conscious programs were a "zero-sum" game, where a benefit that redounds to one race necessarily redounds to the detriment of another.²¹² Put another way, as Justice Scalia said in *Croson*, "[n]othing is worth" incurring this harm.²¹³

The courts that refused to consider race in the Fourth Amendment context for fear of violating the Equal Protection Clause also seemed to believe that taking a person's race into account would lead to some undue benefit for some people of color and result in invidious discrimination against white people.²¹⁴ But the contexts are markedly different. In the affirmative action and government contracting cases, the colorblind Justices reasoned that a program that favored certain people necessarily *disfavored* others in the world of scarce resources. Yet the Tenth and Eleventh Circuits ported this idea to the Fourth Amendment context to suggest that *any* constitutional standard that accounts for race, and therefore potentially operates differently given a person's race, is unconstitutional. And again, they did so without citing any relevant precedent.²¹⁵

The forceful articulation of colorblind constitutionalism that was once on the fringe of the Supreme Court's Equal Protection Clause jurisprudence has now migrated to the mainstream under this newly muscular conservative Court. But colorblind constitutionalism has not only migrated from the wings to center stage; it has also been transposed by lower courts to an entirely different constitutional context: the Fourth Amendment.

The next Part is designed to show that this "case law creep" is a mistake — that colorblind constitutionalism, at least as articulated by the Supreme Court thus far, has no place in the Fourth Amendment seizure context. By case law creep, this Article does not mean to suggest that it is always improper to port case law (or a case's underlying ideas) from one context to another. It's the lack of rigorous analogical critique *before* the transposition that this Article takes issue with. That lack of rigor has paved the way for courts to import colorblindness into Fourth

²¹² *SFFA*, 143 S. Ct. 2141, 2199 (2023) (Thomas, J., concurring).

²¹³ *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 528 (1989) (Scalia, J., concurring in the judgment).

²¹⁴ See *Easley*, 911 F.3d at 1082.

²¹⁵ The Tenth Circuit did not cite anything in support of this proposition. See *id.* The Eleventh Circuit cited *Whren v. United States*, 517 U.S. 806 (1996). *Knights*, 989 F.3d at 1289. This citation may be trolling at its peak, as *Whren* was the case that essentially held that police officers could racially profile someone under the Fourth Amendment, and thus the Equal Protection Clause was the proper recourse for racially selective law enforcement. *Whren*, 517 U.S. at 813. See generally Chin & Vernon, *supra* note 23, at 882. *Whren* said nothing about whether a reasonable person standard can account for race, and in fact, as section III.B explains, *Whren* undermines the Eleventh Circuit's point here. See *infra* p. 1578.

Amendment jurisprudence without engaging in the analytical contestation our system of common law judging requires.

III. THE FOURTH AMENDMENT, IN FULL COLOR

At oral argument in *SFFA*, Justice Jackson made the point that a person's story "in many ways" may be "bound up with his race and with the race of his ancestors," and that in telling his story, he may want to have that "honored."²¹⁶ Of course Justice Jackson was saying this in the context of college admissions and was making a point about a person telling their own individual story, but there is no reason to limit that sentiment to that context. In arguing for suppression, a defendant has to tell a story about how a "reasonable person" would have felt in that particular police encounter. *Not* being allowed to race that reasonable person necessarily means the reasonable person standard is incapable of honoring all experiences, including the experiences of defendants of color.²¹⁷ In that regard, *not* allowing a person of color to race the reasonable person can leave the impression that race has no influence on policing in America, a notion belied both by empirics and public sentiment,²¹⁸ and perhaps more importantly, one that is at odds with how the people from many communities experience policing.

The question with which courts are now grappling — whether the reasonable person standard can account for race — is a question that is ultimately about dignity. Who is the law willing to recognize? As explained below, this question is not all that distinct from the concerns animating the Court's colorblind equal protection jurisprudence. In fact, as this Part argues, the reasoning behind the Court's colorblind equal protection jurisprudence is *compatible* with race-ing the Fourth Amendment seizure analysis, especially when considered in the broader context of the Court's Fourth Amendment jurisprudence. This Part therefore strikes a cautionary note — warning against uncritically extending concepts from one area of law to another. It also strikes a hopeful chord — providing a vision of the law that begins to contend with the complexities of race.

²¹⁶ Transcript of Oral Argument at 66, *Students for Fair Admissions, Inc. v. Univ. of N.C.*, 143 S. Ct. 2141 (2022) (No. 21-707), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2022/21-707_bb7j.pdf [<https://perma.cc/E3X2-XPKA>]. Professors Devon Carbado and Cheryl Harris make a similar point to the one made by Justice Jackson, explaining that "[t]he life stories of many people — particularly with regard to describing disadvantage — simply do not make sense without reference to race." Devon W. Carbado & Cheryl I. Harris, *The New Racial Preferences*, in *RACIAL FORMATION IN THE TWENTY-FIRST CENTURY* 183, 190 (Daniel Martinez HoSang et al. eds., 2012).

²¹⁷ See Carbado, *supra* note 14, at 1003.

²¹⁸ See Drew DeSilver et al., *10 Things We Know About Race and Policing in the U.S.*, PEW RSCH. CTR. (June 3, 2020), <https://www.pewresearch.org/short-reads/2020/06/03/10-things-we-know-about-race-and-policing-in-the-u-s/> [<https://perma.cc/J65F-SNWE>].

A. *The Raced Reasonable Person in the Face of Colorblindness*

Taking the Court at its word (put a pin in this),²¹⁹ colorblind constitutionalism is more than a “rhetorical flourish[]” used to advance a particular agenda.²²⁰ Rather, it is a constitutional theory that purportedly has various foundational underpinnings. Given that, we must examine whether those same underpinnings support the exclusion of race in the Fourth Amendment seizure analysis, putting aside for a moment that it would also require applying a constitutional principle to a wholly distinct constitutional context (put a pin in this, too). An evaluation of the concerns animating colorblindness in the Equal Protection Clause context reveals that those same concerns do not mean that Fourth Amendment doctrine must be immune to racialized realities.

I. *Against Stereotyping & Stigma Concerns.* — Return first to the stereotyping concerns. Behind the theory that the Constitution is colorblind, reasoned some Justices, is the notion that stereotyping people of color is demeaning.²²¹ To these Justices, considering race strips a person of their individuality and renders them nothing more than the color of their skin.²²² But that is not what happens when you race the Fourth Amendment’s reasonable person. Instead, allowing a reasonable person to be raced allows for the truly “holistic” understanding of a person that the colorblind Court seems to demand.

This point may be helpful to illustrate with an example, using the Seventh Circuit case *United States v. Smith*.²²³ There, two Milwaukee police officers stopped a Black man walking on the street, searched him, and found a gun.²²⁴ Mr. Smith argued that he was seized, while the state argued the stop was consensual.²²⁵ He made all the familiar arguments for why a reasonable person would not have felt free to terminate the encounter: the number of officers, time of day, location, tone of questioning, et cetera.²²⁶ But Mr. Smith’s lawyers also pointed out that he

²¹⁹ See Eidelson, *supra* note 187, at 1609 (“[E]ven if one concludes that the Justices themselves are not operating in good faith, it hardly follows that all who might be drawn to their vision of equal protection are not either.”); Harawa, *supra* note 33, at 687 (arguing that “racial justice advocates, especially those forced to operate in the criminal legal system at it stands, should take the Court at its word” when marshalling case law to advance racial justice).

²²⁰ *SFFA*, 143 S. Ct. 2141, 2232 (2023) (Sotomayor, J., dissenting).

²²¹ See *supra* notes 170–173 and accompanying text.

²²² See *supra* notes 170–179 and accompanying text.

²²³ 794 F.3d 681 (7th Cir. 2015).

²²⁴ *Id.* at 683, 687.

²²⁵ See *id.* at 682.

²²⁶ See *id.* at 685.

did not feel free to leave in part because of the Milwaukee Police Department's documented history of racist policing, including a history of using violence against people of color, which, as he pointed out, fit within a broader national trend of racially biased policing.²²⁷ Based on the totality of the circumstances, including race, the Seventh Circuit held that Mr. Smith was seized when police stopped him.²²⁸

One could imagine that if Mr. Smith wanted to further bolster his argument, he could have called people from his community to testify at his suppression hearing about why someone with their experiences or from their neighborhood may feel the need to comply with police. Or, if he so wished, he himself could have taken the stand and explained exactly why the encounter was so arresting for him personally, including the role his race played in him not feeling free to avoid the police.²²⁹ And a judge could also take this information into account when deciding whether a seizure objectively occurred without engaging in any stereotyping at all.

Such nuanced decisionmaking is a far cry from reducing people to their race, or claiming, as some courts have asserted, that allowing race to factor into the seizure analysis would bless a blanket rule that every time a Black person interacts with police it must be a seizure.²³⁰ To the contrary, it allows a person to tell their *whole* story, including how their race affects it, which the Supreme Court has claimed is still allowed even under its view that the Constitution is colorblind.²³¹ If the problem with stereotyping is this idea that race-based classifications reduce people to a form of racial caricature, what this Article advocates is far from that.

And remember *whom* the Court claims to care about being harmed or stigmatized by stereotyping — the *person of color* whose individuality is supposedly demeaned when they are reduced to nothing but their race.²³² It is hard to see how this concern has legs when it is the *defendant* who raises his race as important to the question of whether he was seized. Presumably, if the defendant thought that their race was irrelevant, they would say nothing. If anything, it is the *courts* that refuse to consider race that are doing the demeaning, as now a defendant

²²⁷ See Brief and Required Short Appendix of Defendant-Appellant at 12, *Smith*, 794 F.3d 681 (No. 14-2982) (making similar arguments).

²²⁸ *Smith*, 794 F.3d at 688.

²²⁹ See, e.g., Janice Nadler, *No Need to Shout: Bus Sweeps and the Psychology of Coercion*, 2002 SUP. CT. REV. 153, 201 (2003) (“The simplest way to determine whether a reasonable person voluntarily consented to a police search is simply to ask them, ‘To what extent did you feel free to decline the officer’s request?’”).

²³⁰ The Fourth and Eleventh Circuits have made such assertions. See *Monroe v. City of Charlottesville*, 579 F.3d 380, 386–87 (4th Cir. 2009); *United States v. Knights*, 989 F.3d 1281, 1289 (11th Cir. 2021).

²³¹ *SFFA*, 143 S. Ct. 2141, 2176 (2023).

²³² See *id.* at 2198 (Thomas, J., concurring).

has to pretend that their race played no role in a police-citizen encounter and is effectively forbidden from discussing their truth in court.²³³ Yet this is the exact form of truth telling the *SFFA* Court claimed is constitutionally permissible.²³⁴

It is perhaps for this reason that the courts that discuss stereotyping concerns in the Fourth Amendment context do so in a way that ignores the nuance of the stereotype concerns expressed in the Court's colorblind jurisprudence. Playing at the surface, these courts point out that there is no monolithic racial experience to then conclude *ipse dixit* that this weighs against race being considered as part of an objective reasonable person standard.²³⁵

This reasoning not only is divorced from the dignitary rationale underlying the stereotyping concerns in the Court's colorblind opinions, but also fights a strawman, as one could paint a nuanced picture of how race may factor into a police-citizen encounter based on circumstances on the ground without resorting to gross stereotypes or generalizations. Beyond that, as a general matter, uniformity is foreign to reasonableness standards.²³⁶ As Justice Oliver Wendell Holmes, Jr. explained, reasonableness standards are "standards of general application" that measure "a certain average of conduct."²³⁷ As such, it is hard to see the idea that there is no monolithic racial experience as being a reason to discount race altogether. Ironically, perhaps the version of the stereotype complaint articulated by colorblind Fourth Amendment judges better belongs in the chorus of those who have long advocated for creating more textured reasonable person analyses or abandoning them altogether,²³⁸ including critical race theorists, queer legal theorists, critical disability

²³³ See, e.g., Harawa, *supra* note 14, at 979; David Luban, *Lawyers as Upholders of Human Dignity (When They Aren't Busy Assaulting It)*, 2005 U. ILL. L. REV. 815, 822 ("The advocate defends human dignity by giving the client voice and sparing the client the humiliation of being silenced and ignored."); Walter I. Gonçalves, Jr., *Narrative, Culture, and Individuation: A Criminal Defense Lawyer's Race-Conscious Approach to Reduce Implicit Bias for Latinxs*, 18 SEATTLE J. FOR SOC. JUST. 333, 339 (2020) (noting that, in the author's experience as a federal public defender, "many clients appreciate lawyers sensitive to racial prejudice and willing to do something about it within the system").

²³⁴ See *SFFA*, 143 S. Ct. at 2176.

²³⁵ See *United States v. Easley*, 911 F.3d 1074, 1082 (10th Cir. 2018); *Knights*, 989 F.3d at 1288.

²³⁶ See, e.g., OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 108 (1881).

²³⁷ *Id.*

²³⁸ As Professors Martha Minow and Todd Rakoff compellingly argue: "Requiring people to act like the 'reasonable person under the circumstances' may indeed be the right standard, if the 'circumstances' can be meaningfully explicated in terms of life in a multicultural society. A reinvigorated reasonable person standard could attend to the influences of group experiences and social structures on the perceptions and conduct of individuals and also to the room reasonably available to individuals to move between and beyond group mores." Martha Minow & Todd Rakoff, *Is the "Reasonable Person" a Reasonable Standard in a Multicultural World?* (citing Kathryn Abrams, *The Reasonable Woman: Sense and Sensibility in Sexual Harassment Law*, *DISSENT*, Winter 1995, at 48, 52–54), in *EVERYDAY PRACTICES AND TROUBLE CASES* 40, 48 (Austin Sarat et al. eds., 1998).

theorists, and feminist legal theorists.²³⁹ Rather than figure out what is “average” in a highly diverse society where people have vastly divergent experiences, racialized reasonable person standards make more sense in light of this complaint in that the standard would instead be more closely calibrated to a particular community and more closely aligned to the particular litigant, such that it captures a more proximate vision of what the “average” person of that positionality might believe.²⁴⁰

2. *Against Administrability Concerns.* — Now go back to administrability concerns. In the equal protection context, the administrability problem as expressed by the Court is that it is hard to quantify the success of “diversity” when using race in college admissions programs, and it is hard to neatly categorize people by race for purposes of those programs.²⁴¹ Neither of these concerns fits in the Fourth Amendment seizure context. First, there is no “diversity” aspiration that accompanies a raced reasonable person analysis. Rather, it is an added layer of context to an objective standard. Second, a raced reasonable person standard does not require the state to place people in ill-defined racial categories. Instead, a defendant can identify *their own* racial identity — whatever that may be, at whatever level of granularity the defendant wishes. Third, and critically, a court would not just have to make haphazard guesses about how race should influence the inquiry at hand. Rather, the defendant, after identifying their race, would then explain *how* the court should take race into account when conducting the seizure analysis, just like a college applicant can explain to admissions officers considering their application *why* their race matters.²⁴² And a judge, doing the regular job of judging, would decide how persuasive this evidence is.

²³⁹ See generally Abrams, *supra* note 238, at 48; Naomi R. Cahn, *The Looseness of Legal Language: The Reasonable Woman Standard in Theory and in Practice*, 77 CORNELL L. REV. 1398 (1992); Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991); Mayo Moran, *The Reasonable Person: A Conceptual Biography in Comparative Perspective*, 14 LEWIS & CLARK L. REV. 1233 (2010); Haim Abraham, *Queering the Reasonable Person*, in DIVERSE VOICES IN TORT LAW (Kirsty Horsey ed., forthcoming Apr. 2024) (on file with the Harvard Law School Library); Jamelia Morgan, *Disability's Fourth Amendment*, 122 COLUM. L. REV. 489 (2022); see also sources cited *supra* note 73.

²⁴⁰ As Professor Carol Steiker notes, a “freewheeling ‘reasonableness’ standard . . . suffers from the concerns about official arbitrariness that rules are meant to combat.” Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 855 (1994). Of course, any fight with a reasonable person standard is a fight with a legal standard that underpins much of Anglo-American law. See Brandon L. Garrett, *Constitutional Reasonableness*, 102 MINN. L. REV. 61, 69–70 (2017). I do not take on that fight here.

²⁴¹ See *SFFA*, 143 S. Ct. 2141, 2167 (2023).

²⁴² See *id.* at 2176 (“[N]othing in this opinion should be construed as prohibiting universities from considering an applicant’s discussion of how race affected his or her life, be it through discrimination . . . or otherwise.”).

Another example may help, using the Ninth Circuit's decision in *United States v. Washington*.²⁴³ Mr. Washington, who is Black, was sitting in his parked car one night in Portland, Oregon, when a white police officer decided to approach him.²⁴⁴ The officer walked up to the car with his flashlight glaring and his baton and gun in full view.²⁴⁵ Then, just as the officer asked Mr. Washington to step out of his car, another white police officer pulled up.²⁴⁶ Mr. Washington got out of his car with his hands raised and walked over to one of the squad cars as the officers directed; one of the officers searched his car and found a gun.²⁴⁷ Mr. Washington argued that he was seized at the time of the search.²⁴⁸ And in addition to relying on the standard seizure factors, his lawyers pointed out that in the past one and a half years, Portland police officers shot two Black Portland residents during traffic stops, killing one, and after these incidents, literature was circulated around town urging people to follow police directions and to comply with any requests.²⁴⁹ The Ninth Circuit considered this information when holding that Mr. Washington had been seized at the time police searched him.²⁵⁰

As shown above, there are no “administrability” problems, at least in the equal protection sense, with a court considering the pertinence of racial information. There was no need for the Ninth Circuit to make a crude guess about Mr. Washington's race or lump Mr. Washington into some overly broad racial category with which he may not fully identify. And there was no uncertainty about how race should be considered in this context — *Mr. Washington* told the court how and why his race should factor into the free-to-leave calculus, which the Ninth Circuit rightfully concluded was compelling.

Courts are already tasked with conducting a holistic review of the totality of the circumstances when determining whether a person has been seized.²⁵¹ A defendant can argue about an officer's tone of voice, the quality of their questioning, the proximity and number of officers,

²⁴³ 490 F.3d 765 (9th Cir. 2007).

²⁴⁴ *Id.* at 767–68.

²⁴⁵ *Id.* at 768.

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ *Id.* at 769.

²⁴⁹ *Id.* at 768–69. See Appellant's Opening Brief at 11–12, *Washington*, 490 F.3d 765 (No. 06-30386) (noting that the shooting of Black motorists by Portland police was brought out at the suppression hearing).

²⁵⁰ *Washington*, 490 F.3d at 776.

²⁵¹ *United States v. Mendenhall*, 446 U.S. 544, 554 (1980) (opinion of Stewart, J.) (“We conclude that a person has been ‘seized’ within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.”). The full Court has “embraced” the test articulated by Justice Stewart. *Michigan v. Chesternut*, 486 U.S. 567, 573 (1988).

the presence or absence of weapons.²⁵² The list goes on. None of this is science; no factor is dispositive.²⁵³ Rather, courts must make intuitive guesses about how a reasonable person would feel under a multitude of circumstances with various permutations, meaning the analysis often turns on the sensibilities of the judge.²⁵⁴

Adding race to this calculus, if done thoughtfully, does not make the seizure inquiry any more nebulous. In fact, it concretizes it. When arguing about how a reasonable person of a certain race would experience a police encounter, a defendant could rely on social science studies (psychology, sociology, criminology, political science, and so forth). A defendant could explain how a person of color would experience a police encounter based on events arising out of their specific community, including by calling community members to testify about police relations in the community and drawing from policing data within a particular jurisdiction or department. A defendant themselves could even testify about why they did not feel free to leave and a judge could determine whether that feeling was reasonable based on the objective information, including the information regarding race, before them. In other words, a court could consider a defendant's subjective beliefs and decide whether they were objectively reasonable. These examples illustrate the fact that considering race as a factor in the seizure context is not any more immeasurable than any other factor courts already consider. In fact, given the state of the academic literature on race and policing, judges have plenty of data to work from when considering how race may impact a police-citizen encounter. In this way, race-ing the reasonable person takes out some of the guesswork that judges already have to perform when conducting a seizure inquiry. Allowing courts to consider race gives them license to ground their analyses in more measurable information.

Because a defendant arguing about race in the Fourth Amendment context does not present the court with the same administrability concerns that worried the Court in the race-conscious admissions context, the Fourth Amendment–colorblind courts point to a different variant of the administrability concern: that it will be hard for a police officer to

²⁵² *Mendenhall*, 446 U.S. at 554 (opinion of Stewart, J.) (“Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer’s request might be compelled.”).

²⁵³ See *Florida v. Royer*, 460 U.S. 491, 506 (1983) (plurality opinion) (“We do not suggest that there is a litmus-paper test for distinguishing a consensual encounter from a seizure or for determining when a seizure exceeds the bounds of an investigative stop.”).

²⁵⁴ See *United States v. Arvizu*, 534 U.S. 266, 274 (2002) (“Our cases have recognized that the concept of reasonable suspicion is somewhat abstract But we have deliberately avoided reducing it to ‘a neat set of legal rules.’” (quoting *Ornelas v. United States*, 517 U.S. 690, 695–96 (1996))); see also *id.* at 278 (Scalia, J., concurring) (emphasizing that, on appeal, reasonableness review affords “due weight” to the conclusions drawn by trial court judges).

“readily discern[]” “ex ante what conduct implicates the Fourth Amendment.”²⁵⁵

But this application does not work. First, as other scholars have noted, the Court’s Fourth Amendment jurisprudence is centered more on judicial intuition and less on what happens on the ground from the police officer’s perspective.²⁵⁶ And the literature on whether Fourth Amendment suppression meaningfully alters police behavior is murky at best,²⁵⁷ indicating that courts considering race might not affect the day-to-day life of the average officer. Second, the benefit of the Fourth Amendment analysis is that it speaks of race as it manifests in a contextualized dynamic familiar to the individual officer. In other words, even if we pretend that the Fourth Amendment seizure inquiry does actually account for the perspective of the officer (and not just the judge reviewing the constitutionality of a seizure), then whether a person feels free to leave should depend on all the information available to the officer, which would include an individual’s race. If litigated correctly, race would be contemplated in a way that an officer *could* “readily discern” based on their day-to-day interactions. Third, police already consider race.²⁵⁸ And if an officer can use race to discern whether they have suspicion to make a stop or implicitly take race into account when deciding whether

²⁵⁵ United States v. Easley, 911 F.3d 1074, 1082 (10th Cir. 2018).

²⁵⁶ There is a “lack of empirical evidence informing the application of the Supreme Court’s standard for identifying a seizure.” Kessler, *supra* note 209, at 52 (2009). And thus the standard really turns on a judge’s, not an officer’s, hunch about how a reasonable person would feel. See Nadler, *supra* note 229, at 166–67 (“[T]he Court assumed these questions can be answered from intuition alone.” *Id.* at 167.). Available data “suggest that the Supreme Court’s use of its seizure standard has been inconsistent with the reality of how people feel when interacting with police officers.” Kessler, *supra* note 209, at 81. Carbado argues “that when the Court conducts its seizure analysis, it is not trying to figure out how reasonable people would experience particular forms of police conduct. Instead, the Court is making judgments — normative and policy judgments — about the kinds of burdens people should put up with.” CARBADO, UNREASONABLE: BLACK LIVES, POLICE POWER, AND THE FOURTH AMENDMENT, *supra* note 71, at 58–59.

There are not great data on race and the free-to-leave standard. David Kessler’s study underrepresented people of color (and allowed respondents to identify only as Black, White, or Other), Kessler, *supra* note 209, at 71, and this data could “neither support nor refute” the notion that people of color feel less powerful than white people vis-à-vis police, *id.* at 77. His study did show, however, that most people do not feel free to leave in the very type of encounter the Supreme Court imagined was consensual. *Id.* at 74–77. Thus, the influence of race in police encounters is ripe for further study.

²⁵⁷ See Orin S. Kerr, *An Economic Understanding of Search and Seizure Law*, 164 U. PA. L. REV. 591, 628 (2016) (“The empirical literature on how the exclusionary rule and civil damages actually deter officers is unsettled and remains in considerable dispute.”).

²⁵⁸ Police consider race throughout their investigative process. See, e.g., Priyamvada Sinha, *Police Use of Race in Suspect Descriptions: Constitutional Considerations*, 31 N.Y.U. REV. L. & SOC. CHANGE 131, 134 (2006) (explaining that police use race in suspect descriptions).

to use force, then it surely is not too much to ask of that officer to keep in mind how race influences police-citizen encounters more broadly.²⁵⁹

3. *Against Discrimination Concerns.* — What about discrimination concerns, and the idea that a “seizure analysis that differentiates on the basis of race raises serious equal protection concerns if it could result in different treatment for those who are otherwise similarly situated”?²⁶⁰ In the equal protection context, the argument was that any race-conscious program that favored one race necessarily discriminated against the race that was not favored. This “zero-sum” reasoning was based on a scarcity logic: when opportunities are limited, providing any “preferential treatment” to people of one race discriminates against people of other races, who now have less opportunity.²⁶¹ When talking about the distribution of benefits and burdens, the zero-sum reasoning, even if inaccurate, makes some intuitive sense. However, it is not clear how that same rationale applies to the Fourth Amendment seizure context.

Return to *United States v. Easley*, where Ms. Easley, who was Black, wanted to explain why her race affected whether a reasonable person in her position would have felt free to leave when DEA agents approached her on a Greyhound bus.²⁶² No white person would have been harmed by Ms. Easley making this argument. And a court accepting Ms. Easley’s argument would not have prevented any person of any race from making a similar argument in the future. Indeed, *any* of the passengers on the Greyhound bus could have explained how their race affected whether they felt free to leave, and a court could have considered that information. A seizure analysis is no zero-sum game.

This dynamic raises another problem with the discrimination concern: As a practical matter, how would an equal protection challenge play out in the Fourth Amendment context? By their nature, Fourth Amendment questions are context specific. It is therefore highly unlikely that two encounters will ever be so identical that you can isolate for race and conclude that race makes the difference. This is why these courts had to speculate that a raced reasonable person “could” raise

²⁵⁹ Indeed, officers use race to identify suspects, and may be required to record a suspect’s race upon release. See, e.g., Maria Cramer & Chelsia Rose Marcius, *Race, Age, Gender: What the N.Y.P.D. Must Track During Stops, and Why*, N.Y. TIMES (Feb. 3, 2024), <https://www.nytimes.com/2024/02/03/nyregion/nypd-how-many-stops-act.html> [<https://perma.cc/7LFA-2CQT>]. Most police departments keep racialized arrest data. See, e.g., *Making Criminal Justice System Data Available to All New Yorkers*, NYC MAYOR’S OFF. OF CRIM. JUST. (Jan. 4, 2024), <https://criminaljustice.cityofnewyork.us/system-data/> [<https://perma.cc/7Q3A-XM5C>]. Race is at the forefront of policing.

²⁶⁰ *Easley*, 911 F.3d at 1082.

²⁶¹ See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 527–28 (1989) (Scalia, J., concurring in the judgment).

²⁶² See *Easley*, 911 F.3d at 1077–78, 1081.

equal protection concerns — but a far-fetched hypothetical possibility is an unconvincing argument to reject a standard outright.²⁶³

But then, is the fact that a person can discuss how their race factors into a reasonable person analysis discriminatory at all? The standard is race-neutral in that all people can argue how race should color a court's view of a police-citizen encounter under the Fourth Amendment. By definition, it's a dynamic standard capable of recognizing the realities for people of *any* race.²⁶⁴ Indeed, there is no reason to think that certain arguments are limited to certain races. For example, a white person from a community with a history of police mistreatment of its white residents could cite those facts as a reason they did not feel free to leave. Or, if a white person felt particularly affected by police mistreatment of Black residents or other residents of color in their relevant community, they could raise that as a reason why any reasonable person, regardless of race, would not feel free to terminate an encounter. After all, a police force acting unlawfully towards any group of citizens could cow *any* citizen under that police force's watch.

What's more, it is not at all obvious what "similarly situated" means in this context. The whole point of race-ing the Fourth Amendment is that all people are *not* similarly situated when it comes to policing in America. And with this acknowledgment in hand, it is important to consider whose experiences the reasonable person standard has historically captured. Given the historical homogeneity of federal and state judiciaries, it is reasonable to assume that when judges have contemplated the "reasonable person," the person called to mind looked like them²⁶⁵: a reasonable, relatively well-off, white man. Thus, not allowing reasonable persons to be raced does not mean that the reasonable person is race-less, it just means that they are often raced as white, ignoring the experiences of people of color.²⁶⁶ This means that it is *people of color* who are being discriminated against when they aren't allowed to explain how their race affects what's reasonable. *People of color* are discriminated against when they are not permitted to tell their full story and instead are forced to litigate in a framework that fails to capture their

²⁶³ It's hard to imagine what standing would look like to bring this particular equal protection challenge. That is not to say that the Supreme Court could not be inventive and show special standing solicitude for a white person challenging a raced Fourth Amendment standard. See, e.g., Girardeau A. Spann, *Color-Coded Standing*, 80 CORNELL L. REV. 1422, 1474–75 (1995) (explaining that the Court has similarly expanded standing in its equal protection jurisprudence to allow white challengers to bring cases in the affirmative action context).

²⁶⁴ See *supra* notes 65–70, 89 and accompanying text.

²⁶⁵ See generally Sherrilyn A. Ifill, *Judging the Judges: Racial Diversity, Impartiality and Representation on State Trial Courts*, 39 B.C. L. REV. 95 (1997).

²⁶⁶ See generally Sherrilyn A. Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 WASH. & LEE L. REV. 405 (2000); Carbado, *supra* note 14, at 1002–03; Lindsey Webb, *Legal Consciousness as Race Consciousness: Expansion of the Fourth Amendment Seizure Analysis Through Objective Knowledge of Police Impunity*, 48 SETON HALL L. REV. 403, 416–17 (2018).

lived realities.²⁶⁷ White people are not tangibly harmed by a person of color making these arguments in their own individual cases, especially when a white person is free to explain how their race or any other racial dynamic should influence the seizure inquiry.²⁶⁸

But let's say, for the sake of argument, that allowing for the consideration of race will lead to courts reaching different outcomes for suspects of different races. That is the price of living in a multiracial society, not necessarily an Equal Protection Clause violation. The Court understood in *SFFA* that a person's racial background can matter to their broader life story.²⁶⁹ Therefore, taking the Court at its word, it would be permissible for a college admissions officer to view two students, with the same GPA, SAT score, and extracurricular activities, and then choose to admit the student who, on top of that, could articulate how they had to overcome discrimination on their path to success.²⁷⁰ Here, too, race is being placed in a broader context, where it helps explain how a reasonable person would perceive a police encounter. No person is forbidden from advocating how courts should consider race when conducting the reasonable person analysis, just like in the college admissions context. More still, unlike the college admissions process, the Fourth Amendment can never be about quotas or numbers — it is always a holistic consideration that takes context into account.²⁷¹ Nothing in the case law thus far suggests that a holistic inquiry cannot comprehend a careful accounting of race. Race-ing the Fourth Amendment in this way will never violate the “twin commands” of the Fourteenth Amendment: that race cannot be viewed as a “negative” and cannot “operate as a stereotype.”²⁷²

Which is why it's worth returning to Eidelson's observation that individualism is at the core of the Court's colorblindness ideology.²⁷³ The courts that hold that race cannot be considered as part of the seizure

²⁶⁷ Justice Jackson compellingly made this point in her *SFFA* dissent. As she said there in discussing college admissions:

To demand that colleges ignore race in today's admissions practices — and thus disregard the fact that racial disparities may have mattered for where some applicants find themselves today — is not only an affront to the dignity of those students for whom race matters. It also condemns our society to never escape the past that explains *how and why* race matters to the very concept of who “merits” admission.

SFFA, 143 S. Ct. 2141, 2271 (2023) (Jackson, J., dissenting) (footnote omitted); see Carbado, *supra* note 14, at 1003 (making this argument in the Fourth Amendment context).

²⁶⁸ See, e.g., Pauline T. Kim, *Race-Aware Algorithms: Fairness, Nondiscrimination and Affirmative Action*, 110 CALIF. L. REV. 1539, 1590 (2022) (explaining that “it makes no sense to treat race-conscious efforts to reduce racial bias in criminal law enforcement as ‘affirmative action’ that somehow benefits Black defendants at the expense of white defendants”).

²⁶⁹ See *SFFA*, 143 S. Ct. at 2176.

²⁷⁰ *Id.*

²⁷¹ See *supra* section III.A.2, pp. 1568–72.

²⁷² *SFFA*, 143 S. Ct. at 2168.

²⁷³ Eidelson, *supra* note 187, at 1603.

analysis are conceiving of individualism in the “thin sense.”²⁷⁴ These courts are judging cases individually, as they must, and treating like cases alike, but they are not at all attempting to differentiate between the actual people involved in these cases and ask whether the differences between people should lead to a difference in outcome.²⁷⁵

But if these courts viewed individualism in its thickest sense, then it would be clear why that logic falls short. Under a “thick view” of individualism, “the claim that people should be treated *as individuals* can be understood as saying that the fact of their individuality should be acknowledged and afforded its due significance, whatever that in turn requires.”²⁷⁶ Therefore, to the extent that the Court’s colorblindness is driven by the concern of the failure to see people as individuals, it does not follow that an individual’s race can never be recognized.²⁷⁷ In fact, if the law is truly to “operate equally upon all,”²⁷⁸ the law may well demand the opposite, requiring that everyone have an equal chance to tell their story and have it recognized under law.²⁷⁹

B. *The Already Raced Fourth Amendment*

Additionally, the Supreme Court told us that it is *not* the case that colorblindness necessarily means that race can never be acknowledged in any corner of constitutional law, which makes sense given the prominent role race has played in the development of Fourth Amendment doctrine.

In an important but relatively modest back-and-forth in *SFFA*, the majority and dissent had an interesting discussion about race and the role that it plays in the Fourth Amendment. In her dissent, Justice Sotomayor called out the Court for what she saw as hypocrisy — that “the Court has allowed the use of race when that use burdens minority populations.”²⁸⁰ In support of this claim, Justice Sotomayor cited two Fourth Amendment cases. First, she cited *United States v. Brignoni-Ponce*,²⁸¹ where:

[T]he Court held that it is unconstitutional for border patrol agents to rely on a person’s skin color as “a single factor” to justify a traffic stop based on reasonable suspicion, but it remarked that “Mexican appearance” could be

²⁷⁴ See *id.* at 1612–13.

²⁷⁵ See *id.* at 1613 & n.39.

²⁷⁶ *Id.* at 1614.

²⁷⁷ See *id.* at 1607.

²⁷⁸ *SFFA*, 143 S. Ct. 2141, 2159 (2023) (emphasis omitted) (quoting CONG. GLOBE, 39th Cong., 1st Sess. 2459 (1866) (statement of Rep. Thaddeus Stevens)).

²⁷⁹ Professors Osagie K. Obasogie and Zachary Newman argue that the Framers intended an individualistic understanding of the Fourth Amendment. See Obasogie & Newman, *supra* note 193, at 1470–71. While this may mean that the Fourth Amendment “is structurally unsuited to address racialized group harm,” *id.* at 1470, their argument furthers those made in this Article.

²⁸⁰ *SFFA*, 143 S. Ct. at 2200 (Sotomayor, J., dissenting).

²⁸¹ 422 U.S. 873 (1975).

“a relevant factor” out of many to justify such a stop “at the border and its functional equivalents.”²⁸²

As Justice Sotomayor described, the “Court thus facilitated racial profiling of Latinos as a law enforcement tool and did not adopt a race-blind rule.”²⁸³ Sotomayor next cited *United States v. Martinez-Fuerte*²⁸⁴ and explained that the “Court later extended this reasoning to border patrol agents selectively referring motorists for secondary inspection at a checkpoint, concluding that ‘even if it be assumed that such referrals are made largely on the basis of apparent Mexican ancestry, [there is] no constitutional violation.’”²⁸⁵

The *SFFA* majority did not quarrel with Justice Sotomayor’s characterization of these two cases. Rather, in a footnote, the Court noted that they were Fourth Amendment cases “that have nothing to do with the Equal Protection Clause.”²⁸⁶ This admission is telling. It reveals that the Court does not think that colorblindness plays out the same way in the Fourth Amendment context, providing even more reason not to blindly export the concept from the Fourteenth Amendment.²⁸⁷ The Court has made clear that the two constitutional provisions protect distinct interests.²⁸⁸

Likewise, the Supreme Court has blessed a form of race-based policing by allowing officers to consider whether someone fits a “drug

²⁸² *SFFA*, 143 S. Ct. at 2246 (Sotomayor, J., dissenting) (quoting *Brignoni-Ponce*, 422 U.S. at 884–87).

²⁸³ *Id.*

²⁸⁴ 428 U.S. 543 (1976).

²⁸⁵ *SFFA*, 143 S. Ct. at 2246–47 (Sotomayor, J., dissenting) (alteration in original) (quoting *Martinez-Fuerte*, 428 U.S. at 563). For illuminating discussions of both *Brignoni-Ponce* and *Martinez-Fuerte*, see generally Devon W. Carbado & Cheryl I. Harris, *Undocumented Criminal Procedure*, 58 UCLA L. REV. 1543 (2011).

²⁸⁶ *SFFA*, 143 S. Ct. at 2162 n.3.

²⁸⁷ The Ninth Circuit has done the inverse of what this Article advocates, arguing that the Court’s more recent colorblind Fourteenth Amendment precedents support the cabining of the Court’s color-conscious Fourth Amendment precedents. See, e.g., *United States v. Montero-Camargo*, 208 F.3d 1122, 1134 (9th Cir. 2000). And some scholars have argued that police should make their decisions without regard to race. See, e.g., Randall Kennedy, *Suspect Policy*, NEW REPUBLIC (Sept. 12, 1999), <https://newrepublic.com/article/63137/suspect-policy> [https://perma.cc/8JCS-28NC]. I do not disagree with these arguments, but given that the Supreme Court has not adopted them, this Article does not engage an alternate reality where decisions like *Brignoni-Ponce* and *Martinez-Fuerte*, odious as they may be, are unconstitutional. Moreover, even if the Court eventually adopted the view that a police officer is forbidden from considering race when assessing reasonable suspicion, that does not necessarily mean that the Fourth Amendment’s reasonable person cannot be raced. Already, the reasonable suspicion standard is a judge-made departure from the Fourth Amendment’s text. Therefore, placing limits on what police can and cannot consider is well within the bounds of what courts can do. By contrast, whether a person has been seized and what is reasonable are heartland Fourth Amendment questions. Therefore, ensuring the amendment applies equally for everyone, and that it can be capacious enough to consider racial differences, is a coherent position to take.

²⁸⁸ See *Tehan v. United States ex rel. Shott*, 382 U.S. 406, 416 (1966) (explaining that the Fourth Amendment “reflect[s] the concern of our society for the right of each individual to be let alone”); *SFFA*, 143 S. Ct. at 2159 (noting that the Fourteenth Amendment declares “that all persons, whether colored or white, shall stand equal before the laws of the States”).

courier” profile when assessing reasonable suspicion.²⁸⁹ These profiles sometimes explicitly include race, which lower courts have held is permissible so long as race is but one factor among many, again reinforcing the notion that race can play an explicit role in a holistic Fourth Amendment analysis.²⁹⁰

In addition to the explicit, the Fourth Amendment is also raced in more subtle ways, including by inviting courts to consider clear racial proxies when answering Fourth Amendment questions.

Take, for example, the Court’s decision in *Illinois v. Wardlow*,²⁹¹ which allows courts to consider whether a neighborhood is a “high crime area” when deciding whether police had reasonable suspicion to conduct a stop.²⁹² The Court in *Wardlow* “provided remarkably little guidance on how to interpret and implement the high-crime area standard in practice.”²⁹³ In so doing, the Court left officers with wide discretion to decide what makes a neighborhood “high-crime,” which gives officers room to act out their biases and correlate higher crime rates with the race of the neighborhood’s inhabitants.²⁹⁴ Thus, although not explicitly allowing race-based policing, *Wardlow* tacitly allows for race-based policing under the thinnest of veils.

Or contemplate the Fourth Amendment standard for police use of force. Under current doctrine, the assessment for whether police force is “reasonable” “requires a careful balancing of ‘the nature and quality of the intrusion on the individual’s Fourth Amendment interests’

²⁸⁹ See, e.g., *United States v. Sokolow*, 490 U.S. 1, 10–11 (1989); *Florida v. Royer*, 460 U.S. 491, 493 (1983). And while the profile discussed by the Court in *Royer* does not explicitly discuss race, as one Sixth Circuit judge noted, “the DEA has all but reduced to writing a practice of singling out African-Americans for drug courier inquiries, a facially discriminatory policy.” *United States v. Taylor*, 956 F.2d 572, 581 (6th Cir. 1992) (en banc) (Keith, J., dissenting) (citing Sheri Lynn Johnson, *Race and the Decision to Detain a Suspect*, 93 YALE L.J. 214, 234 (1983); Morgan Cloud, *Search and Seizure by the Numbers: The Drug Courier Profile and Judicial Review of Investigative Formulas*, 65 B.U. L. REV. 843 (1985)). Lower courts have extended this logic even further, holding that it is permissible to consider “ethnic appearance” when investigating potential terrorist activity. See, e.g., *United States v. Ramos*, 629 F.3d 60, 67–68 (1st Cir. 2010).

²⁹⁰ See Ric Simmons, *Race and Reasonable Suspicion*, 73 FLA. L. REV. 413, 435–37 (2021) (providing examples of circuits allowing criminal profiles that included race). However, it is important to note that some lower courts have pushed back on the use of race in determining reasonable suspicion. See, e.g., Samuel R. Gross & Katherine Y. Barnes, *Road Work: Racial Profiling and Drug Interdiction on the Highway*, 101 MICH. L. REV. 651, 736–38 (2002).

²⁹¹ 528 U.S. 119 (2000).

²⁹² *Id.* at 124.

²⁹³ Grunwald & Fagan, *supra* note 24, at 347.

²⁹⁴ *Id.* at 396 (describing a study about the New York Police Department); Elise C. Boddie, *Racially Territorial Policing in Black Neighborhoods*, 89 U. CHI. L. REV. 477, 497 (2022) (asserting that Professors Grunwald and Fagan’s study “suggests the proclivity of police to misuse the ‘high-crime area’ designation to justify aggressive policing in ways that also feed racial stereotypes about Black people in Black neighborhoods”); see also Monica C. Bell, *Anti-segregation Policing*, 95 N.Y.U. L. REV. 650, 715–16 (2020); ERWIN CHEREMERINSKY, PRESUMED GUILTY: HOW THE SUPREME COURT EMPOWERED THE POLICE AND SUBVERTED CIVIL RIGHTS 228 (2022) (calling *Wardlow* “an open invitation to race-based policing”).

against the countervailing governmental interests at stake.”²⁹⁵ Setting forth a totality of the circumstances test, the Court highlighted three factors requiring special consideration: “[T]he severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.”²⁹⁶ Police are much more likely to use force against Black people.²⁹⁷ Part of that phenomenon is attributable to the fact that officers’ biases make them more likely to “perceive Black male suspects as more threatening than other suspects”²⁹⁸ By taking the officers’ threat perception into account, again, the Court allowed for thinly veiled racial considerations to factor into a Fourth Amendment analysis given that Black people “are often associated with aggression, violence, and criminality.”²⁹⁹

Finally, consider *Whren v. United States*.³⁰⁰ There, police pulled over two young Black men driving in Washington, D.C., for minor traffic offenses.³⁰¹ The young men argued that the traffic-offense reason for the stop was pretextual; the officers stopped them because they suspected they had drugs in the car, a suspicion that was ostensibly formed in part due to their race.³⁰² The Supreme Court held that the officers’ subjective intent did not matter; all that matters under the Fourth Amendment is whether the officers had a legal basis to conduct the stop, even if their *actual* motivation for the stop was patently *illegal*.³⁰³ In so holding, “the Court acknowledged the potential for its decision to lead to racial profiling, but suggested that that was an equal protection issue rather than a Fourth Amendment issue.”³⁰⁴ Thus, *Whren* tacitly permits racial profiling in policing under the Fourth Amendment by saying that police can engage in racial profiling consistent with the amendment so long as police can point to other nonracial reasons to justify their conduct.³⁰⁵

²⁹⁵ *Graham v. Connor*, 490 U.S. 386, 396 (1989) (quoting *Tennessee v. Garner*, 471 U.S. 1, 8 (1985)).

²⁹⁶ *Id.*

²⁹⁷ See PHILLIP ATIBA GOFF ET AL., *CTR. FOR POLICING EQUITY, THE SCIENCE OF JUSTICE: RACE, ARRESTS, AND POLICE USE OF FORCE* 4 (2016).

²⁹⁸ Brandon Garrett & Seth Stoughton, *A Tactical Fourth Amendment*, 103 VA. L. REV. 211, 289 (2017).

²⁹⁹ Cynthia Lee, *Reforming the Law on Police Use of Deadly Force: De-Escalation, Preseizure Conduct, and Imperfect Self-Defense*, 2018 U. ILL. L. REV. 629, 645; see also L. Song Richardson, *Arrest Efficiency and the Fourth Amendment*, 95 MINN. L. REV. 2035, 2045 (2011).

³⁰⁰ 517 U.S. 806 (1996).

³⁰¹ *Id.* at 808, 810.

³⁰² *Id.* at 809.

³⁰³ *Id.* at 812–13.

³⁰⁴ Paul Butler, *The System Is Working the Way It Is Supposed to: The Limits of Criminal Justice Reform*, 104 GEO. L.J. 1419, 1453 (2016); see *Whren*, 517 U.S. at 813.

³⁰⁵ See Maclin, *supra* note 49, at 338 (“[T]he *Whren* Court’s unwillingness to consider the impact that pretextual traffic stops have on black and Hispanic motorists is consistent with the modern

All this is to say that the Fourth Amendment already considers race in both explicit and coded ways when it works to the *detriment* of the suspect of color. That, plus the fact that the Supreme Court just said that the Fourteenth Amendment “ha[s] nothing to do” with the Fourth Amendment, is proof that the Court’s claimed commitment to colorblindness does not necessarily mean race cannot be a part of the Fourth Amendment seizure analysis.³⁰⁶ In other words, the Supreme Court’s precedents, including the Court’s statement in *SFFA*, have already warned against muddying Fourth Amendment jurisprudence with Fourteenth Amendment Equal Protection Clause jurisprudence, rejecting the case law creep in which the colorblind Fourth Amendment courts are engaging.

As such, for the courts where this is an open question, it is completely consistent, or at least not inconsistent, with the current understanding of the colorblind Constitution to also consider race as part of the seizure analysis. This is especially important for state courts to remember when construing their state constitutions. As Justice Brennan explained long ago, state constitutions are often more capacious in their protection of individual rights.³⁰⁷ Proving him right, every single state supreme court (save one) that has considered whether the reasonable person standard can account for race either under the Fourth Amendment or the state’s Fourth Amendment analog has answered that question in the affirmative.³⁰⁸ And other state supreme courts have held that race is relevant to other Fourth Amendment questions, such as whether a person’s flight from police provides reasonable suspicion to engage in a stop.³⁰⁹ In this, and in other ways,³¹⁰ state courts are at the vanguard of the push to address the racial bias that is endemic to the criminal legal system.

Court’s trend of ignoring evidence of racial impact as a factor in the reasonableness analysis mandated by the Fourth Amendment.”); Carbado, *From Stopping Black People to Killing Black People*, *supra* note 71, at 129 (“The Supreme Court’s legalization of racial profiling is embedded in the very structure of Fourth Amendment doctrine.”); Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956, 962 (1999) (arguing that the Court’s Fourth Amendment doctrine “is wholly unconcerned with race”).

³⁰⁶ *SFFA*, 143 S. Ct. 2141, 2162 n.3 (2023).

³⁰⁷ William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977) (arguing that “[s]tate constitutions, too, are a font of individual liberties, [with] their protections often extending beyond those required by the Supreme Court’s interpretation of federal law”).

³⁰⁸ See *supra* Part I.B, pp. 1544–48. The Iowa Supreme Court is the exception, as it refused to take into account the defendant’s “minority status” when resolving whether he had been seized. *State v. Cyrus*, 997 N.W.2d 671, 676–77 (Iowa 2023).

³⁰⁹ See *Commonwealth v. Warren*, 58 N.E.3d 333, 342 (Mass. 2016); *Washington v. State*, 287 A.3d 301, 345 (Md. 2022); *Miles v. United States*, 181 A.3d 633, 641–42 (D.C. 2018).

³¹⁰ For example, reforming jury selection to address racial bias. See generally Thomas Ward Frampton & Brandon Charles Osowski, *The End of Batson? Rulemaking, Race, and Criminal Procedure Reform*, 124 COLUM. L. REV. 1 (2024) (discussing various state reforms to Batson v. Kentucky, 476 U.S. 89 (1986)).

It is also important to note what happens when courts hold that race cannot be considered as part of a seizure analysis. It does not mean that race disappears from the courtroom. Rather, advocates will be reduced to discussing race through imprecise proxies, for example referencing neighborhoods and appearances rather than just naming the elephant in the room.³¹¹ Then, there is still the fact that a judge's view of race and policing can influence what they view as reasonable.³¹² The reasonable person standard is malleable enough such that race can have an effect on a judge's ruling without the judge ever having to name the work race is doing.³¹³ Therefore, rather than indulging in the fiction that race plays no part in policing, the express consideration of race has the added benefit of allowing for more precise and transparent decisionmaking.

C. *Guarding Against Case Law Creep*

The immediate goal of the project is obvious: it's an attempt to stem the flow of courts holding that race cannot be considered as part of the seizure analysis. It is apparent that the question will recur. And at first blush, it may seem even more preordained that race should not be considered under the Fourth Amendment given that the Court just articulated its most muscular version of colorblind constitutionalism yet in *SFFA*. This Article attempts to prevent such an outcome. By contextualizing colorblind constitutionalism and explaining its inapplicability to the Fourth Amendment, the Article charts a different path forward. In so doing, it hopes to serve as an accountability mechanism, either keeping courts honest or shaming them for their doctrinal dishonesty. It also hopes to inspire litigators to keep pushing the law in positive directions.

On one hand, then, the Article is in dialogue with courts that have yet to decide the question of whether race can factor into the reasonable person calculus and defenders who hopefully feel that they have space to litigate how their client's race affected a particular police

³¹¹ A similar phenomenon has emerged in the *Batson* context, where prosecutors, who are forbidden from striking jurors because of their race, will strike jurors and then give race-neutral reasons that serve as proxies for race. See, e.g., Kyle C. Barry, *Prosecutors' "O.J. Simpson Question" and the Case Against Peremptory Strikes*, THE APPEAL (Mar. 5, 2020), <https://theappeal.org/prosecutors-o-j-simpson-question-and-the-case-against-peremptory-strikes/> [<https://perma.cc/QTW9-8T6F>].

³¹² See Orley Ashenfelter et al., *Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes*, 24 J. LEGAL STUD. 257, 275–77 (1995) (explaining that a judge's personal characteristics can impact outcomes).

³¹³ An example: in *Florida v. Bostick*, 501 U.S. 429 (1991), Justice Marshall's dissent did not focus on race other than mentioning in a footnote that some officers approach people based on race. See *id.* at 441 n.1 (Marshall, J., dissenting); Harawa, *supra* note 14, at 967 n.320 ("But although race is absent from the dissent, it may still have colored the way Justice Marshall viewed the coerciveness of the encounter."); see also Carbado, *supra* note 14, at 985 n.160.

encounter.³¹⁴ This positive vision is important given the current state of the law. While some courts have asserted that race is a permissible consideration in a seizure analysis, their reasoning is largely based in realism — that race, as a factual matter, can make a difference in the voluntariness of a police encounter.³¹⁵ On the other hand, the courts that refuse to consider race have cloaked their refusal in a mode of constitutional understanding that has found favor in the Supreme Court. The risk is that one methodology may appear to some as more valid than the other. So this Article steps into the breach to explain that even assuming the methodology *is* valid, it does not work here. Just as importantly, it emphasizes the points that other legal scholars have made: courts *are* already considering race, they just are not acknowledging *certain* experiences of minoritized persons.³¹⁶

The long-term goal is far broader. Progressive legal scholarship can often be reactionary, critically evaluating decisions of the Supreme Court as they come down.³¹⁷ That’s not to say there is no value in that. Robust criticism of the law as it develops is an important aspect of legal scholarship.³¹⁸ It’s also not to say that there is no role for legal academics to point out the bankruptcy of certain legal institutions, laws, and actors within the legal system.³¹⁹ And it goes without saying that it is important for legal scholars to reimagine legal institutions and the law from the ground up.³²⁰

But it’s also worth recognizing potential legal fault lines as they appear and charting either a positive path forward, or at least a path of harm reduction.³²¹ It is worth trying to disrupt the doom cycle, explaining before a legal argument or doctrine catches fire why it’s wrong or

³¹⁴ See Harawa, *supra* note 14, at 982.

³¹⁵ See *supra* Part I.B, pp. 1544–48.

³¹⁶ See *supra* notes 71–73 and accompanying text.

³¹⁷ See Justin Driver, *Reactionary Rhetoric and Liberal Legal Academia*, 123 YALE L.J. 2616, 2637 (2014) (“Whatever the precise explanations for reactionary rhetoric’s rise among liberal law professors, its prevalence may produce undesirable consequences. As an initial matter, the ascent of reactionary rhetoric seems likely to instill an unduly anemic understanding of the Supreme Court’s capacity to promote social change.”).

³¹⁸ See generally, e.g., Paul Butler, *Mississippi Goddamn: Flowers v. Mississippi’s Cheap Racial Justice*, 2019 SUP. CT. REV. 73 (2020); Melissa Murray, Address, *Children of Men: The Roberts Court’s Jurisprudence of Masculinity*, 60 HOUS. L. REV. 799 (2023); Bridges, *supra* note 29.

³¹⁹ See generally, e.g., JOANNA SCHWARTZ, SHIELDED: HOW THE POLICE BECAME UNTOUCHABLE (2023); STEPHEN VLADECK, THE SHADOW DOCKET: HOW THE SUPREME COURT USES STEALTH RULINGS TO AMASS POWER AND UNDERMINE THE REPUBLIC (2023).

³²⁰ See, e.g., Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405, 412–13 (2018); Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1161 (2015).

³²¹ Cf. Carol S. Steiker, *Keeping Hope Alive: Criminal Justice Reform During Cycles of Political Retrenchment*, 71 FLA. L. REV. 1363, 1394 (2019) (“[A]n insistence on transformation or nothing seems to me unrealistic and even cruel in its willingness to decline to support real reductions in human misery. After all, first steps . . . are often the only way to get to a second step.”).

wrongheaded.³²² That way, when courts *do* attempt to take progressive swings or break from a seeming trend, they can do so with a body of scholarship at their backs.³²³ Or when courts decide to adopt the wrong-headed argument anyways, there is already a body of scholarship explaining why the courts are wrong, which then creates space for a more thorough critique of the courts.³²⁴

CONCLUSION

This Article has two primary goals. First, it provides evidence of mission creep — here, the elimination of the express consideration of race by the law as a means to remediate America’s history of racial injustice.³²⁵ As the Article reveals, the idea of colorblind constitutionalism, once solely an equal protection theory, has now spread to other areas of the Constitution — here, the Fourth Amendment. Then, it warns against case law creep — where cases (and their analytical foundations) are being uncritically ported across jurisprudential areas to advance a mission. Yet when scrutinized, the case law doesn’t fit.³²⁶ The example here being that the individualistic ideals that underlie colorblind constitutionalism contradict the conclusion that a “reasonable person” must have no identifiable race in the Fourth Amendment seizure

³²² For example, recently we saw a number of scholars intervene early to explain the fallacy of the independent state legislature theory. *See generally, e.g.*, Leah M. Litman & Katherine Shaw, *Textualism, Judicial Supremacy, and the Independent State Legislature Theory*, 2022 WIS. L. REV. 1235.

³²³ *See* Brandon Hasbrouck, *Movement Judges*, 97 N.Y.U. L. REV. 631, 636–38 (2022) (providing examples of “movement judges,” many of whom rely on legal scholarship when issuing their opinions that do the “hard work of shifting fundamental understandings of how the law operates,” *id.* at 638).

³²⁴ Legal scholarship has long served this type of supporting role in the conservative legal movement. *See generally* AMANDA HOLLIS-BRUSKY, *IDEAS WITH CONSEQUENCES: THE FEDERALIST SOCIETY AND THE CONSERVATIVE COUNTERREVOLUTION* (2015). The evolution of colorblind constitutionalism is a perfect illustration. At first, the two biggest proponents of colorblindness, Justices Scalia and Thomas, did not make “any real effort to justify their affirmative action opinions based on the Constitution’s original meaning. Instead, their decisions have relied on a combination of precedent, moral claims, and legal principles.” Michael B. Rappaport, *Originalism and the Colorblind Constitution*, 89 NOTRE DAME L. REV. 71, 73 (2013). “[L]eading constitutional scholars” noted this apparent hypocrisy, and filled the gap by providing evidence that suggests that “the original meaning of the Fourteenth Amendment allows affirmative action.” *Id.* at 81 (collecting articles). In response, conservative legal scholars authored articles supplying “originalist evidence in favor of the colorblind Constitution,” *id.* at 74, which Justice Thomas then relied on when providing his “originalist defense” of the colorblind Constitution, *see SFFA*, 143 S. Ct. 2141, 2177, 2185–86 (2023) (Thomas, J., concurring).

³²⁵ *See, e.g.*, Bridges, *supra* note 29, at 135 (arguing that the Roberts Court imposes a higher bar when asked to remedy nonwhite people’s racial injuries).

³²⁶ For another article in this vein, *see generally* Sonja Starr, *The Magnet School Wars and the Future of Colorblindness*, 76 STAN. L. REV. 161 (2024).

context. In other words, colorblindness necessarily has a logical endpoint; one such endpoint is the Fourth Amendment.³²⁷

In pursuing these goals, the Article seeks to meet conservative doctrine where it stands, and nevertheless tries to use it to advance antiracist ends. Given the current state of the law and the courts, the Article may well be howling into the wind. But all people deserve to see themselves fully reflected in the law. It is this end toward which this Article works.

³²⁷ This will not stop at the Fourth Amendment. For instance, a Justice on the Wisconsin Supreme Court used the idea of colorblind constitutionalism to argue against the state bar requiring training on diversity, equity, inclusion, and access. *See In the Matter of Diversity, Equity, Inclusion, and Access Training for Continuing Legal Education*, No. 22-01, at ¶ 6 (Wisc. July 13, 2023) (R.G. Bradley, J., concurring), <https://www.wicourts.gov/sc/rulhear/DisplayDocument.pdf?content=pdf&seqNo=679679> [<https://perma.cc/K2PW-RMRD>].