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# THE DECLARATION OF INDEPENDENCE AS BELLWETHER

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## ABSTRACT

*As scholars have long observed, the Declaration of Independence serves as one of the principal points of popular engagement with constitutional meaning. In particular, the Declaration's introductory passages regarding liberty and equality provide a key entry point for the general public in engaging with the purpose and meaning of those core constitutional values. As such, claims about the Declaration's meaning—and appropriation of its terms—have long pervaded public debates over core areas of constitutional contestation.*

*This Article suggests that this unique role of the Declaration may render it an especially useful subject of study for understanding shifts in popular constitutional understandings. To the extent that popular invocations of the Declaration have shifted over time, these shifts may signal broader changes in public understandings of how the Constitution should be understood. Moreover, to the extent that one credits popular constitutionalism as a descriptive theory (i.e., a theory of how, ultimately, constitutional law evolves), such shifts may provide an important bellwether of the redirection of constitutional doctrine.*

*This Article explores this idea in the context of a historical examination of shifting invocations of the Declaration of Independence in the context of affirmative action. As such a historical account*

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*demonstrates, invocations of the Declaration's equality principles in the context of affirmative action have shifted profoundly over time, from the early years, when such invocations were found predominantly in the context of pro-affirmative action statements, to the present, in which such invocations are largely made in opposition. This shift has accompanied broader shifts in the equality discourse of both proponents and opponents of affirmative action, shifts that have profoundly changed the dominant discourse of affirmative action's relationship to equality. The Article concludes by discussing the troubling implications for proponents of a particular constitutional project of its disassociation from popular understandings of equality and liberty as represented by the Declaration.*

### INTRODUCTION

The legal stature of the Declaration of Independence—and its role in constitutional interpretation—has long been debated by legal scholars.<sup>1</sup> But amidst these debates, the Declaration has, in fact, remained one of the principal ways in which the public engages with constitutional values.<sup>2</sup> A full 84 percent of Americans believe that the Declaration's famous phrase “all men are created equal” appears in the Constitution.<sup>3</sup> Similarly, the Declaration's promise of “life, liberty and the pursuit of happiness” remains one of the most oft-invoked principles of American “constitutional” text.<sup>4</sup> Thus, despite the fact that the Declaration's famous

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1. Compare ALEXANDER TESIS, CONSTITUTIONAL ETHOS (forthcoming 2016) (manuscript at 4–20) (on file with author) (developing a theory of constitutional interpretation in which the Declaration has a central role), with Lee J. Strang, *Originalism, the Declaration of Independence, and the Constitution: A Unique Role in Constitutional Interpretation?*, 111 PENN. ST. L. REV. 413, 413–14 (2006) (surveying the array of views expressed by scholars regarding the role that the Declaration should play in constitutional interpretation, and arguing for a very modest role for the Declaration in constitutional interpretation).

2. I am far from the first to observe this, although scholars often elide their descriptive and prescriptive accounts of this phenomenon. See, e.g., JACK M. BALKIN, CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD 18–23 (2011); PAULINE MAIER, AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE xi–xx, 206–15 (1997); MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 11–12 (1999). See also ALEXANDER TESIS, FOR LIBERTY AND EQUALITY: THE LIFE AND TIMES OF THE DECLARATION OF INDEPENDENCE *passim* (2012) (detailing the role the Declaration of Independence has played in prior popular constitutional struggles). See generally MARGARET STIMMANN BRANSON, THE ROLE OF CIVIC EDUCATION (1998) (articulating a central role for the Declaration in civic education).

3. Press Release, Nat'l Constitution Ctr., Startling Lack of Constitutional Knowledge Revealed in National Constitution Center Survey (Sept. 15, 1997) (on file with author). Cf. *Bostic v. Rainey*, 970 F. Supp. 2d 456, 460 (E.D. Va. 2014) (stating that “[o]ur Constitution declares that ‘all men’ are created equal,” a phrase actually contained in the Declaration), *aff'd sub nom. Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014).

4. For example, the Declaration's phrase “life, liberty and the pursuit of happiness” can be found 145 times since 1980 in the presidential speeches and documents archived at the American

phrases are not found within the Constitution, they have long played<sup>5</sup>—and continue to play—an outsized role in popular engagement with constitutional values.<sup>6</sup>

To the extent that one credits popular constitutionalism as a descriptive theory—that is, as a theory of how constitutional law is actually made—this role for the Declaration in popular constitutional engagement suggests a similarly robust role for the Declaration in shaping contemporary constitutional law.<sup>7</sup> That is, regardless of whether one thinks that the Declaration ought to play a role in constitutional interpretation, its role in popular engagement with constitutional values suggests that it is,

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Presidency Project at the University of California at Santa Barbara. See Search Results for “life, liberty, and the pursuit of happiness,” AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/> (under “Document Archive,” enter search term “life, liberty, and the pursuit of happiness,” then limit by year from 1980 to 2015) (last visited Jan. 28, 2016). In contrast, the phrase that actually appears in the Constitution—“life, liberty, and property”—appears only seven times in the database during that same time frame. See Search Results for “life, liberty, and property,” AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/> (on the left sidebar, under “Search the Entire Document Archive,” enter search term “life, liberty, and property,” then limit by year from 1980 to 2015) (last visited Jan. 28, 2016).

5. Historically, probably the most prominent instance of popular invocations of the Declaration for competing constitutional principles is the divergent role that the Declaration played in debates over slavery and states’ rights in the time leading up to the Civil War. See generally TESIS, *supra* note 2, at 129–47 (describing the divergent invocations of the Declaration by both proponents and opponents of slavery in the lead-up to the Civil War).

6. See *supra* notes 2–4 and accompanying text. *But cf.* TESIS, *supra* note 2, at 316 (arguing that, unlike in the past, the Declaration today “rarely inform[s] modern political debate”). Although there is some scholarly perception that invocations of the Declaration in the twenty-first century are dominated by conservatives, this appears not to be the case. For example, all presidents from Reagan through Obama have regularly invoked the Declaration, and indeed, invocations by Presidents Barack Obama and Bill Clinton have exceeded invocations of any of their Republican contemporaries. See Search Results for “pursuit of happiness” and “are created equal,” AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/index.php> (on the left side bar, under “Search Entire Document Archive,” enter search terms “pursuit of happiness” and “are created equal”) (last visited Jan. 28, 2016). See also sources cited *infra* note 107 (documenting competing invocations of the Declaration on both sides of several prominent contemporary constitutional issues). For an account of the role of the Declaration in contemporary conservative political ideology, see, for example, Ken I. Kersch, *Beyond Originalism: Conservative Declarationism and Constitutional Redemption*, 71 MD. L. REV. 229 (2011).

7. There are both descriptive and prescriptive theories of popular constitutionalism, and I deal here only with the former. For prominent accounts of popular constitutionalism that argue for its descriptive validity as a theory of constitutional law (sometimes also endorsing its normative desirability), see, for example, BALKIN, *supra* note 2, at 1–16; Lani Guinier, *Courting the People: Demosprudence and the Law/Politics Divide*, 89 B.U. L. REV. 539, 559 (2009); Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 379 (2007); Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191, 192 (2008); Gerald Torres, *Social Movements and the Ethical Construction of Law*, 37 CAP. U. L. REV. 535, 540 (2009). *Cf.* Larry Alexander & Lawrence B. Solum, *Popular? Constitutionalism?*, 118 HARV. L. REV. 1594, 1626 (2005) (book review) (describing various theories of popular constitutionalism, and characterizing this as “expressive popular constitutionalism”).

descriptively, likely important to the evolution of constitutional meaning.<sup>8</sup> By providing an entry point for social movements, lay people, and others (professional and nonprofessional) to engage with constitutional values, contestation over the Declaration's meaning may lead in turn to shifts in constitutional understandings.<sup>9</sup>

This descriptive feature of the Declaration's role in constitutional meaning in turn suggests a reason for constitutional scholars to be attentive to how it is invoked: because the Declaration serves as an important entry point for popular constitutional engagement, how it is invoked may provide insights into popular constitutional understandings (and ultimately, perhaps, constitutional law).<sup>10</sup> In particular, patterns of invocation of the Declaration's most well-known and deeply embraced initial phrases—situating our constitutional commitments in liberty and equality—may provide valuable information regarding the ways in which public constitutional commitments are emerging or shifting around a particular constitutional domain.<sup>11</sup> In that way, invocations of the Declaration may serve as a bellwether: as a means of accessing ordinarily opaque popular constitutional commitments.<sup>12</sup>

This Article explores this idea by focusing on one prominent contemporary context in which the Declaration has been popularly invoked for competing equality claims—affirmative action. As this discussion shows, invocations of the Declaration have shifted substantially over time, from a largely pro-affirmative action conception of the Declaration during the early years of affirmative action, to a largely anti-affirmative action conception today.<sup>13</sup> Moreover, these shifts have accompanied broader shifts in public discourse over affirmative action—and how equality values are

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8. See generally BALKIN, *supra* note 2, at 1–32 (articulating a descriptive and prescriptive theory of popular constitutionalism, with the Declaration as a central source of meaning for popular constitutional debates).

9. *Id.*

10. See generally *infra* Parts I–III.

11. *Id.* A more difficult descriptive task may exist where the Declaration is deployed—not for competing visions of liberty or equality—but instead for liberty on one side, and equality on the other. Historically, there are many examples of these types of divided invocations of the Declaration, including, most prominently, those regarding slavery in the immediate run up to the Civil War. TSESIS, *supra* note 2, at 129–47.

12. This is not to suggest that simply counting invocations of the Declaration will give us a global account of what the public, as a whole, believes, much less what the Court is likely to do as a matter of constitutional law. However, in a context like that described below vis-à-vis affirmative action, in which invocations of the Declaration have pervasively shifted—away from one contestant's characterization of the constitutional values at stake and toward another's—they may give us a meaningful window into the direction of popular constitutional debates.

13. See *infra* Parts I–III.

implicated by the debates over affirmative action.<sup>14</sup> Today, it is opponents of affirmative action who dominate the popular discourse on affirmative action's connections to equality, a dominance that is reflected in the profound shifts in how both public and professional actors understand the Declaration's relationship to affirmative action efforts.<sup>15</sup>

This Article explores the foregoing issues in three parts: Part I describes the substantial shifts that have occurred in popular invocations of the Declaration of Independence in the context of affirmative action, away from a conception of the Declaration's equality guarantees as supporting affirmative action, and toward a conception in which the two are opposed. Part II situates those shifts in the historical evolution of the public discourse regarding affirmative action, and discusses the ways that the evolving strategies of both opponents and proponents of affirmative action have undergone substantial changes in their invocation of equality-based rationales. Finally, Part III takes up the potential implications for proponents of a particular conception of liberty or equality of a perceived disassociation of their constitutional project with the Declaration's liberty and equality guarantees. This final part also discusses briefly some of the other contexts to which such a popular invocation approach might be meaningfully applied.

#### I. DIVIDED INVOCATIONS OF THE DECLARATION

*The basic promise of American life, that all men are created equal, must mean, if it means anything at all, that all Americans are assured an equal opportunity to make the most of their individual abilities. That promise has never been kept for Negroes. The color of their skin has meant not only that they are the last to be hired and the first to be fired but additionally that many doors to opportunity have been implacably closed to them. . . . The so-called "Philadelphia Plan" [a federal affirmative action plan] . . . is an attempt to assure Negroes a chance at those jobs, at least on construction projects where the U.S. Government is directly involved.*

— Opinion Piece, *Washington Post*, December 26, 1969<sup>16</sup>

*The Declaration of Independence proclaims, "We hold these truths to be self-evident, that all men are created equal." This is precisely why*

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14. *Id.*

15. *Id.*

16. Opinion, *Opening the Door to Employment*, WASH. POST, TIMES HERALD, Dec. 26, 1969, at A18.

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*affirmative action and all it stands for should be opposed. Affirmative action promotes disadvantaged minorities to levels they may not be qualified for simply because they are minorities. This is inherently racist. Therefore, we should call a horse a horse: This program is more adequately named "affirmative racism."*

— Opinion Piece, *Las Vegas Review-Journal*, March 25, 2003<sup>17</sup>

In 1995, in the case of *Adarand Constructors v. Peña*,<sup>18</sup> Justice Clarence Thomas and Justice John Paul Stevens would famously both invoke the Declaration of Independence—and its command that “all men are created equal”—in support of their opposing positions regarding affirmative action.<sup>19</sup> Thus, Justice Thomas would contend that:

There can be no doubt that the paternalism that appears to lie at the heart of this [affirmative action] program is at war with the principle of inherent equality that underlies and infuses our Constitution. *See* Declaration of Independence (“We hold these truths to be self-evident, that all men are created equal . . .”).<sup>20</sup>

And Justice Stevens would, in contrast, deploy the Declaration for very different ends, arguing that:

There is . . . a critical difference between a decision to *exclude* a member of a minority race because of his or her skin color and a decision to *include* . . . . The inclusionary decision is consistent with the principle that all men are created equal; the exclusionary decision is at war with that principle.<sup>21</sup>

As many scholars would observe, these divided invocations stand as a testament to affirmative action’s fundamentally contested status on the Court, and to the Declaration’s fundamentally mutable meaning.<sup>22</sup>

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17. Jordan Young, Op-Ed., *R-Jeneration: Do We Need Affirmative Action? NO*, LAS VEGAS REV.-J., Mar. 25, 2003, at 5E.

18. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

19. *Id.* at 240 (Thomas, J., concurring in part and concurring in the judgment); *id.* at 248 n.6 (Stevens, J., dissenting).

20. *Id.* at 240 (Thomas, J., concurring in part and concurring in the judgment).

21. *Id.* at 248 n.6 (Stevens, J., dissenting) (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 316 (1986) (Stevens, J., dissenting)).

22. *See, e.g.*, Charles H. Cosgrove, *The Declaration of Independence in Constitutional Interpretation: A Selective History and Analysis*, 32 U. RICH. L. REV. 107, 152–63 (1998) (discussing Justices Stevens and Thomas’s competing invocations across a number of affirmative action cases, and arguing that “[w]hen the Declaration is invoked in a particular judicial context, it is one of the competing views from [our national debate over the Declaration’s meaning] that speaks”); Strang, *supra* note 1, at 463–65 (discussing Justices Thomas and Stevens’s competing invocations of the Declaration in *Adarand* in support of the contention that the rights phrases of the Declaration are unlikely to provide meaningful guidance to judges due to the existence of “deep, continuing

For many scholars, the Justices' competing invocations of the Declaration have formed the primary focus of their descriptive account of the Declaration's contested stature in the affirmative action debates.<sup>23</sup> But the Justices have not been alone in debating affirmative action's constitutional meaning, nor in linking it to the Declaration. Indeed, from the earliest days of the affirmative action debates—long before the Court's first merits treatment of affirmative action in *Regents of the University of California v. Bakke*<sup>24</sup>—the Declaration has been regularly invoked by both professional and nonprofessional actors alike.<sup>25</sup> Thus, across multiple arenas of constitutional engagement—political discourse, newspaper articles, Supreme Court briefs, and state and lower federal court opinions—the Declaration has been invoked in support of competing visions of affirmative action and its relationship to equality.<sup>26</sup>

These invocations have not remained static.<sup>27</sup> During the roughly fifty years in which affirmative action has been widely debated in the public domain, invocations of the Declaration have shifted dramatically: away from a conception of affirmative action as fundamentally consistent with the Declaration's equality guarantees, and toward one in which the two are characterized as being in opposition.<sup>28</sup> Thus, while today the Declaration is

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disagreement" about their meaning). See also TUSHNET, *supra* note 2, at 13, 185 (pointing to Justice Thomas's invocation in *Adarand* and Justice Blackmun's statements in *Bakke*).

23. See sources cited *supra* note 22. Most scholars acknowledge that the Justices' competing perspectives are simply reflective of broader popular divides in contemporary understandings of equality, but no scholar that I am aware of has endeavored to undertake a descriptive study of how the Declaration has actually been invoked in the context of the broader (non-Supreme Court) public. See sources cited *supra* note 22. There is also a body of literature that attempts to make prescriptive arguments around affirmative action and other race-conscious programs by drawing on the Declaration. See, e.g., Sharon L. Browne & Elizabeth A. Yi, *The Spirit of Brown in Parents Involved and Beyond*, 63 U. MIAMI L. REV. 657, 659–60 (2009); George P. Fletcher, *In God's Image: The Religious Imperative of Equality Under Law*, 99 COLUM. L. REV. 1608, 1621–22, 1627–28 (1999). Cf. Clarence Thomas, *Toward a "Plain Reading" of the Constitution—The Declaration of Independence in Constitutional Interpretation*, 30 HOWARD L.J. 983, 991–95 (1987) (invoking the Declaration in support of general colorblindness principles).

24. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

25. See *infra* notes 27–32 and accompanying text. For this project, I examined an array of arenas of popular constitutional engagement, including political discourse (the Congressional Record, presidential statements and speeches, and discussions of anti-affirmative action voter initiatives); judicial opinions (including both state court and lower federal court opinions); briefs (in Supreme Court affirmative action cases only); and newspaper articles (both news and opinion pieces, as well as letters to the editor). Invocations of the Declaration for other principles, such as the founders' understanding of the relevance of international law, sometimes also appeared in the historical discourse, but are not included in my discussion.

26. See sources cited *infra* note 29.

27. See sources cited *infra* note 29.

28. See sources cited *infra* note 29.

invoked predominantly in opposition to affirmative action, forty to fifty years ago, many, if not most, invocations of the Declaration were in support of affirmative action's institutionalization.<sup>29</sup> As such, this fifty-year

29. For example, only two of fifteen news articles in the last five years (2010–2014) have involved a pro-affirmative action invocation of the Declaration; the remaining thirteen are all against. Compare *Glover-Jones: Some in Black Community Don't Vote, Look to Positive Role Models*, CHILLICOTHE GAZETTE, Jan. 16, 2012 (reporting on pro-affirmative action invocation of the Declaration by proponent), and Kathleen Moore, *Minorities Plead for City Contracts*, DAILY GAZETTE, Feb. 14, 2012, at B7 (same), with *Educators Debate Impact of Ruling on Affirmative Action*, USA TODAY, Oct. 10, 2012 (reporting on anti-affirmative action invocation of the Declaration by opponent); Jeff Jacoby, Opinion, *Ending Race-Based Admissions*, BOS. GLOBE (Dec. 18, 2011), <https://www.bostonglobe.com/opinion/2011/12/18/ending-race-based-admissions/4UbpVvWPyWiowgJOz9jcMO/story.html> (anti-affirmative action opinion writer invoking the Declaration); Kenneth W. Krause, *A Common, Necessary, and Sufficient Cause in Liberty*, HUMANIST, Nov. 1, 2010, at 39 (reporting on anti-affirmative action invocation of the Declaration by opponent); Kevin Maillard, *Oklahoma Legislature Proposes to End Affirmative Action*, CONCURRING OPINIONS (Apr. 29, 2011), <http://concurringopinions.com/archives/2011/04/oklahoma-bill-to-end-affirmative-action.html> (same); Eric Rozenman, Opinion, "Diversity," *No; Individualism, Yes*, WASH. TIMES (May 27, 2013), <http://www.washingtontimes.com/news/2013/may/27/diversity-no-individualism-yes/> (anti-affirmative action opinion writer invoking the Declaration); Keith Shaver, Sr., Letter to the Editor, *ADVANCE-NEWS (OGDENSBURG, N.Y.)*, Mar. 2, 2014, at 9 (same); Editorial, *Supreme Court: For Equality*, RICHMOND TIMES-DISPATCH (Oct. 8, 2012, 1:00 AM), [http://www.richmond.com/news/article\\_c5992220-ae66-5cf2-bcc5-d1f4dc528ec6.html](http://www.richmond.com/news/article_c5992220-ae66-5cf2-bcc5-d1f4dc528ec6.html) (arguing against affirmative action); Berry Trammel, *Discrimination: Jason Collins, Michael Sam & Tim Tebow*, DAILY OKLAHOMAN (Feb. 25, 2014, 1:15 PM), <http://newsok.com/article/3937076> (same); Richard Wolf & Mary Beth Marklein, *Supreme Court Wades Once More into Racial Preferences*, USA TODAY (Oct. 11, 2012), <http://www.usatoday.com/story/news/nation/2012/10/08/supreme-court-affirmative-action-racial-preferences/1611361/> (reporting on anti-affirmative action invocations of the Declaration); Richard Wolf & Mary Beth Marklein, *Supreme Court Weighs Quotas in Affirmative Action Case*, USA TODAY (Oct. 10, 2012), <http://www.usatoday.com/story/news/nation/2012/10/09/supreme-court-affirmative-action/1623487/> (same); Robert L. Weber, Letter to the Editor, STUART NEWS, Apr. 9, 2014, at 10 (anti-affirmative action opinion writer invoking the Declaration); Matt Young, Opinion, *Affirmative Action Hurts Minorities, the Nation*, KY. KERNEL, Apr. 27, 2014 (same); *Transcript: CNN Newsroom: Video Emerges of Officer's Rant*, CNN (Aug. 23, 2014), <http://www.cnn.com/TRANSCRIPTS/1408/23/cnr.03.html> (reporting on anti-affirmative action invocation of the Declaration by opponent).

And all five invocations of the Declaration in Supreme Court briefs during the same time frame (2010–2014) involved an invocation against. Brief of Professor Carl Cohen et al. as Amici Curiae in Support of the Petitioner at 46, *Schuetz v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623 (2014) (No. 12-682); Brief of Amici Curiae California Ass'n of Scholars et al. in Support of Petitioner at 29–31, *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013) (No. 11-345); Brief of the Honorable Allen B. West, Member of Congress & Lieutenant Colonel, United States Army (Ret.), as Amicus Curiae in Support of Petitioner at 22, *Fisher*, 133 S. Ct. 2411 (No. 11-345); Brief of the Texas Ass'n of Scholars as Amicus Curiae in Support of the Petitioner at 38, *Fisher*, 133 S. Ct. 2411 (No. 11-345). See also Amicus Curiae Brief of San Francisco Bay Area Rapid Transit District in Support of Respondent at 3, *Schuetz*, 134 S. Ct. 1623 (No. 12-682) (arguing ultimately in favor of affirmative action, but noting that California's anti-affirmative action ballot initiative was "based on a noble principle that few would question: that all persons are created equal").

Judicial opinions and political invocations show a similarly one-sided pattern: no judge has invoked the

Declaration in support of affirmative action since 1995, see *infra* notes 99–100 and accompanying text; and political invocations, while less common and more uneven, have generally favored opponents of affirmative action in the most recent era. For example, invocations of the Declaration in the most prominent political context in which affirmative action has been debated in the last twenty years—that is, ballot initiatives seeking to ban affirmative action—have overwhelmingly been by opponents. See, e.g., *Affirmative Action Ban Stifles State Powerbrokers*, DETROIT NEWS, Oct. 16, 2006, at C01 (reporting on opponents’ invocation of the Declaration’s principles in the context of the Michigan ballot measure); Thomas Bray, Opinion, *Racism Raises Its Ugly Head in Initiative Fight*, DETROIT NEWS, Jan. 4, 2004, at A13 (invoking the Declaration in opposition to affirmative action in the context of the Michigan ballot measure); Nate Feldpausch, Opinion, *Vote Yes on Prop 2*, LANSING ST. J., Oct. 26, 2006, at A4 (same); Norman Hozak, Letter to the Editor, *A Civil Rights Proposal*, SAGINAW NEWS, Aug. 26, 2005, at 5A (same); Darlene J. Stover, Letter to the Editor, KALAMAZOO GAZETTE, Sept. 23, 2006 (same); Evan Szymczak, Opinion, *End Affirmative Action*, GRAND RAPIDS PRESS, Nov. 3, 2006, at A6 (same); Arthur T. & Elizabeth S. White, Letter to the Editor, *November Vote for MCRI Supports Equal Opportunity for Individuals*, KALAMAZOO GAZETTE, Apr. 23, 2006 (same); Will Tyler White, Opinion, *It’s About Equality*, LANSING ST. J., July 7, 2006, at A6 (same).

In contrast, early invocations of the Declaration in the affirmative action context tended to favor, or at least have equal representation from, affirmative action proponents. Thus, for example, during the 1970s and 1980s, eight of fourteen news articles that included invocations of the Declaration in the context of affirmative action involved a pro-affirmative action invocation. Compare Opinion, *Affirmative Action*, THE DISPATCH, LEXINGTON, N.C., July 5, 1986, at 4 (reproduction of a July 3, 1986 *New York Times* editorial, which invoked the Declaration in support of affirmative action); Tom Baxter, *25 Years After the Civil Rights Act, Civil-Rights Balance Sought: Lawmakers See Broad Consensus as Only Chance for Comprehensive Bill*, ATLANTA J. & CONST., July 2, 1989, at A17 (reporting invocation of the Declaration by affirmative action supporter); Ben A. Franklin, *Rights Panel Expected to Urge Fund Curb on White Suburbs*, N.Y. TIMES, Aug. 29, 1970, at 10 (same); *Opening the Door to Employment*, WASH. POST, TIMES HERALD, Dec. 26, 1969, at A18 (invoking the Declaration in support of affirmative action); William Raspberry, *All Dummies are Created Equal*, FAYETTEVILLE OBSERVER, Dec. 11, 1984, at 4A (invoking the Declaration in support of affirmative action in a tongue-in-cheek opinion piece); Earl Sheridan, Opinion, *Affirmative Action Helps Assure Equality*, WILMINGTON MORNING STAR, May 18, 1983, at 4A (invoking the Declaration in support of affirmative action); *The Right to Remedy, Affirmed*, N.Y. TIMES, July 3, 1986, at A30 (same); Ian Waldron, Opinion, *In the Affirmative*, NEWSDAY, Aug. 19, 1988, at 82 (same), with *Civil Rights Commission Denounces High Court’s Job Preference Ruling*, HOUS. CHRON., May 14, 1987, at 12 (reporting on and describing invocations of the Declaration of Independence in opposition to affirmative action); Leslie Lenkowsky, Opinion, *The Creation of a New Racial Consciousness*, WALL ST. J., Dec. 20, 1979, at 18 (invoking the Declaration in opposition to affirmative action); Ken Masugi, Letter to the Editor, *Personal Rights and Group Wrongs*, WALL ST. J., July 1, 1985, at 13 (same); Thomas J. McDonough, Letter to the Editor, *Court Rulings Reinforce Civil Rights Act Intent*, PALM BEACH POST, July 9, 1989, at 5E (same); Myron Struck, *3 Agencies Won’t Supply EEOC With Hiring Data*, WASH. POST, Aug. 9, 1984, at A21 (reporting on and describing invocations of the Declaration of Independence in opposition to affirmative action); David B. Wilson, Opinion, *Affirmative Action: Is It Fair to All?*, BOS. GLOBE, Dec. 15, 1980, at 19 (invoking the Declaration in opposition to affirmative action). See generally Walter Berns, *Affirmative Action vs. the Declaration of Independence*, 16 NEW PERSP. 21, 28 (1984) (arguing that the Declaration’s equality values were contravened by affirmative action); Kenneth B. Clark, *Those Who Persist in Demanding Moral Consistency Are at Best Told to “Grow Up.”* WASH. POST, May 5, 1977, at D.C. 2 (equating the idea that “all men are created equal” with substantive equality); Albert Shanker, *Affirmative National Leadership Toward Equal Opportunity*, N.Y. TIMES, Nov. 10, 1974, at 229 (invoking the Declaration in support of soft affirmative action, but opposing hard affirmative action); Barry Sussman, *How Leaders Perceive Equality in Our Lives*, WASH. POST, Sept. 26, 1976, at

period has seen substantial shifts in the way that a wide variety of actors in our public constitutional discourse have articulated the relationship of the Declaration to affirmative action debates.

Unlike the competing *Adarand* citations of Justices Thomas and Stevens, which suggest parity—or at least near-parity—of competing visions of affirmative action (and its relationship to the Declaration’s equality guarantees), the picture afforded by a broader examination of popular discourse is much less encouraging for affirmative action’s proponents. As noted above, across a wide array of popular contexts, invocations of the Declaration in support of affirmative action were once robust.<sup>30</sup> But, across every one of those contexts of popular engagement,

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A1 (in reporting on elite perceptions of equality, observing that elites do not appear to associate the notion that “[a]ll men are *created* equal” with the idea that “they should *end up* equal”).

Similarly, four of eight invocations in Supreme Court briefs during this time frame were in support of affirmative action. *Compare* Brief Amicus Curiae of the ACLU et al. in Support of Appellant at 15 n.8, *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (No. 87-998) (invocation in support); Brief of the ACLU & the Society of American Law Teachers Board of Governors Amici Curiae at 37–38, *United Steelworkers of Am. v. Weber*, 443 U.S. 193 (1979) (Nos. 78-432, 78-435, 78-436) (same); Brief of the National Medical Ass’n et al. Amici Curiae at 46–47, *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (No. 76-811) (same); Brief of Amicus Curiae the City of Seattle at 19–20, *DeFunis v. Odegaard*, 416 U.S. 312 (1974) (No. 73-235) (same), *with* Petitioner’s Brief at 46–47, *Johnson v. Transp. Agency of Santa Clara Cty.*, 480 U.S. 616 (1987) (No. 85-1129) (invocation in opposition); Brief for the United States as Amicus Curiae Supporting Petitioners at 7–9, *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986) (No. 84-1340) (same); Brief of the American Federation of Teachers Amicus Curiae at 4, *Bakke*, 438 U.S. 265 (No. 76-811) (same); Brief of American Subcontractors Ass’n, Amicus Curiae in Support of Respondent at 7–8, *Bakke*, 438 U.S. 265 (No. 76-811) (same). All but one case involving a judicial invocation of the Declaration was in favor of affirmative action. *See* sources cited *infra* notes 97–99. *See also* *Wygant*, 476 U.S. at 316 (Stevens, J., dissenting) (invoking the Declaration in support of affirmative action); *Fullilove v. Klutznick*, 448 U.S. 448, 531 n.13 (1980) (Stewart, J., dissenting) (invoking the Declaration in the context of an anti-affirmative action opinion); *id.* at 533 n.1 (Stevens, J., dissenting) (same).

Political invocations, as noted *supra*, have not been as consistent, but have generally trended toward increased representation of the anti-affirmative action perspective since the 1990s. *See* sources cited *supra* (demonstrating recent dominance of anti-affirmative action views in political invocations). *Cf.* 108 CONG. REC. 3833 (1962) (resolution of Young Democratic Clubs of America entered by Senator Moss; linking “affirmative action” to the Declaration, although it is not entirely clear what this concept entailed at this juncture); Lyndon B. Johnson, *Remarks to New Participants in “Plans for Progress” Equal Opportunity Agreements*, AM. PRESIDENCY PROJECT (Jan. 16, 1964), <http://www.presidency.ucsb.edu/ws/?pid=25990> [hereinafter Johnson, “*Plans for Progress*”] (linking a by-the-numbers approach to voluntary compliance to the Declaration of Independence in an early presidential speech); PRESIDENT’S COMM. ON GOV’T CONTRACTS, FIVE YEARS OF PROGRESS: A REPORT TO PRESIDENT EISENHOWER BY THE PRESIDENT’S COMMITTEE ON GOVERNMENT CONTRACTS, 1953–1958, at 2 (1958) (linking soft affirmative action concepts to the Declaration of Independence in an early report by the Eisenhower Presidential Committee).

30. *See* sources cited *supra* note 29.

gradual shifts have occurred in how the Declaration has been deployed.<sup>31</sup> And across each context, invocations of the Declaration in support of affirmative action have decreased substantially since the 1990s, such that today, they mark only a tiny fraction of popular invocations of the Declaration in the affirmative action context.<sup>32</sup>

These shifts in patterns of invocation suggest a much bleaker picture for proponents of affirmative action than the more prominent debates among the Justices. Rather than a closely divided Court, in which both sides feel justified invoking the Declaration in support of their position, they suggest a battle over meaning in which one side has largely won the debate.<sup>33</sup> Thus, while affirmative action proponents once believed they could credibly claim that the Declaration's equality guarantees supported their cause—and did so with regularity—today, few popular invocations of the Declaration are made by affirmative action's supporters.<sup>34</sup> Rather, the Declaration—and its stature as a document that states our core national constitutional commitments—has become predominantly the province of affirmative action opponents.<sup>35</sup>

These shifts in invocations of the Declaration have not taken place in isolation. Rather, they closely track much broader shifts in the general discourse regarding affirmative action that have taken place during the same time frame.<sup>36</sup> The next part of this Article situates the changes that can be seen in the invocation of the Declaration in relation to affirmative action within this broader history of competing rhetorical claims for affirmative action's association with equality. As set out below, those competing rhetorical claims have undergone substantial changes over the decades, with proponents of affirmative action moving *away* from equality-based justifications for affirmative action, even as opponents have moved *toward* an equality-based rationale.

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31. See sources cited *supra* note 29.

32. See sources cited *supra* note 29.

33. See sources cited *supra* note 29.

34. See sources cited *supra* note 29.

35. See sources cited *supra* note 29.

36. See *infra* Part II.

II. THE SHIFTING DISCOURSE OF AFFIRMATIVE ACTION<sup>37</sup>

In 1933, Harold Ickes, as head of the Public Works Administration (“PWA”), adopted an order prohibiting discrimination in PWA projects.<sup>38</sup> To enforce this early federal anti-discrimination requirement, Ickes adopted a “by-the-numbers” approach: contractors’ failure to employ a fixed percentage of black workers would be deemed evidence of discrimination.<sup>39</sup> Ultimately, Ickes’s early anti-discrimination efforts would prove ineffectual—as noted by Terry Anderson, “enforcement was weak, and the PWA’s proportional employment goals were very low compared to the black population.”<sup>40</sup> But in the coming decades of civil rights enforcement, adoption of his numerical target approach would increase exponentially.<sup>41</sup>

This by-the-numbers approach to civil rights enforcement—what would commonly be understood today as “affirmative action”<sup>42</sup>—was

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37. Although many affirmative action programs do not focus exclusively on race, but rather encompass other groups such as women and people with disabilities, affirmative action has long been identified in the popular imagination with race; and much of the initial impetus for affirmative action in fact arose from efforts to achieve race equality. *See, e.g.*, DENNIS DESLIPPE, *PROTESTING AFFIRMATIVE ACTION: THE STRUGGLE OVER EQUALITY AFTER THE CIVIL RIGHTS REVOLUTION* 6, 176–77 (2012). *But cf.* NANCY MACLEAN, *FREEDOM IS NOT ENOUGH: THE OPENING OF THE AMERICAN WORKPLACE* 186–91 (2006) (describing the important role of women in generating early federal affirmative action mandates in the higher education context). For this same reason, my discussion herein is focused primarily on the discourse around race-based affirmative action.

38. TERRY H. ANDERSON, *THE PURSUIT OF FAIRNESS: A HISTORY OF AFFIRMATIVE ACTION* 12 (2004).

39. *Id.*

40. *Id.* at 13.

41. *See, e.g.*, DESLIPPE, *supra* note 37, at 20 (discussing early civil rights protests seeking by-the-numbers approaches); PAUL D. MORENO, *FROM DIRECT ACTION TO AFFIRMATIVE ACTION: FAIR EMPLOYMENT LAW AND POLICY IN AMERICA, 1933–1972*, at 30–65, 84–106, 135–61 (1999) (discussing early civil rights protests seeking by-the-numbers approaches and state civil rights enforcement using by-the-numbers approaches); JOHN DAVID SKRENTNY, *THE IRONIES OF AFFIRMATIVE ACTION: POLITICS, CULTURE, AND JUSTICE IN AMERICA* 111–44 (1996) (discussing pre-Title VII by-the-numbers civil rights enforcement). For the further expansion of by-the-numbers approaches to civil rights enforcement under Title VII and other federal fair employment measures in the 1960s and 1970s, see BRUCE ACKERMAN, *THE CIVIL RIGHTS REVOLUTION* 174–99 (2014), and SKRENTNY, *supra*.

42. Today, some 80 years after Ickes’s order, systemic disparate treatment and affirmative action are considered very different concepts: the former is understood to use numbers to prove that an entity is systematically engaging in differential (adverse) treatment of racial minorities, and the latter is understood to give a preference to racial minorities. *See, e.g.*, THOMAS R. HAGGARD ET AL., *UNDERSTANDING EMPLOYMENT DISCRIMINATION* §§ 5.11, 6.01–.02 (2d ed. 2008). But in the early era of affirmative action, these two were commonly conflated; failure to meet numerical goals imposed by affirmative action policies was understood by enforcement agencies as an indicator of disparate treatment, typically open to some sort of rebuttal through a showing of good faith effort or unavailability. *See infra* notes 43–45 and accompanying text. Thus, although today the line demarcating

understood by many early proponents of affirmative action as it was by Ickes: as a means of enforcing the law's anti-disparate treatment requirements vis-à-vis African Americans and other groups.<sup>43</sup> Thus, rather than "reverse discrimination," numerical targets were considered by many proponents to be ways to achieve racial neutrality in employment.<sup>44</sup> Thus, early affirmative action efforts were often characterized as necessary for formal equality, as a way of ensuring that employers' long-ingrained

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the two doctrinal concepts is quite distinct, in the early years of affirmative action, it was not. *See infra* notes 43–45 and accompanying text.

43. *See, e.g., Breaking Down the Bars*, N.Y. TIMES, Aug. 12, 1969, at 38 (characterizing the Philadelphia Plan as a federal anti-discrimination enforcement measure); *Federal Aides Step Up Bid to Halt Job Bias at Pittsburgh*, BOSTON GLOBE, Nov. 10, 1969, at 26 (reporting on early disputes over the Philadelphia Plan, including the arguments of Nixon administration officials characterizing it as an anti-discrimination measure); *Government to Require Detailed Hiring Plans in Federal-Aid Projects*, WALL ST. J., Dec. 14, 1966, at 6 (reporting on early federal affirmative action program under Johnson, characterizing it as an anti-discrimination measure); Monroe W. Karmin, *Assault on Job Bias: Government May Drop Contracts with Firms Deemed Discriminatory*, WALL ST. J., Feb. 7, 1966, at 1 (same); Richard J. Levine, *U.S. Takes New Step to End Discrimination in Federally Aided Construction Programs*, WALL ST. J., June 30, 1969, at 5 (characterizing the Philadelphia Plan as "[a] bold step by the Nixon Administration to end job discrimination in Federally aided construction work"); *Promoting Fair Employment*, WASH. POST, Aug. 17, 1969, at B6 (characterizing the Philadelphia Plan as a way to eliminate the "gross and blatant" racial discrimination in the construction trades, but also containing other passages seeming to recognize it as a substantive equality measure); *SEC Won't Set Rules to Eradicate Job Bias in Securities Industry*, WALL ST. J., Jan. 15, 1974, at 10 (reporting on the SEC's decision not to adopt affirmative action rules for the brokerage industry, which the SEC justified on the grounds that such a move would simply "duplicate existing federal laws barring employment discrimination on the basis of race or sex"); *The Philadelphia Plan*, WASH. POST, Aug. 10, 1969, at B6 (equating affirmative action directly with "equality of opportunity" and making clear that the author viewed it as a way of addressing "[r]acial discrimination in job opportunities"); Jean M. White, *U.S. to Force Integrated Construction*, WASH. POST, Apr. 2, 1966, at A2 (reporting on early federal affirmative action program under Johnson, characterized as an anti-discrimination measure); Johnson, "Plans for Progress," *supra* note 29 (linking by-the-numbers approach to voluntary compliance to nondiscriminatory hiring); Richard Nixon, *Statement About Desegregation of Elementary and Secondary Schools*, AM. PRESIDENCY PROJECT (Mar. 24, 1970), <http://www.presidency.ucsb.edu/ws/?pid=2923> (characterizing the Philadelphia Plan as necessary to "crack the color bar in the construction unions"). *See also* Brief of the ACLU & the Society of American Law Teachers Board of Governors *Amici Curiae*, *supra* note 29 (arguing in support of affirmative action on the grounds that one should expect to see proportions of African-American workers roughly approximating the surrounding community in the absence of discrimination); Liz Roman Gallese, *Up-the-Ladder Blues: White Males Complain They Are Now Victims of Job Discrimination*, WALL ST. J., Feb. 28, 1974, at 1 (reporting on an affirmative action proponent's view that white males claiming reverse discrimination had simply been accustomed to expecting privileged treatment). *See generally* MACLEAN, *supra* note 37, at 76–113, 190–92, 211–15, 251, 285 (discussing the development of the anti-disparate treatment theory at length). Not all early proponents justified by-the-numbers enforcement in this way; some openly argued that preferential treatment should be the standard, in view of the history of discrimination against blacks. ANDERSON, *supra* note 38, at 76–77; MACLEAN, *supra* note 37, at 55–56. *See also infra* notes 50–58 and accompanying text (discussing other early equality-based rationales for affirmative action).

44. *See* sources cited *supra* note 43 and accompanying text.

patterns of discriminatory practices did not result in the continuation of those practices despite nominal anti-discrimination guarantees.<sup>45</sup>

During the era of affirmative action's rise to prominence in the 1960s and early 1970s,<sup>46</sup> this anti-disparate treatment rationale was regularly invoked by affirmative action proponents and was arguably not difficult to understand.<sup>47</sup> Blacks had long been virtually entirely excluded from wide swaths of the labor market, including jobs that demanded relatively little training or skills at entry.<sup>48</sup> As such, a by-the-numbers approach was articulated by many within the civil rights enforcement and advocacy community as an intuitively obvious corollary of the need to ensure that national commitments to race equality were effectuated.<sup>49</sup>

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45. See sources cited *supra* note 43 and accompanying text. One need only look at the remarkable consistency in rhetorical opposition to black equality over the decades to perceive the genuineness of this concern. See, e.g., MACLEAN, *supra* note 37, at 49–50, 54–55, 67, 252 (documenting that opponents of civil rights were making merit-based arguments for why they failed to hire African Americans, and arguing that the “market is color-blind” even during an era of systematic racial exclusion). Cf. *id.* at 66–67 (discussing early call by an editor of *Fortune* magazine to discriminate in favor of blacks on the grounds that it would be “necessary ‘to overcome the tendencies to exclude the Negro which are built into the very marrow of American society’”).

46. The 1960s and 1970s did not represent the earliest turn to by-the-numbers approaches, as the Ickes example and others illustrate. See *supra* notes 38–40 and accompanying text. But it did mark the coalescing of earlier efforts into a robust and consistent approach to federal enforcement. See sources cited *supra* note 40.

47. See sources cited *supra* notes 42–45. See also *infra* notes 48–49.

48. See, e.g., MACLEAN, *supra* note 37, at 77–79, 92–95 (discussing the examples of the southern textile industry and the northern construction trades, both of which required minimal qualifications at entry). Some jobs, such as skilled union tradesman jobs, did require skills and training, but typically provided such training without a requirement of experience prior to entry into the training program. See, e.g., DAVID HAMILTON GOLLAND, CONSTRUCTING AFFIRMATIVE ACTION: THE STRUGGLE FOR EQUAL EMPLOYMENT OPPORTUNITY 40, 65, 67–69 (Steven F. Lawson & Cynthia Griggs Fleming eds., 2011) (documenting that nepotism was the primary entry qualification for union apprenticeship programs). Of course, there were also very large racial disparities in many arenas that did require higher levels of formal qualifications and/or experience. Because the disparate treatment argument was harder to make in fields requiring higher levels of pre-entry education or qualifications, even some individuals who supported affirmative action in the construction trades based on an anti-disparate treatment rationale did not do so when the federal government began to target higher education jobs. See, e.g., DESLIPPE, *supra* note 37, at 88. Finally, during the 1970s, there were also many fields in which testing and other “hard” qualifications were arguably adopted *because* of the boxing-out effects they had on African American workers. See *generally* *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (striking down testing requirements under Title VII on disparate impact grounds, but in a context that strongly suggested intentional discrimination). See also SCOTT BAKER: PARADOXES OF DESEGREGATION 44–62 (2006) (documenting South Carolina's systematic adoption of a series of testing requirements for teachers in the 1930s and 1940s—requirements which were known to have racially disparate impacts—to confound the efforts of equal pay activists).

49. See sources cited *supra* notes 42–45. *But cf.* ANDERSON, *supra* note 38, at 96–97 (suggesting that white workers during this era would ordinarily be more qualified for most jobs because of the historical segregation of educational opportunities).

Similarly, “soft” affirmative action<sup>50</sup> was not difficult for affirmative action advocates to link to equality in an era when many blacks had personally been deprived of educational and training opportunities because of their race. As President Johnson put it in a prominent early speech at Howard University’s commencement ceremony:

That beginning is freedom; and the barriers to that freedom are tumbling down. Freedom is the right to share, share fully and equally, in American society—to vote, to hold a job, to enter a public place, to go to school. . . . But freedom is not enough. You do not wipe away the scars of centuries by saying: Now you are free to go where you want, and do as you desire, and choose the leaders you please. You do not take a person who, for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say, “you are free to compete with all the others,” and still justly believe that you have been completely fair. Thus it is not enough just to open the gates of opportunity. All our citizens must have the ability to walk through those gates.<sup>51</sup>

Although the Johnson administration sometimes vacillated in its commitment to “hard” affirmative action,<sup>52</sup> the rationale he articulated in his speech at Howard University was widely endorsed by many others who argued in favor of early “soft” affirmative action efforts.<sup>53</sup> Recognizing that “qualifications” and “interests” are not static—and that when prior educational and employment opportunities were unequal, current opportunities will also be so—a diverse array of voices argued for the promotion of equal opportunity through special efforts to encourage training, outreach, and education for minorities.<sup>54</sup> Perceived as a moral

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50. “Hard” affirmative action has typically been understood to refer to affirmative action measures that use or require specific numerical indicators as the indicia of compliance. “Soft” affirmative action typically includes measures such as affirmative efforts to expand recruitment to minorities, provide training and educational support, and otherwise ease pathways to opportunity.

51. Lyndon B. Johnson, *Commencement Address at Howard University: To Fulfill These Rights*, LBJ PRESIDENTIAL LIBRARY (June 4, 1965), <http://www.lbjlib.utexas.edu/johnson/archives.hom/speeches.hom/650604.asp> [hereinafter Johnson, *To Fulfill These Rights*].

52. See, e.g., DESLIPPE, *supra* note 37, at 22.

53. See, e.g., MACLEAN, *supra* note 37, at 58–59, 107–108; Ernest R. Frazier, Letter to the Editor, *Coping with Discrimination. “Reverse” and Otherwise: Lifting the Barriers to Progress*, WASH. POST, Mar. 21, 1974, at A27; Nixon, *supra* note 43; Shanker, *supra* note 29. In addition, many early proponents of affirmative action argued that segregated social networks and other factors favoring white or male employees demanded affirmative efforts on the part of employers (“soft” affirmative action) to reach out to candidates and eliminate barriers to employment. See, e.g., *Equal Opportunity Chief Sounds Off at Interview*, CHI. DAILY DEFENDER, Jan. 20, 1969, at 2; Gallese, *supra* note 43.

54. See sources cited *supra* note 53. A very similar rationale also played a role in the development of doctrines like disparate impact that sought to minimize the effect of widespread historical educational discrimination against blacks. See generally Cary Franklin, *Separate Spheres*, 123

imperative even by many opponents of hard affirmative action, these types of special efforts to make up for the discriminatory building blocks of opportunity were characterized by many as necessary components of achieving actual equality of opportunity.<sup>55</sup>

Both of these early equality-based rationales for affirmative action often bled into a third: the perceived urgency to not wait a generation or more for racial minorities to achieve actual substantive equality under the nation's new egalitarian commitments.<sup>56</sup> (Because of the incremental process by which employment turnover and access to educational opportunities takes place, such was a result that would otherwise naturally be obtained.<sup>57</sup>) Although this "substantive equality now" rationale was arguably inconsistent with the anti-disparate treatment rationale, early affirmative action proponents often invoked both rationales when encouraging employers to adopt by-the-numbers approaches to black employment, without grappling with the tension between the two.<sup>58</sup>

During the earliest era of affirmative action, it was overwhelmingly in these equality-based terms that affirmative action was justified.<sup>59</sup> Although affirmative action proponents would later turn to rationales like diversity—which emphasized the benefits to corporations and educational institutions

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YALE L.J. 2878, 2895–2903 (2014) (arguing that concerns about the cumulative and spillover effects of discrimination and disadvantage across different contexts inspired many of the important legal developments during the Second Reconstruction, including the disparate impact doctrine). *Cf. supra* note 42 and accompanying text (noting that early rationales for affirmative action were often intertwined with other doctrinal theories that are today conceptualized as distinctive).

55. See sources cited *supra* note 53. On the embrace of "soft" affirmative action measures by liberal opponents of "hard" affirmative action, see DESLIPPE, *supra* note 37, at 9–12, 77–78, 108, 112–14. See also *An Opportunity for Dialogue*, JEWISH WK. & AM. EXAMINER, May 11, 1974, at 8 (opposing hard affirmative action, but supporting soft affirmative action); Editorial, *Judging Racial Quotas*, WALL ST. J., Mar. 11, 1974, at 14 (same); Bayard Rustin, Letter to the Editor, WALL ST. J., Mar. 25, 1974, at 15 (same); Shanker, *supra* note 29 (same).

56. Although these commitments were arguably not new, insofar as they originated in the Reconstruction era, the Civil Rights Act of 1964 marked a new era of commitment to the effective enforcement of equality rights. See ACKERMAN, *supra* note 41, at 176 (referring to the Civil Rights Act as "the most important egalitarian initiative since Reconstruction").

57. See, e.g., MACLEAN, *supra* note 37, at 54, 211; William V. Shannon, *End of an Era?*, N.Y. TIMES, Feb. 26, 1974, at 37. One also sees some early iterations of what has become one of the most common equality-based rationales today—the need to make up for past discrimination. See, e.g., MACLEAN, *supra* note 37, at 216; Frazier, *supra* note 53; Shannon, *supra*.

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

59. See sources cited *supra* notes 38–58 and accompanying text. *Cf.* Brief of American Subcontractors Ass'n as Amicus Curiae in Support of Respondent, *supra* note 29, at 7–8 (opposing the Davis plan, but acknowledging that the "established concept of 'affirmative action' has heretofore focused upon precluding discrimination founded upon race, ethnic origin or other such immutable characteristics, eradicating the direct effects of any prior discrimination of that nature and insuring for the future equal opportunity to all persons without regard to such characteristics").

of racial inclusivity—during the 1960s and early 1970s, these justifications had yet to meaningfully enter the public discourse.<sup>60</sup> As such, equality-based rationales, such as the anti-disparate treatment rationale, dominated the discourse of affirmative action proponents into the mid-1970s.<sup>61</sup>

While not universally endorsed, these equality-based rationales for affirmative action were, in the early era of affirmative action's development, both bipartisan and mainstream.<sup>62</sup> Perhaps most strikingly, both President Johnson's Democratic administration and President Nixon's Republican administration prominently embraced equality-based arguments for affirmative action during this early time frame, as they sought to institutionalize robust federal affirmative action requirements.<sup>63</sup> Thus, in the late 1960s and early 1970s, equality discourse in support of affirmative action was regularly articulated by affirmative action supporters, which included proponents from both major political parties.<sup>64</sup>

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60. See sources cited *supra* notes 38–58 and accompanying text. Cf. *infra* notes 84–91 and accompanying text (describing the rise of the diversity rationale).

61. See sources cited *supra* notes 38–58 and accompanying text.

62. See *infra* notes 63–64 and accompanying text. There are reasons to think also that both administrations' attachments to affirmative action may have been partly instrumental: for Johnson, it was linked to a desire to avoid riots; for Nixon, it was linked to a desire to split the left coalition of civil rights and labor, while not appearing to be retrograde on civil rights issues. See SKRENTNY, *supra* note 41, at 67–110 (Johnson); *id.* at 177–224 (Nixon).

63. See, e.g., ANDERSON, *supra* note 38, at 118–19 (describing Nixon administration rhetoric in defending affirmative action, including equality-based rhetoric); SKRENTNY, *supra* note 41, at 199–201 (same); *Equal Opportunity Chief Sounds Off at Interview*, *supra* note 53 (reporting on an interview of a chairperson of the Equal Employment Opportunity Commission during the Johnson and Nixon administrations, in which he defended affirmative action in terms of unequal access to job networks for minorities); *Federal Aides Step Up Bid to Halt Job Bias at Pittsburgh, Boston*, *supra* note 43 (reporting on early disputes over the Philadelphia Plan, including arguments of Nixon administration officials characterizing it as an anti-discrimination measure); *Government to Require Detailed Hiring Plans in Federal-Aid Projects*, *supra* note 43 (discussing the Johnson administration's justification of early federal affirmative action programs in anti-discrimination terms); Karmin, *supra* note 43 (same); *SEC Won't Set Rules to Eradicate Job Bias in Securities Industry*, *supra* note 43 (reporting on the Nixon-era SEC's decision not to adopt affirmative action rules for the brokerage industry, a decision justified by the SEC based on the contention that such a move would simply “duplicate existing federal laws barring employment discrimination on the basis of race or sex”); Johnson, *To Fulfill These Rights*, *supra* note 51 (expressing what would become the classic rationale for “soft” affirmative action in equality-based terms); Johnson, “*Plans for Progress*,” *supra* note 29 (linking by-the-numbers approach to voluntary compliance to nondiscriminatory hiring); Nixon, *supra* note 43 (arguing for affirmative action and other race-targeted actions in equality-based terms, while also opposing the use of compulsory school busing to correct de facto segregation). Cf. *Affirmative Action Programs*, CHI. DEFENDER, July 20, 1974, at 8 (reporting an early argument by a Nixon-era Department of Health, Education, and Welfare official defending affirmative action in proto-diversity terms).

64. See sources cited *supra* notes 62–63 and accompanying text.

In contrast, the earliest equality-based arguments made *against* affirmative action were far less successful, at least in political terms.<sup>65</sup> While equality-based arguments against affirmative action had coexisted with arguments in favor of it since affirmative action's earliest development, the most prominent early proponents of such arguments were, for a variety of reasons, largely unsuccessful.<sup>66</sup> Most notably, early equality-based arguments against hard affirmative action by labor and colorblind liberals generally foundered because of the nuanced nature of the positions they took (which rendered their critiques ambiguous and complex),<sup>67</sup> and the party dynamics that prevented them from securing a central position within the Democratic Party coalition.<sup>68</sup>

Thus, it was not until the mid-1970s, with the rise of colorblind conservatism, that equality-based arguments against affirmative action truly began to gain ground. While conservatives had articulated "reverse discrimination" arguments even prior to this time, such arguments were often coupled with claims to a "right to discriminate"—and as such, were perceived by many as lacking credibility.<sup>69</sup> Moreover, the relative recency (or in some cases, contemporaneity) with which many prominent

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65. See *infra* notes 66–68 and accompanying text. For more on early conservative and neoconservative equality-based arguments, see *infra* notes 69–82 and accompanying text.

66. See, e.g., DESLIPPE, *supra* note 37, at 12, 183–91.

67. As Dennis Deslippe notes, these nuanced positions may, however, most accurately represent the views of the broader American public. *Id.* at 5, 12.

68. See, e.g., *id.* at 12, 183–91. As Deslippe notes, by the mid-1970s, much of the liberal opposition had also begun to move on to other priorities. *Id.* at 179. Deslippe also describes early opposition from labor conservatives, but it appears that labor conservatives were less likely to frame their arguments primarily in racial equality terms, as opposed to in terms of respect for labor rights and defense of parochial interests. See *id.* at 150–79.

69. See, e.g., MACLEAN, *supra* note 37, at 45–51, 61–64, 68–70, 72–75, 197, 234–35, 256–59 (outlining pre- to mid-1970s conservative positions vis-à-vis civil rights, which often involved open racism, as well as global opposition to civil rights on liberty or property rights grounds); Christopher W. Schmidt, *Defending the Right to Discriminate: The Libertarian Challenge to the Civil Rights Movement*, in SIGNPOSTS: NEW DIRECTIONS IN SOUTHERN LEGAL HISTORY 417 (Sally E. Hadden & Patricia Hagler Minter eds., 2013) (describing the history of "right to discriminate" arguments in opposing civil rights); *Text of Sen. Goldwater's Chicago Speech on Civil Rights*, WASH. POST, Oct. 18, 1964, at A34 (showing early use of colorblindness rhetoric, including linkages to the Declaration of Independence, but in a speech where Goldwater simultaneously opposed the Civil Rights Act of 1964 on "freedom of association" grounds). Some of the earliest articulations of the conservative colorblindness theory came from prominent segregationists. See, e.g., Whiteford S. Blakeney, *Segregation-Integration and the U.S. Constitution*, CHARLOTTE OBSERVER, Oct. 14, 1969, at A9 (segregationist Whiteford Blakeney, articulating an early version of the conservative colorblindness theory in the school desegregation context) (copy in the files of, and with markings by, prominent segregationist lawyer John C. Satterfield). See also SOPHIA Z. LEE, *THE WORKPLACE CONSTITUTION FROM THE NEW DEAL TO THE NEW RIGHT* 371 n.17 (Sarah Barringer Gordon et al. eds., 2014) (noting that Blakeney was a segregationist and suggesting that "[c]onservatives ha[ve] since worked to distance this approach [i.e., colorblindness] from its segregationist roots").

conservatives had expressed explicitly racist views rendered such early claims at least questionable.<sup>70</sup>

But by the mid-1970s, this began to change. In 1972, several prominent Jewish groups and scholars—including some who had traditionally been allied with civil rights proponents—came out very publicly against “reverse discrimination,” giving equality-based arguments against affirmative action newfound respectability.<sup>71</sup> Prominent conservatives—aware of the waning viability of traditional conservative arguments in opposition to civil rights—moved quickly to embrace the language of civil rights itself in their opposition to affirmative action, reversing course from their prior global opposition to civil rights.<sup>72</sup> Backgrounding continued racist elements within the conservative movement, conservatives in the early 1970s increasingly pivoted toward an exclusive deployment of civil rights rationales as the predicate for their opposition to affirmative action and other civil rights initiatives.<sup>73</sup>

This new conservative (and neoconservative) version of equality-based rhetoric was much less nuanced and more strident than the version of equality-based arguments that had been deployed by affirmative action’s

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70. See sources cited *supra* note 69. See also MACLEAN, *supra* note 37, at 97–98 (noting that conservative actors’ and organizations’ early invocations of “reverse discrimination” arguments were not taken seriously due to their association with racism). Cf. WILLIAM P. HUSTWIT, JAMES J. KILPATRICK: SALESMAN FOR SEGREGATION 143–201 (2013) (describing the evolving rhetoric of James J. Kilpatrick, a prominent segregationist and newspaper columnist, who shifted from open racism in the 1950s and 1960s to colorblind equality rationales); William P. Hustwit, *From Caste to Colorblindness: James J. Kilpatrick’s Segregationist Semantics*, 77 J. S. HIST. 639 (2011) [hereinafter Hustwit, *Caste to Colorblindness*] (shorter treatment of the same subject).

71. See, e.g., MACLEAN, *supra* note 37, at 185–88, 205, 224. Affirmative action had become a point of contention within Jewish groups even prior to this time—generating both opposition and support—but 1972 appears to have marked a turning point in what were until then much less public divisions. See generally DESLIPPE, *supra* note 37, at 66–78 (discussing early opposition within Jewish organizations to affirmative action); LEE, *supra* note 69, at 172 (“The liberal coalition carefully avoided open disagreement over the affirmative action issue until the summer of 1972, when the fissure cracked wide.”). Some Jewish opponents of affirmative action were colorblind liberals, see sources cited *supra* notes 65–68, but some also were neoconservatives, many of whom would ultimately align themselves with the broader conservative movement. See DESLIPPE, *supra* note 37, at 10–11, 66–78; MACLEAN, *supra* note 37, at 196–97, 230–31. For a much fuller account of the divisions within the Jewish community over the issue of affirmative action in the 1970s, see DESLIPPE, *supra* note 37, at 49–110, and MACLEAN, *supra* note 37, at 185–229.

72. See, e.g., MACLEAN, *supra* note 37, at 223–24, 225–41, 338–41; Hustwit, *Caste to Colorblindness*, *supra* note 70, at 659–67. Interestingly, it appears that the turn to liberty-based “freedom to discriminate” arguments that preceded the turn to equality-based arguments was also, for at least some prominent conservative commentators, instrumentally driven by a perception that older, openly racist arguments were no longer politically palatable. See, e.g., Schmidt, *supra* note 69, at 50–51.

73. See sources cited *supra* note 72.

more liberal detractors.<sup>74</sup> No longer emphasizing the moral imperative of soft affirmative action, conservative proponents of “reverse discrimination” arguments generally eschewed all forms of color consciousness, even when targeted at remediating acknowledged contemporary discrimination.<sup>75</sup> Cast in stark moral terms, conservatives increasingly claimed the mantle of the “true” proponents of civil rights as they sought to roll back color conscious approaches to civil rights enforcement and remediation.<sup>76</sup>

Conservative discourse equating opposition to affirmative action with equality and civil rights steadily gained ground during the 1970s.<sup>77</sup> But it was the election of Ronald Reagan in 1980 that marked its true ascendancy.<sup>78</sup> Once a conservative who had run on an openly anti-civil rights platform,<sup>79</sup> by the early 1980s, Reagan, like many conservatives, had pivoted to an embrace of civil rights rhetoric in his opposition to affirmative action and other civil rights measures.<sup>80</sup> Filling his administration with strong proponents of the colorblind approach to civil rights enforcement, Reagan administration officials promptly set to work using the civil rights enforcement machinery of the federal government to attempt to dismantle the increasingly pervasive use of affirmative action in both the private and public sectors.<sup>81</sup> Although ultimately only modestly successful in their efforts, prominent Reagan officials (such as the head of

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74. See, e.g., DESLIPPE, *supra* note 37, at 207–08; MACLEAN, *supra* note 37, at 224, 234. Cf. *supra* notes 65–68.

75. DESLIPPE, *supra* note 37, at 207–08; MACLEAN, *supra* note 37, at 224, 234. Cf. *supra* notes 67–68. See also MACLEAN, *supra* note 37, at 250, 254–55; *infra* notes 78–82 and accompanying text.

76. See, e.g., MACLEAN, *supra* note 37, at 236, 255. See also *infra* notes 78–82 and accompanying text.

77. See MACLEAN, *supra* note 37, at 225–61 (detailing the rise of colorblind conservatism during the mid-1970s).

78. See, e.g., *id.* at 225–27, 300–32 (discussing colorblind conservatism in the federal government during the Reagan administration).

79. See Schmidt, *supra* note 69, at 49.

80. See, e.g., Ronald Reagan, *Radio Address to the Nation on Civil Rights*, AM. PRESIDENCY PROJECT (June 15, 1985), <http://www.presidency.ucsb.edu/ws/?pid=38782> (making equality-based arguments against affirmative action, and referencing the Declaration of Independence and Martin Luther King in support of his arguments).

81. See, e.g., ANDERSON, *supra* note 38, at 169–92; MACLEAN, *supra* note 37, at 302–14; Reva B. Siegel, *Foreword: Equality Divided*, 127 HARV. L. REV. 1, 23–34 (2013). See also THE HERITAGE FOUNDATION, A MANDATE FOR LEADERSHIP REPORT: AGENDA '83, at 201, 206–12 (1983) (containing an “essay[] on [e]nding [d]iscrimination in [c]ivil [r]ights” authored by an individual holding a “sensitive position[] in the government,” making the case for understanding affirmative action—including affirmative action to remediate adjudicated systemic discrimination—as violating anti-discrimination guarantees); *Civil Rights Commission Denounces High Court’s Job Preference Ruling*, *supra* note 29 (describing the Civil Rights Commission’s opposition to affirmative action under Reagan; opposition the Commission characterized as being predicated on affirmative action’s fundamental opposition to equality principles).

the Civil Rights Division of the Department of Justice, William Bradford Reynolds) regularly used their national platform to put forward a view of affirmative action as “at war with the American ideal of equal opportunity.”<sup>82</sup>

Proponents of affirmative action did not immediately retreat from their arguments in support of affirmative action’s founding in equality. Into the 1990s, progressive supporters of affirmative action continued to make substantial equality-based arguments for why affirmative action measures were required, with leading figures such as President Bill Clinton continuing to subscribe to an equality-based rationale.<sup>83</sup> But gradually, arguments founded in diversity would begin to supplant equality-based justifications for affirmative action. As affirmative action proponents went on the defensive, they increasingly shifted towards rationales that permitted them to enlist institutional allies by deflecting attention away from hard discrimination rationales, and toward the benefits for business and educational institutions of racial diversity.<sup>84</sup>

Other pressures also no doubt played a role in this turn.<sup>85</sup> Starting in the late 1970s, the Supreme Court increasingly turned against equality-based arguments for affirmative action (and toward the equality-based arguments of affirmative action opponents), while signaling a greater receptiveness to the diversity rationale.<sup>86</sup> And patterns of racial

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82. See ANDERSON, *supra* note 38, at 173 (quoting William Bradford Reynolds). See also sources cited *supra* note 81.

83. See, e.g., William J. Clinton, *Remarks on Affirmative Action at the National Archives and Records Administration*, AM. PRESIDENCY PROJECT (July 19, 1995), <http://www.presidency.ucsb.edu/ws/?pid=51631> (major speech on affirmative action, linking affirmative action to equality arguments and the Declaration of Independence).

84. See, e.g., MACLEAN, *supra* note 37, at 222–23, 302, 314–25, 337–38. See generally *supra* note 60 and accompanying text (explaining that diversity-based rationales for affirmative action had not yet entered public discourse during the 1960s and 1970s); *infra* note 88 and accompanying text (describing diversity’s ultimate supplanting of equality rationales).

85. In addition to those considerations addressed in this Article, the shift from discourse around affirmative action focusing primarily on equality in working class jobs, to focusing primarily on higher education admissions and contracting with minority-owned businesses, seems likely to have played a significant role in the fading of the anti-disparate treatment rationale for affirmative action. Because it is more often the case in those newer contexts that there are hard indicators and prerequisites for admissions that may disproportionately exclude minorities on formally neutral grounds, it is more difficult to characterize affirmative action in those contexts as simply seeking to effectuate an anti-disparate treatment mission. See generally *supra* note 48 (describing the turn against affirmative action by some supporters once it turned to domains requiring higher levels of objective qualifications).

86. See, e.g., *Grutter v. Bolinger*, 539 U.S. 306, 307–10 (2003); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 200–02 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 470–73 (1989); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 267 (1978). Cf. BALKIN, *supra* note 2, at 11

segregation—once easy to link to recent explicit racial discrimination—increasingly became characterized as simply the by-product of race-neutral factors, such as poverty and choice.<sup>87</sup> Ultimately, this combination of legal and non-legal forces would channel the discourse of affirmative action supporters away from its historical origins in anti-discrimination, and toward non-equality justifications for affirmative action’s continued existence.<sup>88</sup>

As scholars such as Nancy MacLean have observed, the turn by proponents of affirmative action away from hard anti-discrimination arguments and toward diversity arguments was a response to real strategic constraints.<sup>89</sup> But, this turn also, to some extent, ceded the equality terrain. Today, the conservative conception of affirmative action as a form of discrimination has become mainstream, an idea that is regularly and prominently articulated in public discourse.<sup>90</sup> In contrast, equality-based arguments in support of affirmative action have increasingly receded into the background, as diversity arguments have come to the fore.<sup>91</sup> As

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(observing that there is a risk of people confusing what the “Constitution-in-practice permits” with “what is just”).

87. See sources cited *infra* notes 91–92 and accompanying text. See also Michael I. Norton & Samuel R. Sommers, *Whites See Racism as a Zero-Sum Game that They Are Now Losing*, 6 PERSP. ON PSYCHOL. SCI. 215, 216 fig.1 (2011) (showing that since the 1960s, whites have perceived decreasing levels of anti-black bias and increasing levels of anti-white bias, such that today, they perceive there to be greater levels of bias against whites than against blacks).

88. See sources cited *infra* notes 89–92.

89. See MACLEAN, *supra* note 37, at 222–23, 314–25. See also *Bakke*, 438 U.S. at 311–15 (putting forward the diversity rationale in an opinion that would ultimately prove to be highly influential); *supra* notes 84–88 and accompanying text.

90. For just one example, see the many opinion pieces in 2013 alone objecting to affirmative action on equality-based grounds. See, e.g., Editorial, *Discrimination By Another Name*, WASH. TIMES (June 14, 2013), <http://www.washingtontimes.com/news/2013/jun/14/discrimination-by-another-name/>; Jennifer Gratz, Letter to the Editor, *Civil-Rights Proposal Doesn’t Overreach*, KNOXVILLE NEWS-SENTINEL (Feb. 4, 2013), <http://www.knoxnews.com/opinion/letters-to-the-editor/letter-civil-rights-proposal-doesnt-overreach-ep-358972935-356181491.html>; Paul Greenberg, Editorial, *From the Right: No Clarity from Court*, DAILY PRESS (NEWPORT NEWS, VA), July 5, 2013, at A17; Erick Hildebrandt, Letter to the Editor, *Reader Continues Viewpoint Debate*, CIRCLEVILLE HERALD (Nov. 11, 2013), [http://www.circlevilleherald.com/comment/letters/reader-continues-viewpoint-debate/article\\_8fb8b7b0-d312-520c-a79c-0cbe8fed439.html](http://www.circlevilleherald.com/comment/letters/reader-continues-viewpoint-debate/article_8fb8b7b0-d312-520c-a79c-0cbe8fed439.html); Brianna Martin, Letter to the Editor, *An Ironic Program*, LANCASTER INTELLIGENCER J., Nov. 24, 2013, at P3; Dave Melges, *Should Race Be Considered?*, USA TODAY, July 2, 2013, at 11A; Bob Reagan, Letter to the Editor, *The Discrimination Cycle*, DALL. MORNING NEWS, Apr. 6, 2013, at A18; Sam Stewart, Opinion, *Racial Admissions Policy Wrong*, HARTFORD COURANT, June 11, 2013, at A10. See also Rich Lowry, Opinion, *Race Preferences Rumble On*, CHARLOTTE SUN, June 27, 2013, at 9 (making the equality argument and arguing that affirmative action harms blacks).

91. Among supporters of affirmative action, diversity has increasingly become the dominant, albeit not exclusive, argument. See, e.g., Editorial, *An Affirmative Right of the People*, WASH. POST, Oct. 17, 2013, at A20; Andrew Blotky, Opinion, *Supreme Court Ruling on Affirmative Action Shows*

importantly, where they still remain, such equality arguments have largely shifted from the types of “hard” anti-discrimination rationales that once dominated the discourse to much more nuanced (and arguably less morally compelling) arguments relating to historical discrimination, and the continued de facto disadvantages that many racial minorities face.<sup>92</sup>

Against this backdrop, we should perhaps not be surprised that today, it is rare to hear invocations of the Declaration’s equality guarantee—that “all men are created equal”—in support of affirmative action.<sup>93</sup> Nor should we be surprised that opponents of affirmative action feel increasingly confident in claiming the Declaration’s principles for their cause. In the modern era, it is the conservative conception of affirmative action’s

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*Diversity Still Matters*, CHRISTIAN SCI. MONITOR (June 24, 2013), <http://www.csmonitor.com/Commentary/Opinion/2013/0624/Supreme-Court-ruling-on-affirmative-action-shows-diversity-still-matters>; Wendy H. Chovnick, Letter to the Editor, *Diversity Brings Diversity*, ARIZ. REPUBLIC, June 26, 2013, at B6; Yvette D. Clarke, *State of Equality and Justice in America: Another Side of the Debate on Affirmative Action*, WASH. POST (Jan. 25, 2013), [http://www.washingtonpost.com/blogs/therootdc/post/state-of-equality-and-justice-in-america-another-side-of-the-debate-on-affirmative-action/2013/01/25/05e5f954-6712-11e2-93e1-475791032daf\\_blog.html](http://www.washingtonpost.com/blogs/therootdc/post/state-of-equality-and-justice-in-america-another-side-of-the-debate-on-affirmative-action/2013/01/25/05e5f954-6712-11e2-93e1-475791032daf_blog.html); F. Michael Higginbotham, Editorial, *Affirmative Action Still Needed*, BALT. SUN (June 7, 2013, 12:18 PM), <http://www.baltimoresun.com/news/opinion/oped/bs-ed-affirmative-action-20130606-story.html>; Editorial, *Leave Colleges With Ways to Assemble Diverse Classes*, USA TODAY, Oct. 18, 2013, at 7A; Cokie Roberts & Steven V. Roberts, Editorial, *The Virtues of Diversity*, DAILY J. ONLINE (June 29, 2013, 6:00 AM), [http://dailyjournalonline.com/news/opinion/editorial/the-virtues-of-diversity/article\\_f33c8720-e04f-11e2-a715-001a4bcf887a.html](http://dailyjournalonline.com/news/opinion/editorial/the-virtues-of-diversity/article_f33c8720-e04f-11e2-a715-001a4bcf887a.html); D. R. Tucker, *A Plan of Action*, HUFFINGTON POST (May 22, 2013, 5:36 PM), [http://www.huffingtonpost.com/d-r-tucker/a-plan-of-action\\_b\\_3316153.html](http://www.huffingtonpost.com/d-r-tucker/a-plan-of-action_b_3316153.html). See also MACLEAN, *supra* note 37, at 314–25, 332.

92. See, e.g., Editorial, *Affirmative Action*, HOUS. CHRON., June 25, 2013 (arguing that affirmative action is justified by its value for diversity, as well as “America’s poor track record of rectifying the sins of the past,” and the current “under-representation of blacks and Hispanics in higher education” stifling leadership development in minority communities); Patrick Cunningham, *Should Race Be Considered?*, USA TODAY, July 2, 2013, at 11A (expressing the need for affirmative action in terms of historical discrimination); Curtis Edmonds, Editorial, *College 101: A Course in Race, Class, Life*, PITTSBURGH POST-GAZETTE (June 1, 2013, 12:00 AM), <http://www.post-gazette.com/opinion/oped/2013/06/01/saturday-diary-college-101-a-course-in-race-class-life/201306010096> (arguing for affirmative action in both equality and diversity terms, and suggesting that affirmative action opponents ignore gaps in black/white life chances due to education, housing, and income differentials); Marc Morial, Editorial, *Supreme Court Must Keep Affirmative Action Alive*, CHI. DEFENDER, June 5, 2013, at 10 (arguing for affirmative action on the basis of diversity and equality, including a history of discrimination against minorities and the relegation of minorities to often segregated and substandard schools); Editorial, *Race and College Admissions*, BALT. SUN, Oct. 17, 2013, at 16A (expressing the need for affirmative action in terms of the disproportionate likelihood of African Americans to live in poverty and not have access to college-track courses and counseling, as well as the history of discrimination); Chris Temprow, *Should Race Be Considered?*, USA TODAY, July 2, 2013, at 11A (expressing the need for affirmative action in terms of historical discrimination). *But cf.* Charity Swift, Letter, *Affirmative Action Programs Remain Relevant Today*, TENNESSEAN, Feb. 22, 2013, at A9 (articulating a hard anti-discrimination rationale for affirmative action).

93. Liberals continue to invoke the Declaration for numerous other causes. See sources cited *supra* note 6; sources cited *infra* note 107.

relationship to equality that has increasingly gained ground, even as the original anti-discrimination rationales for affirmative action have increasingly been lost.<sup>94</sup>

### III. IMPLICATIONS

In affirming the federal “Philadelphia Plan” in 1970, District Judge Charles Weiner wrote:

The Court is satisfied that [the affirmative action obligations imposed on the defendant are] constitutional. The Act provides a remedy for a long-continued denial of vital rights of minorities and of every American—the right to equality before the law—the right in every walk of life in a land whose philosophy is that “all men are created equal” . . . .<sup>95</sup>

Thus, invoking the Declaration, Judge Weiner affirmed the lawfulness of early federal efforts to impose affirmative action on federal contractors.<sup>96</sup>

Judge Weiner did not stand alone among his judicial brethren in linking the Declaration’s equality guarantees to support for affirmative action. Until his decision in 1970—and for the decade thereafter—all invocations of the Declaration in the courts, at every level, would be in support of affirmative action.<sup>97</sup> In both federal and state courts, lower and

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94. Even the approach of affirmative action supporters today often reflects this. *See, e.g.*, RANDALL KENNEDY, FOR DISCRIMINATION: RACE, AFFIRMATIVE ACTION AND THE LAW (2013) (book supporting affirmative action, whose title “For Discrimination” suggests that affirmative action is a form of discrimination); Editorial, *An Affirmative Right of the People*, WASH. POST, Oct. 17, 2013, at A20 (editorial supporting affirmative action, but expressing the view that *Schuette*, a case involving a ban on affirmative action, “is not a case of a racist majority blocking a policy necessary to ensure equal treatment of minority citizens”). *But cf.* Noah D. Zatz, *Special Treatment Everywhere, Special Treatment Nowhere*, 95 B. U. L. REV. 1155 (2015) (providing examples of how “special treatment” accusations can be leveled even at enforcement of Title VII’s core anti-discrimination guarantees). For a fascinating account of one agency’s refusal to abandon its own understanding of affirmative action measures as being demanded by the Equal Protection Clause’s equality guarantees, even as most other agencies turned against that understanding, see Sophia Z. Lee, *Race, Sex and Rulemaking: Administrative Constitutionalism and the Workplace, 1960 to the Present*, 96 VA. L. REV. 799 (2010).

95. *The Contractors Ass’n of E. Pa. v. Sec’y of Labor*, 311 F. Supp. 1002, 1008 (E.D. Pa. 1970) (quoting *Weiner v. Cuyahoga Cmty. Coll. Dist.*, 238 N.E.2d 839, 844 (Ohio Ct. Com. Pl. 1968)), *aff’d*, 442 F.2d 159 (3d Cir. 1971).

96. *Id.* (quoting *Weiner*, 238 N.E.2d at 844).

97. *See id.* (quoting *Weiner*, 238 N.E.2d at 844); *Weiner*, 238 N.E.2d at 844. *See also* *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 326 (1978) (Brennan, J., concurring in part and dissenting in part) (invoking the Declaration in a pro-affirmative action opinion, but not directly for affirmative action’s grounding in equality); *id.* at 388 (Marshall, J., separate opinion) (same). *Cf.* *United States v. Jefferson Cty. Bd. of Educ.*, 372 F.2d 836, 869–73 (5th Cir. 1966) (linking the Declaration to the need to take “affirmative action” to achieve substantive equality the context of school desegregation); *Brown v. Moore*, 428 F. Supp. 1123, 1143 (S.D. Ala. 1976) (linking the Declaration to the need to achieve substantive equality in the voting rights context); *Bolden v. City of Mobile*, 423 F. Supp. 384, 402–03 (S.D. Ala. 1976) (same), *rev’d*, 446 U.S. 55 (1980); *Keyes v. Sch. Dist. No. One*, 303 F. Supp. 279, 283

highest courts, the courts would be unanimous in linking the Declaration's equality guarantees to support for affirmative action.<sup>98</sup>

But by 1996, the tide had turned. In 1995, *Adarand*—and its competing invocations of the Declaration—would prove to be the last pro-affirmative action invocation of the Declaration by any judge, in any court, at any level.<sup>99</sup> In the twenty years since *Adarand*, the Declaration has continued to be invoked by judges in opposition to affirmative action, but it has entirely disappeared from judicial discourse in support of affirmative action's moral or legal necessity.<sup>100</sup>

Similar shifts have occurred across a broad array of other contexts as well. Political actors—who once invoked the Declaration regularly in support of affirmative action—now invoke it, if at all, virtually exclusively against affirmative action.<sup>101</sup> Lawyers, in their arguments to the Supreme Court, have similarly turned away from invocations of the Declaration in support of affirmative action, even as invocations against have increased.<sup>102</sup> And in news and opinion pieces, perhaps the best broad metric of popular constitutional debates, once-robust invocations of the Declaration by

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n.1 (D. Colo. 1969) (quoting an administrative body's statement linking the Declaration's values to the need to remediate de facto discrimination in the school desegregation context).

98. See sources cited *supra* note 97.

99. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 248 n.6 (1995) (Stevens, J., dissenting). For invocations against, see *Grutter v. Bollinger*, 539 U.S. 306, 378 (2003) (Thomas, J., dissenting); *Grutter v. Bollinger*, 288 F.3d 732, 792 (6th Cir. 2002) (Boggs, C.J., dissenting); *Monterey Mech. Co. v. Wilson*, 138 F.3d 1270, 1270 (9th Cir. 1998); *Adarand*, 515 U.S. at 240 (Thomas, J., concurring in part and concurring in the judgment). Cf. *Hi-Voltage Wire Works, Inc. v. City of San Jose*, 12 P.3d 1068, 1072 (Cal. 2000) (invoking the Declaration at the beginning of a lengthy anti-affirmative action opinion, but not directly linking the Declaration to arguments against affirmative action).

100. See sources cited *supra* note 99.

101. For example, up through the 1990s, a majority of presidential invocations of the Declaration in the context of affirmative action were pro-affirmative action. See Clinton, *supra* note 83 (linking affirmative action to equality arguments and the Declaration in a major speech on affirmative action); Johnson, "Plans for Progress," *supra* note 29 (linking a by-the-numbers approach to voluntary compliance to the Declaration). See also PRESIDENT'S COMM. ON GOV'T CONTRACTS, *supra* note 29, at 2 (linking soft affirmative action concepts to the Declaration in an early report by Eisenhower Presidential Committee); George H.W. Bush, *Remarks at a White House Ceremony Commemorating the 25th Anniversary of the Civil Rights Act*, AM. PRESIDENCY PROJECT (June 30, 1989), <http://www.presidency.ucsb.edu/ws/?pid=17235> (invoking the Declaration and also expressing support for affirmative action, but not directly linking the two). Cf. Reagan, *supra* note 80 (invoking the Declaration of Independence against affirmative action). Since the 1990s, invocation of the Declaration in political contexts has become rarer, but to the extent such invocations exist, they are virtually exclusively anti-affirmative action. See sources cited *supra* note 29.

102. See sources cited *supra* note 29.

proponents have faded to a small minority of contemporary efforts to link the Declaration to affirmative action.<sup>103</sup>

What are we to make of these changes? It is always a perilous business to try to draw meaning from the cacophony of public constitutional debates, and the shifting terrain of affirmative action's relationship to the Declaration of Independence is no exception. But, it is also difficult to dismiss the significant shifts in the Declaration's invocation—grounded in much wider historical shifts in discourse—as without meaning. Rather, the striking nature of the changing patterns in the invocation of the Declaration—across a host of contexts of popular constitutional engagement—seems consonant only with an increasingly fading public association of affirmative action with the Declaration's equality values, and an increasing association of the Declaration with affirmative action opponents' arguments.

To the extent that one believes that the law follows popular constitutional values, this finding should be troubling for proponents of affirmative action.<sup>104</sup> The window that the Declaration gives us into popular understandings of affirmative action's relationship to equality is not promising for affirmative action's future. It suggests that affirmative action's opponents have increasingly persuaded the public of their vision of affirmative action's relationship to constitutional equality values, while affirmative action's supporters have increasingly failed to do so.<sup>105</sup> In short,

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103. See sources cited *supra* note 29.

104. The dynamics through which popular constitutionalism operates are complex, and I do not mean to suggest that there is a simple one-to-one relationship between public understandings of constitutional values and constitutional lawmaking. However, there are also reasons to believe that the Court will (and often does) conform its constitutional lawmaking to widely successful popular campaigns to introduce new popular constitutional understandings. See sources cited *supra* note 7.

105. In addition to the patterns of invocation of the Declaration, discussed *supra*, some further evidence of the public's changing association of affirmative action with equality values can be found in shifts in the public's responses to equality-framed questions about affirmative action. When questions about support of, or opposition to, affirmative action are framed in equality-based terms, the public has, over the last 25 years, increasingly expressed agreement with the anti-affirmative action perspective, and increasingly declined to agree with the pro-affirmative action perspective. See, e.g., Peter D. Hart & Bill McInturff, *NBC News/Wall Street Journal Study #13200*, WALL ST. J. 26 (May-June 2013), <http://online.wsj.com/public/resources/documents/WSJpoll060513.pdf> (presenting survey results on an affirmative action question from 1991 through 2013). Although today, the public expresses rough parity in support for the pro and anti-affirmative action equality positions, this marks a substantial shift from twenty-five years ago (in 1991, when the issue was first polled), when there was solid majority support (61 percent) for the pro-affirmative action equality argument, and only minority support (28 percent) for the anti-affirmative action equality argument. *Id.* Interestingly, one does not see comparable shifts when questions are framed in ways that do not emphasize the equality rationales for affirmative action, suggesting that it is specifically in this one domain that affirmative action opponents have been successful in persuading the public. Cf. JEFF JONES & LYDIA SAAD, GALLUP POLL SOCIAL SERIES:

if public constitutional beliefs are prologue to constitutional lawmaking, that prologue suggests an increasingly tenuous legal stature for affirmative action.

Today, and historically, affirmative action is far from the only context in which the Declaration of Independence, and its expression of constitutional values, is claimed by both proponents and opponents of a particular constitutional project.<sup>106</sup> Across arenas as diverse as immigrant rights, abortion, gun rights, and LGBT rights, both proponents and opponents have—over the last several decades—continued to invoke the Declaration’s prefatory phrases.<sup>107</sup> Thus, today, as in the past, the

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MINORITY RIGHTS & RELATIONS Q23 (2013), [http://www.gallup.com/file/poll/163679/Affirmative\\_Action\\_130724.pdf](http://www.gallup.com/file/poll/163679/Affirmative_Action_130724.pdf) (reporting survey results from 2001 to 2013 in response to the following question: “Do you generally favor or oppose affirmative action programs for racial minorities?,” and showing that the percentage favoring such programs has increased, while the percentage opposing such programs has dropped).

106. Most notably, opposing invocations of the Declaration played a major role in the long debates over slavery leading up to the Civil War. See TESIS, *supra* note 2, at 129–47.

107. See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584, 2631, 2639 (2015) (Thomas, J., dissenting) (arguing that the majority opinion finding same-sex marriage to be constitutionally protected was contrary to the Declaration); 161 CONG. REC. H2949–51 (daily ed. May 13, 2015) (statement of Rep. Franks) (quoting the Declaration in arguing in opposition to abortion); Kristina Campolongo, *Don’t Guarantee Special Rights for Homosexuals*, CINCINNATI POST, Dec. 4, 1997, at 18A (arguing against laws prohibiting sexual orientation discrimination on the grounds that such laws constitute “special rights” and “[t]he Constitution states that all men are created equal”); Jack Gendron, Opinion, *Gays also Deserve the Same Rights*, TIMES UNION, May 30, 2009, at A8 (arguing that “[g]ays should have the same rights to life, liberty and the pursuit of happiness as all other U.S. citizens”); Susan Gibbons, *Gun Violence Out of Control*, BUCKS COUNTY COURIER TIMES, Mar. 19, 2013, at A10 (arguing that the right to own an assault weapon should not supersede the right to “life, liberty and the pursuit of happiness”); Ashley Villareal, Letter to the Editor, *U.S. Natives Have Dreams, Too*, SANTA FE NEW MEXICAN, Oct. 2, 2007, at A5 (suggesting that allowing undocumented immigrants to be legalized will lead to resources being drained away from American citizens and “will eliminate our natural right as Americans to the pursuit of happiness . . .”); Debbie Wasserman Schultz, *39th Anniversary of Roe v. Wade*, ST. NEWS SERV., Jan. 22, 2012 (“We must continue working to protect a womans [sic] constitutional right to choose as part of her right to life, liberty, and the pursuit of happiness.”); Susan Frances Bonner, *From Lily White Liberal to Gun Toten Momma*, UNCOOPERATIVE BLOGGER (Feb. 28, 2015), <http://uncooperativeblogger.blogspot.com/2015/02/from-lily-white-liberal-to-gun-toten.html> (“I . . . thank the Founding Fathers that we still have the right to protect life, liberty and the pursuit of happiness with a firearm.”); Remarks by the President on the Supreme Court Decision on Marriage, 2015 DAILY COMP. PRES. DOC. 463 (June 26, 2015), <https://www.gpo.gov/fdsys/pkg/DCPD-201500463/pdf/DCPD-201500463.pdf> (President Barack Obama, invoking the Declaration in support of marriage for same-sex couples); Barack Obama, Op-Ed., *President Obama: Why I Acted on Immigration*, WHITE HOUSE BLOG (Dec. 2, 2014, 4:18 PM), <https://www.whitehouse.gov/blog/2014/12/02/president-obama-why-i-acted-immigration> (presenting his reasons for taking administrative action on immigration, and arguing that “[w]hat makes us Americans is our shared commitment to an ideal, that all of us are created equal . . .”).

Declaration has remained key contested terrain in debates over contemporary constitutional issues.<sup>108</sup>

How partisans of contemporary constitutional debates have invoked the Declaration is evidently far from the only way for scholars of popular constitutionalism to uncover the status of such contemporary popular constitutional debates.<sup>109</sup> But neither is it irrelevant. In a country that treats the Declaration as a kind of religious text, understanding who feels empowered, and when, to invoke its constitutional values—and whether lawyers, politicians, and judges subscribe to those claims—may tell us something important about how the winds of popular constitutional engagement are blowing.<sup>110</sup> And to the extent that popular constitutional beliefs matter (as many constitutional scholars believe), such indications may ultimately help us to better understand the direction of constitutional law.

### CONCLUSION

The Declaration of Independence has long inspired competing claims to its constitutional principles.<sup>111</sup> And its sweeping articulation of constitutional principles remains a key entry point for popular engagement in contemporary constitutional debates.<sup>112</sup> Thus, as several constitutional law scholars have observed, the Declaration—and its foundational commitments to liberty and equality—are important, and perhaps even vital, to any theory of popular engagement in the project of constitutional change.<sup>113</sup>

Given this recognized role for the Declaration in popular constitutional engagement, there are substantial reasons for scholars to take seriously *how* the public does so. If, as scholars such as Jack Balkin and Mark Tushnet have contended, the Declaration “constitutes us as a

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108. *But cf.* TESIS, *supra* note 2, at 316 (arguing that, unlike in the past, the Declaration today “rarely inform[s] modern political debate”).

109. For other approaches to popular constitutionalism, see, for example, sources cited *supra* note 7.

110. *See generally* MAIER, *supra* note 2, at xi–xx (describing the treatment of the Declaration as a kind of quasi-religious document).

111. For a sweeping historical account of such invocations, see generally TESIS, *supra* note 2 (describing the many ways in which politicians, associations, groups, and individuals have relied on the Declaration to justify changing policies, laws, and customs).

112. *See* sources cited *supra* note 107.

113. *See* sources cited *supra* note 2.

people,”<sup>114</sup> understanding what the people have to say about the Declaration’s meaning seems of obvious importance to the scholarly project of popular constitutionalism. While such an inquiry will not always lead to clear answers, it may help us to understand the broad direction of popular constitutional understandings: how, and to what extent, the public sees a particular constitutional project as situated within our core constitutional values.

The shifting role that the Declaration has played in affirmative action discourse illustrates these principles. Forty to fifty years ago, in the 1960s and 1970s, affirmative action’s proponents could confidently assert that the Declaration—and its constitutional equality commitments—stood in support of affirmative action efforts.<sup>115</sup> And across an array of contexts, they did so, claiming the mantle of the Declaration’s sweeping statement of equality values in support of the affirmative action project.<sup>116</sup>

In contrast, today, at the start of the twenty-first century, it is affirmative action opponents who dominate the invocation of the Declaration in popular discourse.<sup>117</sup> And it is a very different vision of affirmative action’s relationship to our core constitutional equality values that affirmative action opponents espouse.<sup>118</sup> Rather than one in which affirmative action stands as the guardian of the principle that “all men are created equal,” today the dominant discourse situates affirmative action as violating that core equality guarantee.<sup>119</sup>

To the extent that affirmative action is a constitutional project, this finding bodes ill for its future.<sup>120</sup> Despite the success that affirmative action

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114. BALKIN, *supra* note 2, at 19. *See also* TUSHNET, *supra* note 2, at 12 (making a similar claim about the “thin Constitution,” which Tushnet describes as comprised of the Declaration and the Constitution’s preamble).

115. *See* sources cited *supra* note 29.

116. *See* sources cited *supra* note 29.

117. *See* sources cited *supra* note 29.

118. *See* sources cited *supra* note 29 and accompanying text.

119. *See* sources cited *supra* note 29 and accompanying text.

120. There are reasons to believe that affirmative action proponents have not lost the war for public opinion on affirmative action generally, and they may even be winning it. *See* sources cited *supra* note 105 (providing survey evidence that shows that support for affirmative action has actually increased, but has dropped when couched in equality-based terms). *See also* MACLEAN, *supra* note 37, at 344–47. But, for the public sector, in which the Constitution’s equality values are the standard of conduct, the outlook appears much less promising. *Id.* *Cf.* Sophia Z. Lee, *A Revolution at War with Itself? Preserving Employment Preferences from Weber to Ricci*, 123 *YALE L.J.* 2964, 2977–79 (2014) (discussing the ways that narrowing of the state action doctrine helped save private sector affirmative action). And to the extent the perception of affirmative action as a form of discrimination continues to grow, private sector affirmative action may also come to face similar obstacles under federal statutory law. *Cf.* *Ricci v. DeStefano*, 557 U.S. 557, 561, 593 (2009) (treating actions taken to avoid a disparate

proponents have had in persuading the public of affirmative action's value, they have largely done so through arguments orthogonal to our core constitutional commitments.<sup>121</sup> Whether those arguments will ultimately be able to stand against the rising equality claims of affirmative action's opponents remains to be seen.<sup>122</sup>

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impact against racial minorities as a form of racial discrimination against whites for the first time under Title VII).

121. Diversity is not ordinarily framed as being among our core constitutional commitments, although some scholars have argued that, properly understood, diversity, in fact, forwards core constitutional equality values. *See, e.g.*, Stacy Hawkins, *Diversity, Democracy & Pluralism: Confronting the Reality of Our Inequality*, 66 *MERCER L. REV.* 577, 584 (2015).

122. *See generally* *Fisher v. Univ. of Tex. at Austin*, 135 S. Ct. 2888 (2015) (granting certiorari to review, for a second time, the constitutionality of the University of Texas at Austin's affirmative action program).