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Reverse Passing

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ABSTRACT

Throughout American history untold numbers of people have concealed their true racial identities and assumed a white racial identity in order to reap the economic, political, and social benefits associated with whiteness. This phenomenon is known as passing. While legal scholars have thoroughly investigated passing in its conventional form, the inverse process of reverse passing—the process in which whites conceal their true racial identity and present themselves as nonwhite—has not been closely investigated within legal scholarship.

Rachel Dolezal provides a timely study of the process of reverse passing. Dolezal—an Africana Studies Instructor and head of the Spokane, Washington NAACP—was outed as being white after years of phenotypically and culturally presenting herself as a Black woman. Dolezal's "outing" generated much popular debate and scholarly discourse, most of which tended to frame her actions as a one-off occurrence by a deviant actor. This Article argues instead that her actions were evidence of a deeper structure of incentives rooted in the U.S. Supreme Court's affirmative action jurisprudence.

Though reverse passing is often framed as deviant or irrational, this Article demonstrates how the Supreme Court's affirmative action jurisprudence creates tangible and intangible incentives for white actors to identify as nonwhite. It suggests that the Court's entrenchment of the diversity rationale as the primary compelling state interest that can be used to justify race-conscious affirmative action programs generated situational value in nonwhiteness. That situational value in nonwhiteness now creates incentives that previously did not exist for whites to reverse-pass in order to obtain access to opportunities in education, employment and beyond.

This Article is the first to coin, analyze, and propose a theory of reverse passing. It also deepens the rich and rising scholarship examining performance theory and the pliability of racial identity. Finally, given the reconsideration of the diversity rationale by the Supreme Court in *Fisher v. University of Texas at Austin*, this Article also provides an opportunity to critically examine the merits and shortcomings of the diversity rationale.

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INTRODUCTION

> Color, for anyone who uses it . . . is a most complex, calculated, and dangerous phenomenon.
>
> —James Baldwin, THE PRICE OF THE TICKET[1]
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> All the world's a stage,
> And all the men and women, merely Players;
> They have their *Exits* and their Entrances . . . .
>
> —William Shakespeare, *As You Like It*[2]

American history, and legal literature, is saturated with analysis of the customary "passing" narrative. Passing is the phenomenon whereby nonwhites present themselves as white,[3] while their "underlying identity is not altered, but hidden."[4] Since the inception of slavery through the present day, passing has been prominent within the scholarly literatures, popular media, and indeed, the collective American imagination.

Until recently, racial passing in the other direction—from white to nonwhite—has garnered little to no attention, particularly by legal scholars and commentators.[5] Although precedents for "reverse passing" exist, Rachel Dolezal and her outing as a white woman[6] thrust this burgeoning phenomenon

1. James Baldwin, *Color*, *in* THE PRICE OF THE TICKET: COLLECTED NON-FICTION 1948–1985 319, 322 (1985).
2. William Shakespeare, *As You Like It*, *in* COMEDIES, HISTORIES, & TRAGEDIES: A FACSIMILE OF THE FIRST FOLIO 185, 194 (1623).
3. The passing literature is also rich within the social sciences, particularly in the area of sociology, history, and social psychology. *See, e.g.*, ALLYSON HOBBS, A CHOSEN EXILE: A HISTORY OF RACIAL PASSING IN AMERICAN LIFE (2014); Reginald Daniel, *Passers and Pluralists: Subverting the Racial Divide*, *in* RACIALLY MIXED PEOPLE IN AMERICA 91 (Maria P.P. Root ed., 1992); James E. Conyers & T. H. Kennedy, *Negro Passing: To Pass or Not to Pass*, 24 PHYLON 215 (1963); Randall Kennedy, *Interracial Intimacies: Sex, Marriage, Identity, Adoption*, 17 HARV. BLACKLETTER L.J. 57 (2001). A recent study defined racial passing as "a phenomenon in which a person of one race identifies and presents himself or herself as another (usually white)." Nikki Khanna & Cathryn Johnson, *Passing as Black: Racial Identity Work Among Biracial Americans*, 73 SOC. PSYCHOL. Q. 380, 380 (2010).
4. Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 772 (2002). Yoshino distinguishes passing from "assimilation" and "covering," defining assimilation as an "attempt[] to change or hide her identity" and covering as strategic concealment of stigmatized aspects of identity. *Id.* at 772.
5. *See generally* Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993) (discussing the property value attached to whiteness, and the legal and de facto incentives attached to passing as white); Randall Kennedy, *Racial Passing*, 62 OHIO ST. L.J. 1145 (2001) (presenting a legal analysis of passing from Black to white, combined with a comprehensive legal history of passing narratives from the early and mid-twentieth century).
6. *See, e.g.*, Justin Wm. Moyer, *'Are You an African American?' Why an NAACP Official Isn't Saying*, WASH. POST (June 12, 2015) http://www.washingtonpost.com/news/morning-

and its corollary questions about and the fluidity of racial identity and the concept of "transracialism" to the forefront.[7] Through this tragic archetype, the process of reverse passing was broadly exposed, became the subject of unprecedented attention, and sparked novel questions about the fluidity of race and the malleability of racial identity.

To be sure, Rachel Dolezal provides a noteworthy case study. Dolezal was born a white woman. The daughter of two white parents from Lincoln County, Montana, Dolezal's ancestry was "Czech, German and a few other things."[8] By her own account, Dolezal was fascinated by and identified with Black[9] culture from a very early age.[10] She eventually obtained a graduate degree in fine arts with a focus on Black narrative painting from Howard University—a historically Black university in Washington, D.C.[11]

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mix/wp/2015/06/12/spokane-naacp-president-rachel-dolezal-may-be-white [https://perma.cc/ED4J-VS4H].

7. We define transracialism as an individual of one race deliberately deserting his or her original racial identity for one of their choosing. A critique of transraciality is the subject of Part IV of this Article.

8. Krissah Thompson, *Passing in Reverse: What Does an NAACP Leader's Case Say About Race?*, WASH. POST (June 12, 2015) https://www.washingtonpost.com/lifestyle/style/passing-in-reverse-what-does-rachel-dolezal-tell-us-about-race-today/2015/06/12/76a377a8-112d-11e5-a0dc-2b6f404ff5cf_story.html [https://perma.cc/K3CJ-TVKH]; *see Lincoln Co. Mom Says Daughter Lied About Being Black*, DAILY INTERLAKE (June 13, 2015, 9:20 PM), http://www.dailyinterlake.com/members/lincoln-co-mom-says-daughter-lied-about-being-black/article_5589ea12-1244-11e5-b52f-e3298f99fa0d.html [https://perma.cc/UR2S-UUMX].

9. When using the term "Black," we use the upper-case "B" to reflect the view, articulated by other scholars, that Black people are a specific cultural group and that the term "Black" is worthy of being capitalized as a proper noun. *See* Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1332 n.2 (1988) ("When using 'Black,' I shall use an upper-case 'B' to reflect my view that Blacks, like *A*sians, *L*atinos, and other 'minorities,' constitute a specific cultural group and, as such, require denotation as a proper noun."); Harris, *supra* note 5, at 1710 n.3 (same); Catharine A. MacKinnon, *Feminism, Marxisim, Method, and the State*: *An Agenda for Theory*, 7 SIGNS 515, 516 intro. n. (suggesting that the letter "B" in Black should be capitalized because Black is not "merely a color of skin pigmentation, but . . . a heritage, an experience, a culture and personal identity . . .").

10. *See, e.g.*, Katie Zavadski, *How Did White Rachel Dolezal Convince Everyone She Was Black?*, DAILY BEAST (June 12, 2015, 9:28 AM), http://www.thedailybeast.com/articles/2015/06/12/how-did-this-white-woman-convince-everyone-she-was-black.html [https://perma.cc/8GZC-B977] (noting that Dolezal emphasized her lifelong identification with black identity by posting an alleged early childhood drawing that depicted a girl with brown skin and black braids).

11. *See* Susan Svrluga, *Rachel Dolezal Sued Howard for Racial Discrimination. Because She Was White*, WASH. POST (June 15, 2015), https://www.washingtonpost.com/news/grade-point/wp/2015/06/15/rachel-dolezal-sued-howard-for-racial-discrimination-because-she-was-white [https://perma.cc/JQM4-Z6PJ].

Despite her purported identification with Black culture, Dolezal's tenure at Howard University was marred by controversy. She sued the University for discrimination, alleging that she was denied teaching positions and scholarship aid, received less favorable placements for her artwork, and was subject to a racially hostile environment because she was white.[12] Dolezal's lawsuit was ultimately dismissed after the Court of Appeals found that she failed to demonstrate that the treatment she received was because of her race, or that she was subject to a racially hostile work environment.[13]

After her lawsuit was dismissed, Dolezal's relationship with Black culture shifted markedly from one of purported identification to one of full-fledged assumption. She gradually shed her white identity for one of a "light-skinned black woman,"[14] but devoid of the ancestry, biological ties, and the "lived experience" associated with the latter.[15] Dolezal left her past, parents, and former life behind,[16] strategically piecing together a new identity with the experiences, opportunities, and profile "identifying as Black" offered.[17] Exit Rachel Dolezal the white woman.

12. Moore v. Howard Univ., No. 04-CV-234, at *4 (D.C. Cir. June 14, 2005).
13. *Id.* at *3.
14. Charles M. Blow, Opinion, *The Delusions of Rachel Dolezal*, N.Y. TIMES (June 17, 2015), http://www.nytimes.com/2015/06/18/opinion/charles-blow-the-delusions-of-dolezal.html?_r=0 [https://perma.cc/H4WY-45YD].
15. We define "lived experience," a term vital to this Article's analysis, to encompass how the state and society broadly perceive and treat an individual based on the racial identity into which they were born. While race is a social and political construction, that tenet does not extinguish our position that racial identities and classifications must still bear some biological nexus to a specific race, which is key to shaping one's lived experience. Furthermore, racial identity is not merely a physical or phenotypic representation, but is undergirded by a body of lived experiences that are instrumental to developing that racial identity. Race, therefore, is also an experience rooted in biology, not merely phenotype or physical appearance, as suggested by the U.S. Supreme Court's diversity doctrine. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 315 (1978) (noting that racial or ethnic orgin is an important element of the compelling state interest in diversity that can justify the use of race-conscious admissions programs).
16. For a chronological account of Dolezal's 'transformation' from a white to Black identity, see Meghan Keneally, *Rachel Dolezal: A Timeline of the Ex-NAACP Leader's Transition From White to 'Black'*, ABC NEWS (June 16, 2015, 1:01 PM), http://abcnews.go.com/US/rachel-dolezal-timeline-naacp-leaders-transition-white-black/story?id=31801772 [https://perma.cc/MZ5P-2ALJ].
17. *See* Eun Kyung Kim, *Rachel Dolezal Breaks Her Silence on TODAY: 'I Identify as Black'*, TODAY NEWS (June 16, 2015, 5:46 AM), http://www.today.com/news/rachel-dolezal-speaks-today-show-matt-lauer-after-naacp-resignation-t26371 [https://perma.cc/33QG-22R5]. Devon Carbado and Mitu Gulati would label this process of piecing together a new identity as "image construction," and indeed is an extreme illustration of it. Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259, 1277 (2000).

Enter Rachel Dolezal the Black woman. Dolezal tanned her skin, rotated through several hairstyles traditionally associated with Black womanhood,[18] helmed the Spokane chapter of the National Association for the Advancement of Colored People (NAACP), and obtained an adjunct lecturer position at Eastern Washington University in Africana Studies.[19] She held herself out to the world as a Black woman. Short of explicit declarations of Blackness, her myriad roles and associations bespoke a racial identity that she was not assigned at birth. Dolezal's racial presentation was successful until she was publicly outed on June 11, 2015 by a Spokane, Washington reporter who produced a picture of Dolezal's parents and presented it to her on camera. This caused Dolezal to retreat from the lens,[20] and in the coming days recoil from the racial duplicity she maintained for years.[21]

Even after being outed as white, Dolezal maintained—without biological or ancestral basis—that she was Black. "It's not a costume . . . It's not something that I can put on and take off anymore," she proclaimed days after her public outing.[22] On NBC's *Today Show*, Dolezal stated that, "I identify as Black," to Matt Lauer and a captive American audience,[23] marking that her campaign to reverse pass—from white to Black—was complete. For Dolezal, Blackness is more than a racial costume. It is an identity she can fully assume on account of some deep-seated, existential affinity. Presumably, it is also an identity she can shed if her affinity towards Blackness wanes, or is trumped by a competing identity.

18. Paulette Caldwell examined the significance of hairstyling choices and how they relate to cultural identification for Black women, through discussion of Bo Derek wearing cornrows in the film "10". *See* Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365, 379 (1991). In addition, social psychologists observe that "manipulation of phenotype" and "highlighting/downplaying cultural symbols" are commonly used strategies for passing and reverse passing. Khanna & Johnson, *supra* note 3, at 381. Manipulation of hairstyle is a form of manipulating phenotype. *Id.* at 387.

19. *See* Brittany Paris, *EWU Releases Statement on Rachel Dolezal*, KXLY.COM, (June 12, 2015, 12:50 PM), http://www.kxly.com/news/spokane-news/ewu-releases-statement-on-rachel-dolezal/33552506 [https://perma.cc/NNF7-65TD].

20. KXLY, *KXLY Exclusive: Rachel Dolezal Responds to Race Allegations*, YOUTUBE (June 11, 2015), https://www.youtube.com/watch?t=4&v=_7Gb9kK8HGk [https://perma.cc/7ZWZ-V9PG].

21. To be sure, Dolezal's decision to present herself as a Black woman was rife with deception. As explained by Randall Kennedy in *Racial Passing*, passing necessarily involves "a deception that enables a person to adopt certain roles or identities from which he would be barred by prevailing social standards in the absence of his misleading conduct." Kennedy, *supra* note 5, at 1145.

22. Allison Samuels, *Rachel Dolezal's True Lies*, VANITY FAIR (July 19, 2015, 7:55 PM), http://www.vanityfair.com/news/2015/07/rachel-dolezal-new-interview-pictures-exclusive [https://perma.cc/X4Q3-8J77].

23. Kim, *supra* note 17.

Dolezal's turbulent racial journey is arguably the most prominent and examined reverse passing vignette in American history. But it is hardly the only one. As illustrated in this Article, the Dolezal passage is one of many reverse passing stories and, moreover, is representative of only one form of many modalities of reverse racial deception.

Reverse passing, this Article advances, is the process by which whites shed their white racial identity in exchange for a nonwhite racial identity.[24] As noted by other legal scholars, most notably Cheryl I. Harris, whiteness confers tangible economic, social, and political benefits to those who are classified as white.[25] Indeed, an institutional racial hierarchy exists "in which the closer one can approximate whiteness, the better off one is economically and socially."[26] Put another way, a racial hierarchy and valuation system exists in which white racial classifications are afforded the highest placement and value within the hierarchy while racial classifications that are the farthest away from whiteness, such as Blackness, are afforded the lowest placement and least value.

Given this racial hierarchy, "passing" has traditionally been a process by which nonwhites have sought to perform and present themselves as white in order to escape slavery,[27] circumvent racism,[28] access new worlds of economic and employment opportunity,[29] shop and dine,[30] investigate

24. Nonwhites might also select and pass into another nonwhite identity (for instance, a South Asian man may identity as Black). However, this Article focuses more broadly on whites passing into some nonwhite identity.

25. *See* Harris, *supra* note 5, at 1714 (arguing that white identity is a form of property).

26. Tanya Katerí Hernández, "*Multiracial*" *Discourse: Racial Classifications in an Era of Color-Blind Jurisprudence*, 57 MD. L. REV. 97, 118 (1998).

27. *See* Hobbs, *supra* note 3, at 29 (noting that "[w]hite skin functioned as a cloak in antebellum America" and that many runaway slaves who were able to pass as white "neither imagined nor desired to begin new lives as white; they simply wanted to be free").

28. *See* Jerry Kang, *Cyber-Race*, 113 HARV. L. REV. 1130, 1180 (2000) (arguing that "passing has the potential to create a space for creative self-determination and agency: the opportunity to construct new identities, to experiment with multiple subject positions, and to cross social and economic boundaries that exclude or oppress" (quoting Elaine K. Ginsberg, *Introduction: The Politics of Passing*, *in* PASSING AND THE FICTIONS OF IDENTITY 16 (Elaine K. Ginsberg ed., 1996))).

29. *See, e.g.*, Harris, *supra* note 5, at 1710–13 (leading with a narrative about her grandmother's decision to pass as white in order to procure a job in a white department store in the 1930s). Through her vignette, Harris articulates how passing as white opened up a world of opportunities for her grandmother that other Blacks, who were unable to pass, could not access. In addition to these opportunities, Harris examines the attendant risks associated with passing, which oblige the passer to convincingly perform whiteness in segregated spaces and before gatekeepers, with the gatekeepers being those who decide who can gain entrance to a particular institution, such as an employer.

30. *See* ST. CLAIR DRAKE & HORACE R. CAYTON, BLACK METROPOLIS: A STUDY OF NEGRO LIFE IN A NORTHERN CITY 162 (1945).

lynching,[31] and, for many passers, to seek liberation and ensure survival.[32] Due to the tangible benefits associated with whiteness and the negative value associated with nonwhiteness, persons who are able to racially identity as white have every incentive to do so in most contexts.

This Article suggests that there has been a shift in the valuation scheme within the racial hierarchy caused in part by modern affirmative action jurisprudence. The shift is a situational one in which—at certain times and in certain spaces—racial diversity is perceived as a valuable commodity.[33] Importantly, within this framework, "racial diversity" is conceptualized to mean increasing the number of nonwhite persons in a particular space, particularly with respect to coveted university seats and employment opportunities.[34] As Nancy Leong observes, the concept of racial diversity (or increasing the presence of nonwhite persons) gained widespread societal value as a result of the U.S. Supreme Court's Fourteenth Amendment affirmative action equal protection jurisprudence.[35]

In particular, in the seminal affirmative action case *Regents of the University of California v. Bakke*,[36] the Court held that rather than remedying the generalized lingering effects of past societal discrimination, diversity is the compelling state interest that justifies the consideration of race in college admissions programs.[37] In reaching this conclusion, the Court extolled the virtues

31. *See generally* WALTER WHITE, A MAN CALLED WHITE: THE AUTOBIOGRAPHY OF WALTER WHITE (1948) (profiling a Black man who ventured into the South to investigate the lynching of Blacks).

32. *See, e.g.*, WILLIAM CRAFT, RUNNING A THOUSAND MILES FOR FREEDOM; OR, THE ESCAPE OF WILLIAM AND ELLEN CRAFT FROM SLAVERY 29 (1860) (describing the development of a plan to escape slavery and noting that once it was successful, they as slaves "were free from the horrible trammels of slavery, and glorifying God who had brought us safely out of a land of bondage").

33. *See* Nancy Leong, *Racial Capitalism*, 126 HARV. L. REV. 2151 (2013) (arguing that a system of racial capitalism exists in which at times white individuals and predominantly white institutions gain social and economic value from having nonwhite people in spaces and places that have traditionally been all white).

34. *Id.* at 2169 ("Efforts to create racial diversity usually begin—and often end—with increasing the number of nonwhite people within a group or institution.").

35. *Id.* at 2161 ("While whiteness today remains a marker of status and therefore a source of value, our preoccupation with diversity has caused a shift in the dynamics of valuing race. . . . I trace that preoccupation to the Supreme Court's affirmative action jurisprudence.").

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

37. *Id.* at 307–09 (noting that remedying past societal discrimination can only serve as a compelling state interest justifying the use of race-conscious affirmative action programs when there has been a judicial, legislative, or administrative finding of a constitutional or statutory violation).

of racially heterogeneous groups[38] while diminishing the relevance and propriety of using affirmative action programs as a remedial measure for historic discrimination against minority groups.[39] Subsequent Supreme Court decisions grappling with affirmative action in higher education, namely *Grutter v. Bollinger*[40] and *Fisher v. University of Texas at Austin* (*Fisher I*),[41] reified the notion that racial diversity, rather than remedying the effects of lingering past societal discrimination, is the appropriate compelling state interest that justifies the use of race in college admissions programs.[42]

The Supreme Court's affirmative action jurisprudence narrows the consideration of race, and more specifically, nonwhite racial identities, finding it compelling only for purposes of diversifying a student body. Indeed, recent Supreme Court jurisprudence addressing race generally, and affirmative action specifically, readily ignores the salience of race and the differences in lived experiences resulting from differing racial classifications.[43] By supplanting discrimination

38. *Id.* at 314 ("Physicians serve a heterogeneous population. An otherwise qualified medical student with a particular background—whether it be ethnic, geographic, culturally advantaged or disadvantaged—may bring to a professional school of medicine experiences, outlooks, and ideas that enrich the training of its student body and better equip its graduates to render with understanding their vital service to humanity.").

39. *See id.* at 295–96 ("[T]he white 'majority' itself is composed of various minority groups, most of which can lay claim to a history of prior discrimination at the hands of the State and private individuals. Not all of these groups can receive preferential treatment and corresponding judicial tolerance of distinctions drawn in terms of race and nationality, for then the only 'majority' left would be a new minority of white Anglo-Saxon Protestants. There is no principled basis for deciding which groups would merit 'heightened judicial solicitude' and which would not.").

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

41. Fisher v. Univ. of Tex. at Austin (*Fisher I*), 133 S. Ct. 2411 (2013).

42. *Id.* at 2417 (reaffirming the court's reasoning from *Bakke* that "[r]edressing past discrimination could not serve as a compelling interest, because a university's 'broad mission [of] education' is incompatible with making the 'judicial, legislative, or administrative findings of constitutional or statutory violations' necessary to justify remedial racial classification"). For a critique of the *Fisher I* decision, and the broader civil rights moment in which it came, see Devon Carbado, Kimberlé Williams Crenshaw & Cheryl Harris, *Why We Can't Celebrate*, NATION (July 8, 2013), http://www.thenation.com/article/why-we-cant-celebrate [https://perma.cc/LEV6-43LV]; *see generally* Eang L. Ngov, *Following* Fisher*: Narrowly Tailoring Affirmative Action*, 64 CATH. U. L. REV. 1 (2014) (examining the jurisprudence of narrow tailoring in *Fisher I* and examining race-neutral alternatives to a diminishing race-conscious affirmative action regime).

43. Indeed, Justice Sonia Sotomayor criticized the Court for its failure to acknowledge both the history and lived reality of race and racial difference. *See* Schuette v. Coal. to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equal. By Any Means Necessary (BAMN), 134 S. Ct. 1623, 1676 (2014) (Sotomayor, J., dissenting) ("The way to stop discrimination on the basis of race is to speak openly and candidly on the subject of race, and to apply the Constitution with eyes open to the unfortunate effects of centuries of racial discrimination. As members of the judiciary tasked with intervening to carry out the guarantee of equal protection, we ought not sit back and wish away, rather than confront,

remediation with diversity as the sole compelling state interest, the Supreme Court removed the import of actual "lived experiences," particularly lived experiences of marginalization and discrimination experienced by people of color. The Court instead reduced nonwhite racial identity into phenotype and culture.[44]

Thus, identity-correlated cultural traits, along with phenotypes that appear to result in "adequate" racial representation—rather than the lived experiences marred by marginalization and discrimination—became the marker of access to the benefits afforded by affirmative action programs. Such a reduction of nonwhiteness makes it an identity that some whites can easily perform and present[45] for purposes of capitalizing on racial identities coveted by diversity-driven programming.

Today, because of the emphasis placed on racial diversity by the Supreme Court in its affirmative action jurisprudence,[46] nonwhite racial classifications

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the racial inequality that exists in our society. It is this view that works harm, by perpetuating the facile notion that what makes race matter is acknowledging the simple truth that race *does* matter.").

44. There has been much discussion as to whether the compelling state interest in diversity articulated by the Court relates to racial diversity or, instead, to cultural diversity. *See* Gabriel J. Chin, Bakke *to the Wall: The Crisis of* Bakke*an Diversity*, 4 WM. & MARY BILL RTS. J. 881, 894 (1996) (suggesting that in the Supreme Court's decision in *Bakke*, "Justice Powell did not state precisely whether the compelling interest is diversity of race or diversity of culture"). In the absence of a clear articulation by the court as to whether cultural or racial diversity is the compelling state interest that justifies race-conscious admissions programs, the Court arguably instituted a legal framework that avoids overtly allowing racial distinctions to be used by implicitly encouraging cultural diversity to serve as a proxy for race to achieve racial and ethnic representation in elite institutions. *See* Robert Post, *After* Bakke, 55 REPRESENTATIONS 1, 3–4 (1996) (arguing that Powell's opinion in *Bakke* was meant to work as an ideological rather than functional construct which would allow race-conscious affirmative action plans to continue but without compromising core values related to individualism).

45. *See* Richard T. Ford, *Race As Culture? Why Not?*, 47 UCLA L. REV. 1803, 1809–10 (2000) ("What is silently excluded by this paradigm and explicitly excluded by the *Bakke* opinion [and its progeny] is any acknowledgement that a very recent history of state-sponsored and institutional subordination distinguishes the two groups. The result is that the cultural identity of a racial minority group is foregrounded at the expense of the history of racism.").

46. Narrowing affirmative action jurisprudence intersects with the political front against affirmative action by way of state referenda, introduced first in California in 1998 by way of Proposal 209. Proposal 209 abolished affirmative action in the State of California, and led to copycat referenda in Washington State, Michigan, Colorado, Arizona, Wisconsin, and Nebraska. *See* Tuneen E. Chisolm, *Sweep Around Your Own Front Door: Examining the Argument for Legislative African American Reparations*, 147 U. PA. L. REV. 677, 680–81 (1999) (discussing copycat legislation that emerged in other states and that was inspired by California's proposition 209). The referenda that abolished affirmative action in Michigan (Proposal 2, called the "Michigan Civil Rights Initiative") was challenged as deceptive in the Supreme Court in *Schuette v. Coalition to Defend Affirmative Action*. The Court, however, upheld the referendum, holding that "[t]here is no authority in the Constitution of the

have increased in value to the extent they can be capitalized upon to bring about representational diversity. A critical mass of nonwhites is thought to add value through its performative contributions to classrooms, campuses, and society.[47] These performative contributions are divorced from the broader lived and existential dimensions that remedial affirmative action programs previously took into consideration when considering nonwhite applicants for university admission. Before *Bakke*, university affirmative action programs for example often took measures to consider how membership in a particular racial or ethnic group affected an applicant's life experience and opportunities.[48] In particular, such programs sought to level the playing field by taking into consideration the effect that discrimination likely had on the applicant's lived experience.[49] As a result, these performative contributions flattened the meaning of nonwhite racial identities, and converted them into more accessible forms for whites to perform and into which they can pass. In short, prevailing affirmative action doctrine, by narrowing the applied definition of nonwhite racial identity, incentivizes whites who believe they can pass as nonwhites to do so to access coveted opportunities, particularly in education and employment.

Consequently, the stakes to "reverse pass" are high for whites. Such "reverse passers"[50] seek to access the associated (and perceived) legal and cultural benefits of nonwhite identity concomitant with increased mandates for more diversity. Although not an entirely new phenomenon,[51] recent events—including

United States or in this Court's precedents for the Judiciary to set aside Michigan laws that commit this policy determination to the voters." *Schuette*, 134 S. Ct. at 1638. For a firsthand examination of the campaign against Proposal 2 in Michigan, see generally Khaled Ali Beydoun, *Without Color of Law: The Losing* Race *Against Colorblindness in Michigan*, 12 MICH. J. RACE & L. 465 (2007).

47. *See* Leong, *supra* note 33, at 2207–08 (describing the ways in which nonwhites are required to perform their identity in order to be seen as valuable and to obtain access to societal goods).

48. *See, e.g.*, WILLIAM G. BOWEN & DEREK BOK, THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS 4 (1998).

49. *See, e.g.*, DeFunis v. Odegaard, 507 P.2d 1169, 1175 (Wash. 1973), *vacated*, 416 U.S. 312 (1974) (describing a race-conscious affirmative action program employed by the University of Washington Law School and noting that "[i]n considering minority applicants, the [admissions] committee was guided by a University-wide policy which sought to eliminate the continued effects of past segregation and discrimination against Blacks, Chicanos, American Indians and other disadvantaged racial and ethnic minority groups").

50. This is the term we assign to white subjects who seek to reverse pass as nonwhite.

51. *See* Kennedy, *supra* note 5, at 1189–93; *see also* Daniel J. Sharfstein, *Rachel Dolezal's 'Passing' Isn't So Unusual*, N.Y. TIMES MAG. (June 15, 2015), http://www.nytimes.com/2015/06/25/magazine/rachel-dolezals-passing-isnt-so-unusual.html [https://perma.cc/LR56-R83C]. *See generally* Emily Nix & Nancy Qian, The Fluidity of Race: "Passing" in the

the outing of Rachel Dolezal—highlight the possibilities for increased incidences of reverse passing. While discursively viewed in the media and by many scholars as a phenomenon born out of individual autonomy or "transracial" options and possibilities,[52] this Article investigates the law's—and specifically the Supreme Court's affirmative action equal protection jurisprudence's—role in enabling and incentivizing reverse passing.

Notably, this Article is the first to formally define reverse passing and conceptualize its operation within the legal and cultural realms. Building on the rich legal and social science literature on traditional passing, where the "classic racial passer in the United States has been the 'white Negro,'"[53] this Article analyzes the process by which whites assume nonwhite identities to access valuable educational or employment opportunities, and spaces and communities preferring nonwhites, and to build nonwhite public profiles that augment political influence or social prestige.

By introducing reverse passing—as concept and process—into the legal literature, this Article deepens the rich and rising scholarship examining performance theory and the pliability of racial identity. Several legal commentators, most notably Devon Carbado and Mitu Gulati,[54] Kenji Yoshino,[55] Camille Gear Rich,[56] and Nancy Leong,[57] have made significant contributions to the modern literature on racial performance theory. As such, their work is critical to this Article. Certainly, as affirmative action continues to be debated within the courts, including in the recent decision in *Fisher v. University of Texas II*,[58] reverse passing—as a matter

United States, 1880–1940 (Jan. 1, 2015) (unpublished manuscript), http://aida.wss.yale.edu/~nq3/NANCYS_Yale_Website/resources/papers/NixQian_20150101.pdf [https://perma.cc/WJ77-35N2] (discussing the incidence of passing and reverse passing during this era).

52. Blow, *supra* note 14. The limits and attendant myths of transraciality are explored in Part IV of this Article.

53. Kennedy, *supra* note 5, at 1145. Kennedy continues to define the "white Negro" as "the individual whose physical appearance allows him to present himself as 'white' but whose 'black' lineage (typically only a very partial black lineage) makes him a Negro according to dominant racial rules." *Id.*

54. *See* Carbado & Gulati, *supra* note 17; *see also* DEVON W. CARBADO & MITU GULATI, ACTING WHITE? RETHINKING RACE IN "POST-RACIAL" AMERICA (2013).

55. *See generally* Yoshino, *supra* note 4.

56. *See, e.g.*, Camille Gear Rich, Essay, *Affirmative Action in the Era of Elective Race: Racial Commodification and the Promise of the New Functionalism*, 102 GEO. L.J. 179 (2013); Camille Gear Rich, *Decline to State: Diversity Talk and the American Law Student*, 18 S. CAL. REV. L. & SOC. JUST. 539 (2009) [hereinafter Rich, *Decline to State*].

57. *See generally* Leong, *supra* note 33; *see also* Nancy Leong, *Identity Entrepreneurs* (Univ. Denver Sturm Coll. Of Law Legal Research Paper Series, Working Paper No. 15-10, 2015).

58. Fisher v. Univ. of Tex. at Austin (*Fisher II*), 136 S. Ct. 2198 (2016); Transcript of Oral Argument, *Fisher II*, 136 S. Ct. 2198 (2016) (No. 14-981).

of scholarly, practical, and popular concern—will only become more pressing and prominent.

This Article proceeds as follows. The construction of racial hierarchy and reverse passing theory are the focuses of Part I, which includes a description of the two primary forms of reverse passing: legal and cultural. Part II analyzes prevailing Fourteenth Amendment equal protection jurisprudence in relation to affirmative action, which extends the legal catalyst incentivizing reverse passing. Part III examines the principal forms of reverse passing—legal and cultural—through an analysis of prominent case law and pressing case studies. Part IV examines the dialectic between the law and transracialism, a theory of racial mobility that justifies reverse passing but practically restricts passing in the other direction (nonwhite to white).

I. A THEORY OF REVERSE PASSING

> [T]he reputation of belonging to the dominant race, in this instance the white race, is 'property,' in the same sense that a right of action or of inheritance is property.
>
> —Justice Henry Brown, *Plessy v. Ferguson*[59]

Examining how race and racial hierarchies were historically constructed and maintained in the United States is a critical first step to understanding reverse passing theory and its associated concepts. Part I.A briefly provides such a history. Moving forward, Part I.B analyzes a shift in the racial hierarchy in ways that assign value to nonwhite racial classifications. Finally, Part I.C concludes by setting forth the necessary theoretical and conceptual groundwork of reverse passing.

A. The Construction of Race and Racial Hierarchy

Race is a social rather than a biological construct.[60] There is no race gene from which racial classifications are drawn.[61] Instead, the racial classification

59. 163 U.S. 537, 549 (1896), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

60. Ian Haney López offers an apt definition of race, highlighting its fluidity and its relationship with formative historical events and experiences: "[R]ace constitutes a socially and legally produced hierarchal system structurally embedded in U.S. society." Ian F. Haney López, *"A Nation of Minorities": Race, Ethnicity, and Reactionary Colorblindness*, 59 STAN. L. REV. 985, 990 (2007). Haney López offers a descriptive and nuanced overview of the turbulent understanding of race, and racial classifications, from Reconstruction through the modern "emerging theories of race." *Id.* at 992–1000.

61. *See, e.g.*, Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. CIV. RTS.-CIV. LIBERTIES L. REV. 1, 11 (1994) ("There

system in place today is rooted in the history of American racial slavery, segregation, and exclusion.[62] During the early years of the American colonies, the colonists were aware of race and racial differences, yet racial classifications were fluid and inconsistent.[63] Furthermore, race was not linked with social status as it is today.[64] Blacks in some colonies held the same rights as white indentured servants—they were permitted to own property, get married, and to live as free individuals after completing their terms of service.[65]

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are no genetic characteristics possessed by all Blacks but not by non-Blacks; similarly, there is no gene or cluster of genes common to all Whites but not to non-Whites.").

62. *See* Haney López, *supra* note 60, at 1032–34 (describing how the legal subordination of Blacks allowed the construction of a racial hierarchy in which Blackness is at the bottom); *see also* Richard T. Ford, *Urban Space and the Color Line: The Consequences of Demarcation and Disorientation in the Postmodern Metropolis*, 9 HARV. BLACKLETTER L.J. 117, 134 (1992) ("[I]n order for the concept of a white race to exist, there must be a Black race which is everything the white race is not (read of course: does not want to be associated with). Thus, the most debased stereotypical attributes of the 'Black savage' are none other than the guilty projections of white society."); *see also* Khaled A. Beydoun, *Antebellum Islam*, 58 HOW. L.J. 141, 156–63 (2014), for an analysis of how the Black racial classification was legally constructed in direct opposition to whiteness. For discussion of the "relational" dialectic between the construction of whiteness and Blackness within employment, see Martha R. Mahoney, *Segregation, Whiteness, and Transformation*, 143 U. PA. L. REV. 1659, 1662 (1995) ("Race is a relational concept. It describes at least two social and cultural groups in relation to each other. The concept of race acquires meaning only in the context of historical development and existing race relations. Therefore, the construction of whiteness as 'naturally' employed and employable, and blackness as 'naturally' unemployed and unemployable, are both examples of the way in which concepts of whiteness and blackness imply whiteness as dominant and blackness as 'other.'").

63. Harris, *supra* note 5, at 1716 ("Although the early colonists were cognizant of race, racial lines were neither consistently nor sharply delineated among or within all social groups.").

64. *See, e.g.*, Neil Gotanda, *A Critique of "Our Constitution Is Color-Blind"*, 44 STAN. L. REV. 1, 32 (1991) (noting that "[i]n the early colonial period, racial classifications were highly fluid. Social status often depended as much on the labor status of the individual as on his place of origin"); Ariela Gross & Alejandro de la Fuente, *Slaves, Free Blacks, and Race in the Legal Regimes of Cuba, Louisiana, and Virginia: A Comparison*, 91 N.C. L. REV. 1699, 1717 (2013) (noting that in the pre-antebellum Virginia, "[p]eople appear in legal records designated as 'negroes' who were free or became free after some years of service, so we know that people of African descent were not all slaves, and slaves were not all of African descent").

65. *See* JOHN HOPE FRANKLIN & ALFRED A. MOSS, JR., FROM SLAVERY TO FREEDOM: A HISTORY OF AFRICAN AMERICANS 167–72 (8th ed. 2000) (describing how some slaves during the colonial period were successful in limiting their period of servitude and obtaining substantive rights). Trina Jones, *Race, Economic Class, and Employment Opportunity*, 72 LAW & CONTEMP. PROBS. 57, 63–64 (2009) ("Like indentured servants, the first significant number of African slaves arrived in colonial America in the seventeenth century. The two groups share some similarities. Both were poor and were treated as articles of commerce. Both were subject to violence and inhumane treatment at the hands of masters and employers.").

This changed as the need for slave labor increased.[66] Slave labor was increasingly necessary in order to cheaply cultivate and exploit the vast land within the United States.[67] Other forms of labor, namely white indentured servitude and compelled Native-American labor, proved insufficient and inconsistent.[68] A steady, stable, and inexpensive supply of labor was needed.[69] To that end, colonists began to exploit and seize upon racial differences as a justification for permanently subjecting Blacks to slavery.[70] Indeed, during the 1600s, as slavery expanded, Africans were labeled in derogatory terms such as "heathen" or "infidel" in order to justify their subordination and the creation of a permanent class of slaves.[71] Denying religion to enslaved Africans was vital to the project of stripping them of their humanity and preventing slave revolts.[72]

In addition, during this period colonies enacted slave codes that, among other things, established rules of descent for classifying the offspring of slaves as free or slave in accordance with the amount of nonwhite blood the person had, and allowed for differential punishment of Black slaves and white indentured

66. *See* A. Leon Higginbotham, Jr. & Greer C. Bosworth, *"Rather Than the Free": Free Blacks in Colonial and Antebellum Virginia*, 26 HARV. CIV. RTS.-CIV. LIBERTIES. L. REV. 17, 21 (1991); *see also* Angela Onwuachi-Willig, *Multiracialism and the Social Construction of Race: The Story of* Hudgins v. Wrights, *in* RACE LAW STORIES 147, 149 (Rachel F. Moran & Devon Wayne Carbado eds., 2008) ("[A]s a social and financial matter, white Virginians viewed slavery as economically rational and necessary. To their minds, white indentured servants were too costly . . . because of social customs that required payment for their work with wages and future land grants.").

67. *See* Ralph V. Anderson & Robert E. Gallman, *Slaves as Fixed Capital: Slave Labor and Southern Economic Development*, 64 J. AM. HIST. 24, 27–28 (1977) ("In the New World the impetus to rural slavery imparted by abundant supplies of land, a scarcity of labor, and opportunities for commercial agriculture was very strong . . . .").

68. *See* DAVID R. ROEDIGER, THE WAGES OF WHITENESS: RACE AND THE MAKING OF THE AMERICAN WORKING CLASS 22 (2007).

69. *See* Harris, *supra* note 5, at 1717 (describing the emergence of racial classification and its link to slavery, noting that as the colonies expanded "the demand for labor intensified, resulting in a greater reliance on African labor and a rapid increase in the number of Africans imported into the colonies").

70. *See* Hobbs, *supra* note 3, at 36 ("During the eighteenth century, racial identity was fluid, and race was disaggregated from slave status. These two categories would not become fully intertwined until the early nineteenth century."); Gotanda, *supra* note 64, at 33 ("As slavery became entrenched as the primary source of agricultural labor, slaveholders developed a complementary ideological structure of racial categories that served to legitimate slavery.").

71. *See* Gotanda, *supra* note 64, at 33.

72. Nicholas May, *Holy Rebellion: Religious Assembly Laws in Antebellum South Carolina and Virginia*, 49 AM. J. LEGAL HIST. 237, 243 (2007) (noting that "most antebellum slave revolts made use of religion both as a pretense for insurgent activity and as a source of moral justification for the uprising itself," and that as a result attempts were made to deny religion to slaves).

servants.[73] Consequently, a racial hierarchy emerged in which Blackness was linked with bondage and whiteness linked with freedom; in this way, the slave codes provided the foundation for the initial racial classification system in America.[74] The system of racial categorization engendered by the slave codes was inextricably intertwined with property rights and property valuation. To be sure: "[A] 'presumption of freedom [arose] from color' . . . and the 'black color of the race [raised] the presumption of slavery,' whiteness [therefore] became a shield from slavery, a highly volatile and unstable form of property."[75] Put another way, those who were visibly identifiable as white were presumed to be free, while those visibly identifiable as Black were presumed to be slaves. As described in the sections that follow, the establishment of a racial caste system to justify enslaving Blacks resulted in whiteness becoming a deeply entrenched property interest that still endures today. It also resulted in the creation of the present-day racial hierarchy whereby white supremacy and Black inferiority still occupy the top and bottom rungs, respectively, with other racial groups vacillating in between. The following Parts describe in further detail how whiteness has been entrenched as a form of property and the parameters of the modern day racial hierarchy that exists today.

1. Whiteness as Property[76]

The racial classification system used to maintain and justify slavery roots the modern racial taxonomy.[77] This taxonomy classified and accorded value to races based on their proximity to whiteness.[78] Being classified as white shielded individuals from permanent involuntary servitude.[79] Indeed, during the height of the antebellum period, it was not uncommon for individuals to litigate

73. *See* Gotanda, *supra* note 64, at 33–34 ("Besides codifying punishment for slaves who stole or ran away, the slave code contained specific rules of descent for classifying offspring. Punishments for Blacks and mulattos differed from those for indentured servants.").
74. *Id.* at 34 ("This institutionalization of racial classifications linked to disparate treatment marked the first formal establishment of racial categories in colonial America.").
75. Harris, *supra* note 5, at 1720.
76. *See generally id.*
77. *See* MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1980S 68 (1986) (defining "race" as "an unstable and 'de-centered' complex of social meanings constantly being transformed by political struggle").
78. Hernández, *supra* note 26, at 115 (arguing that "[w]hiteness and approximations of whiteness will always be valued in a society structured on a White/non-White racial continuum").
79. Harris, *supra* note 5, at 1717–18.

the issue of whether they were white and therefore entitled to freedom.[80] Further, in addition to freedom, whiteness also afforded individuals a myriad of concrete rights and privileges.

One such important right was American citizenship. The Naturalization Act of 1790 ensured that (naturalized) citizenship for much of this country's history was only afforded to those classified as white.[81] While the definition of which persons could be classified as white changed over time,[82] the requirement that one be classified as white to become a naturalized citizen endured for some time.[83]

On the other hand, Blacks born into slavery in America were not legally considered American citizens until the ratification of the Fourteenth Amendment to the Constitution.[84] The enactment of black codes and Jim Crow immediately after the abolition of slavery severely diminished the "substantive citizenship" of freed Blacks.[85] Vicious state-led segregation circumscribed the rights and privileges that come with formal citizenship.[86] Native Americans were also denied American citizenship for much of the country's history until the passage of the Indian Citizenship Act of 1924.[87] In addition,

80. *See generally* Ariela J. Gross, *Litigating Whiteness: Trials of Racial Determination in the Nineteenth-Century South*, 108 YALE L.J. 109 (1998) (analyzing antebellum trial records of individuals who sued to prove their whiteness).

81. Naturalization Act of 1790, 1 Stat. 103 (1790) (repealed 1795) ("[A]ny alien, being a free white person, who shall have resided within the limits and under the jurisdiction of the United States for the term of two years, may be admitted to become a citizen thereof . . . .").

82. *See infra* Part I.A.2.

83. *See* IAN HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE 27 (2006) ("Federal law restricted immigration to this country on the basis of race for nearly one hundred years, roughly from the Chinese exclusion laws of the 1880s until the end of the national origin quotas in 1965.").

84. *See* Dred Scott v. Sandford, 60 U.S. 393, 407 (1856), *superseded by constitutional amendment*, U.S. Const. amend. XIV ("[Blacks are] of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect." (quoting Justice Taney)).

85. *See* LINDA BOSNIAK, THE CITIZEN AND THE ALIEN: DILEMMAS OF CONTEMPORARY MEMBERSHIP 31 (2006) ("[T]here is often a gap between possession of [formal] citizenship status and the enjoyment or performance of citizenship in substantive terms.").

86. *See* Kenneth L. Karst, Essay, *Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C. L. REV. 303, 320–21 (1986) (describing the ways in which state-mandated segregation in the South and other parts of the United States denied Black citizens the benefits of American citizenship by disenfranchising them and subjecting them to a second-tier caste system in housing, education, and employment).

87. 1924 Indian Citizenship Act, 43 Stat. 253 (1924) ("*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That all non-citizen Indians born within the territorial limits of the United States be, and they are hereby, declared to be citizens of the United States: *Provided*, That the granting of such citizenship

immigrants from Asia were prohibited from becoming citizens until the 1954 McCarran-Walter Act.[88] Whiteness was such a valuable asset that courts grappled with the very definition of whiteness and which person could or could not be classified as white and obtain access to the privileges attendant to being classified as white.[89]

Importantly, in the absence of citizenship, those who were not classified as white were also denied many important benefits for which citizenship was a prerequisite. The rights to vote,[90] own property, testify in court,[91] and bring lawsuits,[92] to name a few, were denied to nonwhites. Whiteness, therefore, was not merely a racial identity—but also a gateway toward a host of rights, privileges, and resources.

Whiteness remains a deeply entrenched property interest. Whites have sued and sought compensation claiming "wrongful birth" or "emotional distress" when a sperm bank inadvertently gave a white woman a Black man's

shall not in any manner impair or otherwise affect the right of any Indian to tribal or other property.").

88. 8 U.S.C. § 1422 (1952).

89. In line with the position that race is a social construction, "[b]eing white is not a monolithic or homogenous experience, either in terms of race, other social identities, space or time. Instead, Whiteness is contingent, changeable, partial, inconstant, and ultimately social." IAN F. HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE xiv (1996). Whiteness, during the Naturalization era, vacillated between narrow and broader constructions, whereby judges subjectively drew upon a range of criteria—eugenics, physical appearance, language, geographic origin, religion, and other factors—to find an immigrant petitioner within or beyond the statutory definition of whiteness. A popular position by the courts, illustrated in *Ozawa v. United States*, 260 U.S. 178, 178 (1922), held that whiteness was synonymous with Caucasian and "confined to persons of the Caucasian Race," but the court used other measures besides ancestry and etymology to define the basis and bounds of whiteness.

90. The Fifteenth Amendment to the U.S. Constitution prohibits race-related discrimination in voting. *See* U.S. Const. amend. XV, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."). Prior to the enactment of the Fifteenth Amendment, the right to vote was strictly limited to white men. *See* Virginia E. Hench, *The Death of Voting Rights: The Legal Disenfranchisement of Minority Voters*, 48 CASE W. RES. L. REV. 727, 732 (1998) (describing the history of race-based voting restrictions).

91. *See, e.g.*, People v. Hall, 4 Cal. 399, 404 (1854) (barring the testimony of a Chinese witness to a murder committed by a white man, and reasoning that "[t]he same rule which would admit them to testify, would admit them to all the equal rights of citizenship, and we might soon see them at the polls, in the jury box, upon the bench, and in our legislative halls").

92. *See, e.g.*, Dred Scott v. Sandford, 60 U.S. 393, 406 (1856), *superseded by constitutional amendment*, U.S. Const. amend. XIV. (1868) (finding that a person of African descent who was a slave was not a citizen "within the meaning of the Constitution of the United States, and, consequently, was not entitled to sue in its courts").

sperm[93] and litigated to have themselves classified as white because of the perceived harm in being classified as anything other than white, especially Black.[94] Whites with lower levels of education are on average wealthier than similarly educated people of color and are more likely to obtain jobs than Blacks who graduate from college.[95]

For these reasons, nonwhites have passed in order to obtain the political, economic and social advantages that are afforded to whites but denied to nonwhites.[96] Thus, for both whites and nonwhites, whiteness is a valuable form of property that whites seek to hold on to and that nonwhites, at times, seek to obtain. The benefits associated with whiteness, therefore, have overwhelmingly pulled nonwhites to pass in its direction. Similarly, other nonwhite groups,[97] such as Arab or Latino Americans, are driven to perform (and sometimes reshape) their identities in modes that align with whiteness.

2. Racial Hierarchal Slope

Concomitant with the establishment of whiteness as a valuable property interest was the creation of a racial hierarchy premised on white supremacy.[98] Within this hierarchy, racial classifications—and the political and social

93. *See, e.g.*, Lindsey Bever, *White Woman Sues Sperm Bank After She Mistakenly Gets Black Donor's Sperm*, WASH. POST (Oct. 2, 2014), http://www.washingtonpost.com/news/morning-mix/wp/2014/10/02/white-woman-sues-sperm-bank-after-she-mistakenly-gets-black-donors-sperm [https://perma.cc/E6WE-RKVV]; Ronald Sullivan, *Sperm Mix-Up Lawsuit Is Settled*, N.Y. TIMES (Aug. 1, 1991), http://www.nytimes.com/1991/08/01/nyregion/sperm-mix-up-lawsuit-is-settled.html [https://perma.cc/E7TZ-DHLY].

94. *See, e.g.*, Doe v. State, 479 So. 2d 369, 369 (La. Ct. App. 1985) ("Family members sought change in racial designation of their deceased parents on state records and filed action seeking mandamus to compel Department of Health and Human Resources to correct the alleged error.").

95. *See* Michael A. Fletcher, *White High School Dropouts Are Wealthier Than Black and Hispanic College Graduates. Can a New Policy Tool Fix That?*, WASH. POST (Mar. 10, 2015), https://www.washingtonpost.com/news/wonk/wp/2015/03/10/white-high-school-dropouts-are-wealthier-than-black-and-hispanic-college-graduates-can-a-new-policy-tool-fix-that [https://perma.cc/32ET-S3D3].

96. *See, e.g.*, Henry Louis Gates, Jr., *White Like Me*, NEW YORKER, June 17, 1996, at 66, (chronicling the story of Anatole Broyard, a man classified as Black by law, but who passed as a white man for economic and social purposes).

97. *See* Laura E. Gómez, *Off-White in an Age of White Supremacy: Mexican Elites and the Rights of Indians and Blacks in Nineteenth-Century New Mexico*, 25 CHICANO-LATINO L. REV. 9, 10–11 (2005) (defining off-whiteness as a liminal status in which groups are formally classified as white, but do not enjoy a status in society reflective of that designation).

98. *See* Gotanda, *supra* note 64, at 34 (arguing that the American system of racial classification "with its metaphorical construction of racial purity for whites, has a specific history as a badge of enslaveability. As such, the metaphor of purity is not a logical oddity, but an integral part of the construction of the system of racial subordination embedded in American society.").

benefits attached to them—are distributed on the basis of a white/nonwhite scale.[99] Whiteness, of course, is situated at the highest end of the spectrum, while Blackness occupies the countervailing lower end of the spectrum.

The Black-white dichotomy upon which the racial hierarchy is predicated often leaves those who are not Black or white occupying a "racial middle."[100] This racial middle exists on a slope in which "the closer one can approximate whiteness, the better off one is economically and socially."[101] Put another way, persons not categorized as white or Black, such as Latino, Asian, Native American and "Middle Eastern and North African" persons,[102] are often afforded social and political benefits in accordance with their perceived physical and cultural associations to whiteness. Even within nonwhite racial categories, individuals are often afforded social, economic and political rights in accordance with the lightness of their skin or how closely it approximates whiteness, creating an intra-hierarchy within those groups such that the lighter their skin is the more benefits they are afforded.[103] Yet whiteness remains the gold standard, as even those nonwhites who are the most closely associated with whiteness do not receive the full benefits afforded those who are classified as white. For example, Asian-Americans are often portrayed as a model minority group that receives benefits that closely rival those received by whites.[104] Indeed, Asian-Americans as a group earn higher wages than any other racial or ethnic group, including whites.[105] Yet Asian-Americans as a

99. *See* Hernández, *supra* note 26, at 118–19 (describing a racial hierarchy in which social and economic benefits are distributed in accordance with how closely one is to whiteness).

100. *See* Mari Matsuda, *Voices of the Community*, 1 UCLA ASIAN AM. PAC. ISLAND L.J. 79, 79 (1993) (describing Asian Americans as assuming the role of the racial middle).

101. Hernández, *supra* note 26, at 118.

102. *See generally* Khaled A. Beydoun, *Boxed in: Reclassification of Arab Americans on the U.S. Census as Progress or Peril?*, 47 LOY. U. CHI. L.J. 693 (2016) (analyzing the proposed "Middle Eastern or North African" (MENA) category for the 2020 Census, which would create a standalone classification for Arab Americans and other groups with ancestral ties to the regions).

103. *See, e.g.*, Taunya Lovell Banks, *Colorism: A Darker Shade of Pale*, 47 UCLA L. REV. 1705, 1715 (2000) (describing how "members of a racially subordinated group may be 'differentially racialized,' creating different levels of status and power within the group" based on skin tone).

104. *See, e.g.*, Nicholas Kristof, *The Asian Advantage*, N.Y. TIMES (Oct. 10, 2015), http://www.nytimes.com/2015/10/11/opinion/sunday/the-asian-advantage.html?_r=0 [https://perma.cc/PAA2-P9HT] (describing the ways in which Asian Americans are perceived as an advantaged minority group).

105. *See Asian-Americans Lead All Others in Household Income*, PEW RES. CTR., (Apr. 16, 2016), http://www.pewresearch.org/daily-number/asian-americans-lead-all-others-in-household-income [https://perma.cc/MP82-JBBP].

group are still subject to forms of racial discrimination that whites as a group are not.[106]

Instead, the footing within the racial hierarchy on which the racial middle exists is arguably very delicate, as those in the middle are still likely to face some forms of racial discrimination, and even violence, because of their race.[107] The proximity to whiteness (and corresponding benefits) afforded those who occupy the racial middle is arguably linked to their whiter phenotype[108] and their willingness to serve white interests.[109] Some scholars suggest that this results in a "buffer class" of people of color situated between Blacks and whites.[110] For example, Professor Mari Matsuda notes:

> The role of the racial middle is a critical one. It can reinforce white supremacy if the middle deludes itself into thinking it can be just like white if it tries hard enough. Conversely, the middle can dismantle

106. *See* Alexis Buchannon, *Asian Americans Earn Top Wages Yet Still Face Discrimination*, NONPROFIT Q. (July 6, 2016), https://nonprofitquarterly.org/2016/07/12/asian-americans-earn-top-wages-yet-still-face-discrimination/ [https://perma.cc/92U9-3QYE] (describing discrimination experienced by Asian Americans with respect to advancement in the workplace, particularly within the technology sector).

107. *See* Natsu Taylor Saito, *Alien and Non-Alien Alike: Citizenship, "Foreignness," and Racial Hierarchy in American Law*, 76 OR. L. REV. 261, 310–11 (1997) (chronicling instances of violence committed against Asian Americans due to them being characterized as foreigners and outsiders); *The Model Minority Is Losing Patience*, ECONOMIST (Oct. 3, 2015), http://www.economist.com/news/briefing/21669595-asian-americans-are-united-states-most-successful-minority-they-are-complaining-ever [https://perma.cc/5E83-ETV2] (chronicling instances of discrimination against Asian Americans in the workplace and in college admissions).

108. Leonard M. Baynes, *If It's Not Just Black and White Anymore, Why Does Darkness Cast a Longer Discriminatory Shadow Than Lightness? An Investigation and Analysis of the Color Hierarchy*, 75 DENV. U. L. REV. 131, 152 (1997) ("The closer one is to White standards of attractiveness, the better the treatment one is likely to receive. This truth crosses racial and ethnic lines.").

109. *See, e.g.*, Saito, *supra* note 107, at 312 ("Asian Americans have been raced and placed in the middle of the American racial hierarchy to help preserve and maintain racial stratification in the United States . . . ."). *But cf.* Kevin R. Johnson, *Racial Hierarchy, Asian Americans and Latinos As "Foreigners," and Social Change: Is Law the Way to Go?*, 76 OR. L. REV. 347, 361 (1997) (challenging the idea that the American racial hierarchy is a static one and instead suggesting that "race relations in this country are constantly changing with the various racial groups rapidly moving, changing positions, adapting to new conditions, and responding to new pressures within and outside of the community").

110. *See, e.g.*, Tanya Katerí Hernández, *The Construction of Race and Class Buffers in the Structure of Immigration Controls and Laws*, 76 OR. L. REV. 731, 732–33 (1997) ("[T]he structure of immigration laws in the United States has often facilitated the formation and maintenance of a middle-tier buffer class of residents to preserve racial hierarchy."); Chris K. Iijima, *Reparations and the "Model Minority" Ideology of Acquiescence: The Necessity to Refuse the Return to Original Humiliation*, 40 B.C. L. REV. 385, 412 (1998) ("[T]here is a growing middle tier in which a subordinated 'model minority,' Asians and some Latinos, will be given some racial and class privileges in return for being used as both a buffer and a diversion.").

> white supremacy if it refuses to be the middle, if it refuses to buy into racial hierarchy, if it refuses to abandon communities of Black and Brown people, choosing instead to form alliances with them.[111]

Thus for those who occupy the racial middle, while they do not experience the same detriments associated with Blackness, they are also not afforded the benefits that come with a white racial identity.[112] For these reasons, passing has traditionally been a process by which both Blacks and other nonwhites seek to assume a white identity in order to obtain the benefits associated with a white classification.[113]

B. Shifting Racial Paradigm

As discussed in previous sections, within the racial hierarchy that was created to justify Black chattel slavery, white racial identity has commanded the highest value.[114] In order to preserve that value, white racial identity is carefully guarded and legally protected. To that end, for the majority of American history, civil courts held authority over questions of racial classification and belonging.[115] Judges were assigned with the task of interpreting naturalization statutes that made whiteness a prerequisite for citizenship, and enforcing civil and criminal codes that diminished the substantive citizenship of nonwhites.[116] The dissolution of the Naturalization Era, and the Civil Rights Movement that followed, ushered in a new chapter of racial identification that made the individual citizen, instead of the state, the decisionmaker in racial classification.

In the Parts that follow, we closely examine the Era of Top-Down Racial Assignment, which prevailed from 1790–1952,[117] followed by the Era of

111. Matsuda, *supra* note 100, at 79.
112. *See, e.g.*, Baynes, *supra* note 108 and accompanying text.
113. *See generally* Kennedy, *supra* note 5 (describing instances in which minorities passed as white in order to obtain the benefits afforded to whites and to which they would otherwise be denied).
114. *See infra* Part I.A.1.
115. *See generally* Haney López, *supra* note 89 (describing the ways in which civil courts adjudicated questions of racial identity, particularly with respect to questions of who could or could not become naturalized U.S. citizens).
116. *Id.*
117. *Id.*

Racial Self-Identification, or what scholar Camille Rich dubs "elective race," which commenced in 1952 and continues through the current day.[118]

1. Era of Top-Down Racial Assignment

Whatever latitudinarian construction might otherwise have been given to the term 'white person,' it is entirely clear that congress intended by this legislation to exclude Mongolians from the right of naturalization.[119] During the Naturalization Era, from 1790 through 1952, civil judges had unfettered discretion to decide which immigrants fit within the statutory scope of whiteness.[120] The Naturalization Act of 1790 made whiteness a prerequisite for American citizenship during the 160-year period before it was repealed.[121] Immigrants seeking to naturalize were forced to "perform whiteness" before civil court judges, and argue that their identities fit within the statutory definition.[122]

In his landmark work, *White by Law: The Legal Construction of Race*, Ian Haney López examines the fifty-two "prerequisite cases" in which immigrants appealed administrative decisions finding that they were not white.[123]

118. Camille Gear Rich, *Elective Race: Recognizing Race Discrimination in the Era of Racial Self-Identification*, 102 GEO. L.J. 1501, 1505 (2014) (coining the term "elective race" and defining it as "a time when antidiscrimination law is being asked to attend to the dignity concerns of individuals as they attempt to control the terms on which their bodies are assigned racial meaning").

119. *In re Ah Yup*, 1 F. Cas. 223, 224 (C.C.D. Cal. 1878).

120. Naturalization Act of 1790, ch. 3, 1 Stat. 103, *repealed by* Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 ("[A]ny alien, being a free white person, who shall have resided within the limits and under the jurisdiction of the United States for the term of two years, may be admitted to become a citizen thereof, on application to any common law court of record, in any one of the states wherein he shall have resided for the term of one year at least . . . .").

121. *Id.* The Naturalization Act of 1870, which followed the abolition of slavery, extended naturalization eligibility to "aliens of African nativity and to persons of African descent." Naturalization Act of 1870, § 7, 16 Stat. 254 (1870).

122. *See* John Tehranian, *Performing Whiteness: Naturalization Litigation and the Construction of Racial Identity in America*, 109 YALE L.J. 817, 839–40 (2000) (examining how immigrants were tasked with performing whiteness, and persuading judges that they fit within the statutory scheme, to be legally naturalized as American citizens). *See generally* Khaled A. Beydoun, *Between Muslim and White: The Legal Construction of Arab American Identity*, 69 N.Y.U. ANN. SURV. AM. L. 29 (2013) (analyzing ten naturalization proceedings involving immigrant-petitioners from the Arab World, and how the rulings from these proceedings affect the modern legal construction of Arab American identity).

123. Haney López labels this set of cases as such because whiteness was a prerequisite for citizenship. *See* Haney López, *supra* note 89, at 3–9.

The first appeal was in 1878,[124] and the final case of the Era was decided in 1944.[125] During this Era of Top-Down Racial Assignment, "[t]he courts had to establish by law whether, for example, a petitioner's race was to be measured by skin color, facial features, national origin, language, culture, ancestry, the speculations of scientists, popular opinion, or some combination of these factors."[126] Oftentimes, the courts the courts veered away from an assessment of the immigrant-petitioner's whiteness based on these factors, and resorted to arbitrary assessments that delivered their desired conclusion. This was evidenced in the two prerequisite cases that reached the Supreme Court in 1922 and 1923: a Japanese resident of California deemed nonwhite because his ancestry and culture were deemed inassimilable,[127] and a Sikh man from the Indian subcontinent denied naturalization on grounds of "foreign" physical appearance.[128]

A close examination of the prerequisite cases reveals that the fifty-two immigrant petitioners were not only adjudicating their whiteness, but seeking to legally pass as white as evidenced by the inquiry undertaken by the courts in these cases. To be sure, the courts were "deciding not only who was White, but why someone was White."[129] In adjudicating whiteness for purposes of naturalization, courts typically relied on two principles: common knowledge and scientific principles.[130] In relying on common knowledge, courts incorporated common beliefs about race, particularly notions of what the so-called average person understood whiteness to mean.[131] Courts' reliance on scientific principles revolved around ostensibly "objective, technical, and specialized knowledge."[132] By utilizing these two subjective principles—each influenced

124. *In re* Ah Yup, 1 F. Cas. 223, 224 (C.C.D. Cal. 1878) (No. 104) (denying naturalization to a Chinese applicant based on popular understandings of the term "white person," which the court found he did not fit).

125. *Ex parte* Mohriez, 54 F. Supp. 941 (D. Mass. 1944) (holding that a Saudi Arabian, Muslim man fit within the statutory definition of whiteness). For a critical analysis of this ruling, citing American geopolitical interests influencing the decision, see Beydoun, *supra* note 122, at 68–71.

126. Haney López, *supra* note 89, at 2.

127. Ozawa v. United States, 260 U.S. 178, 189, 198 (1922) (finding that although Takao Ozawa resided in the United States for twenty years, attended American churches, and earned his college education from the University of California–Berkeley, he was ultimately ineligible for naturalization on account of his inassimilable ancestry and culture).

128. United States v. Thind, 261 U.S. 204, 214–15 (1923) (denying Bhagat Singh Thind naturalization because his appearance, religion, and culture did not comport with the judge's conception of whiteness).

129. Haney López, *supra* note 89, at 2 (emphasis omitted).

130. *Id.* at 5.

131. *Id.* at 7.

132. *Id.* at 4.

by immigration patterns, xenophobia, demographic shifts, the economy, and labor concerns—in adjudicating whiteness, courts spurred oft-shifting and turbulent conceptions of whiteness during the Naturalization Era.[133]

Despite the arbitrary nature and shifting standards of determining whiteness, courts adjudicated and granted legal passage into whiteness—and the citizenship and concomitant rights and privileges that came with it—until 1952. While nonwhites with amenable physical appearances could and did informally pass as white during this era,[134] a judge stood between them and their attainment of legal whiteness. But the dissolution of the Naturalization Act in 1952,[135] and the ushering in of the Era of Racial Self-Identification, turned that racial regime on its head.

2. Era of Racial Self-Identification

> [I]f I didn't define myself for myself, I would be crunched into other people's fantasies for me and eaten alive.
>
> —Audre Lorde, *Sister Outsider*[136]

The conclusion of the Naturalization Era in 1952 opened the door for racial self-identification. Individual autonomy over racial identity became the norm, as individuals rather than courts became able to self-identity their own race.[137]

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133. *See id.* at 76 (examining the different tests judges used to assess immigrant petitioners, and most notably, the reliance on eugenics science and the common perception tests). *See generally* KAREN BRODKIN, HOW JEWS BECAME WHITE FOLKS AND WHAT THAT SAYS ABOUT RACE IN AMERICA (1998) (concluding that conceptions of whiteness during the Naturalization Era were largely contingent upon developments within the labor sector, analyzing how these developments shifted the racialization of Jews from nonwhite to white).

134. *See* Haney López, *supra* note 89, at 48 (describing categories of persons such as Armenians and Syrians who were categorized as white by courts and therefore able to become naturalized citizens of the United States during the Naturalization Era).

135. Naturalization Act of 1790, ch. 3, 1 Stat. 103, *repealed by* Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163.

136. AUDRE LORDE, SISTER OUTSIDER: ESSAYS AND SPEECHES 137 (1984).

137. While the dissolution of the Naturalization Act of 1952 signaled the end of judges adjudicating an individual's race, third-party census-takers continued to be the arbiters of individual racial identification until 1960 when individuals were given the opportunity to self-identify their own race on the Census. *See* Pew Research Ctr., *Chapter 1: Race and Multiracial Americans in the U.S. Census*, PEW SOC. TRENDS (June 11, 2015), http://www.pewsocialtrends.org/2015/06/11/chapter-1-race-and-multiracial-americans-in-the-u-s-census/#fn-20523-11 [https://perma.cc/YY4P-3Z4V] ("From 1790 to 1950, census takers determined the race of the Americans they counted, sometimes taking into account how individuals were perceived in their community or using rules based on their share of 'black blood'. . . . [But] [b]eginning in 1960, Americans could choose their own race.").

Certainly, racial self-determination still had its statutory bounds. Individual modes of racial identification still had to be made within, and in line with, state-assigned racial categories.[138] Further, racial identification also has its cultural bounds. For individuals who are phenotypically identifiable as having dark skin, cultural norms and expectations make it more likely that they will self-identify as nonwhite and be identified by others as nonwhite.[139] Nonetheless, selection of racial categories is now such that, with some exceptions, individuals can identify as white—or nonwhite—without the need for judicial or other third-party endorsement.[140] This is what Camille Gear Rich calls "elective race," and is particularly salient for individuals who "occupy the margins of [established] racial categories."[141]

As Professor Rich notes, institutional shifts in race-related data collection make it substantially easier for individuals to have autonomy in selecting a racial classification that suits their desires.[142] Indeed, the Office of Management and Budget (OMB) and the U.S. Census Bureau, the two principal federal agencies responsible for delineating race and racial categories, both issued directives that rely on and respect racial self-identification as a means of collecting race-related data.[143]

138. *See* Michael Omi, *Racial Identity and the State: The Dilemmas of Classification*, 15 L. & INEQ. J. 7, 11–12 (1997) (describing the categories of racial classification utilized on the census once individuals were able to self-identify on the census, and critiquing the static nature of the categories).

139. *See, e.g.*, Moni Basu, *Black in America: It's Not Just About the Color of Your Skin*, CNN: IN AMERICA (Dec. 9, 2012, 8:00 AM), http://inamerica.blogs.cnn.com/2012/12/09/black-in-america-its-not-just-about-the-color-of-your-skin [https://perma.cc/G7EK-AEH7] (chronicling the ways in which people identify themselves as Black and noting that "[a]ppearance is a primary factor for many Americans in determining race and identity").

140. *See generally* Rich, *supra* note 118 (describing the shift to a system of racial classifications that allows for self-identification rather than being assigned a racial identity by a court or some other third party).

141. *Id.* at 1505.

142. *Id.* at 1522 (describing changes to federal racial identification schemes that "respected individuals' interest in selecting (or electing) a racial status").

143. *See, e.g.*, Office of Mgmt. & Budget, Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity, 62 Fed. Reg. 58782, 58782 (Oct. 30, 1997) ("Respect for individual dignity should guide the processes and methods for collecting data on race and ethnicity; ideally, respondent self-identification should be facilitated to the greatest extent possible . . . ."); U.S. Census Bureau, *About: Race*, CENSUS.GOV (last revised July 8, 2013), http://www.census.gov/topics/population/race/about.html [https://perma.cc/QH8GALK9] ("The data on race were derived from answers to the question on race that was asked of individuals in the United States."). The Census Bureau collects racial data in accordance with guidelines provided by the U.S. Office of Management and Budget (OMB), and these data are based on self-identification. For a discussion of the OMB's administrative definition, and redefinition, of racial classifications, see Beydoun, *supra* note 102, at 695–97.

By diminishing the courts' authority over questions of racial identity, and enabling individual expressions and configurations that challenged the rigidity of prevailing racial classifications and categorization, the Era of Racial Self-Identification, or "elective race," turned the law on its head. Since individuals supplanted judges as the arbiters of racial identity, and indeed became the arbiters of their own racial identity, they could presumably adopt whatever racial classification (or classifications) they deemed appropriate, even one that did not fit with their ancestry, lived experience, or physical appearance.[144]

Although the Era of Racial Self-Identification converted questions of racial identity from a judicial consideration into an individual matter, it also arguably afforded individuals the latitude to think about racial expression and identification as a means toward maximizing their interests. In short, race arguably became as much a question about advancing interests as about expressing identity.[145] This racial self-identification regime combined with the benefits available through affirmative action programming altered the once mono-directional incentives of passing from nonwhite to white.[146] This parallel development of self-identification and affirmative action programming spurred racial passing in reverse as a means to acquire the benefits of affirmative action.

To be precise, the Era of Racial Self-Identification buttressed by prevailing affirmative action jurisprudence did not spawn reverse passing. As examined more fully in this Article, there are many documented incidents of reverse passing that precede this juncture.[147] But the convergence of the Era of Self-Identification with prevailing affirmative action jurisprudence creates unprecedented incentives for reverse passing. The Part that follows advances a theory of reverse passing and the ancillary concepts vital for understanding it and its application.

144. *See* Camille Gear Rich, *Rachel Dolezal Has a Right to Be Black*, CNN (June 16, 2015, 8:06 AM), http://www.cnn.com/2015/06/15/opinions/rich-rachel-dolezal [https://perma.cc/Z8BE-KRXN] (arguing that because race is a social construct Dolezal and all individuals have a right to racially identify however they want).

145. *Id.* ("[D]ecisions about racial and ethnic identity are typically not merely expressive, strategic, or apolitical, but are driven by social conditions.").

146. Thompson, *supra* note 8 (describing the incentives that nonwhites have traditionally had to pass for white).

147. *See infra* Part III.

C. Reverse Passing

> The concept of passing assumes that the passer fails to convert the underlying identity, secretly retaining it even as she presents a separate face to the outside world.
>
> —Kenji Yoshino, *Covering*[148]

Reverse passing is the process by which whites disavow their white identity and present themselves as nonwhite.[149] We label individuals who undertake this process as "reverse passers."

Although "passing" is common parlance and the subject of extensive examination within legal literature and social science,[150] this Article is the first to define and analyze the proliferating occurrence of reverse passing in the United States today. But like conventional passing, "the outsider not only has to perform, but she has to perform well."[151] As defined by Randall Kennedy, racial passing is fundamentally a "deception" of the broader public.[152] It is a deception in the sense that an individual intentionally holds him or herself out to be a race other than the one that he or she would be assigned according to prevailing social norms. The individual does not reject prevailing social norms or rules regarding racial identification; rather they engage in acts of deception in order to adhere to prevailing social standards related to

148. Yoshino, *supra* note 4, at 813.

149. To be clear, nonwhites are also capable of reverse passing as another racial minority. *See, e.g.*, Vijay Chokal-Ingam, *Why I Faked Being Black for Med School*, N.Y. POST (Apr. 12, 2015, 5:05 AM), http://nypost.com/2015/04/12/mindy-kalings-brother-explains-why-he-pretended-to-be-black [https://perma.cc/MMS9-SZZW] (describing the experience of a Southeast Asian medical school applicant who represented himself as Black in order to obtain admission to medical school through a race-conscious affirmative action program). Indeed, "racially ambiguous groups such as South Asian Americans, can simultaneously possess attributes of whiteness, 'foreignness,' and 'blackness,' and may attempt to claim or rebuke these attributes." Vinay Harpalani, Desi*Crit: Theorizing the Racial Ambiguity of South Asian Americans*, 69 N.Y.U. ANN. SURV. AM. L. 77, 183 (2013). Yet the specific focus of this Article is on reverse passing from white to any nonwhite racial identity.

150. See generally Nix & Qian, *supra* note 51, for a statistical analysis of the rate at which Black men and women passed for white during the Reconstruction and Jim Crow Eras through 1940, in addition to statistical evidence of reverse passing. The time period covered by Nix and Qian overlaps with what social psychologists called "the great age of passing," which "occurred between 1880 and 1925." Khanna & Johnson, *supra* note 3, at 382. One estimate held that "approximately 10,000 to 20,000 people with black ancestry disappeared into the white population each year from 1900 to 1920. Other scholars have put the figure significantly higher at over 100,000 people annually." *Id.* (citations omitted). For a historical genealogy of the term "passing" in American history, see generally Ginsberg, *supra* note 28.

151. Carbado & Gulati, *supra* note 17, at 1291.

152. Kennedy, *supra* note 5, at 1145.

the race into which they are passing.[153] In order for this deception to be successful, the passer must consistently and convincingly perform the identity into which she is passing.[154]

Defined broadly to illustrate the conceptual and operational framework of the term, reverse passing is enabled and facilitated by the prevailing Era of Racial Self-Identification. The ability to elect which race one belongs to on the U.S. Census form, employment, and college applications affords great latitude to individuals over matters of racial identity and affiliation.[155] This formal declaration of racial identity reveals a critical ancillary definition, "legal reverse passing."

Legal reverse passing is the process by which whites disavow their white identity and present themselves as per se nonwhite on legal and administrative documents. These documents may include: birth certificates, the Census form, college and graduate school applications, employment applications and statistics, demographic data, and more. Legal reverse passers may or may not seek to present themselves as nonwhite beyond the four corners of legal or administrative documents—for example, in cultural spheres.

Cultural reverse passing is the process by which whites disavow their white identity and present themselves as nonwhite in cultural spaces. Here, we define "cultural" broadly to include spaces in the real world, and examine cultural reverse passing within the political and social spheres. Cultural reverse passers may or may not seek to legally reverse pass, creating the possibility of racial fissure (and conflict) with their cultural presentation and legal identification.

Below, we illustrate and analyze how legal and cultural reverse passing unfolds through case law and case studies. A preliminary step for engaging that discussion, however, is an analysis of how prevailing equal protection jurisprudence has enabled, and in many instances incentivized, reverse passing in both the legal, cultural, and combined sense.

153. *See, e.g.*, *id.* at 1150–51 (describing an instance in which an individual was passing from Black to white and noting that "[w]hen pressed to talk on the telephone with some authority on an important matter—a consumer complaint, dealing with police, seeking employment or educational opportunities—she would adopt an accent that most listeners would associate with the speech of a white person").

154. *See id.* at 1165–66 (chronicling the attempts of a woman passing from Black to white to maintain her new identity without getting caught).

155. While the Era of Racial Self-Identification heralded many positive changes for nonwhites—particularly the autonomy of being able to chose one's own racial identity—racial identity brought with it the concerning consequences of reverse passing.

II. REVERSE PASSING AND THE LAW

The Era of Self-Identification allows persons to racially identify as they see fit. To be sure, the privileges and benefits afforded to whiteness have not diminished, and those who can self-identify as white still have plenty of incentive to do so. Yet the Supreme Court's affirmative action jurisprudence, particularly the articulation of diversity as the lone compelling state interest that justifies race-conscious affirmative action programming, creates an incentive for reverse passers to want to self-identify as nonwhite.

As other scholars such as Nancy Leong have noted, the Supreme Court's focus on racial diversity as a compelling state interest has created a situational value in nonwhiteness that did not previously exist.[156] Whereas in the past the incentives for passing were solely for nonwhites to pass as whites, the increased interest in cultivating nonwhiteness provides incentives for whites to pass as nonwhite.

This Part provides a detailed analysis of how the Supreme Court's affirmative action jurisprudence created situational value in nonwhiteness through its articulation of diversity as a compelling state interest. It then analyzes how the situational value in nonwhiteness converges with the Era of Self-Identification to create a fertile landscape for reverse passers to frame their identities in ways that facilitate access to coveted legal and cultural interests.

A. Affirmative Action, Equal Protection, and the Remedial Justification

> You do not take a person who . . . 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.
>
> —Lyndon B. Johnson[157]

Broadly defined, affirmative action programs attempt to increase opportunities for members of minority groups to participate in core sectors of society

156. *See* Leong, *supra* note 33, at 2169 ("Efforts to create racial diversity usually begin—and often end—with increasing the number of nonwhite people within a group or institution. As a result, nonwhiteness has acquired a unique value because, in many contexts, it signals the presence of the prized characteristic of diversity.").

157. Lyndon B. Johnson, *Commencement Address at Howard University: "To Fulfill These Rights"* (June 4, 1965), *in* PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES 636 (1965).

from which they have been historically excluded and in which they are contemporarily underrepresented.[158] Since its inception, race-based affirmative action programming has been gradually eroded and steered by the courts to advance a narrower mission: racial diversity.

The first affirmative action program was established by Executive Order 11246 (Order).[159] The Order not only prohibited government contractors from discriminating against minorities, but also required them to take affirmative measures to ensure that minorities who were excluded from public sector employment in the past were now included.[160] Order 11246 resulted in a comprehensive statutory scheme that required anyone wishing to contract with the federal government to take steps to ensure minority inclusion. For example, it required contractors to review their employment practices and examine whether they presented obstacles to hiring minorities.[161] If their practices did create such obstacles, the Order required contractors to develop a plan to eliminate them.[162] It also mandated that contractors engage in recruiting efforts to attract minority candidates and diversify the pool of candidates from which it was selecting.[163]

Importantly, the Order reflected the understanding that, to create equal opportunities for minorities, non-discrimination policies were not enough.

158. *See generally* 41 C.F.R. § 60-2.10 (1984) (describing the purpose and content of federal contractor affirmative action programs).

159. *See* Exec, Order No. 11246, 30 Fed. Reg. 12315, 12320 (Sept. 28, 1965) ("[C]ontractor will not discriminate against any employee or applicant for employment because of race, creed, color, or national origin. . . . [and] will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin."). Prior to the enactment of Executive Order 11246, race-conscious legislation was enacted during the Reconstruction Era that required affirmative steps to be taken to remedy historic discrimination and subordination against Blacks, but that legislation was ultimately deemed unconstitutional. *See, e.g.*, Civil Rights Cases, 109 U.S. 3 (1883). President Kennedy also enacted Executive Order 10925, which required contractors to "take affirmative action to ensure that applicants are employed" in the form of recruiting minorities for jobs. Exec. Order No. 10925, 26 Fed. Reg. 1977 (Mar. 6, 1961). However, Executive Order 11246 was the first program to take aggressive measures beyond just recruiting. Thus, Executive Order 11246 is widely considered to be the first modern-day affirmative action program.

160. Exec. Order No. 11246, 30 Fed. Reg. 12315, 12320 (Sept. 28, 1965).

161. 41 C.F.R. § 60-2.17 (b) ("The contractor must perform in-depth analyses of its total employment process to determine whether and where impediments to equal employment opportunity exist.").

162. 41 C.F.R. § 60-2.17 (c) ("The contractor must develop and execute action-oriented programs designed to correct any problem areas identified pursuant to § 60-2.17(b) and to attain established goals and objectives.").

163. 41 C.F.R. § 60-50.2 ("[E]mployers shall undertake appropriate outreach and positive recruitment activities . . . .").

Rather, affirmative steps were needed to robustly address the historic patterns of intentional exclusion and marginalization of nonwhites from all sectors of society.[164] The Order embodied an anti-subordination approach towards equality insofar as it sought to achieve "not just equality as a right and a theory but equality as a fact and equality as a result."[165]

Thus, the original rationale for affirmative action eschewed the traditional individualistic nature of legal remedies and the thread of individualism that generally runs through American public discourse. Instead, it recognized that individuals were discriminated against because of their membership in a particular group and, as a result, remedies targeted toward particular groups rather than individual remedies were appropriate.[166] This rationale was the genesis of the remedial justification for affirmative action.[167]

Initially, federal courts were clear that the broad nature of the remedial justification did not run afoul of the Constitution on Fourteenth Amendment equal protection grounds. For example, one of the first challenges to the legality of Executive Order 11246 was made by a contractors' association that challenged an affirmative action plan on the grounds that it required the contractors' association to discriminate against whites, and "unreasonably require[d] contractors to undertake to remedy an evil for which . . . they [were not] responsible."[168] The Third Circuit rejected this contention, emphasizing that the affirmative action plan was "valid Executive action designed to remedy the perceived evil that minority tradesmen [were not] included in the labor pool . . . [and] a finding as to the historical reason for the exclusion of available tradesmen from the labor pool [was] not essential for federal contractual remedial action."[169] Other federal courts examining the constitutionality of

164. *See generally* Bok & Bowen, *supra* note 48, at 1–15 (describing the history of exclusion of racial and ethnic minorities from important American institutions that spurred the affirmative action legislation).

165. Johnson, *supra* note 157, at 636.

166. *See* Carl E. Brody, Jr., *A Historical Review of Affirmative Action and the Interpretation of Its Legislative Intent by the Supreme Court*, 29 AKRON L. REV. 291, 301 (1996) (analyzing the origins of affirmative action programs and finding that the government enacted such programs in response to centuries of discrimination against African-Americans and a desire to enact laws that both prohibited discrimination and provided remedial relief for past discrimination).

167. *See id.*

168. Contractors Ass'n of E. Pa. v. Sec'y of Labor, 442 F.2d 159, 165, 176 (3d Cir. 1971), *cert. denied*, 404 U.S. 854 (1971).

169. *Id.* at 177.

the broad remedial justification for affirmative action plans came to similar conclusions.[170]

Thus, the broad remedial justification for affirmative action programs initially stood on firm legal footing. Courts recognized that, as a matter of general policy, programs implemented by the executive and legislative branches to remedy past discrimination against minority groups—particularly African-Americans—that affirmatively targeted such groups for inclusion did not violate the Equal Protection Clause.

Ultimately, however, as minorities began to gain entrance into sectors of the employment market and elite educational institutions from which they were traditionally excluded, the narrative regarding the remedial justification for affirmative action began to change, both in the general public discourse and in the courts.[171] The group nature of the remedy was vociferously questioned, critiqued by proponents of pure meritocracy and colorblindness,[172] and a new narrative emerged that race-conscious affirmative action programs constituted "reverse discrimination" against whites in violation of the Fourteenth Amendment's Equal Protection Clause.[173] Blacks and other nonwhites

170. *See, e.g.*, Legal Aid Soc'y of Alameda Cty. v. Brennan, 608 F.2d 1319, 1343 (9th Cir. 1979) ("Nothing in the decree or inherent in the circumstances of this case requires preferential treatment or discrimination on the basis of race or sex. We therefore need not consider when if ever racial and sexual preferences and discrimination undertaken to comply with Executive Order 11246 can be lawful under either Title VII or the Constitution."); Associated Gen. Contractors of Mass., Inc. v. Altshuler, 490 F.2d 9, 16 (1st Cir. 1973) (finding that an affirmative action program did not violate the Constitution's equal protection requirements and reasoning in part that "our society cannot be completely colorblind in the short term if we are to have a colorblind society in the long term. . . . Discrimination has a way of perpetuating itself, albeit unintentionally, because the resulting inequalities make new opportunities less accessible. Preferential treatment is one partial prescription to remedy our society's most intransigent and deeply rooted inequalities."); Northeast Constr. Co. v. Romney, 485 F.2d 752 (D.C. Cir. 1973).

171. *See generally* John Cocchi Day, *Retelling the Story of Affirmative Action: Reflections on a Decade of Federal Jurisprudence in the Public Workplace*, 89 CAL. L. REV. 59 (2001) (describing the decline in the judiciary's willingness to accept race-conscious affirmative action programs as constitutional); Kent Greenawalt, *The Unresolved Problems of Reverse Discrimination*, 67 CAL. L. REV. 87 (1979) (critiquing the use of race-conscious affirmative action programs and the Supreme Court's use of the diversity rationale to support such programs); James E. Jones, Jr., *"Reverse Discrimination" in Employment: Judicial Treatment of Affirmative Action Programs in the United States*, 25 HOW. L.J. 217 (1982) (describing the emergence of reverse discrimination claims by whites claiming that they were harmed by race-conscious affirmative action programs that benefited racial minorities).

172. *See generally* Keith Aoki, *The Scholarship of Reconstruction and the Politics of Backlash*, 81 IOWA L. REV. 1467 (1996) (describing the backlash against affirmative action and the arguments regarding meritocracy and colorblindness advanced in support thereof).

173. *See generally* Day, *supra* note 171; Jones, Jr., *supra* note 171.

were widely perceived as benefitting at the expense of whites,[174] which in turn spawned complaints of reverse racism and the erosion of meritocracy.[175]

As discussed in the following Part, this backlash against minority inclusion and the perception that Blacks and other minorities were gaining at the expense of whites resulted in a very narrow construction of the circumstances in which remedying past discrimination could be used to justify affirmative action programs, and a marked shift away from the original remediation justification for affirmative action. In place of the remedial justification sprung a rationalization completely divorced from the lived history of exclusion and marginalization faced by minorities: the diversity justification.

B. Affirmative Action, Equal Protection, and Racial Diversity

A little over a decade after President Johnson enacted Executive Order 11246, affirmative action programs proliferated.[176] Opinions about the programs varied widely, with many questioning both the legality and the equity of the programs.[177] There were a number of legal challenges to the constitutionality of the programs in lower courts, but for several years after the enactment of Executive Order 11246, the Supreme Court managed to evade answering pressing questions as to the legality of such programs.[178]

It was not until *Regents of the University of California v. Bakke* in 1978 that the Court finally weighed in on the constitutionality of affirmative action programs.[179] The Court's opinion in *Bakke* was critical because it laid the groundwork for both the legal and normative justification for affirmative

174. *See, e.g.*, Greenawalt, *supra* note 171, at 87 ("[W]hen individual blacks and members of other minority groups began to be given benefits at the expense of whites who, apart from race, would have had a superior claim to enjoy them, the values [underlying affirmative action] were brought into sharp conflict, dividing previously allied liberal organizations . . . .").

175. *See id.* (summarizing the opposition to affirmative action as stemming from "individual blacks and members of other minority groups [being] given benefits at the expense of whites who, apart from race, would have had a superior claim to enjoy them . . .").

176. *See* Jones, Jr., *supra* note 171, at 230 (noting the "proliferation of affirmative action requirements").

177. *See generally* Martin H. Redish, *Preferential Law School Admissions and the Equal Protection Clause: An Analysis of the Competing Arguments*, 22 UCLA L. REV. 343 (1974) (analyzing the various arguments for and against the constitutionality of affirmative action programs).

178. Indeed, the Supreme Court denied certiorari in many cases challenging the constitutionality of affirmative action programs. *See supra* notes 168–170 and accompanying text. When the Court finally granted certiorari in *DeFunis v. Odegaard*, 416 U.S. 312 (1974), the Court punted on questions regarding the constitutionality of the University of Washington Law School's affirmative action program and instead found that the issue was moot because the individual challenging the program had reached his third year of law school at the University of Washington by the time the Court took up the case.

179. 438 U.S. 265 (1978).

action as we know it today. More importantly, it also changed the terms upon which minority inclusion would be conceptualized in education, employment, and American society more broadly. As affirmative action continues to be whittled down by the federal judiciary today, and perhaps even more so with the Supreme Court's reassessment in *Fisher II* during the 2016 term, the lone legal legs it has to stand on is the racial diversity rationale.

1. *Bakke* and the Diversity Rationale

In *Bakke*, a white male applicant to the University of California at Davis Medical School challenged the constitutionality of the medical school's special admissions program, which set aside sixteen out of a total of one hundred slots for disadvantaged minority students.[180] The plaintiff, Alan Bakke, alleged that the University unlawfully discriminated against him because of his race in violation of, among other things, the Fourteenth Amendment's Equal Protection Clause.[181] Bakke's legal claim fomented the idea of reverse discrimination as it is known today, and in turn, challenged the formative remedial mission of affirmative action programming.[182]

Importantly, prior to the Court's decision in *Bakke*, there was much debate as to what standard of review should be applied to programs that use express racial classifications to favor minorities who were previously discriminated against.[183] A plurality decision authored by Justice Powell answered this question by finding that "equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color" and that racial and ethnic classifications always call for the "most exacting

180. *Id.* at 279–80.
181. *Id.*
182. *Id.*; *see* Alan Freeman, *Antidiscrimination Law: The View From 1989*, 64 TUL. L. REV. 1407, 1431–33 (1990) (describing how the Supreme Court's affirmative action jurisprudence accepted and crystallized claims of reverse discrimination by white plaintiffs).
183. *See* Redish, *supra* note 177, at 345.

judicial examination."[184] To that end, Justice Powell went on to apply strict scrutiny to the U.C. Davis Medical School admissions program.[185]

Powell then examined the program's stated purposes, including "countering the effects of societal discrimination" and "achieving a diverse student body."[186] He determined that "countering the effects of societal discrimination" was not an appropriately compelling state interest in this instance because there had been no finding of identifiable discrimination against disadvantaged groups within the context of admissions to the University of California at Davis medical school by the judiciary, legislature, or an administrative agency.[187] Powell's narrow construction of past discrimination in *Bakke* was pivotal, holding that macro evidence of past discrimination was not enough.[188] Affirmative action programs and their administrators, including the U.C. Davis Medical School, would instead have to produce targeted evidence, illustrating that the institution itself discriminated against the protected (nonwhite) groups.[189] Absent the production of evidence of specific institutional discrimination, Powell reasoned that white applicants would be unfairly made to bear the burden of "whatever harm the beneficiaries of the special admissions program [were] thought to have suffered."[190]

Powell, however, found that the Medical School's stated goal of achieving a diverse student body was indeed a compelling state interest that justified

184. *Bakke*, 438 U.S. at 289–91. In contrast, in their concurring opinion, Justices Marshall, White, Brennan, and Blackmun advocated a less exacting standard that would have required the Court to inquire as to whether racial classifications designed to further the goal of remedying past discrimination "serve important governmental objectives" that are "substantially related to achievement of those objectives." *Id.* at 359 (Brennan, J., concurring) (citations omitted). In advocating adoption of this intermediate approach to analyzing affirmative action programs, the concurring justices reasoned that a standard less exacting than strict scrutiny was appropriate because the race-conscious programs are designed not to stigmatize minorities but rather to help them. *Id.* at 359–60.

185. *Id.* at 291 (majority opinion) (finding that "[r]acial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination").

186. *Id.* at 306, 267.

187. *Id.* at 306–10.

188. *Id.* at 310 ("[T]he purpose of helping certain groups whom the faculty of the Davis Medical School perceived as victims of 'societal discrimination' does not justify a classification that imposes disadvantages upon persons like respondent, who bear no responsibility for whatever harm the beneficiaries of the special admissions program are thought to have suffered.").

189. *Id.* at 307–09 (emphasizing that the Court had never accepted the idea that the goal of remedying societal discrimination was a compelling state interest in the absence of a specific finding or adjudication of discrimination, and noting that the University could not make such a finding because "[i]ts broad mission is education, not the formulation of any legislative policy or the adjudication of particular claims of illegality").

190. *Id.* at 310.

application of race-conscious affirmative action admissions decisions.[191] In reaching this conclusion, Powell couched the interest in terms of academic freedom, emphasizing that the "freedom of a university to make its own judgments as to education includes the selection of its student body."[192] Though the Court ultimately found that the Medical School's program was not narrowly tailored to achieve this goal,[193] the decision for the first time introduced the diversity justification for race-conscious affirmative action programs both into the legal sphere and the public discourse more generally.

By upholding diversity—rather than remediation of past discrimination—as the compelling state interest that would justify the use of race-conscious affirmative action programs, the Court ushered in a new legal and normative conceptualization of the significance of race generally and diversity in particular. In his plurality opinion, Justice Powell emphasized the perceived benefits that accrue to students and society as a whole when students have the ability to interact and learn from students who are different from them.[194] The articulation of diversity as a compelling state interest for these reasons completely erased discrimination from the calculus. It focused on the ability of students to learn from one another's differences, rather than the history of discrimination and oppression that resulted in the exclusion of minority students from elite educational opportunities. As other scholars have noted, this rationale does not account for the lived experiences of minority students, particularly discriminatory experiences that may have shaped both the students' identities and the opportunities available to them.[195]

Indeed, the U.C. Davis Medical School admissions program that the Court struck down as unconstitutional took both the racial identities of the applicants and their lived experiences into consideration.[196] In contrast, the diversity rationale championed by Powell was premised on the perceived ability of

191. *Id.* at 311–12.
192. *Id.* at 312.
193. *Id.* at 319–20.
194. *Id.* at 314 ("Physicians serve a heterogeneous population. An otherwise qualified medical student with a particular background—whether it be ethnic, geographic, culturally advantaged or disadvantaged—may bring to a professional school of medicine experiences, outlooks, and ideas that enrich the training of its student body and better equip its graduates to render with understanding their vital service to humanity.").
195. *See* Redish, *supra* note 177, at 396.
196. Greenawalt, *supra* note 171, at 88–89 (noting that applicants for U.C. Davis's special admissions program "had to be both a member of one of four 'minority groups'—blacks, Chicanos, Asians, and American Indians—and either educationally or economically disadvantaged. . . . [and therefore] neither a very poor white nor a wealthy black educated at expensive private schools was eligible for the special program").

nonwhite students to ostensibly provide a perspective in the classroom unfamiliar to white students. While it speaks volumes about the educational and experiential value nonwhite students extend to white students, the diversity rationale championed by Powell is silent about the inherent value of these nonwhite students' lived experiences. And more importantly, Powell's rationale was dismissive of the past and contemporary inequities that stifled their access to educational institutions like the U.C. Davis Medical School. Furthermore, Powell did not seek to dismantle the racial hierarchy inherent in traditionally white spaces, such as elite medical schools, that spurred the need for race-conscious affirmative action programs in the first place. Instead, his viewpoint reified those structures by suggesting that race-conscious programs are only legitimate insofar as they increase the number of nonwhite students in traditionally white spaces who can in turn serve an educational purpose for white students.

As a result, the diversity rationale favors performance of racial identity—meaning the ability to perform in ways that deviate from white cultural norms—over actual lived experiences and historical racial discrimination. Despite these deficiencies, the diversity rationale has been bolstered by subsequent Supreme Court decisions, most notably *Grutter* and *Fisher*, and, consequently, has essentially supplanted the remedial justification for race-conscious affirmative action programs.[197]

2. Beyond *Bakke*: Diversity Supplants Remedial Affirmative Action

As discussed in Part II.B.1, in the early affirmative action cases, lower courts shied away from narrowly construing the remedial justification for affirmative action. Instead, these courts deferred to the legislative branches' determination that race-conscious affirmative action programs were necessary to remedy past discrimination.[198] That began to change with the Supreme Court's decision in *Bakke*. This Part examines how the unraveling of

197. *See* Charles R. Lawrence III, *Each Other's Harvest: Diversity's Deeper Meaning*, 31 U.S.F. L. REV. 757, 764 (1997) (assessing the continued legal vitality of race-conscious affirmative action programs and noting that the Supreme Court decisions that struck down the remedial justification for affirmative action "have not overruled *Bakke*, and that Powell's diversity reasoning is uniquely applicable to the educational setting where the pedagogic purposes of affirmative action, flexible processes of admissions, and faculty hiring distinguish it from the contract set-aside cases" that were struck down as unconstitutional uses of the remedial justification for affirmative action).

198. *See supra* notes 170–172 and accompanying text.

the remedial justification started in *Bakke* continued with subsequent Supreme Court jurisprudence.

In *Bakke*, the Justices took different stances on how broadly the remedial justification for race-conscious affirmative action programs was to be construed. Justice Powell insisted that a prior judicial or legislative determination of discrimination was necessary in order for a remedial race-conscious affirmative action program to be appropriate.[199] Justices Brennan, White, Marshall and Blackmun, on the other hand, took the position that a "judicial determination of a constitutional or statutory violation as a predicate for race-conscious remedial actions would be self-defeating" because it would undermine voluntary efforts to remedy the effects of past discrimination.[200]

Following *Bakke*, some lower federal courts and the Supreme Court continued to broadly construe the remedial purpose justification and to defer to the legislature's determination that race-conscious affirmative action programs were necessary. For example, in *Local Union No. 35 of International Brotherhood of Electrical Workers v. City of Hartford*, the Second Circuit upheld the constitutionality of an affirmative action ordinance adopted by the City of Hartford, Connecticut.[201] The ordinance required contractors to use a good faith effort to employ a workforce that was fifteen percent women or minorities on all city construction contracts greater than ten thousand dollars.[202] In upholding the constitutionality of the ordinance, the Second Circuit reasoned that the Hartford City Council was a competent body to make a legislative determination regarding past discrimination and that their findings of past and present discrimination were sufficient to justify upholding the affirmative action ordinance.[203]

Similarly, in *Fullilove v. Klutznick*, the Supreme Court upheld as constitutional a minority set-aside affirmative action program, reasoning that Congress's broad remedial purpose in enacting the set-aside program was to halt the "perpetuation of the effects of prior discrimination which had impaired or foreclosed access by minority businesses to public contracting opportunities" and that such a broad remedial purpose was appropriate.[204] However, after *Fullilove*, the Court narrowed the construction of the remedial purpose justification such that it was available in theory but not in reality.

199. *Bakke*, 438 U.S. at 301–02.
200. *Id.* at 364 (Brennan, J., concurring).
201. 625 F.2d 416 (2d Cir. 1980).
202. *Id.* at 418–20.
203. *Id.* at 421–22.
204. 448 U.S. 448, 473 (1980).

In *Wygant v. Jackson Board of Education*, the Court rejected a broad remedial purpose justification for a race-conscious provision in a teacher's collective bargaining agreement that gave minority teachers greater protections from layoffs.[205] In particular, the Court rejected the school board's contention that the program was necessary to provide role models for minority students to counter the effects of societal discrimination.[206] Instead, the Court for the first time linked the remedial justification for affirmative action programs to a specific evidentiary standard and required that there be "convincing evidence that [a] remedial action is warranted" before a remedial purpose for an affirmative action program would be sustained.[207]

The imposition of such a standard represented a clear narrowing of the instances in which a remedial purpose could be used to justify affirmative action programs, particularly given the realities of how discrimination works.[208] Importantly, Justice O'Connor's concurring opinion clearly emphasizes that other compelling state interests—such as diversity—could still be used to support affirmative action programs.[209] The diversity rationale would effectively become the most viable option available for upholding affirmative action programs after the Supreme Court's decisions in *City of Richmond v. J. A. Croson Co.*[210] and *Adarand Constructors, Inc. v. Pena*.[211]

In *Croson*, the Court arguably sounded the death knell of the remedial justification for race-conscious affirmative action programs. The Court reaffirmed the evidentiary standard set forth in *Wygant*, which required convincing evidence, namely that there was "a strong basis in evidence" that a remedial affirmative action program is warranted before a race-conscious remedial affirmative action program can be lawfully implemented.[212] In addition, the

205. 476 U.S. 267 (1986).
206. *Id.* at 274–76.
207. *Id.* at 277.
208. Indeed, modern-day discrimination is often not explicit and is instead a function of deeply embedded cognitive biases that systematically work to oppress and exclude racial and ethnic minorities. *See, e.g.*, Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning With Unconscious Racism*, 39 STAN. L. REV. 317, 323 (1987) (arguing that the current legal requirements for demonstrating actionable discrimination "ignores much of what we understand about how the human mind works . . . [i]t also disregards both the irrationality of racism and the profound effect that the history of American race relations has had on the individual and collective unconscious"). As a result the kind of "convincing evidence" needed to sustain a remedial justification for an affirmative action program in the wake of *Wygant* is difficult to obtain.
209. *Id.* at 286 (O'Connor, J., concurring).
210. 488 U.S. 469 (1989).
211. 515 U.S. 200 (1995).
212. *Croson*, 488 U.S. at 510 (citation omitted).

Court found that strict scrutiny should be applied to when a classification is made on the basis of race.[213] However, in *Metro Broadcasting, Inc. v. FCC*, the Supreme Court backtracked and applied intermediate scrutiny to a race-conscious affirmative action program.[214] Five years later, the Court in *Adarand* overruled *Metro Broadcasting*, definitively finding that race-conscious programs should be subject to strict scrutiny review.[215]

The Court in *Adarand* noted that the application of strict scrutiny to race-conscious affirmative action programs did not mean that the standard of review would be "strict in theory, but fatal in fact."[216] Yet insofar as the remedial justifications for race-conscious affirmative action programs are concerned, that was indeed the result.[217]

The import of *Wygant, Croson*, and *Adarand* was to narrow the scope of affirmative action programs that would be deemed constitutional under a remedial justification purpose for affirmative action.[218] These decisions did so by imposing a high evidentiary burden on entities wishing to enact race-conscious affirmative action programs for purposes of remedying discrimination. Because of the legal obstacles associated with articulating and maintaining a race-conscious affirmative action program for purposes of remedying past discrimination, those seeking to utilize a race-conscious affirmative action program are more likely to prevail in court if they instead choose to articulate a desire to achieve diversity as the rationale for such a program.[219]

213. *Id.* at 494.

214. Metro Broad., Inc. v. FCC, 497 U.S. 547, 567–68 (1990), *overruled by* Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) (applying intermediate scrutiny to an affirmative action program and finding that "the interest in enhancing broadcast diversity is, at the very least, an important governmental objective and is therefore a sufficient basis for the Commission's minority ownership policies").

215. *Adarand*, 515 U.S. at 237.

216. *Id.* (quoting Fullilove v. Klutznick, 448 U.S. 448, 519 (1980) (Marshall, J., concurring)).

217. *See* Carl L. Livingston, Jr., *Affirmative Action on Trial: The Retraction of Affirmative Action and the Case for Its Retention*, 40 HOW. L.J. 145, 156 (1996) (arguing that after *Bakke*, the Court attacked remedial affirmative action programs by "limiting the scope of [their] use, heightening the standard of review, and imposing an increasing burden of production"); *see also* Brent E. Simmons, *Reconsidering Strict Scrutiny of Affirmative Action*, 2 MICH. J. RACE & L. 51, 88–90 (1996) (critiquing the Supreme Court's adoption of strict scrutiny for remedial affirmative action programs and demonstrating how the use of strict scrutiny has allowed lower federal courts to strike down legitimate race-conscious affirmative action programs).

218. *See* Kathleen M. Sullivan, City of Richmond v. J.A. Croson Co.*: The Backlash Against Affirmative Action*, 64 TUL. L. REV. 1609, 1612 (1990) ("*Croson* culminated the Court's long-mounting trend toward limiting the justification for affirmative action to a narrow brand of corrective justice: remedying particularized past discrimination.").

219. *See* Lawrence III, *supra* note 197, at 764 ("[A]ffirmative action's supporters have looked to Powell's *Bakke* decision for the salvation of affirmative action in higher education.").

The proliferation of the diversity rationale as the primary justification used to support affirmative action programs is discussed in the Part that follows.

3. The Diversity Rationale Goes Mainstream

After the Court's decisions in cases including *Wygant*, *Croson*, and *Adarand* substantially tightened the requirements for showing a proper remedial justification for race-conscious affirmative action programs, the only realistic and viable way to sustain any affirmative action program was under a diversity rationale, such as the one put forth in *Bakke*.[220] Subsequently, in higher education cases challenging the propriety of race-conscious affirmative action programs, particularly the validity of the diversity rationale, the Court doubled down on the diversity rationale and the reasoning set forth in *Bakke*.

For example, in *Grutter v. Bollinger*, the Court upheld diversity as a compelling state interest that justifies the use of race-conscious admissions programs, reasoning that "student body diversity promotes learning outcomes, and better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals."[221] Similar to the reasoning in *Bakke*, the Court in *Grutter* found that diversity was a compelling state interest, largely deferring to the Michigan Law School's judgment—grounded in its understanding of academic freedom—of the institutional value of racial diversity.[222] In *Fisher v. University of Texas at Austin*, the Court reaffirmed that diversity can serve as a compelling state interest that justifies race-conscious admissions policies, so long as diversity is not defined as racial balancing and race is one among many factors considered in the admissions program.[223]

Importantly, the Court in both *Grutter* and *Fisher* received amicus briefs from all sectors of society including the U.S. military and Fortune 500 companies.[224] The Court in both cases cited and relied on the arguments advanced in those briefs in extolling the virtues of diversity when analyzing whether diversity was indeed a compelling state interest.[225] The Court however failed to include

220. *See generally* Akhil Reed Amar & Neal Kumar Katyal, *Bakke's Fate*, 43 UCLA L. REV. 1745, 1775–76 (1996) (arguing that the diversity rationale articulated by Justice Powell in *Bakke* can and should be used to implement race-conscious affirmative action programs).

221. Grutter v. Bollinger, 539 U.S. 306, 330 (2003) (citations omitted).

222. *Id.* at 328 ("The Law School's educational judgment that such diversity is essential to its educational mission is one to which we defer.").

223. 133 S. Ct. 2411, 2417–18 (2013).

224. Brief for Amici Curiae of 65 Leading American Businesses in Support of Respondents, Grutter v. Bollinger, 539 U.S. 306 (2003) (Nos. 02-241, 02-516).

225. *See, e.g.*, *Grutter*, 539 U.S. at 330–31 (describing the benefits associated with diversity and noting that the "high-ranking retired officers and civilian leaders of the United

any consideration or analysis of the lived experience of students, particularly the historical discrimination against individuals because of their membership in particular racial or ethnic groups in reifying diversity as a compelling state interest. As Rachel Moran notes, "[s]tripped of the compelling imagery of corrective justice, the Michigan cases [*Grutter* and *Gratz*] leave affirmative action in the uneasy space between constitutional law and constitutional culture."[226] That is to say, the Court seemed to rely on non-judicial actors' understanding of the Constitution in its own interpretation of the Constitution—in this case those of the Fortune 500 and military amici[227]—without sufficiently weighing the obligation of the law to remedy rights violations.[228]

Consequently, the kinds of diversity that institutions can pursue through race-conscious admissions programs are not defined by any concrete notion of the need for corrective or restorative justice based on a history of discrimination against minorities. Instead, diversity is conceptualized on terms that are satisfactory to institutions like the University of Michigan Law School and the University of Texas, other colleges and universities, the military, and Fortune 500 companies that have no investment in rights remediation.

C. How the Law Enables Reverse Passing

We suggest that the erosion of a remedial affirmative action program, as well as the development of the racial diversity rationale by the courts, narrowed the meaning of nonwhite racial identity. Divorced from its historic and experiential context, nonwhite racial identity was reduced to a characteristic any applicant could easily articulate on their college, graduate school, or employment applications simply by checking a box.

Undergirded by the Era of Racial Self-Identification, whites seeking to reap direct benefits from affirmative action programs advancing the Court's racial diversity interest could mark themselves as nonwhite. The law—in the form of the U.S. Census regime and affirmative action jurisprudence—enabled this process and increased the incidence of reverse passing.

States military assert that, '[b]ased on [their] decades of experience,' a 'highly qualified, racially diverse officer corps . . . is essential to the military's ability to fulfill its principle [sic] mission to provide national security'" (quoting Brief for Amicus Curiae of Julius W. Becton, Jr., et al. in Support of Respondents, Grutter v. Bollinger, 539 U.S. 306 (2003) (Nos. 02-241, 02-516)).

226. Rachel F. Moran, *Of Doubt and Diversity: The Future of Affirmative Action in Higher Education*, 67 OHIO ST. L.J. 201, 226 (2006).

227. *See supra* note 224 and accompanying text.

228. Moran, *supra* note 226, at 226.

1. Racial Capital and the Diversity Doctrine

Under an affirmative action jurisprudential regime in which diversity stands as the exclusive compelling state interest, institutions clamor to build statistically and superficially diverse student bodies and employee bases.[229] Colleges, universities, and employers in both the private and public sectors view having a diverse group of students or employees as critical to their legitimacy for many of the same reasons articulated by the Supreme Court in *Bakke*, *Grutter*, and *Fisher*. For example, employers champion diversity because they believe that it breeds innovation insofar as a diverse set of employees ostensibly bring differing views and perspectives that can help businesses thrive both domestically and globally.[230] Colleges and universities actively seek out diversity because they want students who offer differing viewpoints and life experiences.[231] In addition, institutions that lack diversity are often criticized and viewed negatively in the public discourse, which can affect the bottom line for businesses and the prestige and reputation of colleges and universities.[232]

This "intense social and legal focus on diversity"[233] incentivizes institutions—like universities or state agencies—to admit or recruit individuals who appear to be nonwhite, or who can effectively perform a nonwhite identity.[234] On the other side, enabled by the Era of Racial Self-Identification, individuals seeking to gain admission to a college or university, or to be more competitive for a job, can negotiate or manipulate their identities to appear to be "diverse."[235]

229. By "superficial," we refer to the mere appearance of racial diversity an institution may seek, and the supposed credibility or legitimacy that mode of diversity brings.

230. *See* FORBES, GLOBAL DIVERSITY AND INCLUSION: FOSTERING INNOVATION THROUGH A DIVERSE WORKFORCE 4 ("A diverse and inclusive workforce is necessary to drive innovation, foster creativity, and guide business strategies. Multiple voices lead to new ideas, new services, and new products, and encourage out-of-the box thinking.").

231. *See, e.g.*, Ronald G. Shaiko, *Admissions Is Just Part of the Diversity Puzzle*, CHRON. HIGHER EDUC. (June 9, 2013), http://chronicle.com/article/Admissions-Is-Just-Part-of-the/139637 [https://perma.cc/YJ69-77AG] (describing the benefits of diversity on college campuses and the ways in which colleges can do more beyond just admissions to reap the benefits of race-conscious admissions policies).

232. For example, the University of Wisconsin was heavily criticized for enrolling a non-racially diverse student body and relying upon deceptive means to make its university appear more diverse, including photoshopping an African-American student into a virtually all-white crowd in one of its advertisement brochures. *See* Deena Prichep, *A Campus More Colorful Than Reality: Beware That College Brochure*, NPR (Dec. 29, 2013, 10:31 AM), http://www.npr.org/2013/12/29/257765543/a-campus-more-colorful-than-reality-beware-that-college-brochure [https://perma.cc/RK9D-3M95].

233. Leong, *supra* note 57, at 12.

234. Leong, *supra* note 33, at 2153–54.

235. "Identity entrepreneurship takes place within a system of identity valuation that I will call *identity capitalism*. In previous work, I identified the phenomenon of racial capitalism—the

Further, the preoccupation with diversity—particularly racial diversity—engenders institutional commodification of nonwhite identity, and subsequently, nonwhite bodies. Whether superficially, statistically, or strategically, "the specific racial commodity that each of us produces often provides . . . 'use value' to the people and institutions with which we affiliate."[236] Cognizant of this "use value," whites seeking to capitalize on institutional missions to enhance racial diversity will present their racial identities in ways that comport with those missions, including reverse passing to personally reap the benefits of diversity policies.

2. Racial Identity Entrepreneurship

Nancy Leong defines racial identity entrepreneurship as "circumstances in which an individual of an identity out-group intentionally leverages her identity for personal benefit."[237] Adopting Leong's theory, we argue that reverse passers shed white ("in-group") identities for nonwhite ("out-group") identities to derive some kind of personal benefit or benefits.[238]

Within a framework wrought by the Supreme Court's affirmative action jurisprudence, where racial diversity is intensely coveted by colleges and universities, sought after in the business world,[239] and valued by government agencies, there are enough personal benefits waiting for whites who choose to reverse pass as nonwhite to make it reasonable, if not advantageous, to do so. These benefits include: seats at prestigious colleges and graduate programs; hotly contested positions at Fortune 500 companies and government agencies; academic appointments and professorships; executive roles with prominent civil rights and advocacy organizations; and a bounty of other opportunities.[240]

In sum, the diversity doctrine set forth by the Supreme Court creates great incentives to reverse pass for whites who can effectively perform and

process of deriving social or economic value from the racial identity of another." Leong, *supra* note 57, at 3.

236. *Id.* at 9.

237. *Id.* at 15.

238. Leong refers to an individual "who intentionally leverages her out-group identity to derive social or economic benefit as an *identity entrepreneur*." *Id.* at 18.

239. *See* Eang L. Ngov, *War and Peace Between Title VII's Disparate Impact Provision and the Equal Protection Clause: Battling for a Compelling Interest*, 42 LOY. U. CHI. L.J. 1, 50 (2010) (discussing the "business case for diversity").

240. *See* Leong, *supra* note 33, at 2169 ("[E]fforts to create racial diversity usually begin—and often end—with increasing the number of nonwhite people within a group or institution . . . [and] nonwhiteness has acquired a unique value because, in many contexts, it signals the presence of the prized characteristic of diversity.").

present themselves as nonwhite.[241] This is particularly true of the Era of Racial Self-Identification, where "people are not merely passive objects shaped by society, but are also active and creative agents of identity."[242] This proactive shaping of identity includes reverse passing. The following Part describes the ways in which persons seeking to reverse pass might do so and the benefits or incentives that exist that may encourage them to do so.

III. FORMS OF REVERSE PASSING

Reverse passing theory is complex, multi-dimensional, and—in line with the fluidity of race and racial classifications in America—constantly shifting.[243] This is particularly true in the Era of Racial Self-Identification, which equips reverse passers with the legal footing to elect whatever race aligns with their subjective affinities or interests.

This Part, through case law and timely case studies, examines two forms of reverse passing: legal reverse passing and cultural reverse passing. It also examines the benefits that might accrue from both of these forms of reverse passing. Part III.A analyzes legal reverse passing and its three attendant benefits: (1) access to higher education opportunities, (2) access to employment opportunities, and (3) economic gains. Part III.B scrutinizes cultural reverse passing and its two subcategories: (1) political reverse passing, and (2) social reverse passing.

Legal and cultural reverse passing are distinct, but they commonly overlap and bring about full-fledged reverse passing. In other words, reverse passers oftentimes legally and culturally reverse pass simultaneously. In some instances, as indicated below, reverse passers may opt to legally reverse pass but continue to culturally identify as white, or vice-versa. This Part aims to articulate the distinct ways reverse passing is deployed by reverse passers, and the myriad effects it has on the subject, associated figures, and the institutions in which they engage.

241. Reverse passing, an extreme form of identity performance, "consumes resources in the form of time and effort . . . ." Carbado & Gulati, *supra* note 17, at 1279. However, for reverse passers, the costs associated with the decision to reverse pass—as discussed above—come with potential for great reward. This rational negotiation is indeed part of the decision to reverse pass from white to nonwhite.

242. Khanna & Johnson *supra* note 3, at 383.

243. *See* Omi & Winant, *supra* note 77, at 68.

A. Legal Reverse Passing

Legal reverse passing is the process by which whites disavow their white identity and present themselves as per se nonwhite on legal and administrative documents. This Part describes the benefits that might accrue from legal reverse passing and demonstrates why whites might have the incentive to do so.

1. Access to Higher Education

> I tell my children to always choose Hispanic or Latino based on the positives they stand to gain from doing so. Yup, I said it.
>
> —Allena Tapia[244]

Affirmative action in higher education created newfound inroads for nonwhites to access colleges and universities. This is particularly true for prestigious institutions, which are gateways to influence, wealth, and power in America. The elimination of affirmative action as a corrective mechanism by the Court, and the ascent of the diversity justification, opened the door for "box checking"—the phenomenon by which college applicants seek to gain advantages in the diversity-driven admissions system by selecting a racial or ethnic classification that they believe will enhance their prospect for admission.[245] Box checking, a specific kind of reverse passing in higher education, is not exclusive to whites, but is also practiced among nonwhites choosing other nonwhite categories that colleges, universities, and graduate programs actively recruit.[246] That nonwhites would elect to identify as another but dif-

244. *Multiracial Children: Teaching My Kids to Check the Latino Box on Applications*, HUFFINGTON POST (Apr. 12, 2012, 12:10 PM), http://www.huffingtonpost.com/allena/why-i-tell-my-children-to-game-the-latino-statistics_b_1386351.html [https://perma.cc/P9SV-4Y7K].

245. "Today, some people have flipped the 'one-drop rule' to claim minority status to try to gain perceived advantages in scholarships, college admission and in the workplace. In response, the Coalition of Bar Associations of Color passed a resolution last year urging law schools to treat the practice of 'box checking' as 'academic ethnic fraud.'" Elise Hu, *Minority Rules: Who Gets to Claim Status as a Person of Color?*, NPR (May 16, 2012, 12:41 PM), http://www.npr.org/sections/itsallpolitics/2012/05/16/152822762/minority-rules-who-gets-to-claim-status-as-a-person-of-color [https://perma.cc/YZY7-N53P]; see also Jessica A. Clarke, *Identity and Form*, 103 CAL. L. REV. 747, 805 (2015), who observes: "The ABA's evidence of fraud was the disparity between the number of self-identified Native American lawyers on the census (228) and the number reportedly graduated by ABA-accredited law schools over that same time period (approximately 2,610)."

246. The most noted incident involved Vijay Chokal-Ingam, the Indian-American brother of actress Mindy Kaling, who administratively passed as Black in order to maximize his

ferent person of color for purposes of the college admissions process aptly illustrates the revised incentive structure that now exists with respect to racial identification. Whereas in the past, all nonwhites had an incentive to identify as white, an incentive now exists for them not only to maintain a nonwhite identity, but to assume one that is perceived as valuable to college admissions officers for purposes of creating diversity.[247]

Similarly, a diversity-driven affirmative action in education model potentially creates great rewards for white reverse passers as well. The admissions incentives also greatly outweigh the risks associated with reverse passing, since colleges and universities do not closely scrutinize the administrative racial identification of candidates pre- and post-admission. Stated simply: "All it would take is filling in one tiny box on one very long application, an almost imperceptible lie that's essentially impossible to disprove, and one that can significantly increase a student's chances of being accepted into college."[248] Indeed, one survey conducted a year after the *Grutter* and *Gratz* decisions found that, "73 percent [of white students questioned] said that they would lie about their ethnicity on college applications if there was no way for colleges to refute their claims,"[249] as a means for enhancing prospects for admission.[250] A hot topic on college and graduate admissions discussion boards, "lying about your race" illustrates the tremendous incentives reverse passing offers white applicants.[251]

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prospects for gaining admission into medical school. "In my junior year of college, I realized that I didn't have the grades or test scores to get into medical school, at least not as an Indian-American . . . ." Kipp Jones, *Mindy Kaling's Brother Lied About Being Black to Get Into Med School, Calls Affirmative Action 'Racist'*, BREITBART (Apr. 6, 2015), http://www.breitbart.com/big-government/2015/04/06/mindy-kalings-brother-lied-about-being-black-to-get-into-med-school-calls-affirmative-action-racist [https://perma.cc/2WD9-2ML5].

247. *Id.* ("I was determined to become a doctor and I knew that admission standards for certain minorities under affirmative action were, let's say . . . less stringent?").

248. John Visclosky, *Re-Writing Race for College Applications*, SILVER CHIPS ONLINE (Nov. 12, 2004), http://silverchips.mbhs.edu/story/4265 [https://perma.cc/5TWW-FHZ4].

249. *Id.*

250. *Id.*

251. *A Hot Topic: Lying About Your Race*, STUDENT DR. NETWORK: FORUMS (Nov. 11, 2006), http://forum.studentdoctor.net/threads/a-hot-topic-lying-about-your-race.338722 [https://perma.cc/UH6J-JDDX] (featuring a medical student blog that contains a discussion, geared for medical students and medical school applicants, about the advantages and disadvantages, benefits, and risks associated with whites choosing an underrepresented minority category on the American Medical College Application Service (AMCAS) application).

Candidates might also leverage amenable phenotypes as bases to reverse pass for admissions purposes. In an admissions blog titled *I Lied About My Ethnicity to Get into a Better College*, an anonymous candidate revealed:

> I have an Italian last name but I'm only 25% Italian. I'm mostly norwegian, welsh, and english. In the summer I get a golden tan and when I spike my hair up, my friends told me [I] look Puerto Rican. Whenever I go to Florida I get brown . . . like dark Mexican or even Indian brown . . . . I really wanted to get into this one highly selective school and my grades and ACT were only slightly above average. When they asked about my ethnicity I put down Hispanic . . . . Three weeks later I got my acceptance letter.[252]

While the empirical research examining the incidence and prevalence of box checking is, at best, scant, anecdotal evidence and the admissions of anonymous students on online blogs and forums strongly suggests that it is more than negligible and that the perceived advantages of being nonwhite might indeed create an incentive to reverse pass.

In addition to checking off a nonwhite classification on the application form itself, "[t]here is an incentive for applicants to structure their personal statements to align with the particular diversity benefits they believe their target colleges or universities seek to advance."[253] Certainly, the decision to identify as nonwhite on a college application, and administratively reverse pass, burdens white applicants to fabricate narratives in personal statements, addenda, and admission interviews to sell their skin.[254] In addition, it oftentimes creates burdens and expectations pre-and post-admission to perform the racial identity into which they have reverse passed, for example through social or extracurricular involvement.[255]

Beyond structuring personal statements and applications, college applicants are spending time and resources to investigate "their ethnic ancestries and

252. Keentan420, *I Lied About My Ethnicity to Get Into a Better College*, REDDIT: CONFESSIONS (Nov. 2, 2013), https://www.reddit.com/r/confession/comments/1pqg5k/i_lied_about_my_ethnicity_to_get_into_a_better [https://perma.cc/QG3E-SWGP].

253. Devon W. Carbado, *Intraracial Diversity*, 60 UCLA L. REV. 1130, 1160 (2013).

254. The process of "selling one's skin" capitalizes on the perceived or prospective benefits one's racial identity may garner in the admission process. In other words, it is the process of racial capitalism theorized by Leong. *See generally* Leong, *supra* note 33.

255. *See* Chokal-Ingam, *supra* note 149. Chokal-Ingam's administrative reverse passing as a Black man was followed by pressure to do so manifestly at the University of Chicago: "I shaved my head, trimmed my long Indian eyelashes, joined the University of Chicago's Organization of Black Students (a black friend ran it, knew my scam and got me in) and began applying to medical schools as a black man. I transposed my middle name with my first name and became Jojo, the African-American applicant." *Id.*

backgrounds through genetic testing in order to assert a minority identity."[256] Further illustrating the growing cognizance among students about the incentives attached to racial identification in the high-stakes world of college admissions, white students may alternatively "decline to state," choosing to appear racially ambiguous on applications instead of affirmatively choosing to reverse pass.[257]

2. Access to Employment Opportunities

Paul and Phillip Malone, twin brothers who lived in Milton, Massachusetts, were aspiring firemen with great ambition.[258] The Brothers Malone participated in a 1975 citywide exam competition for positions with the Boston Fire Department (BFD).[259] They identified as white on the job application.[260] Both scored poorly on the entrance exam, and were not extended offers to join the BFD.

Two years later, and after the BFD "became subject to a court-ordered affirmative action program," the Brothers Malone reapplied for the same positions.[261] This time, however, they checked off "Black" on the application.[262] Paul's and Philip's second set of exam scores were 57 and 69, respectively,[263] and earned them positions on the BFD under a special set-aside program aimed at increasing the number of Black persons on the BFD.[264] Their scores, however, were lower than the 82 scored by the lowest-scoring white applicant to earn a position on the BFD.[265] Sometime between being rejected for positions with the BFD in 1975 and their decision to retake the examination as Black men, or reverse passers, the Brothers Malone recognized that

256. Angela Onwuachi-Willig, *The Admission of Legacy Blacks*, 60 VAND. L. REV. 1141, 1217–18 (2007).

257. *See generally* Rich, *Decline to State*, *supra* note 56 (describing how the majority of law students who decline to state their race on applications are white males and positing that they may strategically opt to not check off a racial category in order to maximize their prospects for admission).

258. Susan Diesenhouse, *Boston Case Raises Questions on Misuse of Affirmative Action*, N.Y. TIMES (Oct. 9, 1988), http://www.nytimes.com/1988/10/09/us/boston-case-raises-questions-on-misuse-of-affirmative-action.html [https://perma.cc/7LTC-8NER].

259. Malone v. Haley, No. 88-339, 2 (Sup. Jud. Ct. for Suffolk Cty., Mass. July 25, 1989).

260. *Id.*

261. Christopher A. Ford, *Administering Identity: The Determination of "Race" in Race-Conscious Law*, 82 CAL. L. REV. 1231, 1232 (1994).

262. Malone v. Haley, No. 88-339, 2 (Sup. Jud. Ct. Suffolk Cty., Mass. July 25, 1989).

263. *Id.*

264. *Id.* at 2 ("[T]he Boston Fire Department [was] subject to a federal consent decree entered in 1975 in NAACP v. Beecher, C.A. No. 72-3060-F (D. Mass.).").

265. *Id.* at 2 fn. 2.

formal identification as Black men enabled their access to jobs they were previously denied as white men.[266] Similar to reverse passers today, they sought to take advantage of perceived benefits of legal reverse passing as nonwhite.

Legal reverse passing enabled the twins—who previously identified as white on employment-related documents—to not only benefit from the court-enforced affirmative action program adopted by BDF, which aimed to diversify the roster of firemen and women, but build ten-year careers within it.[267] For the Brothers Malone, the employment incentives for self-identifying as Black under a diversity-driven affirmative action regime delivered employment opportunities previously inaccessible to them. Remaining white, or choosing not to reverse pass on the BFD's administrative documents, would have disabled access to the positions and prevented the decade-long careers the Brothers Malone had with the BFD.

After the Malone brothers were fired, they challenged their termination in Court, but Judge Herbert Wilkins Judge Herbert Wilkins agreed that "there is was no evidence that the Malones identified themselves personally or socially as Black."[268] Judge Wilkins continued: "[T]he Malones did not claim Black status honestly or in good faith,"[269] aside from the specific and intentional purpose of "claiming jobs and promotion" in the BFD.[270] In the process, the Malones took the positions away from bona fide and qualified Black applicants, and, in turn, undermined the BFD affirmative action program's stated aim of diversifying their roster of firemen.

The Malones's decision to legally reverse pass as Black was not a means of existential expression or cultural assimilability, but—very plainly—was done because checking the Black box, instead of the white one, would enhance

266. *See, e.g.*, Kennedy, *supra* note 5, at 1150. A type of "temporary passing," where passers or reverse passers choose to do so to "advance occupational ambition" and identify as Black by day and white by night, the Brothers Malone limited their self-identification as Black to the workplace, but based on the court record, held themselves out to be white beyond it. *Id.*

267. Judge Wilkins of the Supreme Judicial Court for the Suffolk County of Massachusetts set forth a three-part test for assessing the Malone's self-identification as Black: "[T]he Malones might have supported their claim to be Black[:] (1) by visual observation of their features; (2) by appropriate documentary evidence, such as birth certificates, establishing Black ancestry; or (3) by evidence that they or their families hold themselves out to be Black and are considered to be Black in the community." *Malone*, No. 88-339 at 16. Judge Wilkins ruled that the Brothers Malone did not meet any of these criteria.

268. *Id.* at 19.

269. *Id.* at 20.

270. Ford, *supra* note 261, at 1233; *see also* Kennedy, *supra* note 5, at 1190 (discussing how the Malones where found out to be white, and "racial imposters," when seeking a promotion with the BFD).

access to two coveted positions with the BFD.[271] While Judge Wilkins affirmed the BFD personnel administration's firing of the Malones, the brothers successfully built decade-long careers reaping the professional, personal, and financial benefits of serving on the BFD as white firemen legally classified as Black.[272] The case, twenty-five years later, continues to provide a vivid illustration of and telling precedent for the common phenomenon of legal reverse passing within the employment context.

Many years after the ruling in *Haley v. Malone*, an upstart professor and scholar followed in the footprints of the Brothers Malone. Andrea Smith taught, researched, and wrote in the area of Native American Studies, beginning her career in 2002 as an assistant professor at the University of Michigan's flagship Ann Arbor campus.[273] Smith had a double appointment at the University of Michigan, teaching in the American Culture and Women's Studies Departments.[274] Smith's racial identity came to the fore during a tense dispute about her tenure during which she received the backing of the American Culture Department while the senior faculty of the Women's Studies Department voted against her.[275]

Smith's supporters believed she was Native American, and, specifically, Cherokee.[276] Smith did not qualify or contest these assertions, despite knowing through ancestral research that she was white and had "no connection to the Cherokee tribe."[277] But instead of revealing the truth, Smith remained

271. *See* Bella English, *Color Coordinated*, BOSTON GLOBE, Oct. 12, 1988, at 21 (affirming the conclusion that the Brothers Malone, who identified themselves as white on the 1986 Census in Milton, Washington reverse passed for the sole purposes of procuring jobs, and later promotions, with the BFD).

272. Ford, *supra* note 261, at 1234 ("[B]y the time Judge Wilkins' opinion came down [in 1989], eleven firefighters were under investigation on similar grounds.").

273. See *Media and Cultural Studies Faculty—Andrea Smith*, U.C. RIVERSIDE, http://mcs.ucr.edu/andrea-smith-associate-professor [https://perma.cc/K9EY-5Y6W] for Smith's faculty profile showing she currently teaches in the Media and Cultural Studies Department at the University of California at Riverside.

274. Scott Jaschik, *Concern Over Michigan Tenure Case*, INSIDE HIGHER EDUC. (Mar. 10, 2008), https://www.insidehighered.com/news/2008/03/10/smith [https://perma.cc/ZZ45-2DEY].

275. Scott Jaschik, *Fake Cherokee?*, INSIDE HIGHER EDUC. (July 6, 2015), https://www.insidehighered.com/news/2015/07/06/scholar-who-has-made-name-cherokee-accused-not-having-native-american-roots [https://perma.cc/NS3E-RA6V].

276. Jaschik, *supra* note 274 ("A Cherokee, she is also among a very small group of Native American scholars who have won positions at top research universities.").

277. Samantha Allen, *Meet the Native American Rachel Dolezal*, DAILY BEAST (June 30, 2015, 5:55 PM), http://www.thedailybeast.com/articles/2015/06/30/meet-the-native-american-rachel-dolezal.html [https://perma.cc/E6W4-AQWW].

silent.[278] She facilitated the acceptance of the veracity of these statements by way of silence and "selective disclosure,"[279] endorsing the broad popular belief that she was in fact Cherokee.[280] Smith's silence and selective disclosure amount to what Carbado and Gulati call "strategic performance."[281] Through active and passive behavior, concealing the truth about her identity and asserting that she was Cherokee in specific contexts, Smith's strategic performance adjusted to the context and to the risks her reverse passing posed in different contexts.[282]

This strategic performance by Smith suggests the likelihood that Smith formally identified as Native American, and namely, Cherokee, on her University of Michigan job application and tenure packet.[283] Like the college admissions context, college and university departments—particularly faculties in American Culture and Women's Studies—have strong interests in recruiting, hiring, and promoting professors of color for purposes of increasing diversity amongst the faculty ranks.[284] As a result, Smith may have understood that reverse passing would strengthen her position while fighting for tenure. Reverse passing furnished Smith with professional upward mobility, academic

278. Jaschik, *supra* note 275 ("Steve Russell, an emeritus professor at Indiana University at Bloomington whose research is on Native American Studies, is among those cited by the blog [http://andreasmithisnotcherokee.tumblr.com], and he confirmed to *Inside Higher Ed* that he received a direct promise from Smith to stop calling herself Cherokee.").

279. Khanna & Johnson, *supra* note 3, at 386–87.

280. An article drafted following her denial of tenure at the University of Michigan observed: "Smith is extremely popular with her students, and also has a notable publishing record, with her books and essays appearing on many a syllabus. A Cherokee, she is also among a very small group of Native American scholars who have won positions at top research universities." Jaschik, *supra* note 274.

281. Carbado & Gulati, *supra* note 17, at 1277.

282. Carbado and Gulati observed that "[s]trategic behavior can also be risky and can backfire." *Id.* In Smith's case, she hedged risks by explicitly identifying herself as Cherokee in contexts where the possibility of outing was relatively minimal (on social media, Twitter), while concealing the truth in contexts in which the likelihood of her outing was higher. Ironically, the former led to her outing. *See Top American Indian Scholar Outed As Fake*, DAILY CALLER (July 6, 2015), http://dailycaller.com/2015/07/06/top-american-indian-scholar-outed-as-fake-indian/#ixzz4PpJyNJyj [https://perma.cc/8YAB-ERP2] (describing the controversy over Andrea Smith's claims of Native ancestry and noting that "much of the attack on Smith is coming from an anonymous, but well-sourced, Tumblr blog").

283. Allen, *supra* note 277. In a meeting with David Cornsilk, an ancestral researcher who worked for Cherokee Geneology Services, Smith stated, "[my] employment depended on finding proof of Indian heritage." *Id.*

284. For an example of formal university programs to recruit more faculty of color, see generally SUE GUENTER-SCHLESINGER & KUNLE OKUKUTU, W. MICH. UNIV., BEST PRACTICES: RECRUITING AND RETAINING FACULTY AND STAFF OF COLOR, (2009), https://www.wwu.edu/eoo/docs/Best%20Practices_Recruiting%20and%20Retaining%20Staff%20of%20Color.pdf.

visibility, and caché before the tenure dispute, from which she continued to benefit following the dispute, even after learning through genealogical research—on two occasions—that she lacked any evidence of Cherokee heritage.[285]

Smith's public and academic profile did not diminish, despite her being outed as falsifying her identity, as she remains employed as a tenured professor at the University of California at Riverside.[286] Patti Jo King, interim chair of American Indian Studies, Director of the Center for American Indians at Bacone College, and a member of the Cherokee Tribe, observed:

> But instead of coming clean and showing herself to be a true advocate for Native women, she continued her deception, proving to me that she is merely masquerading for money . . . She is not the first to do this—indeed, there are hundreds of 'pretend Indians' who use the guise to sell their 'authentic' books to an unsuspecting and naïve public. Although we have tried to enlighten the public for decades about our objection to [this] kind of identity fraud, the pretenders seem to feel they have a perfect right to misrepresent themselves.[287]

King's emphasis on "deception" echoes the definition of passing offered by Randall, highlighting that Smith's reverse passing from white to Cherokee veers closer to the "morally disallowable" type of passing since she was not facing or enduring "immoral oppression."[288]

Second, her reference to "pretend Indians" recalls one of the more infamous reverse passers, Asa Earl Carter, a once-prominent Alabama Klansmen who remade himself into Forrest Carter, a Cherokee novelist.[289] As a "pretend Indian[]" author,[290] Carter penned *The Rebel Outlaw: Josey Wales*, *Cry Geronimo!*, *Dances*

285. Allen, *supra* note 277.

286. *See* Andrea Smith, *Faculty*, U.C. RIVERSIDE: MEDIA & CULTURAL STUDIES, http://mcs.ucr.edu/andrea-smith-associate-professor/ [https://perma.cc/AGZ7-59LT].

287. Jaschik, *supra* note 275.

288. Kennedy, *supra* note 5, at 1182 ("The real issue, though, is not whether a passer deceives; as I have defined passing, deception is an essential part of the enterprise. The issue is how to assess the deception. . . . Some are morally allowable, while others are not. It is one thing to lie to a murderer to protect a prospective victim. . . . For purposes of escaping immoral oppression, the presumption against dishonesty is overcome.").

289. *See The Artful Reinvention of Klansman Asa Earl Carter*, NPR (Apr. 20, 2012, 4:28 PM) http://www.npr.org/2012/04/20/151037079/the-artful-reinvention-of-klansman-asa-earl-carter [https://perma.cc/GAG4-9PVF] ("Asa Earl Carter was a Ku Klux Klan organizer, a rabid segregationist and a talk show host who expounded on the dangers of integration. In 1963, he drafted an inaugural address for Alabama Gov. George Wallace that would become one of the most notorious speeches in the civil rights era. 'In the name of the greatest people that have trod this earth,' Wallace said, 'I draw the line in the dust and toss the gauntlet before the feet of tyranny, and I say segregation now, segregation tomorrow, segregation forever!'").

290. Jaschik, *supra* note 275.

With Wolves, and other bestselling works of fiction later remade into Hollywood blockbusters.[291] Like Carter, who engineered a "carefully constructed mask of [a] . . . Cherokee cowboy, self-taught writer and spokesman for Native Americans"[292] for ostensibly economic and visibility gains, Smith reverse passed from white to Cherokee to bolster her legitimacy within her academic discipline and the broader public sphere.

Furthermore, like the Brothers Malone and Forrest Carter,[293] Smith's primary motive was likely broader than just money itself: She sought to build a career, along with the tangible and intangible benefits that would emanate from it. Even after promising Native American scholars in private meetings that she would no longer identify or hold herself out as a member of the Cherokee Nation, Smith continued to reverse pass.[294] As early as 1991, and for the duration of more than two decades, she stayed the course—and at minimum, made no attempt to reveal her genuine racial identity or counter the discursive belief that she was a member of the Cherokee Nation.[295]

For Smith, the academic appointments, professional access, book deals, advocacy and organizational platforms, validation as an indigenous scholar, invitations to participate in conferences and to deliver keynote addresses,[296] honoraria and awards,[297] and Nobel Peace Prize

291. Dan T. Carter, Opinion, *The Transformation of a Klansman*, N.Y. TIMES (Oct. 4, 1991), http://www.nytimes.com/1991/10/04/opinion/the-transformation-of-a-klansman.html [https://perma.cc/K93Q-XE6H].

292. *Id.*

293. *Id.* ("The senior class prophet predicted he would return to Calhoun County as a 'famous movie star.' . . . Handsome, energetic, ambitious, always the actor, his classmates had known that Asa Carter would do whatever he had to to escape the sleepy little Alabama town of Oxford.").

294. *See* Native American Institute, *Steve Russell Part 02 of 04*, YOUTUBE (May 5, 2009), https://www.youtube.com/watch?v=uueHK9K8q8Y [https://perma.cc/X27X-TYHA].

295. *See* Mary Elizabeth Williams, *Two Prominent Native Americans Accused of Faking Their Cherokee Heritage: "They're Just Trying to Make a Buck Off of Us"*, SALON (July 1, 2015, 1:25 PM), http://www.salon.com/2015/07/01/two_prominent_native_americans_accused_of_faking_their_cherokee_heritage_they%E2%80%99re_just_trying_to_make_a_buck_off_of_us [https://perma.cc/8YHN-WNQE].

296. *See* Allen, *supra* note 277 ("I first saw Andrea Smith in 2013 when she delivered a keynote at the Southeastern Women's Studies Association (SEWSA) conference and, although her program bio did not explicitly mention that she was Cherokee, she was widely understood by conference goers to be a Native American speaker.").

297. "For every scholarship she received as a Native person, for every honorarium she has received as an Indigenous speaker, for her book sales that a publisher sold as coming from a 'Cherokee' author, those recognitions came at the expense of some student who wasn't funded, some speaker who wasn't invited, or some book by an Indigenous author that wasn't bought." David Shorter, *Four Words for Andrea Smith: "I Am Not an Indian"*, INDIAN COUNTRY (Jul. 1, 2015), http://indiancountrytodaymedianetwork.com/2015/07/01/four-words-andrea-smith-im-not-indian.

nomination,[298] were ample incentives to reverse pass, even in the face of bona fide Native American scholars asking her to reveal her true identity. Her decision to reverse pass, allegedly both on formal applications and through silence, netted Smith considerable gains. And within a landscape where academic diversity is culturally coveted and legally sanctioned she took away opportunities from actual Native American—particularly Cherokee—scholars.[299]

Charles Lawrence observed that the academy is "a place where inequality is institutionalized and rationalized."[300] Smith, a progressive scholar, was fully cognizant of this inequality within the academy, but continued to reverse pass as Native American to capitalize on scarce opportunities available to nonwhite scholars, and within her specific area, Native scholars. By choosing to reverse pass to access these opportunities, Smith advanced her personal interests, but exacerbated the institutional racial inequality she frequently spoke out against.

In June 2015, roughly two weeks after Dolezal was revealed to be white, Smith was finally outed by a blog called "Andrea Smith is Not Cherokee."[301] The blog, administered by a Native American graduate student at Washington State University, included an extensive archive of news articles and private communications—spanning from 1993 to the present—documenting that Smith was white and had reverse passed for more than two decades for professional gain.[302] The "decoding capacity" of the blog's manager,[303] and the irrefutable evidence she compiled, instantly caused Smith to close her Twitter account, retreat from the social media and public spheres, and, despite her own claims that she is in fact Cherokee, publicly end her twenty-three-year long reverse passing campaign.[304]

298. Jaschik, *supra* note 275.

299. *See* Allen, *supra* note 277 ("Ethnic fraud is harmful to tribes and sometimes to individual real Indians if they are passed over for a fake in a job that really does call for a tribal person.").

300. Charles R. Lawrence III, *Passing and Trespassing in the Academy: On Whiteness as Property and Racial Performance as Political Speech*, 31 HARV. J. RACIAL & ETHNIC JUST. 7, 9 (2015).

301. *Andrea Smith Is Not Cherokee*, TUMBLR, http://andreasmithisnotcherokee.tumblr.com [https://perma.cc/RQY2-ZULQ].

302. *Id.*

303. Yoshino, *supra* note 4, at 822 ("In his discussion of passing, Erving Goffman observed that passing depends not only on the performance of the individual attempting to conceal the trait, but also on the 'decoding capacity' of her audience." (citing ERVING GOFFMAN, STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY 48–51 (1963))).

304. "I have consistently identified myself based on what I knew to be true. My enrollment status does not impact my Cherokee identity or my continued commitment to organizing for justice for Native communities." Andrea Smith, *My Statement on the Current Media Controversy*, ANDREA SMITH'S BLOG (July 9, 2015), https://andrea366.wordpress.com/

3. Other Economic Benefits

Economic benefits exclusively afforded to nonwhites also prompt reverse passing. For instance, government grants and loans specifically reserved for minority groups,[305] geared to diversify a specific industry or area of business or to remedy past racial discrimination,[306] create economic incentives to reverse pass. By claiming to be nonwhite, a white business owner thus may be able to access grants or loans otherwise unavailable to her.

Mirroring the benefits that might be received from legal reverse passing in the employment context, economic reverse passing requires that a business owner, or chief of operations, identify as a member of a racial minority. However, instead of seeking to procure the benefits attached to nonwhiteness for individual gain, economic reverse passers will formally identify as nonwhite to retain benefits for the business entity.[307] Yet the incentive remains the same. For white business owners, the decision to reverse pass might open the door for a number of grants, loans, and government contracts exclusively set aside for nonwhites, and more narrowly, "Small Disadvantaged Businesses (SDB)."[308]

For example, a Boston business owner sought to reverse pass as Black to procure Small Business Administration contracts:[309]

2015/07/09/my-statement-on-the-current-media-controversy [https://perma.cc/32FY-YDYT].

305. *See* Lee Grayson, *Tax Incentives for Using a Minority-Owned Business*, CHRON, http://smallbusiness.chron.com/tax-incentives-using-minorityowned-business-30659.html [https://perma.cc/S7W6-D6LG] ("The federal government passed the first laws offering legislative provisions encouraging minority-owned businesses under President Richard Nixon's administration. Nixon's Executive Order 11458, passed in 1969, created the Office of Minority Business Enterprise (OMBE).").

306. This mission drove the affirmative action programs employed by the respondents in *Adarand* and *Croson*, examined in Part II of this Article.

307. These are not always mutually exclusive, or distinct. The business owner or executive reaps the greatest reward attached to revenue or profit. However, this distinction is being made to highlight how reverse passing in the employment context is more micro-oriented while the reverse passing in the economic context has a macro, institutional impact.

308. *See Small Disadvantaged Businesses*, U.S. SMALL BUS. ADMIN., https://www.sba.gov/content/disadvantaged-businesses [https://perma.cc/V7CQ-K7NR]. To qualify as an Small Disadvantaged Business (SBA), a business must meet the following mandate: "The firm must be 51% or more owned and control by one or more disadvantaged persons. The disadvantaged person or persons must be socially disadvantaged and economically disadvantaged. The firm must be small, according to SBA's size standards." *Id.*

309. U.S. Att'ys Office Dist. of Mass., *Sterling Business Owner Sentenced for Claiming to Be Minority, Service-Disabled Veteran Operated Businesses*, U.S. DEP'T OF JUST. (June 28, 2013), https://www.justice.gov/usao-ma/pr/sterling-business-owner-sentenced-claiming-be-minority-service-disabled-veteran-operated [https://perma.cc/2H3L-6WQ8] ("Tyrone

> [Tyrone] Jones and his co-conspirators submitted false statements to the Small Business Administration and other government agencies, to get federal contract awards that were set aside for or preferentially awarded to disadvantaged minority and service-disabled veteran-owned and operated businesses. The submissions falsely represented that that their company was owned and managed by a minority and service-disabled veteran who purportedly managed the daily operations of the business.[310]

Unlike in the educational context, legal reverse passing for purposes of accessing certain government-sponsored business opportunities gives rise to the crime of fraud,[311] thereby presumptively tempering the incentive to reverse pass to access loans, grants, and SBA grants. However, as illustrated by the Jones case, the high-stakes and lucrative world of government contracts still spurs some to legally reverse pass for economic gain.

B. Cultural Reverse Passing

A second form of reverse passing is what this Article calls cultural reverse passing. The parameters of cultural reverse passing are illustrated in an opinion article written in the immediate wake of Dolezal's outing by University of Southern California School of Law Professor Camille Gear Rich.[312] Based on her elective race framework,[313] Rich issued a trenchant defense of Dolezal as a cultural reverse passer. She centered social exposure, conditioning, and culture as the baselines for her position that "Rachel Dolezal has a right to be Black."[314] And, presumptively, she observed that since race is a social construction, the construction of that tenet should be extended to allow individuals with no biological nexus to Blackness, like Dolezal, to still be able to identify as Black. Rich observed:

> Growing up in a family with black siblings exposed Dolezal to the reality of discrimination and made her more sensitive to its effects. It probably helped her understand the contract between the reality of black lives and white privilege. Other similar experiences, such as

Jones, 48, was sentenced by U.S. District Court Judge Timothy S. Hillman to one year and one day in prison, to be followed by two years of supervised release. Jones was also ordered to forfeit $399,000 [in SBA funds].").

310. *Id.*
311. *See id.*
312. Rich, *supra* note 144.
313. *See generally* Rich, *supra* note 56.
314. Rich, *supra* note 144.

> marrying an African-American and having black children, also make white people [like Dolezal] more sensitive to racism.[315]

For Rich, "sensitivity to racism," racial association, and relationships were not only portals for understanding African-American plight, perspectives, and culture, but also for reverse passing.[316]

Some proponents base their support of cultural reverse passing on the benefits it ostensibly creates for the nonwhite group into which the subject reverse passes. For instance, some defended Rachel Dolezal for working to advance the interest of Blacks, or "break down conscious or unconscious prejudices held by individual in-group [white] members."[317] Others center their defense along lines of individual autonomy, which for these proponents trumps the importance of geological or ancestral connections to a nonwhite group.[318]

Notwithstanding one's views on the propriety of cultural reverse passing, this Part highlights the benefits that might accrue from cultural reverse passing that might incentivize whites to do so.

1. Political Benefits

Two years into his second term as President of the United States, while mired in imminent impeachment proceedings, talk of Bill Clinton's "Blackness" rose from an unexpected place. Toni Morrison, the celebrated Black novelist and social commentator, stated that the embattled Clinton was being impeached because of his "Blackness."[319] In *The New Yorker*, Morrison reconstructed Clinton's racial identity from white to Black: "[W]hite skin notwithstanding, this is our first black President. Blacker than any actual black person who could ever be elected in our children's lifetime. After all, Clinton displays almost every trope of blackness: single-parent household, born poor, working-class, saxophone-playing, McDonald's-and-junk-food-loving boy

315. *Id.*

316. "Dolezal is disturbing for many people because she marks a cultural fault line. Like it or not, we have entered into an era of elective race—a time when people expect that one has a right and dignity to claim the identity of one's choice." Rich, *supra* note 144. The justifications Rich posits in favor of Dolezal's claiming Black identity are, not coincidentally, also leveraged by whites to rationalize racially insensitive or racist language or behavior. "The news is replete with individuals asserting that they cannot be racist because they are, themselves, racial minorities, or because they have non-white friends, family members, or associates." Leong, *supra* note 57, at 23–24.

317. Leong, *supra* note 57, at 58.

318. *See* Kennedy, *supra* note 5, at 1188.

319. Toni Morrison, *Comment*, NEW YORKER (Oct. 5, 1998), http://www.newyorker.com/magazine/1998/10/05/comment-6543 [https://perma.cc/429G-KA53].

from Arkansas."[320] Morrison, an esteemed figure in the Black community, not only named Clinton America's "first black President," but did so on the strength of an upbringing marred by poverty, musical preferences, and eating habits, which considerably influenced how people—particularly African-Americans—viewed him.[321] In Clinton's case, "proximity to blackness is invested with the power to turn whites black."[322] Here, Morrison echoes Rich's observation that exposure to Black culture may sometimes serve as a proxy for, or even supplant, biological Blackness.

Clinton was by no means a reverse passer, but his political performance and embrace of that title was likely more than just a source of pride.[323] Indeed, within the political sphere, it was a coronation that brought legitimacy, value, and enhanced resonance with Black voters.[324] Rich's position that "Rachel Dolezal has a right to be Black" assumes that Clinton, so long as he embraced Morrison's title, would also have the elective right to be Black.[325]

Clinton's "Blackness," although not self-assigned and thus beyond the framework of reverse passing, sheds much light on the motives of reverse passing within "political spaces." For the purposes of this Article, we define political spaces broadly to include government, electoral politics, advocacy, and grassroots organizing work. Twenty years before it became a trending topic and the focus of legal scholarship, Morrison's declaration of Clinton's Blackness seeded the notion that reverse passing—outside and within the political realm—was possible.

Fourteen years before Bill Clinton was tabbed the "first Black President," Mark L. Stebbins—a blue-eyed and light-skinned white councilman on the Stockton, California City Council—reverse passed from white to Black.[326] A white candidate within a majority Black and Latino district,

320. *Id.*
321. *Id.*
322. BAZ DREISINGER, NEAR BLACK: WHITE-TO-BLACK PASSING IN AMERICAN CULTURE 3 (2008).
323. President Bill Clinton Interview, *Jimmy Kimmel Live!* (ABC television broadcast Apr. 3, 2014), http://abc.go.com/shows/jimmy-kimmel-live/news/news/140403-president-bill-clinton-interview [https://perma.cc/PGP3-K2JC] (discussing his feelings on being tabbed the first Black president).
324. Suzy Hansen, *Why Blacks Love Bill Clinton*, SALON, (Feb. 20, 2002, 4:45 PM), http://www.salon.com/2002/02/21/clinton_88 [https://perma.cc/PN6S-X64D] (reporting on acclaimed author Toni Morrison, who suggested that Bill Clinton resonated with Black voters because "he hung out with black folk, he understood our music, he understood our culture and he understood how to connect").
325. Rich, *supra* note 144.
326. *See* Jay Mathews, *Hue and Cry; Blue-Eyed Official Ran as Black, Faces Recall*, WASH. POST, May 6, 1984, at A1.

Stebbins reverse passed in order to resonate with minority voters, and ultimately, claim a spot on the Stockton City Council:

> In 1983, Stebbins won election to the Stockton City Council in a largely black and Latino district. During the campaign, when asked about his racial identity, he said he was black. But after the election, one of his defeated opponents—a larger-than-life local figure named Ralph White, who called himself "the black messiah of Stockton"—argued that Stebbins should be recalled from office because he'd lied about his race and was actually white.[327]

White called his political rival Stebbins "a white guy with a perm," and alleged that he reverse passed as Black to "'defraud[]' District 9's impoverished voters by pretending to share their minority heritage—a reverse case of trying to 'pass.'"[328] In addition, White procured a "birth certificate [that] listed both of [Stebbins's] parents as white."[329]

Like Dolezal thirty years later,[330] however, Stebbins maintained that he was Black despite the evidence produced against him.[331] He based his self-identification on past experiences of prejudice,[332] and more than likely did so to win a seat on the Stockton City Council. Following his outing, Stebbins unsuccessfully campaigned for seats on the City Council, School District, and East Water District, and for Mayor.[333] Stebbins's experiences illustrate that

327. Ben Mathis-Lilley, *An Interview With Mark Stebbins, the Original Rachel Dolezal*, SLATE (June 15, 2015, 2:01 PM), http://www.slate.com/blogs/the_slatest/2015/06/15/mark_stebbins_interview_rachel_dolezal_s_predecessor_in_racial_controversy.html [https://perma.cc/VQ7W-NW89].

328. Maria Wilhelm, *Whether He's Black or White, the Voters Want Stebbins to Stay*, PEOPLE (June 11, 1984), http://www.people.com/people/archive/article/0,,20088031,00.html [https://perma.cc/7DHQ-G4U3].

329. Kennedy, *supra* note 5, at 1189; *see also* Wade Roberts, *The 'White' Man Who Insisits He's 'Black'*, EBONY, June 1984, at 31.

330. Stebbins's similarities to Dolezal also include their peculiarly kindred geographic origins and shared commitment to civil rights, the latter of which served as the foundation of each's self-identification as Black. Wilhelm, *supra* note 328. "Born in the rural Washington town of Colville, [Stebbins] came to a gradual realization, he says, that he was wrongly labeled, in a racial sense. At Washington State University he was active in the civil rights movement. He later enlisted in a variety of community organizing projects, arriving in Stockton in 1965 to help with the United Farm Workers' boycott. About that time Stebbins decided he was black, 'culturally, socially and genetically.'" *Id.*

331. Mathews, *supra* note 326.

332. "Stebbins recalled that, because of his broad nose and curly hair, he faced taunts as a teenager in rural Washington state from classmates who sometimes referred to him as 'nigger hair.'" Kennedy, *supra* note 5, at 1189.

333. When asked whether he ran for public office after being outed as white, Stebbins replied: "Yes, but I wasn't elected to any offices after that. I ran for Stockton city mayor, I ran for

political reverse passing facilitated campaign victories and extended access to governmental positions that being a white man in a minority-majority district could not deliver him.

Cultural reverse passing—for the purpose of obtaining political benefits—is not limited to presidents, politicians, or governmental figures. In fact, it may be a far more common phenomenon within the realm of non-governmental political spaces, and most notably, social movements, where racial identity may be at the core of political activism and advocacy. Approximately two months after Rachel Dolezal's reverse passing from white to Black was revealed, one of the Black Lives Matter's most vocal and visible figures—Shaun King—became the target of allegations that he too was a white man reverse passing as a Black man.[334] On August 19, 2015, toward the close of an active summer for the Black Lives Matter Movement, Breitbart News claimed that one of its archetypal figures was lying about his biracial identity. Breitbart procured King's birth certificate, which documented that both of his legal parents were in fact white.[335] The allegations set off a firestorm in social and mainstream media, intensified by similar debates about racial identity and its role in political organizing following Dolezal's reveal.[336] Yet this time the debate involved a familiar and national figure, deeply steeped in the "new civil rights movement"[337]—not a fringe, regional figure tucked far off in the Pacific Northwest.

King built his prominent political profile overwhelmingly on his involvement in the Black Lives Matter Movement, particularly "during the

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the school district, again for City Council, and I'd also run for Stockton East water district, so I've run for several offices." Mathis-Lilley, *supra* note 327.

334. *See* Milo, *Did Black Lives Matter Organizer Shaun King Mislead Oprah Winfrey by Pretending to Be Biracial?*, BREITBART (Aug. 19, 2015), http://www.breitbart.com/big-government/2015/08/19/did-black-lives-matter-organiser-shaun-king-mislead-oprah-winfrey-by-pretending-to-be-biracial [https://perma.cc/PZ93-V5TM].

335. King admitted that his mother is white, and "a birth certificate, which *Breitbart* . . . independently acquired from the Kentucky Office of Vital Statistics, names a white man as his father." *Id.*

336. For an article that symbolizes the broader debate spurred by questions about King's (and Dolezal's) racial identity, and its implications on affirmative action, see Victor David Hanson, *What Does the Modern Malleability of Gender and Race Mean for the Future of Affirmative Action*, NAT'L REV. (Aug. 27, 2015, 12:00 AM), http://www.nationalreview.com/article/423136/rachel-dolezal-caitlyn-jenner-race-gender [http://perma.cc/EW5A-ENRH].

337. Elizabeth Day, *#BlackLivesMatter: The Birth of a New Civil Rights Movement*, GUARDIAN (July 19, 2015, 5:00 AM), http://www.theguardian.com/world/2015/jul/19/blacklivesmatter-birth-civil-rights-movement [https://perma.cc/7ERS-CAHT].

2014 protests in Ferguson, [Missouri]."[338] His grassroots activism contributed to his visibility, but it was King's social media presence and activity (primarily on Twitter) that garnered him hundreds of thousands of followers,[339] the esteem of other respected activists, and a prominent role within the Black Lives Matter Movement.[340] Although difficult to assess, King's representation that he was biracial—and more specifically, part Black—arguably played a pivotal role in mounting the sizable profile he possesses.[341] Given the importance of racial agency to serving a leading role in the broader Black Lives Matter Movement, King's racial representations cannot be overstated.

Thus, if King did in fact reverse pass as Black as a means of solidifying political legitimacy and resonance,[342] building his profile and following, and seeking "praise[] as [a] hero of civil rights and social activism,"[343] the incentives for doing so are clear. However, a day after allegations were made against King's Blackness, he responded with a defense against the allegations.[344] King denied lying about racial identity,[345] and penned a candid article about the complex and peculiar backdrop of his racial identity, and claimed that he was in fact biracial. King wrote:

> The reports about my race, about my past, and about the pain I've endured are all lies. My mother is a senior citizen. I refuse to

338. Josh Sanburn, *Why a Black Lives Matter Activist's Race Is Under Scrutiny*, TIME (Aug. 20, 2015, 9:34 PM), http://time.com/4004830/shaun-king-race [http://perma.cc/ZZV7-RGRP].

339. *See* @ShaunKing, TWITTER (July 10, 2016, 1:22 PM), https://twitter.com/ShaunKing [https://perma.cc/ASC5-MJE9].

340. *See* Katie Rogers, *In Questions Over Shaun King's Race, Activists See Challenge to Black Lives Matter Movement*, N.Y. TIMES (Aug. 21, 2015), http://www.nytimes.com/2015/08/22/us/in-questions-over-shaun-kings-race-activists-see-challenge-to-black-lives-matter-movement.html [https://perma.cc/WPK5-PRXF].

341. "Shaun King, who built a large online following during the 2014 protests in Ferguson, Mo. following the death of unarmed teenager Michael Brown, has long claimed to be of mixed race, saying his mother is white and his father is black." Sanburn, *supra* note 338.

342. In addition, King's self-identification as biracial (and Black) procured him a full-tuition scholarship at Morehouse University, a Historically Black College in Atlanta. *See* Michele Gorman, *Black Lives Matter Leader Shaun King Denies He Lied About Race and Assault*, NEWSWEEK, (Aug. 20, 2015, 3:10 PM), http://www.newsweek.com/shaun-king-fires-back-conservative-media-outlets-doubt-he-biracial-364595 [https://perma.cc/8AVT-JR4T].

343. Yiannopoulos, *supra* note 334.

344. Shaun King, *Race, Love, Hate, and Me: A Distinctly American Story*, DAILY KOS (Aug. 20, 2015, 3:39 PM), http://www.dailykos.com/story/2015/08/20/1413881/-Race-love-hate-and-me-A-distinctly-American-story [https://perma.cc/A9VV-JG7C].

345. Doug Criss & Dana Ford, *Black Lives Matter Activist Shaun King Addresses Race Reports*, CNN (Aug. 20, 2015, 8:32 PM), http://www.cnn.com/2015/08/20/us/shaun-king-controversy [https://perma.cc/6DU8-3J9W].

> speak in detail about the nature of my mother's past, or her sexual partners, and I am gravely embarrassed to even be saying this now, but I have been told for most of my life that the white man on my birth certificate is not my biological father and that my actual biological father is a light-skinned black man. My mother and I have discussed her affair.[346]

Like Dolezal, King maintained the position that he was Black.[347] But by introducing the story about his mother's affair with "a light-skinned Black man,"[348] he dismissed the allegations that he was lying about his race, and thus, reverse passing. In the Era of Racial Self-Identification, however, whether King is telling the truth or not may not be pivotal, after all. The law enables individuals to elect whatever race they so choose, even if they cannot anchor that selection with genealogical evidence.[349]

Questions about King's real racial identity persist.[350] The debate about King's racial identity sparked a discussion, and greater awareness within political movements like the Black Lives Matter Movement, of the looming possibility of reverse passing, and its facilitation of organizational trespassing, capitalizing off of advocacy, and unseating Black activists and advocates from leadership roles.

2. Social Benefits

Social scientists have examined how racial self-identification is "often determined by association."[351] For well-known reverse passers like Dolezal or Smith, and unknown reverse passers who shed their white identity for a nonwhite

346. King, *supra* note 344.

347. Michele Gorman, *Black Lives Matter Leader Shaun King Denies He Lied About Race and Assault*, NEWSWEEK (Aug. 20, 2015, 3:10 PM), http://www.newsweek.com/shaun-king-fires-back-conservative-media-outlets-doubt-he-biracial-364595 [https://perma.cc/DQP7-DRMR].

348. King, *supra* note 344.

349. King may very well not be a reverse passer, but many claim that he was indeed "accenting," or highlighting a stigmatized identity or "preferred identity" (Black) while concealing or suppressing belonging to a non-stigmatized identity (white). *See* Khanna & Johnson, *supra* note 3, at 386.

350. A February 2016 social media exchange with prominent sports pundit Jason Whitlock highlights the looming suspicion around the authenticity of Shaun King's racial identity. *See* Carly Hoilman, *'You're White': Black Sports Columnist Calls Out Shaun King in Series of Brutal Tweets, Causing the Activist to Lose It*, BLAZE (Feb. 18, 2016, 10:19 AM), http://www.theblaze.com/stories/2016/02/18/youre-white-black-sports-columnist-calls-out-shaun-king-in-series-of-brutal-tweets-causing-the-activist-to-lose-it [http://perma.cc/3EN2-DWRR].

351. Nix & Qian, *supra* note 51, at 12.

identity for social purposes, race by association and "selective association"—the friends, relationships and circles one keeps—serves as proxy for ancestral or biological connection to nonwhiteness.[352] In some instances, race by association "trump[s] any other sort of physical or documentary evidence."[353]

Language, in addition to physical appearance, can be an integral performance of identity in both the passing and reverse passing context.[354] Adopting, and fluently deploying, nonwhite colloquialisms, slang, or argot, and, in addition, speaking a foreign language or perfecting an accent linked to a nonwhite group may be an integral component of the reverse passing. Justice Kennedy, in *Hernandez v. New York*, even observed that, "for certain ethnic groups and in some communities . . . proficiency in a particular language, like skin color, should be treated as a surrogate for race under an equal protection analysis."[355]

In addition to physical spaces, there are also social incentives to reverse pass within virtual spaces. Behind the keyboard, where one can select their own avatar, shape an identity, and hide behind the screen, social reverse passing online is a far easier proposition.[356] And the gradual rise of social media as a space of interaction and engagement suggests a possible increase in incidents of reverse passing.

Virtual reverse passing takes place within online dating, social and political forums, and chat forums. The baselines incentivizing racial reverse passing within the various online spaces remain the same: Namely, reverse passing from white to Black, Latino, Arab or another nonwhite designation advances a subjective interest. Within the dating space, for instance, a white male who chooses to socially reverse pass as "Latino" may do so to make himself appealing to a specific class of online prospects that designate that preference.[357]

352. Khanna & Johnson, *supra* note 3, at 388.

353. ARIELA J. GROSS, WHAT BLOOD WON'T TELL: A HISTORY OF RACE ON TRIAL IN AMERICA 96 (2008).

354. *See* Yoshino, *supra* note 4, at 896–900.

355. Hernandez v. New York, 500 U.S. 352, 371 (1991).

356. See generally LISA NAKAMURA, CYBERTYPES: RACE, ETHNICITY, AND IDENTITY ON THE INTERNET (2002) for a comprehensive and descriptive examination of identity tourism, the use of racial avatars, and racial passing in chat rooms and online forums, as well as the other ways race and racial identity are flexibly deployed online. For a legal analysis of how race is negotiated online, see Kang, *supra* note 28.

357. This is particularly true if the reverse passer is a member of a specific ethnicity dating site, for example a Latino dating site like Latin American Cupid. *See Latin American Cupid*, http://www.latinamericancupid.com [https://perma.cc/2XL3-VZC9]. Therefore, reverse passing may be a necessary step for de facto inclusion (or success) on such a dating site. For an editorial citing the increased popularity of Latino dating sites, and their appeal with non-Latinos, see generally Danielle Restuccia, *Top Latino Online Dating Sites*, HUFFINGTON

Social science research illustrates that racial concordance is heavily preferred with online daters, which encourages social reverse passing among white suitors seeking to attract nonwhite prospects.[358]

The same is true for social reverse passing within political discussion and organizing forums. As illustrated by the Dolezal and King incidents, self-identification as Black enhances the legitimacy, and may very well enhance the political influence, for example, of online reverse passers who present themselves as Black to resonate with Black Lives Matter activists and sympathizers, or to undermine the movement; or a white online commentator who reverse passes as Native American to solidify herself as a native voice and public intellectual on matters important to that population.[359]

Whether on-the-ground or online, the Era of Racial-Identification creates almost unchecked latitude for individuals to racially identify as they see fit, and within an era where diversity is rewarded, in a fashion that advances their interests. As discussed above, the social benefits and incentives procured through reverse passing are distinct, diverse, and numerous.

IV. REVERSE PASSING AND TRANSRACIALISM

> I acknowledge that I was biologically born white to white parents, but I identify as black.
>
> —Rachel Dolezal[360]

After nearly four months of silence, Dolezal admitted on November 2, 2015 that she was born white.[361] Despite these biological roots, however, she steadfastly maintained that she was a Black woman.[362] This declaration ended

POST (Dec. 16, 2013, 12:01 PM), http://www.huffingtonpost.com/2013/12/16/latino-online-dating-_n_4453635.html [https://perma.cc/6DSW-DY5Y].

358. *See generally* Ken-Hou Lin & Jennifer Lundquist, *Mate Selection in Cyberspace: The Intersection of Race, Gender, and Education*, 119 AM. J. SOC. 183 (2013) (building upon a previous body of established sociological research finding that same-race preferences still predominate in online dating).

359. Here, we are referring specifically to Andrea Smith, who was, before being revealed to be white, a common and frequent online commentator on Twitter. She deactivated her Twitter account on June 30, 2015 (her former handle was @andrea366). Jaschick, *supra* note 275.

360. Maria Mercedes Lara, *Rachel Dolezal Admits She Was 'Biologically Born White' but Maintains That She Identifies as Black*, PEOPLE (Nov. 2, 2015, 2:55 PM), http://www.people.com/article/rachel-dolezal-admits-white-the-real-show-video [https://perma.cc/VV4H-UMN4] (internal quotation marks omitted).

361. *See id.*

362. *See id.*

her reverse passing but birthed a new campaign: the idea that she could racially transition from white to Black. This transition, from one race to another, is being dubbed by some in the media as "transracialism."

This Part considers the interplay between reverse passing and transracialism. It analyzes the roots of the term transracialism and argues that the phenomenon of reverse passing substantially expanded the boundaries of the original definition. It also suggests that new and expanded definition of transracialism threatens to rewrite the rules of racial identification.

A. Traditional Definition of Transracialism

Prior to the Dolezal outing and the debate that it spawned, transracialism was a term linked almost exclusively to situations in which parents adopted a child of a different race.[363] Within that context, the term transracial was used to describe the lived experiences of children who were adopted into homes and raised by parents whose racial identification was phenotypically and culturally different from that of the child's.[364] The term "trans" when juxtaposed against "racial" was meant to describe the process by which a nonwhite adopted child navigates a white racial and cultural familial context that is different from the one to which they are phenotypically and culturally viewed as belonging.[365]

A derivative theory of transracialism emerged that also examined the experiences of white siblings who grew up with transracial adoptees as siblings. The specific theory linked to this mode of transracialization suggests that phenotypically white siblings of transracial adoptees, such as Rachel Dolezal, whose family adopted two African-American children, are often forced to think about race in a different way as a result of viewing the experiences of their nonwhite adopted siblings. They are said to "transcend the myth of color-blindness and come to a deeper understanding of the role of race and

363. For an example in the legal literature, see generally Andrew Morrison, *Transracial Adoption: The Pros and Cons and the Parents' Perspective*, 20 HARV. BLACKLETTER L.J. 167 (2004).

364. *See id.*

365. *See, e.g.*, LisaMarie Rollins, *Transracial Lives Matter: Rachel Dolezal and the Privilege of Racial Manipulation*, HUFFINGTON POST (June 17, 2015, 3:23 PM), http://www.huffingtonpost.com/lisamarie-rollins/transracial-lives-matter-rachel-dolezal-and-the-privilege-of-racial-manipulation_b_7599380.html [https://perma.cc/LP2M-WAEZ] (describing transracialism as "navigat[ing] [her] blackness . . . inside an oftentimes racist, religious, violent and rigid white world. . . . [while] living in a house and community that simultaneously erased [her], racialized [her] and tokenized [her]").

discrimination based on color-consciousness in our society."[366] Transracialization purportedly results in the white siblings of transracial adoptees being more likely to "maintain connections to communities of color through their ongoing friendships, romantic involvements, and membership in integrated or predominately people of color organizations."[367] Finally, those whites who have been transracialized are said to be "more aware of racism and more committed to interrupting it."[368]

Thus, the concept of transracialism originated in the context of cross-racial adoptions by white parents. The term was used to describe the lived experiences of transracial adoptees. Additional derivative theories were also developed to describe the effect of such adoptions on white siblings. As discussed in the Part that follows, the concept of transracialism and its theoretical derivatives are now being expanded beyond these original parameters, and are being used to rewrite the rules of and significance of racial identification.

B. Reverse Passing and the Expanded Definition of Transracialism

In essence, reverse passers seek to transcend, pierce, and redefine racial boundaries. Indeed, most cases of passing, whether traditional or reverse, "involve exaggerated and sometimes caricatured negotiations of racial boundaries."[369] This was certainly the case with Dolezal, particularly after her reverse passing deception was put to an end.

Dolezal's outing was immediately followed by a public conversation about transracialism. Yet the transracial possibilities that Dolezal ushered into the American imagination were extrapolated further than the context of transracial adoptees and their white siblings. Transracialism was instead analogized to trans-sexuality,[370] and for some pundits, offered more evidence of a "'post-race' society."[371] The ability of one individual to desert her biological race for

366. *What Is Tranracialization?*, JOHN RAIBLE ONLINE, https://johnraible.wordpress.com/about-john-w-raible/what-is-transracialization [https://perma.cc/EH8P-XXSF].
367. *Id.*
368. *Id.*
369. Dreisinger, *supra* note 322, at 4.
370. *See, e.g.*, Evan Urquhart, *It Isn't Crazy to Compare Rachel Dolezal With Caitlyn Jenner*, SLATE (June 15, 2015, 12:47 PM), http://www.slate.com/blogs/outward/2015/06/15/rachel_dolezal_caitlyn_jenner_how_transgender_is_different_from_transracial.html [https://perma.cc/X6N3-2Y6Y].
371. Sara P. Díaz, Opinion, *Solidarity With Rachel Dolezal's Cause: Don't Let Important Message Be Drowned Out*, SEATTLE TIMES (June 15, 2015, 2:44 PM), http://www.seattletimes.com/opinion/solidarity-with-rachel-dolezal-dont-let-important-message-be-drowned-out [https://perma.cc/BN9W-D36F].

another, particularly the very classification situated on the opposite end of the American racial spectrum, defied the discursive and legal bounds of how race was previously understood.

The new definition of transracialism undeniably stretched the bounds of its original definition. More specifically, it was broadened to stand for the proposition that a person can believe they are a different race than what they were at birth—that they can assume a different racial identity by expressing an affinity or a belief that a race other than the one they are phenotypically better embodies who they are as a person. This definition of transracialism gained much traction after Dolezal's outing, particularly within social and mainstream media forums, and was undoubtedly fertilized by the seeds of post-racialism that have recently littered the public discourse.[372]

Importantly, while the discourses converged and the concepts are related, transracialism is distinct from "post-racialism."[373] The former denotes an individual's transition from one racial identity to another, while the latter refers to (American) society's departure from a time in which race is salient and racism relevant. However, the dialectic between the two is of crucial importance. Particularly as they intersect, the growing notion that an individual can transition from one race to another is used as evidence of America's collective transition toward post-racialism.

C. The Implications of Reverse Passing and Transracialism

As discussed throughout this Article, the Era of Racial Self-Identification, established by administrative deference and subjective determination, facilitated reverse passing. The fluid movement from white to nonwhite enabled by legal and cultural passing gave birth to important scholarly conversations about transracialism, particularly as it was defined in the preceding Part.[374] It also spurred conversations regarding whether transitioning from one race to another was not only possible, but also viable and desirable.

372. *See, e.g.*, Ian F. Haney López, *Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, 98 CAL. L. REV. 1023, 1069 (2010) (describing post-racial era social consensus that "racial inequalities flow from nonracist factors, whether private choices aggregated by the market, cultural predilections, or real racial differences that form inescapable facts of life").

373. *See generally* Sumi Cho, *Post-Racialism*, 94 IOWA L. REV. 1589 (2009) (framing post-racialism as a twenty-first century ideology that dismisses the salience of race as a strategy to eschew racial progress).

374. Prior to the Dolezal outing and the debate her outing spawned, transracialism was a term linked almost exclusively to parents adopting a child of a different race. For an example in the legal literature, see generally Morrison, *supra* note 363.

It is important to note that the fluidity of race and racial identity, while recently thrust into mainstream discourse, is established within legal scholarship. As examined in Part I, courts during the Era of Top-Down Racial Assignment vacillated between a range of metrics—spanning science to phenotype—to define and redefine race and racial categories. Transracialism and its advocates adopt narrower definitions of race that link it to either: (1) culture, (2) phenotype, or (3) both culture and phenotype.[375] Furthermore, as illustrated in Camille Rich's work, the "elective race" legal regime also makes transracialism possible from a formal perspective.[376]

However, the possibility of transracialism is punctured by American racial history and its one-directional access. As examined in Part I, whiteness was carefully constructed in narrow and exclusive terms. Judicial protection of whiteness limited a range of people from legally claiming it; particularly those with darker skin, especially African-Americans:

> Whiteness in this country has historically been incredibly narrowly drawn to protect its purity, and this was not simply enforced by social mores, but also by law. Conversely, blackness was broadly drawn, serving as something of a collecting pool for anyone with even the most minute detectable and provable Negro ancestry. If you weren't 100 percent white, you were black.[377]

Thus, from an accessibility standpoint, claims to transracial identity are overwhelmingly limited to whites seeking to adopt nonwhite classifications. The reverse seldom, if ever, occurs. Because of the narrowness in which whiteness has always been defined, it is unlikely that those with darker skin will be able to exploit transracialism as a means of adopting a white identity in order to reap its attendant range of privileges.

To be sure, reverse passing and transracialism pose very real yet hidden dangers to historically marginalized people of color. As noted above, by its very nature, transracialism is available and utilized primarily by whites. Whites can use principles of transracialism to reverse pass and take advantage of the benefits of race-conscious affirmative action programs, to the exclusion of people of color who have historically been and continue to be denied meaningful access to important institutions and programs. Furthermore, a primary danger posed by transracialism is its shoring up of white privilege: "If anything, to believe that one can transfer one's identity in this way is a privilege—maybe

375. For a critical analysis of how both culture and phenotype are manipulated to transcend race, focusing on Dolezal, see Blow, *supra* note 14.
376. *See generally* Rich, *supra* note 56.
377. Blow, *supra* note 14.

even the highest manifestation of white privilege."[378] The act itself is evidence of that privilege, and increased exercise of reverse passing by whites enhances white supremacy by shifting the sparse resources reserved for nonwhites into the hands of whites.

Importantly, for nonwhites, "race has never represented a mere decorative symbol . . . . Instead, race has always carried with it real substantive consequences for the lives of people of color, who generally endure some form of racial subordination on a daily basis."[379] Neither reverse passing nor transracialism will disrupt this paradigm. Instead, transracialism—with its one-way street of self-identification for whites—and reverse passing—which will enable white people who can perform a nonwhite identity to reap the benefits afforded by the increased push for diversity—will merely reify the existing racial order, and further bolster the privileges and power attendant with whiteness.

Put another way, while both transracialism and reverse passing appear to move us closer to a racial utopia where nonwhite identity is equally as valuable as white identity, the two concepts are in reality part and parcel of the same system of racial domination: A system in which the interests of nonwhites can be exploited, and access to meaningful institutions and opportunities for them is further diminished. For these reasons, reverse passing and the new theory of transracialism that it is spawning should be viewed with great caution.

CONCLUSION

> I'm just not impressed by the fact that—that the University of Texas may have fewer [Black students if the admissions policy changes]. Maybe it ought to have fewer.
>
> —Justice Antonin Scalia, *Fisher v. University of Texas II*[380]

This Article coins and advances a theory of reverse passing. It demonstrates how the Supreme Court's Fourteenth Amendment affirmative action jurisprudence has upended the traditional racial hierarchy in which white racial identities are afforded the highest values and variations of nonwhite racial identities are afforded the lowest values. It does so by creating an increased

378. Syreeta McFadden, *Rachel Dolezal's Definition of 'Transracial' Isn't Just Wrong, It's Destructive*, GUARDIAN (June 16, 2015, 1:30 PM), http://www.theguardian.com/commentisfree/2015/jun/16/transracial-definition-destructive-rachel-dolezal-spokane-naacp [https://perma.cc/9Y6R-RDFV].

379. Mario L. Barnes et al., *Judging Opportunity Lost: Assessing the Viability of Race-Based Affirmative Action After* Fisher v. University of Texas, 62 UCLA L. REV. 272, 289 (2015).

380. Transcript of Oral Argument at 67–68, *Fisher II*, 136 S. Ct. 2198 (2016) (No. 14-981).

value in diversity, conceptualized to mean nonwhiteness. The increased value in diversity has generated a demand for nonwhite individuals in education, employment, and beyond, thereby providing an incentive for whites to reverse pass for purposes of reaping the benefits of the increased push for diversity in all realms of American society.

On its face, the increased value afforded nonwhiteness appears to portend a positive signal for the malleability of racial identity, particularly breaking down the racial caste that marks nonwhite identities as inferior and less valuable. Upon closer examination, however, the increased value afforded to nonwhiteness is a situational one. It does not take into account the real salience of race, particularly the very real lived experience and historical discrimination faced by nonwhite individuals. Instead, the increased value afforded diversity reduces nonwhite racial identities into culture and phenotype. It is divorced from any concrete notion of the need for corrective or restorative justice based on a history of discrimination against minorities and is conceptualized only on terms that are satisfactory to mainstream institutions.

The dangers of nonwhiteness being valued on the aforementioned terms are best exemplified by *Fisher v. University of Texas at Austin* (*Fisher II*), in which the constitutionality of Texas's affirmative action program was challenged once again.[381] During oral argument, a number of justices questioned the real value of admitting nonwhite students, with one of the justices implicitly suggesting that a race-conscious admissions program could only be justifiable if nonwhites added some performative value to classes.[382] Such reasoning is anathema to the original purposes of race-conscious affirmative action programs.[383] It does not acknowledge the reparatory purposes that are really at the heart of the need for affirmative action programs. Instead, it only allows nonwhites to gain access to institutions if they can perform a prescribed racial identity, or put another way, "sing for their supper."[384] Such a conceptualization of the value of nonwhite identities also allows whites to perform a nonwhite identity either phenotypically or culturally, or in other words, to reverse pass.

381. *See* Petition for Writ of Certiorari, *Fisher II*, 136 S. Ct. 2198 (2016) (No. 14-981) ("Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit granted.").

382. *See* Transcript of Oral Argument at 55, *Fisher II*, 136 S. Ct. 2198 (2016) (No. 14-981) (Chief Justice Roberts asking "what unique perspective does a minority student bring to a physics class?").

383. *See infra* Part II.A.

384. In other words, perform racial identity in line with the expectations of the institution, as a means toward gaining access to that institution.

For those reasons, the Court's Fourteenth Amendment affirmative action jurisprudence not only incentivizes reverse passing, but also narrows the terms upon which nonwhite persons are conceptualized as valuable. And valuable not for their own sake, but the educational benefits of their nonwhite classmates, thereby negating both the salience of racial identity and the restorative justice rationales for maintaining race-conscious affirmative action programs. Given that the Court in *Fisher II* did not upend the diversity doctrine that enables and incentivizes reverse passing, the number of whites unseating nonwhites from colleges, law schools, professorships, and political posts, threatens to continue to climb upwards.