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Civil Rights in Living Color

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CIVIL RIGHTS LAW IN LIVING COLOR

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ABSTRACT

This Article will examine how American civil rights law has treated "color" discrimination and differentiated it from "race" discrimination. It is a comprehensive analysis of the changing legal meaning of "color" discrimination throughout American history. The Article will cover views of "color" in the antebellum era, Reconstruction laws, early equal protection cases, the U.S. Census, modern civil rights statutes, and in People v. Bridgeforth*—a landmark 2016 ruling by the New York Court of Appeals. First, the Article will lay out the complex relationship between race and color and discuss the phenomenon of* colorism*—oppression based*

* Associate Professor of Law, University of New Mexico School of Law; J.D. (2009), New York University (NYU) School of Law; Ph.D. (2005), University of Pennsylvania. The title of this Article derives from the Fox sketch comedy television series, *In Living Color*, which aired from 1990 to 1994 and often dealt with controversial racial issues in a light-hearted manner. Many people helped me with the Article in various ways. Tammy E. Linn, attorney for Joseph Bridgeforth during his appeal to the New York Court of Appeals, was responsible for my involvement in *People v Bridgeforth*. After reading one of my law review articles, Ms. Linn contacted me for advice on scholarly sources to cite in her brief. I sent her several references, and I called my mentor, Professor Robert Chang, Executive Director of the Fred T. Korematsu Center for Law and Equality at Seattle University School of Law. Assisted by Akin Gump, LLC, the Korematsu Center filed an amicus brief in support of Joseph Bridgeforth. I was *Of Counsel* for this amicus brief, and my work on the *Bridgeforth* case motivated me to write this Article. Attendees at the 2017 Equality Law Scholars Forum and the 2018 Northeast People of Color Legal Scholarship Conference provided valuable feedback on early drafts, particularly Professors Angela Onwuachi-Willig, Trina Jones, and Anthony Farley. I presented later drafts at the 2019 Loyola (Chicago) Constitutional Law Colloquium and the UNLV William S. Boyd School of Law Faculty Enrichment Lecture, receiving valuable feedback from attendees there. Professors Taunya Lovell Banks, Katie Eyer, Stacy Hawkins, Mark Kende, Miguel Schor, Andrew Jurs, Anthony Gaughan, and Joseph Schremmer, along with Judge Mark Bennett, also had insightful suggestions as I revised it. I thank the faculties of Savannah Law School, Drake University Law School, and the University of New Mexico School of Law, along with the Drake Constitutional Law Center, for providing the intellectual space to develop the Article. Additionally, Tianna Bias and Destinee Andrews provided helpful research support. Sarah Zeigler, Evening Coordinator at Savannah Law School's library, worked diligently to track down sources for me, as did Heather Campbell, Public Services Associate at the Drake University Law Library. The Editors of the *Maryland Law Review*, particularly Gina Bohannon and Mary Scott, did a nice job getting this Article ready for publication. Others who helped in various ways include Professors Michael Higginbotham, Kimberly Norwood, and Shakira Pleasant, along with Cherese Handy. Finally, this Article is dedicated to the memory of Savannah Law School's Associate Dean, Keith Harrison, who passed away in August 2018. Keith was very supportive of my academic career, and he believed firmly in the ideals of social justice espoused in this Article.

on skin color—as differentiated from racism. It then will analyze "color" in Reconstruction Era anti-discrimination laws, examining how both "race" and "color" came to be included in these laws. It will illustrate that under early equal protection cases, prohibitions on "race" and "color" discrimination both aimed to curb racism. "Race" and "color" were equally important, but under the Fourteenth Amendment, "color" discrimination never developed any meaning independent of "race" discrimination. The Article will show how "color" began disappearing from equal protection jurisprudence, just as civil rights efforts to address race discrimination became successful. It will then discuss how "color" reemerged in cases involving modern civil rights statutes and how these cases define "color" discrimination differently, focusing on colorism rather than racism. Additionally, color discrimination claims under these statutes have only applied to an individual member of one racial subclass, *such as a dark-skinned Black plaintiff. However, in* Bridgeforth, *the Court of Appeals recognized a* multiracial color class, *composed of a* group of dark-skinned individuals of different races, *for equal protection-based* Batson *challenges to juror exclusion.* Bridgeforth *was the first case to allow* Batson *challenges for color discrimination, and the first color discrimination case under any law to recognize a multiracial color class. This Article will consider the potential of multiracial color classes for the future of civil rights law.*

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INTRODUCTION

In December 2016, the New York Court of Appeals issued a landmark civil rights ruling. With its decision in *People v. Bridgeforth*,[1] the Court of Appeals held that skin color discrimination is cognizable for *Batson v. Kentucky*[2] challenges to juror exclusion.[3] *Batson* challenges derive from the

1. 69 N.E.3d 611 (N.Y. 2016).

2. 476 U.S. 79 (1986).

3. *See id.* at 96 (laying out three-step framework to address race discrimination in jury selection). Under *Batson*, if a peremptory challenge by the government is at issue, defendant must make a prima facie case by: (1) establishing that defendant is a member of a cognizable racial group (or other protected group); (2) showing that the government's peremptory challenges excluded members of this cognizable group; and (3) putting forth facts to show that the government's peremptory challenges were motivated by the race (or other protected status). If defendant is able to establish this, the burden shifts to the government to articulate a race-neutral reason for striking the juror. *Id.* at 97. The trial court then must decide if the government's articulated race-neutral reason is valid or pretextual. *Id*. at 98.

Legal scholars have critiqued the *Batson* framework, contending it usually does not aid criminal defendants. *See, e.g.*, Kenneth J. Melilli, Batson *in Practice: What We Have Learned About* Batson *and Peremptory Challenges*, 71 NOTRE DAME L. REV. 447, 459 (1996) (finding in the seven years after the *Batson* decision, criminal defendants succeeded in only 15.87% of *Batson* challenges); Tania Tetlow, *Solving* Batson, 56 WM. & MARY L. REV. 1859, 1859 (2015) (noting *Batson* "has failed to meaningfully reform jury selection"). This Article is not primarily concerned with *Batson* per se, but rather with the general recognition of skin color discrimination in civil rights law

Fourteenth Amendment's Equal Protection Clause in the U.S. Constitution, and New York has incorporated *Batson*'s doctrine into its state law.[4] In *Bridgeforth*, the New York Court of Appeals found that the exclusion of a class of dark-skinned jurors of different races violates the New York Constitution's Equal Protection Clause and section 13 of New York's Civil Rights Law.[5] It was a "precedent-setting decision"—the first application of *Batson* specifically to skin color discrimination.[6]

However, *Bridgeforth*'s significance goes well beyond *Batson*. Skin color discrimination, as a claim independent from race discrimination, has only been recognized under a few civil rights statutes,[7] most notably Title VII of the Civil Rights Act of 1964.[8] Under these statutes, courts have interpreted the term "color" narrowly to apply only to discrimination against a plaintiff belonging to a subclass of one race: for example, a dark-skinned African American. Additionally, courts had only recognized such color discrimination claims for *individual* plaintiffs. But *Bridgeforth* recognized a *multiracial color class*—composed of a *group of dark-skinned individuals of different races*. In doing so, the case opens up possibilities for expanding color-based anti-discrimination law.

Some legal scholars have focused on color discrimination under Title VII and other civil rights statutes,[9] and various scholars have written about colorism as a historical and sociological phenomenon which parallels racism.[10] Building on these works, this Article will add several new dimensions.

(and specifically the recognition of a multiracial color class made up of individuals of different races).

4. People v. Kern, 554 N.E.2d 1235 (N.Y. 1990).

5. *Bridgeforth*, 69 N.E.3d at 613.

6. *See* Press Release, Akin Gump Strauss Hauer & Feld LLP, Akin Gump Pens Amicus Brief in Precedent-Setting Decision by N.Y. Court of Appeals That Skin Color Cannot Be Used as Criterion for Excluding Jurors (Dec. 23, 2016), https://www.akingump.com/en/news-insights/akin-gump-pens-amicus-brief-in-precedent-setting-decision-by-ny.html.

7. *See infra* Part V.

8. 42 U.S.C. § 2000e (2012).

9. *See, e.g.*, Taunya Lovell Banks, *Colorism: A Darker Shade of Pale*, 47 UCLA L. REV. 1705 (2000); 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 (1997); Kate Sablosky Elengold, *Branding Identity*, 93 DENV. L. REV. 1 (2015); Angela P. Harris, *From Color Line to Color Chart?: Racism and Colorism in the New Century*, 10 BERKELEY J. AFR.-AM. L. & POL'Y 52 (2008); Trina Jones, *Shades of Brown: The Law of Skin Color*, 49 DUKE L.J. 1487 (2000); Cynthia E. Nance, *Colorable Claims: The Continuing Significance of Color Under Title VII Forty Years After Its Passage*, 26 BERKELEY J. EMP. & LAB. L. 435 (2005).

10. COLOR MATTERS: SKIN TONE BIAS AND THE MYTH OF A POST-RACIAL AMERICA (Kimberly Jade Norwood ed., 2014); MARGARET L. HUNTER, RACE, GENDER, AND THE POLITICS OF SKIN TONE (2005); NINA G. JABLONSKI, LIVING COLOR: THE BIOLOGICAL AND SOCIAL MEANING OF SKIN COLOR (2012); KATHY RUSSELL, MIDGE WILSON & RONALD HALL, THE COLOR COMPLEX (REVISED): THE POLITICS OF SKIN COLOR IN A NEW MILLENNIUM (2013); SHADES OF

It will analyze the changing legal meaning of "color" discrimination in civil rights law, from the antebellum period to the Reconstruction Era to modern statutes. In doing so, it is the first scholarly work to examine color discrimination under the Equal Protection Clause—a long-lost twin of the more familiar race discrimination claims.[11] Color-based equal protection existed long before *Bridgeforth*, albeit in a different form that was coterminous with race-based equal protection. The Article will show how "color" was gradually subsumed by "race" in equal protection jurisprudence, until its reemergence in *Bridgeforth*. By examining this history, this Article will also illuminate the changing legal meaning of "color," which was once used to represent race and now specifically designates skin color. The Article will show how *Bridgeforth* forms a bridge between these two meanings through its recognition of a multiracial color class. Finally, the Article will lay out the potential of multiracial color classes for civil rights law and posit initial strategies to begin realizing this potential.

Part I will delineate the complex relationship between race and color terminology—particularly the ambiguous use of the term "color." This Part will show how "race" and "color" were used interchangeably in the U.S. Census. It also will discuss the phenomenon of *colorism*—oppression based on skin color, as differentiated from racism,[12] and it will consider the relationship between racism and colorism.

Part II will analyze color in the antebellum period and will examine Reconstruction Era anti-discrimination laws, including the Civil Rights Act of 1866 and the Fourteenth and Fifteenth Amendments. It first will consider how race and color intersected in antebellum law, showing how "color" was sometimes used interchangeably with "race" and other times used specifically to denote skin color. Against this backdrop, Part II will illustrate that in the Reconstruction Era, protections against color discrimination focused

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DIFFERENCE, WHY SKIN COLOR MATTERS (Evelyn Nakano Glenn ed., 2009); Suzanne G. Fegley et al., *Colorism Embodied: Skin Tone and Psychosocial Well-Being in Adolescence*, *in* DEVELOPMENTAL PERSPECTIVES ON EMBODIMENT AND CONSCIOUSNESS 281 (Willis F. Overton et al. eds., 2008).

11. Scholars have paid relatively little attention to "color" in Reconstruction Era laws. Professor Trina Jones does note use of the term "color" in the Fifteenth Amendment. *See* Jones, *supra* note 9, at 1532 n.188. However, Professor Jones focuses mainly on the history of colorism, color claims under modern civil rights statutes, and prospects for future claims under these statutes, rather than on the text and application of Reconstruction Era laws. *See generally* Jones, *supra* note 9. Also, Emily Rose Margolis wrote a student note which focused specifically on extending *Bridgeforth* to other states. *See* Emily Rose Margolis, Note, *Color as a* Batson *Class in California*, 106 CAL. L. REV. 2067 (2018) (arguing that California and other states should recognize color as *Batson* class). Margolis' work covers only *Batson* rather than all of equal protection doctrine, and it focuses on state law rather than the federal Constitution.

12. *See infra* Part I.B for a more detailed explanation of colorism.

on racism, not on colorism. This Part also will consider how the Reconstruction Framers came to include both "race" and "color" in their legal enactments.[13]

Parts III and IV will focus on color under the Equal Protection Clause. Part III will show how early equal protection cases considered both race and color discrimination together and that both were treated as manifestations of racism. Color and race were equally important, but color did not develop a legal meaning independent of race. Eventually, as Part IV will illustrate, the Supreme Court began to use the term "color" less frequently, and race subsumed color in equal protection jurisprudence.

Part V will consider color discrimination claims that have emerged under modern application of civil rights statutes, particularly Title VII of the Civil Rights Act of 1964. This Part will show that modern color anti-discrimination laws target colorism rather than racism. Cases under these statutes have involved individual dark-skinned or light-skinned plaintiffs, often targeted for discrimination by members of their own racial group (for example, a light-skinned African American discriminating against a dark-skinned African American).

Part VI will analyze *People v. Bridgeforth* and discuss how it extends the scope of color discrimination protections in civil rights law. This Part will highlight the novel recognition of a multiracial color class, composed of a group of dark-skinned individuals of different races, for *Batson* challenges. Such a multiracial class illustrates how "color" provisions can protect against more complex forms of discrimination, where members of more than one racial group are targeted.

Finally, Part VII will consider the future of color-based anti-discrimination law. It will highlight the potential of multiracial color classes to combat discrimination in an increasingly diverse America. This Part will also posit strategies for civil rights advocates to work towards this end.

13. This Article does not endorse originalism as the preferred theory of constitutional interpretation. Rather, consistent with many critics of originalism, it acknowledges that original meaning and intent are significant factors to consider in constitutional and statutory interpretation. *See* Mitchell N. Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1, 24–25 (2009) ("Not a single self-identifying non-originalist of whom I'm aware argues that original meaning has no bearing on proper judicial constitutional interpretation. To the contrary, even those scholars most closely identified with non-originalism—Paul Brest, David Strauss, Laurence Tribe, for example—explicitly assign original meaning or intentions a significant role in the interpretive enterprise."); David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 881 (1996) ("Virtually everyone agrees that the specific intentions of the Framers count for something.").

I. PROBLEM OF THE "COLOR" LINE

In his 1903 classic, *Souls of Black Folk*, renowned African-American scholar W.E.B. Du Bois famously stated, "The problem of the twentieth century is the problem of the color-line—the relation of the darker to the lighter races of men in Asia and Africa, in America and the islands of the sea."[14] Du Bois articulates how "race" and "color" are intricately linked and often used interchangeably. "Color" and color-based terms have a "double-consciousness"[15]: they can refer either to race or to skin color.[16]

This Part examines the dual meaning of "color" to represent race and skin color. It gives examples of when the term "color" actually denotes race, and it uses the history of the U.S. Census to illustrate how the government has even used "race" and "color" interchangeably. But it then shows how "color" sometimes also specifically designates skin color, differentiated from race, and it distinguishes "colorism"—social hierarchy based on skin color—from racism. Finally, this Part considers the relationship between racism and colorism.

A. "Color" as Race

Color is often used to represent race, and skin color is the physical characteristic most commonly associated with race. The term "color" itself is sometimes used interchangeably with "race": For example, one definition of "color-blind" is one who is "[n]ot influenced by racial prejudice."[17] Color-

14. W.E.B. DU BOIS, SOULS OF BLACK FOLK 3 (Bantam Books 1989) (1903).

15. "Double-consciousness" is a metaphor for duality—often a conflicted duality. *Id.* at 3 ("It is a peculiar sensation, this double-consciousness . . . . One ever feels his two-ness . . . ."). Another example is Rev. Martin Luther King's iconic "I Have a Dream" speech at the 1963 March on Washington. Rev. King famously stated: "I have a dream that my four little children will one day live in a nation where they will not be judged by the *color of their skin* but by the content of their character." Rev. Martin Luther King, Speech at the March on Washington for Jobs and Freedom (Aug. 28, 1963) (emphasis added), https://kinginstitute.stanford.edu/king-papers/documents/i-have-dream-address-delivered-march-washington-jobs-and-freedom. Rev. King was referring to the elimination of racial segregation, but he used the term "color of their skin" to denote race.

16. One definition of "color" given by the Oxford dictionary is "pigmentation of the skin, especially as an indication of someone's race." *Colour*, OXFORD DICTIONARY, https://en.oxforddictionaries.com/definition/colour (last visited May 5, 2020). Another definition is "[a] group of people considered as being distinguished by skin pigmentation." *Id.* The former definition refers directly to skin color, but the latter refers to race itself. "Light-skinned" or "dark-skinned" would seem to be an appropriate use of the former definition. "Black" and "White" would seem to fit the second definition, a racial group—although these are color-based terms and are sometimes used to denote skin color. *See* Jones, *supra* note 9, at 1534 ("Today, as in 1866, 'white' can refer to both a racial category and to skin color.").

17. *Colour-blind*, OXFORD DICTIONARY, https://en.oxforddictionaries.com/definition/colour-blind (last visited May 5, 2020). Various book titles also use "color" as synonymous with "race." *See, e.g.*, K. ANTHONY APPIAH & AMY GUTMANN, COLOR CONSCIOUS: THE POLITICAL MORALITY OF RACE (1998); A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR: RACE AND THE

based language denotes race in common parlance: Color terms such as "Black" and "White" commonly designate specific racial groups.[18] Other color terms used for racial groups include "yellow" for Asian Americans,[19] "red" for Native Americans,[20] and "brown" for Latinx[21] or South Asian Americans.[22] Some of these terms are considered to be pejorative, while others are in common use. Additionally, "people of color" and "person of color" are terms used to denote all people who are not White. Today, "person of color" is a colloquial term, but in earlier eras it was a legal term defined in opposition to "white person."[23]

Historically, the U.S. Census illustrates how race and color have been used interchangeably.[24] As shown in Figure 1, the 1850 U.S. Census was the

AMERICAN LEGAL PROCESS (1980); RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA (2017); *see also* Robin A. Lenhardt, *The Color of Kinship*, 102 IOWA L. REV. 2071 (2017).

18. "Colored" was once commonly used to refer to people of African descent or other non-White people. *See Colored*, OXFORD DICTIONARY, https://en.oxforddictionaries.com/definition/us/colored (last visited May 5, 2020) (giving one "dated, offensive" definition of "colored" as "[a] person who is wholly or partly of nonwhite descent."). In many states, it was once a legal term designating such persons. *See, e.g.*, STATES' LAWS ON RACE AND COLOR 237 (Pauli Murray ed., Univ. of Ga. Press 1997) (1951) (defining "colored" as "includ[ing] not only Negroes but persons of mixed blood having any appreciable amount of Negro blood." (citing MISS. CONST. art. 14, § 263 (repealed 1987)). Although "colored" is now considered pejorative in the United States, it is still in colloquial usage in some parts of the world. *See* Lindsay Johns, *Say It Loud, I'm Coloured and I'm Proud*, ROOT (Oct. 8, 2013, 12:50 AM), https://www.theroot.com/say-it-loud-im-coloured-and-im-proud-1790898391 (noting "[i]n a South African context, 'Coloured' is a wholly acceptable word."). Moreover, the National Association for the Advancement of Colored People (NAACP) is still the name of a major U.S. civil rights organization.

19. *See* FRANK H. WU, YELLOW: RACE IN AMERICA BEYOND BLACK AND WHITE (2002) (analyzing the plight of Asian Americans).

20. *See* TROY R. JOHNSON, RED POWER: THE NATIVE AMERICAN CIVIL RIGHTS MOVEMENT (2007).

21. OTTO SANTA ANNA, BROWN TIDE RISING: METAPHORS OF LATINOS IN CONTEMPORARY AMERICAN PUBLIC DISCOURSE (2002).

22. *See* VIJAY PRASHAD, THE KARMA OF BROWN FOLK (2000) (analyzing the plight of South Asian Americans).

23. *See, e.g.*, GA. CODE ANN. § 79-103 (1935) (defining "person[] of color" as "[a]ll Negroes, mulattoes, mestizos, and their descendants, having any ascertainable trace of either Negro or African, West Indian, or Asiatic Indian blood . . . and all descendants of [such persons] . . . .") (cited in STATES' LAWS ON RACE AND COLOR, *supra* note 18, at 90). In contrast to this definition of "person of color," the official definition of "White person" in Georgia was:

> [O]nly persons of the white or Caucasian race, who have no ascertainable trace of either Negro, African, West Indian, Asiatic Indian, Mongolian, Japanese, or Chinese blood in their veins. No person, any one of whose ancestors has been duly registered with the State Bureau of Vital Statistics as a colored person or person of color, shall be deemed a white person.

Id. (citing GA. CODE ANN. § 53-212).

24. *See generally Index of Questions*, U.S. CENSUS BUREAU, https://www.census.gov/history/www/through_the_decades/index_of_questions/ (last visited May 5, 2020).

first to collect information about an individual's color.[25] There was no mention of "race" on the census form, and the options for "Color" were "Black" and "Mulatto," with instruction to leave the column blank if the person was "White."[26] The directions for the 1860 census form explicitly added "White" as a "Color" category,[27] and the 1870[28] and 1880[29] census forms added other "Color" categories such as "Chinese" and "American Indian."[30] Interestingly, the 1890 census form used "Race" instead of "Color,"[31] and census forms from 1900 to 1940 collected data on "Color or race."[32] In 1950, the census form went back to "Race" only;[33] in 1960 it was "Race or color,"[34] and in 1970, it was "Color or race."[35] Subsequent censuses only collected data on an individual's "Race."[36]

25. *1850*, U.S. CENSUS BUREAU, https://www.census.gov/history/www/through_the_decades/index_of_questions/1850_1.html (last visited May 5, 2020). From 1790 to 1840, the Census did not specifically use the terms "race" or "color," although it did collect data on the number of White people, slaves, and in some instances "colored persons." *See generally Index of Questions*, *supra* note 24.

26. *1850*, *supra* note 25.

27. *1860*, U.S. CENSUS BUREAU, https://www.census.gov/history/www/through_the_decades/index_of_questions/1860_1.html (last visited May 5, 2020).

28. *1870*, U.S. CENSUS BUREAU, https://www.census.gov/history/www/through_the_decades/index_of_questions/1870_1.html (last visited May 5, 2020).

29. *1880*, U.S. CENSUS BUREAU, https://www.census.gov/history/www/through_the_decades/index_of_questions/1880_1.html (last visited May 5, 2020).

30. Future censuses continued to add and replace categories. *See generally Index of Questions*, *supra* note 24.

31. *1890*, U.S. CENSUS BUREAU, https://www.census.gov/history/www/through_the_decades/index_of_questions/1890_1.html (last visited May 5, 2020).

32. *See generally Index of Questions*, *supra* note 24.

33. *1950 (Population)*, U.S. CENSUS BUREAU, https://www.census.gov/history/www/through_the_decades/index_of_questions/1950_population.html (last visited May 5, 2020).

34. *1960 (Population)*, U.S. CENSUS BUREAU, https://www.census.gov/history/www/through_the_decades/index_of_questions/1960_population.html (last visited May 5, 2020).

35. *1970 (Population)*, U.S. CENSUS BUREAU, https://www.census.gov/history/www/through_the_decades/index_of_questions/1970_population.html (last visited May 5, 2020).

36. *See generally Index of Questions*, *supra* note 24.

Figure 1: "Race" and "Color" in the U.S. Census

Year(s)	Language on Questionnaire
1850 – 1880	Color
1890	Race
1900 – 1940	Color or Race
1950	Race
1960	Race or Color
1970	Color or Race
1980 – present	Race

The use of color terminology to refer to race came about because throughout U.S. history, skin color has served as a proxy for race.[37] Race actually derives from a complex amalgamation of factors: ancestry, common stereotypes, self-identification, and various physical features including skin color.[38] Racial categories are not biological groupings but rather social constructs:[39] As the U.S. Census illustrates, these categories can change over time.[40] Skin color as a proxy for race can be misleading—as with a Black person who can "pass" for White.[41] Nevertheless, in everyday interactions, skin color is often the primary means of identifying a person's race and discriminating on the basis of race. Consequently, older civil rights law often viewed "color" as interchangeable with "race," and both race and color antidiscrimination provisions targeted racism.

B. "Color" as Skin Color

In modern civil rights law, "color" specifically means skin color, not merely as a marker of race, but as a separate feature with its own axis of

37. *See* Jones, *supra* note 9, at 1534 (noting that during the Reconstruction Era, "race and color were viewed as overlapping, but nonetheless distinct, phenomena"); Angela Onwuachi-Willig, *Multiracialism and the Social Construction of Race: The Story of Hudgins v. Wrights*, *in* RACE LAW STORIES 147, 148 (Rachel F. Moran & Devon Wayne Carbado eds., 2008) (noting that "skin color" is "the most commonly used proxy for race").

38. *See* Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 7 (1994) (defining "'race' as a vast group of people loosely bound together by historically contingent, socially significant elements of their morphology and/or ancestry"); Onwuachi-Willig, *supra* note 37, at 147.

39. *See, e.g.*, GUNNAR MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY 115 (1962) (noting that race is a "social and conventional, not a biological concept"); Mary E. Campbell, Jenifer L. Bratter & Wendy D. Roth, *Measuring the Diverging Components of Race*, 60 AM. BEHAV. SCI. 381, 382 (2016).

40. *See, e.g.*, *supra* text accompanying notes 24–36.

41. "Passing" refers to situations where a Black person (or other person of color) is perceived by others as White and tacitly encourages that perception. *See generally* ALLYSON HOBBS, A CHOSEN EXILE: A HISTORY OF RACIAL PASSING IN AMERICAN LIFE (2014).

discrimination and inequality.[42] *Colorism* typically refers to social hierarchy and oppression based on skin color,[43] as opposed to race itself.[44] Often, but not always, this involves favoring individuals with lighter skin over those with darker skin.[45] Such discrimination is the target of modern color anti-discrimination provisions.

Colorism is often framed as a within-group phenomenon: for example, light-skinned Black Americans discriminating against dark-skinned Black Americans, or vice versa.[46] However, outgroup members such as White Americans can also specifically favor Black Americans who are lighter or darker,[47] and this can make it more difficult to distinguish between colorism and racism.

Colorism has long existed in societies across the world,[48] and it is woven together with racism in various ways.[49] In the United States, colorism has its

42. Eduardo Bonilla-Silva, *Where Is the Love? A Rejoinder by Bonilla-Silva on the Latin Americanization Thesis*, 5 RACE & SOC'Y 103, 110 (2002) (arguing that "color is a central feature of social stratification").

43. *See* Leila Nadya Sadat, *Introduction: From Ferguson to Geneva and Back Again*, 14 WASH. U. GLOBAL STUD. L. REV. 549, 550–51 (2015).

44. *See* Jones, *supra* note 9, at 1490 (noting that "color differences are still frequently used as a basis for discrimination independently of racial categorization"); Lori L. Tharps, *The Difference Between Racism and Colorism*, TIME (Oct. 6, 2016), http://time.com/4512430/colorism-in-america/. *But see* Taunya Lovell Banks, *Multilayered Racism: Courts' Continued Resistance to Colorism Claims*, *in* SHADES OF DIFFERENCE: WHY SKIN COLOR MATTERS, *supra* note 10, at 213, 222 (arguing that colorism itself is a form of racism); *infra* notes 94–95 and accompanying text.

45. *See* Baynes, *supra* note 9, at 133 ("A dark-skinned person of color is likely to encounter more discrimination than [their] light-skinned counterpart." (footnote omitted)). *But see* Jones, *supra* note 9, at 1520 ("Colorism among Blacks does not operate uniformly in favor of persons with lighter skins."). The interaction of skin color and race discrimination can be complex. For example, one study found that dark-skinned Black men perceived that they experienced more out-group discrimination (by members of other racial groups) than light-skinned Black men; however, both dark-skinned and light-skinned Black men perceived that they experienced more in-group discrimination (by other African Americans) than medium skin tone Black males. *See* Ekeoma E. Uzogara et al., *A Comparison of Skin Tone Discrimination Among African American Men: 1995 and 2003*, 15 PSYCHOL. OF MEN & MASCULINITY 201, 201 (2014).

46. *See* ALICE WALKER, *If the Present Looks Like the Past, What Does the Future Look Like?*, *in* IN SEARCH OF OUR MOTHER'S GARDENS 290, 290–91 (1983) ("Colorism—in my definition, [is] prejudicial or preferential treatment of same-race people based solely on their color . . . ."); *see also* Jones, *supra* note 9, at 1520.

47. Jones, *supra* note 9, at 1498–99 ("It is important to note that colorism operates both *intra*racially and *inter*racially. Intraracial colorism occurs when a member of one racial group makes a distinction based upon skin color between members of [their] own race. . . . Interracial colorism occurs when a member of one racial group makes a distinction based upon skin color between members of another racial group." (footnotes omitted)).

48. *See generally* Sadat, *supra* note 43.

49. *See* Vinay Harpalani, *To Be White, Black, or Brown? South Asian Americans and the Race-Color Distinction*, 14 WASH. U. GLOBAL STUD. L. REV. 609, 636 (2015) (highlighting the "intersection between racism and colorism").

roots in differential treatment of Black slaves by White slave owners.[50] During the era of slavery, White slave owners coerced enslaved Black women to engage in sexual relationships, resulting in mixed-race children.[51] Several categories of mixed-race individuals were defined under law: mulatto (one-half Black), quadroon (one-quarter Black), and octoroon (one-eighth Black).[52] Professor Robert Reece notes that White people generally saw mixed-race slaves, who on average had lighter skin, as more intelligent and "more capable of being 'civilized.'"[53] He notes that slave owners were twice as likely to free mixed-race slaves as those slaves who were classified solely as Black,[54] an assertion supported by other historical sources as well.[55]

Among the enslaved, a color hierarchy also developed. Generally, those with more White ancestry had lighter skin and were treated in a more privileged fashion than their dark-skinned counterparts.[56] Plantation owners sometimes conferred special favors to mixed-race slaves who were their own offspring.[57] Mixed-race slaves could hold more prestigious positions, working within plantation owners' houses rather than in the fields of plantations.[58] Sometimes they were able to acquire skills and learning, including literacy, and they could be hired out to work away from slave plantations.[59] This gave lighter-skinned, mixed-race slaves more mobility around the plantation and

50. *See generally* Jones, *supra* note 9, at 1499–511.

51. *Id.*

52. Fegley et al., *supra* note 10, at 286.

53. *See* Robert L. Reece, *Genesis of U.S. Colorism and Skin Tone Stratification: Slavery, Freedom, and Mulatto-Black Occupational Inequality in the Late 19th Century*, 45 REV. OF BLACK POL. ECON. 3, 8 (2018).

54. *Id.* at 8. Professor Reece reports that in 1860, forty-one percent of "free African Americans" in the South were of mixed race, including seventy-six percent in the Deep South, and that only about ten percent of mixed-race individuals were enslaved. *Id.*

55. *See, e.g.*, Donald L. Horowitz, *Color Differentiation in the American Systems of Slavery*, 3 J. OF INTERDISC. HIST. 509, 514 (1973) (noting that "[i]n the Southern United States, mulattoes comprised a large proportion of the so-called 'free Negroes,' and, in the eighteenth century, perhaps as many as half of all mulattoes were free."). Professor Horowitz further notes that "[m]ost of the Negroes who enjoyed any prosperity were mulattoes." *Id.* Nevertheless, he qualifies this by stating that "[i]n several southern cities, propertied mulattoes were more common," including Charleston, South Carolina; Savannah, Georgia; Mobile, Alabama; and New Orleans, Louisiana. *Id.* at 514, 514 n.20. Although he acknowledges that mixed race individuals were a large proportion of free Black Americans, Professor Horowitz's general view is that "by and large, through nearly all of the slavery period, free browns and blacks had the same generally low status." *Id.* at 514.

56. *See* Ira Berlin, *Time, Space, and the Evolution of Afro-American Society on British Mainland North America*, 85 AM. HIST. REV. 44, 64–65 (1980); Reece, *supra* note 53, at 8 (noting many privileges afforded to light-skinned, mixed-race slaves but not to dark-skinned slaves).

57. *See* Berlin, *supra* note 56, at 53.

58. Reece, *supra* note 53, at 8.

59. *Id.*

off of it.[60] Consequently, they had distinct advantages over dark-skinned monoracial Black Americans even when both were enslaved.[61]

Professor Reece has empirically linked skin color inequalities after Emancipation to the social boundaries that were formed during slavery.[62] Because they were much more likely to be free even before Emancipation and more likely to have acquired skills if they had been enslaved, mixed-race individuals were able to garner more wealth than monoracial Black Americans.[63] Professor Reece's findings indicate that the antebellum color hierarchy, with relatively light-skinned mixed-race individuals at the top and relatively dark-skinned monoracial Black Americans at the bottom, continued after slavery ended.[64] Drawing upon U.S. Census data, his findings indicate that in 1880—shortly after Emancipation—the occupational status disparity between mixed-race individuals and monoracial Black Americans was greater in areas where slavery had been more prominent,[65] and free mixed-race individuals were more literate.[66] Professor Reece also notes that after Emancipation, mixed-race individuals were more likely to marry other mixed-race individuals, thus compounding the wealth differences between light-skinned and dark-skinned Black Americans and further replicating the color stratification that existed during slavery.[67]

All of these biases and inequities became a normalized component of Black communities. Although all Black Americans were subjected to Jim Crow laws and other forms of oppression,[68] both White and Black people

60. *Id.*

61. *See also* Berlin, *supra* note 56, at 64–65 ("While one branch of black society [light-skinned people of color] stood so close to whites that its members sometimes disappeared into the white population, most plantation slaves [who were dark-skinned and monoracial] remained alienated from the world of their masters, physically and culturally."). *But see* Horowitz, *supra* note 55, at 514 ("From time to time, the tendency of whites to differentiate mulattoes from Negroes manifested itself, but it never became dominant." (footnote omitted)).

62. Reece, *supra* note 53, at 9.

63. *Id.* at 3 (noting that "skin color stratification was initiated at least in part by practices during chattel slavery"). Professor Reece does acknowledge the need for more research on the transmission of light-skin privilege from slavery onwards. *Id.* at 19.

64. *Id.* at 17.

65. *Id.* at 15 ("[C]ounties with higher historical proportions of slaves [prior to Emancipation] had, on average, higher Mulatto-Black occupational inequality [in 1880], with Mulattos advantaged relative to their Black counterparts.").

66. *Id.* at 17 ("Mulattos in counties where they could read and write in 1860 had, on average, higher occupational status in 1880.").

67. *Id.* at 18.

68. *See* Plessy v. Ferguson, 163 U.S. 537, 541 (1896) (noting that Petitioner Homer Plessy "was seven eighths Caucasian and one eighth African blood; that the mixture of colored blood was not discernible in him" but still ruling that he had to ride railroad cars with only Black passengers); STATES' LAWS ON RACE AND COLOR, *supra* note 18, at 237 (defining "colored" as "includ[ing] not only Negroes but persons of mixed blood having any appreciable amount of Negro blood." (citing Moreau v. Grandich, 75 So. 434 (1917))).

viewed people with lighter skin in a superior light. During the Jim Crow Era, historically Black colleges and universities discriminated against dark-skinned applicants, as did many other Black institutions.[69] Elite social clubs such as the Blue Vein Society of Nashville, Tennessee, and the Bon Ton Society of Washington, D.C., also favored light-skinned Black Americans.[70] Skin color became a marker of social status within Black communities, and White Americans also continued to favor light-skinned Black Americans.[71] Although the Black Power Movement of the 1960s elevated pride among dark-skinned African Americans, colorism is still a prominent topic of discussion in Black communities. Renowned film director Spike Lee's movie, *School Daze*, dealt with colorism at a historically Black college.[72] More recently, an episode of the popular ABC sitcom, *Black-ish*, focused on skin color bias.[73] Many other Black commentators have also examined these issues.[74]

69. Fegley et al., *supra* note 10, at 286.

70. *Id.* Two tests to determine whether an individual's skin was light enough were the "blue vein" test and the "paper bag" test. Jones, *supra* note 9, at 1515–16. Under the "blue vein" test, members had to have skin light enough so that the veins were visible in their arms. *Id.* at 1515. For the "paper bag" text, skin had to be lighter than a brown paper bag. *Id.* at 1515–16.

71. *See* Taunya Lovell Banks, *A Darker Shade of Pale Revisited: Disaggregated Blackness and Colorism in the "Post-Racial" Obama Era*, *in* COLOR MATTERS: SKIN TONE BIAS AND THE MYTH OF A POST-RACIAL AMERICA 95, 101 (Kimberly Jade Norwood ed., 2014) (noting that Nobel laureate Gunnar Myrdal, "in his classic [1944] study of blacks in the United States, wrote: 'without a doubt a Negro with light skin and other European features has in the North an advantage with white people when competing for jobs available to Negroes'" (quoting MYRDAL, *supra* note 39, at 697)). In 2010, journalists Mark Halperin and John Heilemann revealed that Senate Majority Leader Harry Reid had once privately stated that "[Barack] Obama, as a black candidate, could be successful thanks, in part, to his 'light-skinned' appearance and speaking patterns." Mark Preston, *Reid Apologizes for Racial Remarks About Obama During Campaign*, CNN POLITICS (Jan. 9, 2010, 11:32 PM), https://www.cnn.com/2010/POLITICS/01/09/obama.reid/index.html. Although Reid apologized for these comments, many Black Americans found truth in his sentiments. *See* Jake Tapper & Karen Travers, *Reid's Racial Remark: Some Truth to It?*, ABC NEWS (Jan. 11, 2010, 5:38 PM), https://abcnews.go.com/Politics/senator-harry-reids-racial-remarks-truth-studies-critics/story?id=9535416 ("Many prominent African Americans … said [Reid's] observation was true—that Americans in general find lighter-skinned African Americans more socially acceptable than those with darker skin, especially if they speak eloquently.").

72. SCHOOL DAZE (Columbia Pictures & 40 Acres & A Mule Filmworks 1988).

73. *Black-ish: Black Like Us* (ABC television broadcast Jan. 15, 2019); *see* Sydney Scott, *"Black-ish" Poignantly Tackled Colorism with an Honest Family Conversation*, ESSENCE (Jan. 16, 2019), https://www.essence.com/entertainment/black-ish-colorism-episode/.

74. *See, e.g.*, DARK GIRLS (Urban Winter Entertainment & Duke Media 2011). Some commentators have discussed colorism in casting and portrayal of Black actors. *See, e.g.*, Tiffany Onyejiaka, *Hollywood's Colorism Problem Can't Be Ignored Any Longer*, TEEN VOGUE (Aug. 22, 2017), https://www.teenvogue.com/story/hollywoods-colorism-problem-cant-be-ignored; Tysheira Scribner, *A Look at 90s TV and Colorism*, BLACK 90S (Apr. 30, 2018), http://theblack90s.com/uncategorized/a-look-at-90s-tv-and-colorism/. There are also examples of Black artists whose work has implicitly critiqued colorism within Black communities. *See* Jamilah King, *J. Cole Talks About Colorism in Hip-Hop and the White House*, COLORLINES (Aug. 22, 2013, 12:12 PM), https://www.colorlines.com/articles/j-cole-talks-about-colorism-hip-hop-and-white-house.

Beyond African-American communities, there has been increased attention to colorism within other groups, including Latinx,[75] Asian Americans,[76] South Asian Americans,[77] Native Americans,[78] and biracial and multiracial Americans.[79] On a global scale, commentators have analyzed skin color biases in Latin America,[80] Africa,[81] Asia,[82] and South Asia.[83] Additionally, international human rights activists have begun to address colorism.[84]

Despite this growing awareness, there are challenges to addressing disparities based on skin color. Colorism is difficult to track empirically because unlike formal racial categories,[85] there are no government data which

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Sometimes critiques of colorism have been controversial: for example, when they affirmed the beauty of dark-skinned Black women but also belittled light-skinned Black women. *See, e.g.*, Del tha Funky Homosapien, *Dark Skin Girls*, *on* I WISH MY BROTHER GEORGE WAS HERE (Elektra Records 1991) (stating that "[l]ight skin girls lack the dark skin quality" and "[d]ark skin girls are better than light skin"). For lyrics to *Dark Skin Girls* see *Dark Skin Girls*, GENIUS, https://genius.com/8928001 (last visited May 6, 2020); *see also* Preezy, *Del Tha Funky Homosapiens Offbeat Debut Helped Shape West Coast Alt-Rap*, BOOMBOX (Oct. 25, 2016), https://theboombox.com/del-tha-funky-homosapiens-offbeat-debut-helped-shape-west-coast-alt-rap/ (noting that Dark Skin Girls was "abrasive" and "would clearly be called out for misogyny and colorism [against light-skinned Black women] today.").

75. *See* Tanya Katerí Hernández, *Latinos at Work: When Color Discrimination Involves More Than Color*, *in* SHADES OF DIFFERENCE: WHY SKIN COLOR MATTERS, *supra* note 10, at 236.

76. *See* Kimberly D. Chanbonpin, *Between Black and White: The Coloring of Asian Americans*, 14 WASH. U. GLOBAL STUD. L. REV. 637 (2015).

77. *See* Taunya Lovell Banks, *Colorism Among South Asians: Title VII and Skin Tone Discrimination*, 14 WASH. U. GLOBAL STUD. L. REV. 665 (2015); Harpalani, *supra* note 49, at 610, 635.

78. *See* Donna Brown, Karen Branden & Ronald E. Hall, *Native American Colorism: From Historical Manifestations to the Current Era*, 62 AM. BEHAV. SCIENTIST 2023 (2018).

79. *See* Keshia L. Harris, *Biracial American Colorism: Passing for White*, 62 AM. BEHAV. SCIENTIST 2072 (2018).

80. *See* Tanya Katerí Hernández, *Colorism and the Law in Latin America—Global Perspectives on Colorism Conference Remarks*, 14 WASH. U. GLOBAL STUD. L. REV. 683 (2015).

81. *See* Pumza Fihlani, *Africa: Where Black Is Not Really Beautiful*, BBC NEWS (Jan. 1, 2013), https://www.bbc.com/news/world-africa-20444798.

82. *See* Debito Arudou, *Japan's Under-Researched Visible Minorities: Applying Critical Race Theory to Racialization Dynamics in a Non-White Society*, 14 WASH. U. GLOBAL STUD. L. REV. 695 (2015).

83. *See* Neha Mishra, *India and Colorism: The Finer Nuances*, 14 WASH. U. GLOBAL STUD. L. REV. 725 (2015).

84. *See* William J. Aceves, *Two Stories About Skin Color and International Human Rights Advocacy*, 14 WASH. U. GLOBAL STUD. L. REV. 563 (2015); Stephanie Farrior, *"Color" in the Non-Discrimination Provisions of the Universal Declaration of Human Rights and the Two Covenants*, 14 WASH. U. GLOBAL STUD. L. REV. 751 (2015).

85. *See* Vinay Harpalani, Desi*Crit: Theorizing the Racial Ambiguity of South Asian Americans*, 69 N.Y.U. ANN. SURV. OF AM. L. 77, 111 (2013) (defining "formal racialization" as "the creation and application of official racial classification schemes by the government or another source of authority"); *see id.* at 135–36 (noting how U.S. Census racial classification of Asian Indian Americans changed from "Non-White/Hindu" in 1960 to "White" in 1970 to "Asian Indian" in 1980).

classify individuals based on their skin color.[86] There have been social science studies collecting and analyzing data that provide illustrations of colorism. For example, Professors Michael Hughes and Bradley Hertel report that even after controlling for gender, age, and parental socioeconomic status, light-skinned African Americans complete more years of education than dark-skinned African Americans.[87] Professor Amelia Branigan and her colleagues come to a similar conclusion.[88] A study by Professors Arthur Goldsmith, Darrick Hamilton, and William Darity finds that employers prefer light-skinned African-American employees over those with dark skin,[89] and Professors Verna Keith and Cedric Herring find that light-skinned African Americans had personal income that was sixty-five percent higher than dark-skinned African Americans.[90] Other studies, in a variety of areas,[91] have also

86. *See* Eduardo Bonilla-Silva, *We Are All Americans!: The Latin Americanization of Racial Stratification in the USA*, 5 RACE & SOC'Y 3, 5 (2002) ("[T]here is no data set that includes systematic data on the skin tone of all Americans . . . .").

87. Michael Hughes & Bradley R. Hertel, *The Significance of Color Remains: A Study of Life Chances, Mate Selection, and Ethnic Consciousness Among Black Americans*, 68 SOC. FORCES 1105, 1109 (1990).

88. *See* Amelia R. Branigan et al., *Skin Color, Sex, and Educational Attainment in the Post-Civil Rights Era*, 42 SOC. SCI. RES. 1659, 1659 (2013) [hereinafter Branigan et al., *Skin Color, Sex, and Educational Attainment*] (finding that "[f]or Black men and women . . . increase in skin lightness . . . [is] associated with . . . increase in educational attainment."). *But see* Aaron Gullickson, *The Significance of Color Declines: A Re-Analysis of Skin Tone Differentials in Post-Civil Rights America*, 84 SOC. FORCES 157, 172–73 (2006) ("Beginning with cohorts born in the 1940s, skin tone differences in educational and occupational attainment which have traditionally privileged lighter-skinned blacks declined significantly. The decline was so dramatic that skin tone does not appear to have been relevant at all for cohorts born . . . [by] 1963."). Another study by Branigan et al. suggests there may be a gender difference for the relationship between skin color and educational attainment. *See* Amelia R. Branigan et al., *The Shifting Salience of Skin Color for Educational Attainment*, 5 SOCIUS 1, 1 (2019) [hereinafter Branigan et al., *Shifting Salience of Skin Color*] (finding that there is "a large and statistically significant decline in the association between skin color and educational attainment between baby boomer and millennial black women, whereas the decline in this association between the two cohorts of black men is smaller and nonsignificant"). The authors note that the "results emphasize the need to conceptualize colorism as an intersectional problem and suggest caution when generalizing evidence of colorism in earlier cohorts to young adults today." *Id.*

89. Arthur H. Goldsmith, Darrick Hamilton & William Darity, Jr., *Shades of Discrimination: Skin Tone and Wages*, 96 AM. ECON. REV. 242, 245 (2006) (finding "[e]mployers . . . display a preference for light-skinned [African Americans]" over those with darker skin).

90. Verna M. Keith & Cedric Herring, *Skin Tone and Stratification in the Black Community*, 97 AM. J. SOC. 760, 769 (1991). Another study found that "protective effects of economic success are not as prevalent among darker-skinned African Americans as they are among those with lighter skin." Elizabeth Sweet et al., *Relationships Between Skin Color, Income, and Blood Pressure Among African Americans in the CARDIA Study*, 97 AM. J. PUB. HEALTH 2253, 2256 (2007).

91. *See, e.g.*, Jennifer L. Hochschild & Vesla Weaver, *The Skin Color Paradox and the American Racial Order*, 86 SOC. FORCES 643, 643 (2007) ("Dark-skinned [B]lacks in the United States have lower socioeconomic status, more punitive relationships with the criminal justice system, diminished prestige, and less likelihood of holding elective office compared with their lighter counterparts."); Jessica M. Kizer, *Arrested by Skin Color: Evidence from Siblings and a Nationally Representative Sample*, 3 SOCIUS 1, 1 (2017) ("[H]aving darker skin remains a significant predictor for

illustrated that colorism, like racism, is still a powerful force in American and global society.

C. Racism or Colorism?

In the course of American civil rights law, "color" discrimination has had two different meanings: It can be the manifestation of either racism or colorism. Historically, the law has sometimes treated "race" and "color" as synonymous, thus equating color discrimination with race discrimination.[92] But at other times, the law has differentiated between race and color and thus separated colorism from racism.[93]

Scholarly discourse on color discrimination also reflects this type of dichotomy. Professor Taunya Lovell Banks emphasizes the role of skin color in how individuals experience race, and in "how race-related discrimination is manifested."[94] Professor Banks argues that colorism itself is one of "the varied faces of racism"[95] and that skin color discrimination should be treated as a form of race discrimination.[96] Conversely, Professor Trina Jones acknowledges that skin color is often used to indicate race, but she cautions against "confus[ing] the indicator with the thing that it is indicating."[97] Professor Jones argues that "[w]ith colorism, skin color does not serve as an indicator of race. . . . it is the social meaning afforded skin color itself that results in the differential treatment."[98]

This duality in the meaning of "color" is an overarching theme for a historical survey of color-based anti-discrimination law and for its potential future applications. The next Part examines the ambiguous legal understandings of color in early American history. This paves the way to analyze the evolution of color discrimination in American civil rights law.

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being arrested."); Ellis P. Monk, *The Color of Punishment: African Americans, Skin Tone, and the Criminal Justice System*, 42 ETHNIC & RACIAL STUD. 1593 (2018) ("[A]mong African Americans[] . . . [darker] skin tone is significantly associated with the probability of having been arrested and/or incarcerated, net of relevant controls."); Ellis P. Monk, Jr., *The Cost of Skin Color: Skin Color, Discrimination, and Health Among African Americans*, 121 AM. J. SOC. 396, 396 (2015) [hereinafter Monk, *Cost of Skin Color*] ("Intraracial health differences related to skin tone (and discrimination) often rival or even exceed disparities between blacks and whites as a whole."). *But see* Amelia R. Branigan et al., *Complicating Colorism: Race, Skin Color, and the Likelihood of Arrest*, 3 SOCIUS 1, 1 (2017) ("[B]lack men's probability of arrest remains constant across the spectrum of skin color . . . ."). Ironically, Branigan et al. found that among White males, arrest probability did increase with darker skin. *Id.*

92. *See infra* notes 338, 373–374 and accompanying text; *infra* Part III.D.3.

93. *See infra* note 390 and accompanying text; *infra* Parts V.A. and V.C.

94. Banks, *supra note* 44, at 222.

95. *Id.*

96. *Id.* at 216.

97. Trina Jones, *The Case for Legal Recognition of Colorism Claims*, *in* SHADES OF DIFFERENCE: WHY SKIN COLOR MATTERS, *supra* note 10, at 223, 225.

98. *Id.* at 225.

II. COLOR OF LAW

Dating back to early American history, the term "color," along with other color terminology, has sometimes denoted race and at other times referred to skin color. Whiteness was historically a prerequisite for citizenship rights in the United States, both at the federal and the state levels. Under the Naturalization Law of 1790, Congress restricted federal citizenship to "free, white person[s],"[99] and the meaning of "white person" under this statute was litigated in federal courts.[100] In state courts, definitions of Whiteness and Blackness were also litigated. Blackness could confer slave status, and antebellum cases in Southern states confronted the dilemma of determining race.[101] Skin color played a role in these cases,[102] which provided a backdrop to Reconstruction Era anti-discrimination laws protecting against race and color discrimination.

A. Constructing Color

During the antebellum era, between the late 18th century and the Civil War, the relationship between race and color became part of the law of slavery. Skin color could not only denote hierarchy among slaves,[103] but could itself confer status as a free person or a slave.

Professor Ariela Gross analyzes several cases where slaves sued for their freedom on the ground that they were not Black.[104] Professor Gross notes that common law in Southern states had "established a presumption of freedom for persons of white appearance and of slavery for persons of black appearance."[105] For example, in the Arkansas case of *Daniel v. Guy*,[106] the

99. Naturalization Law of 1790, ch. 3, 103, 103–04 (repealed 1795).

100. *See* IAN F. HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE 49–77 (1996). These "racial prerequisite" cases occurred in the late nineteenth and early twentieth centuries. *Id.* at 49. Skin color did not play a significant role in most of these cases. Between 1878 and 1944, federal courts heard fifty-one "racial prerequisite" cases. *Id.* In only one of these cases was skin color a determining factor. *See* United States v. Dolla, 177 F. 101, 102 (5th Cir. 1910) (holding that Petitioner Abba Dolla was White because the "skin of [Dolla's] arm . . . was sufficiently transparent for the blue color of the veins to show very clearly").

Reconstruction Era legal enactments granted citizenship to African Americans, thus creating another potential venue for naturalization. Haney López, *supra* note 38. There was one case litigated under the 1790 Act where the Petitioner, a Mexican American, argued his Blackness conferred citizenship. *See In re* Cruz, 23 F. Supp. 774, 774 (E.D.N.Y. 1938).

101. Ariela J. Gross, *Litigating Whiteness: Trials of Racial Determination in the Nineteenth-Century South*, 108 YALE L.J. 109 (1998).

102. *Id.*

103. *See supra* note 56.

104. Gross, *supra* note 101.

105. *Id.* at 122 n.33 (emphasis omitted).

106. 19 Ark. 121 (1857).

court noted, "Where a person held as a slave, sues for freedom, and it manifestly appears that he belongs to the negro race . . . he is presumed to be a slave . . . ."[107]

However, two factors complicated these presumptions.[108] First, as mixed racial ancestry became more common, appearance was sometimes too ambiguous to determine race.[109] Second, Native Americans could also have dark skin, and establishing Native American ancestry could negate slave status.[110] Consequently, racial identity became legally contested.[111]

Courts highlighted the importance of skin color in determining a person's race, although they noted that factors such as ancestry and reputation also mattered. In the South Carolina case of *State v. Scott*,[112] the court opined:

> [A]lthough colour would in general be a safe guide in determining the genealogy . . . it is not an infallible criterion . . . . When the colour is distinctly marked, that of itself would furnish a presumption of the class to which the individual belonged. In a doubtful case, common reputation, which is always admissible in the deduction of pedigree, would serve as a guide. But these, as mere presumptions, must yield to positive proof . . . .[113]

Similarly, in *State v. Davis*,[114] also in South Carolina, the court stated race determination was a factual question for juries, based on "inspection as to colour . . . peculiar negro features . . . reputation as to parentage; and . . . evidence . . . of the person's having been received in society, and exercised the privileges of a white man."[115]

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107. *Id.* at 134 (emphasis omitted); *see also* State v. Whitaker, 3 Del. (1 Harr.) 549, 550 (1840) (referring to "color" as "badge of [slave] status").

108. Gross, *supra* note 101, at 122.

109. *Id.*

110. *Id.* In *Hudgins v. Wright*, a family in Virginia sued for freedom on grounds of their Native American ancestry. 1 Va. (1 Hen. & M.) 134, 140 (1806) (holding that plaintiffs were free because of their straight hair). For more on *Hudgins*, *see* Onwuachi-Willig, *supra* note 37.

111. *See generally* Paul Finkleman, *Crime of Color*, 67 TUL. L. REV. 2063, 2108–09 (1993) ("[D]uring the Revolutionary and early post-Revolutionary period race definition . . . [was] a relatively easy task—physical appearance or ancestry would suffice. This would soon change."); Gross, *supra* note 101.

112. 17 S.C.L. (1 Bail.) 270 (1829).

113. *Id.* at 273; *see also Daniel*, 19 Ark. at 134 ("Where a person held as a slave, sues for freedom, and it manifestly appears that he belongs to the negro race, whether of full or mixed blood, he is presumed to be a slave, that being the condition generally of such people in this State." (emphasis omitted)).

114. 18 S.C.L. (2 Bail.) 558 (1832).

115. *Id.* at 560. Similarly, in *Thurman v. State*, the court noted that "[a] mulatto is to be known, not solely by color, kinky hair, or slight admixture of negro blood, or by a greater admixture of it not amounting to one-half, but by reputation, by his reception into society, and by the exercise of certain privileges." 18 Ala. 276, 277 (1850).

The role of skin color in these complex definitions of race varied by locality. States had their own different criteria for determining a person's race, and legal definitions and common understandings of race varied significantly.[116] In the Ohio case of *Gray v. State*,[117] the court used skin color alone to simplify the definition: "We are unable to set out any other plain and obvious line or mark between the different races. Color alone is sufficient."[118]

The relationship between skin color and legal definitions of race was also changing over time. Ohio itself illustrated this: Professor Daniel Sharfstein notes that at the Ohio Constitutional Convention of 1850-51, one delegate stated that "treatment of the negro" was based on "the color of his skin" and "by 'color' in these discussions we do not mean color at all. . . . you must get his genealogy . . . he must stand condemned as a person of 'color' . . . the mixture never runs out. . . . Ten or ten thousand times diluted by mixtures with the Caucasian race, and it is still the same."[119] According to Professor Sharfstein, "[i]n Ohio, blood was eclipsing skin color" as the defining feature of race.[120]

At the same time, the 1850 U.S. Census collected demographic information about "color," not "race."[121] Moreover, Census color categories included terms such as "Mulatto,"[122] which speak to ancestry rather than skin color. In some contexts, race and color were the same; in other contexts, they were different; and at times, it was not easy to tell whether they were the same or different. Against this historical backdrop, the Reconstruction Era Framers had to grapple with drafting anti-discrimination laws—laws that came to include both "race" and "color" in their enacted text.

B. Reconstructing Color

In the aftermath of the Civil War and Emancipation, the key goal of Reconstruction laws was to secure citizenship rights for African Americans. The Reconstruction Era first saw the enactment of the Thirteenth Amendment

116. *See* Daniel J. Sharfstein, *Crossing the Color Line: Racial Migration and the One-Drop Rule, 1600–1860*, 91 MINN. L. REV. 592, 604 (2007) ("Depending on the state, anyone with at least one-quarter, one-eighth, or one-sixteenth 'black blood' was legally black."). *See generally* STATES' LAWS ON RACE AND COLOR, *supra* note 18.

117. 4 Ohio 353 (1831).

118. *Id.* at 355.

119. Sharfstein, *supra* note 116, at 649 (emphasis omitted) (citing FRANK U. QUILLIN, THE COLOR LINE IN OHIO: A HISTORY OF RACE PREJUDICE IN A TYPICAL NORTHERN STATE 87 (1913)).

120. *Id.*; *see also id.* at 652 ("Color is becoming every day less and less a test by which to determine the fact of human chattelship." (quoting *White Slaves*, PHILANTHROPIST, Nov. 12, 1839, at 3)); *id.* at 647 ("It is not the shade of color, but the purity of the blood, which determines the stock or race to which the individual belongs." (quoting Thacker v. Hawk, 11 Ohio 376, 380 (1842) (Read, J., dissenting))).

121. *1850*, *supra* note 25.

122. *Id.*

to abolish slavery.[123] Subsequently, to grant citizenship rights to African Americans, three major laws were enacted: (1) The Civil Rights Act of 1866,[124] which was the first civil rights law to include the terms "race" and "color"; (2) The Fourteenth Amendment,[125] which contained the Equal Protection Clause and was widely understood as an effort to constitutionalize the 1866 Act;[126] and (3) The Fifteenth Amendment,[127] which is the only provision in the U.S. Constitution to include the terms "race" and "color." The text of both the 1866 Act and the Fifteenth Amendment suggests that "race" and "color" have different meanings, lest this text violate the rule against surplusage.[128] But what are those different meanings, and how did the Fram-

123. U.S. CONST. amend. XIII. For more on the history of the Thirteenth Amendment, see William M. Carter, Jr., *Race, Rights, and the Thirteenth Amendment: Defining the Badges and Incidents of Slavery*, 40 U.C. DAVIS L. REV. 1311 (2007); Jacobus tenBroek, *Thirteenth Amendment to the Constitution of the United States: Consummation to Abolition and Key to the Fourteenth Amendment*, 39 CALIF. L. REV. 171 (1951).

124. Ch. 31, 14 Stat. 27 (1866).

125. U.S. CONST. amend. XIV.

126. *See* WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE 115 (1988) ("[S]ection one [of the Fourteenth Amendment] was understood to remove all doubts about the constitutionality of the 1866 Civil Rights Act . . . ."). During floor debate on the Act, Senator Edgar Cowan of Pennsylvania questioned whether the Civil Rights Act of 1866 would be constitutional under the Thirteenth Amendment, which he read narrowly to abolish slavery and nothing more:

> As I understand the chairman of Committee on the Judiciary, he takes his ground upon an amendment to the Constitution of the United States recently passed. . . . [N]obody can pretend, nobody can believe that it was intended by [the first clause of the Thirteenth Amendment] of the Constitution to confer . . . such authority [to pass the provisions of the Civil Rights Act of 1866].

CONG. GLOBE, 39th Cong., 1st Sess. 499 (1866).

127. U.S. CONST. amend. XV.

128. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 174 (1803) ("It cannot be presumed that any clause in the [C]onstitution is intended to be without effect; and therefore such a construction is inadmissible, unless the words require it."). *Marbury* suggests that words in the Constitution cannot be interpreted as "mere surplusage . . . entirely without meaning." *Id*. *See also* Hibbs v. Winn, 542 U.S. 88, 101 (2004) ("A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant . . . ." (quoting 2A NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 46.06, at 181–86 (rev. 6th ed. 2000))); United States v. Wells, 519 U.S. 482, 497 (1997) ("Absent a clearly expressed legislative intention to the contrary, [statutory] language must ordinarily be regarded as conclusive." (quoting Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980))); Walker v. Sec'y of the Treasury, 713 F. Supp. 403, 406 (N.D. Ga. 1989) ("[T]he statutes and case law repeatedly and distinctly refer to race and color. This court is left with no choice but to conclude, when Congress and the Supreme Court refer to race and color in the same phrase, that 'race' is to mean 'race', and 'color' is to mean 'color'. To hold otherwise would mean that Congress and the Supreme Court have either mistakenly or purposefully overlooked an obvious redundancy." (emphasis omitted)); *see also infra* note 390.

ers of these Reconstruction laws come to include both terms? The congressional debates over Reconstruction laws provide some insight into these questions.[129]

1. Civil Rights Act of 1866

The Civil Rights Act of 1866, in its original version, was the first Reconstruction law to include "race" and "color" in its text.[130] The Act was deemed to be "[a]n Act to protect all [p]ersons in the United States in their [c]ivil [r]ights, and furnish the [m]eans of their [v]indication."[131] Congress passed the Act over President Andrew Johnson's veto, approximately one year after the Civil War ended. Section 1 of the Act states:

> [A]ll persons born in the United States . . . excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every *race* and *color* . . . shall have the same right . . . to [various facets of citizenship, property rights, and equal protection] . . . as is enjoyed by [W]hite [persons] . . . .[132]

Section 2 of the Civil Rights Act of 1866 also gave legal effect to both race and color through criminal law: It deemed that that any person who caused any of the rights protected by the Act to be deprived on account of "color or race" would be guilty of a misdemeanor.[133]

In the congressional floor debate on the 1866 Act, Senator Edgar Cowan specifically noted the ambiguity of each term:

> [T]ell me what is meant by the word "race," and where it is settled that there are two races of men, and if it is settled that there are two or more, how many. Where is the line to be drawn? What constitute the distinctive characteristics and marks which limit and bound these races? . . . "[C]olor" is another word upon which nobody is very well advised just at present. Men are of all shades of color,

129. *See* ALFRED AVINS, THE RECONSTRUCTION AMENDMENTS' DEBATES 121–29, 131–34, 136–41 (1967).

130. Ch. 31, 14 Stat. 27 (1866). After the ratification of the Fourteenth Amendment, the Civil Rights Act of 1866 was reenacted as the Enforcement Act of 1870, ch. 114, 16 Stat. 140. *See infra* text accompanying notes 318–319. The 1870 Act did not contain the words "race" or "color." *See infra* text accompanying notes 318–319. However, the Civil Rights Act of 1875 subsequently did refer to "citizens of every race and color." Ch. 114, 18 Stat. 335, 336 (1875).

131. Ch. 31, 14 Stat. 27, 27 (1866).

132. *Id.* (emphasis added). Apparently, the first draft of the bill had included the word "cover" rather than "color." *See* CONG. GLOBE, 39th Cong., 1st Sess. 212 (1866) (Illinois Senator Lyman Trumbull, sponsor of Civil Rights Act of 1866, noting that "the first amendment of the Committee on the Judiciary was . . . to strike out the word 'cover' and to insert the word 'color.'"). Presumably, this was just a typographical error.

133. Ch. 31, § 2, 14 Stat. 27, 27 (1866).

> and the races of men differ from the deepest jet up to the fairest of lily white all over the world.[134]

Senator Cowen seemed to view "race" as a particular group of humans and "color" as their skin color. Interestingly, to further support his point, Senator Cowan also referred to potential discrimination on the basis of hair texture:

> If a [s]tate did not desire to make a distinction on account of race, I suppose it might lawfully make a distinction on account of hair. If it desired to single out any class of its citizens and subject them to special laws, it would be a good description, and would not be obnoxious to the terms of this bill, if it were to say that it should apply to all persons whose hair was ribbon-shaped and curled naturally, and not to persons whose hair was cylindriform.[135]

While both skin color and hair are used to identify race, "color" was deemed important enough to include in the text of the Act. This was likely because skin color was the visible feature that was most closely associated with race, and perhaps also because the term "color" had often been used as a synonym for race.[136]

In other floor statements, color and race seemed to be interchangeable. "Color" could have been a synonym for race, or it could have denoted skin color as a defining feature of race. For example, Senator Garrett Davis stated that "one short bill breaks down all the domestic systems of law . . . so far not only as the negro, but as any man without regard to color is concerned."[137] "Negro" is typically used as a racial term, but at that time, some formal classifications of color, such as those in the U.S. Census, used racial terms.[138] Senator Davis may have also viewed color as skin color: not race per se but a defining physical feature of African Americans. Either way, color here was not separable from race.

Similarly, Senator Reverdy Johnson of Maryland interpreted the Act to mean "that no [s]tate shall discriminate . . . between any inhabitants . . . on

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134. CONG. GLOBE, 39th Cong., 1st Sess. 499 (1866).

135. *Id.* Senator Cowan's statement here is reminiscent of *Hudgins v. Wright*, where the court believed that hair texture was even more indicative of race than skin color. *See supra* note 110. Recently, several states have banned discrimination based on hairstyles and texture. See Ovetta Wiggins, *States Are Banning Discrimination Against Black Hairstyles. For Some Lawmakers, It's Personal.*, WASH. POST (Mar. 16, 2020, 7:18 PM), https://www.washingtonpost.com/local/md-politics/maryland-bill-crown-act-hairstyles-discrimination/2020/03/12/c3b81582-5f05-11ea-b014-4fafa866bb81_story.html. For more on hair-related race discrimination generally, see Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 40 DUKE L.J. 365 (1991); D. Wendy Greene, *Title VII: What's Hair (and Other Race-Based Characteristics) Got to Do With It*, 79 U. COLO. L. REV. 1356 (2008); Angela Onwuachi-Willig, *Another Hair Piece: Exploring New Strands of Analysis Under Title VII*, 98 GEO. L.J. 1079 (2010).

136. *See supra* Section I.A.

137. CONG. GLOBE, 39th Cong., 1st Sess. 598 (1866).

138. *See supra* notes 24–36 and accompanying text.

account of any race to which they may belong, whether white or black, on account of color, if they are not white."[139] Senator Johnson here seems to denote color as a defining feature of race, but it is not clear whether the term refers specifically to skin color or to race itself. Again, color is not separable from race.

Throughout their discussions, the Framers of the 1866 Act typically used the term "white person" to denote those people who already had full citizenship rights. In contrast, they used a variety of terms to refer to African Americans: "negro," "black man," "colored person," "person of color," and "persons of African descent," along with a few references to "mulatto."[140] These different terms may have reflected various understandings of race, including the belief that skin color was often, even if not always, the defining feature of race.

2. Reconstruction Amendments

After the Thirteenth Amendment abolished slavery, the Fourteenth Amendment enacted the broadest constitutional protections of citizenship rights.[141] Although the Fourteenth Amendment did not contain the words "race" or "color," it is widely understood as an endeavor to constitutionalize the 1866 Act.[142] Eventually, the Equal Protection Clause became the primary vehicle in the Constitution to protect against these forms of discrimination.

The congressional debate on the Fourteenth Amendment shows that it was intended to protect Black Americans against race and color discrimination. In the debate, there was still ambiguity around the meaning of "color"; however, statements made during the floor debate illustrated the purpose of the Equal Protection Clause. Pennsylvania Representative and Radical Republican Thaddeus Stevens highlighted some of the protections the Clause would provide:

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139. CONG. GLOBE, 39th Cong., 1st Sess. 505 (1866).

140. *See generally id.*

141. The Equal Protection Clause became the primary means to protect against race and color discrimination. Additionally, section 1 of the Fourteenth Amendment includes the Citizenship Clause, the Privileges and Immunities Clause, and the Due Process Clause. U.S. CONST. amend. XIV, § 1 ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

142. *See* NELSON, *supra* note 126. Opponents of the Fourteenth Amendment questioned its necessity in light of the Civil Rights Act of 1866, and they feared it would allow interracial marriage. *See id.* Proponents of the Amendment argued that since legislation could be repealed, a constitutional amendment would provide more stable protection of Black people's rights and would put to rest any doubt about the constitutionality of the Civil Rights Act of 1866. *Id.* The latter view prevailed as the Amendment was ratified in 1868. *Id.*

> Whatever law punishes a white man for a crime shall punish the black man precisely in the same way and to the same degree. Whatever law protects the white man shall afford "equal" protection to the black man. . . . Whatever law allows the white man to testify in court shall allow the man of color to do the same. . . . Now different degrees of punishment are inflicted, not on account of the magnitude of the crime, but according to the color of the skin. Now color disqualifies a man from testifying in courts, or being tried in the same way as white men.[143]

Representative Stevens appears to view "color of the skin" as a defining feature of race. Other comments in the floor debate also illustrated the overlap between race and color and the ambiguous use of color-based terminology. Comments by New Jersey Representative A. J. Rogers, who opposed the Fourteenth Amendment on grounds that it would allow interracial marriage, showed how common understandings of race fused notions of ancestry, color, and purity:

> A white citizen of any State may marry a white woman; but if a black citizen goes into the same State he is entitled to the same privileges and immunities that white citizens have, and therefore under this amendment a negro might be allowed to marry a white woman. I will not go for an amendment of the Constitution to give a power so dangerous . . . as to run the pure white blood of the Anglo-Saxon people of the country into the black blood of the negro or the copper blood of the Indian.[144]

Here, Representative Rogers used color terminology metaphorically to refer to racial ancestry—"black blood" and "copper blood."

Debate over language in the Fifteenth Amendment, which sought to protect the right to vote, can also shed light on the meaning of "color" in the Reconstruction laws. The Fifteenth Amendment is the only provision in the U.S. Constitution that contains the terms "race" and "color."[145] Section 1 of the Amendment reads: "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."[146]

Congressional floor debate about the Fifteenth Amendment contained nuanced discussion of specific terms. For example, Michigan Senator Jacob

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143. CONG. GLOBE, 39th Cong., 1st Sess. 2459 (1866).

144. CONG. GLOBE, 39th Cong., 1st Sess. app. 134 (1866).

145. U.S. CONST. amend. XV, § 1.

146. *Id.* (emphasis added). A strict textualist analysis of the Fifteenth Amendment suggests not only that "race" and "color" have different meanings, but that this presumption is even stronger than for the Civil Rights Act of 1866. The Fifteenth Amendment states "race, color, or previous condition of servitude." *Id.* The word "or" implies that all three are separate. Taken in historical context, such a presumption could extend to other Reconstruction Era laws: if "color" is different from "race" for the Fifteenth Amendment, then it should be different for other laws as well.

Howard offered an amendment to the language to protect voting rights specifically for "citizens of African descent." When asked to clarify what this meant, he noted:

> I mean by African descent what is popularly known as such. . . . By one of "African descent" is understood a person who has African blood in his veins. . . . It designates what is commonly known as the negro, or some person having colored blood in his veins to the amount of at least one eighth. I believe it is settled by the courts of justice that when the quantity becomes less than one eighth, in law and in jurisprudence he is called a white man.[147]

Representative John Bingham of Ohio, a Radical Republican, wanted to add the terms "nativity," "property," and "creed" to the amendment because some states, such as Rhode Island, discriminated on these bases.[148] Bingham agreed with the terms "race," "color," and "previous condition of servitude," and noted that Ohio and twenty other states had constitutions which "unjustly and wrongfully discriminate among citizens on account of color."[149] Bingham's remarks indicate that he had reached an understanding of the protections conferred by including "race," "color," and "nativity." They also illustrate the level of nuance that went into determining the specific terms in the Reconstruction laws. But it is still not clear that Bingham or others viewed color as a characteristic that was separable from race.

As with the Civil Rights Act of 1866, debate over the Reconstruction Amendments saw White people referred to as just as "white men" or "white women," while various terms were used to denote Black Americans: "negro," "black," and others. Whiteness was the privileged status, and Section 1 of the Fourteenth Amendment aimed to extend the privileges of citizenship to those who, on the basis of race or color, were deemed to be non-White. And while the Reconstruction Framers were clear about this aim, they were varied in their understanding about the relationship between race and color.

C. Why Both "Race" and "Color"?

The Reconstruction Framers vigorously debated the wording of civil rights laws, considering which rights and classes needed enumerated protection. Some of their comments indicate that they equated race with ancestry.[150] They may have also viewed skin color separately from race, though perhaps still as the defining feature of race.[151] Nevertheless, in their debates,

147. CONG. GLOBE, 40th Cong., 3rd Sess. 1009 (1869).

148. *Id.* at 1426–27.

149. *Id.* at 1427.

150. *See, e.g.*, *supra* text accompanying note 147.

151. *See, e.g.*, *supra* text accompanying notes 139, 144.

they often used the terms "race" and "color" interchangeably.[152] Ultimately, the Framers of both the Civil Rights Act of 1866 and the Fifteenth Amendment determined that "race" and "color" were two terms that were important enough to include. But if the terms were essentially used interchangeably, why include both of them? What did the "color" provision offer that the "race" provision could not?

The floor debates do not provide a conclusive answer. But in the antebellum period, skin color often served as a proxy for race when evidence of ancestry was not available.[153] Many different understandings (and misunderstandings) of race emerged, reflected by the plethora of terms used by the Reconstruction Framers to describe Black Americans—such as "black," "person of color," "negro," "African," and "mulatto." In contrast, the Framers only used "White" (or "white person" or "white man") to describe White Americans. Whiteness was a singular, privileged status.[154]

The various terms used to refer to Black Americans could emphasize ancestry or skin color. In the collective minds of the Reconstruction Framers, the language of "race" and "color" together may have captured the different ways to distinguish between "white persons" and others. For example, race may have focused on ancestry[155] and color on skin color.[156] Some of the Framers may have distinguished between race and color,[157] but many seemed to treat race and color as essentially the same.[158]

Even those who understood that race and color were not the same could use skin color as presumptive of race. Because skin color can be easily identified visually, it can become the basis for race discrimination. Race discrimination, based on visual perception of skin color, could then occur against a

152. *See, e.g.*, *supra* text accompanying notes 139, 144.

153. *See* Jones, *supra* note 9, at 1502–03 n.50 (noting that "[ancestry] information was not always available, given that accurate records were not kept and given the pervasive division of slave families throughout the period of slavery").

154. *See supra* notes 99–100 and accompanying text. It may be noteworthy that in later litigation around the meaning of Whiteness, ancestry of the Petitioners was generally known, and the issue was whether particular ethnic groups were considered "White." *See supra* notes 99–100 and accompanying text. Conversely, when courts determined Blackness and slave status, they had to make assumptions about individuals' ancestry—based in part on skin color. *See supra* text accompanying notes 101–118.

155. *See, e.g.*, *supra* text accompanying note 147.

156. *See, e.g.*, *supra* text accompanying note 143.

157. *See, e.g.*, *supra* text accompanying note 134, 143.

158. *See, e.g.*, *supra* text accompanying note 137, 139, 144.

racially ambiguous person who appeared to be non-White, even if that person's ancestry was unknown or contested.[159] "Color" provisions may have captured this form of race discrimination.[160]

The purpose of Reconstruction Era color protections was not to address within-group discrimination by skin color, or discrimination by White Americans specifically against a racial subclass such as dark-skinned African Americans. Rather, the Reconstruction Framers were concerned with discrimination against all "persons of color." Some of the Framers may have viewed "color" as distinct from "race," but they did not view color discrimination as having a distinct target from race discrimination. Both forms of discrimination targeted all African Americans. As the next Part illustrates, this was also reflected in the Supreme Court's initial rulings on the Fourteenth Amendment.

III. COLOR-CONSCIOUS

In early Fourteenth Amendment jurisprudence, the United States Supreme Court considered the Privileges or Immunities Clause, Due Process Clause, and Equal Protection Clause together.[161] The *Slaughterhouse Cases*[162] limited the Privileges or Immunities Clause of the Fourteenth Amendment to those privileges or immunities linked to federal citizenship, not state

159. *See supra* Part II.A. In fact, light-skinned African Americans were more likely to be racially ambiguous, although they were still darker than most White people.

160. Dr. Paul Finkelman, eminent legal historian and current president of Gratz College, gave a similar explanation for including both "race" and "color" in the text of the Fifteenth Amendment. Dr. Finkelman notes two reasons: 1. "Race" in the Reconstruction Era often denoted national origin or ethnicity (e.g., "German race," "Chinese race," "Jewish race"); 2. The Reconstruction Framers realized that Southern states could claim that skin color discrimination was different than race discrimination and thus allowable. *See* Paul Finkelman, President, Gratz College, Clark v. Muscatine Schools and the Historic Civil Rights Decisions of the Iowa Supreme Court, Clark 150 Conference: Past, Present, and Future of Equality in Iowa (Sept. 28, 2018) (recording available at Drake University School of Law). Dr. Finkelman's explanation occurs at 27:00 to 27:55 of this lecture. He notes, at 27:00, that "somebody" asked him about the "apparent redundancy" with both "race" and "color" in the text of the Fifteenth Amendment. "Somebody" referred to the author of this Article, as earlier in the day, I had a conversation with him about the topic. Although framed in a different manner, Dr. Finkelman's insights echoed the intuitions I had developed as I was doing research for this Article. *See supra* text accompanying notes 153–159.

161. *See* Plessy v. Ferguson, 163 U.S. 537, 548 (1896) ("[E]nforced separation of the races . . . neither abridges the privileges or immunities of the colored man, deprives him of his property without due process of law, nor denies him the equal protection of the laws, within the meaning of the Fourteenth Amendment . . . ."); Gabriel Chin, *Unexplainable on Grounds of Race: Doubts About* Yick Wo, 2008 U. ILL. L. REV. 1359, 1374 (2008) (arguing that in early Fourteenth Amendment jurisprudence, "due process and equal protection claims were not distinct: they were two sides of the same coin").

162. 83 U.S. (1 Wall.) 36 (1872).

citizenship.[163] Consequently, the Due Process and Equal Protection Clauses took on prominence, and the latter came to be the main provision to protect against race and color discrimination.

This Part examines how the United States Supreme Court treated race and color in its early equal protection jurisprudence. It considers nineteenth- and early twentieth-century cases that involved the exclusion of Black Americans from jury service, which were the Court's earliest statements on race and color discrimination. It then looks at *Plessy v. Ferguson*[164] and other major equal protection cases in the first half-century after ratification of the Fourteenth Amendment. These cases illustrate that the Supreme Court treated race and color discrimination as essentially the same—both forms of discrimination against Black Americans. By the various ways it referred to Black Americans, the Court seemed to view race and color as two ways of designating the same group. Language by some of the Justices suggests that they viewed color as a means to identify an individual's race. But importantly, the Court also did not develop any color discrimination jurisprudence independent of its race discrimination jurisprudence.

A. Nineteenth-Century Jury Service Cases

During the late nineteenth century, the Supreme Court decided several cases which involved the exclusion of Black jurors. Through these opinions, the Court notes that African Americans were discriminated against based on both "race" and "color," though the distinction between the two was still not clear. Nevertheless, it is apparent that race and color provisions were equally important and worked together to protect against racism.

Justice William Strong wrote the Court's opinions in the first three of these cases, which were decided in the same term. *Strauder v. West Virginia*[165] involved Taylor Strauder, a "very light mulatto,"[166] who was convicted of murder by an all-white jury. Strauder challenged the exclusion of Black

163. *Id.* In the *Slaughterhouse Cases*, the Court also stated that all of the Reconstruction Amendments were intended to protect African Americans against race and color discrimination. *See id.* at 71–72 ("It is true that only the fifteenth amendment, in terms, mentions the negro by speaking of his color and his slavery. But it is just as true that each of the other articles was addressed to the grievances of that race, and designed to remedy them as the fifteenth."). Ten years later, the *Civil Rights Cases* also limited the scope of the Fourteenth Amendment, ruling that it only applied to state actors. 109 U.S. 3 (1883).

164. 163 U.S. 537 (1896).

165. 100 U.S. 303 (1879). For a more detailed analysis of the *Strauder* opinion, see Sanford Levinson, *Why* Strauder v. West Virginia *is the Most Important Single Source of Insight on the Tensions Contained Within the Equal Protection Clause of the Fourteenth Amendment*, 62 ST. LOUIS U. L.J. 603 (2018).

166. *Horrible Murder*, WHEELING DAILY INTELLIGENCER, Apr. 19, 1872, *reprinted at Taylor Strauder Case*, W. VA. DEP'T ARTS, CULTURE & HIST., http://www.wvculture.org/history/africanamericans/strauder01.html (last visited June 10, 2020).

jurors on equal protection grounds. Justice Strong's opinion illustrates that the Reconstruction Amendments protected against race and color discrimination:

> If the defendant has a right to have a jury selected for the trial of his case without discrimination against all persons of his race or color, because of their race or color, the right, if not created, is protected by those [Reconstruction] amendments, and the legislation of Congress under them.[167]

Here, *race* and *color* appear to have equal legal effect: If either is used to exclude jurors, then a defendant's rights would be violated. Other language in *Strauder* suggests that in this specific instance, Black jurors were excluded "because of color alone":

> And how can it be maintained that compelling a colored man to submit to a trial for his life by a jury drawn from a panel from which the State has expressly *excluded every man of his race, because of color alone*, however well qualified in other respects, is not a denial to him of equal legal protection?[168]

The opinion goes on to state: "Concluding, therefore, that the statute of West Virginia, discriminating in the selection of jurors, as it does, against negroes *because of their color*, amounts to a denial of the equal protection of the laws to a colored man . . . ."[169] Twice, the *Strauder* Court notes that Black jurors were excluded "because of [their] color alone."[170] One might infer that Justice Strong saw "color" as a defining feature of race—perhaps the means used to identify race.[171]

In *Virginia v. Rives*,[172] the issue was exclusion of Black jurors. Referencing *Strauder*, Justice Strong reiterated that the Equal Protection Clause prevented race and color discrimination not only through legislation, but also through the actions of state officials:

> [A]s we endeavored to maintain in the case of *Strauder v. West Virginia*, that *discrimination by law against the colored race, because of their color*, in the selection of jurors, is a denial of the equal protection of the laws to a negro when he is put upon trial for an alleged criminal offence against a State, the laws of Virginia

167. *Strauder*, 100 U.S. at 305.

168. *Id*. at 309 (emphasis added).

169. *Id*. at 310 (emphasis added).

170. *See supra* notes 168–169 and accompanying text.

171. Almost 140 years later, the Defendant-Appellant in *Bridgeforth* would argue that in a typical peremptory challenge and *Batson* case, jurors are dismissed upon observation of their skin color, without formally classifying them by race. *See infra* text accompanying notes 380–386. This may or may not have occurred in nineteenth-century jury service cases: Jurors could also have been excluded ante exclusion from jury service rolls. Nevertheless, the language suggests that the Justices viewed "color" as the typical means to differentiate by race.

172. 100 U.S. 313 (1879).

> make no such discrimination. If, as was alleged in the argument, though it does not appear in the petition or record, the officer to whom was intrusted the selection of the persons from whom the juries for the indictment and trial of the petitioners were drawn, disregarding the statute of the State, confined his selection to white persons, and refused to select any persons of the colored race, solely *because of their color*, his action . . . . was the act of the State, and was prohibited by the constitutional amendment.[173]

Again, the Supreme Court's language here suggests that skin color is typically the feature used to identify race. It twice notes that discrimination against the "colored race" occurred "because of their color."[174] Besides "colored race," Justice Strong also used the term "negro"[175] to refer to African Americans.

Justice Strong also wrote the opinion in *Ex parte Virginia*,[176] which also dealt with the exclusion of Black jurors. Here, he did seem to differentiate between race and color. He noted, "an officer charged by law with the selection of jurors . . . did then and there exclude and fail to select as grand and petit jurors certain citizens . . . of *African race* and *black color*."[177] This language suggests a distinction: Justice Strong viewed "African" as a racial background (denoting ancestry) and "black" as skin color.

Other jury service cases show similar language trends. In *Neal v. Delaware*,[178] Justice Harlan framed the issues as "whether . . . citizens of the African race . . . were . . . excluded from service on juries because of their color."[179] Similarly, in *Gibson v. Mississippi*,[180] also written by Justice Harlan, the opinion refers to "exclusion of the *black race* from juries *because of their color* was not less forbidden by law than would be the exclusion from juries, in [s]tates where the blacks have the majority, or the *white race because of their color*."[181] This opinion refers to the "African race"[182] and "African descent,"[183] and it uses the term "colored" in many places.[184] In these opinions, only the term "White" was used for White Americans; conversely, Black Americans were described in many different ways.

173. *Id.* at 321 (emphasis added) (citation omitted).
174. *Id.*
175. *Id.*
176. 100 U.S. 339 (1879).
177. *Id.* at 340 (emphasis added).
178. 103 U.S. 370 (1880).
179. *Id.* at 387.
180. 162 U.S. 565 (1896).
181. *Id.* at 581 (emphasis added).
182. *Id.* at 580.
183. *Id.* at 583–84.
184. *See generally id.*

In all of these cases, race and color were of equal importance when describing discrimination against Black Americans, although the Supreme Court did not appear to draw any legal distinctions between the two terms.[185] Importantly, nothing in these opinions privileges "race" over "color." Equal protection applied equally to both.[186]

Language used in the opinions resembles that of the Reconstruction Framers' floor statements. The different Justices who wrote the opinions used many different terms to describe Black Americans. This may again reflect various understandings of race, color, and the relationship between the two.[187] Implicitly, the Court seemed to recognize that either "race" or "color" could be the basis for discrimination against African Americans. The Justices also seemed to suggest that skin color is often the means to identify and discriminate on the basis of "race" (perhaps denoting ancestry). The infamous case of *Plessy v. Ferguson*[188] further illustrated this understanding of the relationship between race and color.

B. Plessy v. Ferguson *(1896)*

In addition to the jury cases, other well-known early equal protection opinions use "race" and "color" in comparable ways. The tide of equal protection turned for the worse in *Plessy v. Ferguson*, where the infamous "separate but equal" doctrine originated and diminished civil rights protections for African Americans.[189] *Plessy*'s distinction between race and color is also

185. Two other Harlan opinions replicated these different trends to one extent or another. In *Bush v. Kentucky*, Justice Harlan also stated:

> It is sufficient for this assignment to say that the motion was properly overruled, for the reason, amongst others, that the grounds upon which it was rested do not clearly and distinctly show that the officers who selected and summoned the petit jurors excluded from the panel qualified citizens of African descent because of their race or color.

107 U.S. 110, 117 (1883) (emphasis omitted). *In re Wood* uses both "because of their race" and "because of their color." *See generally* 140 U.S. 278 (1891).

Jury service cases in the early twentieth century used these terms in similar fashion. *See generally* Thomas v. Texas, 212 U.S. 278 (1909); Martin v. Texas, 200 U.S. 316 (1906); Rogers v. Alabama, 192 U.S. 226 (1904); Carter v. Texas, 177 U.S. 442 (1900).

186. Another well-known equal protection case during this era was *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), which involved discrimination against Chinese Americans in the operation of laundries. *Yick Wo* only used the terms "race" and "color" in passing and did not contain the linguistic patterns of the jury service cases. The Supreme Court may have viewed the case differently because Chinese Americans rather than African Americans were the plaintiffs. Also, Professor Gabriel Chin argues that *Yick Wo* was actually a due process case, and that it only used the language of equal protection because at the time, it was conventional for courts to consider due process and equal protection claims together. *See* Chin, *supra* note 161.

187. *See supra* note 154.

188. 163 U.S. 537 (1896).

189. *Id.* (upholding separate railroad cars for Black and White passengers).

vague, but language used by the Court still suggests the Justices viewed color as the means of identifying race.

Justice Henry Billings Brown's opinion states that "Plessy . . . was assigned by officers of the company to the coach used for the race to which he belonged, but he insisted upon going into a coach used by the race to which he did not belong."[190] Homer Plessy appeared White: "[P]etitioner was seven eighths Caucasian and one eighth African blood; that the mixture of colored blood was not discernible in him . . . ."[191] Plessy was not and could not have been identified as Black by his skin color. The case was pre-designed as a test challenge to Louisiana's law requiring segregation in railroad cars.[192]

When the *Plessy* majority rejected Homer Plessy's Thirteenth Amendment claim, the Court stated explicitly that color is the means by which races are distinguished:

> A statute which implies merely a legal distinction between the white and colored races—a *distinction which is founded in the color of the two races*, and which must always exist so long as *white men are distinguished from the other race by color*—has no tendency to destroy the legal equality of the two races, or reestablish a state of involuntary servitude.[193]

With regard to the Fourteenth Amendment, the *Plessy* Court opined:

> The object of the amendment was undoubtedly to enforce the absolute *equality of the two races* before the law, but in the nature of things it could not have been intended to abolish *distinctions based upon color*, or to enforce social, as distinguished from political equality, or a *commingling of the two races* upon terms unsatisfactory to either.[194]

The *Plessy* Court here contrasted "equality of the two races" with "a commingling of the two races," but when referring to means of discrimination to be abolished (or not, in this case), it referred to "distinctions based upon color." This may suggest the Justices believed that skin color typically identified a person's race—although ironically, not for Homer Plessy.[195]

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190. *Id*. at 541.

191. *Id*.

192. *See A Brief History of the Evolution of the Case*, PLESSY & FERGUSON FOUND., http://www.plessyandferguson.org/history/ (last visited May 8, 2020) ("Every detail of Plessy's case was strategically planned . . . .").

193. *Plessy*, 163 U.S. at 543 (emphasis added).

194. *Id*. at 544 (emphasis added).

195. *See supra* text accompanying note 191. The terms "African," "colored," and "negro" are also used in the *Plessy* opinion. Also, both "because of color" and "because of race" appear in the opinion. *See generally id.* Justice Harlan's famous dissent in *Plessy* seems to use race and color interchangeably:

> The white race deems itself to be the dominant race in this country. . . . But . . . [o]ur Constitution is color-blind . . . . The law regards man as man, and takes no account of . . .

C. Early Twentieth-Century Cases

Early twentieth century cases show a similar pattern with respect to the use of "race" and "color." The Supreme Court did not make any distinction between "race" and "color" discrimination, though some of its language suggests that the Justices viewed "color" as the primary means to identify race. In *Giles v. Harris*,[196] a voting rights case, plaintiff Jackson Giles, "applied in March, 1902, for registration as a voter, and was refused arbitrarily on the ground of his *color*, together with large numbers of other duly qualified negroes, while all white men were registered."[197] The group being discriminated against is described in race terms—"duly qualified negroes"—but the means of discrimination is again described in terms of color—"refused arbitrarily *on the ground of his color*."[198]

In *Buchanan v. Warley*,[199] Justice William Rufus Day's opinion, the Supreme Court struck down a Kentucky statute that restricted property owners from selling their property based on the buyer's race.[200] Although this ruling was based on the Due Process Clause rather than the Equal Protection Clause, the Supreme Court noted "[t]he Fourteenth Amendment and these statutes enacted in furtherance of its purpose operate to qualify and entitle a colored man to acquire property without state legislation *discriminating against him solely because of color*."[201] The opinion also refers to "compulsory separation of the races on account of *color*."[202] Again, "color" appears to be the means to discriminate by race.

D. Racing Color

These early Fourteenth Amendment cases illustrate how the Supreme Court treated "color" as an anti-discrimination provision in its equal protection jurisprudence. Three trends emerge from these cases:

1. Two Sides of a Coin

First, race and color were twin claims: two sides of a coin. The two were considered together, and color claims did not just apply to a subclass

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> his color . . . . It is, therefore, to be regretted . . . that it is competent for a [s]tate to regulate the enjoyment by citizens of their civil rights solely upon the basis of race.

Id. at 559 (Harlan, J., dissenting). In addition to "white race," Justice Harlan uses the terms "colored race," "black race," and "Chinese race" in his dissent. *See generally id.*

196. 189 U.S. 475 (1903).

197. *Id.* at 482 (emphasis added).

198. *Id.* (emphasis added).

199. 245 U.S. 60 (1917).

200. *Id.*

201. *Id.* at 79 (emphasis added).

202. *Id.* at 81 (emphasis added).

such as dark-skinned African Americans. In all of the opinions, the Supreme Court's use of "race" and "color" overlaps significantly, and the language suggests that they were dual, equivalent provisions to protect against racial discrimination (or not in many of these cases). Both race and color provisions were intended to protect all African Americans (or all "persons of color") from race discrimination. Moreover, these provisions were equally important: The Court's opinions did not privilege one over the other.

2. Different Shades of Black

Second, much like the Reconstruction Era floor debates, there are differences in how the Court refers to White and African Americans. In the cases noted above, White Americans are simply described as "White"—save one reference to "Caucasian" when describing Homer Plessy's descent.[203] Conversely, the opinions use a variety of terms to refer to African Americans: "negro," "black," and "colored."[204] This again reflects the different understandings of Blackness and suggests that race and color anti-discrimination protections together may have captured these various understandings.[205]

3. Equal but Not Separate

Third, although the Justices recognized color discrimination was as important as race discrimination, they did not separate the two in any meaningful way. The Court's language acknowledges discrimination occurred "because of color"[206] or "because of their color"[207] or "on account of color."[208] However, beyond these subtle allusions to color as the distinction between races and the means to identify race, color discrimination simply meant race discrimination, perhaps when accomplished via perception of skin color. This may have reflected how the Justices thought about race, color, and the relationship between the two. There continued to be different understandings of race, some more closely correlated with skin color than others. And despite the attention it paid to both race and color in these early equal protection cases, the Supreme Court never forged an independent jurisprudence around color discrimination.

After *Plessy*, social distinctions based on color (that is, racial distinctions) were permissible under the law. Civil rights advocates would eventually turn the tide and successfully use the Equal Protection Clause to combat

203. Plessy v. Ferguson, 163 U.S. 537, 541 (1896).

204. *See, e.g.*, *supra* text accompanying notes 173–175, 181–184, 197; *supra* note 195.

205. *See supra* note 154.

206. *See supra* text accompanying notes 168–169, 201.

207. *See supra* text accompanying notes 173–174, 179, 181; *supra* note 185.

208. *See supra* text accompanying notes 139, 149, 202.

race discrimination. But as this happened, "color" became subsumed by "race" in equal protection jurisprudence—as the next Part will show.

IV. "COLORBLIND"

Beginning in mid-twentieth century, the Supreme Court began to broaden the scope of equal protection and strike down laws that discriminated against African Americans. In academia, progressive scholars had begun debunking the concept of race as a biological entity and arguing that it was a social construct.[209] Responding to the racist ideology of Nazi Germany, scientists also started to emphasize historical circumstances rather than genetic differences as the basis for racial inequality.[210] The NAACP Legal Defense Fund ("LDF"), led by Thurgood Marshall, employed these ideas to bring challenges to de jure segregation—challenges that would eventually lead to *Brown v. Board of Education I ("Brown I")*.[211] In this context, as World War II progressed and ended, the Court began shifting away from stating that equal protection violations occurred "because of color." The Court's shift here may have reflected the diminished emphasis on physical differences in defining race,[212] in favor of highlighting social inequalities. As this occurred and in the aftermath, some opinions continued to use the term "color" in conjunction with race, but those which did so were often just quoting language from earlier cases.[213] This Part will explore these trends and their implications.

209. *See, e.g.*, ASHLEY MONTAGU, MAN'S MOST DANGEROUS MYTH: THE FALLACY OF RACE (1942); MYRDAL, *supra* note 39.

210. *See* WILLIAM H. TUCKER, THE SCIENCE AND POLITICS OF RACIAL RESEARCH 138–39 (1996) (noting statements made by scientists "in response to the racially based policies of the Third Reich.").

211. 347 U.S. 483 (1954).

212. *See* MYRDAL, *supra* note 39. Even before it became more progressive, the Supreme Court sometimes espoused that race (at least with respect to Whiteness) was not a biological entity, but one defined by common understanding. *See* United States v. Thind, 261 U.S. 204, 209 (1923) ("[T]he term 'race' . . . must be applied to a group of living persons *now* possessing in common the requisite characteristics, not to groups of persons who are supposed to be or really are descended from some remote, common ancestor . . . ."); *id.* at 211 ("The word 'Caucasian' . . . . includes not only the Hindu but some of the Polynesians, (that is the Maori, Tahitians, Samoans, Hawaiians and others), the Hamites of Africa, upon the ground of the Caucasic cast of their features, though in color they range from brown to black." (footnote omitted)).

213. It is important to note, however, that the Court has still often viewed skin color as the defining feature of race. *See* Hernandez v. New York, 500 U.S. 352, 371 (1991) ("It may well be, for certain ethnic groups and in some communities, that . . . skin color[] should be treated as a surrogate for race under an equal protection analysis."). It is likely that by "certain ethnic groups and in some communities," the Court was referring to groups of Black people. At other times, the Court has also noted that "[a]ncestry can be a proxy for race." Rice v. Cayetano, 528 U.S. 495, 514 (2000); *see also id.* at 540 (Stevens, J., dissenting) ("Ancestry surely can be a proxy for race, or a pretext for invidious racial discrimination.").

*A. Pre-*Brown *Cases*

Several cases set the stage for *Brown I*. One landmark case for equal protection jurisprudence came with *Korematsu v. United States*.[214] Although *Korematsu* upheld the internment of Japanese Americans during World War II, it was the first case where the Supreme Court applied strict scrutiny to racial classifications.[215] *Korematsu* was about race, not color: the term "color" does not appear anywhere in the Court's opinion or in the dissents. Perhaps the Justices linked "color" discrimination mainly to African Americans and thus did not consider it in *Korematsu*.[216] But the process of "e-racing" (erasing) color from equal protection jurisprudence had begun.

The legal discourse on race and color changed further in the wake of World War II, when there was a budding ethos to eliminate racial segregation. The NAACP LDF was founded in 1940, one year after Thurgood Marshall was named special counsel of the NAACP.[217] Marshall advocated for a strategy which aimed to overturn the "separate but equal" doctrine, particularly in educational institutions, rather than seeking to equalize facilities.[218] The NAACP Board of Directors endorsed Marshall's integration strategy in 1948.[219] Part of this strategy was to show that skin color is not determinative of race,[220] and that race itself is not a meaningful concept.[221]

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214. 323 U.S. 214 (1944).

215. *See id*. at 216 ("[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny.").

216. "Color" appeared less in other equal protection cases involving Asian Americans. *See supra* note 186 (regarding *Yick Wo v. Hopkins*, 118 U.S. 356 (1886)); *see also* Gong Lum v. Rice, 275 U.S. 78 (1927) (using terms "colored" and "persons of color" but not "color" by itself). Both *Yick Wo* and *Gong Lum* involved Chinese Americans.

217. *See generally* RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY (2004); MARK V. TUSHNET, THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925–1950 (1987).

218. *See* TUSHNET, *supra* note 217, at 114 ("I had assumed that the NAACP really meant business about an all-out attack against segregation, especially in the public school system." (quoting Memorandum from Thurgood Marshall to Roy Wilkins (1947)).

219. *Id.* at 115.

220. *See* Brief for Amici Curiae at 17, Bolling v. Sharpe, 347 U.S. 497 (1954), 1952 WL 47260, at *17–18 (arguing that "mature students of anthropology . . . have shown that no significance whatever can be attached to skin color alone"). *Bolling* was one of the companion cases to *Brown v. Board of Education*.

221. *See id.* (arguing that "the concept of 'race', which has been thought to have a scientific explanation . . . [has] been demonstrated by mature students of anthropology to be largely lacking even such a foundation"). Part I of the amicus brief also differentiated between "ancestry" and "skin color." *See id*. at *5 (arguing that "[s]eparation of school children by *skin color or ancestry* has no warrant in twentieth-century community experience, proper legislative purpose, or scientific understanding and is therefore a meaningless classification violative of the Fifth Amendment" (emphasis added)). This language suggests that LDF differentiated between "race" (framed as ancestry) and "color" (framed as skin color).

This was a successful legal strategy. In 1950, with *Sweatt v. Painter*[222] and *McLaurin v. Oklahoma State Regents*,[223] the Supreme Court respectively struck down de jure segregation at the University of Texas Law School and the University of Oklahoma Graduate School. Unlike *Korematsu*, both of these cases had Black plaintiffs. But neither opinion used the term "color" anywhere within its text. As framed in the *Sweatt* opinion, the two cases "present[ed] different aspects of this general question: To what extent does the Equal Protection Clause of the Fourteenth Amendment limit the power of a state to *distinguish between students of different races* in professional and graduate education in a state university?"[224]

The Court's answer, limited to the facts of each case, was that "the Fourteenth Amendment precludes differences in treatment by the state based upon race."[225] Whether it was the NAACP's strategy,[226] the changing scientific and social views of race,[227] or some other factor, there was a diminished emphasis on color.

B. Brown v. Board of Education I

LDF's integration strategy peaked with *Brown v. Board of Education I*, which struck down de jure segregation in public schools.[228] Chief Justice Earl Warren's unanimous opinion does not contain the term "color" anywhere in the main text; he only used the term "race."[229] Footnote 13 of *Brown I* poses the question of whether the Supreme Court can "permit an effective gradual adjustment . . . from existing segregated systems to a system not based on *color* distinctions."[230] As part of its strategy to promote integration, LDF argued that "color distinctions" were not a viable reason for segregation and were not even the underlying motivation behind it. In his oral argument

222. 339 U.S. 629 (1950).

223. 339 U.S. 637 (1950).

224. *Sweatt*, 339 U.S. at 631 (emphasis added). The *Sweatt* opinion only used the term "Negro" to refer to African Americans: It had no references to "black," "African," or "colored." *See generally id.*

225. *McLaurin*, 339 U.S. at 642. The *McLaurin* opinion used the term "colored," but it used the term "Negro" more frequently, and it did not use terms "black" or "African." *See generally id.*

226. *See supra* notes 220–221 and accompanying text.

227. *See supra* note 209.

228. 347 U.S. 483 (1954). In *Brown v. Board of Education II*, the Supreme Court ordered the remedy to be implemented "with all deliberate speed[,]" thus extending the timeline for actual desegregation of schools. 349 U.S. 294, 301 (1955).

229. The *Brown I* opinion does use the terms "colored children" and "Negro." 349 U.S. 294 (1955). The opinion does not use the term "African," and it only uses "black" when quoting the *Slaughter-House* cases and *Strauder*. *Id.* at 490 n.5.

230. *Id*. at 496 n.13 (emphasis added). This language may have been taken from *Plessy*. *See supra* notes 193–195 and accompanying text.

in *Brown I*, Thurgood Marshall rhetorically asked why African Americans were subject to segregation. He answered:

> It can't be because of slavery in the past . . . . [*i]t can't be color* because there are Negroes as white as the drifted snow, with blue eyes, and they are just as segregated . . . . [t]he only thing can be . . . [Black Americans] shall be kept as near [slavery] as is possible.[231]

Marshall's goal here was to highlight the social meaning of segregation while arguing that physical differences such as skin color were unimportant. In fact, during the Jim Crow era, mixed-race individuals were classified as "Black" or "colored"[232] and subject to segregation regardless of their skin color: Homer Plessy was the hallmark example.[233] Some states, such as Mississippi, defined "persons of mixed blood and any appreciable amount of Negro blood" as "colored," even if they were very light-skinned.[234]

Consequently, addressing "color" discrimination specifically was not central to LDF's goal. Rather, Marshall argued that *Plessy*'s "separate but equal" doctrine[235] was not reasonable because segregation itself created social distinctions, and these rather than physical differences were the cause of racial inequality.[236] In *Brown I* and its other hallmark civil rights cases, LDF brought facial challenges to segregationist policies, focusing on systemic exclusion by race, not on identification of individuals by skin color.

This was an important and effective strategy. Nevertheless, buried here were the immediate manifestations of discrimination, such as racial profiling[237] and peremptory challenges to jurors,[238] which occur precisely through visual observation of skin color and other physical differences.

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231. A. LEON HIGGINBOTHAM, JR., SHADES OF FREEDOM 82–83 (1996) (citing ARGUMENT: THE ORAL ARGUMENT BEFORE THE SUPREME COURT IN BROWN V. BOARD OF EDUCATION OF TOPEKA, 1952–55, at 239–40 (Leon Friedman ed., 1969)) (emphasis added).

232. *See* STATES' LAWS ON RACE AND COLOR, *supra* note 18.

233. *See supra* Section III.B.

234. STATES' LAWS ON RACE AND COLOR, *supra* note 18, at 237 (defining "colored" as "includ[ing] not only Negroes but persons of mixed blood having any appreciable amount of Negro blood." (citing Moreau v. Grandich, 75 So. 434 (1917))).

235. Plessy v. Ferguson, 163 U.S. 537 (1896).

236. *Cf. supra* note 231 and accompanying text.

237. *See infra* Part VII.B.

238. *See infra* text accompanying notes 385–386.

*C. Post-*Brown *Cases*

After *Brown I*, there was still "color" language in the Supreme Court's equal protection rulings, and even reference to skin color as a means to determine race.[239] In *McLaughlin v. Florida*,[240] the Court struck down, on equal protection grounds, a Florida statute which criminalized cohabitation by unmarried interracial couples. Justice Potter Stewart wrote a concurring opinion, joined by Justice William Douglas, which stated that he could not

> conceive of a valid legislative purpose under our Constitution for a state law which *makes the color of a person's skin the test* of whether his conduct is a criminal offense. . . . [A]ppellants were convicted, fined, and imprisoned under a *statute which made their conduct criminal only because they were of different races*. . . . [I]t is simply not possible for a state law to be valid under our Constitution which makes the criminality of an act depend upon the race of the actor.[241]

Justice Stewart's opinion is significant here for two reasons. First, it denotes "color of a person's skin" as the "test" for race, thus referencing color as the visual means to identify race. Justice Stewart may have underscored this point in *McLaughlin* because one of the appellants' claims was that the Florida statute violated the Due Process Clause, due to its unconstitutionally vague definition of race.[242] The appellants in *McLaughlin* also argued that the method for ascertaining race in this case was physical appearance incommensurate with the statutory definition of race that is rooted in ancestry:

> At the trial one of the arresting officers was permitted, over objection, to state his conclusion as to the race of each appellant based on his observation of their physical appearance. Appellants claim that the statutory definition is circular in that it provides no independent means of determining the race of a defendant's ancestors and that testimony based on appearance is impermissible because not related to any objective standard.[243]

The Supreme Court did not reach this due process claim, deciding the case instead on broader equal protection grounds.

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239. *See supra* note 213.

240. 379 U.S. 184 (1964).

241. *Id.* at 198 (Stewart, J., concurring) (emphasis added).

242. *Id.* at 187 n.6. (majority opinion) (defining "Negro" to "include every person having one-eighth or more of African or negro blood." (quoting FLA. STAT. ANN. § 1.01(6)). *McLaughlin* employed the range of terms used to refer to African Americans, as it dealt with a Florida statute that contained these definitions. *Id.* (stating that "Fla. Stat. Ann. § 1.01(6) provides: 'The words "negro," "colored," "colored persons," "mulatto" or "persons of color," when applied to persons, include every person having one-eighth or more of African or negro blood.'").

243. *Id.* at 187–88 n.6.

Second, Justice Stewart's concurrence in *McLaughlin* was quoted by the Supreme Court three years later in Chief Justice Earl Warren's majority opinion in *Loving v. Virginia*,[244] when the Court struck down a Virginia statute which outlawed interracial marriage. This quote was the only reference to "color" in the *Loving* opinion.[245]

These cases show that beginning around World War II, "color" was subsumed by "race" under equal protection doctrine.[246] This trend was visible through the late twentieth and early twenty-first centuries. Even within the modern cases involving the exclusion of Black jurors—the very type of cases where color had appeared frequently a century earlier—the term largely disappeared from the text of Supreme Court opinions.

D. Modern Jury Service Cases

Recent Supreme Court opinions involving racial exclusion from jury service most clearly demonstrate the disappearance of color. These cases contain very few references to "color," even though "color" language was used frequently in the nineteenth- and early-twentieth-century jury service

244. 388 U.S. 1, 11 (1967) ("At the very least, the Equal Protection Clause demands that racial classifications . . . be subjected to the 'most rigid scrutiny' . . . . [T]wo members of this Court have already stated that they 'cannot conceive of a valid legislative purpose . . . which makes the *color of a person's skin the test* of whether his conduct is a criminal offense." (emphasis added) (quoting *McLaughlin*, 379 U.S. at 198 (Stewart, J., concurring))).

245. Ironically, Justice Stewart himself wrote a separate concurrence in *Loving*, where he quoted a different part of his *McLaughlin* concurrence—a part that used the term "race" but not the term "color." *See id.* at 13 (Stewart, J., concurring) ("[I]t is simply not possible for a state law to be valid under our Constitution which makes the criminality of an act depend upon the *race of the actor*." (emphasis added) (quoting *McLaughlin*, 379 U.S. at 184, 198 (Stewart, J., concurring))). Perhaps Justice Stewart recognized that skin color as a means to identify race was directly at play in *McLaughlin* but was not always at play in Virginia statutes defining race—because race here was defined in terms of ancestry rather than skin color. *See id.* at 5 n.4. (noting that under Virginia Code section 20-54 (1960), "the term 'white person' shall apply only to such person as has no trace whatever of any blood other than Caucasian; but persons who have one-sixteenth or less of the blood of the American Indian and have no other non-Caucasic blood shall be deemed to be white persons[,]" and under Virginia Code section 1-14 (1960), "[e]very person in whom there is ascertainable any Negro blood shall be deemed and taken to be a colored person, and every person not a colored person having one fourth or more of American Indian blood shall be deemed an American Indian; except that members of Indian tribes . . . having one fourth or more of Indian blood and less than one sixteenth of Negro blood shall be deemed tribal Indians.").

246. There was a similar pattern in Fifteenth Amendment cases decided by the Supreme Court. In *Guinn v. United States*, Chief Justice Edward Douglass White noted that the accusation was that "certain election officers . . . conspired . . . to deprive certain negro citizens, on account of their race and color, of a right to vote." 238 U.S. 347, 354 (1915). Both "race" and "color" are used at several places in the opinion. *See generally id.* Forty-five years later, in *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), Justice Frankfurter's opinion used only the term "race": It did not use the term "color" at all, although the *Gomillion* opinion did refer to "colored voters" and "colored citizens." *See generally id.*

cases,[247] and even though skin color has often been the means used to identify race when Black jurors are excluded.[248] In *Batson v. Kentucky*,[249] the basis for color-based challenge in *People v. Bridgeforth*,[250] the Court's only reference to "color" is a quote from *Strauder v. West Virginia*.[251] Later, in *Georgia v. McCollum*,[252] *Purkett v. Elem*,[253] *Miller-El v. Cockrell*,[254] *Johnson v. California*,[255] *Miller-El v. Dretke*,[256] *Rice v. Collins*,[257] *Snyder v. Louisiana*,[258] *Rivera v. Illinois*,[259] and *Foster v. Chatman*,[260] the Supreme Court reaffirmed race-based *Batson* challenges without a single use of the term "color" in any of the opinions.[261] In its most recent *Batson* case, *Flowers v. Mississippi*,[262] the Court's various opinions used the term "color" three times, once quoting the Civil Rights Act of 1875 and twice quoting *Strauder*.[263] In contrast, the term "race" appeared 122 times in the *Flowers* opinions.[264]

E. "E-racing" Color

Color was thus "e-raced": subsumed by race in equal protection cases. Some of the Supreme Court's later equal protection opinions have used the

247. *See supra* Section III.A.

248. *See infra* text accompanying notes 380–386.

249. 476 U.S. 79 (1986); *see also supra* note 3.

250. 69 N.E.3d 611, 613–14 (N.Y. 2016); *see also* supra note 3.

251. *Baston*, 476 U.S. at 87 (quoting Strauder v. West Virginia, 100 U.S. 303, 309 (1879)).

252. 505 U.S. 42 (1992). The *McCollum* opinion did use the term "color of state law" but not "color" as denoting a visual quality.

253. 514 U.S. 765 (1995).

254. 537 U.S. 322 (2003).

255. 545 U.S. 162 (2005).

256. 545 U.S. 231 (2005).

257. 546 U.S. 333 (2006).

258. 552 U.S. 472 (2008).

259. 556 U.S. 148 (2009).

260. 136 S. Ct. 1737 (2016).

261. *See generally supra* notes 252–260. All of these opinions did use the term "race"—often numerous times. *Id.* There were other opinions which used "color" sparingly or in a different context. *See* Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991) (four uses of "color" or "skin color" and thirty-six uses of "race"); Hernandez v. New York, 500 U.S. 352 (1991) (two uses of "skin color" and fifty uses of "race"); Powers v. Ohio, 499 U.S. 400 (1991) (eight uses of "color" and eighty-one uses of "race"). *Edmonson* also used the term "color of state law" to denote the appearance of authority, not race or skin color. *See generally id.*

262. 139 S. Ct. 2228 (2019).

263. *See id.* at 2238–39.

264. *See generally id.*

term "color," but these opinions are generally just quoting prior cases.[265] Despite Justice Thurgood Marshall's protestations,[266] the Supreme Court sometimes continued to espouse that skin color could be a proxy for race.[267] Nevertheless, because the Court recognized only racism and not colorism, "color" had no independent meaning and largely disappeared in the Court's equal protection jurisprudence.

The Supreme Court "e-raced" color in another way: It adopted a "color-blind" ideology, rooted in an anticlassification view of civil rights.[268] Although race was still there, it became neutral and even antithetical to civil rights. Color did not exist in equal protection doctrine, until it reemerged in *Bridgeforth*. But while color became subsumed by race under equal protection, a different type of color-based anti-discrimination jurisprudence emerged under modern civil rights statutes. As the next Part shows, this jurisprudence did focus specifically on colorism and distinguish it from racism.

265. *See, e.g.*, *supra* notes 249–251 and accompanying text. Also, it is sometimes obvious the use of "color" does not denote observation of skin color, but just a metaphor to denote race. *See, e.g.*, University of California Regents v. Bakke, 438 U.S. 265, 318 (1978) (Powell, J., concurring) ("The applicant . . . will not have been foreclosed from all consideration for that seat simply because he was not the right color . . . ."); *id.* at 320 ("[W]hen a State's distribution of benefits or imposition of burdens hinges on ancestry or the color of a person's skin . . . ."). *Bakke* was a case involving affirmative action in higher education: Universities typically determine an applicants' race by self-identification on an application, not by observing their skin color. *Id.*

266. During his years on the United States Supreme Court, Justice Marshall remained keen to the distinction between race and skin color. He raised the point in the oral arguments for *Shaare Tefila Congregation v. Cobb*. 481 U.S. 615 (1987). *See* Oral Argument at 38:39, 38:52, Shaare Tefila Congregation v. Cobb, 481 U.S. 615 (1987) (No. 85-2156), https://www.oyez.org/cases/1986/85-2156 (Justice Marshall noting that his father was "white with blond hair and blue eyes[]" but that "[h]e was a Negro"). Here, Justice Marshall was reacting to Respondent's Counsel's contention that "one obvious way . . . [to] identif[y] . . . a non-white person would be by reference to immutable physical characteristics such as skin color." *Id.* at 38:25.

Later, Justice Marshall noted that he "just never liked" using the term "Black." *Justice Marshall, on 'Afro-American': Yes*, N.Y. TIMES (Oct. 17, 1989), https://www.nytimes.com/1989/10/17/us/justice-marshall-on-afro-american-yes.html. Although he did use "black" in some of his later opinions, Justice Marshall initially used "Negro" and then came to prefer "Afro-American." *Id.*

267. *See* Hernandez v. New York, 500 U.S. 352, 371 (1991) ("It may well be, for certain ethnic groups and in some communities, that . . . skin color[] should be treated as a surrogate for race under an equal protection analysis.").

268. There is a general debate over whether American civil rights law, including equal protection, should espouse an antisubordination view or an anticlassification view. *See generally* Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9, 9–10 (2003) (defining antisubordination as the view "that law should reform institutions and practices that enforce the secondary social status of historically oppressed groups," and defining anticlassification as the view "that the government may not classify people either overtly or surreptitiously on the basis of a forbidden category").

V. "COLORABLE" CLAIMS

In modern civil rights law, color discrimination typically refers only to bias targeting skin color.[269] Most often, this is framed as a within-group phenomenon: for example, light-skinned Black Americans discriminating against dark-skinned Black Americans, or vice versa.[270] Such claims have been recognized under civil rights statutes. Unlike early equal protection jurisprudence, color is separate from race in these modern claims. However, color discrimination claims are only viable when race or national origin discrimination is not applicable.[271]

This Part examines how modern color discrimination is legally defined and differentiated from race discrimination. It considers the legislative history of Title VII of the Civil Rights Act of 1964, which protects against employment discrimination and has been the vehicle for most modern color discrimination claims. It also examines how the Equal Employment Opportunity Commission ("EEOC"), which is responsible for enforcement of Title VII, has defined color discrimination and race discrimination. Subsequently, this Part looks at color discrimination cases under Title VII, as well as the small number of color claims brought under other civil rights statutes.

A. Defining Modern Color Discrimination

Various civil rights statutes, many of which contain the terms "race" and "color," have been the primary vehicles for the development of modern color discrimination claims. The Civil Rights Act of 1964 contains both terms, right next to each other and separated by a comma, in Titles II, III, IV, VI, VII, VIII, IX, and X.[272] This language may have been parroted from the original version of the Civil Rights Act of 1866.[273]

"Color" was not defined in the Civil Rights Act of 1964. Arkansas Senator John Little McClellan asked his colleagues twice about the definition of

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269. *See, e.g.*, Baynes, *supra* note 9, at 133 ("A dark-skinned person of color is likely to encounter more discrimination than his/her light-skinned counterpart." (footnote omitted)).

270. *See* WALKER, *supra* note 46, at 290 (noting that "[c]olorism . . . [is] preferential treatment of same-race people based solely on their color"). *But see* Jones, *supra* note 9, at 1498–99 ("It is important to note that colorism operates both intraracially and interracially." (emphasis omitted)).

271. Banks, *supra* note 9, at 1727.

272. Pub. L. No. 88–352, 78 Stat. 241. Only Titles I, V, and XI lack the terms "race" and "color." *Id.* Also, Voting Rights Act of 1965 (VRA) states, in part: "[n]o voting qualification or prerequisite . . . shall be imposed or applied . . . to deny or abridge the right of any citizen of the United States to vote on account of race or color . . . ." Pub. L. No. 89–110, 79 Stat. 437 (codified as amended at 42 U.S.C. § 1973 (1976)). Other civil rights laws also contained the terms "race" and "color," but these are the most well-known.

273. Ironically, Section 1981, the modern iteration of that Act, does not contain the language. *See infra* text accompanying note 319.

"color" within the bill.[274] Senator John Tower of Texas acknowledged that "[t]he term is ambiguous"[275] and further stated that "we get into a real problem when we go into questions of color, religion, sex, or national origin. There can be all sorts of discussions along those lines."[276] Representative Timothy Abernethy of Mississippi asked explicitly whether Title VII would make it illegal for "an employer not to hire a person on the ground of race—that is, color . . . because the skin of the applicant is too dark?"[277] Representative Abernethy also referred to intraracial discrimination, inquiring whether the statute would apply "where light-skinned Negroes refuse to hire Negroes of dark skin."[278] Representative Emanuel Celler replied in the affirmative to both questions.[279]

Professor Kate Sablosky Elengold notes that there was confusion in separating race from color and distinguishing between race discrimination and color discrimination.[280] Ultimately, "color" was not defined in the statute, perhaps because legislators felt that the principles underlying the statute would allow courts or administrative agencies to determine its meaning.[281] After several cases involving color discrimination,[282] this is what happened. Most skin color discrimination claims have occurred under Title VII's prohibition on employment discrimination,[283] and the Equal Employment Opportunity Commission has set forth the following definition:

> [C]olor discrimination occurs when a person is discriminated against based on the lightness, darkness, or other color characteristic of the person. Even though race and color clearly overlap, they are not synonymous. Thus, color discrimination can occur between persons of different races or ethnicities, or between persons of the same race or ethnicity.[284]

The EEOC's definition of race discrimination is broader: It can involve not only skin color, but a number of different characteristics, including an-

274. 110 CONG. REC. 7772 (1964); *see also* Elengold, *supra* note 9, at 12–13.

275. 110 CONG. REC. 7772.

276. *Id.*

277. 110 CONG. REC. 2553 (1964); *see also* Elengold, *supra* note 9, at 14.

278. 110 CONG. REC. 2554.

279. *Id.*

280. Elengold, *supra* note 9, at 14–15.

281. *Id.* at 15.

282. *See infra* Part V.B.

283. 42 U.S.C. § 2000e–2000e-17 (2012).

284. U.S. EQUAL EMP'T OPPORTUNITY COMM'N, EEOC COMPLIANCE MANUAL § 15-III (2006) (footnotes omitted), http://www.eeoc.gov/policy/docs/race-color.html#III.

cestry, physiognomy and appearance, culture, perception (that is, discrimination based on perceived, rather than actual, race),[285] and association (that is, discrimination based on having interracial marriages, friendships, etc.).[286]

The EEOC's definitions of race and color discrimination are not binding on the federal courts.[287] Nevertheless, courts have also adopted a narrow view of color discrimination, treating it as subordinate to race discrimination.[288] Color discrimination is not a viable cause of action if intent to discriminate by race can be shown.[289] Additionally, "color" discrimination has only been applied in situations where a particular color-based subgroup (e.g., dark-skinned African Americans) is targeted.

B. Modern Color Discrimination Claims

Under modern civil rights statutes, color discrimination has typically come into play in two situations: (1) When the plaintiff's race is ambiguous and a national origin claim is not viable; and (2) If discrimination occurs only against a member of a racial subclass, such as a dark-skinned African American.[290] Courts have recognized both intraracial color claims (for example, a light-skinned Black defendant discriminating against a dark-skinned Black plaintiff) and interracial color claims (for example, a White defendant discriminating against dark-skinned African Americans but not light-skinned African Americans). Such color claims have been brought under Title VII of the Civil Rights Act of 1964, Title 42, sections 1981 and 1982 of the United States Code, and the Fair Housing Act.[291]

1. Title VII

Most of the jurisprudence on color discrimination has occurred under the Civil Rights Act of 1964[292]—specifically prohibition of employment discrimination under Title VII. Although Title VII covers both interracial and intraracial discrimination, most Title VII color claims have been intraracial—between members of the same racial group.[293] In *Felix v. Marquez*,[294] a 1981 case between two Puerto Rican citizens, the United States District Court for

285. *Id.*

286. *Id.*

287. Kaili Moss, *Black Hair(tage): Career Liability or Civil Rights Issue?*, 25 WM. & MARY J. RACE, GENDER & SOC. JUST. 191, 209 (2018) (citing EEOC v. Catastrophe Mgmt. Sols., 852 F.3d 1018, 1022 (11th Cir. 2016)).

288. *See infra* Part V.B.

289. Banks, *supra* note 9, at 1727.

290. *Id.*

291. 42 U.S.C. § 3604(a)–(b) (2012).

292. *Id.* § 2000e–2000e-17.

293. *See* Banks, *supra* note 9, at 1711–12.

294. No. 78-2314, 1981 WL 275, at *1 (D.D.C. Mar. 26, 1981).

the District of Columbia noted that the "case presents, for perhaps the first time in a federal court, an allegation of color discrimination that is not subordinated to a more familiar claim of racial discrimination."[295] In denying the Defendant's motion for summary judgment, the *Felix* court recognized a claim of color discrimination,[296] stating: "Color may be a rare claim, because color is usually mixed with or subordinated to claims of race discrimination, but considering the mixture of races and ancestral national origins in Puerto Rico, color may be the most practical claim to present."[297] Here, the court acknowledges that color discrimination claims are often subsumed within race discrimination claims—an observation that applies broadly to all laws that include color.[298] Importantly though, the *Felix* court recognizes that color discrimination claims can themselves be viable options, particularly when race, national origin, and other statuses are undetermined or subservient to color.

Professor Cynthia Nance notes that more color claims have been brought by dark-skinned plaintiffs of all races than by light-skinned plaintiffs.[299] In the federal district courts, there have been cases involving dark-skinned plaintiffs from a variety of backgrounds: *Hill v. Textron Automotive Industries*[300] (relatively dark-skinned White), *Brack v. Shoney's, Inc.*[301] (Black), and *Sidique v. University*[302] and *Munshi v. Alliant Techsystems, Inc.*[303] (Asian Indian). Nevertheless, one of the more widely cited Title VII color cases involved a light-skinned plaintiff. In *Walker v. Secretary of the Treasury, IRS*,[304] a light-skinned Black employee brought suit against her dark-skinned Black supervisor.[305] The *Walker* court recognized a Title VII color claim, contending that "statutes and case law repeatedly and distinctly refer to race and color. . . . [and] Congress and the Supreme Court refer to race and color in the same phrase," both of which imply that race and color are distinct.[306] Unlike the early equal protection cases, courts have distinguished between race and color discrimination in modern civil rights law.

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295. *Id.* at *11.

296. Felix v. Marquez, No. 78-2314, 1980 WL 242, at *1 (D.D.C. Sept. 11, 1980).

297. *Id.*

298. *Id.*

299. Nance, *supra* note 9, at 465.

300. 160 F. Supp. 2d 179 (D.N.H. 2001).

301. 249 F. Supp. 2d 938 (W.D. Tenn. 2003).

302. No. 02-365, 2003 WL 22290334, at *1 (W.D. Pa. Oct. 3, 2003).

303. No. CIV. 99-516PAMJGL, 2001 WL 1636494, at *1 (D. Minn. June 26, 2001). For other Title VII color discrimination claims involving South Asian Americans, see Banks, *supra* note 77.

304. 713 F. Supp. 403 (N.D. Ga. 1989), *aff'd*, 953 F.2d 650 (11th Cir. 1992).

305. *Id.* at 404–05.

306. *Id.* at 406 (emphasis omitted). More recently, *Jones v. Jefferson Parish* also recognized a Title VII color discrimination claim by a light-skinned Black plaintiff against a dark-skinned Black employer. No. 12-2191, 2013 WL 871539, at *1 (E.D. La. Mar. 8, 2013).

Until recently, only federal district courts had explicitly recognized color claims.[307] This changed in 2015, with the United States Court of Appeals for the Fifth Circuit ruling in *Etienne v. Spanish Lake Truck & Casino Plaza, L.L.C.*[308] The plaintiff, a dark-skinned Black woman, was denied a promotion to a managerial position.[309] The casino's general manager and his wife repeatedly told another employee that the plaintiff was "too black to do various tasks at the casino."[310] The general manager also stated that he would not allow "a dark skinned black person [to] handle any money."[311] The district court granted summary judgment to the defendant, largely because most of the general managers at the casino were Black.[312] The Fifth Circuit reversed, noting that: (1) Recognition of color discrimination is "unequivocal" in the text of Title VII;[313] and (2) the defendant's statements were direct evidence of color discrimination.[314]

Some Title VII color claims have also sometimes resulted in settlements.[315] However, courts have dismissed many color claims,[316] and Professor Taunya Lovell Banks argues that it is difficult for plaintiffs to prevail even in those claims that are recognized.[317]

307. Benjamin L. Riddle, *"Too Black": Waitress's Claim of Color Bias Raises Novel Title VII Claim*, NAT'L L. REV. (Feb. 25, 2015), https://www.natlawreview.com/article/too-black-waitress-s-claim-color-bias-raises-novel-title-vii-claim ("[T]he U.S. Court of Appeals for the Fifth Circuit rul[ing] in *Etienne v. Spanish Lake Truck & Casino Plaza, LLC* . . . [was] the first time that a 'color' claim under Title VII succeeds as a separate and distinct claim from 'race' in Federal Court at the appellate level . . . ."). Previously, the Seventh Circuit had noted in dicta that Title VI and Title VII allow claims of color discrimination. *See* Williams v. Wendler, 530 F.3d 584, 587 (7th Cir. 2008) ("Title VI, like Title VII, forbids discrimination on the basis of 'color' as well as on the basis of 'race.' Light-skinned blacks sometimes discriminate against dark-skinned blacks, and vice versa, and either form of discrimination is literally color discrimination.").

308. 778 F.3d 473 (5th Cir. 2015).

309. *Id.* at 474–75, 477 n.4.

310. *Id.* at 475.

311. *Id.*

312. *Id.* at 475 n.2.

313. *Id.*

314. *Id.* at 477.

315. EEOC v. Pioneer Hotel, Inc., Case No. 2:11-CV-01588-LRH-GWF (D. Nev. Apr. 28, 2015) (Notice of Settlement); EEOC v. Rugo Stone, LLC, No. 1:11-cv-00915-TSE-TCB (E.D. Va. Mar. 6, 2012) (Consent Decree); EEOC v. Applebee's Neighborhood Bar & Grill, Case No. 1:02-CV-00829-CAM (N.D. Ga. July 10, 2003) (Consent Decree).

316. *See* Banks, *supra* note 9, at 1727.

317. *Id.*

2. Section 1981

Section 1981 is derived from Section 1 of the Civil Rights Act of 1866, which was reenacted by the Enforcement Act of 1870.[318] Unlike the 1866 Act, the reenacted version does not contain the words "race" or "color," but rather states:

> All persons within the jurisdiction of the United States shall have the same right . . . to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by *white citizens*, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.[319]

Section 1981 "lay largely dormant for nearly a century" but was revived during the Civil Rights era, in the late 1960s.[320]

Professor Banks notes that the initial Section 1981 color claims involved Latinx plaintiffs,[321] probably because they did not fit neatly into existing racial categories,[322] and because Section 1981, unlike Title VII, did not protect against national origin discrimination.[323] In the 1977 case of *Vigil v. City of Denver*,[324] the United States District Court for the District of Colorado upheld such a color claim, stating that "skin color may be a basis for discrimination" against Mexican Americans, even though skin color varied widely within the group.[325] Professor Banks analyzes how courts disallowed other color claims by Latinx and Black plaintiffs,[326] usually recognizing such claims only when the plaintiff's race was ambiguous and color or ethnicity could serve as a substitute.[327] According to Professor Banks, this served particularly to disadvantage Black plaintiffs.[328]

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318. Ch. 114, 16 Stat. 140 (1870); *see also* Theodore Eisenberg & Stewart Schwab, *The Importance of Section 1981*, 73 CORNELL L. REV. 596, 596 n.1 (1988) (noting that Section 1981's "statutory ancestor" was the Civil Rights Act of 1866).

319. 42 U.S.C. § 1981(a) (2012) (emphasis added).

320. Eisenberg & Schwab, *supra* note 318, at 596 n.1.

321. Banks, *supra* note 9, at 1724–25.

322. *Id*.

323. *Id.* at 1725.

324. No. 77-F-197, 1977 WL 41, at *1 (D. Colo. May 23, 1977).

325. *Id*. at *1; *see also* Gonzalez v. Stanford Applied Eng'g, Inc., 597 F.2d 1298, 1300 (9th Cir. 1979) (finding that "prejudice towards those of Mexican descent having a skin color not characteristically Caucasian must be said to be racial prejudice").

326. Banks, *supra* note 9, at 1727.

327. *Id.*

328. *See id*. (citing Sere v. Bd. of Trs. of Univ. of Ill., 628 F. Supp. 1543, 1546 (N.D. Ill. 1986) (disallowing Section 1981 color discrimination claim by Nigerian plaintiff), *abrogated by* Jordan v. Whelan Sec. of Ill., Inc., 30 F. Supp. 3d 746, 753 (N.D. Ill. 2014)); *see also* Waller v. Int'l Harvester

Nevertheless, in *Saint Francis College v. Al-Khazraji*,[329] the Supreme Court noted that Section 1981 "reaches discrimination against an individual 'because he or she is genetically part of [a] . . . physiognomically distinctive sub-grouping of *homo sapiens*.'"[330] In *Jordan v. Whelan Security of Illinois, Inc.*,[331] the United States District Court for the Northern District of Illinois cited *Saint Francis College* and recognized a Section 1981 color claim by a light-skinned African-American plaintiff.[332] In doing so, the district court abrogated its own earlier rulings which had not recognized similar claims.[333]

3. Fair Housing Act

In *Rodriguez v. Gattuso*,[334] the United States District Court for the Northern District of Illinois recognized color discrimination under the Fair Housing Act[335] and section 1982.[336] The plaintiff, a dark-skinned Latino, sought to rent an apartment from the defendant, but after the two met, defendant told him it was unavailable. The plaintiff's wife, who was a light-skinned Latina, then met with the defendant, who told her the apartment was available. However, upon learning that the plaintiff was her husband, the defendant recanted and again claimed that the apartment was unavailable. The *Rodriguez* court reasoned that "the very inclusion of 'color' as a separate term in addition to 'race'"[337] implied that color could be a separate, independent claim under the Fair Housing Act—even if "[m]ost often 'race' and 'color' discrimination are viewed as synonymous."[338]

Co., 578 F. Supp. 309, 314 (N.D. Ill. 1984) (holding that "Section 1981 applies only to race discrimination, not to discrimination on the basis of color"), *abrogated by* Jordan v. Whelan Sec. of Ill., Inc., 30 F. Supp. 3d 746, 753 (N.D. Ill. 2014).

329. 481 U.S. 604 (1987).

330. *Id.* at 613 (quoting Al-Khazraji v. Saint Francis College, 784 F.2d 505, 517 (3d Cir. 1986)).

331. 30 F. Supp. 3d 746 (N.D. Ill. 2014).

332. *Id.* at 753.

333. *See supra* note 328.

334. 795 F. Supp 860, 864 (N.D. Ill. 1992).

335. *See* Fair Housing Act, Pub. L. No. 90–284, § 804, 82 Stat. 81, 83 (1968) (codified as amended at 42 U.S.C. § 3604(a)–(b) (2012)) (noting that it is unlawful "to refuse to sell or rent . . . to any person because of race, color, religion, sex, familial status, or national origin . . . [t]o discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling . . . because of race, color, religion, sex, familial status, or national origin").

336. 42 U.S.C. § 1982 (2012).

337. *Rodriguez*, 795 F. Supp. at 865.

338. *Id.*; *see also* Walker v. Sec'y of the Treasury, IRS, 713 F. Supp. 403 (N.D. Ga. 1989), *aff'd*, 953 F.2d 650 (11th Cir. 1992). For further discussion of *Walker*, see *supra* text accompanying notes 304–306.

C. Separate but Not Equal

Color discrimination claims under modern civil rights statutes differ from those in early equal protection claims in two basic ways. First, modern color claims are separate: "color" means skin color, differentiated from race. However, although they have an independent identity, modern color claims are not on equal ground with race claims. Rather, they become applicable only when race or national origin claims are not viable.

All of the color claims under modern civil rights statutes have involved *plaintiffs who belonged to one particular race-color subgroup* (e.g., dark-skinned African Americans). However, a different type of color claim emerged from state equal protection in *People v. Bridgeforth*: a multiracial color class claim which involved a *group of individuals of different races*. The next Part examines *Bridgeforth* in depth.

VI. BRIDGING THE COLOR LINE

With its 2016 ruling in *People v. Bridgeforth*,[339] the New York Court of Appeals became the first court to recognize color discrimination as a viable basis for *Batson* challenges and the first court to recognize a multiracial color class—a protected class of individuals from different racial backgrounds based solely on the dark skin color of the members.[340] *Bridgeforth* revived color in equal protection doctrine, albeit only under New York's Constitution.

This Part examines the *Bridgeforth* ruling, highlighting the novel recognition of a multiracial color class. It first reviews New York's Equal Protection Clause and Civil Rights Law Section 13, which were the laws at play in *Bridgeforth*. Next, it gives the factual background to *Bridgeforth*. It then highlights the State's argument against the recognition of a multiracial color class and Bridgeforth's argument for such recognition. Finally, this Part examines the New York Court of Appeals ruling and its reasoning in siding with Bridgeforth.

A. New York's Equal Protection Clause and Civil Rights Law Section 13

New York previously adopted *Batson*'s doctrine for the Equal Protection Clause of its State Constitution.[341] New York's Equal Protection Clause reads:

339. 69 N.E.3d 611 (N.Y. 2016).

340. *Id.* at 617.

341. People v. Luciano, 890 N.E.2d 214, 216–17 (N.Y. 2008); *see also* People v. Kern, 554 N.E.2d 1235, 1240–41 (N.Y. 1990).

> No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color, creed or religion, be subjected to any discrimination in his or her civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state.[342]

New York Civil Rights Law section 13 also explicitly lists both "race" and "color" as a protected classes:

> No citizen of the state possessing all other qualifications which are or may be required or prescribed by law, shall be disqualified to serve as a grand or petit juror in any court of this state on account of race, creed, color, national origin or sex . . . .[343]

Until *Bridgeforth* however, no case brought under these laws had focused on color.

B. Factual Background to People v. Bridgeforth

Defendant-Appellant Joseph Bridgeforth ("Bridgeforth") was a dark-skinned African American who was charged with three counts of robbery[344] and convicted by a jury at trial. During voir dire, the prosecutor used peremptory challenges to strike a number of jurors, including four dark-skinned African-American women[345] and one dark-skinned woman of South Asian (Asian Indian) descent who the parties believed to be Guyanese.[346] However, the prosecutor did not move to strike all prospective jurors who were African-American or Guyanese.[347] Bridgeforth raised a *Batson* challenge on grounds that dark-skinned women (both African-American and Guyanese-American) were being excluded.[348] The prosecutor could not remember why he excluded the Guyanese South Asian juror and ultimately did not give a reason. However, he did argue that for the *Batson* class, defense counsel must "either . . . do Guyanese or African American, [counsel] can't do black or skin color."[349] The trial judge agreed, denied Bridgeforth's *Batson* challenge, and allowed the prosecutor's peremptory challenge.[350] The dark-skinned South

342. N.Y. CONST. art. I, § 11.

343. N.Y. CIV. RIGHTS LAW § 13 (McKinney 2009).

344. *Bridgeforth*, 69 N.E.3d at 615.

345. *Id*. at 615.

346. *Id*. Approximately forty-four percent of the population of Guyana is of South Asian/Asian Indian descent. *See Guyana Population 2020*, WORLD POPULATION REVIEW, https://worldpopulationreview.com/countries/guyana-population/ (last visited May 9, 2020). The juror in question, however, was born in India. *Bridgeforth*, 69 N.E.3d at 615.

347. *Id.* at 619 (Garcia, J., concurring). One of the African-American women was ultimately seated, but four of them, along with the one South-Asian woman were excused. *Id*. at 620.

348. *Id.* at 615 (majority opinion).

349. *Id.*

350. *Id.*

Asian juror was not seated.[351] Bridgeforth was convicted and appealed the verdict, arguing that color is cognizable for *Batson* challenges under the New York Constitution and Civil Rights Law Section 13.[352] After losing in the Appellate Division, Bridgeforth then appealed to the New York Court of Appeals.

C. Recognition of a Multiracial Color Class

The operant question in *People v. Bridgeforth* was whether a multiracial color class, composed of dark-skinned individuals from different racial backgrounds, is cognizable and protected under *Batson*'s prohibition on juror exclusion.[353] Previously, such a class had not been recognized: Color claims under modern civil rights statutes had only involved plaintiffs representing one racial group.[354] *Bridgeforth* was the first case in which a multiracial color class was recognized.

1. State's Argument

The People of the State of New York ("the State") made various arguments to dispute Bridgeforth's claim that dark-skinned individuals are a cognizable class. The State's main argument was that one cannot create a cognizable class by "us[ing] a physical characteristic, by itself, to combine distinct groups into a single 'super group' for the purposes of *Batson*'s first step, the *prima facie* case."[355] It further contended that the group of dark-skinned women proffered by Bridgeforth consisted of "women of widely disparate backgrounds, national origins, or ethnicities, and different races."[356] In contrast to Title VII color jurisprudence, where the courts have dismissed color claims when race and national origin claims have been *available*,[357] the State here argued that the disparate race and national origin backgrounds of

351. *Id.*

352. *Id.* at 616–17.

353. New York has incorporated *Batson* into its state law. *See* People v. Kern, 554 N.E.2d 1235, 1240–41 (N.Y. 1990).

354. The Second Circuit has held that *Batson* is applicable when jurors of different races are excluded because of their race. *See* Green v. Travis, 414 F.3d 288, 298 (2d. Cir. 2005) ("It is indisputable that one venireperson cannot be excluded from a jury on account of race. *A fortiori*, several venirepersons of different races cannot be excluded from a jury on account of race."). *See also id.* at 298 n.5 (citing cases which have allowed race-based *Batson* challenges based on exclusion of jurors of different races). Nevertheless, these *Batson* challenges were not based on skin color.

355. Respondent Reply Brief to Brief of Amicus Curiae Fred T. Korematsu Ctr. for Law and Equality at 4, People v. Bridgeforth, 69 N.E.3d 611 (N.Y. 2016) (No. 207) [hereinafter Respondent Reply to Amicus Brief].

356. Brief of Respondent at 44, People v. Bridgeforth, 69 N.E.3d 611 (N.Y. 2016) (No. 207) [hereinafter Brief of Respondent].

357. Banks, *supra* note 9, at 1727.

the class, which rendered those claims *unavailable*, also precluded color claims.

The State argued that a cognizable group must be "a recognizable, distinct class . . . defined and limited by some clearly identifiable factor or factors."[358] The State cited New York Court of Appeals rulings that have rejected "people of color,"[359] "non-whites,"[360] "minorities,"[361] and "individuals with ethnic backgrounds"[362] as a cognizable classes, because these groups lack "internal cohesion" and defined common interests, attitudes, and other characteristics that can be classified together in a meaningful way.[363] In arguing that a color class would be similar, the State conceded that a single racial or ethnic group, such as African Americans, East Indians, or Guyanese could be a cognizable group.[364] Nevertheless, the State argued that recognition of a group based on color alone "presents intractable skin tone line-drawing problems."[365] Such a group would be subjective because light-skinned and dark-skinned are relative features rather than discrete groups, and individuals will disagree on whether a particular juror is light- or dark-skinned.[366]

When responding to Bridgeforth's contention that discrimination against dark-skinned individuals is rampant and has a long history, the State did not altogether deny the existence of colorism but rather pointed to lack of evidence of it in the record.[367] Further, the State argued that the mere fact that a group faces discrimination or is disadvantaged does not make the group a cognizable class for *Batson*.[368] It gave other examples of groups that may

358. Brief of Respondent, *supra* note 356, at 53 (first quoting Castaneda v. Partida, 430 U.S. 482, 494 (1977), then quoting Gray v. Brady, 592 F.3d 296, 305–06 (1st Cir. 2010)).

359. *Id.* at 56 (citing Griffin v. Lewis, No. 2:11-CV-1358-JKS, 2012 U.S. Dist. Lexis 146962, at *15 (E.D. Cal. Oct. 11, 2012)). Professor Kate Sablosky Elengold also criticizes the notion of "people of color" as a cognizable class in civil rights litigation. *See* Elengold, *supra* note 9, at 1.

360. Brief of Respondent, *supra* note 356, at 56 (citing United States v. Suttiswad, 696 F.2d 645, 649 (9th Cir. 1982), *overruled in part by* United States v. Hernandez-Estrada, 749 F.3d 1154 (9th Cir. 2014); United States v. Daly, 573 F. Supp. 788, 792 (N.D. Tex. 1983); United States v. Marcano, 508 F. Supp. 462, 469 (D.P.R. 1980)).

361. *Id.* (citing People v. Smith, 613 N.E.2d 539, 540 (N.Y. 1993)).

362. *Id.* (citing *Griffin*, No. 2:11-CV-1358-JKS, 2012 U.S. Dist. Lexis 146962, at *14–15).

363. *Id.* at 56–57. *But see supra* note 354 (referencing federal cases where race-based *Batson* challenges involving jurors of different races were allowed).

364. *See* Brief of Respondent, *supra* note 356, at 60 n.8.

365. Respondent Reply to Amicus Brief, *supra* note 355, at 8.

366. Brief of Respondent, *supra* note 356, at 67–68.

367. *Id.* at 5 (arguing that "[d]efendant did not show and cannot show that all 'dark-colored' woman [sic] . . . constitute a distinct, clearly-defined class . . . that has been singled out for discrimination").

368. Respondent Reply to Amicus Brief, *supra* note 355, at 6.

face discrimination but were not recognized as cognizable, such as "overweight individuals,"[369] and "red-heads."[370] Moreover, the State argued that skin color is not "immutable": Individuals' skin color can change due to disease, sun exposure, use of skin lightening creams, and by other willful means.[371] The State contended that because individuals can be "temporarily rendered a particular skin tone or color . . . . [there are] obvious problems . . .[in] . . .defining the group."[372]

Additionally, the State argued that the term "color" in the New York Constitution and Civil Rights Law section 13 is synonymous with race.[373] It contended that courts analyzing *Batson* claims interpret terms like "black" to denote race rather than color, and that when "people of color" and "of color" are cognizable racial groups, these terms are referring to Black Americans or Latinx Americans, not to skin color.[374]

But the state did not answer the operant question: Why then are there separate "race" and "color" protections in the New York's Equal Protection Clause and Civil Rights Law section 13?[375]

2. Bridgeforth's Argument

Bridgeforth's argument first highlighted the long history of colorism as discrimination against dark-skinned people. This argument was buttressed by the amicus brief of the Fred T. Korematsu Center for Law and Equality and others in support of Bridgeforth, assisted by attorneys from Akin Gump Strauss Hauer & Feld LLC, which added more empirical support for discrimination against dark-skinned people.[376]

Bridgeforth also argued that skin color alone can form a cognizable class. Responding to the State's arguments, Bridgeforth noted that African Americans and women, both of whom are "indisputably cognizable class[es]," also have "widely varied interests, attitudes, ideas, cultural traditions, religious beliefs, and experiences."[377] Bridgeforth noted that "[t]he Supreme Court's definition of a cognizable class is 'a recognizable, distinct

369. *Id.*; Brief of Respondent, *supra* note 356, at 61.

370. Brief of Respondent, *supra* note 356, at 50.

371. *Id.* at 68–69.

372. *Id.* at 66.

373. *Id.* at 64–65.

374. *Id.* at 63 (citing United States v. Esparza-Gonzalez, 422 F.3d 897, 904 (9th Cir. 2005) and United States v. Douglas, 525 F.3d 225, 238–41 (2d Cir. 2008)).

375. *See supra* note 128 and accompanying text.

376. *See generally* Respondent Reply to Amicus Brief, *supra* note 355.

377. Reply Brief for Defendant-Appellant at 10, People v. Bridgeforth, 69 N.E.3d 611 (N.Y. 2016) (No. 207) [hereinafter Reply Brief for Defendant-Appellant].

class, singled out for different treatment under the laws, written or as applied.'"[378] Further, even if a "common thread" was required to recognize a cognizable class, Bridgeforth argued that "being the target of color-based discrimination is a powerful collective experience that transcends individual ethnic groups."[379]

Additionally, Bridgeforth argued that *Batson* challenges are based on visual discernment of race and thus truly based on color: "*Batson* challenges are often based on lawyers' and judges' assumptions about prospective jurors' races (as in this case), [and] parties and/or the court can disagree about group membership, which can devolve into an extremely subjective determination by the court."[380] Bridgeforth pointed to two New York cases: (1) *People v. Chery*, where the trial court did not move past *Batson* Step 1 because one of two prospective jurors identified as "Black" did not appear to be "an individual of African descent";[381] and (2) *People v. Chance*,[382] where the trial court did not believe that some jurors were African-American because their skin color was "very light" and they "could 'pass for White.'"[383] Citing these, Bridgeforth contended that "courts already resort to skin color to determine whether jurors belong to a group that is the subject of a race-based *Batson* challenge."[384]

Bridgeforth's counsel, Ms. Tammy E. Linn, reiterated this point at oral argument. When pressed by Judge Eugene M. Fahey that color is "not part of the normal calculus in the *Batson* analysis," Ms. Linn replied: "[C]olor is, in general, used as a proxy for race in the normal race-based *Batson* challenge. . . . it's part of the calculus that's already applied. . . if you think about jury selection, jurors aren't being asked what race they are."[385] Ms. Linn further asserted that "federal courts are using color as well. . . . this is how race-based challenges have been . . . applied."[386]

378. *Id.* at 11 (emphasis omitted) (quoting Castaneda v. Partida, 430 U.S. 482, 494 (1977)).

379. *Id.* at 14.

380. *Id.* at 19.

381. Reply Brief for Defendant-Appellant, *supra* note 377, at 19.

382. 5 N.Y.S.3d 191 (N.Y. App. Div. 2015).

383. Reply Brief for Defendant-Appellant, *supra* note 377, at 20.

384. *Id.*

385. Transcript of Oral Argument at 4, People v. Bridgeforth, 69 N.E.3d 611 (N.Y. 2016) (No. 207).

386. *Id.* at 5–6. This argument harks back to the early jury service cases under the Fourteenth Amendment's Equal Protection Clause: Race discrimination against prospective jurors is occurring "because of their color." *See supra* Part III.A.1–2. *But see supra* note 171 (noting that in nineteenth-century jury cases, it is not clear whether jurors were actually excluded by visual examination of their skin color).

D. New York Court of Appeals Opinion

In a unanimous opinion[387] authored by the late Justice Sheila Abdus-Salaam,[388] the New York Court of Appeals held that color is cognizable for *Batson* challenges.[389] The Court granted Bridgeforth a new trial and offered five reasons for its holding.

The first reason was textual: "race" and "color" are separately enumerated in the New York Constitution and section 13 of the Civil Rights Law, and this "indicates that 'color' is a distinct classification from 'race.'"[390] Second, the Court acknowledged the long history of colorism, noting that "[d]iscrimination on the basis of one's skin color—or colorism—has been well researched and analyzed."[391] To support this proposition, the Court cited scholarly works by Professors Taunya Lovell Banks, Trina Jones, and Michael Hughes and Bradley R. Hertel.[392] Third, the Court noted the importance of jury service, which it deemed "a principal means of participation in government . . . [and] an instrument of public justice."[393] Fourth, the Court distinguished color classes from "'minorities' in general."[394] It described "minorities" as "a category that includes a vast and varied group . . . that is subject to change based on census and other demographic data."[395] In contrast, the Court found that "[s]kin color is generally an immutable characteristic" that requires a much narrower showing to establish discrimination.[396] Finally, the Court addressed subjectivity and administrability of color

387. 69 N.E.3d 611 (N.Y. 2016). Justice Michael Garcia concurred on separate grounds and did not agree with the Court that color should be cognizable for *Batson*. *See id.* at 620 (Garcia, J., concurring) ("[T]o hold that 'skin color' is a cognizable class for purposes of *Batson*. . . . [is] a monumental ruling [that] should occur only after careful consideration . . . ."); *see also infra* note 424.

388. Sadly, less than four months after issuing the *Bridgeforth* decision, Justice Abdus-Salaam passed away. *See* Mike Hayes, *The Life and Tragic Death of the First Black Female Judge on New York's Highest Court*, BUZZFEEDNEWS (Apr. 14, 2017, 6:57 PM), https://www.buzzfeednews.com/article/mikehayes/the-life-and-tragic-death-of-sheila-abdus-salaam.

389. *Bridgeforth*, 69 N.E.3d at 613–615.

390. *Id.* at 614 ("The separation of 'race' and 'color' in the [New York Constitution's Equal Protection] Clause indicates that 'color' is a distinct classification from 'race.' Similarly, section 13 of [New York's] Civil Rights Law . . . lists 'race' and 'color' as distinct classes. . . . indicat[ing] that 'color' is a separate and distinct classification from 'race.'").

391. *Id.*

392. *Id.*; *see supra* notes 9, 87 for the specific works cited. These works were referred to the Court by the Brief of Amicus Curiae Fred T. Korematsu Center for Law and Equality et al. Brief for Amici Curiae Fred T. Korematsu Center for Law and Equality et al. in Support of Defendant-Appellant, People v. Bridgeforth, 69 N.E.3d 611 (N.Y. 2016) (No. 2012-07683).

393. *Bridgeforth*, 69 N.E.3d at 614.

394. *Id.* at 615.

395. *Id.*

396. *Id.*

claims.[397] It stated that trial courts can use the existing protocol for *Batson* challenges to determine whether a particular group of individuals constitutes a cognizable color class—whether they "share a similar skin color"[398]—in the same manner that such determinations are made for race, ethnicity, gender, and other classifications.[399]

People v. Bridgeforth is the first modern equal protection case to recognize color discrimination, and the first equal protection case in any era to recognize it as separate from race discrimination. It is also the first case under any civil rights law to recognize a cognizable class made up of individuals of different races, linked solely by their skin color. Although limited to *Batson* challenges and to the State of New York, it opens up a conversation about the future of color-based anti-discrimination law—an area with growing potential as America becomes more multiracial and racially fluid. As the next Part lays out, *Bridgeforth*'s recognition of a cognizable, multiracial color class can have significant implications for civil rights law.

VII. GIVING "COLOR" TO CIVIL RIGHTS LAW

As shown in Figure 2, *People v. Bridgeforth* bridges the gap between Reconstruction Era laws and modern civil rights laws and expands the protections they provide against color discrimination. It separates skin color from race, but not by limiting it to racial subclasses (e.g., dark-skinned African Americans). Rather, *Bridgeforth* allows discrimination based on skin color to create a much larger protected class—one that transcends formal racial categories and can address discrimination more broadly.

Figure 2: Types of Color Discrimination Claims

Cause of Action	Protected Class
14th Amendment – Equal Protection Clause	Racial Group (e.g., African Americans)
Modern Civil Rights Statutes (e.g., Title VII)	Racial Subgroup (e.g., dark-skinned African Americans)
New York's Equal Protection Clause § 13 (*People v. Bridgeforth*)	Multiracial Group (e.g., dark-skinned people of different races)

Multiracial color classes such as the one recognized in *Bridgeforth* can be important in the future, as the American population becomes more racially diverse and fluid and as discrimination crosses racial lines. Developing a broader color-based anti-discrimination jurisprudence will add a valuable

397. *Id.*
398. *Id.*
399. *Id.*

facet to civil rights law. To do so, civil rights advocates will need to develop ways to collect data on color discrimination and develop legal strategies to address it. This Part considers ways to accomplish that end.

A. America's Changing Color Line

As the twenty-first century progresses, colorism and racism will intersect even more. America's racial demographics are changing: Professor William Frey notes that for the first time in 2011, more children of color were born in the United States than White children.[400] Professor Frey and many others forecast that the United States will become a majority-minority nation by the middle of the twenty-first century.[401] Latinx and Asian Americans, along with people of mixed race, continue to add more variation to the color line—including variation in skin color. Consequently, Professor Eduardo Bonilla-Silva argues that colorism will become an even more significant aspect of American social hierarchy.[402]

Additionally, racial classifications continue to be malleable. Census racial categories have always evolved over time,[403] and people from different nationalities may experience changes in racial classification over their own

400. WILLIAM H. FREY, DIVERSITY EXPLOSION: HOW NEW RACIAL DEMOGRAPHICS ARE REMAKING AMERICA 1 (2015).

401. *Id.* at 1. *See also* DALE MAHARIDGE, THE COMING WHITE MINORITY: CALIFORNIA, MULTICULTURALISM, AND AMERICA'S FUTURE (1996); SARAH CARR, SANDRA L. COLBY & JENNIFER M. ORTMAN, PROJECTIONS OF THE SIZE AND COMPOSITION OF THE U.S. POPULATION: 2014 TO 2060 (2015), https://www.census.gov/content/dam/Census/library/publications/2015/demo/p25-1143.pdf; William H. Frey, *The US Will Become 'Minority White' in 2045, Census Projects*, BROOKINGS INST.: THE AVENUE (Mar. 14, 2018), https://www.brookings.edu/blog/the-avenue/2018/03/14/the-us-will-become-minority-white-in-2045-census-projects/. *But see* Jonathan W. Warren & France Winndance Twine, *White Americans, the New Minority? Non-Blacks and the Ever-Expanding Boundaries of Whiteness*, 28 J. BLACK STUD. 200, 202 (1997) (arguing that projections of majority-minority America are based on assumption that 'White' is fixed category and ignore pattern of assimilation of many American immigrant groups, who gradually position themselves as 'White' and distance themselves Black Americans).

402. *See* Bonilla-Silva, supra note 69, at 5 (arguing that "color gradations [in the U.S.] . . . will become more salient factors of stratification"); *see also* Harris, *supra* note 9, at 54 (noting "the possible effects on society and anti-discrimination law of a drift away from ancestry as an important component of assigned race and towards a greater focus on color"). Professor Bonilla-Silva argues that U.S. social hierarchy will come to resemble the color-based hierarchy in Latin American nations. *See* Bonilla-Silva, supra note 69, at 4. *But see* Christina Sue, *An Assessment of the Latin Americanization Thesis*, 32 ETHNIC & RACIAL STUD. 1058, 1062 (2009) (noting that "some recent evidence for both Mexican Americans and African Americans suggests that skin colour in the US may actually be *decreasing* in significance"). Professor Sue's contention here refers to specific within-group color hierarchies, not the multiracial color hierarchy posited by Professor Bonilla-Silva. For an overview of race and color hierarchies in Latin America, see Hernandez, *supra* note 80.

403. *See supra* notes 24–36 and accompanying text.

lifetimes.[404] The 2000 and 2010 Censuses allowed multiracial identification.[405] Increasing numbers of people are identifying with more than one race,[406] and this makes it more difficult to track race discrimination.[407]

Individual racial identity itself is becoming more fluid. Growing numbers of racially ambiguous people do not fit neatly into existing categories.[408] Individuals are even changing their own racial identities.[409] Professor Carolyn Liebler and her colleagues find that almost 10 million Americans changed their racial self-identification between the 2000 and 2010 Censuses.[410] These researchers also highlight the complexity of this pattern: "People who change their race . . . are doing so in a wide variety of ways . . . . [their] responses change from multiple races to a single race, from a single race to multiple races, and from one single race to another."[411] Others have advocated eliminating racial classification and identification altogether,[412]

404. *See* Harpalani, *supra* note 85, at 135–36 (noting how U.S. Census racial classification of Asian Indian Americans changed from "Hindu" in 1960 to "White" in 1970 to "Asian Indian" in 1980).

405. NICHOLAS A. JONES & JUNGMIWHA BULLOCK, U.S. CENSUS BUREAU, THE TWO OR MORE RACES POPULATION: 2010 1 (2012), https://www.census.gov/prod/cen2010/briefs/c2010br-13.pdf.

406. Kim Parker, Juliana Menasce Horowitz, Rich Morin & Mark Hugo Lopez, *Multiracial in America: Proud, Diverse and Growing in Numbers*, PEW RES. CTR. (June 11, 2015), http://www.pewsocialtrends.org/2015/06/11/multiracial-in-america/.

407. *See* TANYA KATERÍ HERNÁNDEZ, MULTIRACIALS AND CIVIL RIGHTS MIXED-RACE STORIES OF DISCRIMINATION (2018); NATALIE MASUOKA, MULTIRACIAL IDENTITY AND RACIAL POLITICS IN THE UNITED STATES (2017); Tanya Katerí Hernández, *"Multiracial" Discourse: Racial Classifications in an Era of Color-Blind Jurisprudence*, 57 MD. L. REV. 97 (1998); Lauren Sudeall Lucas, *Undoing Race? Reconciling Multiracial Identity with Equal Protection*, 102 CAL. L. REV. 1243 (2014).

408. *See generally* Harpalani, *supra* note 68.

409. *See, e.g.*, Camille Gear Rich, *Affirmative Action in the Era of Elective Race: Racial Commodification and the Promise of New Functionalism*, 102 GEO. L.J. 179 (2013); Nancy Leong, *Identity Entrepreneurs*, 104 CAL. L. REV. 1333, 1335–36 (2016) (describing a student who identifies as Native American on application based on one distant Native American ancestor as an "*identity entrepreneur*—someone who leverages his or her identity as a means of deriving social or economic value"); Charles M. Blow, *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 (noting how the story of a woman who was born White but later began identifying herself as Black "has sparked a national conversation about how race is constructed and enforced, to what extent it is cultural and experiential, and whether it is mutable and adoptable").

410. *See* Carolyn Liebler et al., *America's Churning Races: Race and Ethnic Response Changes Between Census 2000 and the 2010 Census*, 54 DEMOGRAPHY 259 (2017); *see also* Carolyn Liebler, et al., *America's Churning Races: Race and Ethnic Response Changes Between Census 2000 and the 2010 Census* (Center for Admin. Records Research and Applications, Working Paper No. 2014-09, 2014) [hereinafter Carolyn Liebler, et. al., Working Paper].

411. Carolyn Liebler, et. al., Working Paper, *supra* note 410, at 39.

412. *See, e.g.*, Complaint at 119, Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 397 F. Supp. 3d 126 (D. Mass. 2019) (No. 1:14-cv-14176-DJC) (seeking "permanent injunction requiring Harvard to conduct all admissions in a manner that does not permit those engaged in the decisional process to be aware of or learn the race or ethnicity of any applicant for

which could also thwart attempts to collect and analyze data on race discrimination.[413]

In this context, formal racial categories can become less relevant, and tangible characteristics such as skin color and other physical features can become more central to discrimination. A formalist approach to antidiscrimination law, emphasizing government racial classifications, fails to capture many discriminatory acts and policies. To protect civil rights, advocates will need to think about protected classes in a broader, more flexible manner: one that matches the changing demographics of American society, and one that captures everyday mechanisms of discrimination such as visual identification by skin color. *Bridgeforth*'s multiracial color class can open the door for civil rights advocates to do so.

B. "Darker than a Latte"

The advent of a racially ambiguous U.S. landscape means that discrimination will take new forms. In July 2018, Republican strategist Rick Wilson commented that President Donald Trump's core supporters wanted to deport anyone who was "darker than a latte."[414] Wilson's comment portends how animus and discrimination may play out in twenty-first-century America—sometimes without any formal classification of race.

At times, racist rhetoric and policies are themselves transcending formal racial categories. President Trump's stark appeals to xenophobia have targeted a variety of groups—ranging from Muslims from various Middle Eastern and African countries to Mexican Americans and other Latinx Americans.[415] President Trump has scapegoated these groups to promote his

admission"); KENNETH PREWITT, WHAT IS "YOUR" RACE? THE CENSUS AND OUR FLAWED EFFORTS TO CLASSIFY AMERICANS (2013) (arguing that questions about race should eventually be eliminated from U.S. Census). *But see* Elise Boddie, *A Damaging Bid to Censor Applications at Harvard*, N.Y. TIMES (Oct. 11, 2018), https://www.nytimes.com/2018/10/10/opinion/harvard-affirmative-action-lawsuit.html (arguing that "bar[ring] colleges from being able to consider, learn about or even become aware of an applicant's race . . . . denies all of us chances to build bridges across communities and to understand the lived realities of race in America").

413. Even if the Census and other government agencies continue to collect race data, individuals may choose not to identify by race, which would make race discrimination and racial inequality more difficult to track.

414. Greg Price, *Donald Trump's Supporters "Want Anybody Darker Than a Latte Deported," Claims Republican Strategist*, NEWSWEEK (July 11, 2018, 12:16 PM), https://www.newsweek.com/trump-supporters-darker-latte-1018600.

415. *See* Erika Lee, *Trump's Xenophobia Is an American Tradition—But It Doesn't Have to Be*, WASH. POST (Nov. 26, 2019, 6:00 AM), https://www.washingtonpost.com/outlook/2019/11/26/trumps-xenophobia-is-an-american-tradition-it-doesnt-have-be/ ("Trump may be the most xenophobic American leader in United States history. From the effort to restrict immigrants from mostly Muslim countries and the drastic reduction in refugee admissions, to efforts to build a wall along the U.S.-Mexico border and the denial of asylum seekers from Central America, Trump's policies have transformed immigration to the United States."). Most recently, Trump has

administration's policies on immigration and national security. Members of each of these groups may vary in their racial or national origin classifications, and sometimes the government jointly classifies them with other groups that are not targeted. Latinx can self-identify as "White" or "Black," as the Census asks a separate question about "Hispanic, Latino, or Spanish origin."[416]

With all of these groups, various forms of discrimination can transcend formal racial classification. Skin color and other physical features can often be a means to identify members of these groups and distinguish them from White Americans of European descent. If law enforcement officials target these groups by discrimination based on appearance, color-based protections could be a valuable tool to address such discrimination.

Racial profiling of Black men by police officers, a practice with long historical roots,[417] provides another example where color-based protections may be useful under certain circumstances. Such profiling often involves identifying race via skin color, in a manner similar to the peremptory challenges in *Bridgeforth*. If police officers target Black males, the officers typically identify who is Black through visible features, including skin color. The officers do not know if these men self-identify as "Black" and do not have information about their ancestry. In the absence of other social or visual cues to identify race, police officers may be less likely to target very light-skinned Black people who can "pass" for White. Police officers may also target dark-skinned people who are not Black but are perceived as Black. Once such case that garnered national attention occurred in 2015 in Madison, Alabama.[418] Police officers beat and severely injured Sureshbhai Patel, a

scapegoated Asian Americans over the spread of novel coronavirus pandemic. *See* Ted Lieu, *Ted Lieu: Trump Is Stoking Xenophobic Panic in a Time of Crisis*, WASH. POST (Mar. 18, 2020, 6:48 PM), https://www.washingtonpost.com/opinions/ted-lieu-trump-is-stoking-xenophobic-panic-in-a-time-of-crisis/2020/03/18/91433600-6959-11ea-b313-df458622c2cc_story.html ("Trump's repeated insistence on calling coronavirus the 'Chinese virus' is more than just xenophobic; it causes harm both to Asian Americans and to the White House's response to this life-threatening pandemic.").

416. *2010*, U.S. CENSUS BUREAU, https://www.census.gov/history/www/through_the_decades/index_of_questions/2010.html (last visited May 10, 2020). For the 2020 Census, the Census Bureau considered adding a separate racial category for Latinx, but this was ultimately rejected. *See* Hansi Lo Wang, *2020 Census To Keep Racial, Ethnic Categories Used In 2010*, NPR (Jan. 26, 2018, 7:06 AM), https://www.npr.org/2018/01/26/580865378/census-request-suggests-no-race-ethnicity-data-changes-in-2020-experts-say. Professor Tanya Katerí Hernández argues that separate Latinx racial category would reduce the number of Latinx who identify as "Black" and thus undermine data collection on racism. *See* Tanya Katerí Hernández, *Latino Anti-Black Bias and the Census Categorization of Latinos*, NEWMAN FERRARA LLP (Dec. 15, 2017), https://www.nyrealestatelawblog.com/manhattan-litigation-blog/2017/december/latino-anti-black-bias-/. This underscores the importance of tracking skin color discrimination separately. *See infra* Part VII.C.2.

417. *See generally* ANGELA J. DAVIS, ET AL., POLICING THE BLACK MAN (2018).

418. *See* Peter Holley, Abby Phillip & Abby Ohlheiser, *Alabama Police Officer Arrested After Indian Grandfather Left Partially Paralyzed*, WASH. POST (Feb. 12, 2015, 7:19 AM),

fifty-seven-year-old Asian Indian immigrant grandfather who had only been in the United States for one week, after a suspicious caller identified him as "a skinny [B]lack guy."[419]

In this vein, the absence of color-based protections could enable racial discrimination by proxy—on the basis of skin color. If color is not a protected class, prosecutors like the one in *Bridgeforth* and police officers such as those in the Patel case could use skin color to effectively discriminate by race. Addressing these and other issues of color discrimination will be difficult, given the current legal and political climate in America.[420] Nevertheless, the final two Sections propose ways to begin this process.

C. Measuring the Color Line

The collection of data on skin color discrimination is a key first step for civil rights advocates.[421] Measurement and analysis of color discrimination presents many challenges. Since *Bridgeforth* became law in New York,

http://www.washingtonpost.com/news/morning-mix/wp/2015/02/11/alabama-cops-leave-a-grandfather-partially-paralyzed-after-frisk-goes-awry/.

419. *Id.* The Patel case also illustrates the continuing significance of Black-White racial hierarchy in many circumstances, as Patel was profiled because he was perceived as Black. *See* Harpalani, *supra* note 85, at 182 ("W]hile the demographics and dynamics of racialization in America have become increasingly complex, the black-white paradigm of American race relations still has salience, even for groups who do not fit into 'black' or 'white' formal categories.").

420. *See* Ian Millhiser, *The Supreme Court Handed Down a Unanimous Decision That Bodes Ill for the Future of Civil Rights*, VOX (Mar. 25, 2020, 8:00 AM), https://www.vox.com/2020/3/25/21192320/supreme-court-comcast-decision-civil-rights-mixed-motive-lawsuits ("[The] future bodes ill for anyone who cares about victims of discrimination.").

421. The EEOC has listed data collection and analysis as a main goal of its Eradicating Racism and Colorism from Employment (E-RACE) Initiative. *See E-RACE Goals and Objectives*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, https://www.eeoc.gov/eeoc/initiatives/e-race/goals.cfm#goal3 (last visited May 10, 2020).

questions have been raised about the administrability of color discrimination claims.[422] As stated in *People v. Ortega*:[423]

> The difficulties . . . in assessing skin color . . . will be of a different character than . . . race or ethnicity. With race or ethnicity . . . it may be difficult in some cases to discern whether a juror is African-American or Hispanic. But there are at least agreed-upon questions. The issue of whether someone has a sufficiently dark (or light) skin color . . . may not be so simple.[424]

Ortega further noted that "courts may need new tools and training to adequately address such issues. . . . To fulfill the aspirations of *Bridgeforth*, we may all need to think in new ways."[425]

Administrability concerns about skin color arise in part from a lack of formal categories. Unlike race, skin color is not formally classified by the government.[426] U.S. Census forms once included "color or race" categories determined by enumerators,[427] but the Census now uses self-identification of race.[428] There are no formal government skin color categories such as "light-skinned" and "dark-skinned": These terms reflect only subjective informal assessments that vary among individuals. Consequently, there is much less

422. *See* People v. Ortega, 62 N.Y.S.3d 879, 880 (N.Y. Sup. Ct. 2017) ("The rationale for the *Bridgeforth* decision is compelling. How trial courts will be able to practically assess whether a party is discriminating . . . by virtue of 'similar skin color, for example, dark-colored' is less clear." (footnote omitted) (quoting People v. Bridgeforth, 69 N.E.3d 611, 615 (N.Y. 2016)). The *Ortega* court held that:

> [A] class . . . [which] consisted of persons of African American, Hispanic or Middle Eastern decent [sic], with the possible additional qualification that such persons had skin tones darker than a Caucasian and the additional provisos that the class likely included Indians (but not Asians) and that persons of Middle Eastern descent were African. . . . does not constitute a cognizable class under *Batson*.

Id. at 884. Conversely, the appellate court in *People v. Pescara* affirmed *Bridgeforth*'s recognition of skin color for Batson challenges. 79 N.Y.S.3d 827, 829 (N.Y. App. Div. 2018). This case involved peremptory strike of a dark-skinned juror (described as "black") whose race was disputed: The defense claimed he was "African American" and the prosecutor claimed he was "Caribbean." *Id.*

423. 62 N.Y.S.3d 879 (N.Y. Sup. Ct. 2017).

424. *Id.* at 886; *see also Bridgeforth*, 69 N.E.3d at 621 (Garcia, J., concurring) ("[T]he only 'guidance' offered to trial courts is that they should somehow 'decide whether the individuals identified . . . share a similar skin color' . . . [which] supplies little concrete or practical instruction for lower courts tasked with creating a record that allows for meaningful appellate review." (quoting *id.* at 615 (majority opinion))).

425. *Ortega*, 62 N.Y.S.3d at 886. Another aspect about skin color discrimination claims that may have implications for enforcement is whether a judge or jury decides if there has been discrimination. For *Batson* challenges, it is the former; however, for Title VII and other statutory claims, it would be the latter if a case goes to trial.

426. *See supra* note 86 and accompanying text.

427. *See supra* notes 24–36. Even when the Census collected "color" data, this did not correspond to skin color itself, but rather to race. *See supra* notes 24–36 and accompanying text.

428. *See Index of Questions*, *supra* note 30.

data on skin color discrimination than on race discrimination.[429] Such data exist only when social science studies have collected them.[430]

Most social science studies of colorism to date have used subjective ratings by researchers to determine skin color.[431] These ratings have been based on options such as "light," "medium," and "dark."[432] Some studies have also included self ratings of skin color by subjects.[433] Concerns echoed by the *Ortega* Court[434] also resonate in these studies. Many of them did not provide a baseline visual inventory of skin color for the raters to use as a reference point.[435] Also, these studies generally have not reported how reliable and consistent these ratings are across different raters.[436] There is evidence that biases affect subjective assessments of skin color.[437] Even when there is a visual skin color inventory as a reference point, researcher ratings of skin color may be unreliable.[438]

429. *See* Bonilla-Silva, *supra* note 86, at 5 (noting that "there is no data set that includes systematic data on the skin tone of all Americans").

430. *See supra* notes 87–91.

431. *See, e.g.*, Goldsmith, Hamilton & Darity, *supra* note 89; Hughes & Hertel, *supra* note 87; Keith & Herring, supra note 90.

432. *See supra* note 431.

433. *See, e.g.*, Fegley et al., *supra* note 10; Monk, *Costs of Skin Color*, *supra* note 91.

434. *See supra* note 424 and accompanying text.

435. *See, e.g.*, *supra* note 431. One such visual inventory that has been used recently is the Massey-Martin Scale. *See* DOUGLAS S. MASSEY & JENNIFER A. MARTIN, NEW IMMIGRANT SURVEY SKIN COLOR SCALE (2003), https://nis.princeton.edu/downloads/nis-skin-color-scale.pdf. This scale has been used in General Social Survey's 2010-14 panel. *See* Lance Hannon & Robert Defina, *Reliability Concerns in Measuring Respondent Skin Tone by Interviewer Observation*, 80 PUB. OPINION Q. 534, 534 (2016) [hereinafter Hannon & Defina, *Reliability Concerns*]. The 2012 and 2016 American National Election Studies time series data collections also used the Massey-Martin Scale. *See* Lance Hannon & Robert Defina, *The Reliability of Same-Race and Cross-Race Skin Tone Judgments*, RACE & SOC. PROBS. (Feb. 14, 2020), https://link.springer.com/article/10.1007%2Fs12552-020-09282-4#citeas [hereinafter Hannon & Defina, *Skin Tone Judgements*]. Another visual inventory for assessing skin color is described by Dr. Fegley and her coauthors. Fegley et al., *supra* note 10, at 297 (discussing the Visual Inventory for Skin Color Assessment ("VISTA"): "a commercially produced, glossy-finished, 15-inch color bar . . . comprised of 10 colors arrayed across the bar from lightest to darkest. . . . selected . . . from a wide range of human skin-tone colors").

436. *See supra* notes 87–91. An exception here is Professors Shervin Assari and Cleopatra Howard Caldwell, who report that in their study, self-ratings and interviewer ratings of skin color had a correlation of 0.8. Shervin Assari & Cleopatra Howard Caldwell, *Darker Skin Tone Increases Perceived Discrimination Among Male but Not Female Caribbean Black Youth*, 4 CHILD. 107, 110 (2017). Additionally, Professor Uzogara et al.'s study reports discrepancies between interviewer-rated and self-rated skin tones. Uzogara et al., *supra* note 45, at 208–209.

437. *See* Denia Garcia & Maria Abascal, *Colored Perceptions Racially Distinctive Names and Assessments of Skin Color*, 60 AM. BEHAV. SCI. 420, 420 (2016) (finding that "skin color ratings are affected by the presence of a racially distinctive name: A significant share of people will rate the same face darker when that face is assigned a distinctively Hispanic name as opposed to a non-Hispanic name.").

438. *See* Hannon & Defina, *Reliability Concerns*, *supra* note 435, at 534 ("Despite the widespread use of the Massey-Martin scale to investigate potential effects of skin tone on social attitudes

More objective data on skin color discrimination may also be collected via photographs,[439] and some studies of race and color bias in criminal sentencing have employed this method.[440] Additionally, quantitative measurements of skin color can be conducted with a spectrophotometer, which can measure wavelengths of light reflected from skin.[441] Various studies of colorism and skin color bias have used these as well.[442]

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and outcomes, the data suggest that the measure has low intercoder reliability."); Hannon & Defina, *Skin Tone Judgments*, *supra* note 435 ("We strongly recommend that researchers and survey organizations seek alternate measurements of respondent skin tone that do not rely on humans memorizing subtle variations in color. In theory, the strategy of having respondents self-rate with an abridged color guide is a straightforward alternative, but evidence on the reliability of self-ratings is currently lacking.").

439. *Cf.* People v. Ortega, 62 N.Y.S.3d 879, 885 (N.Y. Sup. Ct. 2017) ("No one has proposed, for example, that photographs be taken when skin color *Batson* challenges are made.").

440. *See, e.g.*, Jennifer L. Eberhart et al., *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes*, 17 PSYCHOL. SCI. 383, 384 (2006) (using photographs of Black capital defendants in study of bias based on "stereotypicality of . . . Black defendant's appearance . . . [based on] features [such as] . . . lips, nose, hair texture, [and] skin tone"). Professor Eberhart et al. found that "the more stereotypically Black a defendant is perceived to be, the more likely that person is to be sentenced to death" in a mock sentencing experiment. *Id.* at 383. Other studies have yielded similar findings. *See* Mark W. Bennett & Victoria C. Plaut, *Looking Criminal and the Presumption of Dangerousness: Afrocentric Facial Features, Skin Tone, and Criminal Justice*, 51 U.C. DAVIS L. REV. 745, 775–85 (2018) (reviewing empirical studies of relationship between dark skin tone, Afrocentric facial features, and length of criminal sentences); Irene Blair et al., *The Influence of Afrocentric Facial Features in Criminal Sentencing*, 15 PSYCHOL. SCI. 674, 677 (2004) (finding relationship between more Afrocentric features and longer criminal sentences). Some studies have found that darker skin is associated with harsher punishment even for White defendants. *See, e.g.*, Ryan D. King & Brian D. Johnson, *A Punishing Look: Skin Tone and Afrocentric Features in the Halls of Justice*, 122 AM. J. SOC. 90, 90 (2016) (finding that "darker skin tone and Afrocentric facial features are associated with harsher [criminal] sanctions and that the latter effect is particularly salient for white defendants").

441. *See* Edward A. Edwards & S. Quimby Duntley, *The Pigments and Color of Living Human Skin*, 65 AM. J. ANATOMY 1 (1939); ELLI ANGELOPOULOU, THE REFLECTANCE SPECTRUM OF HUMAN SKIN TONE (Univ. of Pa. Dep't of Comput. and Info. Sci. Technical Report No. MS-CIS-99-29, 1999).

In the cosmetics industry, spectrophotometers have been used to measure skin color, for the purpose of matching it with makeup. *See* Marissa A., *Spectrophotometers Help Cosmetic Brands Create More Diverse Foundation Shades*, HUNTERLAB (Feb. 18, 2018), https://www.hunterlab.com/blog/color-pharmaceuticals/spectrophotometers-help-cosmetic-brands-create-more-diverse-foundation-shades/; *EasyMatchQC*, HUNTERLAB, https://www.hunterlab.com/easymatch-qc.html (last visited May 11, 2020). Relatedly, Dr. Thomas Fitzpatrick developed the Fitzpatrick Scale to measure the amount of melanin in skin after exposure to sunlight. *See The Fitzpatrick Scale*, DERMA HEALTH SKIN & LASER (Nov. 2, 2017), https://dermahealthinstitute.com/blog/the-fitzpatrick-scale/. The Fitzpatrick Scale is not a measure of skin color per se, but rather of "skin's reactivity to the sun when exposed." *Id.*

442. *See, e.g.*, Branigan et al., *Skin Color, Sex, and Educational Attainment*, *supra* note 88; Branigan et al., *Shifting Salience of Skin Color*, *supra* note 88; Branigan et al., *supra* note 91; Sweet et al., *supra* note 90; Mara Ostfeld & Nicole Yadon, Mejorando La Raza?: The Political Undertones of Latinos' Skin Color in the U.S. (unpublished manuscript) (on file with author); Nicole Yadon & Mara Ostfeld, Shades of Privilege: The Relationship Between Skin Color and Political Attitudes Among White Americans (2020) (unpublished manuscript) (on file with author). *But see* Monk, *Cost of Skin Color*, *supra* note 91, at 409 ("Many studies use spectrophotometers to 'objectively'

If these methods can be used reliably and efficiently to collect data, they could prove useful for assessing color discrimination on a large scale. Data on colorism will be necessary in the creation of multiracial color classes, which by definition require aggregation of discriminatory acts against multiple individuals. It is only with such data that civil rights advocates can expand the scope of color-based antidiscrimination law.

D. Erasing the Color Line

Once there is sufficient data on color discrimination, the major challenge will be the incorporation of protected multiracial color classes into existing legal frameworks or new frameworks. Civil rights advocates will need to develop innovative legal strategies to bring forth multiracial color class claims. This will be a long, arduous task—but if successful, it would parallel some of the most significant civil rights victories in America.[443]

Two challenges that civil rights advocates will confront are devising legal frameworks to further develop color discrimination law and finding venues to bring cases to develop that law. Implicit bias is one area to explore for the former, and state civil rights law could be a guide for the latter.

1. Potential Legal Frameworks

By combining data on skin color discrimination and state civil rights law, advocates may be able to draw upon and expand existing legal frameworks to address skin color discrimination. Statistical analyses with large data sets could help drive pattern-or-practice cases, similar to those that have been used in Title VII employment discrimination claims.[444] Additionally, statistical evidence can give rise to disparate impact claims under Title VII.[445] Data on color discrimination could allow claims to be brought under Title VII itself, or under state civil rights laws which use pattern-or-practice or disparate impact claims as models.

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measure respondents' skin tone. In these studies, researchers typically measure the skin reflectance of respondents' inner arms. . . . As research demonstrates, however, social classification . . . and ethnoracial discrimination related to skin tone, in particular, are both related to the perception of the lightness or darkness of faces, not inner arms (which, due to differential exposure to the sun, among other factors, may not even be the same shade as individuals' faces)." (citations omitted)).

443. *See supra* note 217; *see infra* notes 467–468. Of course, even such victories are far from complete. *See generally* DERRICK BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE (1989); DERRICK BELL, FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM (1992).

444. *See* Teamsters v. United States, 431 U.S. 324, 360 (1977). Pattern-or-practice claims are also available under other modern civil rights laws. *See generally A Pattern or Practice of Discrimination*, U.S. DEP'T OF JUSTICE (Aug. 6, 2015), https://www.justice.gov/crt/pattern-or-practice-discrimination.

445. *See* Griggs v. Duke Power Co., 401 U.S. 424 (1971).

Following *Bridgeforth*'s lead, *Batson* challenges may also be the best venue to expand the recognition of protected color classes in the realm of equal protection. *Bridgeforth* did not require any data collection:[446] The case emerged from a specific pattern of juror exclusion. While such patterns may be uncommon, *Bridgeforth* does provide persuasive authority for other state courts when similar fact patterns do arise.[447] Moreover, if color-based protections are recognized for *Batson*, it follows logically that they should be recognized for equal protection more generally. A sympathetic court might extend color-based anti-discrimination to other areas, based on *Bridgeforth* and other states that follow the decision.

Nevertheless, color-based equal protection will have to grapple with some of the same doctrinal constraints that have impeded race-based equal protection. A major hurdle has been proof of intent to discriminate—a requirement for equal protection claims,[448] and a very difficult standard to meet in most cases.[449] It is no coincidence that modern color-based equal protection arose in a case involving *Batson* challenges, the one area of equal protection where direct evidence (or strong circumstantial evidence) is not necessary for a viable claim. *Batson* challenges are a unique branch of equal protection: They create presumptions of intent if certain criteria are met, shifting the burden to prosecutors to rebut such a presumption.[450] Beyond *Batson* and other rebuttable presumptions of intent, civil rights advocates will need novel legal frameworks.

One proposed means to address the intent doctrine is use of research on *implicit bias*: "attitudes or stereotypes that affect . . . understanding, actions, and decisions in an unconscious manner."[451] Legal scholars and advocates

446. Social science data were cited in the *Bridgeforth* opinion. *See supra* note 392 and accompanying text. However, such data was not used for an element of the claim itself.

447. *See* Margolis, *supra* note 11, at 2091–93 (making doctrinal and statutory argument that California should adopt color as *Batson* class).

448. *See* Washington v. Davis, 426 U.S. 229, 241–42 (1976).

449. For a classic treatment of problems with the intent doctrine and a proposed solution, *see* Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 355–58 (1987) (proposing a "'cultural meaning' test" to replace intent requirement for equal protection claims). Given the current composition of the Supreme Court, federal courts are highly unlikely to adopt Professor Lawrence's proposed test. *See infra* text accompanying notes 459–462.

450. *See supra* note 3. Title VII disparate treatment claims also create such presumptions under the McDonnell-Douglas framework. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802–03 (1973) (holding that plaintiffs can create a prima facie case of intentional discrimination and shift burden to defendant to proffer non-discriminatory motive).

451. *Understanding Implicit Bias*, KIRWAN INST. FOR STUDY RACE AND ETHNICITY, http://kirwaninstitute.osu.edu/research/understanding-implicit-bias/ (last visited May 11, 2020); *see also* MAHZARIN R. BANAJI & ANTHONY G. GREENWALD, BLINDSPOT: HIDDEN BIASES OF GOOD PEOPLE (2013). For a critique of implicit bias research, see Frederick L. Oswald et al., *Predicting Ethnic and Racial Discrimination: A Meta-Analysis of IAT Criterion Studies*, 105 J. PERSONALITY & SOC. PSYCHOLOGY 171 (2013). For a broader critique of the focus on implicit bias to address

have argued for incorporating implicit bias into equal protection doctrine and other existing anti-discrimination frameworks.[452] Results from implicit bias research have consistently shown that a majority of Americans associate white and light skin with positive attributes and black and dark skin with negative attributes.[453]

As with color discrimination itself, juror selection is an area where the law has begun to embrace implicit bias. In April 2017, the Washington Supreme Court adopted General Rule 37,[454] becoming the first American court to address implicit bias in the selection of juries.[455] General Rule 37 states: "If the court determines that an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge, then the peremptory challenge shall be denied. The court need not find purposeful discrimination to deny the peremptory challenge."[456] The rule makes it clear that "an objective observer is aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have resulted in the unfair exclusion of potential jurors in Washington State."[457]

If implicit bias can be incorporated into civil rights law, the law cannot only address unconscious forms of racism, but colorism-related research might one day lead to additional legal protections against color discrimination.[458] It is also noteworthy that both the recognition of skin color discrimination and the acknowledgment of implicit bias in juror selection occurred

racial inequities, see JONATHAN KAHN, RACE ON THE BRAIN: WHAT IMPLICIT BIAS GETS WRONG ABOUT THE STRUGGLE FOR RACIAL JUSTICE (2017).

452. *See, e.g.*, Alyson Grine & Emily Coward, *Recognizing Implicit Bias Within the Equal Protection Framework*, TRIAL BRIEFS, Apr. 2017, at 26. For example, one proposal has been to create presumptions of motive based on statistical or circumstantial evidence: For racial profiling by police officers, these may include statistical disparities in police stops. *Id. But see* McClesky v. Kemp, 481 U.S. 279 (1987) (holding that statistical evidence of racial disparities in application of capital punishment did not demonstrate discriminatory motive).

453. *See* PROJECT IMPLICIT, https://implicit.harvard.edu/implicit/selectatest.html (last visited May 11, 2020). The most common test of implicit bias is the Implicit Association Test ("IAT"), which involves pairing positive and negative words with characteristics such as race, skin color, and gender. *Id.* One study of implicit bias found that "[c]olor . . . had a large, unambiguous effect that was independent of race" and that "[t]he magnitude of the effect of race . . . depended primarily on color. . . . darker skin magnified the effect of race [and] exacerbated stereotypical beliefs." Vesla M. Weaver, *The Electoral Consequences of Skin Color: The "Hidden" Side of Race in Politics*, 34 POL. BEHAV. 159, 188 (2012).

454. WASH. GEN. R. 37.

455. *See New Rule Addresses Failings of U.S. Supreme Court Decision*, ACLU (Apr. 9, 2018), https://www.aclu.org/news/washington-supreme-court-first-nation-adopt-rule-reduce-implicit-racial-bias-jury-selection.

456. WASH. GEN. R. 37(e).

457. WASH. GEN. R. 37(f).

458. Bennett & Plaut, *supra* note 440, at 800 (recommending that "judges, court staff, probation officers, prosecutors, and defense lawyers . . . have the experience of taking an implicit association test"). One of the authors, Mark W. Bennett, is himself a federal judge. *Id.* at 745.

at the state level rather than in the federal courts. As the next Section lays out, states are currently the best venues for these kinds of innovations in civil rights law.

2. State Civil Rights Law

For several decades now, the United States Supreme Court has narrowed the scope of civil rights protections for minority groups, seriously eroding the notion of strict scrutiny articulated in Footnote 4 of *United States v. Carolene Products*.[459] The major trend in federal constitutional doctrine has been the anticlassification view of equal protection.[460] Rooted in this view, the most prominent recent equal protection cases have involved challenges to affirmative action programs which benefit racial minorities.[461] Given the current composition of the Supreme Court, attempts to expand the scope of federal protections against color discrimination would likely be futile for many years to come. Nevertheless, *Bridgeforth* provides another lesson here—one about the potential of state courts. Currently, state civil rights laws provide the most promising vehicle for expanding legal protections against color discrimination.[462]

Often, state laws have been an impediment to civil rights,[463] but that is not always the case.[464] In the current judicial climate, state governments provide the most promising venue for development of anti-discrimination law. Forty years ago, with federal courts becoming increasingly conservative, Justice William Brennan famously called civil rights lawyers to look to state

459. 304 U.S. 144, 152–53 n.4 (1938) ("[P]rejudice against discrete and insular minorities may be a special condition . . . which may call for a correspondingly more searching judicial inquiry.").

460. *See* Balkin & Siegel, *supra* note 268.

461. *See, e.g.*, Fisher v. Univ. of Tex. at Austin II, 136 S. Ct. 2198 (2016).

462. Like New York, many other state constitutions incorporate equal protection or other provisions that protect against color discrimination. *See, e.g.*, ARK. CONST. art. II, § 3 ("[N]or shall any citizen ever be deprived of any right, privilege or immunity; nor exempted from any burden or duty, on account of race [or] color . . . ."); CONN. CONST. art I, § 20 ("No person shall be denied the equal protection of the law nor be subjected to segregation or discrimination in the exercise or enjoyment of his or her civil or political rights because of religion, race, [or] color . . . ."); MA. CONST. pt. I, art. I ("Equality under the law shall not be denied or abridged because of sex, race, color, creed or national origin."); MT. CONST. art. II, § 4 ("No person shall be denied the equal protection of the laws. Neither the state nor any person, firm, corporation, or institution shall discriminate against any person in the exercise of his civil or political rights on account of race [or] color . . . ."); N.C. CONST. art. I, § 19 ("No person shall be denied the equal protection of the laws; nor shall any person be subjected to discrimination by the State because of race [or] color . . . ."); TX. CONST art. I, § 3a ("Equality under the law shall not be denied or abridged because of sex, race, color, creed, or national origin."); WY. CONST art. I, § 3 ("Since equality in the enjoyment of natural and civil rights is only made sure through political equality, the laws of this state affecting the political rights and privileges of its citizens shall be without distinction of race [or] color . . . .").

463. *See* Jeff Nilsson, *The Civil Rights Act vs. States' Rights*, SATURDAY EVENING POST (July 2, 2014), https://www.saturdayeveningpost.com/2014/07/the-civil-rights-act-vs-states-rights/.

464. *See, e.g.*, *infra* notes 467–468.

constitutions for future pursuit of individual rights.[465] State constitutions have been "a rich source of protection for equality."[466] School finance litigation under state constitutions has been quite successful,[467] and most recently, same-sex marriage rights also developed under state constitutional rulings,[468] which influenced other states and then eventually the federal courts to guarantee the same rights.[469] Through a process of strategic litigation and lobbying, color-based anti-discrimination law could be another area where "courageous [s]tate[s] may . . . serve as . . . laborator[ies]; and try novel social and economic experiments"[470] in the pursuit of equality.

VIII. CONCLUSION

This Article has considered the changing relationship between race and color in civil rights law. The term "color" has at times actually denoted race

465. Scott R. Bauries, *State Constitutions and Individual Rights: Conceptual Convergence in School Finance Litigation*, 18 GEO. MASON L. REV. 301 (2011); Joseph Blocher, *Reverse Incorporation of State Constitutional Law*, 84 S. CAL. L. REV. 323 (2011); William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); *see also* Katie Eyer, *The Canon of Rational Basis Review*, 93 NOTRE DAME L. REV. 1317, 1342-68 (2018); Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131 (1999) (discussing standards of review that state courts should apply in assessing whether state constitutional obligations are being met); Sanford Levinson, *America's "Other Constitutions": The Importance of State Constitutions for Our Law and Politics*, 45 TULSA L. REV. 813 (2010); Hon. Jenny Rivera, *State High Courts and Individual Rights: The New York State Court of Appeals Recent Jurisprudence, From Skin-Color Based Peremptory Challenges to the Right of Sepulcher*, 55 HOUS. L. REV. 1107 (2018); Jeffrey M. Shaman, *The Evolution of Equality in State Constitutional Law*, 34 RUTGERS L.J. 1013 (2003); Vinay Harpalani, Note, *Maintaining Educational Adequacy in Times of Recession: Judicial Review of State Education Budgets*, 85 N.Y.U. L. REV. 258 (2010).

466. Shaman, *supra* note 465, at 1018.

467. *See* MICHAEL REBELL, COURTS AND KIDS: PURSUING EDUCATIONAL EQUITY THROUGH THE STATE COURTS (2009).

468. *See, e.g.*, Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009) (holding prohibitions on same-sex marriage to violate the Iowa Constitution). For other state court rulings with similar holdings, see Eyer, *supra* note 465, at 1344 n.126. Also, Mary Bonauto and James Esseks discuss how in strategizing the legal effort to strike down bans on same-sex marriage, they began by bringing state constitutional cases:

> [W]e wanted the focus to be on the State's decisions about how to treat people. . . . We also did not want to federalize the issue at that time but instead to break through the historic barriers, get to a win and hold it, and . . . . develop a patchwork where some states allowed marriage, even as others didn't, and get to a point where we could ask for a national resolution.

Mary Bonauto & James Esseks, *Marriage Equality Advocacy from the Trenches*, 29 COLUM. J. OF GENDER & L. 117, 120 (2015).

469. *See* Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (holding prohibitions on same-sex marriage to violate the U.S. Constitution).

470. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). Justice Louis Brandeis's opinion in *Liebmann* laid out the idea of states as "laboratories" of experimentation for social policy. *Id.*

and at other times referred directly to skin color.[471] This ambiguity was apparent in the antebellum era and Reconstruction Era laws,[472] and in the late nineteenth and early twentieth centuries.[473] Although it was known and undisputed that skin color did not always determine race, judges and others often gave heavy weight to skin color when identifying an individual's race.[474] In particular, those with relatively dark skin were presumed to be Black.[475]

In the late nineteenth and early twentieth centuries, the Supreme Court recognized both race and color discrimination under the Fourteenth Amendment, but it did not differentiate between the two.[476] Skin color was often presumed to be the means to identify race, but no separate jurisprudence developed around color discrimination.[477] Gradually, use of "color" became much less common in the Supreme Court's equal protection opinions: Often the term was used just when quoting prior cases.[478]

Nevertheless, after the passage of the Civil Rights Act of 1964, color discrimination re-emerged under Title VII of that act and under other civil rights statutes.[479] Under these statutes, courts distinguished between race and color discrimination, with the later referring specifically to skin color bias independent of race.[480] Color discrimination cases brought under these statutes typically involved a single plaintiff of one race-color subclass: for example, a dark-skinned African American.

People v. Bridgeforth added a novel dimension to "color" discrimination jurisprudence.[481] For the first time, a court recognized a multiracial color class, made up of individuals of different races linked solely by their dark skin color.[482] *Bridgeforth* was limited to New York's Equal Protection Clause and Section 13 of New York's Civil Rights Law,[483] but it opens up possibilities for future developments in color discrimination law.[484]

471. *See supra* Part I.

472. *See supra* Part II.

473. *See supra* Part III.

474. *See supra* text accompanying notes 105, 118; *see also* United States v. Dolla, 177 F. 101, 102 (5th Cir. 1910) (holding that Petitioner Abba Dolla was White because the "skin of [Dolla's] arm . . . was sufficiently transparent for the blue color of the veins to show very clearly").

475. *See supra* text accompanying note 105.

476. *See supra* Part III.

477. *See supra* Part III.

478. *See supra* Part IV.

479. *See supra* Part V.

480. *See supra* Part V.

481. 69 N.E.3d 611 (N.Y. 2016).

482. *Id.*; *see supra* Part VI.D.

483. *See supra* Part VI.D.

484. *See supra* Part VII.

As American racism becomes more complex and intersects even more with colorism, multiracial color classes will become more relevant and important for civil rights law.[485] Civil rights advocates will need to collect data on skin color discrimination and employ creative legal strategies to address it.[486] In the broader scope, this can move American civil rights law in a more progressive direction. A century and a half after the ratification of the Fourteenth Amendment, "color" itself may help to change the "colorblind" ideology[487] that has stifled civil rights law in America.

485. *See supra* Part VII.A–B.

486. *See supra* Part VII.D.

487. *See supra* text accompanying note 268.