

LIVING IN THE SHADOW OF AMERICAN RACISM

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I

INTRODUCTION

*Last night I saw upon the stair
A little man who wasn't there
He wasn't there again today
Oh, how I wish he'd go away . . .*

William Hughes Mearns

I grew up in segregated Charlotte, North Carolina, in the shadow of racism. It was ubiquitous, but often not discussed. Sometimes it was visible, but more often not. Sadly, it still darkens our country.

Like many black people, my family put their faith in education as the key to a better life. They and the teachers who taught us in our segregated public schools did all they could to help us get the most out of the public education available to us, despite the racism that enveloped our lives. Along the way, I also benefitted from race-conscious affirmative action and, consequently, I am a product of the opportunities provided by such policies.

Supreme Court Justice Antonin Scalia would have called the black public school from which I graduated as valedictorian in 1965 a “lesser” or “slower track” high school; and he would have been right in one sense.¹ The Charlotte-

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* John S. Bradway Professor of the Practice of Law. I dedicate this essay to the memory of Marjorie Rowe Belton and Marion H. Cannon, to whom I am eternally grateful for encouraging me always to believe in myself. I also dedicate it to the teachers at Myers Street Elementary School, York Road Junior High School, and Second Ward High School who, in the shadow of racism, prepared their students not just to survive but to succeed; they were my only indispensable teachers.

1. During oral argument in *Fisher v. University of Texas*, 579 U.S. 365 (2016), a challenge to the University of Texas’ race-conscious admissions program, Justice Scalia said, “There are those who contend that it does not benefit African Americans to get them into the University of Texas where they do not do well, as opposed to having them go to a . . . slower-track school where they do well.” Oral Argument at 67:10–15, *Fisher*, 579 U.S. 365 (No. 14-981), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2015/14-981_onjq.pdf. He referred to a point made in a brief that the country’s black scientists go to “lesser schools where they do not feel that they’re being pushed ahead in classes that are too fast for them.” *Id.* at 67:20–23. And he concluded, “I’m just not impressed by the fact that the University of Texas may have fewer. Maybe it ought to have fewer. And maybe, you know, when you take more, the number of blacks admitted to lesser schools turns out to be less.” *Id.* at 67:25–68:5. Although counsel for the University pushed back,

Mecklenburg County School Board was indifferent to the education of black children when I was a student. By its funding and policies, it ensured that Second Ward High School was inferior to the public schools attended by white students. And although *Brown v. Board of Education of Topeka*² was decided in 1954, Second Ward was as segregated and unequal in 1965 as it had been in 1923, when the school first opened.³

Justice Scalia also might have said that I was mismatched⁴ when I left Charlotte in the fall of 1965 to attend a series of elite predominantly white educational institutions. That journey began with a post-graduate year of high school at Phillips Exeter Academy in New Hampshire, followed by Harvard College in 1966, and Columbia University School of Law in 1971. About that, however, he would have been wrong. The fact that Second Ward and other black schools were inferior to the white schools in resources and programs did not mean that the black students who attended them were inferior. Nor did those around

none of Scalia's colleagues responded to his jolting statement. *Id.* at 68. That included Justice Clarence Thomas, who presents himself as a champion of black colleges and universities in the same opinions in which he previously embraced the mismatched theory of affirmative action espoused by Scalia. *See Fisher v. Univ. of Tex.*, 570 U.S. 297, 332–33 (2013) (Thomas, J., concurring). Nor did he address Scalia's disparaging remarks in his dissenting opinion. *Fisher*, 579 U.S. at 389 (Thomas J., dissenting).

2. 347 U.S. 483 (1954). The Supreme Court finally ordered the school board to desegregate the school system in 1971. *Swann v. Charlotte-Mecklenburg Bd. Of Educ.*, 402 U.S. 1, 32 (1971). Two years before that, the Board had voted to close Second Ward High School and five other black schools. In March 2003, during a visit by Supreme Court Justice Sandra Day O'Connor to Duke Law School, Professor Walter Dellinger and I had a dinner conversation with her about our respective experiences as students in segregated high schools in Charlotte; Dellinger graduated from the white Myers Park High School in 1959. Justice O'Connor seemed surprised when I said *Brown* had no impact on my education in the Charlotte public school system during the ten years between when it was decided in 1954 and when I graduated in 1965.

3. Second Ward was the first high school for black students in Charlotte. Before 1923, the only public education for black children was at the Myers Street Elementary School, which opened in 1882 in an abandoned tobacco barn. At one time, Myers Street was the largest elementary school for black children in North Carolina. It was torn down in the late 1960s, a victim of urban renewal and preparation for desegregation. *School History*, SECOND WARD HIGH SCHOOL NATIONAL ALUMNI FOUNDATION, http://secondwardfoundation.org/tiger_historic_happenings/school_history. I attended Myers Street through the sixth grade. The School Board bussed my classmates and me to York Road Junior High School for seventh grade. And we entered Second Ward High School in the eighth grade.

4. Under the mismatched critique of affirmative action, opponents argue that as a result of race-conscious admissions and employment decisions the beneficiaries of affirmative action end up in universities and prestigious jobs for which they are unprepared and at which they underperform. They would be better off, its advocates argue, if they attended less selective institutions or pursued less demanding employment for which they were more suited and where they were more likely to succeed. *See, e.g.*, Richard H. Sanders, *The Racial Paradox of the Corporate Law Firm*, 84 N.C. L. REV. 1755 (2006) (arguing race-conscious employment of lawyers of color by large law firms leads to disparities in performance that hurts the intended beneficiaries of affirmative action). *See also* James E. Coleman, Jr. & Mitu Gulati, *A Response to Professor Sanders: Is It All About The Grades?*, 84 N.C. L. REV. 1823 (2006) (acknowledging that the attrition of lawyers of color at large law firms is concerning, but arguing that Professor Sander's analysis of the problem minimizes the negative environment that often greets these associates and the harmful stereotyping and unwarranted low expectations that limit their opportunities for success).

us suggest we were inferior. As a result, I left Charlotte believing I could accomplish whatever I worked hard to achieve.

It is ironic in a uniquely American way that the United States Supreme Court appears poised to decide in 2023 that the race-conscious admissions decisions that made my elite education possible are unconstitutional. The rationale here is that such admissions decisions violate the constitutional rights of better-prepared white students, because their chance of being admitted to such elite institutions is reduced by some small degree when black (and brown) students are not judged solely by color-blind standards. A decision that it violates the Constitution to consider the race of students admitted to elite colleges and universities will pave the way for black students being relegated because of their race to “lesser” or “slower track” colleges and universities. Underlying the decision will be an assumption that this is where they belong.⁵ If the Supreme Court takes that step, history one day will rightly judge its decision as harshly as *Plessy v. Ferguson*.⁶

II

THE MISMATCHED CRITIQUE OF RACE-CONSCIOUS COLLEGE ADMISSIONS

When I left Second Ward High School in 1965, I was not as well prepared academically as many of the white classmates with whom I competed at the three elite private schools I subsequently attended. At Exeter, for example, I could not overcome the fact that Second Ward did not offer science and mathematics

5. Despite his strong embrace of black colleges and universities, Justice Thomas has also described them implicitly as lesser institutions. *See Fisher*, 570 U.S. at 332 (Thomas, J., concurring) (“The University [of Texas] admits minorities who otherwise would have attended less selective colleges where they would have been more evenly matched.”).

6. 163 U.S. 537 (1896). Justice Thomas and other conservatives on the Court appear to assume that historically black colleges and universities would survive as such under a color-blind constitution and continue to educate less prepared black students. The only requirement under the Constitution is that the historically black schools be “open to all on a race-neutral basis” *United States v. Fordice*, 505 U.S. 717, 749 (1992) (Thomas, J., concurring). The Constitution “does not compel the elimination of all observed racial imbalance; it portends neither the destruction of historically black colleges nor the severing of those institutions from their distinctive histories and traditions.” *Id.* at 745 (Thomas, J., concurring). A colorblind constitution “does not foreclose the possibility that there exists ‘sound educational justification’ for maintaining historically black colleges as such.” *Id.* at 748 (Thomas, J., concurring). “Although I agree that a State is not *required* to maintain a historically black institution as such, . . . I do not understand our opinion to hold that a State is *forbidden* to do so. It would be ironic, to say the least, if the institutions that sustained blacks during segregation were themselves destroyed in an effort to combat its vestiges.” *Id.* at 749 (Thomas, J., concurring) (emphasis in original); *see also id.* at 760–61 (Scalia, J., concurring) (“There is nothing unconstitutional about a ‘black’ school in the sense, not of a school that blacks *must* attend and that whites *cannot* attend, but of a school that, as a consequence of private choice in residence or in school selection, contains, and has long contained, a large black majority.”) (emphasis in original). These patronizing arguments are both disingenuous and unprincipled. At most, they express a hope, based on racial behavior, that black and white students will continue to self-select same race schools, but there is no principle of constitutional law that would guarantee that “traditions and programs” that would appeal to black students could be maintained after white students start to become majorities in those schools as funding for higher education generally is reduced and admissions to all colleges and universities become more competitive. Irony is not barred by a color-blind constitution.

courses that would have prepared me to compete in the college-level science and math courses that seniors at Exeter were taking. As a result, I did not take such courses. But I never doubted my ability to compete in other courses for which my preparation was less deficient, and I did not underperform in the classroom.

I believe that Exeter, Harvard, and Columbia, taking my race into consideration, fairly and appropriately gave me an opportunity to earn an elite education—not for the sake of classroom diversity and the benefit of my white classmates⁷—but because of the promise I had as a person of color to be a leader in the racially diverse and divided communities in which I would live and work. That goal, however, does not assume what is implicit in the mismatched theory: that such race-conscious admissions and merit-based admissions are mutually exclusive. They are not.

In a revealing article about Clarence Thomas that Juan Williams wrote for the *Atlantic Magazine* in 1987, the future Justice candidly discussed his bitterness that race had influenced Yale Law School's decision to admit him. After that epiphany, Thomas saw race-conscious affirmative action as more damaging than beneficial to its intended beneficiaries and concluded, contrary to all objective evidence, that his Yale law degree was worthless.⁸ For that reason, he argues, black people would be better off without such help from well-meaning white institutions and that the Constitution should view such policies as unlawful racial discrimination.

In trashing affirmative action, a key aspect of Thomas' critique is that race-attentive decisions are racial discrimination against white and Asian applicants. He argues that “[t]he worst forms of racial discrimination in this Nation have always been accompanied by straight-faced representations that discrimination helped minorities.”⁹ According to Thomas, “racial engineering does in fact have insidious consequences,” but the “injury to those admitted under [race-conscious policies] is even more harmful” than the injury to the unidentifiable white and

7. I agree with Justice Thomas that diversity is a weak justification for race-conscious admissions. Instead, they are necessary to achieve the compelling public interest in educating racially and ethnically diverse citizens to function in a democratic society. See James E. Coleman, Jr., *Diffusion of Knowledge: The Ignored Goal of Public Education*, 8 DUKE F. FOR L. & SOC. CHANGE 45 (2016) (arguing that achieving the original “diffusion of knowledge” purpose of education requires a race-conscious approach that intentionally preserves the link between public education and democracy, especially necessary in a society in which race is at the center of its fault lines).

8. CLARENCE THOMAS, MY GRANDFATHER'S SON 99–100 (2007) (“As a symbol of my disillusionment, I peeled a fifteen-cent price sticker off a package of cigars and stuck it on the frame of my law degree to remind myself of the mistake I'd made by going to Yale.”). Thomas apparently wants people to acknowledge that he succeeded without affirmative action; perhaps even that he did so despite the obstacle of race. His bitterness is a tragedy for him and for those who might benefit from race-conscious admissions in the future if the Court finds them unconstitutional. In his memoir, Thomas quoted what Justice White told him when they met at the Court after Thomas' confirmation: “It doesn't matter how you got here. All that matters is what you do here.” *Id.* at 286. Although Thomas said this advice stayed with him “ever since,” his actions strongly suggest otherwise. He cares how *others* think he got there. And because of that, he wants to pull up the ladder that helped him.

9. *Fisher*, 570 U.S. at 328 (Thomas, J., concurring).

Asian applicants whose chances for admissions theoretically are reduced when students of color are admitted under such policies.¹⁰

In characterizing race-conscious affirmative action as discrimination against white and Asian students based on *their* race, Thomas advances what amounts to an implicitly racist critique of affirmative action. This critique has four parts:

First, black and Hispanic students “as a result of racial discrimination” are “far less prepared than their white and Asian classmates” for study in elite colleges and universities that historically have been white. Nor is there any evidence that “black and Hispanic students are able to close this substantial gap during their time at the [elite universities].” As a result, these students “underperform[] in the classroom” and end up in the “lower quarter of their class.”¹¹

Second, because of this mismatch, these less prepared students of color would be better off in less rigorous and less selective colleges and universities (including historically black colleges and universities). Consequently, race-conscious admission policies have “a pervasive shifting effect.” The elite universities and colleges admit “minorities who otherwise would have attended less selective colleges where they would have been more evenly matched.”¹² Due to this mismatching, “many blacks and Hispanics who likely would have excelled at less elite schools are placed in a position where underperformance is all but inevitable because they are less academically prepared than the white and Asian students with whom they must compete.”¹³ In addition to the “damage wreaked upon the self-confidence of these overmatched students, there is no evidence that they learn more at the [elite university] than they would have learned at other schools for which they were better prepared.” To the contrary, Thomas argues, “they may learn less.”¹⁴

Third, because of these inevitable consequences, affirmative action “stamp[s] [blacks and Hispanics] with a badge of inferiority.”¹⁵ Further, “[i]t taints the accomplishment of all of those who are admitted as a result of racial discrimination. And it taints the accomplishments of all those [otherwise objectively qualified] who are the same race as those admitted as a result of racial discrimination” because “no one can distinguish those students from the ones whose race played a role in their admission.”¹⁶

Fourth, “[w]hen blacks and Hispanics take positions in the highest places of government, industry, or academia, it is an open question . . . whether their skin

10. *Id.* at 331.

11. *Id.* at 331–32.

12. *Id.* at 332.

13. *Id.*

14. *Id.*

15. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 241 (1995) (Thomas, J., concurring).

16. *Fisher*, 570 U.S. at 333 (Thomas, J., concurring).

color played a part in their advancement.”¹⁷ According to Thomas, “[t]he question itself is the stigma—because either racial discrimination did play a role, in which case the person may be deemed ‘otherwise unqualified,’ or it did not, in which case asking the question itself unfairly marks those . . . who would succeed without discrimination.”¹⁸ This is a broad swipe at all students of color.

Justice Thomas should not have the final word on the benefit of race-conscious admissions. To judge the success of such policies, one must examine individual cases. The problem may not be affirmative action but the corrosive environment in which the policies are debated and the continuing shadow of racism over the lives of black people. As Thomas has said, “[t]here is nothing you can do to get past black skin. I don’t care how educated you are, how good you are at what you do—you’ll never have the same contacts or opportunities, you’ll never be seen as equal to whites.”¹⁹ In other words, the stigma that Thomas attributes to affirmative action may really be the product of this persistent racism.

III

FROM SECOND WARD HIGH SCHOOL TO THE IVY LEAGUE



I have never sought affirmation from white people that I was equal to them; nor have I ever been interested in their opinion about that. I assumed that I belonged in the elite schools I attended and that I was equal to my white classmates. That self-confidence came from my black teachers at Second Ward High School and from a young black civil rights lawyer for whom I worked as an

17. *Id.* at 334 (citing *Grutter v. Bollinger*, 539 U.S. 306, 373 (2003)).

18. *Id.*

19. Juan Williams, *A Question of Fairness*, *THE ATLANTIC*, Feb. 1987, <https://www.theatlantic.com/magazine/archive/1987/02/a-question-of-fairness/306370/>.

office boy my senior year in high school. By the time I arrived at Exeter, I never thought there was a chance I would not succeed.

I was poor growing up, but not destitute. My mother worked in the house, taking care of our family. My father worked at a dry cleaning and laundry business within walking distance of our home. He was paid to drive a truck in which he would pick up laundry and dry cleaning from branch locations around the city, bring the clothes back to the main plant to be cleaned, and then deliver the items back to the branches. But he also was a gifted self-taught mechanic, and his real job was to maintain and repair the large washers, driers, and presses on which the business relied. Because he was black, however, he could not become a licensed mechanic or plumber, so he did the more challenging work of a mechanic or plumber for a truck driver's pay.

A. Myers Street Elementary School

I do not have much recollection of my early public-school education. I attended Myers Street Elementary School, which had been established in 1872 as the first public school for black children in Charlotte. I started Myers Street in the fall of 1953 and remained until I completed the sixth grade in 1960. All of my teachers were black women. I have only two vivid recollections of those years.

My first clear memory is of my first-grade teacher, Miss Frances Sampson Miller. She was a slight black woman who walked with a limp, possibly due to polio when she was young. She maintained a warm and inclusive classroom. She changed the self-made room decorations with the season. She left books on a table for us to borrow, if we liked. And she also posted our best work—printing and numbers—on a bulletin board, with our names on the work. Through this and other small gestures, she motivated us to do our best. Her methods worked for me. I approached elementary school as an exciting adventure; by the time I left Myers Street, my teachers had convinced me I was an excellent student. Despite our segregation, we had no reason to think we might be inferior to children in other schools, black or white. Importantly, that was not a message that our teachers conveyed by their words or actions. We did not feel stigmatized by our race, despite what others might say.

A second memory that I have of elementary school is being captain of the School Safety Patrol.²⁰ Safety Patrol members wore a white belt to which chrome badges were pinned. The inner face of the badge was color-coded to identify three officers. The captain's badge, which I wore, was blue; the lieutenant's badge was green; and the sergeant's badge was red. I believe there was only one captain, but a number of lieutenants and sergeants. As safety patrol members, we got out of class a few minutes early every day to take up stations in the halls and on street corners to make sure students were observing safety rules as they left school to go home. As captain, I walked the halls and sidewalks to make sure the other

20. The Safety Patrols was a national program sponsored by AAA to promote leadership skills and school safety. The program started in 1920. *AAA School Safety Patrol*, EXCHANGE AAA, <https://exchange.aaa.com/safety/aaa-school-safety-patrol/>.

members were doing their jobs; occasionally, I went to a nearby convenience store to buy candy, one of the perks of my position.

Every year safety patrol members from around the country went to Washington, D.C., for a four-day trip in recognition of their service. These sixth graders took trains and buses from their hometowns and, along with chaperones, headed to D.C. During the trips, the students visited the White House, the Capitol, Mount Vernon, major monuments, the Smithsonian, and possibly the National Zoo. There was also a parade of the patrol units down the District's wide avenues behind banners identifying each group.²¹ I do not remember the cost of the trip, but my family could not afford it. Nevertheless, I wanted badly to go to D.C.

Wanting me to have the opportunity to go to Washington, my mother wrote a letter to Kays Gary, a columnist for the *Charlotte Observer*, and asked for his help to raise the money for me to take the trip. I learned my mother had done this when the *Observer* published an article about me and the trip. It was the first time I had traveled outside North and South Carolina. My sense of awe from seeing the federal buildings and monuments for the first time has never died. Nor did my appreciation for my mother's appeal to the *Charlotte Observer* for help; it was my first experience with affirmative action — this time initiated by my mother.

Myers Street Elementary School ended at the sixth grade, and Second Ward High School did not start until the eighth grade. As a result, in the fall of 1960, the School Board bused my classmates and me to York Road High School for seventh grade. At the time we were being bused, the School District was under the *Brown v. Board of Education* mandate to desegregate but chose not to assign us to a white junior high school within walking distance of where we lived in the Brooklyn neighborhood of Charlotte. Instead, we rode yellow school buses to the closest black school with a seventh grade, located at the southern city limit, a few miles from South Carolina and miles from our home.

Compared to Myers Street and Second Ward, York Road was a relatively new school with more modern furniture and equipment. The school had opened as a junior high school in 1956 and was the last segregated school built for black students in Charlotte. After York Road opened, it added grades until it became a high school in 1959. But for the year we were there, we thought of it as a junior high school; in eighth grade, we would transfer to Second Ward High School and back to Brooklyn. At York Road, I learned to diagram sentences in an English

21. I recently saw a short video taken at one of the parades around the time I was in the patrols. *Joe DiMaggio at School Safety Parade in Washington, DC*, GETTY IMAGES, <https://www.gettyimages.com/detail/video/washingtonians-watch-parade-of-national-school-safety-news-footage/542239954>. Virtually all the students captured by the video were white and one large group of students wore Confederate uniforms and carried a large Confederate flag. I have no specific recollection of anything like that. I do remember that a group of black students and I could not stay in a hotel as some of the white students did. Instead, we stayed in a large room (perhaps in the black YMCA) that had been converted into a barracks where we slept on cots. That did not detract from the value of the trip for me.

class taught by my first male teacher, Mr. Harold Clawson, who, like all of my public school teachers, was black. I approached the activity like a game and sought the most challenging sentences I could find to diagram. I took pride in never being given a sentence, however complex, that I could not diagram. Although rumblings about civil rights had started, including about desegregation,²² I do not recall people expressing objections to us being bused to York Road. The bus ride to a new school was just another day of life in a segregated city.

B. Second Ward High School

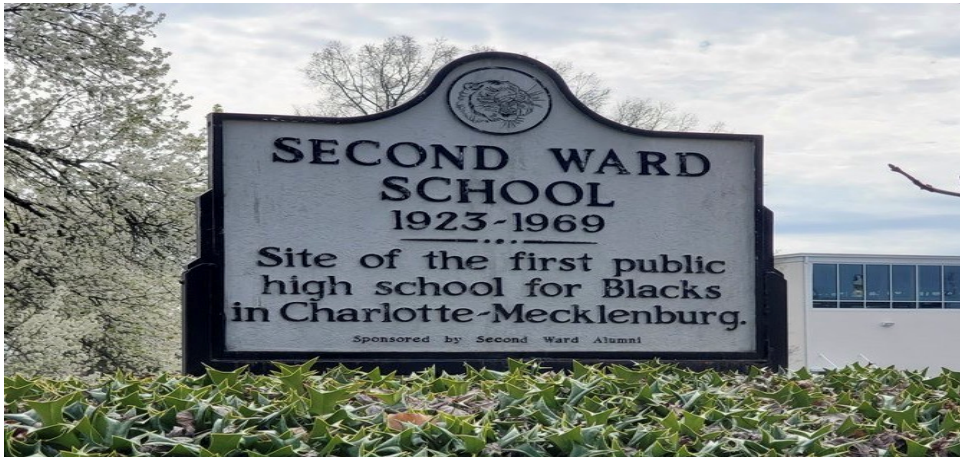


Photo Credit to Phil H of *Where We've Been: A Charlotte Story*

After York Road, we entered the eighth grade at Second Ward High School. Second Ward was established in 1923 as the first public high school for black children in Charlotte. It closed in 1969, four years after I graduated. This is where I met Marjorie Rowe Belton, the most important educator in my life. Mrs. Belton

22. Delois Huntley was one of four black students to integrate the Charlotte schools in 1957 when she enrolled in the all-white Alexander Graham Junior High in 1957. The school was located on Morehead Street, within walking distance of where I lived on East Hill Street. After one year, Huntley left Alexander Graham and enrolled in Second Ward High School, from which she graduated in 1963. Alexander Graham was torn down in 1958 and rebuilt in Myers Park, a wealthy white section of the city. Another black student who transferred to a previously all-white school during this early period was Dorothy Counts, who enrolled in Harding High School; she was the only black student in the school. Her transfer was met with strong white resistance. "On the first day she was scheduled to attend, harassment began. Much of it was orchestrated by leaders of the segregationist White Citizens Council which urged the boys attending the school to block her entry and the girls of the school to spit on her." Samuel Momodu, *Dorothy Counts (1942-)*, BLACK PAST (Aug. 31, 2016), <https://www.blackpast.org/african-american-history/counts-dorothy-1942/>. Counts' family removed her from the school after four days. A famous photograph of her first day at Harding High School circulated worldwide. Ryan Pitkin, *Dorothy Counts-Scoggins Reflects on Her Historic Walk to School 60 Years Ago*, CREATIVE LOAFING CHARLOTTE (Aug. 30, 2017), <https://clclt.com/charlotte/dorothy-counts-scoggins-reflects-on-her-historic-walk-to-school-60-years-ago/Content?oid=5498511>.

spoke with her eyes. They twinkled when she was pleased with you and became questioning if not. She told me I could be anything I wanted and set out to help me do it. I had total faith in her judgment and worked hard not to disappoint her. I was one of a small group of students, boys and girls, who were very competitive academically and pushed each other. We competed for all awards and recognition. I was the top student in the group, but not without effort.

In the spring of the eleventh grade, Mrs. Belton gave me an opportunity that changed my life. Marion H. Cannon, a wealthy white woman she knew, wanted to pay to send a Second Ward student to New Hampshire for a five-week summer academic enrichment program at Phillips Exeter Academy.²³ Mrs. Belton wanted to know if I would like to be considered for the program.

I had never heard of Exeter, but Mrs. Belton told me it was one of the best private schools in the country. The summer program would enroll students from around the country. My mother and grandmother were excited about the opportunity. My father was more measured; he could not afford to pay for me to participate in such a program. I was not sure how it would be paid for, but I told my father that it would not cost us anything.

In June 1964, I packed a cheap footlocker I had purchased and boarded a Greyhound bus for the 830-mile, fifteen-hour, journey north. My grandmother gave me \$25 and told me to come home if I did not like the place. Although it was not much in my thoughts, this was also the start of Freedom Summer, when young people from around the country went to Mississippi to register black people to vote in the 1964 presidential election. The summer also turned out to be a kind of freedom summer for me as well; I was introduced to an America I had never seen and began to consider for the first time the possibility that I might become a part of it.

Everything about Exeter was new to me. I was assigned a single room in McConnell Hall, a new red brick dormitory that had been dedicated in the fall of 1963. It was the first time I had slept in my own room, and it was by far the best living space I had ever seen. It was the first time I had white classmates or white teachers. The campus is divided into two halves by a main street that runs through it. McConnell was on the side of the campus nearer the athletic fields. The imposing Academy Building, where we assembled each morning, most classrooms, and older, more traditional brick dormitories were located on the other side of the campus.

23. By marriage, Mrs. Cannon was a member of the family that owned Cannon Mills, a textile company headquartered in Concord, not far from Charlotte. Mrs. Belton and Mrs. Cannon had a rare interracial friendship, unusual in the segregated South at the time. In 1957 they ran a business with several other women. See Laura Page Frech, *If We Can't Get It, You Don't Need It*, CHARLOTTE OBSERVER, Oct. 24, 1957, at B1. Mrs. Cannon had graduated Phi Beta Kappa from Barnard College in New York. During the 1960s, she marched in protest demonstrations lead by Dr. Martin Luther King and lobbied for equality in education. I was not aware of any of that at the time.

We took math, science, and English classes that had been shortened for the summer and met around large oval conference tables²⁴ to present and discuss our schoolwork. The courses were ungraded, apparently so they could not be used for high school credit. Like the school's regular program, summer students had to participate in athletic activities. At home, I was strictly a sandlot athlete, so I tried sports that were new to me. I especially liked the high jump: running seven steps to jump over a bamboo pole that sagged in the middle and fell into a pit filled with random lengths of black rubber tubes.

When the summer was over, Exeter offered me a scholarship to remain there and complete high school. I turned it down because I wanted to return to Charlotte and graduate from Second Ward with my friends. But Exeter had hooked me, and I agreed to return in the fall of 1965 for a post-graduate year of high school.

C. Julius LeVonne Chambers

When I returned to Second Ward in the fall of 1964, I struggled hard not to be bored. Mrs. Belton came through again. That fall, a group of black ministers who were helping a young black civil rights lawyer set up an uptown office on East Trade Street asked Mrs. Belton if there was someone at Second Ward she would recommend to work as an office boy. She recommended me. As a result, I worked for Julius LeVonne Chambers my senior year of high school until I left for New Hampshire the next fall.

Julius Chambers was a brilliant lawyer. He graduated first in his class from North Carolina Central University, a historically black university. Subsequently, he graduated first in his class at the University of North Carolina School of Law, where he was the first black editor-in-chief of Carolina's Law Review.

In January 1965, while I worked for him, Chambers filed a lawsuit against the Charlotte-Mecklenburg County Board of Education to force it to desegregate the still-segregated public school system.²⁵ A federal judge ruled in favor of the school board in June 1965, at about the time I left, but Chambers finally won a second case against the school system in 1971.²⁶ But the case involving race that shattered Charlotte's reputation as a moderate southern city was filed by Chambers in the fall of 1965, after a former Second Ward football player was passed over for selection to play in the annual Shrine Bowl. The Shrine Bowl pitted the best high school players in the two Carolinas against each other in a game at Memorial Stadium.²⁷

24. Exeter's Harkness Method was established in 1930. All classes consist of twelve students sitting around a large oval table with a teacher who facilitates discussion of the subject matter. Students read their written work aloud and, led by the teacher, discussed what each other had written.

25. *Swann v. Charlotte Mecklenburg Bd. of Educ.*, 369 F.2d 29 (4th Cir. 1966).

26. *Swann v. Charlotte Mecklenburg Bd. of Educ.*, 402 U.S 1 (1971).

27. The Shrine Bowl of the Carolinas is an all-star football game featuring the best athletes from North and South Carolina pitted against each other. The annual game began in 1937. From its inception, it was limited to the white high schools in North and South Carolina. At one time it was considered the

In my senior year at Second Ward, Jimmie Lee Kirkpatrick had been a star running back, probably the best ever to play for the school. He was a junior that year. For his senior year, however, Kirkpatrick decided to transfer to the predominantly white Myers Park High School, in one of the wealthiest white neighborhoods in the city. Myers Park was recruiting him, and he thought the move would improve his chances of receiving a scholarship to play football for a major college, such as Wake Forest.

With Kirkpatrick as its star running back, Myers Park went undefeated during the 1965–1966 school year and won a state regional championship.²⁸ Kirkpatrick set the school record for touchdowns that still stands. But in November 1965, when the coach of the Myers Park football team nominated Kirkpatrick to be one of the two players to represent the school in the Shrine Bowl, the coach of the North Carolina team passed on him and selected two white players from Myers Park. The coach of the North Carolina team denied that race had been a factor, but that was belied by the fact that most coaches and sports writers considered Kirkpatrick the best football player in the state.

Chambers filed a lawsuit on November 12, 1965, seeking an injunction that would effectively bar Kirkpatrick's exclusion from the team.²⁹ On November 19, 1965, a federal judge denied the injunction, but made clear the game would no longer be allowed to exclude black players. That was apparently too much for some. Within a week, on November 22, terrorists set off bombs at the homes of four prominent civil rights leaders in Charlotte, including Chambers.³⁰ Although the people responsible were never identified, people assumed the Klan was responsible for the bombings, among other reasons, in reaction to Chambers' lawsuit to integrate the Shrine Bowl.³¹

most prestigious all-star high school game in the country. As of 1965, no black player had ever been selected to play in the game, which was played in Charlotte's Memorial Stadium.

28. At the time, there was no state championship game, although Myers Park considered its regional championship the equivalent of a state championship.

29. See generally Richard A. Rosen & Joseph Mosnier, *JULIUS CHAMBERS: A LIFE IN THE LEGAL STRUGGLE FOR CIVIL RIGHTS* 89–92 (2016).

30. See Jim Morrill, *50 years ago: Bombs ignited night of terror*, *THE CHARLOTTE OBSERVER* (Nov. 23, 2015), <https://www.charlotteobserver.com/news/politics-government/article45744905.html> (Staff writer Gary Schwab contributed).

31. On the afternoon of January 28, 2014, I received an email from a Charlotte Observer reporter about a series of articles he had written in February 2013 about Jimmie Lee Kirkpatrick, a black student-athlete who had integrated the annual Shrine Bowl. Email from Gary Schwab, Senior Sports Ed., *The Charlotte Observer*, to James E. Coleman (Jan. 28, 2014, 4:57 p.m.) (on file with author). The reporter was now working on another story involving Jimmie Lee Kirkpatrick and De Kirkpatrick, Jimmie Lee's white classmate at Myers Park High School. The reporter contacted me because Jimmie Lee Kirkpatrick had played football for Second Ward during my senior year, and De Kirkpatrick and I became friends the fall of 1966, when we were freshmen at Harvard and drove his car between Cambridge and Charlotte for holiday breaks. The reporter had learned through his research that De's great-great grandfather had enslaved Jimmie Lee's great-great-great grandfather on the Kirkpatrick dairy farm outside of Charlotte. Jimmie Lee and De were having extended conversations about this newly discovered history. "I'm writing about their journey and also researching some of the history of slavery in Mecklenburg County which I think many people in Charlotte are unaware of." The reporter wanted to know what I thought since I

When the bombings occurred, I was already back at Exeter. But Chambers' work as a civil rights lawyer and the terrorist attacks inspired me to be a lawyer. Chambers was my first mentor and remained so for the rest of his life.

D. Phillips Exeter Academy



When I graduated from Second Ward, as a graduation present, Mrs. Cannon purchased my first new suit at a fancy men's store in Charlotte, and I returned to Exeter for a post-graduate year. It was the best and most important academic experience of my life. I appreciated both the challenge and the excitement of learning in classes in which a dozen students—all white except me—sat around a large oval conference table with a professor who facilitated discussions. In senior English one of my classmates was the grandson of a president; he wrote essays about traveling with his grandfather, and I wrote essays about growing up in a segregated country. Such diversity was not the purpose of my admission to Exeter but it was a natural consequence of it, facilitated by the Harkness Method, where we were all equal around the table.

Many post-graduate students at elite boarding schools were athletes admitted to enhance the athletic performance of the schools' teams and burnish the athletes' academic records for admissions to college. I was not a student-athlete when I arrived at Exeter; I was there solely to enrich my academic experience. But because Exeter required students to participate in sports, I played football on a team below the varsity level and learned to high jump; at Harvard, I became an All-Ivy League high jumper.

knew both men. I thought the extraordinary story reflected both the shadow of racism that is an obstacle to reconciliation in this country, but also the possibilities for the future. Jimmie Lee and De found it difficult initially to talk candidly about their history, but Jimmie Lee broke the ice by telling De, "If you will put aside your guilt, I will put aside my anger."

I packed in one year at Exeter a range of experiences that for most of my classmates had unfolded over three or four years. I obviously did not overcome the gaps in my preparation in a single year, but I learned to appreciate the effort necessary to be successful.

I was just a student. There were not enough black students at Exeter to gravitate towards, so I developed relationships with the white students in my dorm, in the dining room, and on my teams. I never felt nor did anyone try to make me feel that I was an outsider. That allowed me to do my best, unencumbered by self-doubts created by a constant public debate about whether I was inferior or mismatched. My teachers at Exeter conveyed a genuine interest in me personally and in my success. I was a fish in unfamiliar water, but I never lost confidence in my ability to swim. Exeter helped me to be a better swimmer.

My overall performance at Exeter was objectively noteworthy. My race and growing up poor in segregated Charlotte were factors that contributed to it being so. It demonstrated that a person like me could compete successfully with better-prepared white students at a high level, despite the shadow of racism. My presence at Exeter made it a different community for me and for my classmates. The fact that the decision to bring me into the community was race-conscious did not diminish in any way the merits of my accomplishments; nor did anyone ever suggest that what I had accomplished had been tainted by race.³²

After I graduated from Exeter, Harvard's decision to admit me was both race-conscious and justified on the merits. Elite schools pride themselves in producing leaders, and my admission to them had the potential to strengthen the country in a different way than the admission of a better-prepared white student would have. That, I believe, ought to be an important goal of American higher education.

IV

CONCLUSION

Nothing that I have accomplished since leaving Charlotte in the fall of 1965 has been tainted by race.

Harvard was less academically demanding than Exeter. As a result, in some ways, academics there took a back seat to other interests. My white roommates were my best friends and remain so. I flirted with Harvard's Navy ROTC, withdrew from the program, then sought the unit's help to get into the Navy JAG program which permitted me to attend Columbia Law School and avoid the draft.

I was a volunteer with Phillips Brooks House, a student-run organization that allowed me to work with black and white children who lived in Cambridge public housing. Beginning my freshman year and throughout my time at Harvard, I was a tutor at Charles River Academy, a small private school in Cambridge for emotionally-disturbed boys. After graduation I took a fulltime job there as a

32. I graduated with honors and was a recipient of one of the four small George Sutro Loewenstein Scholarships for my freshman year at Harvard College.

teacher. Briefly, I had put aside my plan to become a lawyer and was considering a career in education, where I believed at the time I might have a greater impact.

I started law school in the fall of 1971 after the Charles River Academy parents, even with the sincere help of the two senators from North Carolina, were unable to persuade my draft board to allow me to continue teaching.

In law school, as I expected, I enjoyed law and earned good grades, but I was most motivated by my job as an intern with the National Employment Law Project (NELP), a federally funded backup legal services center that focused on impact employment litigation. I worked virtually fulltime at NELP alongside four young lawyers who taught me to be an advocate. Before graduating from Law School, I wrote a section of my first Supreme Court brief—in a case that NELP lost 9–0. The trip to Washington to hear the argument was as special as the trip I made as a member of the safety patrol in sixth grade. In 1989, after my client Ted Bundy was executed, a group of public interest lawyers asked me to brief and argue a case in the Supreme Court involving their right to attorney’s fees—this time, I won 5–4, with Justice O’Connor writing for the majority.³³

Thinking back, three things have mattered most. First, the black teachers I had at Myers Street, York Road, and Second Ward instilled in me the self-confidence necessary to compete against classmates who were better prepared and not burdened with the weight of racism. Second, while I was a student at Exeter, Harvard, and Columbia, I never doubted that I was equal to my classmates. Neither my classmates nor my professors ever suggested I was mismatched. Nor was there a public debate raging in which one side suggested that black students like me were inferior to their white classmates or that we would have been better off at lesser or slower track schools. Third, at the same time, there was a sense at the schools I attended that affirmative action was good for the country.

It would be a mistake for the Supreme Court to decide that the Constitution bars consideration of race when institutions of higher education are trying to identify talented students of color. The only rationale that would support such a decision is that ultimately it is not important whether people of color are educated when a state establishes a college or university or when a private institution receives public funds. This is wrong for the individual students who would be excluded, it is wrong for their communities, and it is wrong for the country.

The assumption that historically black colleges and universities (HBCUs), which depend on public funds, will make up the difference by continuing to fulfill their historical mission is disingenuous. If the Supreme Court is right that a color-blind constitution does not permit elite colleges and universities to look at the race of the students they admit, providing public funds to HBCUs as such eventually will cease, however ironic. We ought to be clear about that.

33. *Sullivan v. Hudson*, 490 U.S. 877 (1989).