Essay

STARE DECISIS AND REMEDY

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ABSTRACT

Much ink has been spilled on the Roberts Court's approach to stare decisis and precedent. Such commentary is hardly surprising. In just the last five years, the Court has overruled extant precedents on issues that range from abortion and jury convictions to property rights and public unions. It has also substantially narrowed and limited existing precedents, curbing the reach of earlier decisions in ways that disrupt and distort the jurisprudential landscape.

Some view the Court's uneven approach to precedent as ideologically determined. As these critics maintain, the Court adheres to precedents that are consistent with the views of its six-member conservative supermajority while jettisoning or narrowing those precedents that do not accord with those ideological priors.

This Essay takes a different tack. Specifically, it argues for reading the Roberts Court's approach to precedent and stare decisis through the lens of remedy. That is, the Court's treatment of precedent might be understood, whether in whole or in part, as animated by a desire to rectify an earlier error or injustice. To be sure, this impulse is not merely

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corrective—the Court's approach to stare decisis goes beyond correcting what it views as jurisprudential errors. Instead, the Court's approach seems marked by an interest in identifying and righting a past wrong. Recent cases like Dobbs v. Jackson Women's Health Organization*,* New York State Rifle & Pistol Association, Inc. v. Bruen*, and* Ramos v. Louisiana *accord with this interpretive frame. In these cases, the Court departed from—or overruled—earlier decisions in part to remedy past racial injustices. Likewise, in* Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, the Court dismissed the extant precedent upholding the limited use of race-conscious admissions policies on the view that "[e]liminating racial discrimination means eliminating all of it."*

Viewing the Roberts Court's approach to stare decisis through a remedial lens is clarifying. It helps us to understand—and better anticipate—the Court's treatment of earlier decisions. Understanding the Court's approach to stare decisis as a form of remedy renders more legible the Court's conception of legal injuries—and, in particular, racialized injuries. As this Essay explains, the Roberts Court's remedial approach to stare decisis is often deployed to correct what a majority of the Court views as a racial injustice. In some cases, like Ramos v. Louisiana*, this remedial impulse focuses on correcting historic injustices wrought by white supremacy and historic acts of racism.*

But critically, a remedial lens may also render visible a reparative logic that unites a series of recent cases involving religious freedom, gun rights, and affirmative action. Although these cases focus on distinct doctrinal questions, they share a unifying impulse: the Court's apparent desire to remedy injuries done to Christian conservatives, working-class whites, and, more generally, white people. In this regard, viewing the Court's decisions through a remedial lens may provide a more coherent account—across legal doctrines—of the Roberts Court's understanding of discrimination, the injuries it produces, and its apparent victims.

TABLE OF CONTENTS

INTRODUCTION

In recent years, much of the commentary on the Roberts Court has focused on its approach to precedent and stare decisis.[1] Such

1. *See* Linda Greenhouse, *Look at What John Roberts and His Court Have Wrought over 18 Years*, N.Y. TIMES (July 9, 2023), https://www.nytimes.com/2023/07/09/opinion/supreme-court-conservative-agenda.html [https://perma.cc/4VLS-QVUN]; Adam Liptak, *The Problem of 'Personal Precedents' of Supreme Court Justices*, N.Y. TIMES (Apr. 4, 2022), https://www.nytimes.com/2022/04/04/us/politics/supreme-court-personal-precedents.html [https://perma.cc/4K2P-CJ5X]; Charlie Savage, *Draft Opinion Overturning* Roe *Raises a Question: Are More Precedents Next?*, N.Y. TIMES (May 5, 2022), https://www.nytimes.com/2022/05/05/us/14th-amendment-roe-wade.html [https://perma.cc/B3SY-NBBM]; Adam Liptak, *In Property Rights Case, Justices Sharply Debate Power of Precedent*, N.Y. TIMES (June 21, 2019), https://www.nytimes.com/2019/06/21/us/politics/supreme-court-precedent.html [https://perma.cc/9A6C-REUW]; Noah Feldman, *When Does This Supreme Court Care About Precedent? Ask Kavanaugh*, WASH. POST (June 11, 2023, 8:04 AM), https://www.washingtonpost.com/business/2023/06/11/surprised-by-the-supreme-court-s-voting-rights-act-ruling-don-t-be/699c5f32-0852-11ee-8132-a84600f3bb9b_story.html [https://perma.cc/KP5F-XVJD]; Ruth Marcus, *At the Supreme Court, Precedent Takes a Leave of Absence*, WASH. POST (May 21, 2021, 5:51 PM), https://www.washingtonpost.com/opinions/2021/05/21/supreme-court-precedent-takes-leave-absence [https://perma.cc/4W5V-N9KC]; David Litt, *A Court Without Precedent*, ATLANTIC (July 24, 2022), https://www.theatlantic.com/ideas/archive/2022/07

commentary is hardly surprising. In just the last five years, the Court has overruled extant precedents on issues that range from abortion and jury convictions to property rights and public unions.[2] It has also substantially narrowed and limited these precedents, curbing the reach of these earlier decisions in ways that disrupt and distort the jurisprudential landscape.[3]

Some view the Court's uneven approach to precedent as ideologically driven. That is, the Court adheres to precedents that are consistent with the views of its six-member conservative supermajority while jettisoning or narrowing those precedents that do not accord with these ideological priors. The most recent Supreme Court terms, which saw the Court deliver to conservatives long-desired wins on abortion rights and affirmative action, support this view.

Predictably, the Court's members do not view their decisions as ideologically predetermined. Speaking at an event at the University of Louisville's McConnell Center, Justice Amy Coney Barrett insisted that she and her colleagues were not "a bunch of partisan hacks."[4] Instead, she maintained, she and her colleagues were guided by "judicial philosophies," not partisan views.[5]

This Essay takes Justice Barrett at her word and considers the judicial philosophies that may undergird the Roberts Court's approach to precedent and stare decisis. Specifically, it argues for reading the

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/supreme-court-stare-decisis-roe-v-wade/670576/ [https://perma.cc/S82F-JYQ5]; Jane Chong, *Senate Republicans Are Playing a Dangerous Game with the Court's Legitimacy*, ATLANTIC (Oct. 11, 2020), https://www.theatlantic.com/ideas/archive/2020/10/republicans-are-abusing-the-concept-of-precedent/616564 [https://perma.cc/S6J3-BKGF].

2. *E.g.*, Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 231 (2022) (overruling *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992), and *Roe v. Wade*, 410 U.S. 113 (1973)); Ramos v. Louisiana, 140 S. Ct. 1390, 1405 (2020) (overruling *Apodaca v. Oregon*, 406 U.S. 404 (1972)).

3. *See* Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181, 224–25 (2023) (dismantling *Grutter v. Bollinger*, 539 U.S. 306 (2003), and the use of race-conscious admissions policies); June Med. Servs. v. Russo, 140 S. Ct. 2103, 2133–42 (Roberts, C.J., concurring) (joining the judgment but, in a concurrence that controls under the *Marks* rule, limiting the force of *Whole Woman's Health v. Hellerstedt*, 579 U.S. 582 (2016)); Melissa Murray, *The Symbiosis of Abortion and Precedent*, 134 HARV. L. REV. 308, 325 (2020) [hereinafter Murray, *Symbiosis of Abortion*] (noting that in *June Medical*, the Chief Justice "at once adhered to *Whole Woman's Health* and simultaneously denounced [it] as a departure from past precedent . . . . In this way, Chief Justice Roberts's respect for precedent depended entirely on identifying those aspects of past decisions that he wished to follow and those that he did not").

4. *See* Chandelis Duster, *Justice Amy Coney Barrett Says Supreme Court Is 'Not a Bunch of Partisan Hacks'*, CNN (Sept. 13, 2021, 9:45 AM), https://www.cnn.com/2021/09/13/politics/amy-coney-barrett-supreme-court-not-partisan/index.html [https://perma.cc/5F8S-NPLX].

5. *Id.*

Roberts Court's approach to precedent and stare decisis through the lens of remedy. As this Essay explains, in recent cases, the Court's treatment of precedent might be understood, whether in whole or in part, as being animated by a desire to rectify an earlier injustice or error.

To be clear, my use of the term "stare decisis" is not limited to those circumstances in which the Court adheres to past precedents. Rather, I invoke the term expansively as a heuristic for the Court's general approach to precedent. On this account, "stare decisis" goes beyond simply maintaining fidelity to a past decision to include adhering to precedent, narrowing precedent, and in some cases overruling precedent, whether explicitly or in effect. In this regard, "stare decisis" reflects a web of practices that courts—and the Court, in particular—use vis-à-vis past decisions. And, as I argue here, this Court's approach to precedent can be understood as having remedial contours.

Recent cases like *Dobbs v. Jackson Women's Health Organization*,[6] *New York State Rifle & Pistol Association, Inc. v. Bruen*,[7] and *Ramos v. Louisiana*[8] bear out this interpretive frame. In these cases, the Court departed from—or overruled—earlier decisions in part to remedy past racial injustices. Likewise, in a recent decision, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*,[9] the Court dismissed the extant precedent upholding the limited use of race-conscious admissions policies, insisting that "[e]liminating racial discrimination means eliminating all of it."[10]

Viewing the Roberts Court's approach to stare decisis through a remedial lens is clarifying. It helps us to understand—and better anticipate—the Court's treatment of earlier decisions. Understanding the Court's approach to stare decisis as a form of remedy renders more legible the Court's conception of legal injuries—and, in particular, racialized injuries. The Roberts Court's remedial approach to stare decisis is often deployed to correct what a majority of the Court views as a racial injustice. In some cases, like *Ramos v. Louisiana*, this

6. Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

7. N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1 (2022).

8. Ramos v. Louisiana, 140 S. Ct. 1390 (2020).

9. Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181 (2023).

10. *Id*. at 206.

remedial impulse focuses on correcting historic injustices wrought by white supremacy and historic acts of racism.[11]

But critically, a remedial lens can also render visible a logic that unites a series of recent cases involving religious freedom, gun rights, and affirmative action. Although these cases focus on distinct doctrinal questions, they share a unifying impulse: the Court's apparent desire to remedy injuries done to Christian conservatives, working-class whites, and, more generally, white people. In this regard, viewing the Court's decisions through a remedial lens makes clear whom the Court now perceives as besieged and aggrieved minorities.

This Essay proceeds in five parts. Part I briefly rehearses the principle of stare decisis[12] and the various rationales that underlie adherence to past precedents. It considers the various factors that the Court has historically weighed in deciding whether to maintain fidelity to an earlier precedent. From this foundation, Part II pivots to consider the Roberts Court's approach to stare decisis. It argues that over time, the Roberts Court has collapsed the traditional stare decisis factors into a generalized inquiry: whether the earlier decision's reasoning was sound and whether there is a "special justification" that warrants overruling.

Part III notes that the Court has come under fire for overruling precedents that do not cohere with its members' preferred views. However, this critique overlooks another impulse that underlies the Roberts Court's approach to stare decisis. As this Part explains, another way to understand the Roberts Court's approach to precedent is through the lens of remedies—or, as I term it, "remedial stare decisis." That is, the Court's decision to depart from or overrule an earlier decision often is shaped by its own sense that doing so is necessary to correct the earlier Court's error or to remedy some more profound injustice that the earlier Court perpetuated or otherwise overlooked. To be sure, a remedial approach to stare decisis did not

11. *See infra* Part III.C.2 (discussing the Court's disposition of *Ramos v. Louisiana*); *infra* Part III.B (discussing the Court's disposition of *Brown v. Board of Education*, 347 U.S. 483 (1954), and *Loving v. Virginia*, 388 U.S. 1 (1967)).

12. To be clear, this Essay focuses exclusively on constitutional interpretation at the Supreme Court and principles of "horizontal" stare decisis. There are separate stare decisis considerations in circumstances involving statutes and statutory interpretation. *See* Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406–11 (1932) (Brandeis, J., dissenting). Further, there are "vertical" stare decisis considerations that guide adherence to precedents among various levels of the judiciary. *See* BRANDON J. MURRILL, CONG. RSCH. SERV. R45319, THE SUPREME COURT'S OVERRULING OF CONSTITUTIONAL PRECEDENT 4 (2018).

originate with the Roberts Court; Part III explains how remedial stare decisis can be glimpsed in some of the most iconic cases in the constitutional canon.

But, as Part IV maintains, the Roberts Court has claimed the principle of remedial stare decisis with particular urgency, correcting decisions it views as wrongly decided and in the process remedying what the Court views as "discrimination"—real and perceived—against certain groups. In so doing, its approach to precedent can be understood as being part of a broader effort to harness the narrative of racism and racial injury to define and protect new constituencies as "discrete and insular minorities."[13]

Part V steps back to consider the impact of "remedial stare decisis." As this Part maintains, viewing stare decisis—and the Roberts Court's approach to precedent—through the lenses of remedy and repair allows us to glimpse broader themes in the Court's jurisprudence. Taken together, these themes provide a more coherent account—across legal doctrines—of the Roberts Court's understanding of discrimination, the injuries it produces, and its apparent victims.

I. STARE DECISIS—IN PRINCIPLE

For purposes of this Essay, I invoke the term "stare decisis" broadly as a heuristic for the Court's approach to precedent. However, to lay a foundation for the argument that the Roberts Court's approach to precedent should be understood as reflecting remedial concerns, it is necessary to consider the traditional understanding of stare decisis.

Latin for "let the decision stand,"[14] stare decisis maintains that a court cannot simply overrule past decisions because it believes they are wrong.[15] According to this logic, such overruling would produce

13. United States v. Carolene Prods. Co., 304 U.S. 144, 152–53 n.4 (1938).

14. *See Stare Decisis*, ENCYC. BRITANNICA (2023), https://www.britannica.com/topic/stare-decisis [https://perma.cc/5X62-BCVU]; Murray, *Symbiosis of Abortion*, *supra* note 3, at 309 ("Latin for 'to stand by what has been decided,' stare decisis is a cornerstone of the Anglo-American legal tradition."); Joseph W. Mead, *Stare Decisis in the Inferior Courts of the United States*, 12 NEV. L.J. 787, 792 (2012) (noting that federal courts have employed stare decisis since the Founding).

15. *See* Henry J. Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. 747, 758 (1982) (noting that it is a "most basic principle of jurisprudence that 'we must act alike in all cases of like nature'") (quoting Ward v. James [1966] 1 QB 273, 294 (C.A.)); *see also* BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 33 (1921) ("It will not do to decide the same question one way between one set of litigants and the opposite way between another."). To be sure, mine is a reductive distillation of the principle of stare decisis—one that elides broader distinctions in

jurisprudential lurches from position to position, undermining the predictability and order of the judicial system and needlessly exposing courts to charges of illegitimacy and partisanship.[16]

That said, the U.S. Supreme Court has repeatedly insisted that allegiance to principles of stare decisis, though the preferred course, "is not an inexorable command."[17] The obligation to observe principles of stare decisis is perhaps most relaxed in the context of "constitutional cases, because in such cases 'correction through legislative action is practically impossible.'"[18]

Over the years, the Court has, in a series of cases, outlined considerations that courts must employ to determine whether to adhere to precedent.[19] Chief among these "precedent[s] on precedent"[20] is *Planned Parenthood v. Casey*.[21] In *Casey*, a plurality of the Court famously upheld *Roe v. Wade*,[22] but also went further to identify a series of factors designed to "gauge the respective costs of reaffirming and overruling a prior case."[23] Under *Casey*'s logic, when

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the principle and the way that it is deployed in other courts. For instance, the principle can refer to either horizontal or vertical stare decisis. *See* Mead, *supra* note 14, at 790. Horizontal stare decisis refers to a court's application of its own precedent to newer cases, whereas vertical stare decisis refers to a court's application of legal precedents developed in higher courts to cases that come before it. *Id*. For the purposes of this Essay, I focus broadly on horizontal stare decisis in the context of decisions of the U.S. Supreme Court.

16. *See* Bush v. Vera, 517 U.S. 952, 985 (1996) ("Our legitimacy requires, above all, that we adhere to *stare decisis*, especially in such sensitive political contexts as the present, where partisan controversy abounds."); Melissa Murray, *Race-ing* Roe*: Reproductive Justice, Racial Justice, and the Battle for* Roe v. Wade, 134 HARV. L. REV. 2025, 2072 (2021) [hereinafter Murray, *Race-ing* Roe] (suggesting that departures from precedent "would compromise the predictability and order of the judicial system, while exposing the Court to claims of illegitimacy and partisanship").

17. *See, e.g.*, Dickerson v. United States, 530 U.S. 428, 443 (2000) (quoting State Oil Co. v. Khan, 522 U.S. 3, 20 (1997)); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854 (1992) (plurality opinion).

18. Payne v. Tennessee, 501 U.S. 808, 828 (1991) (quoting Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 407 (1932) (Brandeis, J., dissenting)).

19. *See, e.g.*, *id.* at 828; Patterson v. McLean Credit Union, 491 U.S. 164, 172 (1989), *superseded by* 42 U.S.C. § 1981(b) (1994); *Dickerson*, 530 U.S. at 443; *Casey*, 505 U.S. at 854–55; Agostini v. Felton, 521 U.S. 203, 236 (1997). To be sure, these criteria are not always followed—indeed, some courts may take a more relaxed approach to precedent. *See* Jeremy Waldron, *Stare Decisis and the Rule of Law: A Layered Approach*, 111 MICH. L. REV. 1, 13 (2012) ("Sometimes precedents will be followed; sometimes not. No one really knows when or why.").

20. Murray, *Symbiosis of Abortion*, *supra* note 3, at 328.

21. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992), *overruled by* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

22. Roe v. Wade, 410 U.S. 113 (1973), *overruled by Dobbs*, 597 U.S. 215 (2022).

23. *Casey*, 505 U.S. at 846, 854.

contemplating a departure from extant precedent, courts should consider:

> [1] whether the rule has proven to be intolerable simply in defying practical workability; [2] whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation; [3] whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine; or [4] whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification.[24]

In the period preceding and immediately following *Casey* and its articulation of these criteria, the Court often engaged explicitly with these factors when considering the weight of an earlier decision. For example, in *Payne v. Tennessee*,[25] a 1991 challenge to the admissibility of victim impact statements, a 6–3 majority of the Court overruled two prior decisions on the ground that their endorsement of a per se rule against the admission of victim-impact statements "defied consistent application by the lower courts,"[26] neglected criminal sentencing's concern for the injuries to the victim and society,[27] and diminished the states' "traditional latitude to prescribe the method by which those who commit murder shall be punished," and was thus "unworkable."[28]

More recently, the Court has engaged with these factors less directly. The Court's disposition of *Lawrence v. Texas*[29] is instructive. In *Lawrence*, a challenge to a Texas antisodomy law, a 5–4 majority of the Court concluded that *Bowers v. Hardwick*,[30] which upheld a similar Georgia law, "was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent."[31] In rejecting *Bowers*, the *Lawrence* Court nodded at two *Casey* factors: changed facts and the prospect that the precedent in question, and its underlying ethos, had been abandoned. Relying on new briefing and historical research, the *Lawrence* Court dismissed as incomplete *Bowers*'s historical account of criminal prohibitions on homosexual conduct, noting that

24. *Id*. at 854–55 (citations omitted).
25. Payne v. Tennessee, 501 U.S. 808 (1991).
26. *Id*. at 830.
27. *Id*. at 825.
28. *Id*. at 824, 827 (quoting Blystone v. Pennsylvania, 494 U.S. 299, 309 (1990)).
29. Lawrence v. Texas, 539 U.S. 558 (2003).
30. Bowers v. Hardwick, 478 U.S. 186 (1986), *overruled by Lawrence*, 539 U.S. 558 (2003).
31. *Lawrence*, 539 U.S. at 578.

these "historical premises [we]re not without doubt and, at the very least, [we]re overstated."[32] Further, the *Lawrence* Court emphasized significant changes in the United States and in other countries, all of which indicated that criminal prohibitions on sodomy had been largely abandoned and were remnants of a now-disfavored doctrine.[33] Taken together, these flaws warranted the Court's decision to disregard *Bowers*'s precedential value.[34]

But critically, in addition to identifying these flaws, the *Lawrence* Court also questioned *Bowers*'s reasoning. According to *Lawrence*, the *Bowers* Court failed to appreciate the scope of the Constitution's protections for sexual privacy, as well as the nature of the rights in question.[35] In response to the respondent's contention that the Georgia antisodomy law violated his right to privacy under the Fourteenth Amendment, the *Bowers* Court famously concluded that the right of privacy does not "stand for the proposition that any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription."[36] But this view, the *Lawrence* Court opined, failed to appreciate the nature of the right at stake.[37] The question was not whether the right to privacy encompassed a right "to engage in certain sexual conduct," as the *Bowers* Court had characterized it, but whether individuals had a right to engage in "a personal relationship . . . , whether or not entitled to formal recognition in the law, . . . without being punished as criminals."[38] In this regard, poor reasoning—as much as inattention to facts and other developments—doomed *Bowers*.[39]

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32. *Id.* at 571.

33. *Id.* at 572 (maintaining that the *Bowers* Court should have been cognizant of "an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex").

34. *Id.* at 578 ("*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled.").

35. *Id.* at 567 (discussing the *Bowers* Court's "failure to appreciate the extent of the liberty at stake").

36. Bowers v. Hardwick, 478 U.S. 186, 191 (1986), *overruled by Lawrence*, 539 U.S. 558.

37. *Lawrence*, 539 U.S. at 567.

38. *Id.*

39. *Id.* at 576–78 (noting that "criticism of *Bowers* has been substantial and continuing, disapproving of its reasoning in all respects, not just as to its historical assumptions"; "that the reasoning and holding in *Bowers* have been rejected" in other countries; and that "*Bowers* itself causes uncertainty [, not reliance], for the precedents before and after its issuance contradict its central holding").

The *Lawrence* Court's treatment of *Bowers* suggests the ease with which the *Casey* stare decisis factors can be collapsed into an overarching evaluation of the earlier decision's "reasoning." Critically, this approach to stare decisis is not confined to earlier Courts. As the following Part explains, collapsing the stare decisis factors into a broader consideration of a decision's "reasoning" has been a hallmark of the Roberts Court's approach to precedent.

II. STARE DECISIS AND THE ROBERTS COURT

As the foregoing discussion of *Lawrence* suggests, in recent years, the Court has been more elastic in its consideration of the stare decisis factors. This has been especially true for the members of the Roberts Court. To be sure, the Roberts Court often nods to the *Casey* factors. But rather than consider each factor in isolation, as earlier Courts did, the Roberts Court often focuses on a more generalized assessment of the quality of the earlier decision's logic and reasoning. The Court's disposition of three cases—*Janus v. AFSCME, Council 31*,[40] *Franchise Tax Board v. Hyatt*,[41] and *Citizens United v. FEC*[42]—is instructive.

Janus required the Court to consider *Abood v. Detroit Board of Education*,[43] a unanimous 1977 decision upholding public-sector union shop fees.[44] Forty-one years later, the *Janus* Court rejected *Abood* on the ground that it was "poorly reasoned."[45] As with the *Lawrence* Court's consideration of *Bowers*, the *Janus* Court focused principally on the legal landscape that had unfolded after *Abood*. A series of cases, the Court noted, had called into question the continued constitutionality of public-sector union shop fees, rendering *Abood* a First Amendment "anomaly"[46] whose reasoning was "questionable on several grounds."[47] For example, *Harris v. Quinn*[48] described *Abood* as faulty "at or before the time of the decision" and further noted that its flaws "ha[d] become more evident and troubling in the years since then."[49] In an effort to reconcile First Amendment doctrine with these

40. Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448 (2018).
41. Franchise Tax Bd. v. Hyatt, 139 S. Ct. 1485 (2019).
42. Citizens United v. FEC, 558 U.S. 310 (2010).
43. Abood v. Detroit Bd. of Educ., 431 U.S. 209 (2019).
44. *Id.* at 229.
45. *Janus*, 138 S. Ct. at 2460.
46. *Id.* at 2483 (citations omitted).
47. *Id.* at 2463 (quoting Harris v. Quinn, 573 U.S. 616, 635 (2014)).
48. Harris v. Quinn, 573 U.S. 616 (2014).
49. *Id.* at 635.

developments, the *Janus* Court overruled *Abood*, citing what the Court deemed to be *Abood*'s flawed reasoning and abandonment of core principles.

To be sure, in overruling *Abood*, the *Janus* Court gestured toward some of the *Casey* factors. As the Court noted, *Abood* had proven unworkable, engendering "practical problems and abuse."[50] Further, the decision lacked sufficiently justifiable "reliance interests" and, critically, was "inconsistent with other First Amendment cases and ha[d] been undermined by more recent decisions."[51] But meaningfully, the Court's interest in workability, reliance interests, and doctrinal consistency was in service of its conclusion that "*Abood* was not well reasoned."[52]

The Court displayed a similar impulse in *Hyatt* and *Citizens United*. In *Hyatt*, a 5–4 majority of the Court concluded that states, unless they consent, have sovereign immunity from private suits filed against them in the courts of another state.[53] In so doing, the Court overruled *Nevada v. Hall*,[54] a 1979 decision that held that "[n]othing in the Federal Constitution authorizes or obligates" states to grant sister states immunity from suit.[55] In overturning *Hall*, the *Hyatt* Court reiterated that "*stare decisis* is 'not an inexorable command.'"[56] It then proceeded to focus explicitly on "the quality of [*Hall*'s] reasoning."[57] As evidence of the poverty of the *Hall* Court's reasoning, the *Hyatt* Court cited the earlier decision's "[lack of] consistency with related decisions," as well as subsequent "legal developments."[58] These subsequent developments rendered *Hall* an "outlier in our sovereign-immunity jurisprudence"[59] and diminished "reliance on the decision."[60]

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50. *Janus*, 138 S. Ct. at 2460.

51. *Id.* at 2460. Tellingly, *Abood*'s inconsistency with other First Amendment cases was largely a product of a series of very recent decisions that the Court itself had issued. But even as the *Janus* majority identified *Abood*'s problems in terms of workability, reliance, and consistency with current doctrine, it made clear that these problems were the direct result of *Abood*'s faulty reasoning. In this regard, the Court underscored that a critical factor in its consideration of precedent would be its own assessment of whether the prior Court had reasoned properly.

52. *Id.* at 2481.

53. Franchise Tax Bd. v. Hyatt, 139 S. Ct. 1485, 1490 (2019).

54. Nevada v. Hall, 440 U.S. 410 (1979); *see also Hyatt*, 139 S. Ct. at 1490.

55. *Hall*, 440 U.S. at 426.

56. *Hyatt*, 139 S. Ct. at 1499 (quoting Pearson v. Callahan, 555 U.S. 223, 233 (2009)).

57. *Id.*

58. *Id.* at 1499.

59. *Id.*

60. *Id.*

The incongruence of *Hall*'s reasoning with extant sovereign immunity jurisprudence therefore dictated the Court's decision to overrule.[61]

In *Citizens United*, a 5–4 majority concluded that the First Amendment's Free Speech Clause prohibits the government from restricting independent expenditures for political campaigns by corporations, including nonprofit corporations, labor unions, and other associations.[62] In so doing, the *Citizens United* Court departed from two earlier decisions: *Austin v. Michigan Chamber of Commerce*,[63] which upheld a prohibition on election spending by incorporated entities[64]; and *McConnell v. FEC*,[65] a 2003 decision that upheld restrictions on corporate spending for "electioneering communication."[66] In departing from these earlier decisions, the *Citizens United* Court trod a familiar path. Conceding that "[o]ur precedent is to be respected unless the most convincing of reasons demonstrates that adherence to it puts us on a course that is sure error," the Court gestured toward the stare decisis factors.[67] Considerations of workability, reliance interests, and, chiefly, the quality of the earlier decision's reasoning "counsel[ed] in favor of rejecting *Austin*," which contravened other campaign-finance precedents and thus was "offensive to the First Amendment.'"[68] The *Austin* Court's errors further implicated the decision in *McConnell*, which relied on *Austin*'s reasoning, prompting the *Citizens United* Court to overrule the part of *McConnell* that relied on *Austin*.[69]

Notably, in all three cases, the dissenters chided the majority for its dismissive treatment of extant precedent and the principle of stare decisis. In *Hyatt*, Justice Breyer explicitly referenced the stare decisis factors, noting that "[t]he law has not changed significantly since this

61. *See id.* What the Court did not say was that many of the subsequent legal developments that had muddied the doctrinal waters and undermined *Hall*'s precedential value were decisions that the Roberts Court had issued. *See id.* Thus, to the extent that "*Hall* stands as an outlier in our sovereign immunity jurisprudence," it was largely because the Court made it so. *Id.*

62. Citizens United v. FEC, 558 U.S. 310, 319 (2010).

63. Austin v. Mich. Chamber of Com., 494 U.S. 652 (1990).

64. *Id.* at 651–52.

65. McConnell v. FEC, 540 U.S. 93 (2003).

66. *Id.* at 194.

67. *Citizens United,* 558 U.S. at 362–63 ("Beyond workability, the relevant factors in deciding whether to adhere to the principle of *stare decisis* include the antiquity of the precedent, the reliance interests at stake, and of course whether the decision was well reasoned. We have also examined whether 'experience has pointed up the precedent's shortcomings.'" (citations omitted)).

68. *Id.* at 363.

69. *Id.* at 365–66.

Court decided *Hall*" and that the *Hall* Court had relied upon earlier Court decisions that were recently reaffirmed, casting doubt on the majority's conclusion that *Hall* was wrongly decided.[70] Likewise, in *Janus*, Justice Kagan observed that the majority's decision to abandon *Abood* turned on little more than its view that *Abood* was wrong.[71] "But even if that were true (which it is not), it is not enough," Kagan insisted.[72] "Respecting *stare decisis* means sticking to some wrong decisions," as "[a]ny departure from settled precedent (so the Court has often stated) demands a 'special justification—over and above the belief that the precedent was wrongly decided.'"[73] The *Janus* majority, Kagan pressed, "[did] not have anything close" to this exacting standard.[74]

In *Citizens United*, Justice Stevens's partial concurrence was even more pointed in its disdain for the Court's approach to precedent. On Stevens's telling, the majority's "central argument for why *stare decisis* ought to be trumped [in *Citizens United*] is that it [did] not like *Austin*."[75] But critically, the majority offered "no empirical evidence with which to substantiate the claim" that other developments in First Amendment doctrine and practice had undermined *Austin*.[76] Instead of proper analysis, Stevens wrote, "we just have its *ipse dixit* that the real world has not been kind to *Austin* . . . . How any of these ruminations weakens the force of *stare decisis* escapes my comprehension."[77]

Viewed collectively, *Janus*, *Hyatt*, and *Citizens United* can tell us much about the Roberts Court's approach to stare decisis and precedent. As a general matter, although the Court is not slavishly bound to the *Casey* stare decisis factors, it regularly nods to these factors in its overarching inquiry into the quality of an earlier decision's reasoning. And notably, the Roberts Court often regards an earlier decision's misalignment with the current doctrine as evidence that the earlier decision was poorly reasoned—even in circumstances where the

70. Franchise Tax Bd. v. Hyatt, 139 S. Ct. 1485, 1505 (2019) (Breyer, J., dissenting).

71. Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2497 (2018) (Kagan, J., dissenting).

72. *Id.*

73. *Id.* (quoting Kimble v. Marvel Ent., LLC, 576 U.S. 446, 455–56 (2015)).

74. *Id.*

75. Citizens United v. FEC, 558 U.S. 310, 409 (2010) (Stevens, J., concurring in part).

76. *Id.* at 409.

77. *Id.* at 409–10.

doctrinal misalignment is the result of the Court's own decision-making.

In addition to collapsing the stare decisis factors into a more general inquiry into the quality of an earlier decision's reasoning, the Roberts Court has also emphasized another line of inquiry: whether there is some "special justification" that warrants departing from extant precedent. In *Gamble v. United States*,[78] a 2018 Term case, the Court emphasized that "even in constitutional cases, a departure from precedent 'demands special justification.'"[79] As to what constituted a "special justification" that warranted overruling, the *Gamble* majority did not say. However, in a solo concurrence, Justice Thomas elaborated this view, suggesting that the only special justification that the Court should heed was whether the precedent in question was "demonstrably erroneous"—that is, a decision that was "outside the realm of permissible interpretation."[80] Meaningfully, the inquiry into a "special justification" that would warrant overruling aligns well with the assessment that the quality of the precedent's reasoning is a basis for determining whether to adhere to that precedent or not.

Taken together, the Roberts Court's focus on the quality of the earlier Court's reasoning and whether there are special circumstances that justify overruling has an undeniably subjective tenor. Whether the logic undergirding a precedent is sound or faulty and whether an earlier decision is "egregiously wrong"[81] are inquiries that pit the current Court's sensibilities against those of its predecessors. Indeed, the Court's departure from a more precise application of the traditional stare decisis factors in favor of a more generalized—and subjective—inquiry into the quality of the earlier decision's reasoning has prompted critiques that the Roberts Court's approach to stare decisis is driven not by law or principle, but instead by the preferences of a majority of the Justices.[82]

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78. Gamble v. United States, 139 S. Ct. 1960 (2019).

79. *Id.* at 1969 (quoting Arizona v. Rumsey, 467 U.S. 203, 212 (1984)).

80. *Id.* at 1981 (Thomas, J., concurring).

81. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 231 (2022).

82. *See, e.g.*, Nina Varsava, *Precedent, Reliance, and* Dobbs, 136 HARV. L. REV. 1845, 1880 (2023) ("Perhaps foreseeing the need to characterize *Casey*'s approach to stare decisis as aberrant and cobble together a pedigree for their desired approach in the decision that would overrule *Roe*, the Justices had laid some groundwork for the approach in recent Terms."); Mark A. Lemley, *The Imperial Supreme Court*, 136 HARV. L. REV. F. 97, 113 (2022) (noting that "textualism, originalism, and fidelity to precedent . . . are tools the Justices deploy to achieve particular results those Justices have already decided they want to reach; they can't explain those results because they aren't used consistently"); Darren Lenard Hutchinson, *Thinly Rooted:*

To be sure, the Justices would likely object to this characterization of their decisions. A decision to break with precedent is not an act of will, in their view, but one that is compelled by the juridical obligation to "get it right." On this account, the Court's overturning or narrowing of precedent on the ground that an earlier decision was poorly reasoned might be understood as corrective. That is, the Court's approach to stare decisis is focused on addressing judicial errors and reconciling incoherent jurisprudence.

As the following Part also demonstrates, we might understand the Roberts Court's brand of stare decisis as not only *corrective*, but also *remedial*. In several cases, the Court's decision to limit, depart from, or entirely overrule an extant precedent might be understood as reflecting a remedial or reparative impulse to address an injury that the law has wrought. Departures or breaks from precedent are not acts of will—

Dobbs*, Tradition, and Reproductive Justice*, 65 ARIZ. L. REV. 385, 429 (2023) ("The Court has chosen to ignore fundamental rights precedent that treats liberty and tradition in flexible terms, relying instead upon limited caselaw that provides some support for the proposition that *Roe* was wrongly decided."); Reva B. Siegel, *Memory Games:* Dobbs*'s Originalism as Anti-Democratic Living Constitutionalism—and Some Pathways for Resistance*, 101 TEX. L. REV. 1127, 1135 (2023) (critiquing how the *Dobbs* Court overturned *Roe* "with undisguised expressions of contempt . . . despite the Court's undoubted awareness that this right is of central significance to American women of every age and of all walks of life," and going on to state that "[t]he *Dobbs* opinion performs its history-and-traditions analysis with the energies of movement-identified judges achieving a goal long sought by 'Team Originalism'"); Mary Ziegler, Dobbs *and the Jurisprudence of Exclusion*, 55 POLITY 419, 419–20 (2023) (arguing that the *Dobbs* Court could not claim "to be bound by precedent when rejecting the idea of an abortion right rooted in principles of constitutional equality" while "dismantling a precedent in *Roe* that is nearly five decades old. The Court proclaims its ability to rise above the partisan fray on abortion at the same time that it echoes a rich range of arguments long made by antiabortion attorneys and grassroots advocates"); Aziz Huq, *No, the Roberts Court Is Not Moderating*, TIME (July 6, 2023, 6:00 AM), https://time.com/6292282/the-supreme-court-remains-profoundly-counter-democratic [https://perma.cc/W7E6-6BF6] ("Justifying the millions expended on confirmation battles by right-of-center groups and individuals, the Roberts Court continues to provide an end-running path for scoring Republican policies without majority support or a plausible pathway into law."); Dahlia Lithwick & Neil S. Siegel, *The Lawlessness of the* Dobbs *Decision*, SLATE (June 27, 2022, 2:58 PM), https://slate.com/news-and-politics/2022/06/dobbs-decision-glucksberg-test-lawlessness.html [https://perma.cc/X44P-6NJX] ("Under the banner of originalism and conservative traditionalism, the majority can claim that a test that is inherently biased against women, Black people, and LGBTQ people, is 'neutral.'"); Josh Gerstein, *Kagan Repeats Warning that Supreme Court Is Damaging Its Legitimacy*, POLITICO (Sept. 14, 2022, 5:56 PM), https://www.politico.com/news/2022/09/14/kagan-supreme-court-legitimacy-00056766 [https://perma.cc/8BW8-SBW4] ("If there's a new member of a court and all of a sudden everything is up for grabs, all of a sudden very fundamental principles of law are being overthrown, are being replaced, then people have a right to say: What's going on there? That doesn't seem very law-like." (quoting Justice Kagan)).

rather, they are especially justified because they remedy an injustice created or endorsed by an earlier Court.

III. STARE DECISIS AND REMEDY

The typical rationale for stare decisis is that respect for precedent encourages predictability in the law's development and ensures the public's faith in the legitimacy of the judicial system. Departures from precedent thus must be justified by exceedingly strong rationales—to confirm a doctrinal shift, to reconcile conflicting jurisprudential threads, or to correct an earlier court's error. This last rationale suggests that, at least in some circumstances, a court's approach to stare decisis may serve remedial ends, correcting past errors in a court's judgment or, more intriguingly, past injustices that the law overlooked or even endorsed.

The following sections elaborate this idea. Part III.A provides the theoretical underpinnings by identifying and explaining what I term "remedial stare decisis." Here, I maintain that a court's approach to precedent—and indeed, its decision to overrule, narrow, or otherwise limit the force of an extant precedent—may be understood as a species of judicial remedy. As Part III.B shows, the impulse toward remedial stare decisis is evident in some of the most canonical cases in constitutional law. Finally, Part III.C considers the Roberts Court's approach to precedent through this remedial lens. As I explain here, recognizing stare decisis's remedial contours may give us greater insight into the Roberts Court's penchant for overruling past decisions. On one level, the Court's approach to precedent might be understood as evincing a basic interest in correcting what the Court views as errors in judicial reasoning. That is, it might be understood as reflecting a *corrective* impulse.

But we might also understand the Roberts Court's approach to precedent to go beyond mere doctrinal correction. Indeed, we might view the Court's approach to precedent through a lens that is explicitly remedial and reparative, reflecting a desire to correct more fundamental injuries to groups the Court views as disadvantaged, whether historically or presently, while also returning these injured parties to the positions they occupied before the injuries were inflicted.

A. Remedial Stare Decisis in Theory

Generally, when individuals speak of judicial remedies, they are speaking of the various forms of relief—both legal and equitable—that

courts may impose in order to make individuals whole after a loss or injury.[83] These discussions typically focus on legal remedies, like damages, or equitable remedies, like injunctions, restitution, and declaratory judgments.[84]

Although stare decisis is not considered a remedy that courts may impose, a court's decision to maintain faith with or depart from extant precedent often turns on (unstated) remedial interests. For example, the decision to maintain faith with an earlier precedent might be characterized as remedial insofar as the court is attempting to settle—and remedy—any confusion or lack of clarity about the precedent's weight or force. *Casey*'s approach to *Roe v. Wade* is instructive on this point. In the years preceding *Casey*, there had been considerable discussion about whether and under what circumstances *Roe* permitted state regulation of abortion,[85] as well as whether *Roe* had proven "unworkable" and should be overruled.[86] The *Casey* plurality

83. *See* JAMES M. FISCHER, UNDERSTANDING REMEDIES § 3.1, at 11–12 (2d ed. 2006) ("The law of remedies is essentially a study of the rules and principles that have been developed to determine how much redress a person is entitled to once a right has been violated."); DAN B. DOBBS & CAPRICE L. ROBERTS, LAW OF REMEDIES: DAMAGES-EQUITY-RESTITUTION § 1.1, at 1 (3d ed. 2018) ("Judicial remedies usually fall in one of the four major categories. (1) Damages remedies, (2) Restitutionary remedies, (3) Coercive remedies [such as injunctions] and (4) Declaratory remedies."); *id.* (noting that major remedies categories were treated as separate fields of legal and equitable remedies until about the middle of the twentieth century, when Charles Alan Wright's casebook on remedies "brought them together").

84. *See* Douglas Laycock, *How Remedies Became a Field: A History*, 27 REV. LITIG. 161, 164 (2008) ("The law of remedies thus includes compensatory damages, injunctions, restitution of unjust enrichment, declaratory judgments, punitive damages, and a great variety of more specialized remedies ranging from replevin to *ne exeat*."); Douglas Laycock, *The Scope and Significance of Restitution*, 67 TEX. L. REV. 1277, 1277 (1989) ("In every major remedies book, three of the largest subdivisions are some variation of damages, equity, and restitution.").

85. This debate played out over a series of Supreme Court cases in which the Court did not overrule *Roe* and instead held that state abortion regulations were consistent with the 1973 decision. *See, e.g.*, Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 63, 67, 81 (1976) (concluding that the state regulation's definition of "viability" and requirements of prior written consent, recordkeeping, and reporting did not conflict with *Roe*); Poelker v. Doe, 432 U.S. 519, 521 (1977) (upholding state funding restrictions for abortion services); Maher v. Roe, 432 U.S. 464, 478 (1977) (same); Beal v. Doe, 432 U.S. 438, 445–46 (1977) (same); Bellotti v. Baird, 428 U.S. 132, 148–50 (1976) (considering a state parental-notification statute); Harris v. McRae, 448 U.S. 297, 326–27 (1980) (considering a federal funding restriction on abortion services).

86. *See, e.g.*, Webster v. Reprod. Health Servs., 492 U.S. 490, 518 (1989) (plurality opinion) ("Since the bounds of the [*Roe*] inquiry are essentially indeterminate, the result has been a web of legal rules that have become increasingly intricate, resembling a code of regulations rather than a body of constitutional doctrine."); Brief for the United States as Amicus Curiae in Support of Appellants at 21–23, Thornburgh v. ACOG, 476 U.S. 747 (1986) (Nos. 84-495 and 84-1379) (arguing that *Roe* had proven unworkable); James Bopp, Jr. & Richard E. Coleson, *The Right to Abortion: Anomalous, Absolute, and Ripe for Reversal*, 3 BYU J. PUB. L. 181, 201 (1989) (maintaining that *Roe* was unworkable in practice).

intervened, affirming *Roe*'s central holding that the Constitution recognized a right to abortion before viability[87] while also clarifying the state's interest in regulating abortion.[88] In this regard, *Casey*'s approach to *Roe* not only confirmed the vitality of the earlier precedent, but also clarified important aspects of *Roe*'s scope and application in an effort to allay doubts that had been percolating in lower courts regarding the embattled precedent.

But the notion of "remedial" stare decisis goes beyond merely settling doctrinal confusion—or even overruling a decision in order to correct an earlier court's flawed reasoning. Clarifying a decision's scope or restoring doctrinal coherence by overruling is *corrective*, but it is not necessarily *remedial* in the way I wish to invoke that term. The remedial stare decisis on which this Essay focuses is one in which breaks from precedent go beyond correcting errors or reconciling competing doctrinal strands. Instead, remedial stare decisis refers to instances in which the Court focuses on remedying the injuries that arose from the impact of the earlier decision.

Again, the Court's disposition of *Lawrence v. Texas* is instructive. The *Lawrence* Court's objections to *Bowers* went beyond the earlier Court's conclusion that the Constitution placed no limits on the state's authority to criminalize same-sex intimacy. Rather, the *Lawrence* Court viewed *Bowers* as inflicting distinct injuries on gay men and women. In blessing the criminalization of same-sex sodomy, *Bowers* served as "an invitation to subject homosexual persons to discrimination both in the public and in the private spheres."[89] Put another way, *Bowers*—and the criminalization of gay life that it underwrote—"demean[ed] the lives of homosexual persons,"[90] producing injuries that the *Lawrence* Court sought to remedy by overruling the earlier decision.

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87. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 846 (1992), *overruled by* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022) ("It must be stated at the outset and with clarity that *Roe*'s essential holding, the holding we reaffirm, has three parts. First is a recognition of the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State.").

88. In *Casey*, the Court clarified that:

> The woman's liberty is not so unlimited, however, that from the outset the State cannot show its concern for the life of the unborn, and at a later point in fetal development the State's interest in life has sufficient force so that the right of the woman to terminate the pregnancy can be restricted.

Id. at 869.

89. Lawrence v. Texas, 539 U.S. 558, 575 (2003).

90. *Id.*

In this regard, viewing *Lawrence* through a remedial lens makes clear that the Court's decision to overturn *Bowers* was not animated solely by objections to the earlier decision's facts and reasoning. In jettisoning *Bowers*, the *Lawrence* Court acted with remedial purpose—identifying and redressing *Bowers*'s injuries to gay men and women.

And critically, a similar brand of remedial stare decisis can be gleaned throughout the Court's history from cases involving the dismantling of racial hierarchies. Indeed, some of the most canonical cases in constitutional law were ones in which the Court overruled a prior Court's decision in order to remedy the racial injustice that the earlier decision underwrote. The Section that follows considers these canonical examples of *racially* remedial stare decisis.

B. Remedying Racial Injuries

In some of the most famous cases in constitutional law, departures from precedent—and indeed, the overruling of precedent—might be understood as serving remedial purposes. And quite often, the remedial interests aim to correct past episodes of racial injustice or address ongoing racial injuries. Consider *Brown v. Board of Education*,[91] where the Court unanimously overruled *Plessy v. Ferguson*[92] and declared the principle of "separate but equal" unconstitutional.[93] *Plessy* had withstood numerous challenges and was regarded as settled.[94] Nevertheless, the *Brown* Court overruled *Plessy*, largely on the view that the earlier Court, at the time it rendered its decision blessing *de jure* segregation, had not—and could not have—appreciated the growing importance of public education in a democratic society.[95] By 1954, however, the importance of public education was obvious. As the *Brown* Court explained, public education had evolved to become "perhaps the most important function of state and local governments" and "the very foundation of good citizenship."[96]

But the shifting importance of public education alone did not account for the *Brown* Court's momentous decision to abandon *Plessy*. Equally important—and perhaps more difficult to categorize—was the

91. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

92. Plessy v. Ferguson, 163 U.S. 537 (1896), *overruled by Brown*, 347 U.S. 483.

93. *Brown*, 347 U.S. at 494–95.

94. *See id.* at 491–92 (collecting cases).

95. *Id.* at 489–90.

96. *Id.* at 493.

Court's understanding of the way that state-sanctioned segregation "generate[d] a feeling of inferiority . . . that may affect [Black children's] hearts and minds in a way unlikely ever to be undone."[97] "Put differently, the *Plessy* Court had deliberated . . . blind[ly], unconscious of the future import of public" education and oblivious to the racial injuries that segregation would inflict.[98] In overruling *Plessy*, the *Brown* Court both acknowledged the changed landscape and sought to remedy the racial injuries that segregation had inflicted.[99]

Brown was not the only instance in which the Warren Court would depart from extant precedent for the purpose of remedying racial injuries that earlier decisions had produced. In *McLaughlin v. Florida*[100] and *Loving v. Virginia*,[101] the Warren Court struck down criminal prohibitions on interracial cohabitation and interracial marriages, respectively.[102] In so doing, it repudiated *Pace v. Alabama*,[103] an 1883 decision in which an earlier Court upheld as constitutional Alabama's antimiscegenation laws on the view that the laws applied equally to Blacks and whites and thus posed no equal protection problems.[104] In deciding *McLaughlin*, a challenge to Florida's ban on interracial cohabitation, the Court acknowledged *Pace* as the "controlling authority"[105] but nevertheless struck down the challenged law on the ground that *Pace*'s "narrow view of the Equal Protection Clause [had been] swept away"[106] in favor of a "strong policy [that] render[ed] racial classifications 'constitutionally suspect.'"[107]

Loving, decided just three years later, wrung any remaining life out of *Pace*. In defending its Racial Integrity Act of 1924, which prohibited interracial marriages, Virginia relied on *Pace*, arguing that so long as interracial marriage prohibitions applied equally to Blacks and whites, they were constitutionally permissible.[108] The *Loving* Court

97. *Id.* at 494.

98. *See* Murray, *Race-ing* Roe, *supra* note 16, at 2077 (explaining how the *Plessy* Court failed to account for the importance of public education and the effects of segregation on children).

99. *Id*.

100. McLaughlin v. Florida, 379 U.S. 184 (1964).

101. Loving v. Virginia, 388 U.S. 1 (1967).

102. *See McLaughlin*, 379 U.S. at 184; *Loving*, 388 U.S. at 2.

103. Pace v. Alabama, 106 U.S. 583 (1883), *overruled by McLaughlin*, 376 U.S. at 184.

104. *Id.* at 585.

105. *McLaughlin*, 379 U.S. at 188.

106. *Id.* at 190.

107. *Id.* at 192 (citing Bolling v. Sharpe, 347 U.S. 497, 499 (1954)).

108. Loving v. Virginia, 388 U.S. 1, 10 (1967).

disagreed—both with the argument and the characterization of *Pace* as good law. Building on *McLaughlin*'s logic, the *Loving* Court noted that because the Fourteenth Amendment's "clear and central purpose . . . was to eliminate all official state sources of invidious racial discrimination," the necessary question was not whether the prohibition applied equally to all races, but rather whether the interracial marriage ban constituted "arbitrary and invidious discrimination."[109] To underscore its break from *Pace*, the *Loving* Court emphasized that "[t]here can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause."[110]

Viewed together, these canonical Warren Court decisions make clear that at various turns in the Court's history, the decision to depart from precedent has been animated by a remedial impulse. In high-profile cases like *Brown* and *Loving*, the Court's decision to overrule an earlier decision might be characterized as rejecting—and correcting—the earlier decision's flawed reasoning. But more profoundly, in rejecting the reasoning in both *Plessy* and *Pace*, the Court also was deeply preoccupied with the racial injuries that both these Reconstruction-era precedents imposed on racial minorities. In this regard, what made *Plessy* and *Pace* egregiously wrong was not simply the quality of the earlier Court's reasoning, but also the strong sense that the earlier Court's reasoning was deeply rooted in racism and racial supremacy. On this view, *Brown* and *Loving* corrected their predecessors' flawed logic while also remedying the injuries that the earlier decisions imposed.

C. Remedial Stare Decisis and the Roberts Court

As the foregoing discussion suggests, the Court has, in its history, engaged in what I term "remedial stare decisis." That is, the decision to depart from and overrule an earlier decision was animated largely by the Court's interest in remedying the discrimination and racial injustices that a prior Court had failed to appreciate or, indeed, had perpetuated. Critically, some of the most lauded decisions in the Court's history, including *Brown* and *Loving*, bear the imprint of remedial stare decisis.

109. *Id.*

110. *Id.* at 12.

But the interest in remedial stare decisis is not limited to the Warren Court. More recently, the Roberts Court also has considered underlying racial injustices and remedial interests to determine whether an extant precedent should be followed. The following sections discuss a series of decisions in which the Court departed from extant precedent to remedy long-standing injustices and injuries to racial minorities.

1. Trump v. Hawaii—*Remedying* Korematsu v. United States. As recently as 2018, the Court discarded a precedent because it was synonymous with a profound episode of racial injustice. Issued in the heat of World War II and after the bombing of Pearl Harbor, *Korematsu v. United States*[111] upheld Executive Order 9066, which required the internment of Japanese nationals and U.S. citizens of Japanese descent living on the West Coast.[112] Although it relied on national security interests to justify its decision, the *Korematsu* Court clearly understood the racialized contours of upholding the challenged order[113]—indeed, all three dissenters specifically identified the executive order's underlying racism and xenophobia.[114]

Despite its obvious racism, *Korematsu* remained good law until 2018, when the Roberts Court, in the context of a challenge to the Trump administration's "travel ban," formally departed from and disavowed the 1944 decision. In *Trump v. Hawaii*,[115] a 5–4 majority of the Court upheld the travel ban over claims that the executive order implementing the ban exceeded the President's authority and discriminated against Muslims.[116] The majority's decision prompted a vigorous dissent that compared the travel ban to the internment order upheld in *Korematsu*.[117] This comparison spurred an indignant majority to denounce the comparison while also taking the unusual step of "express[ing] what is already obvious: *Korematsu* was gravely wrong

111. Korematsu v. United States, 323 U.S. 214 (1944), *abrogated by* Trump v. Hawaii, 585 U.S. 667 (2018).

112. Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 19, 1942).

113. *Korematsu*, 323 U.S. at 223.

114. *See id.* at 226, 233, 242–44.

115. Trump v. Hawaii, 585 U.S. 667 (2018).

116. *Id.*

117. *Id.* at 752–53 (Sotomayor, J., dissenting) ("Today's holding is all the more troubling given the stark parallels between the reasoning of this case and that of *Korematsu v. United States*." (citation omitted)).

the day it was decided, has been overruled in the court of history, and—to be clear—'has no place in law under the Constitution.'"[118]

2. Ramos v. Louisiana—*Remedying* Apodaca v. Oregon. In *Ramos v. Louisiana*, the Court overruled an earlier precedent in part because the deciding court had failed to properly consider racial harm in its disposition of the case. At issue in *Ramos* was whether Louisiana's policy of allowing criminal convictions to proceed from nonunanimous jury verdicts was consistent with the Sixth Amendment.[119] In two 1972 cases, *Apodaca v. Oregon*[120] and *Johnson v. Louisiana*,[121] the Court considered whether the Fourteenth Amendment incorporated the Sixth Amendment's guarantees to apply against the states. Consolidated for review, the two appeals produced "a tangle of seven separate opinions," as well as the principle that although the Sixth Amendment guaranteed criminal defendants a right to conviction by a unanimous jury, that right did not extend to defendants in *state* trials.[122]

Not surprisingly, when the Court announced its decision in *Ramos*, the question of stare decisis and fidelity to past precedent was at the forefront of the majority opinion overruling *Apodaca* (and, by extension, *Johnson*) on the basis that the challenged Louisiana rule was inconsistent with the logic and history of the Sixth Amendment.[123] While the *Ramos* majority declared *Apodaca* "gravely mistaken," at least part of the earlier decision's illogic, the Court maintained, was its treatment of race and racism.[124] Louisiana's nonunanimous jury rule was rooted in a Reconstruction-era effort to "establish the supremacy of the white race" by "sculpt[ing] a 'facially race-neutral' rule" that would "ensure that African-American juror service would be meaningless."[125] Although the Oregon jury rule upheld in *Apodaca* did not share the Louisiana rule's Jim Crow provenance, as the majority noted, its origins in the 1930s could be "similarly traced to the rise of

118. *Id.* at 710 (majority opinion) (quoting *Korematsu*, 323 U.S. at 248 (Jackson, J., dissenting)).

119. Ramos v. Louisiana, 140 S. Ct. 1390, 1394 (2020).

120. Apodaca v. Oregon, 406 U.S. 404 (1972).

121. Johnson v. Louisiana, 406 U.S. 356 (1972); *Ramos*, 140 S. Ct. at 1397–98.

122. Brief for Petitioner at 6–8, Ramos v. Louisiana, 140 S. Ct. 1390 (2020) (No. 18-5924), 2019 WL 2451204, at *7–8.

123. *Ramos*, 140 S. Ct. at 1405.

124. *Id.*

125. *Id*. at 1394 (citations omitted).

the Ku Klux Klan and efforts to dilute 'the influence of racial, ethnic, and religious minorities on Oregon juries.'"[126]

To be sure, *Apodaca*'s status as a Sixth Amendment "outlier" casts doubt on its reasoning and logic. But critically, the clear racist origins of the nonunanimous jury rule further justified the Court's decision to disregard stare decisis and overrule *Apodaca*.[127] Indeed, Justice Gorsuch, who wrote for the *Ramos* majority, observed that *Apodaca*'s precedential value was diminished by the "implacable fact that the plurality spent almost no time grappling with the historical meaning of the Sixth Amendment's jury trial right, this Court's long-repeated statements that it demands unanimity, *or the racist origins of Louisiana's and Oregon's laws*."[128]

3. Box v. Planned Parenthood of Indiana and Kentucky *and* Dobbs v. Jackson Women's Health Organization—*Remedying* Roe v. Wade *and* Planned Parenthood v. Casey. This interest in remedying past racial injustices has also informed the Roberts Court's consideration of other high-profile precedents. In May 2019, the Court issued a per curiam shadow docket decision in *Box v. Planned Parenthood of Indiana and Kentucky, Inc.*,[129] a challenge to two Indiana laws regulating abortion. The Court denied certiorari as to the first law while upholding the second without requiring full briefing and argument.[130] Although he concurred in the Court's judgment, Justice Thomas wrote separately to make the point that one of the challenged laws—a so-called reason ban—was merely the state's modest attempt to prevent abortion "from becoming a tool of modern-day eugenics."[131] Thomas then proceeded to craft a selective history linking the reproductive rights movements to the eugenics movement of the early twentieth century and its efforts to prevent the white race from being "overtaken by inferior races."[132] To Thomas, reproductive rights—and abortion, particularly—were rooted in a thick stew of white supremacy, racial injustice, and the prospect of racial genocide.

As I have discussed elsewhere, the narrative linking abortion rights to the eugenics movement, though incomplete and selective, has

126. *Id.* (citation omitted).
127. *Id.* at 1405–06.
128. *Id.* at 1405 (emphasis added).
129. Box v. Planned Parenthood of Ind. & Ky., Inc., 139 S. Ct. 1780 (2019).
130. *Id.* at 1782.
131. *Id.* at 1783.
132. *Id.* at 1785.

gained traction in the lower federal courts, where it has been invoked to justify laws limiting abortion access.[133] More recently, this narrative has also complemented the Roberts Court's rationales for overruling *Roe v. Wade* and *Planned Parenthood v. Casey*, the twin pillars of the Court's abortion jurisprudence.

In *Dobbs v. Jackson Women's Health Organization*, a 5–4 majority of the Court concluded that "five factors weigh[ed] strongly in favor of overruling *Roe* and *Casey*: the nature of their error, the quality of their reasoning, the 'workability' of the rules they imposed on the country, their disruptive effect on other areas of the law, and the absence of concrete reliance."[134] But even as the *Dobbs* majority reviewed the various stare decisis factors, it also noted other implicit grounds for departing from the two decisions recognizing and upholding a constitutional right to abortion. In a footnote, the *Dobbs* majority referenced various amicus briefs that "note[d] that some [abortion] supporters have been motivated by a desire to suppress the size of the African-American population."[135] Citing these briefs, as well as Justice Thomas's concurrence in *Box*, the majority concluded that "it is beyond dispute that *Roe* has had that demographic effect," since "[a] highly disproportionate percentage of aborted fetuses are Black."[136] By crediting this narrative linking abortion and eugenics, the *Dobbs* majority implicitly endorsed the view that abortion is a tool of racial genocide.

While preventing genocide and prompting racial justice were not determinative rationales in the decision to overrule *Roe* and *Casey*, it is telling that the *Dobbs* majority cited arguments linking *Roe* and its recognition of a constitutional right to abortion with an alleged effort to deracinate the Black community.[137] In a decision already studded with references to *Brown v. Board of Education* and its overruling of

133. *See, e.g.*, Preterm-Cleveland v. McCloud, 994 F.3d 512, 517 (6th Cir. 2021) (crediting the state's interest in "protect[ing] the Down syndrome community—both born and unborn—from . . . discriminatory abortions"); *id.* at 536 (Sutton, J., concurring) (characterizing the challenged abortion ban as an "anti-eugenics statute"); *id.* at 538 (Griffin, J., concurring) (arguing that the challenged abortion ban prevented "physicians from knowingly engaging in the practice of eugenics"); Melissa Murray, *Abortion, Sterilization, and the Universe of Reproductive Rights*, 63 WM. & MARY L. REV. 1599, 1604 (2022) (discussing these dynamics).

134. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 268 (2022).

135. *Id.* at 255 n.41.

136. *Id.*

137. *Id.* (citing Box v. Planned Parenthood of Ind. & Ky., Inc., 139 S. Ct. 1780, 1782–84 (2019) (Thomas, J., concurring)).

Plessy v. Ferguson,[138] this curious footnote no doubt reinforced the view that the majority, like the *Brown* Court before it, was not just denouncing decisions that it believed were "egregiously wrong from the start."[139] Instead, the decision to break from almost fifty years' worth of precedent was justified by *Roe* and *Casey*'s "deeply damaging"[140] impact on minority communities—after all, "[a] highly disproportionate percentage of aborted fetuses are Black."[141] Notably, in identifying rational basis as the appropriate standard of review for determining the constitutionality of abortion regulations, the *Dobbs* majority specifically noted that "the prevention of discrimination on the basis of race" was among the legitimate state interests that would sustain abortion restrictions going forward.[142]

4. District of Columbia v. Heller *and* McDonald v. City of Chicago—*Remedying* United States v. Miller *and* United States v. Cruikshank. The interest in remedying racial injustice has also shaded the Roberts Court's efforts to reshape the scope and substance of Second Amendment doctrine. Until 2008, most courts, including the Supreme Court, viewed the text of the Second Amendment as limiting the right to keep and bear arms to the context of militia service, authorizing the federal government to enact gun control legislation limiting individual possession of firearms. Indeed, in 1939's *United States v. Miller*,[143] the Court upheld the National Firearms Act because those challenging the law had not proffered "any evidence tending to show that possession or use of a 'shotgun having a barrel of less than eighteen inches in length' at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia."[144]

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138. *Id.* at 264–65 (noting that "[s]ome of our most important constitutional decisions have overruled prior precedents" and referencing *Brown* as "overrul[ing] the infamous decision in *Plessy v. Ferguson*"); *id.* at 268 (referencing *Plessy* for the view that "[a]n erroneous interpretation of the Constitution is always important, but some are more damaging than others"); *id.* at 291–92 ("A precedent of this Court is subject to the usual principles of *stare decisis* under which adherence to precedent is the norm but not an inexorable command. If the rule were otherwise, erroneous decisions like *Plessy* . . . would still be the law. That is not how *stare decisis* operates."); *id.* at 293 (asking rhetorically whether "overruling *Plessy* was not justified until the country had experienced more than a half-century of state-sanctioned segregation and generations of Black school children had suffered all its effects" (citation omitted)).

139. *Id.* at 231.

140. *Id.* at 268.

141. *Id.* at 255 n.41.

142. *Id.* at 301.

143. United States v. Miller, 307 U.S. 174 (1939).

144. *Id.* at 178.

Miller reflected the long-standing interpretation of the Second Amendment—that is, until 2008, when the Roberts Court upended this settlement. In *District of Columbia v. Heller*,[145] the Court blithely dismissed both text and precedent, concluding that despite its explicit pronouncement that "a well regulated [m]ilitia" was "necessary to the security of a free State,"[146] the Second Amendment's protections were not confined to militia service and instead encompassed an individual right to keep and bear arms in the home for purposes of self-defense.[147] In so doing, the *Heller* Court insisted that *Miller* was not controlling because it had been read "for more than what it said . . . [and] did not even purport to be a thorough examination of the Second Amendment."[148] Two years later, in *McDonald v. City of Chicago*,[149] the Court made *Heller*'s vision of the Second Amendment applicable to the states through the Fourteenth Amendment's Due Process Clause.[150]

Heller and *McDonald* ushered in a dramatic shift in the Court's interpretation of the Second Amendment. Critically, they did so by explicitly linking the more limited vision of the Second Amendment to the Reconstruction-era disarmament of racial minorities. In *Heller*, although the Court focused principally on identifying the proper guidelines for interpreting the Second Amendment, the majority also referenced the postbellum effort to vest newly freed Blacks with an individual right to keep and bear arms.[151] To be sure, in recounting this history, the *Heller* majority did necessarily intend to highlight the disarmament of freedmen as a distinct constitutional injury. Rather, the discussion served to bolster the view that the Second Amendment right to bear arms had long been understood to be untethered from military service and to protect an individual right to possess a firearm for self-defense in the home.[152]

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145. District of Columbia v. Heller, 554 U.S. 570 (2008).

146. *Id.* at 576 (citing U.S. CONST. amend. II).

147. *Id.* at 570.

148. *Id.* at 623.

149. McDonald v. City of Chicago, 561 U.S. 742 (2010).

150. *Id.* at 791 ("We therefore hold that the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment right recognized in *Heller*.").

151. *Heller*, 554 U.S. at 614–16.

152. *Id.* at 616 (recounting this history and noting that "[i]t was plainly the understanding in the post-Civil War Congress that the Second Amendment protected an individual right to use arms for self-defense").

Still, the *Heller* Court acknowledged that "Blacks were routinely disarmed by Southern States after the Civil War"[153]—a point that the *McDonald* Court would reprise when it considered whether the Fourteenth Amendment incorporated the Second Amendment's protections against the states.[154] In *McDonald*, the fact of Black disarmament would be marshaled as a distinct constitutional injury that warranted incorporating to the states *Heller*'s view of the Second Amendment as an individual right.[155] Writing for the majority, Justice Alito painted a broad and sweeping (and selective[156]) postbellum history in which Southern states sought to deny the citizenship of newly freed African Americans by denying them the right to keep and bear arms.[157] But even as the *McDonald* majority partially located the impetus for the incorporation of the Second Amendment in the postbellum disarmament of newly freed Blacks, it was Justice Thomas's concurrence in *McDonald* that made explicit the remedial dimension of this muscular approach to the Second Amendment.

In his *McDonald* concurrence, Justice Thomas concurred in the majority's judgment that the Second Amendment had been incorporated as to the states. However, he wrote separately to argue that the Privileges or Immunities Clause of the Fourteenth Amendment was the proper doctrinal basis for incorporating the guarantees of the Bill of Rights.[158] In so doing, Justice Thomas rejected *United States v. Cruikshank*,[159] an 1875 case in which the Supreme Court held that despite the ratification of the Fourteenth Amendment, the Bill of Rights' guarantees, including the Second Amendment's

153. *Id.* at 614.

154. *McDonald*, 561 U.S. at 771–73 (discussing "systematic efforts" to disarm Blacks and the subsequent efforts, both constitutional and statutory, to protect the right to keep and bear arms as an indicium of citizenship).

155. *Id.* at 791.

156. Specifically, the *McDonald* Court ignored evidence that the Fourteenth Amendment was intended to authorize states to *limit* the bearing and keeping of arms by those bent on using racial terrorism and violence to subordinate and subjugate newly freed Blacks. *See* JAMES FORMAN JR., LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA 65–66 (2017) ("Many Reconstruction legislators argued that the Fourteenth Amendment was necessary to ensure that recently freed slaves would receive state protection from private violence."). This view of the Fourteenth Amendment as *obligating* states to take measures to protect freedmen from acts of violence, whether public or private, is wholly absent in the history that the *McDonald* Court recounts.

157. *McDonald*, 561 U.S. at 770–76.

158. *Id.* at 806 (Thomas, J., concurring).

159. United States v. Cruikshank, 92 U.S. 542 (1875).

right to keep and bear arms, did not apply to restrain private actors or state governments.[160]

Justice Thomas's repudiation of *Cruikshank* was significant. The case involved the Colfax Massacre of 1873, where white militiamen slaughtered dozens of newly freed Blacks, many of whom were unarmed.[161] In denouncing *Cruikshank*, Thomas was not simply defending his preferred vehicle for incorporation. He was making clear that *Cruikshank* wrought a terrible racial injustice, neutering the Privileges or Immunities Clause and "enabl[ing] private forces, often with the assistance of local governments, to subjugate the newly freed slaves and their descendants through a wave of private violence designed to drive blacks from the voting booth and force them into peonage, an effective return to slavery."[162] In discrediting *Cruikshank*, Thomas bolstered the majority's view that the cause of racial justice demanded a more expansive vision of the Second Amendment—one that would remedy the decades-long campaign of racialized violence waged against African-Americans that *Cruikshank* sanctioned.[163]

The interest in the Second Amendment as a salve for racial injustice would arise again in 2022's *New York State Rifle & Pistol Association, Inc. v. Bruen*. There, a 6–3 majority of the Court invalidated New York's concealed-carry gun licensing regime, and in so doing, it endorsed a broader right to keep and bear arms in and outside of the home.[164] Writing for the *Bruen* majority, Justice Thomas justified this broad expansion of the Second Amendment beyond the home by reprising the history of postbellum racial violence. As he explained, during Reconstruction and Redemption, Southern states relied on gun laws and other official actions to thwart newly freed Black men who sought to exercise their Second Amendment rights.[165] Unable to arm themselves, these new citizens could not "defend themselves and their communities."[166] On this account, Justice

160. *See id.* at 553 (noting that the Second Amendment "has no other effect than to restrict the powers of the national government").

161. *See* Danny Lewis, *The 1873 Colfax Massacre Set Back the Reconstruction Era*, SMITHSONIAN MAG. (Apr. 13, 2023), https://www.smithsonianmag.com/smart-news/1873-colfax-massacre-crippled-reconstruction-180958746 [https://perma.cc/X7MA-XUUJ] (noting that the Black Louisianians had surrendered before they were murdered by the white militiamen).

162. *Id.* at 855–56.

163. McDonald, 561 U.S. at 855–58. (Thomas, J., concurring).

164. N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 31–32 (2022).

165. *Id.* at 59–66.

166. *Id.* at 61.

Thomas's vision of a more expansive Second Amendment was explicitly rooted in an effort to remedy and repair these past episodes of racial subjugation and violence.[167]

* * *

Taken together, *Trump v. Hawaii*, *Ramos*, *Dobbs*, *Heller*, *McDonald*, and *Bruen* all nod, to some degree, to the kind of remedial impulse that can be glimpsed in canonical cases like *Brown* and *Loving*. In these cases, the Roberts Court, like the Warren Court before it, departed from earlier decisions and long-standing doctrine in part because those decisions and doctrines underwrote, whether actually or allegedly, a racial injustice that the Court was keen to correct.[168] And critically, in these cases, the nature of the racial injury to be remedied can be understood in terms that are like those seen in *Brown* and *Loving*. That is, the injuries to be addressed are injuries inflicted upon racial minorities that accord with traditional understandings of racism and racial injury.

In this regard, the Roberts Court's use of remedial stare decisis in these contexts is consistent with the vision of the judicial role articulated by theorists like John Hart Ely. In his most famous work, *Democracy and Distrust*, Ely sought to defend the Warren Court and its decisions, particularly those related to racial integration and voting rights, against claims of countermajoritarianism.[169] Building on

167. Critically, some amici sought a modern update to this narrative. In a much-discussed brief, Black public defender groups made the case for expanding the reach of the Second Amendment on the ground that gun control laws have been used not only to disarm Blacks, but also to police them. Brief of the Black Attorneys of Legal Aid, the Bronx Defenders, Brooklyn Defender Services et al. as Amici Curiae in Support of Petitioners at 5, *Bruen*, 597 U.S. 1 (No. 20-843), 2021 WL 4173477, at *5.

168. *See* Murray, *Race-ing* Roe, *supra* note 16, at 2079. ("[T]hese cases make clear that, modernly, an interest in correcting racial wrongs has shaped the Court's thinking about stare decisis—and indeed, has on occasion provided the special justification necessary for the Court to depart from precedent.").

169. *See* Melissa Murray & Katherine Shaw, Dobbs *and Democracy*, 137 HARV. L. REV. 728, 798–800 (2024) (discussing *Democracy and Distrust*); Nicholas O. Stephanopoulos, *The Anti-*Carolene *Court*, 2019 SUP. CT. REV. 111, 135 ("Ely's book was the academic analogue of the Warren Court's reapportionment decisions: a full-throated defense of *Carolene*'s thesis that democratic malfunction should prompt judicial intervention."); David A. Strauss, *Modernization and Representation Reinforcement: An Essay in Memory of John Hart Ely*, 57 STAN. L. REV. 761, 762 (2004) ("One of the signal contributions of *Democracy and Distrust* was its highly influential defense of the Warren Court: in its most important decisions, Ely convincingly argued, the Warren Court was reinforcing democracy, not just implementing its own constitutional vision.").

Footnote Four of *United States v. Carolene Products Co.*,[170] which identified a more searching brand of judicial scrutiny for cases involving fundamental rights, the political process, and official actions aimed at "discrete and insular minorities,"[171] Ely argued that the Court's role was to bolster and safeguard the infrastructure of democracy and facilitate political participation.[172] On this view, judicial review was legitimate, even where it invalidated the actions of elected officials, if it was intended to protect "discrete and insular minorities."[173]

Viewed through Ely's lens, remedial stare decisis might also be defended as being entirely consistent with the judicial role. That is, overruling or departing from a precedent may be especially justified when doing so remedies injustices perpetrated against those who are unable to adequately protect themselves in majoritarian politics. On this telling, some of the Roberts Court's recent departures from precedent are defensible not only because they ostensibly correct flawed judicial reasoning, but also because they remedy injustices to minority groups. This remedial slant both licenses a court to act *and* may serve to shield those judicial actions from critique.

The decisions canvassed here are notable in that, in these cases, the Court explicitly acknowledged its remedial aims. In other cases in which the Roberts Court has overruled or narrowed precedent, it has not adverted expressly to remedial ends. Nevertheless, as the following Part maintains, viewing the Court's approach to precedent in these other cases through a remedial lens is enriching and illuminating. In these circumstances, where the Court does not explicitly acknowledge remedial concerns, one might nevertheless understand it as taking aim at precedents that have inflicted racial injuries against certain groups. But meaningfully, in these other cases, the injured parties who are now the subjects of the Court's solicitude are markedly different from the underrepresented minority groups for whom earlier Courts interceded.

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170. United States v. Carolene Prods. Co., 304 U.S. 144 (1938).

171. *Id.* at 152–53 n.4.

172. *See* Stephanopoulos, *supra* note 169, at 135–37 (noting that Ely, like *Carolene*, encourages the "idea of pro-democratic judicial review" and that the basic premise behind Ely's theory is "that obstacles to political participation should be removed" (quoting Mark Tushnet, *Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory*, 89 YALE L.J. 1037, 1045 (1980)).

173. Murray & Shaw, *supra* note 169, at 798–800.

IV. REMEDIAL STARE DECISIS AND THE NEW MINORITIES

As the previous Part discussed, the Supreme Court's approach to stare decisis has often evinced a remedial bent. Indeed, some of the most famous departures from precedent have been animated by a desire to remedy an earlier decision's racist antecedents or to correct an obvious racial injustice. The Roberts Court, like earlier Courts, has also embraced the remedial aspect of stare decisis, stepping in to overrule or break from an extant precedent rooted in racism and discrimination.

Applying this remedial lens to other Roberts Court decisions makes clear that the interest in remedial stare decisis is not limited to remedying racial injustices perpetrated against traditional minority groups. Instead, viewed through the aperture of remedy, the Roberts Court's approach to precedent may reflect an interest in remedying injuries and injustices done to a new group of "minorities"—namely, Christian conservatives, working-class whites, and, more generally, white people.

To be very clear, what follows is not a descriptive account of how the Court operates. In the cases canvassed below, unlike those discussed above, the Court makes no gestures toward remedying injuries inflicted upon any particular group. Instead, this is an *interpretive* intervention. Reading the cases that follow through the lens of remedial stare decisis reveals aspects of the decisions that may otherwise go overlooked. As importantly, viewing the decisions through the lens of racial remedy surfaces a unifying structure that brings these doctrinally disparate cases into conversation with one another.

A. Remedying Harms to Christian Conservatives

As commentators have noted, in recent years, the Roberts Court has been steadily remaking First Amendment doctrine.[174] In doing so,

174. *See* Nelson Tebbe & Micah Schwartzman, *The Politics of Proportionality*, 120 MICH. L. REV. 1307, 1330–31 (2022) ("The Roberts Court is in the process of remaking the law of religious freedom, most evidently as to the Establishment Clause and more stealthily with respect to the Free Exercise Clause."); Micah Schwartzman & Nelson Tebbe, *Establishment Clause Appeasement*, 2019 SUP. CT. REV. 271, 276–77 (discussing profound shifts in the Court's approach to the First Amendment); Richard Schragger & Micah Schwartzman, *Establishment Clause Inversion in the Bladensburg Cross Case*, 3 AM. CONST. SOC'Y SUP. CT. REV. 21, 24–29 (2019) (discussing the collapse of Establishment Clause doctrine); Nelson Tebbe, *The Principle and Politics of Liberty of Conscience*, 135 HARV. L. REV. 267, 293–95 (2021) (discussing recent and significant changes in free-exercise jurisprudence).

it has taken a multifaceted approach to precedent. As this Section discusses, in some cases, the Court has abandoned long-settled precedents, effectively overturning them. In other cases, it has distinguished or narrowed extant precedent in ways that limit its force and reach. This is all to say that while the Court has not yet formally overruled controversial First Amendment precedents like *Employment Division v. Smith*[175]—despite opportunities (and invitations![176]) to do so—it has indicated that many of the bedrock

175. Emp. Div. v. Smith, 494 U.S. 872 (1990). *Smith* is among the most disfavored First Amendment decisions in recent history. The case involved two Native Americans who were denied unemployment benefits after being fired for using peyote, a criminally proscribed hallucinogen. *Id*. at 890. In appealing the denial of benefits, the respondents argued that their peyote use was part of a Native American religious ceremony, and thus the law criminalizing its use violated the Free Exercise Clause of the First Amendment. *Id.* at 878. In reversing the state court's decision, the Court concluded that the law proscribing peyote use was a "neutral law of general applicability" that was not intended to target any particular religion. *Id.* at 872 (quoting United States v. Lee, 455 U.S. 252, 263 & n.3 (1982)). On this account, an earlier precedent, *Sherbert v. Verner*, 374 U.S. 398 (1963), which required courts to apply strict scrutiny to laws that burdened religious exercise, was inapplicable. *Id.* at 883–84. The Court's decision in *Smith* was, understandably, viewed as a blow to the religious liberty of *minority* religious sects whose practices were more likely than the practices of mainstream religions to be proscribed by generally applicable laws. Ronald F. Thiemann, *Beyond the Separation of Church and State: Public Religion and Constitutional Values*, 66 N.Y. ST. BAR J. 48, 50 (1994) ("What the [*Smith*] Court failed to see is that religious exemptions are essential precisely for those minority faiths that the free exercise and non-establishment clauses are designed primarily to protect."). As a corrective in the wake of *Smith*, Congress passed with bipartisan support the Religious Freedom and Restoration Act, which restored the *Sherbert* standard for judging free exercise claims. 42 U.S.C. § 2000bb(b)(1).

Although *Smith* was a 6–3 opinion written by Justice Antonin Scalia, it has fallen out of favor among conservatives. Steven H. Aden & Lee J. Strang*, When a "Rule" Doesn't Rule: The Failure of the* Oregon Employment Division v. Smith *"Hybrid Rights Exception,"* 108 PENN ST. L. REV. 573, 581 (2003) ("*Smith* has the rather unusual distinction of being one case that is almost universally despised . . . by both liberals and conservatives."). Christian conservatives have, in recent years, vehemently objected to *Smith* and advocated for overturning the decision. Stephen M. Feldman, *White Christian Nationalism Enters the Political Mainstream: Implications for the Roberts Court and Religious Freedom*, 53 SETON HALL L. REV. 667, 724 (2023) ("With conservatives worried that white Christians are being discriminated against and persecuted—and with a conservative bloc of Justices controlling the Supreme Court—conservative Christians want[] stronger judicial protection of religious freedom [than the *Smith* decision], particularly for Christians, whether under the Free Exercise or the Establishment Clause.").

176. *See, e.g.*, Fulton v. City of Philadelphia, 593 U.S. 522, 533, 540–41 (2021) (presenting the question of whether to overrule *Smith*). Indeed, in *Fulton*, the Court narrowed *Smith*'s rule regarding laws of general applicability, thereby expanding the array of laws that are subject to strict scrutiny—and therefore likely to be invalidated. *See* Ira C. Lupu & Robert W. Tuttle, *The Radical Uncertainty of Free Exercise Principles: A Comment on* Fulton v. City of Philadelphia, 5 AM. CONST. SOC'Y SUP. CT. REV. 221, 222 (2021) (noting that the Court rested "its holding on the narrow and questionable ground that Philadelphia's non-discrimination policies were not 'generally applicable'"); James M. Oleske, Jr., *Free Exercise (Dis)honesty*, 2019 WIS. L. REV. 689, 731–39 ("[T]he *rule itself* is fundamentally inconsistent with the Court's current understanding of the Free Exercise Clause and adopting it would most accurately be described as pulling on a 'loose

precedents that have undergirded modern First Amendment doctrine are on uneven footing. And indeed, some of these precedents have been abandoned or fundamentally cabined, even if they have not yet been explicitly overruled.[177]

As discussed earlier, there is much to say about the Roberts Court's penchant for incrementally limiting precedents and then eventually declaring them inconsistent with current doctrine, or otherwise abandoned.[178] But for purposes of this Essay, I consider the Roberts Court's approach to precedent through the lens of racially remedial stare decisis. This lens illuminates the degree to which the Court's approach to precedent in these cases serves a broader effort to cast certain First Amendment litigants—namely, religious conservatives—as besieged minorities.

To be sure, the national climate has concretized for many religious believers the sense that they are an aggrieved minority group. Recent developments have resulted in the increasing secularization of civil society—and an expanding legal landscape that demands acceptance of a wide range of groups and conduct once thought objectionable.[179] In this evolving climate, sexual activity has become untethered from marriage, marriage rates and religiosity have declined, and the equality of racial and sexual minorities is a public-policy imperative in many jurisdictions.[180] For many religious conservatives, "[s]weeping changes in gender roles and sexual mores throughout the twentieth century

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thread[]' to 'cause the entire fabric of *Smith*'s anti-discrimination rule to unravel.'" (alteration in original) (quoting Roderick M. Hills, Jr., *Federalism, Democracy, and Deep Disagreement: Decentralizing Baseline Disputes in the Law of Religious Liberty*, 69 ALA. L. REV. 913, 942 (2018)).

177. *See* Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 510 (2022) ("[T]his Court long ago abandoned *Lemon* and its endorsement test offshoot."); Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2072–73 (2019) (abandoning the test established in *Lemon v. Kurtzman*, 403 U.S. 602 (1971)); *id.* at 2092 (Kavanaugh, J., concurring) (identifying five paradigms of Establishment Clause cases that *Lemon* left unexplained).

178. *See infra* Part II; Murray, *Symbiosis of Abortion*, *supra* note 3, at 327 (noting, in the context of abortion rights, the Court's penchant for "an approach to precedent that at once has generated important, and often incremental, doctrinal changes and simultaneously preserved the appearance of fealty to its past decisions . . . these cases . . . distinguish[] and cabin[] earlier decisions, forging a line of jurisprudence that entrenches the abortion right while sharply limiting its scope"); *id.* at 333 (identifying, in the context of public union fees, the Court's "strategy [of] distinguishing and limiting precedent [a]s part of an incremental approach that, over time, destabilizes and discredits precedent, laying the foundation for later overruling").

179. *See* Melissa Murray, *Consequential Sex: #MeToo,* Masterpiece Cakeshop*, and Private Sexual Regulation*, 113 NW. U. L. REV. 825, 853–54 (2019) (describing this shifting landscape).

180. *Id.*

[have] sparked a sense of cultural dislocation."[181] The Court's own rulings recognizing a right to abortion[182] and same-sex marriage[183] exacerbated the view among many religious conservatives that they were being "left in the wake of a cultural tide."[184]

This sense that religion is under siege has pervaded much of the discourse concerning religious freedom in the United States. In a 2014 keynote address at Brigham Young University, then-Senator Orrin Hatch lamented that "[b]oth at home and abroad, religious liberty is under attack."[185] In particular, then-Senator Hatch accused the Obama administration of "tak[ing] positions that, at best, treat religious liberty as simply an ordinary consideration and, at worst, are openly hostile to religious liberty."[186] In a similar vein, when announcing the Trump administration's Religious Liberty Task Force, then-Attorney General Jeff Sessions noted that the task force would prioritize filing religious freedom cases aimed at counteracting "[a] dangerous movement . . . challenging and eroding our great tradition of religious freedom."[187] More recently, then-Attorney General Bill Barr denounced "militant secularism" and its deployment of "mass communications, popular culture, the entertainment industry, and academia in an unremitting assault on religion and traditional values."[188]

But critically, the sense that religious freedom—and religious conservatives—are under attack is not limited to elected officials or executive branch appointees. Some members of the Court have expressly advanced the notion that religious conservatives are at sea in

181. Hannah Bailey, *A New Minority in the Courts: How the Rhetoric of Christian Victimhood and the Supreme Court Are Transforming the Free Exercise Clause*, 73 SYRACUSE L. REV. 199, 205 (2023) (internal quotations omitted).

182. Roe v. Wade, 410 U.S. 113 (1973).

183. Obergefell v. Hodges, 576 U.S. 644 (2015).

184. Bailey, *supra* note 181, at 205.

185. Senator Orrin G. Hatch, Keynote Address at Brigham Young University 21st International Law and Religion Symposium (Oct. 5, 2014), *in* 2015 BYU L. REV. 585, 585.

186. *Id*.

187. Jeff Sessions, Attorney General, Dep't of Justice, Remarks at the Department of Justice's Religious Liberty Summit (July 30, 2018), https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-department-justice-s-religious-liberty-summit [https://perma.cc/HQ48-KN9Y].

188. William P. Barr, Attorney General, Remarks to the Law School and the de Nicola Center for Ethics and Culture at the University of Notre Dame (Oct. 11, 2019), https://www.justice.gov/opa/speech/attorney-general-william-p-barr-delivers-remarks-law-school-and-de-nicola-center-ethics [https://perma.cc/A2SC-CM38].

an increasingly secular society.[189] In a recent concurrence, Justice Thomas took aim at the Court's First Amendment jurisprudence—and, in particular, its Establishment Clause jurisprudence—for manifesting a "trendy disdain for deep religious conviction."[190] Once a part of the majority culture, religious conservatives now view themselves as a beleaguered minority overwhelmed by the secular majority's preferences. And importantly, we might understand the Court as responding in kind to these perceived injuries, revisiting long-settled precedents and doctrines to craft a new vision of the First Amendment in which religious conservatives are recast as minorities whose claims for religious freedom are prioritized over the civil rights of groups traditionally understood to be underrepresented minorities.[191]

The Court's disposition of *Kennedy v. Bremerton School District*[192] is instructive. Kennedy, an avowed Christian who happened to be an assistant football coach at a public high school, repeatedly engaged in a postgame practice of praying at midfield.[193] The school district, concerned that a school official engaged in prayer at a school event on school property might give rise to an Establishment Clause challenge, demanded that Kennedy immediately stop the practice.[194] Kennedy refused, prompting the school board to discipline him. Kennedy then filed suit, arguing that the school board's disciplinary action violated his First Amendment right to free exercise of religion.[195]

A 6–3 majority of the Court agreed.[196] As the majority explained, the dispute turned on whether Kennedy's prayers were private speech or government speech undertaken by a public official in the course of

189. Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2266–67 (2020) (Thomas, J., concurring) (noting the "denigration" and "'trendy disdain'" for religious traditionalism (quoting Locke v. Davey, 540 U.S. 712, 733 (2004) (Scalia, J., dissenting))).

190. *Id*. (citations omitted).

191. I have discussed this dynamic in other work. *See, e.g.*, Melissa Murray, *Inverting Animus:* Masterpiece Cakeshop *and the New Minorities*, 2018 SUP. CT. REV. 257, 281–82 [hereinafter Murray, *Inverting Animus*] (discussing the Court's depiction of straight, white, Protestant men as the imagined subjects of unconstitutional animus).

192. Kennedy v. Bremerton Sch. Dist., 597 U.S. 507 (2022).

193. *Id*. at 514–15 ("Like many other football players and coaches across the country, Mr. Kennedy made it a practice to give 'thanks through prayer on the playing field' at the conclusion of each game.").

194. *Id*. at 514–18.

195. *Id*. at 520–21.

196. *Id*. at 514.

his official duties.[197] The Court concluded that the prayers were clearly the former.[198] Although Kennedy was a school official, his prayers occurred when he was not engaged in official duties. As such, Kennedy's prayers were "private speech, not government speech," rendering the school board's efforts to reprimand him improper and unconstitutional.[199]

Meaningfully, Kennedy's free exercise rights were not the only religious liberty issue in play in the case. As the school board averred, Bremerton was a diverse, multifaith community, and there was concern that Kennedy's actions might be understood as the school district's "endorsement" of Christianity above other religions in violation of the Establishment Clause.[200] In articulating its Establishment Clause concerns, the school board referred specifically to *Lemon v. Kurtzman*,[201] the long-standing test of state "'endorsement' of religion."[202] The *Kennedy* Court, however, waved away these concerns,[203] insisting that the school district had "effectively created its own 'vise between the Establishment Clause on one side and the Free Speech and Free Exercise Clauses on the other,' placed itself in the middle, and then chose its preferred way out of its *self-imposed trap*."[204] In rejecting the school district's Establishment Clause concerns and prioritizing Kennedy's free speech and free exercise rights, the *Kennedy* Court repudiated *Lemon* as "abandoned."[205]

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197. *Id*. at 528.

198. *Id*. at 529 (concluding that Kennedy's prayers were not "speech 'ordinarily within the scope' of his duties as a coach" because his prayers were private and, as such, could not be considered government speech (quoting Lane v. Franks, 573 U.S. 228, 240 (2014)).

199. *Id.* ("[I]t seems clear to us that Mr. Kennedy has demonstrated that his speech was private speech, not government speech.").

200. *Id.* at 516; *see id.* at 546–48 (Sotomayor, J., dissenting); Brief for Amici Curiae Religious and Denominational Organizations and Bremerton-Area Clergy Supporting Respondent at 4, *Kennedy*, 597 U.S. 507 (2022) (No. 21-418), 2022 WL 1032770, at *4.

201. Lemon v. Kurtzman, 403 U.S. 602 (1971).

202. *Kennedy*, 597 U.S. at 534 (majority opinion).

203. *Id*. at 533–36.

204. *Id*. at 533 (emphasis added) (quoting Capitol Square Rev. & Advisory Bd. v. Pinette, 515 U.S. 753, 768 (1995)).

205. *Id*. at 534. Although the Court did not utter the words "*Lemon v. Kurtzman* is hereby overruled," many First Amendment scholars agree that the decision in *Kennedy* effectively overruled this established precedent. *See* J. Joel Alicea, *The October 2021 Term and the Challenge to Progressive Constitutional Theory*, 2023 WIS. L. REV. 659, 670 ("[I]n *Kennedy v. Bremerton School District*, the Court overruled *Lemon v. Kurtzman* . . . ."); Mary-Rose Papandrea, *The Future of the First Amendment Foretold*, 57 WAKE FOREST L. REV. 897, 923 (2022) ("[I]n *Kennedy v. Bremerton School District*, the Court overruled the *Lemon* test in favor of a focus on 'historical practices and understandings' with a focus on 'original meaning and history.'" (quoting

If the Court had any qualms at all about consigning *Lemon* to the dustbin of history, the majority assuaged these concerns by insisting that its actions were necessary to vindicate Kennedy's rights against the school board's improper encroachments.[206] On this account, "the praying coach is figured as a beleaguered victim,"[207] while the school board is figured as an antagonist, scheming to thwart Kennedy in the exercise of his First Amendment rights.[208]

The treatment of Coach Kennedy as the victim of state overencroachment accords with the Roberts Court's treatment of the litigants in two other First Amendment cases, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*[209] and *303 Creative LLC v. Elenis*.[210] Both involved clashes between the First Amendment and state antidiscrimination laws that prohibit those doing business in the public sphere from discriminating on the basis of certain protected criteria, including sexual orientation.[211] Both Jack Phillips and Lorie

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Kennedy, 142 S. Ct. at 2428)); *see also Kennedy*, 142 S. Ct. at 2434 (Sotomayor, J., dissenting) ("The Court overrules *Lemon v. Kurtzman* . . . and calls into question decades of subsequent precedents that it deems 'offshoot[s]' of that decision."); Sabra v. Maricopa Cnty. Cmty. Coll. Dist., 44 F.4th 867, 887 (9th Cir. 2022) ("In *Kennedy*, . . . the Court recognized that *Lemon* had been overruled and abandoned what it described as *Lemon*'s '"ambitious," abstract, and ahistorical approach to the Establishment Clause.'" (quoting *Kennedy*, 142 S. Ct. at 2427)); Williams v. Bd. of Educ., No. 20 C 4540, 2023 WL 3479161, at *6 (N.D. Ill. May 16, 2023) ("In *Kennedy v. Bremerton School District*, the Supreme Court overruled the test articulated by *Lemon v. Kurtzman* . . . .").

206. As discussed in *Kennedy*,

> In the name of protecting religious liberty, the [school district] would have us suppress it. Rather than respect the First Amendment's double protection for religious expression, it would have us preference secular activity. Not only could schools fire teachers for praying quietly over their lunch, for wearing a yarmulke to school, or for offering a midday prayer during a break before practice. Under the District's rule, a school would be *required* to do so. It is a rule that would defy this Court's traditional understanding that permitting private speech is not the same thing as coercing others to participate in it. It is a rule, too, that would undermine a long constitutional tradition under which learning how to tolerate diverse expressive activities has always been "part of learning how to live in a pluralistic society." We are aware of no historically sound understanding of the Establishment Clause that begins to "mak[e] it necessary for government to be hostile to religion" in this way.

Kennedy, 597 U.S. at 540–41 (alteration in original) (citations omitted).

207. Melissa Murray, *Children of Men: The Roberts Court's Jurisprudence of Masculinity*, 60 HOUS. L. REV. 799, 824 (2023) [hereinafter Murray, *Children of Men*].

208. For further discussion of this dynamic, see *id.* For a detailed discussion of the Court's framing of its Free Exercise cases, see Dahlia Lithwick, *The Holy Morality of the Supreme Court's Most Sympathetic Plaintiffs*, SLATE (Apr. 27, 2022), https://slate.com/news-and-politics/2022/04/how-religious-adherents-became-scotus-most-sympathetic-plaintiffs.html [https://perma.cc/D26Z-LAPX].

209. Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 584 U.S. 617, 630–40 (2018).

210. 303 Creative LLC v. Elenis, 600 U.S. 570, 577–79 (2023).

211. *Masterpiece Cakeshop*, 584 U.S. at 629; *303 Creative*, 600 U.S. at 557–79.

Smith, the respective plaintiffs in *Masterpiece Cakeshop* and *303 Creative*, maintained that their Christian evangelical faith required them to refuse to provide services in the context of same-sex weddings.[212] In *Masterpiece Cakeshop*, the overarching clash between religious liberty and LGBTQ+ equality was never fully resolved because the Court concluded that, in reviewing the underlying claim, the Colorado Civil Rights Commission had violated Phillips's rights by exhibiting "animus"—that is, "hostility to a religion or [a] religious viewpoint."[213] By contrast, in *303 Creative*, decided five years later, the Court concluded that the First Amendment prevented the state from enforcing its public accommodations law to "compel" an individual to create "pure speech" and "communicate ideas" with which the individual disagreed.[214]

As I have argued elsewhere,[215] the *Masterpiece Cakeshop* Court's invocation of animus to protect Jack Phillips, a straight, white, Christian man, inverts and confounds the traditional equal protection hierarchy, which reserves more searching judicial scrutiny for state actions that discriminate against "discrete and insular minorities"[216] or, alternatively, actions that reflect a "bare . . . desire to harm a politically unpopular group."[217] Historically, straight, white Protestants have not been viewed as a "politically unpopular group" or as "discrete and insular minorities."[218] Indeed, more often they are understood to be

212. *Masterpiece Cakeshop*, 584 U.S. at 625–26; Brief for the Petitioner at 4, *303 Creative*, 600 U.S. 570 (No. 21-476), 2022 WL 1786990, at *4.

213. *Masterpiece Cakeshop*, 584 U.S. at 638.

214. *303 Creative*, 600 U.S. at 587.

215. Murray, *Inverting Animus*, *supra* note 191, at 282 (discussing the deployment of equal protection doctrine to protect the rights of Christian conservatives); *see also* Murray, *Children of Men*, *supra* note 207, at 823 (2023) ("Under the majority's watchful eye, Phillips is recast from a Christian business owner refusing to serve certain customers to a beleaguered minority crushed by the state's antidiscrimination mandate.").

216. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

217. U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973).

218. *See* DANIEL COX & ROBERT P. JONES, PRRI, AMERICA'S CHANGING RELIGIOUS IDENTITY 18 (2017), https://www.prri.org/wp-content/uploads/2017/09/PRRI-Religion-Report.pdf [https://perma.cc/GVM9-CJ5Q] (reporting that in 1976, white Christians comprised 81 percent of Americans, with 55 percent of white Christians identifying as Protestants); Jason Wilson, *We're at the End of White Christian America. What Will That Mean?*, GUARDIAN (Sept. 20, 2017, 6:00 AM), https://www.theguardian.com/us-news/2017/sep/20/end-of-white-christian-america [https://perma.cc/RH4M-RFLS] (noting that "[e]ven as recently as 1996, white Christians were two-thirds of the population"); Caroline Mala Corbin, *Christian Legislative Prayers and Christian Nationalism*, 76 WASH. & LEE L. REV. 453, 458 (2019) (observing that "Christian nationalism . . . has become more prominent at a time when white Christians have lost their position as a demographic majority").

among the most advantaged in society.[219] To be sure, demographics are shifting and Christians are now a numerical minority in the United States,[220] fueling a narrative—one that the Court appears to credit—that Christians are, like racial minorities, *aggrieved*. On this view, because civil society has become increasingly secular, Christian evangelicals have been "transform[ed] into minorities who face discrimination and subordination in public life."[221] In this way, public accommodations laws that were promulgated to limit discrimination are now refigured as vehicles of discrimination, and Jack Phillips and Lorie Smith, individuals who refuse to provide services for same-sex weddings, are transformed into victims of discrimination.[222]

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219. KHYATI Y. JOSHI, WHITE CHRISTIAN PRIVILEGE: THE ILLUSION OF RELIGIOUS EQUALITY IN AMERICA 2 (2020) (discussing white Christian privilege, whereby Christian, English, free, and white identities are "superimposed to form mutually supporting advantages on the co-construction of religion, race, and national origin"); Caroline Mala Corbin, *Ceremonial Deism and the Reasonable Religious Outsider*, 57 UCLA L. REV. 1545, 1578 (2010) (noting the "privileged status of Christians" and their "dominant position" in society relative to other religious groups).

220. *See* COX & JONES, *supra* note 218, at 7 (noting that white Christians now comprise just 43 percent of Americans).

221. Murray, *Inverting Animus*, *supra* note 191, at 282. To be sure, some members of the Court have cultivated this narrative. *See, e.g.*, Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2266–67 (2020) (Thomas, J., concurring) (maintaining that a "distorted view of the Establishment Clause" facilitates "the repeated denigration of those who continue to adhere to traditional moral standards . . . as outmoded at best and bigoted at worst"); Locke v. Davey, 540 U.S. 712, 733 (2004) (Scalia, J., dissenting) (suggesting that social culture—and the Court's own precedents—reflected a "trendy disdain for deep religious conviction"). Indeed, in a recent Federalist Society keynote address, Justice Samuel Alito cautioned that "religious liberty is fast becoming a disfavored right." Samuel Alito, Assoc. J., Sup. Ct., Keynote Address at the Federalist Society National Lawyers Convention (Nov. 12, 2020), https://www.rev.com/blog/transcripts/supreme-court-justice-samuel-alito-speech-transcript-to-federalist-society [https://perma.cc/QHY2-BSPL]. For further discussion of the evolution of "Christian victimhood" discourse, see Leah M. Litman, *Disparate Discrimination*, 121 MICH. L. REV. 1, 74 (2022) (describing the "jurisprudence of conservative grievance"), and Bailey, *supra* note 181, at 208. For a discussion of the historic links between opposition to racial integration and conservative Christianity and the use of religious freedom arguments to mask objections to racial integration, see Vania Blaiklock, *The Unintended Consequences of the Court's Religious Freedom Revolution: A History of White Supremacy and Private Christian Church Schools*, 117 NW. U. L. REV. ONLINE 46, 50 (2022).

222. *See* Richard Schragger & Micah Schwartzman, *Religious Antiliberalism and the First Amendmen*t, 104 MINN. L. REV. 1341, 1403 (2020) (arguing that there has been "[a] significant shift in the Court's understanding of who counts as a 'religious minority,'" with Christian evangelicals "repositioned . . . as an embattled cultural and political minority"). *But see* Douglas Laycock, *Religious Liberty for Politically Active Minority Groups: A Response to NeJaime and Siegel*, 125 YALE L.J.F. 369, 370 (2016) (arguing that "the sexual revolution has swept away the former religious majority on sexual matters," rendering religious conservatives a distinct minority group in U.S. society).

Casting Christian evangelicals as minorities at the mercy of majoritarian secular society is perverse on two levels. As an initial matter, it undermines the thrust of extant First Amendment doctrine, which emerged in the mid-twentieth century as a vehicle for promoting religious diversity through protections for minority religions.[223] As Justice Sandra Day O'Connor explained in her concurrence in *Employment Division v. Smith*, "[T]he First Amendment was enacted precisely to protect the rights of those whose religious practices are not shared by the majority and may be viewed with hostility."[224] On this view, the First Amendment's two religion clauses ostensibly work in tandem to facilitate pluralism by protecting minority religions from the religious preferences of the majority.[225] And while it is not clear whether the Roberts Court's revamped vision of religious freedom is intended to accommodate those sects that traditionally have been viewed as minority sects—that is, "unpopular or emerging religious groups such as the Jehovah's Witnesses and the Amish"[226]—it is telling that, in recent years, the Court's Free Exercise Clause has been deployed largely for the protection of Christian conservatives, as opposed to a wider cross-section of the faithful.[227]

And, as cases like *Masterpiece Cakeshop* and *303 Creative* make clear, the Roberts Court's muscular vision of the First Amendment

223. *See* NOAH FELDMAN, DIVIDED BY GOD: AMERICA'S CHURCH-STATE PROBLEM—AND WHAT WE SHOULD DO ABOUT IT 182–83 (2005); Bailey, *supra* note 181, at 208 (explaining that in the mid-twentieth century, the Court deployed the religion clauses to protect minority religious sects); *see also* Mark C. Rahdert, *A Jurisprudence of Hope: Justice Blackmun and the Freedom of Religion*, 22 HAMLINE L. REV. 1, 29–30 (1998) (noting that the Court's free exercise jurisprudence is focused on protecting the rights of minority religious sects to practice their faiths); Wisconsin v. Yoder, 406 U.S. 205, 218 (1972) (concluding that compulsory high school attendance would threaten the Amish faith by forcing adherents to "assimilate[] into society at large"); Sherbert v. Verner, 374 U.S. 398, 406 (1963) (concluding that state unemployment law's differential treatment of Saturday Sabbath worshippers violated the First Amendment); Cantwell v. Connecticut, 310 U.S. 296, 310 (1940) (reversing a breach of peace conviction against a Jehovah's Witness street preacher and noting that the purpose of the religion clauses is to promote pluralism by allowing "many types of life, character, opinion and belief can develop unmolested and unobstructed").

224. Emp. Div. v. Smith, 494 U.S. 872, 902 (1990) (O'Connor, J., concurring).

225. For further discussion of this dynamic, see SARAH BARRINGER GORDON, THE SPIRIT OF THE LAW 43–55 (2010) (discussing the post–World War II Court's interest in and defense of religious pluralism).

226. *See Smith*, 494 U.S. at 902 (O'Connor, J., concurring in the judgment).

227. *See, e.g.*, Trinity Lutheran Church of Columbia, Inc. v. Comer, 582 U.S. 449, 453–54 (2017); Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2252 (2020); Carson v. Makin, 596 U.S. 767, 771–75 (2022); Fulton v. City of Philadelphia, 593 U.S. 522, 540–41 (2021); Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 584 U.S. 617, 634–39 (2018); 303 Creative LLC v. Elenis, 300 U.S. 570, 588–92 (2023).

threatens to effectively overrule—or at least undermine—extant precedents and legislation that prioritize civil rights ahead of religious liberty claims.[228] In both *Masterpiece Cakeshop* and *303 Creative*, gay couples invoked Colorado's public accommodations law as a limit on religious freedom. Accordingly, if they wished to do business in the public sphere, small business operators like Jack Phillips and Lorie Smith were obliged to serve all comers, regardless of their own religious beliefs. However, as the Court observed in *303 Creative*, laws that impose antidiscrimination mandates may compel speech, forcing the business owner to adopt and spout a message with which she does not agree. In their zeal to protect religion, decisions like *303 Creative*, perhaps ironically, limit the force of antidiscrimination law, amounting to a "license to discriminate" without any "obvious limiting principle."[229]

Critically, the interest in remedying (perceived) discrimination against (perceived) minorities is not limited to privileging majority religions and undermining antidiscrimination law (and the earlier decisions upholding those laws against First Amendment challenges). In a series of recent cases, remedial interests have shaped decisions expanding the scope of free exercise of religion in the context of government benefits. In *Carson v. Makin*,[230] the Court concluded that where the state funds secular institutions, the Free Exercise Clause requires that the same funding be available to religious institutions.[231] The Court's decision in *Carson* bookended an earlier decision, *Zelman v. Simmons-Harris*,[232] where the Court held that the Establishment Clause does not prohibit school choice programs from including sectarian schools so long as the programs are neutral with respect to religion and operate through private choice. When it was announced in 2002, *Zelman* was widely viewed as a sea change in the Court's

228. *See* Donald Verrilli, *What's at Stake in* 303 Creative, 47 HUM. RTS. 49, 50 (2022) (noting the implications of a ruling in *303 Creative* for antidiscrimination precedents like *Katzenbach v. McClung*, 379 U.S. 294 (1964), and *Newman v. Piggie Park Enterprises, Co.*, 390 U.S. 400 (1968), both of which involved religion and individual rights–based objections to the operation of federal civil rights statutes).

229. Kate Shaw, *The Supreme Court's Disorienting Elevation of Religion*, N.Y. TIMES (July 8, 2023), https://www.nytimes.com/2023/07/08/opinion/supreme-court-religion.html [https://perma.cc/7KN9-RK64].

230. Carson v. Makin, 596 U.S. 767 (2022).

231. *Id.* at 788–89.

232. Zelman v. Simmons-Harris, 536 U.S. 639, 662–63 (2002).

approach to the Establishment Clause.[233] In the same vein, *Carson*, alongside other decisions, has wrought a marked change in the Court's vision of the Free Exercise Clause.[234]

The facts of *Carson* were straightforward. As part of its mission to provide public education, Maine enacted a tuition assistance program for parents who resided in school districts that did not operate a secondary school, creating a stand-in for public education when no public school was available.[235] Seeking to avoid violating the Establishment Clause, Maine modified the program in 1981 to allow aid only to "nonsectarian" schools.[236] The *Carson* plaintiffs challenged the exclusion of religious schools, arguing that the policy violated the free exercise rights of parents who wished to send their children to a religious school "because the school's Christian worldview aligns with their sincerely held religious beliefs."[237]

In a 6–3 opinion, the Court agreed, concluding that "a State violates the Free Exercise Clause when it excludes religious observers from otherwise available public benefits."[238] The Court dismissed Maine's concern that providing funding for religious schools would offend the Establishment Clause. As the Court explained, "[A] neutral benefit program in which public funds flow to religious organizations through the independent choices of private benefit recipients does not

233. *See, e.g.*, Corey D. Hinshaw, *Constitutional Law—First Amendment—School Voucher Program Held Constitutional Under the Establishment Clause*, 72 MISS. L.J. 885, 906–07 (2002) ("Though the Court proclaimed adherence to its past caselaw, it is clear that the decision represents a new era in Establishment Clause jurisprudence and a departure from the strict 'separationist' philosophy identified by the Court in the genesis of Establishment Clause law."); Sara J. Crisafulli, Zelman v. Simmons-Harris*: Is the Supreme Court's Latest Word on School Voucher Programs Really the Last Word?*, 71 FORDHAM L. REV. 2227, 2256 (2003) ("The ruling in *Zelman v. Simmons-Harris* departs from the Supreme Court's prior treatment of Establishment Clause challenges to programs directing public funds to private, religious institutions." (citations omitted)); Gabriel D. Wickline, Zelman v. Simmons-Harris, 29 OHIO N.U. L. REV. 483, 483 (2003) (viewing *Zelman* as part of a trend toward "adopt[ing] a less stringent test in its latest decisions involving public aid and religious institutions" and observing that the case "is yet another step in the deterioration of Thomas Jefferson's 'wall' between church and state" (footnotes omitted)).

234. *See* Bailey, *supra* note 181, at 199. *See generally* Justin Driver, *Three Hail Marys:* Carson*,* Kennedy*, and the Fractured Détente Over Religion and Education*, 136 HARV. L. REV. 208 (2022) (discussing the development of the Court's First Amendment jurisprudence); Blaiklock, *supra* note 221 (same); Kathleen A. Brady, *Independent and Overlapping: Institutional Religious Freedom and Religious Providers of Social Services*, 54 LOY. U. CHI. L.J. 683 (2022) (same).

235. *Carson*, 596 U.S. at 771–74.

236. Maine defined a sectarian school as one that is run by a religious entity and promotes education through the lens of faith. *Id.* at 772.

237. *Id.* at 775.

238. *Id.* at 778.

offend the Establishment Clause."[239] Indeed, in a move that echoed its treatment of the Establishment Clause concerns in *Kennedy*, the Court intimated that Maine's concerns were overblown—the state's "decision to continue excluding religious schools from its tuition assistance program . . . promotes stricter separation of church and state than the Federal Constitution requires."[240]

The Court's decision in *Carson* relied principally on *Espinoza v. Montana Department of Revenue*,[241] which concerned a state-level funding program for which religious institutions were ineligible. There, the Court departed from extant free exercise jurisprudence to hold that refusing state benefits to religious institutions while extending those benefits to secular institutions constitutes impermissible discrimination against religion.[242]

The *Espinoza* Court made explicit what was only implicitly signaled in *Carson*, highlighting concerns that the historic exclusion of religious institutions from state funding programs was in fact rooted in anti-Catholic and anti-immigrant bias.[243] In *Espinoza*, those challenging Montana's program focused on the state's constitutional provision barring "any direct or indirect appropriation or payment" to religious organizations or schools affiliated with religious organizations.[244] The provision, the challengers maintained, was adopted in the late nineteenth century as part of a nationwide campaign against Catholics and immigrants.[245] This nativist fervor

239. *Id.* at 781.

240. *Id.*

241. Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246 (2020).

242. *Id.* at 2254–57 (2020) (citing Trinity Lutheran Church of Columbia, Inc. v. Comer, 582 U.S. 449 (2017)).

243. *Id*. at 2259 (noting that "many of the no-aid provisions belong to a more checkered tradition shared with the Blaine Amendment of the 1870s," which was "'born of bigotry' and 'arose at a time of pervasive hostility to the Catholic Church and to Catholics in general'" (quoting Mitchell v. Helms, 530 U.S. 793, 828–29 (2000))).

244. *Id*. at 2252.

245. *See, e.g.*, Reply Brief for Petitioner at 17, *Espinoza*, 140 S. Ct. 2246 (No. 18-1195), 2019 WL 6726413, at *17; Brief Amicus Curiae of the Becket Fund for Religious Liberty in Support of Petitioners at 5–6, *Espinoza*, 140 S. Ct. 2246 (No. 18-1195), 2019 WL 4512940, at *5–6 [hereinafter Becket Fund Amicus Brief]; Brief for the United States as Amicus Curiae Supporting Petitioners at 1, *Espinoza*, 140 S. Ct. 2246 (No. 18-1195), 2019 WL 4512941, at *1 [hereinafter United States Amicus Brief]; Brief for Senators Steve Daines, Tim Scott, John Kennedy, & Marsha Blackburn & Representative Greg Gianforte as Amici Curiae Supporting Petitioners at 5, *Espinoza*, 140 S. Ct. 2246 (No. 18-1195), 2019 WL 4512942, at *5 [hereinafter Brief for Senator Daines et al.]; Brief for Georgia GOAL Scholarship Program, Inc. as Amicus Curiae in Support of Petitioners at 1–2, *Espinoza*, 140 S. Ct. 2246 (No. 18-1195), 2019 WL 4568204, at *1–2; Brief for Alliance for Choice in Education as Amicus Curiae Supporting Petitioners at 6, *Espinoza*, 140 S. Ct. 2246 (No. 18-

culminated in the effort to amend the U.S. Constitution to include the Blaine Amendment, which would have prohibited federal aid to sectarian institutions.[246] Although the Blaine Amendment failed, it spawned state-level "no-aid" provisions, which were enacted as amendments to state constitutions or as stand-alone laws.[247] And while Montana re-adopted its no-aid provision in the 1970s, "for reasons unrelated to anti-Catholic bigotry,"[248] the challengers insisted that the state's no-aid provision continued to bear the indelible taint of this discriminatory past.[249]

In addressing these arguments, the *Espinoza* Court acknowledged that "the historical record [wa]s 'complex.'"[250] Nevertheless, the majority seemed to credit certain historical claims. Quoting *Mitchell v. Helms*,[251] a 2000 decision authorizing government loans to religious institutions, the majority noted that "it was an open secret that 'sectarian' was code for 'Catholic,'" that "[t]he Blaine Amendment was 'born of bigotry' and 'arose at a time of pervasive hostility to the Catholic Church and to Catholics in general,'" and that "many of its state counterparts have a similarly 'shameful pedigree.'"[252] The fact that the majority understood Montana's no-aid provision to share a "checkered tradition . . . with the Blaine Amendment of the 1870s"[253]

1195), 2019 WL 4568208, at *6 [hereinafter Alliance for Choice Amicus Brief]; Brief of Amicus Curiae Jewish Coalition for Religious Liberty in Support of Petitioners at 2, *Espinoza*, 140 S. Ct. 2246 (No. 18-1195), 2019 WL 4640377, at *2 [hereinafter Jewish Coalition Amicus Brief]; Brief of 131 Current and Former State Legislators in Support of the Petitioners at 1, *Espinoza*, 140 S. Ct. 2246 (No. 18-1195), 2019 WL 4640381, at *1 [hereinafter State Legislators Brief]; Brief of Amicus Curiae Montana Family Foundation Supporting Petitioners at 2, *Espinoza*, 140 S. Ct. 2246 (No. 18-1195), 2019 WL 4640382, at *2 [hereinafter Montana Family Foundation Amicus Brief].

246. *See Mitchell*, 530 U.S. at 828 (plurality opinion) (discussing the history of the Blaine Amendment); John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause,* 100 MICH. L. REV. 279, 301–05 (2001) (same).

247. *See* Joseph P. Viteritti, Blaine*'s Wake: School Choice, the First Amendment, and State Constitutional Law*, HARV. J.L. & PUB. POL'Y 657, 673–75 (1998).

248. *Espinoza*, 140 S. Ct. at 2259.

249. *See, e.g.*, Reply Brief for Petitioner, *supra* note 245, at 19; Brief of the Rutherford Institute as Amicus Curiae in Support of Petitioners at 12, *Espinoza*, 140 S. Ct. 2246 (No. 18-1195), 2019 WL 4512937, at *12; Becket Fund Amicus Brief, *supra* note 245, at 16; United States Amicus Brief, *supra* note 245, at 25; Brief for Senator Daines et al., *supra* note 245, at 6; Alliance for Choice Amicus Brief, *supra* note 245, at 8; Jewish Coalition Amicus Brief, *supra* note 245, at 13; Brief for Independence Institute as Amicus Curiae in Support of Petitioners at 34, *Espinoza*, 140 S. Ct. 2246 (No. 18-1195), 2019 WL 4640378, at *34; State Legislators Brief, *supra* note 245, at 9; Montana Family Foundation Amicus Brief, *supra* note 245, at 2, 13.

250. *Espinoza*, 140 S. Ct. at 2259.

251. Mitchell v. Helms, 530 U.S. 793 (2000).

252. *Espinoza*, 140 S. Ct. at 2259 (quoting *Mitchell*, 530 U.S. at 828–29 (plurality opinion)).

253. *Id.* at 2260.

subtly shaded its consideration of the case, bolstering the view that sectarian schools were excluded from the program "solely because of their religious character."[254] Relying on *Trinity Lutheran Church of Columbia, Inc. v. Comer*,[255] a 2017 case in which no-aid provisions were similarly linked to historic anti-Catholic bias,[256] the *Espinoza* Court concluded that the exclusion of religious institutions from state aid programs violated the Free Exercise Clause.[257]

As these cases make clear, in recent years, the Roberts Court has steadily refashioned First Amendment doctrine, narrowing, limiting, and in some cases overruling long-standing precedents. Viewing these cases through the lens of remedy suggests that the Court's approach to precedent in these cases is not merely an act of judicial will, but rather a broader effort to remedy what a majority of the Court views as historic and present-day injuries inflicted upon the faithful. In his concurrence to the majority opinion in *Espinoza*, Justice Thomas intimated that the Court was guided, at least in part, by a desire to remedy the injurious impact of extant First Amendment precedents on religious believers—and Christian evangelicals, particularly. As he explained, then-extant First Amendment doctrine had done little to protect religious freedom—at least for some believers.[258] Indeed, the Court's "distorted understanding of the Establishment Clause" had facilitated "the repeated denigration of those who continue to adhere to traditional moral standards . . . as outmoded at best and bigoted at worst."[259]

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254. *Id*. (quoting Trinity Lutheran Church of Columbia, Inc. v. Comer, 582 U.S. 449, 462 (2017) (internal quotation marks omitted)).

255. Trinity Lutheran Church of Columbia, Inc. v. Comer, 582 U.S. 449 (2017).

256. *See* Brief for Petitioner at 43, *Trinity Lutheran*, 582 U.S. 449 (No. 15-577), 2016 WL 1496879, at *43 (noting that the no-aid provision in Missouri's constitution "has a credible connection to the bigotry of the federal Blaine Amendment"); Transcript of Oral Argument at 21–22, *Trinity Lutheran*, 582 U.S. 449 (2017) (No. 15-577), 2017 WL 1399510, at *21–22 (noting similarities between Missouri's no-aid provision and the anti-Catholic Blaine Amendment).

257. *Espinoza*, 140 S. Ct. at 2262.

258. As Justice Thomas noted in his concurrence,

> The concern with avoiding endorsement has nevertheless been used to prohibit voluntary practices that potentially implicate free exercise rights, with courts and governments going so far as to make the "remarkable" suggestion "that even while off duty, a teacher or coach cannot engage in any outward manifestation of religious faith."

Id. at 2265 (quoting Kennedy v. Bremerton Sch. Dist., 139 S. Ct. 634, 637 (2019) (Alito, J., concurring in denial of certiorari)) (citing a series of cases in which various federal courts rejected the claims of Christian conservatives).

259. *Id*. at 2267 (citing Masterpiece Cakeshop v. Colo. C.R. Comm'n, 584 U.S. 617, 665–66 (2018) (Thomas, J., concurring in part and concurring in judgment)); Obergefell v. Hodges, 576 U.S. 644 (2015) (Roberts, C.J., dissenting).

In making this claim, Thomas explicitly referenced *Masterpiece Cakeshop* and *Obergefell v. Hodges*,[260] the 2015 decision constitutionalizing a right to same-sex marriage.[261] Notably, in *Obergefell*'s wake, Christian evangelicals argued that their Christian faith prevented them from issuing marriage licenses to same-sex couples or providing services for same-sex weddings.[262] Under the then-prevailing First Amendment doctrine, their claims were unsuccessful.[263]

Going forward, however, the Court's new vision of the First Amendment may be deployed in ways that are more solicitous of religious "minorities" who once constituted majorities. In this way, a remedial lens brings into focus the ways in which *Masterpiece Cakeshop*, *303 Creative*, *Carson*, and *Espinoza* reflect, at least in part, an effort to reorient the Court's First Amendment jurisprudence to address this persistent "hostility" to religious traditionalism.[264]

B. Remedying Harms to the Working Class

The Court's reconfiguration of settled doctrine to benefit "new minorities" has not been limited to the First Amendment. Second Amendment doctrine has also been a site for the Court's deployment of remedial stare decisis. As previously discussed, in cases like *Heller*, *McDonald*, and *Bruen*, the Roberts Court invoked the specter of postbellum racial violence against newly freed African Americans to justify departures from long-standing Second Amendment doctrine in

260. Obergefell v. Hodges, 576 U.S. 644 (2015).

261. *Id.* at 681.

262. *See, e.g.*, Miller v. Davis, 123 F. Supp. 3d 924, 929 (E.D. Ky. 2015); State v. Arlene's Flowers, Inc., No. 13-2-00871-5, 2015 WL 720213, at *6 (Wash. Super. Ct. Feb. 18, 2015); Klein v. Or. Bureau of Lab. & Indus., 410 P.3d 1051, 1056–57 (2017).

263. *See* Steven J. Heyman, *A Struggle for Recognition*: *The Controversy over Religious Liberty, Civil Rights, and Same-Sex Marriage*, 14 FIRST AMEND. L. REV. 1, 9 (2015) (noting that, post-*Obergefell*, claims of religious objections to same-sex marriages routinely failed).

264. And meaningfully, this narrative characterizing the exclusion of religious institutions from state aid programs as biased and discriminatory has been amplified by claims that such programs are not only rooted in historic anti-Catholic and anti-immigrant bias, but that they also exacerbate inequities that are disproportionately borne by underrepresented minorities and the poor. On this account, a refashioned First Amendment jurisprudence serves explicitly remedial interests by addressing long-standing inequities and allowing state funds to flow to sectarian institutions that serve these populations. *See generally* MARGARET F. BRINIG & NICOLE STELLE GARNETT, LOST CLASSROOM, LOST COMMUNITY: CATHOLIC SCHOOLS' IMPORTANCE IN URBAN AMERICA 1, 3 (2016) (arguing that religious schools serve underrepresented minorities and the poor); Michael Bindas, *The Once and Future Promise of Religious Schools for Poor and Minority Students*, 132 YALE L.J.F. 529, 529 (2022) (same).

favor of a more muscular and expansive individual right to keep and bear arms.[265]

But critically, the Court's remedial interest in the Second Amendment has not been limited to redressing harms to newly freed Blacks. In *Heller*, *McDonald*, and *Bruen*, members of the Court have looked beyond the historic injustices done to Blacks to also consider injuries to an entirely different set of constituencies. For example, even as *McDonald* referenced the postbellum disarmament of newly freed Blacks,[266] Justice Alito linked the Court's expansive vision of the Second Amendment to the protection of modern-day Americans "who live in high-crime areas."[267] In making this point, Justice Alito nodded to race, noting that "minorities and those lacking political clout" were among those living in Chicago's high-crime areas.[268]

The gesture to the racial composition of "high crime" neighborhoods likely reflected the demographic and geographic character of Chicago and other metropolitan areas—localities that justified their efforts to restrict Second Amendment rights on the view that the impact of gun violence was disproportionately borne by racial minorities and the poor.[269] By noting the demographic composition of high-crime areas, Justice Alito turned this gun control logic on its head, emphasizing instead that the regulation of firearms made it more difficult for "minorities and those lacking political clout" to defend themselves, their families, and their property.[270] To emphasize this

265. *Supra* Part III.C.4.

266. The *McDonald* Court's emphasis on postbellum history is unsurprising given that at issue was whether the Fourteenth Amendment, passed in the wake of the Civil War, authorized the incorporation of the Second Amendment as a limit on state governments. McDonald v. City of Chicago, 561 U.S. 742, 753–54 (2010).

267. *Id.* at 789.

268. *Id*.

269. *Gun Control*, PROCON.ORG (Aug. 3, 2023), https://gun-control.procon.org [https://perma.cc/RL4U-8VB6] (noting that gun control laws "are frequently aimed at inner city, poor, black communities"); Jumaane D. Williams, *Redefining Public Safety 2.0: Gun Violence Updates* (2023), https://advocate.nyc.gov/static/assets/PublicSafetyReport.pdf [https://perma.cc/WFQ5-BCCK] (showing that the Public Advocate for New York City's gun violence recommendations are "reinforced by statistics that show that low-income communities of color are disproportionately impacted by gun violence in NYC"); *cf.* Press Release, Governor J.B. Pritzker, Gov. Pritzker Declares Gun Violence a Public Health Crisis, Pledges $250 Million Investment for Hardest Hit Communities (Nov. 1, 2021), https://www.illinois.gov/news/press-release.24090.html [https://perma.cc/UE2C-JZNK] (stating that the Illinois Criminal Justice Information Authority "released the Statewide Violence Prevention Plan in September which supports the administration's goals of breaking the cycles of violence caused by years of failed criminal justice policies and economic disinvestment in Black and Brown communities").

270. *McDonald*, 561 U.S. at 789.

point, Justice Alito cited statistics showing that "80% of the Chicago [homicide] victims were black."[271]

But even as Alito nodded to defenseless contemporary communities of color, the *McDonald* Court's remedial interest in Second Amendment rights also took a more universalist turn. It was not just unarmed "minorities" who faced the scourge of criminality on the mean streets of Chicago, but also "other law-abiding members of the community . . . whose needs are not being met by elected public officials."[272] In this way, Alito drew a parallel between the Southern states' disarmament of Black freedmen during Reconstruction and Redemption and the efforts of contemporary cities to regulate guns. Both actions, he intimated, left innocent citizens unable to defend themselves and bereft of state protection. But critically, in pointing to "law-abiding members of the community" who also lived in high-crime areas, Alito implicitly invoked a new constituency—nonminority members of the working class.

The Court's disposition of *Bruen* would reiterate this shift from the postbellum racial violence endured by freedmen to the contemporary criminal threats borne by "hard-working, law-abiding members of the community." Although Justice Thomas's majority opinion in *Bruen* linked the Court's effort to expand the scope and substance of the Second Amendment to Redemption and the postbellum disenfranchisement of newly freed Black men, Justice Alito, who joined the *Bruen* majority, wrote a separate concurrence emphasizing the decision's benefits for "ordinary," "law-abiding people."[273] Leaving the racially remedial aspects of a muscular Second Amendment to Justice Thomas, Justice Alito instead shouldered the cause of working-class Americans forced to live under the threat of violence because of the state's failure to ensure public safety and its insistence on limiting the Second Amendment's guarantees.[274] This preoccupation with this new constituency was evident at the oral argument in *Bruen*, where Justice Alito engaged in a spirited colloquy with New York Solicitor General Barbara Underwood, questioning her about the rights of "hard-working, law-abiding people" forced to

271. *Id*. at 790.

272. *Id*.

273. N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 76 (2022) (Alito, J., concurring).

274. *See id*.

endure an unarmed commute through an urban landscape replete with criminals brandishing "illegal guns."[275]

On its face, Justice Alito's interest in the working-class denizens of metropolitan areas is not necessarily racially coded. After all, the dishwashers, janitors, and doormen[276] that Alito imagines braving an urban commute might come from all manner of demographic backgrounds. That said, the logic of Alito's appeal to the needs of "law-abiding" citizens often sounds in a register that is both raced and classed. Although present-day Second Amendment proponents argue that gun-safety measures improperly deny minorities the right of self-defense, in the not-too-distant past, gun enthusiasts sang an entirely different tune when it came to race and the Second Amendment.

In the 1960s, in the face of racial unrest in cities, the emergence of the Black Panther Party as a more aggressive vehicle for civil rights agitation, and rising crime, gun rights enthusiasts rejected gun control measures as improperly limiting the ability of white "law-abiding" citizens to defend themselves against armed criminals.[277] As gun rights advocates adopted an explicitly "law and order" framing for their rights claims, their advocacy assumed a racialized edge.[278] The rhetoric deployed in defense of the Second Amendment framed, albeit implicitly, people of color as threats to law and order while associating whites with "law-abiding" citizens imperiled by criminal threats.[279]

Over time, the racially charged rhetoric of gun rights also assumed a more class-conscious cast. Although the National Rifle Association spoke of gun rights in the register of libertarianism, its appeals were "unmistakably racialized."[280] The campaign for a more robust Second Amendment employed direct appeals "to white racial consciousness," and figured itself in opposition to feminists, gays and lesbians, and "militant" African Americans.[281] In doing so, the movement for gun

275. Transcript of Oral Argument at 67–70, *Bruen*, 597 U.S. 1 (No. 20-843).

276. *See id.* at 67.

277. *See* Timothy Zick, *Framing the Second Amendment: Gun Rights, Civil Rights and Civil Liberties*, 106 IOWA L. REV. 229, 245 (2020).

278. *See* ADAM WINKLER, GUNFIGHT: THE BATTLE OVER THE RIGHT TO BEAR ARMS IN AMERICA 252 (2011).

279. *See* Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in* Heller, 122 HARV. L. REV. 191, 208 (2008) (noting how rhetoric supporting gun rights in the 1970s "sharply differentiated 'law abiding . . . gun owners' from a different group of Americans . . . called 'criminals'" (citation omitted)).

280. *Id*. at 232.

281. *Id*. at 233–34 (quoting Charlton Heston, First Vice President, Nat'l Rifle Ass'n, Address at the Free Congress Foundation's 20th Anniversary Gala (Dec. 7, 1997)).

rights presented itself in terms that smacked of working-class white grievance. Speaking directly to white gun owners, Charlton Heston, the then-president of the NRA, analogized the fight for gun rights to another "civil war, a cultural war that's about to hijack your birthright."[282]

The 2008 presidential election became a class-constructed flashpoint in the culture war over guns. In a much-discussed campaign misstep, then-candidate Barack Obama adverted to guns, religion, and class divisions to explain his failure to secure the votes of working-class Pennsylvanians: "[T]hey get bitter, they cling to guns or religion or antipathy to people who aren't like them or anti-immigrant sentiment or anti-trade sentiment as a way to explain their frustrations."[283] While both Obama's rival, Hillary Clinton, and the press seized on the remark as evidence of the candidate's apparent elitism, it also underscored the way in which gun rights had been transformed into an issue of class—working-class—grievance. Guns—and the interest in more robust gun rights—had become a marker dividing "coastal elites" from the working class.[284]

On this telling, the Court's expansive understanding of the Second Amendment—and the sidelining of decades' worth of precedents outlining a more modest vision of the right to keep and bear arms—might be viewed as serving imbricated remedial purposes. An expanded Second Amendment may purport to remedy the historic injustices done to Black freedmen, as the *McDonald* and *Bruen* majority opinions recount. But modern working-class whites also likely benefit from the Court's remedial interest in expanding the Second

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282. *Id*. at 234 (quoting Charlton Heston, President, Nat'l Rifle Ass'n, Address at Harvard Law School Forum: Winning the Culture War (Feb. 16, 1999)).

283. Jeff Zeleny, *Opponents Call Obama Remarks 'Out of Touch*,' N.Y. TIMES (Apr. 12, 2008), https://www.nytimes.com/2008/04/12/us/politics/12campaign.html [https://perma.cc/SHQ5-5Y59].

284. Candidate Clinton would also fall into a similar trap. In 2016, while campaigning for the presidency, Clinton referred to many of Donald Trump's supporters as a "basket of deplorables." Amy Chozick, *Hillary Clinton Calls Many Trump Backers 'Deplorables,' and G.O.P. Pounces*, N.Y. TIMES (Sept. 10, 2016), https://www.nytimes.com/2016/09/11/us/politics/hillary-clinton-basket-of-deplorables.html [https://perma.cc/A2PS-6CVP]. Although she did not identify gun owners as being among the ranks of deplorables, one gun rights group "believe[d] Mrs. Clinton would gladly place 'gun owners' into her 'basket of deplorables.' . . . Mrs. Clinton has backed away from the gun control rhetoric of the primary season now that she must appeal to more general election voters. About the Democratic vehemently pro-gun-control platform, she is now largely silent." *What You Find When You Unpack Mrs. Clinton's 'Basket'*, FIREARM INDUS. TRADE ASS'N (Sept. 13, 2016), https://www.nssf.org/articles/what-you-find-when-you-unpack-mrs-clintons-basket [https://perma.cc/VXN9-HT3G].

Amendment's scope. In this regard, *Heller*, *McDonald*, and *Bruen* jettison the precedents that scaffold a more cabined iteration of the Second Amendment in favor of a more muscular right that serves the interests of working-class whites.

C. Remedying Harms to Whites

Viewed through the lens of remedial stare decisis, the Court's recent forays into the Second Amendment are better understood as ostensible efforts to remedy the injuries done to working-class Americans who, because of state restrictions on firearms, are defenseless against a rising criminal tide. To be sure, these members of the working class are racially indistinct in *Bruen* and *McDonald*. However, applying a remedial lens to a pair of cases decided in the 2022 Term suggests that the Roberts Court's concern for "ordinary hard-working" people is, in all likelihood, trained on *white* people. In both *Biden v. Nebraska*,[285] a challenge to the Biden administration's student loan relief program, and *Students for Fair Admissions v. President & Fellows of Harvard College*,[286] a challenge to affirmative action in college admissions, the Roberts Court took a similarly skeptical view of extant precedents in its zeal to remedy harms to, and vindicate the interests of, whites.

To be sure, *Biden v. Nebraska* did not present a straightforward stare decisis question. Nevertheless, in considering the constitutionality of the Biden administration's student debt relief plan, the Court made familiar moves, sidelining extant doctrine concerning the regulatory authority of administrative agencies in favor of what some termed a "made-up major-questions doctrine."[287] And notably, in sidestepping extant doctrine in favor of its own vision of agency authority, the Court seemed to prioritize the interests of a very specific constituency—working-class whites.

Biden v. Nebraska invalidated the Biden administration's student debt relief plan on the view that the program exceeded the remit of the Heroes Act, the federal statute under which the debt relief program was promulgated.[288] In reaching this conclusion, the Court departed from extant precedents regarding administrative agency actions,

285. Biden v. Nebraska, 143 S. Ct. 2355 (2023).

286. Students for Fair Admissions, Inc. v. Pres. & Fellows of Harvard Coll., 600 U.S. 181(2023).

287. *Biden v. Nebraska*, 143 S. Ct. at 2400 (Kagan, J., dissenting).

288. *Id*. at 2362 (majority opinion).

instead relying on the major questions doctrine to conclude that the Secretary of Education lacked statutory authority to grant debt relief to approximately 43 million student borrowers.[289] *Biden v. Nebraska* and its companion case, *Department of Education v. Brown*,[290] were nominally about the scope of agency authority under an existing statutory framework. But it was clear that some members of the Court understood the key question to be whether a program that forgave the debts of those pursuing higher education was fundamentally unfair to those individuals who had never pursued college.[291] At oral argument in *Brown*, Chief Justice Roberts pressed this point in a hypothetical involving a small business entrepreneur who never attended college, and thus would be ineligible for student debt relief:

> I think it appropriate to consider some of the fairness arguments. You know, you have two situations, both two kids come out of high school, they can't afford college, one takes a loan, and the other says, well, I'm going to, you know, try my hand at setting up a lawn care service, and he takes out a bank loan for that.
>
> At the end of four years, we know statistically that the person with the college degree is going to do significantly financially better over the course of life than the person without.
>
> And then along comes the government and tells that person: You don't have to pay your loan. Nobody's telling the person who is trying to set up the lawn service business that he doesn't have to pay his loan.[292]

Throughout the *Brown* oral argument, the Chief Justice returned to the hypothetical "person who is trying to start the lawn service, because he can't afford college."[293] And he was not alone. Justices Barrett and Alito, who joined the 6–3 majority to invalidate the student debt relief program, also referenced the imagined "lawn care person who doesn't

289. *Id.* at 2368 ("The Secretary asserts that the HEROES Act grants him the authority to cancel $430 billion of student loan principal. It does not.").

290. Dep't of Educ. v. Brown, 600 U.S. 551 (2023).

291. Transcript of Oral Argument at 27, *Brown*, 600 U.S. 551 (No. 22-535).

292. *Id.*

293. *Id.*

go to college [and] starts a lawn care business"[294] and pressed the concomitant "fairness question."[295]

Because the Court dismissed *Brown* on jurisdictional grounds,[296] it never had the opportunity to expressly plumb the question of whether student debt relief was inherently unfair to those who had bypassed higher education in favor of other paths.[297] Nevertheless, the exchanges at oral argument were telling, and they made clear that, for at least some members of the 6–3 majority in *Biden v. Nebraska*, an important issue was the administration's decision to provide relief to those pursuing higher education but not to small business owners and tradesmen, like the hypothetical lawn service entrepreneur.

In a similar vein, the Court's disposition of *Students for Fair Admissions v. Harvard & UNC*, a challenge to affirmative action in higher education, also presented issues of fundamental fairness and advantaged and disadvantaged constituencies. To be sure, the issue of affirmative action in higher education has long been framed as a question of fairness—on both sides. Those who favor race-based affirmative action say it leads to fairer outcomes because it remedies the historic exclusion of certain minority groups from elite institutions in American life while contributing to the diversity and educational mission of the institutions themselves.[298] However, detractors assert

294. *Id*. at 66 ("JUSTICE BARRETT: What about the Chief Justice's lawn–lawn care person who doesn't go to college, starts a lawn care business.").

295. *Id*. at 34 ("JUSTICE ALITO: Why is it fair? GENERAL PRELOGAR:—is warranted. JUSTICE ALITO: Why is it fair?").

296. *Brown*, 600 U.S. 551, 568 ("[R]espondents lack standing, and we therefore vacate the judgment of the District Court and remand the case with instructions to dismiss.").

297. Perhaps if the Court had been able to reach the merits, the dissenting Justices could have noted that although student debt relief was limited to student loan borrowers, other COVID-19 relief programs had expressly targeted small business owners for assistance. *See generally* CARES Act, Pub. L. No. 116-136, 134 Stat. 286 (2020) (containing the "Paycheck Protection Program," or PPP); Business Loan Program Temporary Changes; Paycheck Protection Program, 85 Fed. Reg. 20811, 20813 (Apr. 15, 2020) (codified at 13 C.F.R. pt. 120) (announcing the implementation of certain sections of the CARES Act that were intended to provide economic relief to small businesses). Ostensibly, the owner of a lawn care business would have been eligible for that government program. Further, the dissenters might also have observed that student loan debts, unlike most business debts, are not dischargeable in bankruptcy, arguably another form of government relief to small business owners. Kayla Webley, *Why Can't You Discharge Student Loans in Bankruptcy*, TIME (Feb. 9, 2012), https://business.time.com/2012/02/09/why-cant-you-discharge-student-loans-in-bankruptcy [https://perma.cc/4E3X-HJWZ].

298. *See, e.g.*, Brief of the National Education Ass'n & Service Employees International Union as Amici Curiae in Support of Respondents at 29–30, Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181 (2023) (Nos. 20-1199, 21-707), 2022 WL 3240767, *29–30 (citing empirical research showing that racially diverse classrooms produce long-range benefits because they break the cycle of segregation in neighborhoods, schools, social

that affirmative action is fundamentally *unfair*—it is a form of "reverse racism" that requires certain groups (historically, whites) to forego elite opportunities so that they might be redistributed to (less-deserving) Black and brown students.[299]

networks, and occupations and benefit educational institutions); Brief of Amici Curiae the ACLU, ACLU of Massachusetts, & ACLU of North Carolina in Support of Respondents at 1–2, *Students for Fair Admissions*, 600 U.S. 181 (Nos. 20-1199, 21-707), 2022 WL 3130690, at *1–2 (explaining that the practice of "[r]ace-conscious admissions . . . was central to the integration of many of our nation's most prestigious institutions after centuries of racial exclusion" and is "critical to ensuring an education that exposes students to the full range of experiences and perspectives"); Brief for Amici Curiae HBCU Leaders and National Association for Equal Opportunity in Higher Education in Support of Respondents at 27, *Students for Fair Admissions*, 600 U.S. 181 (Nos. 20-1199, 21-707), 2022 WL 3108910, at *27 (noting that the "critical context" for both the adoption of the Fourteenth Amendment and its application to permit some consideration of race in university admissions processes is "the historic exclusion of and ongoing discrimination against Black people in this country"); Brief Amicus Curiae of Anti-Defamation League in Support of Respondent at 7, *Students for Fair Admissions*, 600 U.S. 181 (No. 20-1199), 2022 WL 3108799, at *7 (noting the benefits of a "diverse educational environment," including the opportunity for students "to rethink their own assumptions and prejudices, and to achieve the kind of understanding that comes only from testing their own hypotheses against those of people with other or differing beliefs"); Brief for Amici Curiae American Psychological Ass'n, Massachusetts Psychological Ass'n, & North Carolina Psychological Ass'n in Support of Respondents at 22–27, *Students for Fair Admissions*, 600 U.S. 181 (Nos. 20-1199, 21-707), 2022 WL 3108813, at *22–27 (discussing and citing scientific research showing that educational benefits flow from diverse campuses); Brief of Amici Curiae College Board , National Ass'n of Collegiate Registrars & Admissions Officers, & Act, Inc. in Support of Respondents at 7–14, *Students for Fair Admissions*, 600 U.S. 181 (Nos. 20-1199, 21-707), 2022 WL 3108822, at *7–14 (noting that "[h]olistic review achieves excellence by combining concrete standards and rigor with flexibility and autonomy to advance an institution's educational mission and aims"); Brief for the NAACP Legal Defense & Educational Fund, Inc. and the ACLU as Amici Curiae in Support of Respondents at 4, Grutter v. Bollinger, 600 U.S. 181 (2003) (No. 02-241), 2003 WL 399628, at *4 ("Voluntary race-conscious admissions policies by colleges and universities remain one of the sole avenues for seeking to mitigate the stubborn vestiges of past wrongs, ameliorating the effects of ongoing discrimination, and increasing the participation of all members of our society."); Brief for the University of Michigan as Amicus Curiae Supporting Respondents at 4, Fisher v. Univ. of Tex. at Austin, 579 U.S. 365 (2016) (No. 14-981), 2015 WL 6748811, at *4 (stating that the University of Michigan's view of the educational benefits of racial diversity "accords with the overwhelming consensus of American universities, which have concluded that racial diversity benefits the exchange and development of ideas by increasing students' variety of perspectives; promotes cross-racial understanding and dispels racial stereotypes; and helps prepare students to be leaders in a global marketplace and increasingly multicultural society").

299. *See* Brief Amici Curiae Former Federal Officials of the U.S. Department of Education's Office for Civil Rights in Support of Petitioners at 6, 10, *Students for Fair Admissions*, 600 U.S. 181 (Nos. 20-1199, 21-707), 2022 WL 2919010, at *6, *10 (stating that the trend of using race in U.S. educational institutions is geared toward "*more* racially preferential conduct, not less," and noting that schools "used racial discrimination when making admissions and other educational decisions" under *Grutter*'s regime); Amici Curiae Brief of Judicial Watch, Inc. & Allied Educational Foundation in Support of Petitioners at 17–19, *Students for Fair Admissions*, 600 U.S. 181 (Nos. 20-1199, 21-707), 2022 WL 2919012, at *17–19 (arguing that the *Bakke* line of cases allows schools to "intentionally discriminate against their applicants on the basis of race"); FRED

The Court's disposition of the affirmative action challenges bore out these competing fairness narratives—but came out in favor of the petitioners. Writing for the majority, Chief Justice Roberts lamented the use of race in the universities' admissions processes, which, in Harvard's case, served as "'a determinative tip for' a significant percentage 'of all admitted African American and Hispanic applicants.'"[300] At UNC, Roberts maintained, race-conscious policies meant that "underrepresented minority students were 'more likely to score [highly] on their personal ratings than their white and Asian American peers,' but were more likely to be 'rated lower by UNC readers on their academic program, academic performance, . . . extracurricular activities,' and essays."[301] The Chief Justice's meaning was clear—considering race meant that less-deserving Black and brown students were being admitted to elite colleges at the expense of qualified applicants.[302]

L. PINCUS, REVERSE DISCRIMINATION: DISMANTLING THE MYTH 3 (2003) (describing the increased perception among the white population that affirmative action policies constitute reverse discrimination); Robert S. Chang, *Reverse Racism!: Affirmative Action, the Family, and the Dream That Is America*, 23 HASTINGS CONST. L.Q. 1115, 1117 (1996) ("The anti-affirmative action forces often characterize affirmative action as reverse discrimination or reverse racism, and tell the story of the innocent white male."); Cecil J. Hunt, II, *The Color of Perspective: Affirmative Action and the Constitutional Rhetoric of White Innocence*, 11 MICH. J. RACE & L. 477, 479 (2006) ("[O]thers urge that racism's most virulent contemporary manifestation is in fact a form of reverse racism aimed at innocent Whites, especially White males, who, it is argued, have been unfairly burdened by ancient sins that they did not commit in favor of modern claimants who have not suffered."). SFFA's briefs before the Court were rooted in this rationale. *See, e.g.*, Brief for Petitioner at 49, *Students for Fair Admissions*, 600 U.S. 181 (Nos. 20-1199, 21-707), 2022 WL 2918946, at *49 ("[W]hen elite universities place high-schoolers on racial registers and tell the world that their skin color affects what they think and know, the universities are hurting, not helping."); *id.* at 64, 2022 WL 2918946, at *64 ("*Grutter* tells universities that it's okay to treat students differently based on race .... Racial preferences, this Court has explained, are poisonous."); *id.* at 73, 2022 WL 2918946, at *73 ("While Harvard's anti-Asian penalty on the personal rating shows discrimination *during* the admissions process, Harvard also discriminates against Asian Americans in actual admissions outcomes.").

300. *Students for Fair Admissions*, 600 U.S. at 195 (citing the record).

301. *Id.* at 196.

302. Chief Justice Roberts made this association plain at oral argument in *Students for Fair Admissions*, noting that two Black applicants, despite having very different socioeconomic profiles and different perspectives, were still likely to "get a tip [in the admissions process] . . . based on their race." Transcript of Oral Argument at 66, *Students for Fair Admissions*, 600 U.S. 181 (Nos. 20-1199, 21-707) (quoting Roberts, C.J); *see also* Henry L. Chambers Jr., *Supreme Court Chief Justice John Roberts Uses Conflicting Views of Race To Resolve America's History of Racial Discrimination*, CONVERSATION (July 26, 2023, 8:19 AM), https://theconversation.com/supreme-court-chief-justice-john-roberts-uses-conflicting-views-of-race-to-resolve-americas-history-of-racial-discrimination-209670 [https://perma.cc/YE68-WQM5] (noting that the Chief Justice's majority opinion credited *SFFA*'s argument that because of race, "traditionally underrepresented

To be clear, both the admissions policies at Harvard and UNC were consistent with the Court's earlier pronouncements on race-conscious admissions policies. In 2003's *Grutter v. Bollinger*,[303] the Court upheld the University of Michigan Law School's race-conscious admissions policy because it involved a "highly individualized, holistic review of each applicant's file" and "afford[ed] this individualized consideration to applicants of all races."[304] Both Harvard and UNC averred that they had structured their admissions protocols to be compliant with *Grutter* and its progeny.[305] Accordingly, in concluding that the policies "cannot be reconciled with the guarantees of the Equal Protection Clause," the majority was effectively signaling its abandonment of *Grutter* and the line of cases crediting the limited use of race in higher education admissions.[306] Indeed, Justice Thomas, who joined the 6–3 majority, acknowledged this reality in his concurrence. As he explained, "*Grutter* is, for all intents and purposes, overruled."[307]

Read together, *Biden v. Nebraska* and *Students for Fair Admissions v. Harvard* gesture toward the Roberts Court's remedial impulses. In *SFFA*, the Court construed *Grutter*—the controlling precedent—more narrowly than previous Courts had done, departing from the decision in favor of more novel approaches that considered—both explicitly and implicitly—the degree to which the challenged race-conscious policies (and the precedents that underwrote them) injured certain constituencies.[308]

But who were these constituencies with whom the majority was principally concerned? Although *SFFA v. Harvard* was brought by Asian American applicants who claimed to have been discriminated

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Blacks and Hispanics who may not have earned the same grades or standardized test scores as other applicants" are advantaged in the admissions process).

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

304. *Id*. at 337.

305. *See* Brief by University Respondents at 8, *Students for Fair Admissions*, 600 U.S. 181 (No. 21-707), 2022 WL 2975486, at *8 (noting that, per *Grutter*, "UNC affords each candidate a comprehensive, holistic, and individualized review"); Brief for Respondent-Students at 17, *Students for Fair Admissions*, 600 U.S. 181 (No. 21-707), 2022 WL 2987152, at *17 (maintaining that the holistic admissions policies that UNC used—and that *Grutter* blessed—"have enabled universities to best fulfill their missions, account for their particularized challenges, and ensure talented students of all backgrounds can fully convey their perspectives and contributions").

306. Students for Fair Admissions, 600 U.S. at 230.

307. *Id.* at 287 (Thomas, J., concurring).

308. According to the dissent, the majority had construed *Grutter* so narrowly that it had effectively overruled the 2003 decision. *See id*. at 318 (Sotomayor, J., dissenting) (noting that the majority "overrul[ed] decades of precedent" while "disguis[ing] its ruling as an application of established law") (internal quotations and citations omitted).

against in the admissions process, the majority spent little time probing the nature of this anti-Asian discrimination. Indeed, the majority opinion mentions Asian Americans only glancingly. Instead of focusing on Asian Americans' discrete claims of discrimination, the majority gestured toward the broader unfairness of race-conscious admissions policies and the prospect of qualified applicants being denied admission in favor of less qualified Black and brown applicants.[309] Put differently, the majority's discussion literally viewed the problem in stark black-and-white terms.

And while the circumstances in *Biden v. Nebraska* had no obvious racial valence, one might argue that race—and racialized grievances—shaped the Court's approach to that case as well. Again, a major theme at oral argument in one of the student debt challenges was the fundamental unfairness of student debt relief for those who had not attended college and would therefore be ineligible for debt relief.[310] The Chief Justice continued to press the fairness point, repeatedly invoking the image of an entrepreneur struggling to build a business without a college degree and without the prospect of government assistance.[311]

Although the Chief Justice did not name or otherwise identify the imagined entrepreneur, existing data provide some demographic context for the hypothetical. Most small businesses in the United States are owned by white entrepreneurs.[312] In the lawn care sector, 61 percent of landscapers are white and 91 percent are men.[313] And critically, in recent years, researchers have called attention to the decline in men's college attendance and completion—a trend that is most pronounced among middle- and working-class white men.[314]

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309. *See supra* Part IV.

310. *See supra* at Part IV.C.

311. Transcript of Oral Argument at 27, Dep't of Educ. v. Brown, 600 U.S. 181 (2023) (No. 22-535).

312. BRIAN HEADD, U.S. SMALL BUS. ADMIN. OFF. OF ADVOC., SMALL BUSINESS FACTS: BUSINESS OWNERSHIP DEMOGRAPHICS (2021), https://advocacy.sba.gov/wp-content/uploads/2021/03/Business-Ownership-Demographics-Fact-Sheet.pdf [https://perma.cc/R5CD-38PC].

313. *Landscaper Demographics and Statistics in the US*, ZIPPIA, https://www.zippia.com/landscaper-jobs/demographics/#employment-statistics [https://perma.cc/NDV6-G2FR].

314. Richard V. Reeves & Ember Smith, *The Male College Crisis Is Not Just in Enrollment, but Completion*, BROOKINGS INST. (Oct. 8, 2021), https://www.brookings.edu/articles/the-male-college-crisis-is-not-just-in-enrollment-but-completion [https://perma.cc/NS8T-EALQ]; Douglas Belkin, *A Generation of American Men Give Up on College: 'I Just Feel Lost'*, WALL ST. J. (Sept. 6, 2021, 1:12 PM), https://www.wsj.com/articles/college-university-fall-higher-education-men-women-enrollment-admissions-back-to-school-11630948233 [https://perma.cc/8ZPE-GUHN].

Data can also contextualize the group that the majority perceives as the likely beneficiaries of the Biden administration's student debt relief program. More than 50 percent of Black students take out student loans to finance higher education, and their monthly student loan payments are the highest across all demographic groups.[315] The average student debt load was $22,550 for Black students and $21,240 for Hispanic students, compared to $17,850 for white students.[316] Researchers maintain that student debt relief will have immediate and significant impacts on the ability of racial minorities to build wealth and capital.[317] Not surprisingly, in the political debate over student debt relief, advocates and activists often underscored the impact of student debt—and student relief—on Black and brown borrowers.[318]

Viewed in tandem, *Biden v. Nebraska* and *SFFA v. Harvard* reveal, of course, the Court's general antipathy for redistribution. But

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315. MELANIE HANSON, STUDENT LOAN DEBT BY RACE, EDUC. DATA INITIATIVE (Sept. 3, 2023), https://educationdata.org/student-loan-debt-by-race [https://perma.cc/DVE3-RLMY].

316. *Id.*

317. *See generally* Tim Shaw & Kiese Hansen, *Making the Case: Solving the Student Debt Crisis*, ASPEN INST. (Feb. 2020), https://www.aspeninstitute.org/publications/solving-the-student-debt-crisis [https://perma.cc/NLW9-P3HC] (describing the disproportionate student debt burden, and related long-term financial challenges, borne by racial minorities).

318. *See, e.g.*, Brief of the NAACP as Amicus Curiae in Support of Petitioners at 1, Biden v. Nebraska, 143 S. Ct. 2355 (2023) (No. 22-506), 2023 WL 199389, at *1 ("The NAACP and its members believe that student loan debt poses a barrier to racial justice in the United States."); *id.* at *2 (noting that "48% of Black college graduates owe more on their federal undergraduate loans than they borrowed, compared to only 17% of White graduates," and that "Black graduates face a stark wage gap: earning 20% less than their White counterparts" while having "higher monthly payments than their White counterparts"); Brief for Lawyers' Committee for Civil Rights Under Law et al. as Amici Curiae in Support of Petitioners at 4, *Biden v. Nebraska*, 143 S. Ct. 2355 (No. 22-506), 2023 WL 205984, at *4 ("COVID-19 has compounded racial disparities and inflicted particularized harm on Black and Latinx borrowers."); Amicus Brief for Borrower Advocacy & Legal Aid Organizations in Support of Petitioners at 13, *Biden v. Nebraska*, 143 S. Ct. 2355 (No. 22-506), 2023 WL 288002, at *13 ("A disproportionate number are borrowers of color and women, many of whom are supporting other family members."); Andre M. Perry, Marshall Steinbaum & Carl Romer, *Student Loans, the Racial Wealth Divide, and Why We Need Full Student Debt Cancellation*, BROOKINGS INST. (June 23, 2021), https://www.brookings.edu/articles/student-loans-the-racial-wealth-divide-and-why-we-need-full-student-debt-cancellation [https://perma.cc/Y7HU-MRRD] (discussing how "the disproportionate debt Black students are taking to finance their education is reinforcing the racial wealth gap"); Victoria Jackson & Brittani Williams, *How Black Women Experience Student Debt*, EDUC. TRUST (Apr. 2022), https://edtrust.org/wp-content/uploads/2014/09/How-Black-Women-Experience-Student-Debt-April-2022.pdf [https://perma.cc/228V-45W7] (describing how Black women often struggle the most with student loan debt); Hannah Grabenstein & Saher Khan, *Student Loan Debt Has a Lasting Effect on Black Borrowers, Despite the Latest Freeze in Payments*, PBS NEWSHOUR (Apr. 11, 2022, 4:59 PM), https://www.pbs.org/newshour/economy/student-loan-debt-has-a-lasting-effect-on-black-borrowers-despite-the-latest-freeze-in-payments [https://perma.cc/T7TS-MJDH] (discussing the disproportionate impact of student loans on Black borrowers).

more importantly, these cases also make clear the Court's desire to remedy the perceived injustices and injuries that redistribution may engender. To be sure, redistributive policies necessarily advantage some over others. But tellingly, in *Biden v. Nebraska* and *SFFA v. Harvard*, the Court's skepticism of redistribution aligns with its view that extant precedents and doctrines improperly facilitate redistribution and, in so doing, impose injuries on certain groups.

In this regard, *Biden v. Nebraska* and *SFFA v. Harvard* are of a piece with the remedial impulses on display in the Roberts Court's revision of the First and Second Amendments. In the First Amendment context, the Court reimagines the scope of the religion clauses to remedy injuries imposed on Christian conservatives. Likewise, in the Second Amendment context, the Court departs from a more limited understanding of the right to keep and bear arms in favor of a more muscular right that accrues to the benefit of "hard-working, law-abiding," working-class citizens who must brave criminal threats every day.

Although the Court does not say so explicitly, the demographic character of these groups it prioritizes and seeks to make whole are consistent in some respects. Political strategists have noted in recent years that there is considerable racial overlap among the groups that identify as Christian conservatives, gun rights advocates, and the (non-college-educated) working class.[319] While these groups may feature some minority representation, in our cultural imagination, they are often figured as white.[320]

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319. *See* Diana Orcés, *The Gun Ownership Bubble: Gun Owners Are More Likely To Have Other Gun Owners as Close Friends*, PRRI (June 10, 2022), https://www.prri.org/spotlight/the-gun-ownership-bubble-gun-owners-are-more-likely-to-have-other-gun-owners-as-close-friends [https://perma.cc/4N38-CSRV] (showing the overlap among these constituencies); *In Changing U.S. Electorate, Race and Education Remain Stark Dividing Lines*, PEW RSCH. CTR. (June 2, 2020), https://www.pewresearch.org/politics/2020/06/02/in-changing-u-s-electorate-race-and-education-remain-stark-dividing-lines [https://perma.cc/KM62-RDDN] (noting that white voters, including non-college-educated and Christian voters, are more likely to identify as Republican).

320. *See* NANCY ISENBERG, WHITE TRASH: THE 400-YEAR UNTOLD HISTORY OF CLASS IN AMERICA 33–34 (2016) (arguing that the association of whiteness with the working class was "[m]ore than a reaction to progressive changes in race relations" and that the shift "was spurred on by a larger fascination with identity politics," since being understood as a working-class white person—a "redneck" in some parlance—"implied that class took on the traits (and allure) of an ethnic heritage, which in turn reflected the modern desire to measure class as merely a cultural phenomenon"). Critically, the association between whiteness and working-class status also implicates the politics of downward mobility and racial grievance. *See* George Packer, *Hillary Clinton and the Populist Revolt*, NEW YORKER (Oct. 24, 2016), https://www.newyorker.com/maga

To be sure, an interest in providing redress to these injured whites is not express on the face of these cases. Instead, any remedial interests are framed primarily in terms of class and religion. But it is *SFFA v. Harvard*, with its explicitly racialized orientation, that suggests the racially remedial thread that unites these disparate cases. Viewed through the lens of remedial stare decisis, it becomes clear that across these different domains—free exercise, gun rights, student debt relief, and affirmative action—the unifying principle is that white Americans are under siege and losing ground, whether to secular society, criminals, or free-riding racial minorities.[321] On this account, remedial stare decisis helps to isolate and surface a narrative of racialized grievance in which the Court's intervention is necessary to repair and remedy harms imposed upon white people.

* * *

Reading the Roberts Court through the lens of racial remedy helps to identify a racialized valence that unites the Court's approach to precedent. The following Part considers the impact of this remedial approach. Understanding the Roberts Court's approach to stare decisis as remedial provides some predictability and coherence to the Court's breaks with precedents. More importantly, it provides some clarity as to the Court's effort to reframe and recast the juridical understanding of interest groups and race-based injuries.

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zine/2016/10/31/hillary-clinton-and-the-populist-revolt [https://perma.cc/J7US-348V] (noting that while the term "working class" used to connote a sturdy productivity, it has evolved to signify a strain of downward mobility once associated with the urban underclass).

321. *See* Robert P. Jones, Daniel Cox, E.J. Dionne, Jr., William A. Galston, Betsy Cooper & Rachel Lienesch, PRRI, How Immigration and Concerns About Cultural Changes Are Shaping the 2016 Election 7 (2016), https://www.prri.org/wp-content/uploads/2016/06/PRRI-Brookings-2016-Immigration-survey-report.pdf [https://perma.cc/WYD6-J349] (noting that a majority of white Americans believe that American society has changed for the worse since the 1950s); Don Gonyea, *Majority of White Americans Say They Believe Whites Face Discrimination*, NPR (Oct. 24, 2017, 1:35 PM), https://www.npr.org/2017/10/24/559604836/majority-of-white-americans-think-theyre-discriminated-against [https://perma.cc/T8DF-NDN8] (reporting that white Americans believe that they are increasingly subject to discrimination and quoting a sixty-eight-year-old white man who believes that "[discrimination has] been going on for decades, and it's been getting worse for whites"); Paul Waldman, *Why White People Think They're the Real Victims of Racism*, WEEK (Oct. 25, 2017), http://theweek.com/articles/732849/why-white-people-think-theyre-real-victims-racism [https://perma.cc/JL6Y-SNHH] (noting that conservative media and pundits have stoked the view that "any advancement for minorities com[es] at the expense of whites").

V. THE IMPACT OF THE ROBERTS COURT'S REMEDIALISM

As the preceding Parts maintain, the Roberts Court's interests in remedial stare decisis run in two distinct directions. One is retrospective. That is, when the Roberts Court departs from or refines precedent to remedy injuries to minorities, the injuries are typically ones that are in the rearview mirror—long-standing injustices that require immediate correction.[322] The Court's approach in *Ramos* exemplifies this impulse. There, the Court overruled *Apodaca* partly on the view that the 1972 decision enshrined—and did not interrogate—the white supremacist logic of the nonunanimous jury rule.[323] And there was clear evidence that jettisoning the rule would have meaningful benefits for Black defendants and jurors.[324]

But critically, the Roberts Court's remedial impulses are not limited to long-standing injuries done to traditional racial minorities—they move in a second direction, too. As its recent forays into religion, student debt relief, and affirmative action make clear, the Court is also interested—and deeply so—in remedying racial injuries that are perhaps more perceptual and inchoate. As these cases suggest, the racialized injuries that preoccupy the Court in its disposition of cases concerning religion, student debt relief, and affirmative action are injuries visited upon white people, namely Christian conservatives, working-class whites, and the alleged victims of affirmative action policies.

In identifying the Roberts Court's penchant for remedialism in its approach to precedent and noting the two directions in which these remedial interests run, my point is not to paint the Court with the brush of racism. Rather, viewing the Court's approach to stare decisis as a

322. *See* Khiara M. Bridges, *Foreword: Race in the Roberts Court*, 136 HARV. L. REV. 23, 86–104 (2022) (discussing the Roberts Court's penchant for redressing historic episodes of racism).

323. *See* Ramos v. Louisiana, 140 S. Ct. 1390, 1405 (2020) ("[I]t's just an implacable fact that the plurality spent almost no time grappling with the historical meaning of the Sixth Amendment's jury trial right, this Court's long-repeated statements that it demands unanimity, or the racist origins of Louisiana's and Oregon's laws.").

324. Data suggest that the use of the nonunanimous jury rule often renders the votes of Black jurors inconsequential. *See* Thomas Ward Frampton, *The Jim Crow Jury*, 71 VAND. L. REV. 1593, 1621–22 (2018). Further, data from five thousand criminal trials conducted over a six-year period in Louisiana reveal that "black jurors are more likely than white jurors to cast 'empty votes' (i.e., dissenting votes that are overridden by supermajority verdicts)." *Id.* at 1622. The study also found that under the nonunanimous jury rule, Black jurors were more than twice as likely as white jurors to cast a dissenting vote that would be overridden by a supermajority of jurors. *Id.* at 1638. Troublingly, the same study found that Black defendants are more likely than white defendants to be convicted by nonunanimous verdicts. *Id.* at 1622.

form of racial remedy is clarifying. It helps us to understand the Court itself and its work. And, as importantly, it allows us to better anticipate the Court's treatment of earlier decisions in its evolving jurisprudence.

Further, understanding the Roberts Court's penchant for remedial stare decisis renders more legible its understanding of legal injuries—and, in particular, racialized injuries. A better understanding of the remedial contours of the Court's approach to precedent brings into sharper focus the Court's understanding of injustice and racism—and those whom the Court believes are the victims of such injustices. Viewing the Court's approach to precedent through a remedial lens can perhaps shed light on its more subtle project of reimagining what it means to be a "discrete and insular minority" in constitutional law.

A. Recasting the Roberts Court

It is no secret that in the wake of high-profile (and controversial) decisions on abortion, gun rights, and affirmative action, the Court has been subject to intense public criticism.[325] In response, some members of the Court have vehemently insisted that such criticism is no more than sour grapes over decisions with which some facet of the public disagrees.

I raise these reactions—and the Justices' responses—to underscore an important point. The recent criticism has painted the Court as unbound by precedent, unprincipled, and outcome driven.[326]

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325. Katy Lin & Carroll Doherty, *Favorable Views of Supreme Court Fall to Historic Lows*, PEW RSCH. CTR. (July 21, 2023), https://www.pewresearch.org/short-reads/2023/07/21/favorable-views-of-supreme-court-fall-to-historic-low [https://perma.cc/QAS8-6R99] (documenting the sharp decline in public perception of the Court); PEW RSCH. CTR., MAJORITY OF PUBLIC DISAPPROVES OF SUPREME COURT'S DECISION TO OVERTURN *ROE V. WADE* 4 (2022), https://www.pewresearch.org/politics/2022/07/06/majority-of-public-disapproves-of-supreme-courts-decision-to-overturn-roe-v-wade [https://perma.cc/7ZKP-NR7F]; David Leonhardt, *Supreme Court Criticism*, N.Y. TIMES (May 22, 2023), https://www.nytimes.com/2023/05/22/briefing/supreme-court-criticism.html [https://perma.cc/5FX9-S6E7] (discussing the increasing criticism of the Court, its decisions, and its members' conduct); Isaac Chotiner, *The Historical Cherry-Picking at the Heart of the Supreme Court's Gun-Rights Expansion*, NEW YORKER (June 23, 2022), https://www.newyorker.com/news/q-and-a/the-historical-cherry-picking-at-the-heart-of-the-supreme-courts-gun-rights-expansion [https://perma.cc/2PMK-2ZMN] (reporting Professor Adam Winkler's critique of the *Bruen* decision); Nicquel Terry Ellis, *The Gutting of Affirmative Action Is a 'Clear and Present Danger' to Equal Education, Critics Say*, CNN (June 29, 2023, 12:35 PM), https://www.cnn.com/2023/06/29/us/affirmative-action-impact-reaj/index.html [https://perma.cc/9PHF-7JK5] (discussing public critiques of the Court's affirmative action ruling).

326. *See* Sam Baker, *The Supreme Court Falls to Earth*, AXIOS (July 2, 2023), https://www.axios.com/2023/07/02/supreme-court-rulings-justices [https://perma.cc/8WSB-KFHZ] (discussing the changing perception of the Court as ideological, rather than apolitical); Nina Totenberg, *The Supreme Court Is the Most Conservative in 90 Years*, NPR, (July 5, 2022, 7:04 AM)

While this certainly may be the case, understanding the Court's work through the lens of remedial stare decisis provides an alternative framing. On this account, the Court *is* outcome driven—and righteously so. It understands itself and the outcomes it seeks as repairing profound injuries to those it perceives as vulnerable constituencies and advancing what it understands to be a project of justice.

Viewed through this lens, it is easy to understand why the Justices have been so indignant about the public criticism the Court has received. If their approach to precedent is guided by remedial impulses, such swipes are not only unwarranted, but also *unfair* in failing to appreciate the broader remedial effort in which the Court is engaged.

To be sure, not everyone will agree that the Roberts Court is engaged in a broad project of racial repair and remedy. But if the Court itself understands its approach to precedent as part of a more profound effort to achieve justice, then that realization, by itself, is meaningful. It makes clear that public critiques of the Court as being inattentive to precedent and principle are unlikely to inspire the desired reflection or reconsideration that the Court's critics seek. So long as the Court and its supermajority understand themselves to be righteously cloaked in the discourse of repair and justice, they can insulate themselves from claims of opportunism and unprincipledness.

Thus the adoption of a program of remedial stare decisis does not simply recast departures from precedent as attempts to remedy and repair injustice; it also has the potential to recast the Court and its members in a more appealing posture. It is about explicitly naming the Justices' vision, however distorted, of themselves as warriors in the fight for racial justice and the vindication of rights.

B. Recasting Racism in Black and White

The Roberts Court's remedial interest goes beyond simply cloaking the Justices in the mantle of racial justice as a response to public criticism. The two distinct strains of remedial stare decisis allow the Court to refigure our collective understanding of what counts as

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https://www.npr.org/2022/07/05/1109444617/the-supreme-court-conservative [https://perma.cc/MLS5-6BZ7] (discussing the Court's rightward tilt); Stephen I. Vladeck, *Just How Hypocritical Are the Court's Conservatives Willing To Be?*, N.Y. TIMES (Mar. 13, 2023) https://www.nytimes.com/2023/03/13/opinion/supreme-court-conservatives-standing.html [https://perma.cc/TNJ3-5BB9] (arguing that the Court's neglect of traditional jurisdictional principles serves ideological interests).

racism and racial injury. Critically, the Court's interest in providing redress for the injuries imposed upon racial minorities is almost always *retrospective*. That is, the Court departs from precedent to correct the injustices that the earlier decision underwrote or otherwise facilitated.

The Court's repudiation of *Korematsu* and its overruling of *Apodaca* cohere with this framing. In *Trump v. Hawaii*, the Court acknowledged the injustices wrought by the wartime Court's decision in *Korematsu*, making clear that the decision "was gravely wrong the day it was decided . . . and—to be clear—'has no place in law under the Constitution.'"[327] Likewise, in *Ramos*, the Court jettisoned *Apodaca* on the view that the earlier Court had failed to interrogate the white supremacist origins of the nonunanimous jury rule.[328]

But even when the Court recognizes these historic injuries, it does not dwell on whether vestigial aspects of these now-discredited decisions (and the injuries they produced) persist in contemporary society. In *Trump v. Hawaii*, any discussion of the injustices wrought by the internment of Japanese Americans, including its effects on contemporary Japanese Americans, is conspicuously absent.[329] Likewise, in *Ramos*, even as the majority highlighted the white supremacist underpinnings of the nonunanimous jury rule, it was left to Justice Kavanaugh to note in a partial concurrence that "[t]hen and now, non-unanimous juries can silence the voices and negate the votes of black jurors, especially in cases with black defendants or black victims, and only one or two black jurors."[330] For the *Ramos* majority, the impact of the rule on present-day minorities and its role in fueling a "perception of unfairness and racial bias" that risked "undermin[ing] confidence in and respect for the criminal justice system"[331] paled in importance to the rule's origins in white supremacy.[332]

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327. Trump v. Hawaii, 585 U.S. 667, 710 (2018) (quoting Korematsu v. United States, 323 U.S. 214, 248 (1944) (Jackson, J., dissenting)).

328. *Ramos*, 140 S. Ct. at 1405 ("[I]t's just an implacable fact that the plurality spent almost no time grappling with the historical meaning of the Sixth Amendment's jury trial right, this Court's long-repeated statements that it demands unanimity, or the racist origins of Louisiana's and Oregon's laws.").

329. Although it denounced "[t]he forcible relocation of U.S. citizens to concentration camps[] solely and explicitly on the basis of race" as "objectively unlawful" and "morally repugnant," the majority opinion in *Trump v. Hawaii* studiously avoided discussing the interned Japanese Americans or the impact of internment on their lives. *Trump*, 585 U.S. at 710.

330. *Ramos*, 140 S. Ct. at 1418 (Kavanaugh, J., concurring in part).

331. *Id.*

332. *See id.* at 1394 (majority opinion).

Similarly, in *Bruen*—and indeed, in all of the Roberts Court's Second Amendment cases—the Court looks to history to identify a redressable injury to Black people. In *Heller*, *McDonald*, and *Bruen*, the Court focuses on the postbellum efforts to thwart Black people in the exercise of their Second Amendment rights. On this telling, departures from extant precedents like *Miller* and the expansion of the scope and substance of the Second Amendment are underwritten by an ostensible commitment to Black freedom and citizenship.

However, this commitment to Black freedom is deeply unsatisfying—it requires no more than the expansion of the Second Amendment. It does not grapple with a history in which states sought to limit gun rights for the purpose of keeping guns out of the hands of white supremacists and others bent on racial violence.[333] Nor does it contemplate continued or present-day injustices to these same groups, or the possible injuries that might be visited on these same constituencies because of a more muscular Second Amendment.

This last point is telling—and suggests the Roberts Court's thin commitment to remedying injustice. Just weeks before the Court announced its decision in *Bruen*, a white supremacist killed ten Black shoppers at a grocery store in Buffalo, New York.[334] Despite dominating the news, the episode was never mentioned in the *Bruen* majority opinion.[335] Indeed, the only member of the *Bruen* Court to discuss the tragedy in the pages of the U.S. Reports was Justice Alito, who, in his concurrence, glibly dismissed the tragedy by observing that the challenged New York licensing law "obviously did not stop that perpetrator."[336] As Professor Daniel Harawa wryly notes, "*Bruen* called itself vindicating the rights of the ancestors without considering what the decision would mean for their progeny."[337]

It is illuminating that the Roberts Court prioritizes *historic* injuries to racial minorities over more contemporary injuries. First, it makes

333. *See* Brief of Amicus Curiae Everytown for Gun Safety in Support of Respondents at 18, N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1 (2022) (No. 20-843), 2021 WL 4355659 at *18 (discussing this history).

334. *See* Drew Harwell & Will Oremus, *Only 22 Saw the Buffalo Shooting Live. Millions Have Seen It Since*, WASH. POST (May 16, 2022, 6:13 PM), https://www.washingtonpost.com/technology/2022/05/16/buffalo-shooting-live-stream [https://perma.cc/H83P-MZ6N].

335. *See* Daniel S. Harawa, NYSRPA v. Bruen*: Weaponizing Race*, 20 OHIO ST. J. CRIM. L. 163, 169 (2022) (observing that "*Bruen* explicitly shunned any relevance of modern-day realities when considering the lawfulness of firearm regulations, holding that what matters for Second Amendment purposes is history, and history alone").

336. *Bruen*, 597 U.S. at 72 (2022) (Alito, J., concurring).

337. Harawa, *supra* note 335, at 172.

clear that at least in the context of racial minorities, the injustices that the Court views as demanding remedial action are limited to those that are *historic* and *intentional* in nature—that is, injuries that cohere to traditional accounts of racism, like Jim Crow segregation or xenophobic bias.[338] Meaningfully, the Court seems less willing and able to discern more subtle forms of bias and discrimination. *Trump v. Hawaii* consigned *Korematsu* to constitutional law's anticanon[339]; but it also endorsed the view that only discrete acts of intentional discrimination constitute racial injuries redressable under the Constitution.[340] Even as the Court acknowledged *Korematsu*'s intent to discriminate, it concluded that the challenged travel ban was entirely disconnected from racial animus, both temporally and in terms of purpose, and thus was "facially neutral."[341]

The Roberts Court's view of racism and racial injury is not just limited to injustices that took place in the past.[342] It also cannot appreciate how past injustices might reverberate in the present and have repercussions for the future.[343] This helps to explain why the Court was moved to remedy the nonunanimous jury rule, which originated in Reconstruction-era white supremacy, but cannot appreciate the remedial interests in affirmative action for present-day—and future—racial minorities.

Tellingly, the demand that racial injustice be historic, intentional, and egregious is typically made in circumstances where the Roberts Court is considering injuries to traditional racial minorities—that is,

338. *See* Bridges, *supra* note 322, at 86–104 (discussing the Roberts Court's interest in remedying historic acts of racism); *see also* Murray, *Race-ing* Roe, *supra* note 16, at 2095–2101 (noting the Roberts Court's interest in remedying particularly egregious episodes of racism).

339. *See* Trump v. Hawaii, 585 U.S. 667, 710 (2018).

340. *See id.* ("[I]t is wholly inapt to liken [the forcible internment of U.S. citizens on the basis of race] to a facially neutral policy denying certain foreign nationals the privilege of admission.").

341. *Id*. at 2423.

342. Bridges, *supra* note 322, at 24 ("The crux of the Roberts Court's apparent racial common sense is that racism against people of color is what racism looked like during the pre-Civil Rights Era—in the bad old days.").

343. Professor Daniel Harawa has made this observation in the context of *Timbs v. Indiana*, 139 S. Ct. 682 (2019), and the prohibition on excessive fines. *See* Daniel S. Harawa, *Lemonade: A Racial Justice Reframing of the Roberts Court's Criminal Jurisprudence*, 110 CALIF. L. REV. 681, 707 (2022) ("As the *Timbs* Court recounted, fines were used to 'subjugate' Black Americans after the Civil War and maintain a 'racial hierarchy.' But modern fining practices also work to subjugate Black Americans." (quoting *Timbs*, 139 S. Ct. at 688)). Harawa also notes that the *Ramos* Court overlooked "the fact that while the law remained on the books, the nonunanimous jury provision worked exactly how the White supremacists who established it intended—it disproportionately nullified the votes of Black jurors and made it easier for White jurors to convict Black defendants." *Id.* at 708.

Black and brown people. In circumstances where the Court's gaze focuses on nonminorities as the injured party, the nature of the injury to be remedied is decidedly more inchoate and unstructured, eliding traditional accounts of racism and discrimination.[344]

Again, *Bruen* is instructive. There, Justice Alito's interest in an expanded Second Amendment proceeds on little more than his own intuition that "ordinary hard-working, law-abiding" people *require* guns to face down the criminal threats they routinely encounter in the conduct of their daily lives.[345] There is no clear allegation of injury to this particular constituency—perhaps because the individuals challenging the New York licensing scheme as a violation of their Second Amendment rights were not the dishwashers, janitors, and orderlies that Justice Alito invoked at oral argument,[346] but rather upstate gun owners who were denied licenses to carry concealed weapons in public.[347]

Likewise, in *Masterpiece Cakeshop* and *303 Creative*, the injuries of which Jack Phillips and Lorie Smith complained were generalized and inchoate.[348] Essentially, the pair objected to being subject to an antidiscrimination law to which *all* Colorado businesses were subject.[349] Although Colorado's public accommodations law was a neutral law of general applicability that did not specifically target any business owner, let alone Christian conservative business owners,[350] both Phillips and Smith insisted that the law's application to them constituted a violation of their First Amendment rights. And, in *303 Creative*, the Court credited these shadowy claims of injury, endorsing the view that

344. *See* Bridges, *supra* note 322, at 135 (arguing that "the Court should be read as allowing white claimants a unique freedom to innovate in their articulation of redressable racial injuries"). *See generally* Jessica A. Clarke, *Explicit Bias*, 113 NW. U. L. REV. 505 (2018) (exploring the dynamic in which courts refuse to recognize evidence of explicit bias against traditional minority groups).

345. Transcript of Oral Argument at 67–70, N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U. S. 1 (2021) (No. 20-843).

346. *Id*. at 67.

347. *See Bruen*, 597 U.S. at 14–17.

348. This may be especially true of Smith, who had not yet established her wedding website business and had not been approached to provide services for a same-sex couple at the time she filed her complaint. 303 Creative v. Elenis, 600 U.S. 570, 578–80 (2023).

349. *See* Colo. Rev. Stat. § 24-34-601(2)(a) (making it unlawful "to refuse, withhold from, or deny to an individual or a group" full enjoyment of public accommodations on the basis of certain protected characteristics).

350. *Id*. § 24-34-601.

religious conservatives are besieged by the "demands" of secular culture.[351]

But it is *Biden v. Nebraska* and *SFFA v. Harvard* where the Court's receptivity to nonminorities' vague claims of racial injury is perhaps most pronounced. Although the issue in the student loan relief cases was an anodyne question of administrative law, at oral argument the Court, and the Chief Justice in particular, reframed the issue to be one of individual fairness[352]—whether it was fair to redistribute government resources to student loan borrowers while small business owners were ineligible for the proffered relief.

By focusing on redistribution and fairness, the Chief Justice oriented the discussions in ways that gestured to the racialized contours of the student debt relief debate. It was not simply about college-educated borrowers versus non-college-educated small business owners; it was about minorities who had "bitten off more than they could chew" and white business owners who had "played by the rules" and were being left behind. This racial valence suggests that the injury to the nonborrowers was both their ineligibility for this form of government aid *and* a generalized antipathy for government redistribution to undeserving minorities. And in debating the issue and deciding the case, the Court seemed to credit the view that non-college-educated small business owners were broadly harmed by a program that redistributed government largesse to irresponsible (minority) borrowers.

The Court's disposition of *SFFA v. Harvard* echoes this amorphous account of racial injury. As in *Biden v. Nebraska*, the Court seemed convinced that the issue was a question of individual fairness—namely, was it fair to allow race to tip the balance in college admissions in favor of less qualified minorities? To be sure, racial identity was just one factor in the challenged admissions policy, which involved a holistic consideration of a wide range of factors. Nevertheless, the majority seemed satisfied with the broad view that consideration of race routinely tipped the balance in favor of minorities, disadvantaging nonminorities.[353] And while the Asian American plaintiffs insisted that

351. *303 Creative*, 600 U.S. at 589.

352. *See* Transcript of Oral Argument at 27, Dep't of Educ. v. Brown, 600 U.S. 551 (2023) (No. 22-535).

353. Students for Fair Admissions, Inc. v. Pres. & Fellows of Harvard Coll., 600 U.S. 181, 195 (2023) (noting that according to Harvard's admission process, "'race is a determinative tip for' a significant percentage 'of all admitted African American and Hispanic applicants'" (quoting

they had been injured—that Harvard and UNC had ranked them lower than whites and other minorities on the personal characteristics rubric[354]—the *SFFA* majority spent little time attending to this actual claim of injury or the prospect of Asian American disadvantage.[355] Instead, it made clear that it understood the case—and the injury—through the lens of whiteness. On this account, the concern was not implicit or express bias against Asian Americans, but the notion that white students were somehow losing out to unqualified and undeserving Black and brown students.

The Court's willingness to address amorphous injuries to white students stands in stark contrast to its insistence on remedying injuries to minorities that are historic, concrete, and the product of intentional acts of discrimination. In this regard, the bar to prevail as a minority claiming a racial injury is considerably higher than the bar for white claimants. It demands presenting evidence of discrimination and disadvantage that is intentional and consistent with the contours of historic acts of discrimination—like Jim Crow segregation, eugenics, or white supremacy. By contrast, whites need not proffer evidence of such concrete and structured harms. Instead, the injuries that they allege—and that the Court credits—are more generalized grievances: applying a neutral public accommodations law, being denied admission under a holistic college admissions calculus. In this way, the Court appears willing to credit the feelings, intuitions, and entitlements of white

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Students for Fair Admissions, Inc., v. President & Fellows of Harvard Coll., 397 F. Supp. 3d. 126, 178 (D. Mass. 2019))).

354. Brief for Petitioner, *supra* note 299, at 16, 2022 WL 2918946, at *16 (stating that personal ratings assigned by Harvard "reveal a clear racial hierarchy" with African Americans consistently getting the best personal ratings and Asian Americans consistently getting the worst); *id.* at 27–28, 2022 WL 2918946, at *27–28 (noting that Harvard's Office of Institutional Analysis created a report that found "predicted Asian admission to Harvard" to be lower because of the personal rating); *id.* at 30, 2022 WL 2918946, at *30 ("Asian Americans receive the lowest personal ratings among all races, and the 'negative relationship between Asian American identity and the personal rating' is 'statistically significant.'").

355. In fact, the Court discussed this claim—which was the crux of the petitioners' argument—in just a single paragraph:

> [The Court's] cases have stressed that an individual's race may never be used against him in the admissions process. Here, however, the First Circuit found that Harvard's consideration of race has led to an 11.1% decrease in the number of Asian-Americans admitted to Harvard. And the District Court observed that Harvard's "policy of considering applicants' race . . . overall results in fewer Asian American and white students being admitted."

Students for Fair Admissions, 600 U.S. at 218 (quoting Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 908 F.3d 157, 170, n.29 (1st Cir. 2020)).

people while demanding more articulated forms of injury from racial minorities.[356]

C. Recasting Minorities and Rights

In addition to creating two tiers of racialized injuries, the Roberts Court's embrace of remedial stare decisis also sheds light on the Court's efforts—both explicit and implicit—to reshape our understanding of what it means to be a minority and the tools by which courts may vindicate minority rights. Traditionally, under the *Carolene Products* framework, the Equal Protection Clause provided redress for harms against "discrete and insular minorities."[357] For years, a group was understood as a minority based on characteristics such as that group's history of experiencing past discrimination, its political power (or lack thereof), the immutability of the identity trait with which the group is associated, and the trait's impact on the group's ability to contribute to or participate in society.[358] On this account, racial minorities—and African Americans, in particular—have often been understood as the exemplar of minority status.[359]

But the Roberts Court's embrace of remedial stare decisis upends traditional notions of minority status. In the plurality opinion in *Regents of the University of California v. Bakke*,[360] one of the earliest affirmative action cases, Justice Lewis Powell famously noted that "the United States had become a Nation of minorities."[361] The current Court, it seems, has taken this axiom to heart, expanding its understanding of minority status to include groups that traditionally have not been considered minorities—and, indeed, are more likely to be considered part *of the majority*.

The Court's approach to the First Amendment is exemplary on this front. Through its refashioning of the Free Exercise and Free Speech Clauses (and the concomitant diminution of the Establishment

356. In some respects, it is almost as if the Court is taking "judicial notice" of "white harms," but fails to afford the same deference to racial minorities. Many thanks to *Duke Law Journal* Articles Editor Ken Krmoyan for this helpful observation.

357. United States v. Carolene Prods. Co., 304 U.S. 144, 152–53 n.4 (1938).

358. Marcy Strauss, *Reevaluating Suspect Classifications*, 35 SEATTLE U. L. REV. 135, 146 (2011).

359. *See* Gabriel J. Chin & Randy Wagner, *The Tyranny of the Minority: Jim Crow and the Counter-Majoritarian Difficulty*, 43 HARV. C.R.-C.L. L. REV. 65, 68 (2008) (referencing the long-standing view of African Americans as a minority group).

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

361. *Id.* at 292 (plurality opinion).

Clause), the Court has provided Christian conservatives with a broad license to exercise their faith, irrespective of other constitutional values and commitments. In this way, the Roberts Court imagines religious conservatives, like more traditional minority groups, to be actively engaged in a "struggle" to "overcome the prejudices . . . of a 'majority' composed of various minority groups," all of whom are united in their shared "willingness to disadvantage other groups."[362] In the Court's imagining, the secularization of society has rendered religious conservatives a minority—one that is increasingly at the mercy of the secular majority. And critically, this new secular majority is one comprised of "various minority groups"—women, sexual minorities, racial minorities, and others—who have captured society and its institutions and now insist that religious traditionalists subordinate their religious liberty in the service of this new *majority's* narrow vision of equality and civil rights.

To be sure, the Court's vision of religious conservatives as minorities often draws on historical antecedents. In the Court's consideration of no-aid provisions in *Espinoza*, some members of the majority appeared to credit the view that such provisions were historically animated by anti-Catholic bias—and that the residue of such bias clung to no-aid policies, even when the policies were reissued under neutral rationales.[363]

But more often, the Court's effort to refashion religious conservatives as minorities arises in contemporary clashes between religious liberty and LGBTQ+ civil rights. In these cases, where religious conservatives are charged with discrimination on the basis of sexual orientation, the Court perversely inverts the discrimination paradigm to refigure public accommodations laws—antidiscrimination laws—as vehicles for discriminating against religious conservatives. Consider *Masterpiece Cakeshop*, where the majority repurposed the equal protection concept of unconstitutional animus in defense of a Christian baker who refused to provide services for same-sex weddings.

With this in mind, the Roberts Court's approach to stare decisis should not be understood as merely remedial, but *reparative*. In this

362. *Id.*

363. *See* Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2273 (2020) (Alito, J., concurring) (discussing at length the anti-Catholic bias that attended the enactment of Montana's no-aid provision in the nineteenth century and noting that "it is not so clear that the animus was scrubbed").

series of recent cases that span disparate doctrinal areas, a unifying thread emerges. The Court's approach to stare decisis renders departures from precedent an engine of remedial justice. But justice for whom and for what? The racialized remedies that departures from precedent produce are not intended to benefit racial minorities, but rather to benefit those who, historically, were part of a once-dominant majority. And therein lies the rub. It is not just that the Court's approach to stare decisis might be understood as remedying injuries to particular constituencies; it is that this approach credits these amorphous injuries and seeks to make these constituencies *whole* by restoring them to the vaunted social positions they once occupied.

And in making these constituencies whole, the Court, paradoxically, thwarts efforts that were intended to remedy injuries inflicted on other groups. By expanding gun rights, withdrawing reproductive rights, invalidating student loan relief, dismantling affirmative action, and undermining antidiscrimination laws, the Court has effectively hobbled an array of public policies that were, in and of themselves, remedial in nature. The rights and programs that the Court's jurisprudence has rolled back were intended to address the widespread exclusion of racial minorities, women, and LGBTQ+ persons from civic and political life. In the Roberts Court's jurisprudence, these interventions are no longer remedial, but *are themselves injuries*. By including those who have been historically disenfranchised, these redistributive measures have taken power and authority away from those who historically possessed it. In this way, the Court is not just creating new minorities; as its own form of remedy for these new minorities, it is delegitimizing a prior round of public policies and jurisprudence that attempted to create new legal baselines and a flatter social hierarchy.

Viewing the Court's relationship to precedent in terms of remedial action makes this transformation stunningly clear. In overruling and narrowing precedents, the Court is effectively undoing prior doctrines that were meant to help equalize the status of disenfranchised groups. In so doing, the Court is repairing the harms of egalitarian constitutional law and social movements and *restoring* the white-straight-Christian-male–centered universe that existed before *Brown*.[364] The Court is engaged in a project of repairing harms that

364. For additional discussion of the Court's efforts to restore this traditional sociolegal landscape, see generally Leah Litman, Melissa Murray & Katherine Shaw, *Of Might and Men*,

have resulted from measures that were themselves intended to be remedial. And this insight makes clear the baseline problem of such a project: the injuries that these new minorities experience—and that the Court seeks to repair—are almost entirely the result of viewing any change to their dominant social position as a "harm." Neither this ascendant minority nor the Court considers whether these vested interests in social and political dominance are themselves illegitimate and injurious.

CONCLUSION

Viewing the Court through the lens of remedial stare decisis tells us much about the Roberts Court, its approach to precedent, and its understanding of constitutional injury and redress. Taken together, the dynamics that characterize the Court's remedial impulses may render more legible and coherent the Court's seemingly idiosyncratic approach to past decisions. And, as importantly, they make clear that for this Court, departures from precedent are not simply acts of defiance and will. They may, in fact, be part of a more comprehensive effort to utterly reimagine race, racial injury, and the very understanding of minority status. In this regard, the logic of remedy and repair may, perhaps perversely, serve to dismantle a body of constitutional and statutory law that was itself intended to be remedial and reparative, while privileging and prioritizing a revanchist vision of constitutional equality.

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