
Monochromacy of Justice: The Global Cost of Racial Colorblindness

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MONOCHROMACY OF JUSTICE: THE GLOBAL COST OF RACIAL COLORBLINDNESS

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I. INTRODUCTION

The doctrine of “colorblindness” has become a pivotal yet contentious principle in the jurisprudence of the United States Supreme Court and other nations’ highest courts, redefining anti-discrimination measures and reshaping legal systems both domestically and globally. The doctrine of colorblindness¹ is “the notion that the consideration and discussion of race perpetuate racial division,” and therefore racial classifications by government agencies should be prohibited.² This Comment delves into the repercussions of the U.S. Supreme Court’s embrace of the principle of colorblindness, which has led to the dismissal of remedial measures aimed at tackling racial inequality and inequity. These repercussions have resonated not only within U.S. state court systems but also in the law on a global scale, as the doctrine continues to embed itself in the judicial decisions and policymaking of other nations.

To understand the doctrine of colorblindness and its application in modern law, Part II begins with a brief history of race-conscious policies in the United States, focusing on the rise of affirmative action practices. It examines the three levels of judicial scrutiny and their relevance to affirmative action cases, as well as the broader effects of affirmative action across various sectors of American society. Given that the doctrine of colorblindness has been present for over a century, this Comment traces its evolution through two key periods: before and after *Brown v. Board of Education*. In the postbellum era, colorblindness was initially invoked to challenge racial caste laws and later served to support integration efforts.³ This Comment argues, however, that in the present day, the doctrine is increasingly used to obstruct race-conscious, progressive policies. To illustrate this argument with an example, this Comment analyzes a recent application of the colorblindness doctrine in twin landmark cases—*Students for Fair Admissions v. President and Fellows of Harvard College* and *Students for Fair Admissions v. University of North Carolina*—poised to have a profound and far-reaching impact on race-conscious policies.

Building on the American origins and historical development of the doctrine, Part II of this Comment also examines race relations in other nations and how colorblind interpretations have shaped their constitutional frameworks. The narratives of the chosen countries primarily

1. This term will be interchanged with “constitutional colorblindness” or “colorblind doctrine” throughout the Comment.

2. Gene Demby, *Two Justices Debate the Doctrine of Colorblindness*, NPR (Apr. 23, 2014, 3:15 PM), <https://www.npr.org/sections/codeswitch/2014/04/23/306173835/two-justices-debate-the-doctrine-of-colorblindness> [<https://perma.cc/VAU8-GQ5B>]; see also ANDREW KULL, *THE COLOR-BLIND CONSTITUTION* 1 (1998).

3. See Ian Lopez, *A Nation of Minorities: Race, Ethnicity, and Reactionary Colorblindness*, 59 *STAN. L. REV.* 985, 991–95 (2007).

focus on the plights of the African diaspora; however, narratives of other minorities are discussed when relevant to the analysis. This section explores the histories of marginalized communities in Canada and Australia, examining how the need for race-conscious remedial measures emerged in each country. Both nations have embraced the colorblind doctrine through judicial decisions and policymaking, leading to challenges in addressing racial justice and discrimination. Canadian courts have grappled with principles of colorblindness, especially in matters concerning equality rights under the Canadian Charter of Rights and Freedoms.⁴ This concept has been scrutinized within the context of affirmative action and anti-discrimination measures.⁵ The High Court of Australia has also explored colorblind principles in its interpretation of Section 51(xxvi) of the Australian Constitution, especially regarding race-based affirmative action and policies addressing historical injustices faced by Indigenous populations.⁶

The final Part of this Comment examines the harmful effects of adopting a colorblind interpretation of constitutional provisions on minority communities and scrutinizes the motivations behind the reasons why some nations have embraced this doctrine. It argues that these countries have implemented the colorblind doctrine as a means of maintaining existing racial hierarchies under the guise of equality. To address these challenges, the Comment purposes the use of saving clauses—provisions that explicitly permit laws and programs designed to redress disadvantages faced by marginalized groups. These clauses can help ensure the necessary implementation of race-conscious policies to promote substantive equality.

II. BACKGROUND

This Part explores the historical and constitutional underpinnings of the doctrine of constitutional colorblindness across three countries: the United States, Canada, and Australia. Beginning with the United States, the discussion examines the historical context of race and its impact on the nation's legal and social framework. It traces the doctrine's origins, particularly in the context of constitutional amendments, such as the Fourteenth Amendment, and highlights key U.S. Supreme Court cases that have shaped its modern interpretation. The analysis then shifts to Canada, where constitutional colorblindness intersects with Section 15 of the Canadian Charter of Rights and Freedoms. Canada's distinct historical and cultural approach to race and equality is examined, along with landmark Supreme Court of Canada cases that demonstrate how

4. *See infra* Section II.A.

5. *See infra* Section II.A.

6. *See infra* Section II.B.

the doctrine of colorblindness has shaped, and at times hindered, efforts to redress racial inequities. Finally, Section C explores how Australia's unique history of race relations influenced the development of a constitutional identity tied to notions of equality. The Section examines race-conscious policies in the context of Section 51(xxvi) of the Australian Constitution and pivotal High Court decisions that reflect the influence of colorblind ideology on Australian jurisprudence. This Part provides a comparative lens to understand how the concept obstructs socioeconomic progress, particularly for marginalized communities, while framing the global implications of its application.

A. *Colorblindness in the United States of America*

Constitutional colorblindness finds its deepest historical roots and greatest prominence in the United States, a nation whose identity and legal framework have been profoundly shaped by the complex interplay of race and individual rights. As the country has progressed socially and legally, there has been a notable shift from collective considerations of race to an increasing emphasis on individual merit and personal accountability. This evolution reflects broader societal changes, where the impact of race on one's opportunities and lived experiences is often downplayed in favor of a race-neutral ideal. Yet, the meaning and application of colorblindness have evolved significantly in the United States, particularly through judicial interpretations. From landmark decisions in the Reconstruction Era to contemporary rulings on affirmative action, the Supreme Court has continually shaped the legal understanding of race and equal protection. These decisions have influenced not only U.S. law but also global discussions on equality and justice. Today, debates over colorblindness remain at the heart of American jurisprudence, as the country grapples with how best to reconcile its ideals of equality with the realities of enduring racial disparities.

1. *The History of Race-Conscious Policies*

The history of race-conscious policies in America is deeply intertwined with its legacy of racial discrimination and inequality. Dating back to the Colonial Era, race-based policies were established to uphold systems of oppression, racism, and degradation, with laws and practices specifically designed to subjugate African Americans and other minority groups.⁷ The institution of chattel slavery, which prevailed in many parts of the United States, epitomized the most egregious form

7. See generally Jennifer Spear, *Race Matters in the Colonial South*, 3 J.S. HIST. 579 (2007).

of race-conscious policy, systematically depriving African Americans of their humanity, rights, and dignity.⁸ Even after the abolition of slavery, the enactment of Jim Crow laws in the late nineteenth and early twentieth centuries entrenched racial segregation in public facilities, schools, and housing across the nation, perpetuating a system of separate and unequal treatment based on race.⁹

The mid-twentieth century witnessed significant efforts to dismantle legally sanctioned racial discrimination and advance civil rights for African Americans and other marginalized communities. The Civil Rights Movement of the 1950s and 1960s culminated in landmark legislation such as the Civil Rights Act of 1964 and the Voting Rights Act of 1965, which aimed to eliminate racial barriers to equal opportunity and political participation, respectively.¹⁰ However, the legacy left by centuries of racial oppression persisted, prompting policymakers to adopt race-conscious policies as a means of addressing ongoing disparities and promoting diversity and inclusion. Affirmative action programs emerged in the late 1960s and early 1970s, initially as efforts to provide a remedy to the system of American apartheid and later to promote equal access to education and employment opportunities for historically marginalized groups.¹¹

Affirmative action can be defined as “treating groups that face differently discriminatory conditions outside the context differently, so as to achieve outcomes within the context that are less tainted by the discriminatory treatment those groups face outside of the context.”¹² In simpler terms, affirmative action refers to policies designed to assist groups that have historically faced discrimination by offering them tailored opportunities to ensure fairer outcomes and reduce the lingering effects of past injustices. These policies, which include considerations of race or ethnicity in admissions, hiring, and contracting decisions, have sought to level the playing field and foster greater representation and participation for minorities in various sectors of society.¹³ However, by the 1990s, pushback against affirmative action gradually shifted public perception, leading many today to see structural inequalities as the

8. For the history and legal impact of chattel slavery, see Joyce Scott, *Reparations, Restitution, and Transitional Justice: American Chattel Slavery & Its Aftermath, a Moral Debate Whose Time Has Come*, 39 WIS. INT'L L.J. 269 (2022).

9. See Margaret Hu, *Algorithmic Jim Crow*, 86 FORDHAM L. REV. 633, 652–53 (2017).

10. See Tomiko Brown-Nagin, *Elites, Social Movements, and the Law: The Case of Affirmative Action*, 105 COLUM. L. REV. 1436, 1524 (2005).

11. See John White, *What Is Affirmative Action?*, 78 TUL. L. REV. 2117, 2121 (2004).

12. See Doaa Abu-Elyounes, *Contextual Fairness: A Legal and Policy Analysis of Algorithmic Fairness*, 2020 U. ILL. J.L. TECH. & POL'Y 1, 17 (2020).

13. *Id.* at 15.

products of individual choices, cultures of poverty, and underachievement rather than products of oppressive racial laws.¹⁴

2. *How Courts Define and Defend Equality*

At its core, affirmative action is about treating groups differently based on context. Different groups have faced different disadvantages throughout the history of America, meaning that there are different classifications of groups that require different levels of equity. In cases dealing with affirmative action, the Equal Protection Clause—which states that “[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws”¹⁵—is used to “balance” preferential treatment towards historically oppressed groups as the Clause implies that “similarly situated people should be treated similarly and not discriminated against.”¹⁶ An Equal Protection analysis applies different levels of scrutiny based on protected attributes like race or gender. The Supreme Court has adopted three levels of scrutiny to apply in cases involving discrimination, depending on the classification of the group affected.¹⁷ Each level reflects a different degree of suspicion that the Court uses when evaluating legislation that categorizes individuals based on certain traits.¹⁸

Rational basis review, sometimes known as minimal scrutiny, is the lowest level of scrutiny applied by judicial courts when evaluating the constitutionality of a law or government action.¹⁹ Under rational basis review, courts assess whether the law or policy has a legitimate government interest and whether the means chosen to achieve that interest are rationally related to it.²⁰ Laws subject to rational basis review are presumed to be constitutional unless they are shown to be arbitrary or irrational.²¹ Rational basis review is typically applied to laws that do not involve suspect classifications.²² In the context of affirmative action, laws or policies that classify individuals based on a non-suspect criteria, such as disability status, are generally subject to rational basis review.²³

14. White, *supra* note 11, at 2121.

15. U.S. Const. amend. XIV, § 1.

16. See Abu-Elyounes, *supra* note 12, at 12.

17. See Jeffrey Shaman, *Cracks in the Structure: The Coming Breakdown of the Levels of Scrutiny*, 45 OHIO ST. L.J. 161, 175 (1984).

18. *Id.* at 175–76.

19. See Katie Eyer, *Protected Class Rational Basis Review*, 95 N.C.L. REV. 975, 1010 (2017).

20. *Clark v. Jeter*, 486 U.S. 456, 461 (1988).

21. See Shaman, *supra* note 17, at 161–62.

22. See *Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985) (analyzing whether the requirement of a special use permit for a proposed group home for people with intellectual disabilities violated the Equal Protection Clause).

23. *Id.* at 442, 446–47.

Courts are more likely to uphold programs under rational basis review if they are deemed to serve a legitimate governmental interest, such as regulating traffic or promoting cost-saving measures.²⁴

Intermediate scrutiny is a heightened level of scrutiny applied by courts when evaluating laws that involve certain suspect classifications—a class or group of persons meeting a series of criteria suggesting they are likely the subject of discrimination²⁵—or implicate fundamental rights, such as a constitutional right, but are not considered to be inherently suspect.²⁶ Under intermediate scrutiny, the government must demonstrate that the challenged law or policy is substantially related to an important governmental interest.²⁷ In the context of affirmative action, intermediate scrutiny is typically applied to laws that classify individuals based on gender or legitimacy.²⁸ This level of scrutiny allows the Court to take a neutral stance on an issue, neither favoring the government nor the party challenging the law or policy.²⁹

Strict scrutiny is the highest level of scrutiny applied by U.S. courts when evaluating laws that involve suspect classifications, such as race or ethnicity, or that implicate fundamental rights.³⁰ Under strict scrutiny, the government must demonstrate that the challenged law or policy is narrowly tailored to serve a compelling governmental interest.³¹ Strict scrutiny places a heavy burden on the government to justify the classification, and the law is presumed to be unconstitutional unless it is shown to be necessary to achieve a compelling interest.³² In the context of affirmative action, laws or policies that involve race-conscious classifications, regardless of whether they are remedial or insidious, are subject to strict scrutiny.³³ Affirmative action programs must be shown

24. See, e.g., *Ry. Express Agency, Inc. v. New York*, 336 U.S. 106, 110 (1949) (finding that the legitimate governmental interest in traffic congestion passed minimal scrutiny); *Kadrmas v. Dickinson Pub. Schs.*, 487 U.S. 450, 461–62 (1988) (finding that the legitimate governmental interest of encouraging school districts to provide bus transportation to students through allowing districts to impose a bus fee passed minimal scrutiny).

25. See, e.g., *Hirabayashi v. United States*, 320 U.S. 81 (1934); *Korematsu v. United States*, 323 U.S. 214 (1944).

26. See Shaman, *supra* note 17, at 162–63.

27. *Id.*

28. *Id.*

29. *Id.* See also *Califano v. Webster*, 430 U.S. 313, 316–18 (1977) (finding that the Social Security Act's provision for women to exclude more lower-earning years than men from their old-age insurance benefits calculations served an important governmental interest in correcting the economic disparities women have historically faced in the job market).

30. Shaman, *supra* note 17, at 162.

31. See Roy Spece & David Yokum, *Scrutinizing Strict Scrutiny*, 40 VT. L. REV. 285, 295 (2015).

32. Shaman, *supra* note 17, at 162.

33. *Id.*; Nino Monea, *Next on the Chopping Block: The Litigation Campaign Against Race-Conscious Policies Beyond Affirmative Action in University Admissions*, 33 B.U. PUB. INT. L.J. 1, 8 (2024).

to serve a compelling governmental interest, such as remedying past discrimination or promoting diversity, and must be narrowly tailored to achieve that interest without unduly burdening the rights of individuals who are not beneficiaries of the program.³⁴

3. *Historical Origins of the Colorblind Doctrine*

In his famous 1963 speech “I Have a Dream,” Martin Luther King Jr. proclaimed, “I have a dream that my four little children will one day live in a nation where they will not be judged by the color of their skin but by the content of their character.”³⁵ While this quote lends itself to diverse interpretations, numerous scholars have observed that it tends to espouse a colorblind ideology.³⁶ This segment of King’s speech conveys the idea that one’s skin color should not dictate the course of one’s life. It suggests that opportunities should be based on individual merit, with race playing a secondary role, as all individuals should be treated equally under the law.³⁷ A colorblind interpretation of King’s speech can be seen as foundational to the notion of constitutional colorblindness.³⁸ This reading supports the idea that individuals should have unlimited opportunities regardless of race, reinforcing the theory behind a colorblind constitution.³⁹ However, others disagree and instead find this statement to be wrenched out of its social and political context, being misappropriated by modern proponents of colorblindness.⁴⁰ For those people, the modern meaning of King’s quote is clear—special

34. See, e.g., *United States v. Paradise*, 480 U.S. 149, 150–53, 184–85 (1987) (finding that the “one-black-for-one-white” promotion requirement implemented in the Department of Public Safety was narrowly tailored to address significant racial disparities caused by historical discrimination and served the compelling interest of remedying past discrimination).

35. Read Martin Luther King Jr.’s ‘I Have a Dream’ Speech in Its Entirety, NPR (Jan. 16, 2023, 10:32 AM), <https://www.npr.org/2010/01/18/122701268/i-have-a-dream-speech-in-its-entirety> [<https://perma.cc/4PMD-JA5L>].

36. See, e.g., Helen A. Neville, Miguel E. Gallardo & Derald Wing Sue, *The Myth of Racial Color Blindness: Manifestations, Dynamics, and Impact*, AM. PSYCH. ASS’N, 53–64 (2016).

37. See generally Colin Seale, *MLK’s “I Have a Dream” Speech and Rejecting Colorblindness for Today’s Children*, FORBES (Jan. 20, 2020, 9:15 AM), <https://www.forbes.com/sites/colin-seale/2020/01/20/mlks-i-have-a-dream-speech-and-rejecting-colorblindness-for-todays-children/> [<https://perma.cc/885S-PB8Q>].

38. See generally U.S. MLK’s “Content of Character” Quote Inspires Debate, CBS NEWS (Jan. 20, 2013, 5:34 PM), <https://www.cbsnews.com/news/mlks-content-of-character-quote-inspires-debate/> [<https://perma.cc/2T9G-667V>].

39. See generally Bev-Freda Jackson, *Ketanji Brown Jackson and the Color Blind Society of Martin Luther King Jr.*, CONVERSATION (Apr. 5, 2022, 8:31 AM), <https://theconversation.com/ketanji-brown-jackson-and-the-color-blind-society-of-martin-luther-king-jr-180490> [<https://perma.cc/JF7T-SZC2>].

40. Ronald Turner, *The Dangers of Misappropriation: Misusing Martin Luther King, Jr.’s Legacy to Prove the Colorblind Thesis*, 2 MICH. J. RACE & L. 101, 116 (1996).

consideration for one racial group is a violation of the dream of equality.⁴¹ The evolving interpretation of King's famous line is analogous to the evolution of the doctrine of colorblindness. While originally used to champion the notion of equality, the doctrine now promotes the idea of a post-racial America, hindering progressive efforts across the nation.⁴²

a. Colorblindness in the Postbellum Period

The roots of the doctrine of colorblindness can be traced back to the post-Civil War Era when the United States sought to reconcile the Nation's deep racial divisions. The Equal Protection Clause of the Fourteenth Amendment, ratified in 1868, was intended to secure the rights of newly freed slaves, prohibiting states from denying equal protection under the law.⁴³ However, in the late-nineteenth and early-twentieth centuries, the U.S. Supreme Court's interpretation of this Clause took a divergent path. In the landmark case of *Plessy v. Ferguson*, the Court sanctioned the doctrine of "separate but equal," allowing racially segregated facilities if they were deemed equivalent.⁴⁴ This test case centered around Homer Plessy, a mixed-race man in Louisiana who refused to sit in a designated "colored" railway car, arguing that such segregation violated his rights under the Equal Protection Clause of the Fourteenth Amendment.⁴⁵ The Supreme Court upheld the state's segregation laws under the "separate but equal" doctrine, asserting that segregation was constitutional as long as facilities for African Americans were equivalent to those for white Americans.⁴⁶ This ruling effectively legalized racial segregation and paved the way for the establishment of Jim Crow laws throughout the South, institutionalizing racial discrimination and inequality for decades to come. Notably, the notion of a colorblind constitution found its footing in Justice John Marshall Harlan's dissent in *Plessy*. He argued that the Constitution is colorblind and neither knows nor tolerates classes among citizens. Harlan wrote:

The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth, and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage, and holds fast to the principles of constitutional liberty. But in the view of the constitution, in the eye of the law, there is in this country no superior, dominant, ruling class

41. MLK's "Content of Character" Quote Inspires Debate, CBS NEWS (Jan. 20, 2013), <https://www.cbsnews.com/news/mlks-content-of-character-quote-inspires-debate/> [https://perma.cc/WW46-F7NA].

42. See Seale, *supra* note 37.

43. See generally Victor Li, *The 14th*, 103 A.B.A.J. 37 (2017).

44. See generally *Plessy v. Ferguson*, 163 U.S. 537 (1896).

45. *Id.* at 542.

46. *Id.* at 550–52.

of citizens. There is no caste here. Our constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved.⁴⁷

Academics have examined the ongoing influence of Harlan's dissent, particularly his advocacy for a constitution devoid of racial bias.⁴⁸ Some argue that his dissent laid the groundwork for later civil rights jurisprudence, influencing decisions that rejected racial classifications.⁴⁹ Others have argued that Harlan's commitment to a colorblind constitution was limited, suggesting that his views on race were more complex than initially thought.⁵⁰ They point to other aspects of Harlan's judicial record and personal beliefs that may not align perfectly with a strict interpretation of colorblindness.⁵¹ For example, Harlan, a former slave owner, initially opposed the Thirteenth Amendment—which abolished slavery and involuntary servitude, except as punishment for a crime—and, within his dissent, did not necessarily advocate for immediate social or political equality between races.⁵² Still, Harlan's dissent in *Plessy* is often considered a lone voice of reason during a time when racial inferiority was becoming deeply entrenched in American society.⁵³ Harlan's dissent was rooted in a broader interpretation of the Equal Protection Clause of the Fourteenth Amendment.⁵⁴ Harlan, like many nineteenth-century scholars, believed that America was divinely chosen to fulfill a moral destiny, viewing the Declaration of Independence as the Nation's true founding document and “political bible,” which the Reconstruction Amendments later constitutionalized by enshrining the Founders' promise of universal equality.⁵⁵ This belief allowed him to confidently assert that the Fourteenth Amendment was intended to establish equality before the law, regardless of race, and provided a philosophical basis

47. *Id.* at 559.

48. See generally Douglas Reed, *Harlan's Dissent: Citizenship, Education, and the Color-Conscious Constitution*, 7 RUSSELL SAGE FOUND. J. SOC. SCIS. 148 (2021).

49. See generally Hannah Weiner, *The Next “Great Dissenter”?: How Clarence Thomas Is Using the Words and Principles of John Marshall Harlan to Craft a New Era of Civil Rights*, 58 DUKE L.J. 139 (2008).

50. See John Powell, *An Agenda for the Post-Civil Rights Era*, 29 U.S.F. L. REV. 889, 893–94 (1995).

51. See generally Phillip Hutchison, *The Harlan Renaissance: Colorblindness and White Domination in Justice John Marshall Harlan's Dissent in Plessy v. Ferguson*, 19 J. AFR. AM. STUD. 426 (2015).

52. See Randall Kennedy, *Colorblind Constitutionalism*, 82 FORDHAM L. REV. 1, 5 (2013).

53. See Weiner, *supra* note 49, at 143; Powell, *supra* note 50, at 896.

54. See Reed, *supra* note 48, at 151.

55. See Weiner, *supra* note 49, at 152.

for challenging segregation and discrimination in the wake of *Plessy*.⁵⁶ While his views in his dissent did not immediately influence the Court's decisions, they gained recognition and significance over time.⁵⁷

In the immediate aftermath of *Plessy*, the “separate but equal” doctrine became firmly entrenched in American jurisprudence, and racial segregation persisted in various aspects of American life.⁵⁸ While legal challenges continued to try to overturn the doctrine, they often faced resistance from the courts.⁵⁹ The prevailing sentiment during this period was far from embracing Harlan's colorblind vision. It was not until the Progressive Era, following the social and political upheaval of World War I, that his ideas began to gain traction.⁶⁰ As the racial climate shifted, recognition of the need for civil rights grew.

The landmark case of *Brown v. Board of Education* is often seen as the watershed moment in the development of constitutional colorblindness. The case was a conglomeration of five separate cases in which African-American minors sought to obtain admission to public schools on a nonsegregated basis.⁶¹ The plaintiffs argued that racial segregation in public schools violated the Fourteenth Amendment's Equal Protection Clause.⁶² The Supreme Court, in a unanimous decision, declared state laws establishing separate public schools for black and white students to be unconstitutional, overturning the precedent set by *Plessy*.⁶³ The Court's opinion focused on the Equal Protection Clause, asserting that the segregation of children in public schools solely on the basis of race denied them equal protection under the law.⁶⁴ This approach aligned with Justice Harlan's dissent in *Plessy*, which argued for a colorblind constitution against racial classifications. In the years following *Brown*, the U.S. Supreme Court continued to refine and expand the principles of equal protection. Landmark cases like *Loving v. Virginia*, which invalidated laws prohibiting interracial marriage,⁶⁵ and *Griggs v.*

56. *Id.*

57. See Scott Grinsell, “The Prejudice of Caste”: The Misreading of Justice Harlan and the Ascendancy of Anticlassification, 15 MICH. J. RACE & L. 317, 330 (2010).

58. See generally Douglas Ficker, *From Roberts to Plessy: Educational Segregation and the “Separate but Equal” Doctrine*, 84 J. NEGRO HIST. 301 (1999).

59. See Erin Blakemore, *Plessy v. Ferguson Aimed to End Segregation—but Codified It Instead*, NAT'L GEOGRAPHIC (Jan. 4, 2022), <https://www.nationalgeographic.com/history/article/plessy-v-ferguson-aimed-to-end-segregation-but-codified-it-instead> [<https://perma.cc/5GT5-W6CZ>].

60. See William Eskridge Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2221 (2002).

61. 347 U.S. 483, 487 (1954).

62. *Id.* at 488.

63. *Id.* at 495.

64. *Id.* at 493.

65. *Loving v. Virginia*, 388 U.S. 1 (1957).

Duke Power Co., which addressed employment discrimination,⁶⁶ exemplified a broader application of the colorblind principle. These rulings reinforced the notion that laws and policies should not discriminate based on race—promoting equal treatment under the law and challenging systemic barriers that perpetuate racial inequality.

b. *Colorblindness in the Modern Era*

As the Court began dismantling overtly discriminatory laws, it initially embraced a colorblind approach, advocating for formal equality to address historical injustices. However, as race-conscious policies emerged to confront the lingering effects of racial discrimination, the colorblind doctrine was reshaped to downplay the realities of racial discrimination, now often used to overlook those same historical injustices. This shift notably solidified in the 1978 case, *Regents of the University of California v. Bakke*, in which the majority opinion rejected the use of racial quotas in affirmative action and emphasized individual merit, laying the groundwork for a version of colorblindness that would limit protections for minorities.⁶⁷ In *Regents*, a white applicant, Bakke, challenged the admissions policy of the University of California, Davis School of Medicine, which set aside a specific number of seats for minority applicants as part of its affirmative action program.⁶⁸ Bakke argued that the school's policy violated the Equal Protection Clause by discriminating against him on the basis of race.⁶⁹ Justice Powell endorsed a modern colorblind interpretation of the Equal Protection Clause, calling for strict scrutiny any time the government treated people differently based on their race regardless if the interest was discriminatory or remedial.⁷⁰ The Court held that while race could be considered as one of many factors in university admissions decisions to achieve diversity, racial quotas in admissions were unconstitutional.⁷¹ This decision represented a pivotal moment in the evolution of the concept of a colorblind constitution.⁷² Instead of focusing on ending discrimination against minorities to ensure equality between races, the Court began a narrative that all forms of discrimination were bad, including discrimination that benefits African Americans and other minorities.⁷³ Justice Brennan even rejected the original meaning of a colorblind constitution

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

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

68. *Id.* at 276–77.

69. *Id.* at 277–78.

70. *Id.* at 290–91.

71. *Id.* at 314.

72. For more information about the impact of this case, see Robert Dixon, *Bakke: A Constitutional Analysis*, 67 CAL. L. REV. 69 (1979).

73. See Powell, *supra* note 50, at 903.

as expressed by Harlan, stating that it “has never been adopted by this Court as the proper meaning of the Equal Protection Clause.”⁷⁴ The goal of the application of the colorblind doctrine was to now treat everyone equally without reference to context, situation, history, or culture.⁷⁵

Recent manifestations of the modern colorblindness doctrine can be found in decisions like the 2007 case, *Parents Involved in Community Schools v. Seattle School District No. 1*.⁷⁶ There, the Court held that school assignment plans using race as a factor to achieve diversity were unconstitutional, reinforcing the idea that government actions explicitly considering race were impermissible, even in pursuit of remedying historical racial imbalances.⁷⁷ Although the doctrine is most commonly seen in education, this modern interpretation extends its influence to many different areas of American life. In *City of Richmond v. J.A. Croson Co.*, the Court struck down a set-aside program in Richmond, Virginia that required a percentage of city construction contracts to be awarded to minority-owned businesses.⁷⁸ The majority opinion, authored by Justice O’Connor, emphasized that general assertions of past discrimination were insufficient to justify racial classifications.⁷⁹

In *Adarand Constructors, Inc. v. Peña*, the Court extended the strict scrutiny standard to federal affirmative action programs.⁸⁰ The decision reinforced the principle that all race-conscious remedial measures—whether imposed by federal, state, or local governments and even those designed to assist disadvantaged groups—must undergo the highest level of judicial review to ensure they do not violate equal protection principles. The Court’s conclusion reflects a modern colorblind approach to governmental actions as the lines have blurred between invidious discrimination and remedial efforts, finding that because race is inherently suspect, *any use* of it is presumptively unconstitutional.⁸¹

The decision in *Adarand* further established that race-conscious measures must be carefully justified, even when aimed at remedying past discrimination. This skepticism towards remedial race-based policies found further support in *Shelby County v. Holder*, where the Court struck down a key provision of the Voting Rights Act of 1965 that required certain jurisdictions to obtain federal preclearance before

74. *Bakke*, 438 U.S. at 355–56.

75. See Powell, *supra* note 50, at 903.

76. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007).

77. See Christopher Schmidt, *Brown and the Colorblind Constitution*, 94 CORNELL L. REV. 203, 210 (2008).

78. *City of Richmond v. J.A. Croson Co.*, 448 U.S. 469 (1989).

79. *Id.* at 499.

80. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995).

81. Cedric Powell, *Hopwood: Bakke II and Skeptical Scrutiny*, 9 SETON HALL CONST. L.J. 811, 824, 830 (1999).

altering their voting laws.⁸² The decision reflected a reluctance towards using historical patterns of discrimination as a basis for ongoing federal oversight, aligning with principles of modern colorblindness in an equal protection analysis. The Court argued that the preclearance formula, which was based on decades-old data, no longer reflected current voting conditions.⁸³ This decision can be viewed as the step toward dismantling federal safeguards designed to protect minority voting rights, as the Court essentially concluded that past discrimination should not be the primary consideration in assessing the validity of current policies, signaling a shift away from race-conscious remedies rooted in historical injustices.⁸⁴

These decisions have marked a pivotal moment in the Court's application of constitutional colorblindness, restricting the permissible scope of race-conscious measures. The majority opinions reflect a modern colorblind principle, asserting that any racial classification, regardless of intent, perpetuates a constitutionally impermissible hierarchy. These interpretations culminated in the 2023 *Students for Fair Admissions* cases, where the Court invalidated affirmative action programs in college admissions, marking a pivotal shift in equal protection jurisprudence. The application of the strict scrutiny test to any race-conscious policy now embodies the modern understanding of the doctrine, and with it, the Court aims to apply the Equal Protection Clause to every person "without regard to any difference of race, of color, or of nationality."⁸⁵

4. *SFFA and the Unraveling of Affirmative Action*

On June 29, 2023, the United States Supreme Court held in the twin cases—*Students for Fair Admissions v. President and Fellows of Harvard College* and *Students for Fair Admissions v. University of North Carolina* (collectively, *SFFA*)—that affirmative action programs based on race in college admissions processes contravene the Equal Protection Clause.⁸⁶ In doing so, the Court overturned two decades of precedent that had enabled colleges and universities to build diverse student bodies, fostering a richer and more inclusive educational environment.⁸⁷

82. *Shelby Cnty. v. Holder*, 570 U.S. 529 (2013).

83. *Id.* at 554.

84. See John Tehranian, *Playing Cowboys and Iranians: Selective Colorblindness and the Legal Construction of White Geographies*, 86 U. COLO. L. REV. 1, 73–74 (2015).

85. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 206 (2023) (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886)).

86. *Id.* at 194–96.

87. Ariana Boa, *Supreme Court Bans Colleges from Considering Race in Admissions*, INDEPENDENT (June 29, 2023), <https://www.independent.co.uk/news/world/americas/supreme-court-strike-affirmative-action-university-b2366556.html> [<https://perma.cc/3KN9-75ZY>].

Before *SFFA*, the Court's last decision regarding affirmative action in university admissions was *Fisher v. University of Texas* in 2016.⁸⁸ In *Fisher*, a white applicant challenged the university's admissions policy, arguing that it violated the Equal Protection Clause. The University of Texas used a holistic review process that included race as one of many factors in admitting students to promote diversity on campus. The applicant contended that she was denied admission based on her race and that the policy discriminated against her and other white people. The Court ruled that the university's admissions policy was constitutional, affirming the use of race as one factor among many in admissions decisions to achieve diversity.⁸⁹

In *SFFA*, the Court examined whether Harvard, a private institution, violated Title VI of the Civil Rights Act of 1964—which prohibits discrimination based on race, color, or national origin in programs receiving federal funding⁹⁰—and whether the undergraduate admissions practices at UNC, a public institution, violated the Fourteenth Amendment. Harvard and UNC both used a method of race-based admissions that allowed the institutions to use race as one of many factors in their admissions process, which Students for Fair Admissions, a legal advocacy group, claimed discriminated against Asian American applicants.⁹¹

The Court gave several reasons as to why they were striking down affirmative action in college admissions. First, the Court found that race-conscious admissions programs violated the Equal Protection Clause by using race as a “negative” factor, since favoring some applicants based on race necessarily disadvantaged others.⁹² Second, the Court criticized the reliance on racial stereotyping, arguing that such practices undermined individual dignity and perpetuated harm rather than remedying past discrimination.⁹³ Finally, the Court held that these programs lacked a “logical end point,” pointing to evidence that universities were maintaining racial balances rather than progressing toward the elimination of race-based admissions.⁹⁴

In what many would call an “unusual” move, Justice Clarence Thomas read parts of his dense fifty-eight-page concurring opinion in *SFFA*

88. *Fisher v. Univ. of Texas*, 579 U.S. 365 (2016).

89. *Id.* at 388.

90. Civil Rights Act of 1964, tit. VI, 42 U.S.C. § 2000d to 2000d-7.

91. P.R. Lockheart, *The Lawsuit Against Harvard That Could Change Affirmative Action in College Admissions, explained*, Vox (Oct. 18, 2018, 8:00 PM), <https://www.vox.com/2018/10/18/17984108/harvard-asian-americans-affirmative-action-racial-discrimination> [<https://perma.cc/MWN8-6BFB>].

92. *Harvard*, 600 U.S. at 218.

93. *Id.* at 220–21.

94. *Id.* at 221–22.

from the bench.⁹⁵ In his concurrence, Thomas said that he “sees the universities’ admissions policies for what they are: rudderless, race-based preferences.”⁹⁶ Thomas further went on to say that “[race-conscious admissions] policies fly in the face of our colorblind Constitution.”⁹⁷ Within this statement, Justice Thomas reiterated his longstanding belief that affirmative action harms the very people it claims to benefit,⁹⁸ writing that “all forms of discrimination based on race—including so-called affirmative action—are prohibited under the Constitution.”⁹⁹ Justice Thomas’s statements exemplify the Court’s growing commitment to a colorblind interpretation of the Constitution, where any form of race-based consideration is viewed as inherently unconstitutional. His assertion that affirmative action policies “fly in the face of our colorblind Constitution” reflects a rejection of the idea that race-conscious measures are necessary to address historical and systemic racial inequality. By framing affirmative action as harmful rather than remedial, Thomas’s concurrence aligns with the broader judicial and societal shift towards the modern understanding of the colorblind doctrine, where the consideration of race is eliminated from legal and governmental decision-making.

It has yet to be realized what the full extent of this ruling will have on the progress of race-conscious policies—specifically those that explicitly address systemic racial barriers.¹⁰⁰ Reports already indicate a decline in Black enrollment at Harvard and other colleges, signaling one immediate impact of the Court’s decision.¹⁰¹ This colorblind interpretation of the Constitution could ripple far beyond education, affecting nearly every aspect of American life—from life expectancy and maternal mortality to employment, income, wealth, environmental exposures, and criminal justice involvement.¹⁰²

95. See Nina Totenberg, *Supreme Court Guts Affirmative Action, Effectively Ending Race-Conscious Admissions*, NPR (June 29, 2023, 7:52 PM), <https://www.npr.org/2023/06/29/1181138066/affirmative-action-supreme-court-decision> [<https://perma.cc/43YX-VS5R>].

96. *Harvard*, 600 U.S. at 287 (Thomas, J., concurring).

97. *Id.* (Thomas, J., concurring).

98. See *Fisher v. Univ. of Texas at Austin*, 570 U.S. 297, 332 (2013) (Thomas, J., concurring).

99. *Harvard*, 600 U.S. at 232 (Thomas, J., concurring).

100. See Kevin Carey, *Can College Diversity Survive the End of Affirmative Action?*, Vox (June 29, 2023, 11:50 AM), <https://www.vox.com/scotus/2023/6/29/23767756/affirmative-action-college-admissions-race-sffa-ruling> [<https://perma.cc/96TW-GJLM>].

101. Joseph Pisani, *Harvard Enrolls Fewer Students Identifying as Black, More Don’t Disclose Race*, WALL ST. J. (Sept. 11, 2024, 11:29 AM), <https://www.wsj.com/us-news/education/harvards-latest-class-fewer-students-who-identify-as-black-more-who-didnt-disclose-their-race-b79c28a6> [<https://perma.cc/29SJ-CX7C>].

102. Sonja Starr, *The Next Battle Over Colorblindness Has Begun*, N.Y. TIMES (July 10, 2023), <https://www.nytimes.com/2023/07/10/opinion/supreme-court-high-school-admissions.html> [<https://perma.cc/PU9Y-RWHS>].

The Supreme Court's explicit endorsement of colorblind principles sets the stage for lower federal courts to build a growing body of decisions grounded in modern colorblindness.¹⁰³ By embracing colorblind constitutionalism, the Court sends a clear signal to the lower courts that this doctrine is now the guiding framework for interpreting the Constitution, empowering them to craft and reinforce their own colorblind legal narratives. While lower courts are bound to follow the precedents set by the U.S. Supreme Court and adhere to its principles, the doctrine of colorblindness has also gained traction internationally, influencing legal interpretations and policies in other countries. While the direct influence may vary, these countries, especially those with legal systems rooted in principles of equality and non-discrimination, have considered or referenced modern colorblindness in their own judicial decisions and policymaking.

B. *Colo[un]r Blindness in Canada*

If you have the time, I would like you to navigate to the Government of Canada's website.¹⁰⁴ In the search bar, look up "examples of Charter-related cases." It should lead you to a page where you can click on a link with the same name. The listed cases give a broad overview of the built-up legal framework surrounding the Canadian Charter of Rights and Freedoms which guarantees certain political and civil rights.¹⁰⁵ It discusses decisions that helped establish equality for individuals with disabilities, protections for discrimination based on sexual orientation, and even protection of voting rights for non-resident Canadian citizens.¹⁰⁶ However, you will see no decisions relating to race, a striking omission given Canada's historical and ongoing racial inequalities.

This absence reflects the Canadian legal system's reluctance and inadequacy to confront race explicitly within its constitutional framework. Despite being celebrated for its progressive policies and multicultural ideals, Canada's journey toward racial equality is complex and fraught

103. See, e.g., *Taxman v. Board of Educ. of Twp. of Piscataway*, 91 F.3d 1547, 1550 (3d Cir. 1996) (holding that affirmative action programs designed to promote diversity, rather than remedy past discrimination, violate Title VII); *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996) (finding that diversity is not a compelling interest and race should never be a factor in implementing affirmative action programs in law school admissions).

104. The website can be accessed at <https://www.canada.ca/en.html> [<https://perma.cc/4WWY-5C3A>].

105. *Examples of Charter-Related Cases*, GOV'T OF CAN., <https://justice.gc.ca/eng/csj-sjc/rfc-dlc/ccrf-ccdl/cases.html> [<https://perma.cc/QR5V-JKMX>]. See generally Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B of the Canada Act, 1982, reprinted in 23 U.B.C. L. REV. 609 (1989).

106. See *Eldridge v. British Columbia (Att'y Gen.)*, [1997] 3 S.C.R. 624 (Can.); see also *Vriend v. Alberta*, [1998] 1 S.C.R. 493 (Can.); *Frank v. Canada (Att'y Gen.)*, [2019] 1 S.C.R. 3 (Can. Ont.).

with contradictions. The country's history includes over 200 years of slavery, discriminatory immigration policies, and systemic exclusion of Indigenous peoples, which have left a legacy of inequality that continues to influence its legal and social frameworks.¹⁰⁷ The adoption of the Canadian Charter of Rights and Freedoms in 1982 marked a pivotal moment in the Nation's history, offering a constitutional promise of equality and protection against discrimination.¹⁰⁸ However, this promise has been shaped by the Supreme Court of Canada's interpretation of Section 15 of the Charter, which guarantees equality rights. Over time, the doctrine of colorblindness has begun to take root in Canadian jurisprudence. The Supreme Court's analysis of equality claims prioritizes treating everyone the same under the law, often at the expense of recognizing, addressing, and protecting the unique disadvantages faced by racialized communities. While the Charter has provided a framework for significant legal advancements, the courts' reliance on colorblind principles has created tension between the ideals of equality and the realities of systemic discrimination in Canada's multicultural society.

1. *The Beginnings of a Colorblind Canada*

After 200 years of physical, psychological, and sexual abuse, enslaved persons in Canada found release when slavery was legally abolished by the imperial parliament's enactment of the Slavery Abolition Act in 1833.¹⁰⁹ However, what followed were decades of racial segregation impacting education, employment, and housing—paralleling, in many ways, the experiences of Black communities in America.¹¹⁰ Similar to the United States, it took a string of judicial decisions to erode those racist principles.¹¹¹ One of those cases laid the foundation of constitutional colorblindness within Canadian jurisprudence. In the 1899 case *Johnson v. Sparrow*, Fred Johnson, a Black man, purchased two seats to attend an orchestra at the Montreal Academy of Music, owned by

107. For a broad overview of research on racism, discrimination, and migrant workers in Canada, see NALINIE MOOTEN, IMMIGRATION, REFUGEES & CITIZENSHIP CAN., RACISM, DISCRIMINATION AND MIGRANT WORKERS IN CANADA: EVIDENCE FROM THE LITERATURE (July 2021), <https://www.canada.ca/content/dam/ircc/documents/pdf/english/corporate/reports-statistics/research/racism/r8-2020-racism-eng.pdf> [<https://perma.cc/AB3Q-65ZD>].

108. For the history and content of the full Charter, see Elmer A. Driedger, *The Canadian Charter of Rights and Freedoms*, 14 OTTAWA L. REV. 366 (1982).

109. Slavery Abolition Act 1833, c 73 (U.K.) (The Act did not come into force until 1834.).

110. CONSTANCE BACKHOUSE, COLOUR-CODED: A LEGAL HISTORY OF RACISM IN CANADA, 1900-1950, at 251 (Univ. Toronto Press ed. 1999); see also Natasha Henry-Dixon, *Racial Segregation of Black People in Canada*, CANADIAN ENCYCLOPEDIA (Sept. 8, 2021), www.thecanadianencyclopedia.ca/en/article/racial-segregation-of-black-people-in-canada [<https://perma.cc/YS6G-65SX>].

111. BACKHOUSE, *supra* note 110, at 257.

John Sparrow.¹¹² When the usher refused him entry, he sued for monetary damages.¹¹³ Québec Judge John Sprott Archibald ruled in favor of Johnson proclaiming Canadians of all races to have equal access to places of public entertainment and that the Constitution did not admit distinctions made based on race or class.¹¹⁴ He stated, “[O]ur constitution is and always has been essentially democratic, and does not admit of distinctions of races or classes. All men are equal before the law and each has equal rights as a member of the community.”¹¹⁵ Much like U.S. Justice Harlan’s dissent in *Plessy*, while Archibald’s colorblind views did not initially shape the decisions of the Supreme Court of Canada, they gradually gained recognition and influence in the nation’s legal landscape.¹¹⁶

Although Canada lacked the widespread system of legalized chattel slavery seen in the United States, racial inequality and systemic discrimination continued to shape the lives of marginalized communities well after slavery was abolished.¹¹⁷ In the late nineteenth and early twentieth centuries, discriminatory laws, and policies, such as the Chinese Head Tax and the imposition of Indian residential schools, disproportionately affected racial minorities and Indigenous peoples across the country.¹¹⁸ However, it was not until the mid-twentieth century that affirmative action measures—also known as ameliorative programs in Canada—emerged in response to calls for greater inclusion and equity. The Canadian government introduced affirmative action programs, particularly in employment and education, to address historical injustices and foster diversity.¹¹⁹ These initiatives sought to enhance representation and opportunities for marginalized groups, including Indigenous peoples, racial minorities, and women, in sectors where they had long been underrepresented. Over the years, ameliorative programs in Canada have adapted to shifting social and legal contexts, sparking debate about the extent and effectiveness of these measures in achieving true equality.¹²⁰

112. *Id.* at 253 (citing *Johnson v. Sparrow* (1899), 15 Que. S.C. 104 (Can.)).

113. *Id.*

114. *Id.* at 257.

115. *Id.*

116. See BACKHOUSE, *supra* note 110, at 258.

117. See generally Henery-Dixon, *supra* note 110.

118. See generally Constance Backhouse, *The White Women’s Labor Laws: Anti-Chinese Racism in Early Twentieth-Century Canada*, 14 LAW & HIST. REV. 315 (1996).

119. For a history of early employment equity programs in Canada as well as later developments, see Nicholas M. Poulantzas, *Human Rights in Canada: Affirmative Action Programs and the Canadian Constitution*, 38 RHDI 205, 205–06 (1986) and Nicole Busby, *Affirmative Action in Women’s Employment: Lessons from Canada*, 33 J.L. & Soc’y 42 (2006).

120. See Christopher Totten, *Constitutional Precommitments to Gender Affirmative Action in the European Union, Germany, Canada and the United States: A Comparative Approach*, 21 BERKELEY J. INT’L L. 27, 44–45 (2003).

2. *Section 15 of the Canadian Charter of Rights and Freedoms*

Section 15 of the Canadian Charter of Rights and Freedoms states:

(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.¹²¹

Similar to the Fourteenth Amendment in American jurisprudence, the purpose of Section 15 is seen as a way to provide a guaranteed right to equal protection under the law.¹²² In fact, Section 15(2) was added to the Charter to address concerns that a broad equality principle might expose governments to “reverse discrimination” claims, similar to those occurring in the United States, when the Charter was being drafted.¹²³ This equality guarantee is an integral part of the Canadian Constitution.¹²⁴ The Charter as a whole can be seen as an essential tool for checking the powers of the government over the individual.¹²⁵ In the decades since its enactment, the Supreme Court of Canada has distinguished between the two components of Section 15. Section 15(1) aims to prevent governments from engaging in discriminatory practices, while Section 15(2) empowers governments to implement affirmative measures to combat systemic discrimination.¹²⁶

Under this framework, a Section 15 equality analysis begins by assessing whether differential treatment occurred based on a protected ground. If such treatment exists, the government may invoke Section 15(2) by demonstrating that the law, program, or action in question has an ameliorative purpose targeting disadvantaged groups. Success under Section 15(2) negates a claim under Section 15(1); otherwise, the

121. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B of the Canada Act, 1982, c 11 (U.K.) [hereinafter Canadian Charter].

122. *Id.*

123. Jena McGill, *Ameliorative Programs and the Charter: Reflections on the Section 15(2) Landscape Since R v Kapp*, 95 CANADIAN BAR REV. 213, 216 (2017).

124. Joseph Pellicciotti, *The Constitutional Guarantee of Equal Protection in Canada and the United States: A Comparative Analysis of the Standards for Determining the Validity of Governmental Action*, 5 TULSA J. COMP. & INT'L L. 1, 4 (1997).

125. See *McKinney v. Univ. of Guelph*, [1990] 3 S.C.R. 229, 232 (Can.).

126. *R. v. Kapp*, [2008] 2 S.C.R. 483, 484–86 (Can.).

claimant must prove that discrimination occurred.¹²⁷ Courts have specifically interpreted Section 15 to handle multiple forms of discrimination, whether it be “intentional or inadvertent, direct (resulting from a classification on a prohibited ground that is evident on the face of a law or policy) or indirect (resulting from the effects of the application of a facially-neutral law or policy).”¹²⁸ However, an issue between the formal and substantive understandings of equality is currently dominating the jurisprudence surrounding Section 15.

“Substantive equality” is focused on groups, interpreted in Canadian jurisprudence as ensuring that laws and policies do not impose subordinating treatment on groups already disadvantaged in Canadian society.¹²⁹ “Formal equality” can be understood as focusing on an individual’s situation, and ensuring that laws and policies do not impose disadvantages on individuals by treating them according to false stereotypes associated with irrelevant personal characteristics.¹³⁰ Formal equality ensures that laws avoid treating individuals according to irrelevant personal characteristics comporting with Section 15(1) and its focus on the equality rights of individuals. Scholars have found formal equality as a colorblind approach to law, as it assumes that differences in characteristics are irrelevant in legal analysis.¹³¹

3. *The Legal Framework of Equality Rights Under Section 15*

The Supreme Court of Canada outlined, in *Andrews v. Law Society of British Columbia*, an approach to the interpretation of equality rights in Section 15 of the Charter.¹³² In *Andrews*, a British law graduate challenged the validity of Section 42 of the Barristers and Solicitors Act, arguing that the Canadian citizenship requirement for being called to the bar violated Section 15 of the Charter.¹³³ In 1983, Andrews moved to Vancouver with his Canadian spouse to pursue a legal career. While his spouse, a permanent resident, was called to the bar, Andrews was denied due to a citizenship requirement under British Columbia’s Barristers and Solicitors Act, as he had not met the residency requirement. Andrews challenged this, arguing that the law violated Section 15 of the

127. See Jonnette Hamilton & Jennifer Koshan, *The Supreme Court of Canada, Ameliorative Programs, and Disability: Not Getting It*, CAN. J. WOMEN & L. 1, 6 (2012).

128. Bruce Ryder, Cidalia Faria & Emily Lawrence, *What’s Law Good For?: An Empirical Overview of Charter Equality Rights Decisions*, 24 SUP. CT. L. REV. 103, 105 (2004).

129. *Id.* at 106.

130. *Id.* at 105.

131. Dominique Allen, *An Evaluation of the Mechanisms Designed to Promote Substantive Equality in the Equal Opportunity Act 2010 (VIC)*, 44 MELB. U. L. REV. 459, 465 (2021).

132. See generally *Andrews v. Law Soc’y of B.C.*, [1989] 1 S.C.R. 143 (Can.).

133. *Id.* at 145.

Canadian Charter of Rights and Freedoms by discriminating against non-citizens based on their national origin, denying them equal treatment under the law.¹³⁴ The Supreme Court ruled in favor of Andrews holding that Section 42 of the Barristers and Solicitors Act violated Section 15 of the Charter.¹³⁵ The test adopted by the majority, simply put, states that claims under Section 15 should be based on: (1) actual differential treatment; (2) one of the enumerated prohibited grounds in Section 15, or one that is analogous to those grounds; and (3) which is discriminatory because of an imposed burden or denied benefit.¹³⁶ Unlike the U.S. Supreme Court, which employs different levels of scrutiny in its constitutional analysis based on legislative classification, the Canadian approach is that discrimination based on race, national or ethnic origin, color, religion, sex, age or mental or physical disability, and all analogous grounds, are treated by the Canadian courts equally within the context of Section 15.¹³⁷

Building on *Andrews*, the Supreme Court in *Law v. Canada (Minister of Employment and Immigration)* introduced a more detailed approach for evaluating whether government actions violate equality rights.¹³⁸ In *Law*, the Court held that the denial of a female survivor's pension benefit under the Canada Pension Plan because of the survivor's age did not violate Section 15(1).¹³⁹ As part of its Section 15 analysis of whether a claimant was subject to differential treatment on the basis of "race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability," *Law* emphasized the need for a court to inquire as to whether the unequal treatment provided by law causes differential treatment and whether that differential treatment constitutes discrimination.¹⁴⁰ The Supreme Court stated that an analysis of an equality rights claim should involve three main components: (1) identifying whether the law draws a distinction based on a protected characteristic; (2) assessing whether this distinction is discriminatory in either purpose or effect; and (3) considering whether the law, taken as a whole, promotes substantive equality.¹⁴¹ Additionally, the Court gave a non-exhaustive list of contextual factors to consider in determining whether differential treatment on a prohibited ground would constitute discrimination by

134. *Id.* at 159.

135. *Id.* at 145.

136. See Pellicciotti, *supra* note 124, at 51.

137. *Id.* at 76.

138. Ian Peach, *Section 15 of the Canadian Charter of Rights and Freedoms of the Future of Federal Regulation of Indian Status*, 45 U.B.C. L. Rev. 103, 108 (2012).

139. See *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. para. 91, 94 (Can.).

140. *Id.* at paras. 21–23.

141. *Id.* at para. 23.

implicating the claimant's human dignity: pre-existing disadvantage, correspondence with the claimant's actual characteristics, ameliorative purpose, and the nature and significance of the claimant's affected interest.¹⁴² The *Law* test essentially required an objective approach to determining if government action violated a person's dignity, asking what a reasonable person in the claimant's situation would likely feel.

The cases of *R. v. Kapp* and *Alberta v. Cunningham* helped the Supreme Court of Canada create a clear test for evaluating government programs under Section 15(2) of the Charter. In *Kapp*, non-Aboriginal fishers argued that a government program giving exclusive fishing rights to Aboriginal bands violated their equality rights.¹⁴³ The Court, however, upheld the program, stating that it aimed to improve the conditions of a disadvantaged group, thus falling under Section 15(2), which protects ameliorative programs.¹⁴⁴ In *Cunningham*, the claimants challenged their exclusion from Métis settlements under similar equality arguments.¹⁴⁵ The Court ruled that the exclusion served the ameliorative goals of the legislation, refining the *Kapp* framework by establishing that governments must show a genuine link between the program's goals and the disadvantage it seeks to address.¹⁴⁶ If these criteria are met, the program is immune from further scrutiny under Section 15(1). Accordingly, the current *Kapp-Cunningham* Section 15(2) analysis requires that the government produce evidence to show: (1) "that the program is a genuinely ameliorative program directed at improving the situation of a group that is in need of ameliorative assistance in order to enhance substantive equality"; (2) that there is a "correlation between the program and the disadvantage suffered by the target group"; and (3) that the impugned distinction on an enumerated or analogous ground "in a general sense serves or advances the ameliorative object of the program."¹⁴⁷

While the Supreme Court of Canada has made strides toward defining Section 15 through frameworks like the *Kapp-Cunningham* analysis, the road to a consistent interpretation has been far from smooth. The Court has oscillated between promoting substantive equality and falling back on formal equality, resulting in an unstable foundation for equality claims. Each iteration of the Court's tests attempts to balance these approaches, yet the constant revisions create confusion for lower

142. *Id.* at paras. 69–74; see also Sophia Moreau, *R. v. Kapp: New Directions for Section 15*, 40 OTTAWA L. REV. 283, 293 (2009).

143. See generally *R. v. Kapp*, [2008] 2 S.C.R. 483 (Can.).

144. *Id.* at paras. 35–36.

145. *Alberta v. Cunningham*, [2011] 2 S.C.R. 670, 671 (Can.).

146. *Id.* at paras. 44–46.

147. McGill, *supra* note 123, at 222.

courts and litigants alike. This lack of consistency leaves Section 15 jurisprudence vulnerable to further shifts, threatening its ability to address systemic inequalities effectively. In recent Canadian jurisprudence, the Court's continued struggle to define a consistent and effective framework has blurred the distinction between substantive and formal equality, gradually paving the way for a modern colorblind interpretation that risks undermining the original intent of Section 15.

C. *Colorblindness in Australia*

Did you know that Australia is home to one of the world's largest foreign-born populations and has one of the highest migration rates?¹⁴⁸ Like Canada and the United States, immigration has played a significant role in shaping Australia's history. Settlers have come from over 100 countries resulting in Australians having a multitude of skin colors, speaking a vast range of languages, adhering to any of the world's religions, and following many cultural practices.¹⁴⁹ Yet, this rich tapestry of identities and cultures has made it difficult to define what it truly means to be an Australian citizen. Australia lacks historical events which would symbolize its autonomy and uniqueness such as a national liberation like the American Revolution.¹⁵⁰ There is additionally no document describing what it means to be an Australian analogous to the United States Constitution and Bill of Rights.¹⁵¹ Despite this, Australians find common ground in shared cultural values, traditions, and norms. However, these commonalities have often shaped policies and practices that benefit those from the dominant cultural group while marginalizing individuals from minority backgrounds.¹⁵²

Not until recently has "Australia [started to shift] away from a culturally-bound notion of citizenship towards a civic one, permitting equality of rights for all Australians, irrespective of their origins."¹⁵³ This shift

148. As of 2024, 30.7% of Australia's population was born abroad and the country ranked 15th globally in net migration, with 5.9 migrants per 1,000 people. See *World Prospects 2022*, UNITED NATIONS, <https://population.un.org/wpp/> [<https://perma.cc/85VZ-YW4K>]; *Australia's Population by Country of Birth*, AUSTRALIAN BUREAU OF STATS. (June 2023), <https://www.abs.gov.au/statistics/people/population/australias-population-country-birth/latest-release> [<https://perma.cc/85VZ-YW4K>]; *Country Comparison – Net Migration Rate*, CENT. INTEL. AGENCY: THE WORLD FACTBOOK, <https://www.cia.gov/the-world-factbook/field/net-migration-rate/country-comparison/> [<https://perma.cc/LH5C-Y7JH>].

149. Gianni Zappala & Stephen Castles, *Citizenship and Immigration in Australia*, 13 GEO. IMMIGR. L.J. 273, 275 (1999).

150. *Id.* at 276–77.

151. *Id.*

152. AMANUEL ELIAS, FETHI MANSOUTRI & YIN PARADIES, *RACE RELATIONS IN AUSTRALIA: A BRIEF HISTORY* 33–94 (Palgrave Macmillan 2021).

153. Zappala & Castles, *supra* note 149, at 280.

has brought a stronger focus on equal opportunities and the idea that success should be based on merit, leading to less consideration of the history and effects of race in shaping policies like affirmative action. Despite efforts to promote equality of opportunity, minority groups in Australia continue to experience significant disparities in areas such as education, employment, and health outcomes.

1. *Race and Legal Identity in Australia*

The British arrived in Australia in 1788, with eleven ships full of colonists and convicts.¹⁵⁴ At least twelve of the convicts were identified as Black, being born in a European country or one of its colonies.¹⁵⁵ While Indigenous Australians had inhabited the continent for tens of thousands of years before European colonization, the presence of white and Black immigrants introduced new dynamics to Australia's racial landscape.¹⁵⁶ Although the African-diaspora settlers were involved in the colonial project of displacing Aboriginal people, they themselves faced varying degrees of discrimination and marginalization, being the only foreign minorities in a white settler society.¹⁵⁷ Race relations in early colonial Australia were characterized by hierarchies of power and privilege, with Black immigrants and Indigenous people often occupying the lowest rungs of society and facing systemic barriers to full inclusion and participation.¹⁵⁸ Colonialism kept minority communities under strict control, with settlers even trying to assimilate the Indigenous community by taking their children.¹⁵⁹

The first major event after colonialism was the discovery of gold within the country. The discovery of gold led to a rush of immigrants to the country.¹⁶⁰ As a result of the competition between Europeans and non-Europeans in the gold fields, colonial laws were introduced to restrict

154. *Id.* at 273; Kathomi Gatwiri, *Growing Up African in Australia: Racism, Resilience and the Right to Belong*, THE CONVERSATION (Apr. 3, 2019, 3:13 PM), <https://theconversation.com/growing-up-african-in-australia-racism-resilience-and-the-right-to-belong-113121> [<https://perma.cc/GL3K-R7MB>].

155. For more information about the first Black immigrants in Australia, see CASSANDRA PYBUS, *BLACK FOUNDERS: THE UNKNOWN STORY OF AUSTRALIA'S FIRST BLACK SETTLERS* (UNSW Press 2006).

156. See generally ELIAS, MANSOUTRI & PARADIES, *supra* note 152.

157. Gatwiri, *supra* note 154.

158. Hilary Whiteman, *Every Year, 'Invasion Day' Forces Australia to Confront Some Painful Truths*, CNN (Jan. 27, 2023, 7:55 PM), <https://www.cnn.com/2023/01/27/australia/australia-invasion-day-indigenous-voice-intl-hnk-dst/index.html> [<https://perma.cc/JLY6-K7UP>].

159. *Id.*

160. *How Immigration Changed Australia – an Interactive Journey Through History*, GUARDIAN, <https://www.theguardian.com/australia-news/ng-interactive/2023/jan/30/how-immigration-changed-australia-an-interactive-journey-through-history> [<https://perma.cc/H34V-7784>].

immigration to Australia as a means of preserving the established hierarchies within the colonies, reflecting efforts to maintain social and economic control during a period of transformation.¹⁶¹ One such set of laws was the “White Australia Policy,” which aimed to restrict non-European immigration and maintain a predominantly white population.¹⁶² Enacted through various legislation and administrative measures from the late-nineteenth century until the mid-twentieth century, these laws effectively excluded people of non-European descent from immigrating to Australia.¹⁶³ The first federal act in the series of immigration laws was the Immigration Restriction Act of 1901 that famously introduced the dictation test, a language test deliberately designed to exclude non-white immigrants by administering it in European languages that many non-Europeans were unlikely to understand.¹⁶⁴ After World War II, facing significant labor shortages, Australia began to revise its immigration policies to include refugees and immigrants from Europe, leading to gradual changes in its admission criteria to meet the country’s growing economic needs.¹⁶⁵ By 1973, the government officially adopted multiculturalism, eliminating race as a criterion for immigration selection, and recognizing the significant contributions of non-European immigrants.¹⁶⁶ This policy marked a major step away from overt racial discrimination in immigration and led to increased support services, such as language assistance, to aid immigrant integration.¹⁶⁷

The end of the White Australia Policy opened doors for many migrants seeking better lives and protection, including African migrants who arrived through the humanitarian program to escape civil war and ethnic cleansing in their home countries.¹⁶⁸ With the dismantling of the White Australia Policy came legal reforms aimed at addressing the disadvantages faced by minority groups. As immigrants settled, they encountered challenges such as unemployment, language barriers,

161. See Benjamin Jones, *Australian Politics Explainer: The White Australia Policy*, CONVERSATION (Apr. 9, 2017, 4:01 PM), <https://theconversation.com/australian-politics-explainer-the-white-australia-policy-74084> [<https://perma.cc/8E7F-6AZE>].

162. Fady Aoun, *Whitewashing Australia’s History of Stigmatizing Trade Marks and Commercial Imagery*, 42 MELB. U.L. REV. 671, 705 (2019).

163. See Jones, *supra* note 161.

164. See Carlos Scott López, *Prolonged Administrative Detention of Illegal Arrivals in Australia: The Untenable HIV/AIDS Justification*, 4 WASH. U. GLOBAL STUD. L. REV. 263, 307 (2005).

165. Alperhan Babacan & Hürriyet Babacan, *New Racism and Fear: The Cronulla Riots and Racial Violence in Australia*, 1 USAK Y.B. 507, 508 (2008).

166. *Id.* Although the dictation test was initially given in European languages, in 1905 the Act was amended so that the test could be submitted in “any prescribed language.”

167. *Id.*

168. William Abur, *Migration and Settlement of African People in Australia*, U. MELB. 1, 2 (2023).

and racial discrimination.¹⁶⁹ In response, the post-war welfare state was established to provide quality public education, shorter working hours, and national health services—fostering societal diversity and equity.¹⁷⁰ This effort was further bolstered on June 11, 1975, when the Australian Parliament enacted the Racial Discrimination Act.¹⁷¹ This legislation made racial discrimination unlawful in various contexts across the country and ensured that any inconsistent state or territory laws were overridden.¹⁷² Naturally, this Act faced several legal challenges. Notably, in *Koowarta v Bjelke-Petersen*, the constitutionality of the Racial Discrimination Act was questioned, raising concerns about whether it aligned with the powers granted under the Australian Constitution.¹⁷³ The central issue revolved around Section 51(xxvi), which grants Australia power to make laws for the people of any race.¹⁷⁴ While the High Court¹⁷⁵ concluded that the government could pass laws to prevent discrimination, the Racial Discrimination Act covered all races and did not align specifically with the “any race” power under Section 51(xxvi).¹⁷⁶ This decision highlighted serious concerns about the ability of Section 51(xxvi) to safeguard minority rights, especially when it failed to uphold legislation aimed at addressing racial discrimination. The decision also sparked broader scrutiny of the section’s limitations, calling into question its capacity to protect marginalized communities within Australia’s constitutional framework.

2. Section 51(xxvi) of the Constitution of Australia

Section 51(xxvi) of the Constitution, often referred to as the “race power,” originally gave the Commonwealth Parliament the power to make laws with respect to: “[T]he people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make

169. See generally Omid Rezaei, Hossein Adibi & Vicki Banham, *Integration Challenges of Immigrants from Non-English-Speaking Backgrounds in Australia*, 16 *DIASPORA STUD.* 1, 1–31 (2023).

170. See Eva Cox, *The State of Australia: Welfare and Inequality*, *CONVERSATION* (May 6, 2014, 12:33 AM), <https://theconversation.com/the-state-of-australia-welfare-and-inequality-26037> [<https://perma.cc/2TJS-S435>].

171. *Racial Discrimination Act 1975* (Cth) (Austl.).

172. *Id.*

173. *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 (Austl.). The main issue was that the Racial Discrimination Act was not valid under Section 51(xxvi) of the Constitution, since it applied to *all* races, and not to one race which was the power prescribed to Section 51(xxvi).

174. See Colin Howard, *Koowarta v Bjelke Petersen and Others Queensland v Commonwealth of Australia – External Affairs Power*, 13 *MELB. U. L. REV.* 635, 637 (1982).

175. Australia’s High Court is the equivalent of the Supreme Court of Canada and the Supreme Court of the United States.

176. *Id.*

special laws.”¹⁷⁷ The roots of Section 51(xxvi) lie in the debates and negotiations that shaped the drafting of the Australian Constitution in the late-nineteenth century. During this period, there was considerable concern about the status of Indigenous Australians and non-European immigrants within the proposed federation. This provision was originally intended to support laws that regulated and protected people of different races who had immigrated to Australia or, in some cases, restricted them.¹⁷⁸ It was directed at immigrants, primarily Japanese, Chinese, and Indian laborers, including those who arrived as indentured workers from the South Pacific.¹⁷⁹ The laws under this provision confined them to specific occupations, limited their living arrangements, and even facilitated their eventual return to their home countries after a set period.¹⁸⁰

The inclusion of Section 51(xxvi) reflected the prevailing attitudes towards race and immigration at the time, which were characterized by notions of white supremacy and the desire to preserve a racially homogeneous society. Edmund Barton, Australia’s first Prime Minister and later, a member of the High Court, argued at the 1898 Melbourne Convention that this legislative power was crucial for allowing the Commonwealth of Australia to “regulate the affairs of the people of coloured or inferior races who are in the Commonwealth.”¹⁸¹ While originally intended to give the government flexibility in addressing perceived threats from non-white immigrants, Section 51(xxvi) also had profound implications for Indigenous Australians, as their rights and status became subject to laws enacted under this provision.¹⁸² Over time, the scope of Section 51(xxvi) expanded to include governance over Indigenous Australians. This shift led to the historic 1967 referendum, often referred to as the “race power” referendum, held on May 27, 1967.¹⁸³ The referendum sought to remove discriminatory references to Indigenous peoples from the Constitution, specifically striking out the phrase “other than the aboriginal race in any State,” thus enabling the

177. Australian Constitution s 51(xxvi).

178. See Anne Twomey, *A Revised Proposal for Indigenous Constitutional Recognition*, 36 SYDNEY L. REV. 381, 385 (2014).

179. *Id.*

180. *Id.*

181. George Williams, *Race and the Australian Constitution: From Federation to Reconciliation*, 38 OSGOODE HALL L.J., 643, 649 (2000).

182. *Id.*

183. See Chelsea Watego, *Fifty Years on From the 1967 Referendum, It's Time to Tell the Truth About Race*, CONVERSATION (May 29, 2017, 9:49 PM), <https://theconversation.com/fifty-years-on-from-the-1967-referendum-its-time-to-tell-the-truth-about-race-78403> [<https://perma.cc/5642-PAQM>].

federal government to pass laws in relation to Indigenous Australians without racial restrictions.¹⁸⁴

The referendum was overwhelmingly successful, with over ninety percent of Australian voters supporting the proposed amendment.¹⁸⁵ This historic outcome marked a significant milestone in Australia's journey towards Indigenous rights and reconciliation. Following the referendum, the federal government gained the ability to enact laws aimed at addressing the social, economic, and political inequalities faced by Indigenous Australians.¹⁸⁶ However, recent legal developments show that the jurisprudence, particularly towards Indigenous Australians, has shifted towards a modern colorblindness interpretation.

III. ANALYSIS: INTERNATIONAL COURTS

In an increasingly interconnected global landscape, the principle of constitutional colorblindness has emerged as a cornerstone of legal discourse across various jurisdictions. Building on the principle of equality before the law, many countries have embraced the doctrine of colorblindness, often hesitating to support race-based classifications in their legal systems and instead prioritizing a uniform application of legal principles.¹⁸⁷ This shared sentiment among many countries showcases a universal aspiration for impartiality and fairness with each country aiming for their inhabitants to be free from differential social and legal treatment based on the color of their skin.¹⁸⁸ Particularly in Western democracies, there seems to exist a palpable desire for the law to apply equitably to all individuals, irrespective of racial identity.

This Comment looks at two countries, Canada and Australia, to see how the notion of modern colorblindness has affected their jurisprudence. The United States, Canada, and Australia share similarities as affluent, advanced democracies established by European settlers on lands already occupied by Indigenous peoples.¹⁸⁹ Due to the legacies

184. *About Constitutional Recognition: Founding Document of the Nation*, AUSTRALIAN HUMAN RIGHTS COMMISSION, <https://humanrights.gov.au/our-work/aboriginal-and-torres-strait-islander-social-justice/about-constitutional-recognition> [<https://perma.cc/JY5F-E6QG>]; *Commonwealth of Australia Constitution Act 1900*, NATIONAL ARCHIVES, <https://www.legislation.gov.uk/ukpga/Vict/63-64/12/enacted> [<https://perma.cc/SW2K-8G89>].

185. Watego, *supra* note 183.

186. See generally *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) (Austl.); *Native Title Act 1993* (Cth) (Austl.).

187. See generally Jean Beaman & Amy Petts, *Towards a Global Theory of Colorblindness: Comparing Colorblind Racial Ideology in France and the United States*, 14 SOCIO. COMPASS 1 (2020) (available at <https://doi.org/10.1111/soc4.12774>).

188. *Id.*

189. Sonny Lee Hodgin, *Elder Wisdom: Adopting Canadian and Australian Approaches to Prosecuting Indigenous Offenders*, 46 VAL. U. L. REV. 939, 943 (2012).

of colonization, slavery, and other historical injustices, many countries now confront deep-rooted racial issues as they strive to reconcile those effects and create societies where all can live together equally.¹⁹⁰ As we delve into the global landscape of constitutional interpretation, it becomes apparent that while legal systems may vary in structure and application, the pursuit of a colorblind jurisprudence remains a common thread binding nations together in their quest for equality under the law.

A. *Canada's Legal Approach to Equality*

No prominent Canadian cases explicitly highlight robust protections for racial equality, as the word “race” is often absent from discussions surrounding the Canadian Charter of Rights and Freedoms. This absence reflects the Canadian legal system’s advocacy for a colorblind constitution and society in the modern era. While Canadian jurisprudence has occasionally affirmed the constitutionality of race-conscious policies, courts have generally been reluctant to endorse race-based classifications. This promotion of colorblindness perpetuates the false notion of racelessness, allowing the legacy of bigotry to persist within Canadian institutions and legal frameworks. As a result, this approach reinforces systemic inequities and white supremacy rather than dismantling them.

This reluctance is evident in the jurisprudential trajectory following the landmark *Andrews* decision, which has been celebrated as a foundational case in Section 15 jurisprudence. Despite its promise to guarantee equality rights, research reveals that the success rate of Section 15 claims has remained relatively low, particularly compared to other Charter claims. In the decade following *Andrews*, a significant number of equality claims were dismissed due to restrictive interpretations of prohibited grounds in the Section 15(1) analysis.¹⁹¹ Even with the reformulation of the *Andrews* test, meaningful progress in equality claims has been minimal, illustrating the practical challenges of addressing systemic inequities under a colorblind framework.

Building on *Andrews*, the Supreme Court of Canada’s decision in *Law* introduced a structured approach to evaluating equality rights under Section 15. The *Law* test, ostensibly aimed at balancing formal and substantive equality, ultimately favored the former by requiring an objective assessment of whether a “reasonable person” in the claimant’s

190. See generally JOCK COLLINS, CONTEMPORARY RACISM IN AUSTRALIA, CANADA AND NEW ZEALAND (1995).

191. Ryder et al., *supra* note 128, at 116.

position would perceive a violation of their dignity.¹⁹² This framing, which was meant to focus objectively on how a reasonable person in the claimant's position would assess their dignity, was often misapplied by lower courts, shifting the emphasis to the claimant's subjective feelings.¹⁹³ As a result, this misinterpretation detracted from evaluating the fairness of the claimant's treatment, inadvertently sidelining the broader issues of systemic discrimination and collective inequalities. Consequently, this approach severely limited the potential for successful discrimination claims. In fact, claims grounded in six of the nine protected grounds under Section 15—race, national origin, ethnic origin, color, religion, and mental disability—failed to yield a single successful outcome until after 2008, highlighting the ineffectiveness of the *Law* framework in addressing the realities of marginalized groups.¹⁹⁴

The *Kapp-Cunningham* framework for Section 15(2) further limits the ability to critically assess distinctions made in ameliorative programs as it leaves room for exclusions or selective inclusions that may still amount to discrimination under Section 15. This is problematic because the framework allows programs that claim to “serve and advance” their goals to avoid scrutiny under Section 15(1).¹⁹⁵ By focusing on the goal rather than the method of achieving it, the *Kapp-Cunningham* analysis may validate decisions that exclude or inadequately represent certain groups, allowing discriminatory practices to persist without adequate judicial review. This interpretation weakens substantive equality by failing to hold the government accountable for decisions that may disproportionately affect marginalized communities or subgroups, undermining the intent of Section 15 to address systemic inequality.

Similarly, while reverting to the principles established in *Andrews*, the Supreme Court of Canada's interpretation of Section 15(1) perpetuates challenges for equality claimants.¹⁹⁶ The *Andrews* analysis evaluates discrimination based on two criteria: the perpetuation of prejudice or disadvantage and stereotyping that misaligns with a claimant's actual circumstances and characteristics.¹⁹⁷ However, this framework's focus on formal equality creates a troubling emphasis on individual rights at the expense of addressing systemic barriers. By concentrating on irrational differences in treatment, the Court diminishes attention to structural inequities faced by marginalized groups. This formalistic approach is particularly harmful because it allows for findings of discrimination

192. *Id.* at 122.

193. See Moreau, *supra* note 142.

194. Ryder et al., *supra* note 128, at 115.

195. McGill, *supra* note 123, at 230.

196. See Moreau, *supra* note 142, at 292.

197. *Id.*

without requiring claimants to belong to historically disadvantaged groups.¹⁹⁸ The Court's focus on formal equality—defined by violations of individual treatment—diverts attention away from broader, group-based inequities. Although seemingly neutral, this interpretation undermines Section 15's core purpose, the achievement of substantive equality.¹⁹⁹

The ability of an equality claimant to bring and win a discrimination claim without belonging to a historically disadvantaged group shows a significant flaw in the Court's interpretation of equality.²⁰⁰ This perspective shifts the focus of Section 15 away from addressing systemic inequities faced by marginalized communities, reinforcing a view that constitutions protect individual rights rather than rectifying group-based disadvantages.²⁰¹ This formal equality framework weakens Section 15's ability to foster substantive equality, stifling the potential of constitutional protections to dismantle systemic injustices and perpetuating barriers to justice for racialized and marginalized groups. Ultimately, the Supreme Court of Canada's approach reinforces a form of constitutional colorblindness. By interpreting Section 15 in a way that allows equality claims detached from historical disadvantage, the Court weakens legal safeguards for marginalized communities and limits the potential of constitutional protections to advance substantive equality.

The state of a Section 15 analysis continues to evolve and change as the Court struggles with the ideas of substantive and formal equality within Canadian jurisprudence. The Court has seemingly moved on from the *Kapp-Cunningham* framework as seen in the twin *Pay Equity* cases—*Québec (Attorney General) v. Alliance (APP)* and *Centrale des Syndicats du Québec v. Québec (Attorney General) (CSQ)*²⁰²—where

198. *Id.*

199. See Ryder et al., *supra* note 128, at 123.

200. *Id.* at 107.

201. See Reva Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 *YALE L.J.* 1278, 1281 (2011).

202. *Québec (Att'y Gen.) v. All. du Pers. Pro. et Tech. de la Santé et des Servs. Sociaux*, [2018] 1 S.C.R. 464 (Can.); *Centrale des Syndicats du Québec v. Québec (Att'y Gen.)*, [2018] 1 S.C.R. 522 (Can.) (Québec's Pay Equity Act, enacted in 1996, required employers with 10 or more employees to continuously monitor and address pay equity, ensuring wage adjustments for gender parity and allowing retroactive compensation enforced by the Pay Equity Commission. In 2009, amendments shifted this to periodic pay equity audits every five years, removing retroactive compensation except in cases of bad faith or discrimination. In *APP*, the majority of the Supreme Court found the 2009 amendments discriminatory and not protected under Section 15(2) or justified under Section 1. In *CSQ*, a majority ruled that delaying pay equity for workplaces without male comparators violated Section 15).

the Court affirmed the 2015 *Kahkewistahaw First Nation v. Taypotat* two-part framework for evaluating Section 15(1) claims.²⁰³

Essentially, the *Taypotat* analysis has two steps: determining whether a law creates a distinction based on an enumerated or analogous ground and, if so, whether it imposes burdens or denies benefits in a way that reinforces or exacerbates a disadvantage. In affirming this analysis, the *Pay Equity* cases indicated that the Section 15(1) framework from *Kapp* is no longer binding.²⁰⁴ However in applying the *Taypotat* test, the twin cases diverged. In *CSQ* the Court expanded the second step of the analysis by explicitly incorporating ‘historical disadvantage,’ broadening the scope of inquiry, while in *APP* the Court omitted the term “arbitrary,” subtly shifting how disadvantage is assessed.²⁰⁵ These inconsistencies highlight the challenges lower courts face in applying a uniform approach. Many still rely on the *Kapp* test in their Section 15(1) analysis, further complicating the balance between substantive and formal equality.²⁰⁶ As the Court’s interpretation of Section continues to evolve, some lower courts may embrace the addition of ‘historical disadvantage,’ while others may disregard it. Likewise, the inclusion or omission of ‘arbitrary’ reflects the ever-changing judicial reasoning in this area, leaving the framework unsettled.

This inconsistency by the Supreme Court is particularly detrimental to race-conscious policies. Section 15 jurisprudence often avoids directly engaging with the racialized impacts of laws, framing issues through a race-neutral lens that fails to account for systemic inequities. This colorblind approach undermines the potential for targeted interventions aimed at addressing historical and ongoing discrimination, particularly for Indigenous and racialized communities. While the Court’s recognition of substantive equality represents some progress, its reluctance to embrace group-based protections prioritizes individual claims and formal equality, limiting broader systemic redress. This narrow focus diminishes the ability of Canadian legal frameworks to address structural racism effectively, raising serious concerns about whether the courts are adequately equipped to promote true equality.

203. *Kahkewistahaw First Nation v. Taypotat*, [2015] 2 S.C.R. 548, paras. 19–20 (Can.) (“The first part of the [Section] 15 analysis . . . asks whether, on its face or in its impact, a law creates a distinction on the basis of an enumerated or analogous ground . . . [and t]he second part . . . focuses on arbitrary—or discriminatory—disadvantage, that is, whether the impugned law fails to respond to the actual capacities and needs of the members of the group and instead imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating their disadvantage.”).

204. See Jonnette Hamilton & Jennifer Koshan, *Equality Rights and Pay Equity: Déjà Vu in the Supreme Court of Canada*, J.L. & EQUALITY 1, 10 (2019).

205. *Centrale des Syndicats*, [2018] 1 S.C.R. 522, para. 22; *Alliance*, [2018] 1 S.C.R. 464, para. 25.

206. See Hamilton & Koshan, *supra* note 204, at 3.

As the tension between formal equality and the need for substantive justice persists, the evolution of Canadian jurisprudence will play a critical role in determining whether these frameworks can meaningfully address the realities of marginalized groups.

B. Australia's Legal Approach to Equality

Unlike the U.S. Constitution, which includes the Equal Protection Clause of the Fourteenth Amendment, and Canada's Constitution, which contains Section 15 of the Charter guaranteeing equality rights, Australia's Constitution lacks explicit provisions that guarantee equal rights or prohibit discrimination based on race. However, as previously mentioned, key provisions of the Australian Constitution, such as the "race power" in Section 51(xxvi), have been interpreted by the High Court in ways that reflect principles of equality and non-discrimination. Over time, the Court has increasingly emphasized equal treatment before the law, irrespective of race or ethnicity. Yet, the Court's current interpretation of Section 51(xxvi) has allowed for the passage of laws that can be racially discriminatory, especially with regard to Indigenous Australians, while failing to provide the necessary protections or safeguards to prevent such discrimination. By prioritizing a universal concept of citizenship and rights, the High Court overlooks the need for race-conscious measures that could address the ongoing disadvantages faced by Indigenous communities.

With the passage of the 1967 referendum, questions remained as to Section 51(xxvi)'s judicial interpretation. Many had assumed that the purpose of the amended section was to confer on the Commonwealth Parliament the power to make laws for the benefit of Indigenous Australians.²⁰⁷ Yet, in the 1983 case, *Commonwealth v. Tasmania*, it was held that the race power enabled the Commonwealth to make laws "(a) to regulate and control people of any race in the event that they constitute a threat or problem to the general community and (b) to protect people of a race in the event that there is a need to protect them."²⁰⁸ In 1988, the Constitutional Commission observed that prior to the 1967 referendum, the Australian Parliament held the power to pass laws that discriminated based on race under Section 51(xxvi).²⁰⁹ This racial discretion reflected the prevailing attitudes of the time, reinforcing a modern colorblind legal framework that, by allowing discriminatory laws

207. Sarah Pritchard, *The 'Race' Power in Section 51(XXVI) of the Constitution*, 15 AUSTRALIAN INDIGENOUS L. REV. 44, 49 (2011).

208. *Id.*

209. *Id.*

against any race, diminishes the ability to provide special considerations to minority groups that have faced systemic inequalities. This colorblind framework was called into question even after the 1967 referendum, particularly in the 1998 case of *Kartinyeri v. Commonwealth*, where the High Court delivered a split decision on whether the race power still allowed Parliament to pass discriminatory laws, especially in instances impacting Aboriginal Australians.²¹⁰

In *Kartinyeri*, the High Court decided whether Section 51(xxvi) could be used to enact legislation that adversely discriminated on the basis of race. Although Section 51(xxvi) has been used to support numerous pieces of Commonwealth legislation directed specifically at Aboriginal people, the Hindmarsh Island Bridge Act of 1997 (Bridge Act) was the first act passed under the Section that was claimed to be detrimental to the interests of Aboriginal people.²¹¹ The Bridge Act authorized the construction of a bridge connecting Goolwa to Hindmarsh Island, located in the Lower Murray River region of South Australia.²¹² Controversy stemmed from allegations of improper conduct and discrimination against the Ngarrindjeri Aboriginal people, the traditional owners of Hindmarsh Island.²¹³ The Ngarrindjeri community opposed the construction of the bridge, citing concerns about the potential environmental impact and the desecration of sacred sites on the island.²¹⁴ The Bridge Act raised questions about the government's ability to make laws with respect to Aboriginal Australians.²¹⁵ The controversy specifically highlighted the tensions between the federal government's responsibilities for Indigenous affairs under Section 51(xxvi) and the powers of state governments to enact legislation affecting Indigenous rights and interests.²¹⁶

The Ngarrindjeri people challenged the legislation in the High Court. The applicants argued that the "race power" under Section 51(xxvi) of the Australian Constitution could only be used to pass laws that *benefit* Aboriginal people.²¹⁷ Their argument was twofold: First, they claimed that the 1967 referendum fundamentally changed the meaning of Section 51(xxvi), asserting that the removal of discriminatory language

210. See generally *Kartinyeri v Commonwealth* (1998) 195 CLR 337 (Austl.).

211. *Id.* at 576–77 (Kirby, J., dissenting); Alexander Reilly, *Reading the Race Power: A Hermeneutic Analysis*, 23 MELB. U. L.R. 476, 480 (1999).

212. *Hindmarsh Island Bridge Act 1997* (Cth) sch 1 (Austl.).

213. See generally Margaret Cordova, *Human Rights and the Environment: The Hindmarsh Island Bridge Case and Matters of Secret Aboriginal "Women's Business"*, COLO. J. INT'L ENV'T L. & POL'Y 129 (2000).

214. See Williams, *supra* note 181, at 653–54.

215. See Cordova, *supra* note 213, at 131–32.

216. *Id.* at 135–37.

217. Reilly, *supra* note 211, at 476, 481.

meant it could now only be applied to benefit Aboriginal people.²¹⁸ The first argument focused on the historical context, maintaining that the text's meaning remained stable until formally amended. Second, they argued that over time, the interpretation of Section 51(xxvi) had evolved, and by 1967, it could no longer be used to discriminate against any racial group, only to benefit them.²¹⁹ This argument encouraged the Court to adopt a more flexible interpretation, responsive to contemporary social conditions, asserting that the meaning of Section 51(xxvi) had progressively shifted since the creation of the Commonwealth.²²⁰

While five out of the six justices held that the Bridge Act was valid, with Justice Kirby dissenting,²²¹ the High Court was split two to two (two justices not deciding) as to whether the power could be used to the detriment of an identified race.²²² Justice Kirby contended that the race power should not be used to enact laws that are detrimental or discriminatory against any race, including Aboriginal Australians, emphasizing that the 1967 amendment reflected a clear parliamentary intention to protect against such discrimination.²²³ Similarly, Justice Gaudron argued that only laws aimed at remedying disadvantages could be considered appropriate under the current interpretation of the race power.²²⁴ Conversely, Justices Gummow and Hayne held that the power could be used to withdraw a benefit previously granted to Aboriginal people, thus imposing a disadvantage.²²⁵ They pointed out that the use of "race" as a criterion, required by Section 51(xxvi) is inherently discriminatory, and that any discriminatory measure which benefits some may disadvantage others.²²⁶ Ultimately, the split among the justices failed to resolve whether the Commonwealth possesses the power under the Australian Constitution to enact racially discriminatory laws.²²⁷

The controversy surrounding the Bridge Act highlights the tension between the government's authority to make laws for people of any race under Section 51(xxvi) and the broader principles of equality and non-discrimination.²²⁸ The perspectives of the justices in this case reflect a shift towards a modern colorblind reading of laws and policies in Australia, wherein the Court's focus on equality before the law may

218. *Id.*

219. *Id.*

220. *Id.*

221. *Kartinyeri*, 195 CLR at 376.

222. *See Williams*, *supra* note 181, at 655–56.

223. *Kartinyeri*, 195 CLR at 413.

224. *Id.* at 367.

225. *See Williams*, *supra* note 181, at 655.

226. *Id.*

227. *Id.* at 656.

228. *Cordova*, *supra* note 213, at 129–30.

inadvertently undermine the efficacy of race-conscious policies like affirmative action. Justices Gummow's and Hayne's interpretation emphasized the potential for race-based policies to impose inequalities.²²⁹ This decision has opened the door for the High Court to potentially interpret freedom from racial discrimination in a way that could strike down laws and programs offering special benefits or recognition to Aboriginal and Torres Strait Islanders.²³⁰ It is possible that the Court could view these race-conscious remedies as discriminatory against non-Indigenous people, undermining efforts to address historical and systemic inequalities faced by Indigenous communities. This could affect affirmative programs which, for example, provide accelerated entry into universities in order to redress the long-term shortage of Indigenous doctors and lawyers.²³¹ As it provides benefits to Indigenous individuals, the High Court could find the affirmative action programs to be discriminatory against non-Indigenous people and strike them down. This tension reflects a deeper issue within Australian law, where the colorblind interpretation of constitutional provisions can inadvertently hinder the progress made toward addressing racial inequality. By potentially striking down race-conscious remedies aimed at benefiting Indigenous communities, the High Court risks undermining efforts to redress historical disadvantages and systemic barriers.

Beyond these judicial concerns, the broader debate over the effectiveness of Section 51(xxvi) has gained momentum, with two key arguments emerging in favor of its removal. One argument centers on its ineffectiveness, as highlighted in *Kartinyeri*, which demonstrated the potential for Parliament to use this provision to unjustly restrict the rights of minorities based on race. Critics argue that this unchecked power leaves room for arbitrary racial discrimination, a threat to the liberties of minority groups.²³² Removing Section 51(xxvi) would eliminate the legal foundation for such discriminatory legislation, ensuring stronger protections for all ethnic, national, and linguistic groups.²³³ Importantly, even without Section 51(xxvi), the Racial Discrimination Act of 1975 would remain a crucial safeguard, enabling Parliament to enact inclusive, non-discriminatory laws.

229. *Kartinyeri*, 195 CLR at 570.

230. George Williams, *Removing Racism from Australia's Constitutional DNA*, 37 ALJ. L.J. 151, 155 (2012) (available at <https://doi.org/10.1177/1037969X1203700302>).

231. *Id.*

232. See Lisa McAnearney, *Indigenous Recognition, Race and Section 51[XXVI]: Constitutional Law Conundrums and Possibilities*, 18 AUSTRALIAN INDIGENOUS L. REV. 88, 89 (2014) (available at <https://www.jstor.org/stable/26423292>).

233. Pritchard, *supra* note 207, at 52.

Another perspective for the removal of Section 51(xxvi) argues that the Australian Constitution should eliminate racial distinctions entirely, embracing the principles of a truly colorblind framework. This position, shared by former High Court justices, challenges the continued relevance of race as a legal concept. Retired Chief Justice Robert French argues that “race” is now largely a cultural construct, no longer carrying factual significance in modern society.²³⁴ He suggests that the term itself has outlived its usefulness.²³⁵ Former Chief Justice James Spigelman has described Section 51(xxvi) as undeniably rooted in racism when introduced, as it was designed to regulate and control non-European immigrants.²³⁶ He states that “[a] power with respect to people is I regard a very dangerous power to confer on any legislature, even the Commonwealth parliament . . . because it can be focused on particular groups by reason of their presumed characteristics, rather than what their behaviour is or what their needs are, but just because of who they are.”²³⁷

Justice James Spigelman’s views on Section 51(xxvi) of the Australian Constitution align closely with the original colorblindness doctrine espoused by U.S. Supreme Court Justice John Marshall Harlan in his famous dissent in *Plessy*. As previously mentioned, Harlan argued that the Constitution should not recognize distinctions based on race, asserting that “[i]n respect of civil rights, all citizens are equal before the law.”²³⁸ Spigelman echoes this sentiment by expressing concern over giving Parliament the power to make laws based on “presumed characteristics” of specific racial groups rather than individual behavior or need.²³⁹ Like Harlan’s belief in a colorblind constitution, Spigelman critiques any legal framework that allows for differential treatment based solely on who individuals are, rather than on their actions. Both Justices fear, in different ways that reflect the original and modern interpretations of constitutional colorblindness, that racial classifications by the government could reinforce divisions and perpetuate inequality instead of ensuring equal treatment before the law.

In 2012, the Expert Panel on Constitutional Recognition of Indigenous Australians recommended the removal of Section 51(xxvi), advocating for its replacement with a new provision that would specifically empower the government to make laws for Aboriginal and Torres Strait

234. See Jane Lee, *Does the Races Power Still Have a Place in the Australian Constitution?*, ABC NEWS (June 3, 2020, 2:00 PM), <https://www.abc.net.au/news/2020-06-04/races-power-in-constitution-should-change-say-retired-judges/12312362> [<https://perma.cc/L4F9-HNT8>].

235. *Id.*

236. *Id.*

237. *Id.*

238. *Plessy*, 163 U.S. at 559.

239. See Lee, *supra* note 234.

Islander peoples.²⁴⁰ This new section was to not only grant legislative power but also acknowledge Indigenous Australians as the first peoples of the country, respecting their cultures, languages, and heritage.²⁴¹ Building on this, in 2017, the Referendum Council, co-chaired by the same leaders as the 2012 Expert Panel, reaffirmed these recommendations. They emphasized the need for constitutional change to better reflect the unique status of Indigenous Australians, advocating for greater legal and cultural recognition of their historic and ongoing contributions to the Nation.²⁴²

The High Court of Australia's colorblind reading of Section 51(xxvi) illustrates a tension between the principle of equality and the realities of race-conscious policies meant to address historical injustices, particularly for Indigenous Australians. While the Court has used a colorblind approach to justify treating all citizens equally, this reading undermines remedial measures aimed at addressing systemic inequalities that affect minorities. This interpretation, seen in the prominent case of *Kartinyeri*, permits the passage of laws that could be racially discriminatory, without offering the necessary protections for Indigenous Australians, thereby hindering affirmative measures meant to close gaps in housing, education, health, and employment. By taking a modern approach to colorblindness that does not recognize the need for targeted, race-conscious remedies, the High Court's application of Section 51(xxvi) risks perpetuating inequalities instead of alleviating them.

C. *The Grim Future of Colorblind Jurisprudence*

Australia permitting the ratification of laws that undermine race-conscious policies aligns with the interpretations of the Supreme Courts of the United States and Canada regarding constitutional guarantees for minorities. In all three countries, modern jurisprudence reflects a colorblind approach that embraces race-neutral legal frameworks. In Australia, the race power has been interpreted in a way that may disadvantage the very groups it was meant to protect, raising questions about whether a true colorblind legal framework can foster substantive equality in a multicultural society. In Canada, the unstable framework of the Section 15 analysis has allowed individualism and formal equality to take precedence. Its ever-changing interpretations of Section 15

240. Pritchard, *supra* note 207, at 54.

241. *Id.*

242. See generally *Final Report, Joint Select Committee on Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples*, PARLIAMENT OF THE COMMONWEALTH AUSTRALIA (Nov. 18, 2017), https://parlinfo.aph.gov.au/parlInfo/download/committees/reportjnt/024213/toc_pdf/Finalreport.pdf;fileType=application%2Fpdf [<https://perma.cc/MK6Z-7L87>].

raise doubt that the Court can alleviate racial disadvantages and save the integrity of ameliorative programs. Finally in the United States, the fate of race-conscious policies is seemingly written in stone. The U.S. Supreme Court's recent decisions have signaled the likely demise of race-conscious policies under the guise of promoting neutrality. With the 2024 Presidential election coming out in favor of conservative Donald Trump, who supported the rejection of race-based affirmative action in college admissions,²⁴³ the promotion of a post-racial society is imminent. If allowed to appoint more Supreme Court justices, the conservative majority will continue to apply its doctrine of colorblindness to future challenges of race-conscious policies, destroying the hope of its continuation into the foreseeable future.

The analysis of constitutional colorblindness across the United States, Canada, and Australia reveals a troubling pattern in modern jurisprudence. Each country has embraced race-neutral legal frameworks that fail to address, and in some cases exacerbate, the systemic disadvantages faced by marginalized communities. Together, the trends observed in these countries reflect a global shift toward legal frameworks that obscure, rather than address, the enduring consequences of historical and systemic racism. The widespread adoption of the colorblind doctrine has profound implications for equality and justice, as it prioritizes race neutrality over interventions designed to remedy past and ongoing inequities. As this analysis highlights, such an approach not only weakens legal protections but also hinders meaningful progress toward achieving genuine equity. The detrimental effects of this doctrine are already evident, with minority communities facing significant setbacks due to its dominance in judicial interpretations.

IV. IMPACT

The rise of constitutional colorblindness in the United States, Canada, and Australia reflects a broader trend in which these nations have embraced legal frameworks that emphasize individualism over addressing historical injustices. Although provisions in each of these constitutions were originally intended to safeguard minority rights, modern jurisprudence has shifted toward race-neutral readings. This approach, while purportedly promoting equality, often overlooks the systemic discrimination that has long disadvantaged minority communities. In doing so, these countries perpetuate a global and racial hierarchy

243. Neil Vigdor & Jonathan Weisman, *The G.O.P. Presidential Field Is Hailing the Dismantling of Affirmative Action*, N.Y. TIMES (June 29, 2023), <https://www.nytimes.com/2023/06/29/us/politics/affirmative-action-republican-reactions.html> [https://perma.cc/FVB4-QVQH].

by maintaining legal structures that fail to recognize or remedy the deep-rooted inequities faced by marginalized groups. The colorblind doctrine, then, becomes a tool for reinforcing the status quo, under the guise of neutrality and equal treatment. Abandoning the colorblind doctrine or adding constitutional safeguards would remove the barriers to provide the opportunity for minority communities to thrive both socially and economically. Currently, the doctrine's rigid application strips minority groups of crucial protections and opportunities, undermining the very purpose of equality-focused legislation.

By allowing laws that discriminate against minorities and enabling individuals without a history of systemic disadvantage to challenge such legislation, the courts render these laws ineffective, weakening their impact and purpose. Moving away from colorblindness, and adding efficient constitutional equality protections, would restore the intent behind these protections and ensure that equality efforts meaningfully address the realities of historical and systemic discrimination. This Part will examine the consequences of allowing the colorblind doctrine to dominate jurisprudence and the transformative potential of overturning it. By allowing race-conscious policies designed to address historical injustices to thrive and curbing harmful measures targeting minorities, courts can drive meaningful progress toward genuine equality.

A. *Impact in the United States*

Race has been, and continues to be, a defining factor in the workings of the United States. Despite widespread belief, even among government officials, that we live in a post-racial society, the reality is far different. The very Congress that framed the Fourteenth Amendment in the Constitution did not embrace a “colorblind” interpretation. Instead, they explicitly designed a landmark civil rights statute that required the government to consider race when determining if the rights of non-white individuals were fully respected.²⁴⁴ Ample research has shown that the Fourteenth Amendment permits race-conscious programs designed to uplift disadvantaged racial groups.²⁴⁵ Yet, in practice, the appointment of conservative leaders who advocate for a “post-racial”

244. See Ian Millhiser, *What the Constitution Actually Says About Race, Explained*, VOX (Oct. 23, 2022, 5:00 AM), <https://www.vox.com/policy-and-politics/23403021/supreme-court-affirmative-action-race-ketanji-brown-jackson-colorblind-originalism> [<https://perma.cc/FVW9-XE5U>].

245. See generally Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753 (1985).

society—including Supreme Court justices and even U.S. presidents—has significantly influenced the dismantling of these initiatives.²⁴⁶

Despite progress, minorities in America continue to face deep-rooted social and economic challenges stemming from centuries of racism and discrimination.²⁴⁷ African Americans, in particular, confront the steepest hurdles in achieving comfortable and secure lives.²⁴⁸ Unlike many white families, where it is more common to inherit property or wealth, African Americans are largely excluded from this legacy of financial security and generational wealth due to historical injustices like slavery, segregation, and systemic racism. Given this legacy, it is only natural that African Americans and other marginalized groups, who experienced similar plights, would require additional support from the government that once enabled their oppression.

Affirmative action has been one such tool to address the long-standing impacts of racial inequality. By promoting opportunities for desegregation in workplaces and higher education, affirmative action helps open pathways for social and economic mobility for people of color.²⁴⁹ These policies provide a crucial mechanism for leveling the playing field, helping to remedy both past and present discrimination. However, the prevailing sentiment among Conservatives is that affirmative action policies allow for unfair advantages at the expense of opportunities for other groups. They believe that policies such as these force employers and schools to consider lesser-qualified candidates for the sake of having a more diverse representation, essentially creating a reverse racism argument.²⁵⁰

Without affirmative action programs, many minority communities will lose a vital support system that has helped bridge the gap caused by centuries of systemic inequality. This loss would likely cause them to fall further behind in achieving the so-called “American dream,” deepening existing disparities in education, employment, and economic mobility. The recent U.S. Supreme Court decision in *SFFA* has already begun to show its effects, with many colleges reporting a decline in minority

246. See generally Ibram Kendi, *Is This the Beginning of the End of American Racism?*, ATLANTIC (Sept. 2020), <https://www.theatlantic.com/magazine/archive/2020/09/the-end-of-denial/614194/> [https://perma.cc/G23C-WW5G].

247. See generally Benjamin Harris, *Racial Inequality in the United States*, U.S. DEP'T OF TREAS. (July 21, 2022), <https://home.treasury.gov/news/featured-stories/racial-inequality-in-the-united-states> [https://perma.cc/8T5V-37ZL].

248. See generally Adewale Maye, *Chasing the Dream of Equity: How Policy has Shaped Racial Economic Disparities*, ECON. POL'Y INST. (Aug. 1, 2023), <https://www.epi.org/publication/chasing-the-dream-of-equity/#full-report> [https://perma.cc/ZA7D-5SAR].

249. See *supra* Section II.A.

250. See, e.g., *2012 Republican Platform*, AM. PRESIDENCY PROJ. (Aug. 27, 2012), <https://www.presidency.ucsb.edu/documents/2012-republican-party-platform> [https://perma.cc/7A7U-CRNP].

enrollment.²⁵¹ This drop in representation signals the potential for a wider erosion of diversity and equal access to opportunities in higher education.

As affirmative action policies in other areas, such as employment, come under scrutiny, the repercussions could be even more detrimental. Instead of shifting toward race-neutral policies, the Court should uphold the original intent of the Equal Protection Clause, which was designed to safeguard the rights of marginalized and oppressed communities. Race-neutral policies, though seemingly fair on the surface, fail to address the deep-rooted racial inequalities that continue to plague minority communities. These policies overlook the fact that systemic racism has shaped social and economic outcomes for generations, and without targeted measures like affirmative action, the tools to dismantle those inequities are significantly weakened. In the absence of these programs, the promise of equal opportunity for all becomes harder to fulfill, especially for those whose lives have been shaped by the enduring impacts of discrimination.

B. *Impact in Canada*

Many Canadians believe that racism is not a significant issue within the country, but history and contemporary data tell a different story.²⁵² Many minorities still face multiple forms of racism, particularly Black Canadians. Seven out of ten Black respondents in the Black Canadian National Survey reported experiencing unfair treatment due to race, while over 75% identified racial discrimination as a major issue in both the workplace and the criminal justice system.²⁵³ This is compounded by the legacy of over 200 years of slavery in Canada, which has left enduring impacts on the lives and opportunities of Black Canadians today.

Despite the diversity of Black Canadians and other minority communities—encompassing various nationalities, religions, and languages—they face shared challenges, with enduring racial disparities evident across nearly every socio-economic indicator, including education,

251. Aatish Bhatia, *Colleges Are Reporting Post-Affirmative Action Data. Be Careful Interpreting It*, N.Y. TIMES (Sept. 27, 2024, 5:02 AM), <https://www.nytimes.com/2024/09/27/upshot/colleges-affirmative-action-race.html> [https://perma.cc/SVR7-2GMA].

252. Debra Thompson, *Black Lives Matter and the Struggle for Racial Justice in Canada*, CANADIAN MUSEUM FOR HUM. RTS. (Sept. 26, 2023), <https://humanrights.ca/story/black-lives-matter-and-struggle-racial-justice-canada> [https://perma.cc/7A54-Z6VR].

253. LORNE FOSTER, STELLA PARK, HUGH McCAGUE, MARCELLE-ANNE FLETCHER & JACKIE SIKDAR, *BLACK CANADIAN NATIONAL SURVEY: FINAL REPORT 2023*, INST. FOR SOC. RSCH. 7 (2023), https://www.yorku.ca/news/wp-content/uploads/sites/242/2023/06/BCNS-Report_2023-FINAL.pdf [https://perma.cc/KAT7-HPY4].

employment, income, wealth, policing, incarceration, health, and housing.²⁵⁴ These systemic inequalities reflect the long-standing racial issues still deeply embedded in Canadian society. Ameliorative programs help alleviate the effects that Black Canadians and other minority groups have faced due to oppressive governmental and social regimes.

The courts, however, have interpreted Section 15 of the Canadian Charter in ways that may undermine efforts to combat racial disparities. While Section 15(2) is meant to protect ameliorative programs designed to support disadvantaged groups, decisions like *Kapp* and *Cunningham* created a framework that, although upholds such programs,²⁵⁵ largely focuses on formal equality. The Supreme Court of Canada's approach has shifted towards a formalistic interpretation that emphasizes treating everyone the same, regardless of systemic discrimination or historical disadvantage. This framework, although claiming to support substantive equality, effectively weakens it by applying a formalistic lens that views inequality through individual rights rather than collective or group-based protections. By allowing any claimant—regardless of historical disadvantage—to challenge ameliorative programs, the Court's formal equality approach weakens the recognition of structural inequality and the necessity of race-conscious policies. This shift has made it easier to challenge programs designed to address historical disadvantages, limiting their effectiveness. The issues are further compounded by inconsistencies in the Court's application of Section 15, as demonstrated in the *Pay Equity* cases, which create confusion and undermine the coherence of the framework.²⁵⁶ This lack of clarity is particularly problematic for lower courts that rely on the Supreme Court's guidance to adjudicate equality claims effectively.

The Court's misguided formal equality interpretation of Section 15 has paved the way for political attacks on programs like the Employment Equity Act. In 2010, the Conservative government challenged employment equity policies that prioritize applicants from historically disadvantaged groups, arguing that race or ethnicity should not be a factor in hiring decisions.²⁵⁷ This attack, initiated by Jason Kenney and Stockwell Day, arose after a white woman was barred from applying

254. *Id.*

255. See Jamal Greene, *On the Origins of Originalism*, 88 TEX. L. REV. 1, 32–33 (2009); Canadian Charter, *supra* note 121, § 15(2) (providing that the Charter's guarantee of equality rights “does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability”).

256. See *supra* Section III.A.

257. Joe Friesen, *Tories Take Aim at Employment Equity*, GLOBE & MAIL (July 22, 2010), <https://www.theglobeandmail.com/news/politics/tories-take-aim-at-employment-equity/article1389384/> [<https://perma.cc/KFY9-EVYA>].

for a government job due to the position being reserved for Aboriginal people and visible minorities under the Employment Equity Act.²⁵⁸ While these policies aim to address systemic underrepresentation and improve diversity in public service, Kenney and other Conservatives argued that merit-based hiring is the only fair approach and wanted the Act reviewed.²⁵⁹ As Canadian society seeks to move beyond its racist past, it now focuses on fostering a culture of individual merit, aiming to provide equal opportunities for all, even if this overlooks the need for certain programs designed to support and protect disadvantaged groups. The Court's interpretation of Section 15 has made government programs like the Employment Equity Act more vulnerable to challenges, as it has weakened protections for ameliorative policies by enabling excluded groups to bring claims against them.²⁶⁰

The attack on ameliorative programs like the Employment Equity Act will have harmful consequences for minorities in Canada. These programs were designed to address the historical and systemic disadvantages faced by marginalized groups, but the Court's interpretation of Section 15 has made them easier to challenge. By focusing on formal equality and individual rights, the courts have diminished the recognition of collective and historical injustices, leaving these essential programs vulnerable. If the Supreme Court of Canada does not clarify and flesh out its approach to Section 15 claims, it risks further diminishing the protections afforded to minority groups. Without robust legal protection, the dismantling of ameliorative programs will likely deepen the inequalities that they were meant to resolve, further marginalizing communities already facing significant systemic barriers. This shift threatens to undo decades of progress in advancing equality and justice for all Canadians.

C. *Impact in Australia*

Australia's Constitution is explicitly not colorblind, as Section 51(xxvi) grants the government the power to make laws for people based on race. While this provision could theoretically be used to promote the welfare of Indigenous Australians, history shows that it has often been used to enact policies that harm them instead.²⁶¹ Section 51(xxvi) originally allowed the government to legislate for any race except Aboriginal people, leaving Indigenous Australians outside the

258. *Id.*

259. *Id.*

260. *See supra* Section III.A.

261. *See supra* Section III.B.

protections afforded to other groups.²⁶² Even after a 1967 referendum removed this exclusion, subsequent uses of Section 51 have often failed to support Indigenous rights.²⁶³ Instead, the government has used this power to justify discriminatory interventions, including the suspension of certain legal protections, disproportionately affecting Indigenous communities. This constitutional framework has provided legal grounds for policies that further marginalize Indigenous Australians rather than addressing the systemic inequalities they face.

For example, from 2007 to 2012, the government overrode the Northern Territory's local governance and set aside sections of the Racial Discrimination Act, directly intervening in Indigenous communities.²⁶⁴ This intervention involved deploying more police, imposing curfews, banning alcohol, and restricting welfare payments. Indigenous land rights were undermined as lease arrangements were overhauled, and the permit system controlling access to Indigenous communities was suspended.²⁶⁵ Soldiers were sent to assist with the logistics of these measures, but their presence symbolized the history of colonization and the often contentious relationship between the state and Indigenous peoples.²⁶⁶ Fear and unrest followed, with reports of families fleeing as troops arrived, and nearby regions, like Queensland's Mt. Isa, had to manage an influx of displaced Indigenous people.²⁶⁷ This intervention, which was meant to address social problems, instead evoked memories of colonial control and further entrenched systemic inequalities.

The High Court's split decision in *Kartinyeri* left unresolved whether the Commonwealth has the power to enact racially discriminatory laws under the Australian Constitution, creating the legal ambiguity that has enabled harmful policies like those in the Northern Territory. Instead of being used to secure protection of the rights that Indigenous people had to negotiate for, such as land rights, the Section is being used to discriminate against them. Section 51(xxvi) supports the rejection of legal equality requirements when considering legislation otherwise validly enacted under the Constitution.²⁶⁸ While this provision can be used to address historical advantages like health, education, and welfare, there

262. See *supra* Section II.C.2.

263. See *supra* Section III.B.

264. *Indigenous People's Rights in Australia Today: Where Do You Stand?*, AMNESTY INT'L, at 10, <https://www.amnesty.org/es/wp-content/uploads/2021/05/SEC010032010ENGLISH.pdf> [<https://perma.cc/9E9G-3APB>].

265. Stan Grant, *A Decade on from the NT Intervention, the 'Torment of Powerlessness' Lives on*, ABC NEWS (June 20, 2017, 11:44 PM), <https://www.abc.net.au/news/2017-06-21/stan-grant-a-decade-on-from-the-nt-intervention/8638628> [<https://perma.cc/M2G3-AUND>].

266. *Id.*

267. *Id.*

268. See *Kruger v Commonwealth*, [1997] HCA 27, 44–45 (Austl.).

is nothing prohibiting the legislature from passing laws to their detriment in these areas. Australia must ensure Section 51(xxvi) is used to remedy historical disadvantages. It is necessary to use the “race power” for protection rather than harm, as it is one of the few tools that minorities possess to overcome exclusion and oppression.

Affirmative action programs play a crucial role in reducing inequality and creating opportunities for the representation of minorities, particularly Indigenous Australians. However, despite various governmental efforts, these initiatives have been insufficient. Reports reveal that the Australian government has failed to meet the majority of its targets aimed at alleviating Indigenous disadvantage.²⁶⁹ There has been no measurable progress toward achieving the goal of reducing Indigenous inequality by 2030.²⁷⁰ Indigenous Australians continue to experience lower life expectancy, as well as limited educational and employment opportunities.²⁷¹ This situation is further compounded by the fact that Parliament can enact laws that harm Indigenous communities. Section 51(xxvi) of the Constitution continues to be a powerful tool used to impose control over Indigenous lives, undermining what little progress has been made toward addressing the persistent inequality they endure.

Rather than leaving open the possibility for Parliament to pass laws that discriminate against racialized groups, it is essential to implement a non-discrimination guarantee or replace the Section altogether with explicit protections for minority groups. As it stands, Section 51(xxvi) gives Parliament the power to perpetuate its oppressive regime, reinforcing a system that disproportionately harms Indigenous Australians. Despite enduring severe disadvantages in health, education, and employment, Indigenous communities remain vulnerable to laws that erode their rights and deepen their marginalization. If Australia does not confront the racial biases embedded in its legal framework, it will continue to use its constitutional powers to suppress Indigenous voices and maintain a deeply unequal social order.

D. Impact of Saving Clauses

Saving clauses could play a crucial role in strengthening constitutional equality provisions by explicitly protecting race-conscious policies from being invalidated under formal equality interpretations.

269. Kirstie Wellauer & Stephanie Boltje, *Latest Close the Gap Data Shows Only Five Out 19 Targets for Indigenous Australians Are ‘On Track’*, ABC NEWS (Mar. 6, 2024, 5:31 AM), <https://www.abc.net.au/news/2024-03-06/closing-the-gap-targets-progress-report-2024/103546578> [<https://perma.cc/B7CM-267N>].

270. *Id.*

271. *Id.*

These clauses would explicitly state that constitutional provisions do not preclude the enactment of laws and programs aimed at redressing disadvantages faced by marginalized groups. By explicitly recognizing targeted measures, saving clauses provide an avenue for constitutional flexibility, allowing for the implementation of race-conscious policies—such as affirmative action—while safeguarding them from invalidation under interpretations that prioritize formal equality.

In the United States, a saving clause within the Fourteenth Amendment could shield affirmative action and other remedial measures from judicial decisions that prioritize “colorblind” interpretations, such as *SFFA*, which curtailed race-based admissions policies. In Canada, while Section 15 of the Canadian Charter of Rights and Freedoms somewhat functions as a saving clause—allowing affirmative programs aimed at disadvantaged groups to withstand legal challenges under Section 15(1)—a more robust provision could provide stronger and more consistent protections for racialized communities. A well-defined saving clause could also help shield race-conscious policies from inconsistent judicial interpretations of Section 15, as varying analyses by the Supreme Court of Canada leave these protections vulnerable to legal challenges from non-disadvantaged individuals claiming discrimination. Similarly, in Australia, where Section 51(xxvi) of the Constitution grants Parliament the power to legislate for people of any race, a saving clause could clarify that race-conscious laws aimed at remedying historical injustices—such as Indigenous advancement policies—are constitutionally valid.

Without such safeguards, courts may continue to interpret equality provisions in a manner that undermines substantive equality, striking down essential programs designed to address systematic discrimination. By explicitly protecting remedial measures, saving clauses could help ensure that constitutional commitments to equality are not reduced to hollow formalities but instead serve as active tools for social justice.

V. CONCLUSION

The doctrine of colorblindness, once invoked to dismantle racial caste systems, has now become a tool to undermine race-conscious policies designed to achieve substantive equality. As this Comment has demonstrated, the judicial embrace of colorblind interpretations in the United States, Canada, and Australia has weakened legal protections for marginalized communities, making it increasingly difficult to redress historical and systematic injustices. By prioritizing formal equality over substantive justice, courts risk reinforcing existing disparities rather than dismantling them.

However, there is still a path forward. The incorporation of saving clauses can ensure that race-conscious policies remain legally protected and effective in addressing inequality. These clauses would not only help shield affirmative action and other programs from judicial rollback but also reaffirm a nation's commitment to achieving genuine equality. At a time when hard-won rights and protections are under attack, saving clauses offer a critical legal mechanism to uphold justice, ensuring that progress toward racial equality is not merely preserved but actively advanced.

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