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Disrupting the Racialized Status Quo in Exam Schools?: Racial Equity and White Backlash in Boston Parent Coalition for Academic Excellence v. The School Committee of the City of Boston

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DISRUPTING THE RACIALIZED STATUS QUO IN EXAM SCHOOLS?: RACIAL EQUITY AND WHITE BACKLASH IN *BOSTON PARENT COALITION FOR ACADEMIC EXCELLENCE V. THE SCHOOL COMMITTEE OF THE CITY OF BOSTON*

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INTRODUCTION

Educational equity[1] for racially minoritized students[2] has been a topic of debate since the 1954 landmark case *Brown v. Board of Education*.[3] Civil rights advocates have sought to advance educational rights for racially minoritized students since *Brown*, but white backlash[4] has stalled and regressed progress where possible.[5] White backlash in education is part of a larger phenomenon with a long-standing history in the United States.[6] Each legal and other social gain for racially minoritized people was met with

1. We intentionally use the following terms throughout this Article: diversity, equity, racial equity and racial justice. We do not use these terms interchangeably. Rather, we use the terms to refer to the specific meanings described here. We define diversity broadly to encompass individuals' distinct identities, experiences, and perspectives. By equity we mean attending to individuals' unique needs to ensure meaningful access and outcomes. Racial equity is a type of equity where resources and power are allocated in a manner that accounts for and ameliorates the historical marginalization of ethnoracially minoritized communities. Racial justice goes beyond racial equity, focusing on the systemic fair treatment of individuals towards equitable opportunities and outcomes, accounting for historical marginalization of ethnoracially minoritized communities, and proactively addressing systemic racism.

2. We use the term "racially minoritized" to refer to students from racial backgrounds who are "minoritized" through a process of exclusion and oppression in society and are not necessarily numerically in the minority. *See* Michael Benitez, Jr., *Resituating Culture Centers Within a Social Justice Framework*, *in* CULTURE CENTERS IN HIGHER EDUCATION: PERSPECTIVES ON IDENTITY, THEORY, AND PRACTICE 119, 119 n.1 (Lori P. Davis ed., 2010); Dafina-Lazarus Stewart, *Racially Minoritized Students at U.S. Four-Year Institutions*, 82 J. NEGRO EDUC. 184, 184 (2013); David M. Quinn & Ashley M. Stewart, *Examining the Racial Attitudes of White Pre-K–12 Educators*, 120 ELEMENTARY SCH. J. 272, 273–79 (2019).

3. *See* Gloria Ladson-Billings & William F. Tate IV, *Toward a Critical Race Theory of Education*, 97 TCHRS. COLL. REC. 47, 55–56 (1995); *see* also Ethan P. Fallon, *The Lingering Battleground Between Race and Education*, 60 LOY. L. REV. 727, 758 (2014) ("The significant difference between then and now is that past de jure segregation has been replaced by de facto segregation. And, as has been shown, this sort of segregation is significantly more difficult to ameliorate.").

4. We define white backlash as a phenomenon that refers to the resistance and set of tactics a predominantly white majority has historically used to stall and regress social advancements towards racial equity. *See* Matthew W. Hughey, *White Backlash in the 'Post-racial' United States*, 37 ETHNIC & RACIAL STUD. 721, 721–22 (2014).

5. *See* Hughey, *supra* note 4, at 722–24.

6. *See* Hughey, *supra* note 4, at 722–26 (explaining that white backlash was first identified and gained traction after the civil rights movement); Michael Omi, *Shifting the Blame: Racial Ideology and Politics in the Post-civil Rights Era*, 18 CRIT. SOC. 77, 78 (1991).

resistance and further retrenchment, seeking to reverse or stall racial progress.[7] As a result, the struggle to advance racial equity amidst persistent resistance continues, even decades after the civil rights era.[8]

In particular, resistance to racial equity in education through covert state and private actions has contributed to continuance of high levels of racial segregation since the civil rights era.[9] In some regions, racial segregation is as high as it was before *Brown v. Board*.[10] Amidst this context, exam schools[11] are a particular phenomenon contributing to racial segregation

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7. *See* Derrick Bell, *Racism Is Here to Stay: Now What*, 35 HOW. L.J. 79, 80 (1991) ("[O]ur racial status in this country has been a cyclical phenomenon in which legal rights are gained, then lost, then gained again in response to economic and political developments in a country over which blacks exercise little or no control.").

8. *See generally* STEPHEN STEINBERG, COUNTERREVOLUTION: THE CRUSADE TO ROLL BACK THE GAINS OF THE CIVIL RIGHTS MOVEMENT (2022) (documenting the history of white backlash against racial progress from the civil rights era to the present day). Racism changed over time. In the twenty-first century, racism commonly occurs through covert actions. Covert racism, or color-evasive racism, has become a prominent ideology through which sociologists and legal scholars analyze resistance to racial progress. Color-evasive racism ignores the existence of racial differences while exacerbating racial inequality through seemingly neutral or harmless methods. Given that overt racism is generally not socially acceptable, racism has adapted by using socially acceptable language that is intended to pursue racially harmful outcomes. *See* EDUARDO BONILLA-SILVA, RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN AMERICA 53, 72–76 (4th ed., 2014); Neil Gotanda, *A Critique of "Our Constitution Is Color-Blind,"* 44 STAN. L. REV. 1, 53–62 (1991).

9. *See, e.g.*, Genevieve Siegel-Hawley, Sarah Diem & Erica Frankenberg, *The Disintegration of Memphis-Shelby County, Tennessee: School District Secession and Local Control in the 21st Century*, 55 AM. EDUC. RSCH. J. 651 (2018) (assessing covert actions to maintain segregation); *see also* Sequoia Carrillo & Pooja Salhotra, *The U.S. Student Population Is More Diverse, But Schools Are Still Highly Segregated*, NPR (July 14, 2022), https://www.npr.org/2022/07/14/1111060299/school-segregation-report [https://perma.cc/L6AS-XBG8] (reporting higher levels of segregation when school district boundaries are redrawn). *See generally* RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA 132–37 (2017) (outlining the public and private actions that created and maintained segregated housing patterns, and therefore segregated schools, across the U.S.). Other in-school phenomena have contributed to racial segregation within schools, including student tracking and racial biases. *See* Matthew Knoester & Wayne Au, *Standardized Testing and School Segregation: Like Tinder for Fire?*, 20 RACE ETHNICITY & EDUC. 1, 11 (2017) ("Testing . . . provides justification for their support of segregation within schools — tracking students of different races into rigid 'ability groups,' relegating students of color to lower tracks, as well as lower expectations, fewer resources . . . and with little chance to escape this lower track."); Anne Steketee et al., *Racial and Language Microaggressions in the School Ecology*, 16 PERSPS. PSYCHOL. SCI. 1075, 1085–86 (2021).

10. *See* ERICA FRANKENBERG & GARY ORFIELD, THE RESEGREGATION OF SUBURBAN SCHOOLS: A HIDDEN CRISIS IN AMERICAN EDUCATION 1–3 (2012); Amy Stuart Wells et al., *The More Things Change, the More They Stay the Same: The Resegregation of Public Schools Via Charter School Reform*, 94 PEABODY J. EDUC. 471, 471–73 (2019).

11. Exam schools are academically selective public schools that generally use some form of entrance exam as part of their admissions process. *See* Steven Mazie, *Equality, Race and*

rates across the United States.[12] Researchers have critiqued these schools for their role in maintaining racial segregation and have called for action and change.[13] While exam schools are present across the United States, exam schools in Boston offer a unique locus of study to examine how a confluence of issues (e.g., a city and school district seeking to advance racial equity, white backlash tactics, and a history of racism) led to the perpetuation of racial inequity two decades into the twenty-first century.[14]

Racial segregation in the Boston area has been a function of public and private actions.[15] Public schools historically excluded students of color from attending, and once the courts mandated school integration, local communities resisted.[16] Boston became the epicenter of school integration debates after *Brown*, as predominantly white parents resisted racial integration.[17] White flight followed as public schools integrated, and white parents moved their children to private schools where the student body was predominantly white.[18] A decade after *Brown*, the courts found that the city-wide policies and practices in the school system had been adopted to maintain racial segregation in schools.[19] In sum, white backlash and outrage from local parents have repeatedly counteracted integration efforts in Boston.

Gifted Education: An Egalitarian Critique of Admission to New York City's Specialized High Schools, 7 THEORY & RSCH. EDUC. 5, 11–14 (2009)

12. *See* Robert A. Dentler, *Special Report: A Critical Review of Wessmann v. Gittens, The U.S. First Circuit Court of Appeals Decision in the Boston Latin School Admissions Case*, 32 EQUITY & EXCELLENCE EDUC. 5, 16 (1999); Floyd M. Hammack, *Paths to Legislation or Litigation for Educational Privilege: New York and San Francisco Compared*, 116 AM. J. EDUC. 371, 371–73 (2010).

13. *See* Hammack, *supra* note 12, at 387–90; Nicole Tortoriello, *Dismantling Disparities: An Analysis of Potential Solutions to Racial Disparities in New York City's Specialized High Schools Admissions Process*, 49 COLUM. J.L. & SOC. PROBS. 417, 426–29 (2016).

14. *See* Kimberly Probolus-Cedroni, *Bright Flight: Desegregating Boston's Elite Public Schools, 1960-2000*, 48 J. URB. HIST. 657, 660–63 (2022).

15. *See* Matthew Delmont & Jeanne Theoharis, *Introduction: Rethinking the Boston "Busing Crisis,"* 43 J. URB. HIST. 191, 195–97 (2017); *see also* Zebulon Vance Miletsky, *Before Busing: Boston's Long Movement for Civil Rights and the Legacy of Jim Crow in the "Cradle of Liberty,"* 43 J. URB. HIST. 209, 210–15 (2017) (contextualizing Boston's history of white backlash in favor of racial segregation before the Civil Rights Movement).

16. *See* Delmont & Theoharis, *supra* note 15, at 198–201.

17. *See* JEANNE THEOHARIS, FREEDOM NORTH: BLACK FREEDOM STRUGGLES OUTSIDE THE SOUTH 1940–1980 125–52 (Jeanne Theoharis & Komozi Woodard eds., 2003).

18. *See* James T. Hannon, *The Influence of Catholic Schools on the Desegregation of Public School Systems: A Case Study of White Flight in Boston*, 3 POPULATION RSCH. & POL'Y REV. 219, 220–23 (1984).

19. *See* Morgan v. Hennigan, 379 F. Supp. 410, 482 (D. Mass. 1974) (landmark ruling ordering Boston public schools to desegregate).

By 2020, Boston neighborhoods and schools remain highly racially segregated.[20] Boston has taken steps to integrate. For instance, students residing within inner Boston adopted and opted into the Metropolitan Council for Educational Opportunity (METCO) program, a policy to advance racial integration.[21] METCO, a volunteer-based program that does not mandate integration, allows some students from inner Boston schools, where the student body is predominantly of color, to attend suburban schools where the student population is predominantly white.[22] At the same time, BPS operates exam schools, reserved for students who score high on an admissions test and boast high grades.[23] While the BPS student population is predominantly of color, students of color are disproportionately left out of the exam schools, and a disproportionate number of white students attend the exam schools.[24]

The COVID-19 pandemic exacerbated social inequities in the Boston area and disproportionately left students of color with fewer opportunities to take the admissions test.[25] In response to the exacerbated inequities, the BPS School Committee (the "Committee") proposed the removal of the admissions test for the 2021–2022 academic year to increase the opportunities for all students in the city to be admitted to the exam schools.[26] After holding public hearings about the proposed change to the admissions

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20. Iván Espinoza-Madrigal et al., *Let's Not Repeat The Sins Of Racial Segregation In Boston's Next Housing Plan*, WBUR (Jan. 16, 2020), https://www.wbur.org/cognoscenti/2020/01/16/racial-segregation-boston-housing-ivan-espinoza-madrigal-oren-sellstrom-janelle-dempsey [https://perma.cc/2S7S-YRLY] (highlighting increasing housing and school segregation).

21. *See* Delmont & Theoharis, *supra* note 15, at 196.

22. *See* Michael Savage, *Beyond Boundaries: Envisioning Metropolitan School Desegregation in Boston, Detroit, and Philadelphia, 1963-1974*, 46 J. URB. HIST. 129, 135 (2018).

23. *See* Memorandum in Support of Motion for Preliminary Injunction at 1, Bos. Parent Coal. for Acad. Excellence Corp. v. Sch. Comm. of Bos. et al., No. 1:21-cv-10330-WGY, 2021 WL 5103253 (D. Mass. Feb. 26, 2021).

24. *See* Michael Contompasis, Tanisha Sullivan & Monica Roberts, *Recommendation of Exam Schools Admissions Criteria for SY21-22*, BOS. PUB. SCHS., https://www.bostonpublicschools.org/cms/lib/MA01906464/Centricity/Domain/162/FINAL%20FINAL%20Exam%20Schools%20Admission%20Criteria%20Recommendation%20to%20SC%20102120.pdf [https://perma.cc/4DPN-K75P] (last visited Sept. 19, 2022) (showing the enrollment trend across decades where students of color, despite making up the majority of the BPS student population, remain not the majority); *see also* Boston City TV, *Boston School Committee Meeting 10-8-20 (Virtual)*, YouTube (Oct 10, 2020), https://www.youtube.com/watch?v=nS9vXCrLPy4&t [https://perma.cc/GY5S-8WU7] (2:54:00) (noting exam school enrollment trends showing additional disproportionality).

25. *See* Contompasis et al., *supra* note 24 (noting the educational disruption caused by COVID-19 and the disparate impact it had on low-income families and families of color).

26. *See id.*

policy, the Committee adopted the one-year change.[27] White backlash followed and culminated in a lawsuit challenging the policy change.[28]

In this Article, we employ a critical lens to examine this dynamic — the Committee's efforts to advance racial equity and the social and legal resistance that followed in the *Boston Parent Coalition for Academic Excellence v. the School Committee of the City of Boston* (*BPCAE v. Boston*) controversy. We employ critical discourse analysis[29] to answer one guiding question: *How does white backlash manifest itself in the* BPCAE v. Boston *controversy to stall racial equity?* Our analysis revealed the ways in which both parties used or responded to the rhetoric of white backlash and the ensuing social and legal contexts surrounding the case.[30] We argue that given the state of the law two decades into the twenty-first century, racial equity as a goal for public schools has become hampered, if not (seemingly) impossible.[31] That is, the courts' legal approach to racial discrimination claims — examining race-conscious policies under strict scrutiny coupled with a color-evasive,[32] ahistorical lens — has forced school districts to refrain from adopting policies that further racial equity in unequal schools.[33] Schools fear being struck down when explicitly pursuing racial equity within the courts' paradigm and legal precedent.[34] Additionally, white backlash often follows such intentional school efforts to advance racial equity.[35]

We begin our argument in Part I, where we provide a brief history of white backlash movements across decades, discuss the issues that arise with color-evasive frames, and offer a brief history of the roots of standardized testing

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27. *See* Plaintiff's Responses to Defendants' Proposed Findings of Fact at 25, Bos. Parent Coal. for Acad. Excellence Corp. v. Sch. Comm. of Bos. et al., No. 1:21-cv-10330-WGY (D. Mass. Apr. 8, 2021).

28. *See infra* Section II.C.

29. Critical discourse analysis examines the role and use of language to reproduce sociopolitical inequality and empower a dominant group. *See* Teun A. van Dijk, *Principles of Critical Discourse Analysis*, 4 DISCOURSE & SOC'Y 249, 279–81 (1993); *see infra* Section II.B.

30. *See infra* Section II.C.

31. *See infra* Section III.

32. We use the term "color-evasiveness" intentionally. Scholars have noted that the term "color-blindness" is ableist. Color-evasiveness rejects this deficit ideology, and notes that to avoid a discussion of race does not make things neutral or make race irrelevant in the discussion – it only masks racial issues and further marginalized people of color (i.e., it is not possible to be color "blind" one is simply choosing to ignore racialized issues, to avoid addressing them, and to evade them). *See* Subini Ancy Annamma et al., *Conceptualizing Color-evasiveness: Using Dis/ability Critical Race Theory to Expand a Color-blind Racial Ideology in Education and Society*, 20 RACE ETHNICITY & EDUC. 147, 153–56 (2017).

33. *See infra* Section III.C.

34. *See infra* Section III.C.

35. *See infra* Section III.A.

as a tool of racialization and exclusion and its current use.[36] This review of the extant literature provides the context that informs our analysis. In Part II, we turn to the *BPCAE v. Boston* controversy as a case study. We begin with a discussion of the relevant legal principles governing racial discrimination in K-12 school assignment and admissions policies. We situate *BPCAE v. Boston* within the doctrinal developments.[37] We also provide an overview of the historical context of segregation and racialization in the Boston area and the role of testing to maintain racial segregation in the city's public schools.[38] Then, we discuss the conceptual lens and analytic approach we employed in the case study.[39] Using a racial-justice lens, we then present our findings, where we detail the white backlash tactics in the controversy and the response to the backlash.[40] We conclude our argument in Part III with a discussion and the implications that follow from the case study.[41] We discuss the ease with which white backlash obstructs racial equity through a narrative of victimhood to secure white interests[42] and the ways in which a color-evasive frame of diversity and merit deny the realities of racial exclusion and marginalization experienced by students of color.[43] Moreover, we discuss how legal doctrinal developments have restricted racial equity efforts in schools.[44] The case study findings call attention to the need for systemic change in legal doctrine and society to advance racial equity in schools in our democracy.

I. LITERATURE REVIEW

This Part reviews how separate tactics of white backlash are used in a coordinated fashion to stall racial equity. Generally, white backlash centers a narrative of white victimhood as an urgent call to preserve a status quo that favors white interests.[45] These narratives of white victimhood also make use of color-evasive language to obscure racial inequities and effectively silence people of colors' counternarratives.[46] By denying the existence of racial inequities, white backlash can then frame diversity and merit in a color-

36. *See infra* Section I.
37. *See infra* Section II.A.
38. *See infra* Section II.A.
39. *See infra* Section II.B.
40. *See infra* Section II.C.
41. *See infra* Section III.
42. *See infra* Section III.A.
43. *See infra* Section III.B.
44. *See infra* Section III.C.
45. *See infra* Section I.A.
46. *See infra* Section I.B.

evasive lens to preserve white power and privilege.[47] Overall, the white backlash tactics that we discuss below work in concert to attack racially equitable policies in education and deny the existence of a racially inequitable status quo.

A. White Backlash and White Victimhood

Scholars have argued that white backlash movements serve to hinder racial progress and reproduce racial inequality[48] by inciting a moral panic as a call to action to protect white resources, power, and privilege at the expense of people of color.[49] A moral panic, as defined by sociologist and criminologist Stanley Cohen, requires an enemy or threat, a victim, and a movement for social control of values and interests.[50] White backlash first fulfills these requirements by framing policies that advance racial equity, and their beneficiaries, as anti-white and discriminatory.[51] White people then position themselves as the unfair victims of a supposed zero-sum scenario, where policies that benefit people of color are perceived as taking from, stigmatizing, and marginalizing white people.[52] This claim of white victimhood becomes a political tool, serving as a declaration of reverse-racism that validates a moral and legal demand for relief and reparation.[53]

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47. *See infra* Section I.C.

48. *See* Hughey, *supra* note 4 (chronicling the evolution of white backlash since the civil rights movement).

49. *See, e.g.*, Jamie G. Longazel, *Moral Panic as Racial Degradation Ceremony: Racial Stratification and the Local-Level Backlash against Latino/a Immigrants*, 15 PUNISHMENT & SOC'Y 96, 98–101 (2013) (discussing how racialized tropes about illegal immigrants are used to advance racially punitive laws); Sarah Farmer, *Criminality of Black Youth in Inner-City Schools: 'Moral Panic', Moral Imagination, and Moral Formation*, 13 RACE ETHNICITY & EDUC. 367, 370–74 (2010) (connecting media-driven moral panic to the criminalization of schools and Black and Latinx students); Leigh Patel, *Desiring Diversity and Backlash: White Property Rights in Higher Education*, 47 URB. REV. 657, 668–70 (2015) (describing white students' unwillingness to recognize college faculty of color as competent authority figures).

50. *See* STANLEY COHEN, FOLK DEVILS AND MORAL PANICS: THE CREATION OF THE MODS AND ROCKERS xii (3d ed., Routledge 2011).

51. *See* Mike King, *The 'Knockout Game': Moral Panic and the Politics of White Victimhood*, 56 RACE & CLASS 85, 88–89 (2015).

52. *See* Michael I. Norton & Samuel R. Sommers, *Whites See Racism as a Zero-Sum Game That They Are Now Losing*, 6 PERSPS. ON PSYCH. SCI. 215, 217 (2011) ("[N]ot only do Whites think more progress has been made toward equality . . . Whites also now believe that this progress is linked to a new inequality—at their expense.").

53. *See* Robert B. Horwitz, *Politics as Victimhood, Victimhood as Politics*, 30 J. POL'Y HIST. 552, 553 (2018) ("Victimhood is now a pivotal means by which individuals and groups see themselves and constitute themselves as political actors . . . Victimhood embodies the declaration that a group or individual has suffered wrongs that must be requited . . . . [V]ictim status authorizes an aggrieved party to proclaim injury and demand recognition and reparation.").

Additionally, by claiming a grievance or injury, white victimhood centers whiteness[54] in matters of social concern and in control of the racial narrative.[55] This narrative distracts and obscures the reality of race in two distinct ways. Counter-narratives and voices of color are silenced and reframed as evidence of white oppression and anti-white bias, while mechanisms of white power and racism are glossed over or redirected.[56] Claims of white victimhood and a fight to control the narrative are how white backlash incites further action towards the preservation or expansion of a status quo that favors whiteness over the true victims of racial oppression, those who have been historically excluded.[57] In sum, white victimhood can "create a protective barrier to directly addressing white supremacy . . . and prove[s] dangerous in potential to obscure accountability in matters of contemporary racial stratification."[58]

White backlash has been enacted through various social contexts in response to movements for racial equity and justice.[59] In education, white backlash movements have targeted policies aimed at rectifying the effects of racial segregation and systemic racism.[60] White individuals who have legally contested the equitable opportunities that educational institutions have implemented to admit ethnoracially minoritized students frequently target affirmative action, or race-conscious admission policies.[61] Cheryl

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54. We define whiteness as a constructed identity and culture that carries "power, privilege, and prestige" over a larger group of people. Whiteness controls how racial identities are constructed and defines who has access to opportunities and resources. *See* Barbara J. Flagg, *Forewood: Whiteness as Metaprivilege*, 18 WASH. U. J.L. & POL'Y 1, 1–2 (2005).

55. *See* JOE R. FEAGIN, THE WHITE RACIAL FRAME: CENTURIES OF RACIAL FRAMING AND COUNTER-FRAMING 17–18 (3d ed., 2013) (proposing that most white Americans seeking to conform to white norms and perspectives will maintain a white racial frame, or worldview, to deny the racialized realities of people of color).

56. *See* Andrea Gibbons, *The Five Refusals of White Supremacy*, 77 AM. J. ECON. & SOC. 729, 732–33 (2018); *see also* Jesse Kolber, *Having it Both Ways: White Denial of Racial Salience While Claiming Oppression*, 11 SOC. COMPASS 1, 5–7 (2017) (specifying how white victimhood reframes beliefs and narratives about discrimination).

57. *See* Hughey, *supra* note 4, at 723–24 ("The resonance of the white backlash rests upon the reification of two characters: the undeserving non-white recipient of resources and the unfairly victimized white person."). To this effect, white victimhood is accepted as a valid claim of anti-white racism or racial prejudice which catalyzes white backlash and the erosion of racial progress. *Id.* at 727.

58. Kolber, *supra* note 56, at 1.

59. Hughey, *supra* note 4.

60. *See* Louise Seamster & Kasey Henricks, *A Second Redemption? Racism, Backlash Politics, and Public Education*, 39 HUMAN. & SOC'Y 363, 364–69 (2015) (recounting instances of white backlash in education).

61. *See* LaWanda W.M. Ward, *Radical Affirmative Action: A Call to Address Hegemonic Racialized Themes in U.S. Higher Education Race-Conscious Admissions Legal Discourse*, 34 INT'L J. QUALITATIVE STUD. EDUC. 315, 315 (2021) (exploring how themes of color-

Harris' analysis of landmark affirmative action cases offers insight to the operation of white power and privilege where:

> [T]he parameters of appropriate remedies are not dictated by the scope of the injury to the subjugated, but by the extent of the infringement on settled expectations of whites. These limits to remediation are grounded in the perception that the existing order based on white privilege is not only just "there," but also is a property interest worthy of protection. Thus, under this assumption, it is not only the interests of individual whites who challenge affirmative action that are protected; the interests of whites as whites are enshrined and institutionalized as a property interest that accords them a higher status than any individual claim to relief.[62]

For example, *Regents of the University of California v. Bakke* (1978) upheld the use of affirmative action policies but weakened their power and broadened their intent by no longer allowing the use of race to be a determining factor in college admission policies.[63] Later challenges, such as *Gratz v. Bollinger* (2003) and *Grutter v. Bollinger* (2003), further restricted affirmative action policies by limiting the use of race under strict scrutiny's narrow tailoring requirements, rather than justifying the use of race in admissions due to historic and present systemic racism.[64] Affirmative action policies were preserved in the *Fisher v. University of Texas* cases (2013; 2016),[65] but now face another round of white backlash in the pending cases *Students for Fair Admissions v. President and Fellows of Harvard College*[66] and *Students for Fair Admissions v. University of North Carolina.*[67] Legal and education researchers have noted that affirmative action may not survive after the U.S. Supreme Court hears the cases.[68] Similar social and legal white

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evasiveness, white privilege, diversity, and meritocracy are used to maintain inequity in affirmative action).

62. Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1768 (1993).

63. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 311–15 (1978).

64. *See* Gratz v. Bollinger, 539 U.S. 244, 270–76 (2003); Grutter v. Bollinger, 539 U.S. 306, 334–35 (2003).

65. Fisher v. Univ. of Tex., 570 US 297, 314–15 (2013); Fisher v. Univ. of Tex., 758 F.3d 633 (5th Cir. 2014), *aff'd*, 136 S. Ct. 2198, 2205–07 (2016).

66. *See* Students for Fair Admissions, Inc. v. President and Fellows of Harv. Coll., 980 F.3d 157, 163–64 (1st Cir. 2020) (holding that Harvard admissions program does not violate Title VI.).

67. *See* Students for Fair Admissions, Inc. v. Univ. of N.C., 567 F. Supp. 3d 580, 586 (M.D.N.C. 2021), *cert. granted and consolidated sub nom.* Students for Fair Admissions, Inc. v. President and Fellows of Harv. Coll., 142 S. Ct. 895 (2022), *consolidation rev'd sub nom* Students for Fair Admissions v. Univ. of N.C., No. 21-808, 2022 WL 2899390, at *1 (U.S. July 22, 2022).

68. *See* Hoang Vu Tran, *Diversity's Twilight Zone: How Affirmative Action in Education Equals 'Discrimination' in the Colorblind Era*, 22 RACE ETHNICITY & EDUC. 821, 821 (2019); *see also* Malerie Barnes & Michele Moses, *Radical Misdirection: How Anti-affirmative Action Crusaders Use Distraction and Spectacle to Promote Incomplete Conceptions of Merit*

backlash movements have revolved around K-12 exam schools and their admissions policies, where litigants hope to bar the use of race in affirmative action policies.[69]

White backlash tactics have changed over time and have developed novel approaches to maintain a semblance of white innocence and non-racism, while limiting racial progress and equity.[70] An increasingly common social and legal phenomena in backlash against affirmative action admissions policies involves the framing of Asian Americans as equally harmed or burdened as white people.[71] In doing so, opposition to affirmative action is presented as a genuine concern of racist harm and discrimination, rather than an attack against racial equity.[72] This tactic obscures the reality that affirmative action benefits Asian Americans as well as other traditionally marginalized students.[73] Furthermore, the use of stereotypes that portray Asian Americans as hard working and high achieving presents "an ideal rhetorical foil to calls for racial equity" by suggesting that other marginalized people of color are undeserving of the benefits of affirmative action.[74] The stereotype of Asian Americans as a model minority trivializes affirmative

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and Perpetuate Racial Inequality, 35 EDUC. POL'Y 323, 324–42 (2020) (asserting that *SFFA v. Harvard* is the latest attempt to expand white dominance over admissions policies).

69. *See* Christa McAuliffe Intermediate Sch. PTO, Inc. v. De Blasio, 364 F. Supp. 3d 253, 261 (S.D.N.Y. 2019); Coal. for TJ v. Fairfax Cnty. Sch. Bd., No. 1:2021cv00296, 2022 WL 579809, at *1 (E.D. Va. Feb. 25, 2022); Friends of Lowell Found. et al. v. S.F. Bd. of Educ., Order Granting in Part Petition for Writ of Mandate and Related Relief, No. CPF-21-517445 (Nov. 17, 2021).

70. *See* Thomas Ross, *Innocence and Affirmative Action*, 43 VAND. L. REV. 297, 299–301 (1990) (underscoring a common rhetoric of innocence against affirmative action that "avoids the argument that white people generally have benefited from the oppression of people of color" by casting affirmative action as "hurt[ing] innocent white people, and advantag[ing] undeserving black people [or other people of color]").

71. *See* LaWanda W.M. Ward, *Exploring the Color-evasive Hustle 2.0 and Asian Americans Within U.S. Higher Education Race-conscious Admissions Oral Arguments*, RACE, ETHNICITY & EDUC., Apr. 22, 2021, at 1, 3–4 (2021); *see also* Cynthia Chiu, *Justice or Just Us: SFFA v. Harvard and Asian Americans in Affirmative Action*, 92 S. CAL. L. REV. 441, 444–45 (2018) (cautioning that the positioning of Asian Americans against affirmative action can potentially serve white interests).

72. *See* Nancy Leong, *The Misuse of Asian Americans in the Affirmative Action Debate*, 64 UCLA L. REV. 90, 90 (2016), https://www.uclalawreview.org/misuse-asian-americans-affirmative-action-debate/ [https://perma.cc/4E2L-CYGS] ("[O]pposition to affirmative action seems less racist if affirmative action programs can be characterized as harmful to both white and Asian American people, rather than something that is good for everyone but white people.").

73. *See* Julie J. Park & Amy Liu, *Interest Convergence or Divergence? A Critical Race Analysis of Asian Americans, Meritocracy, and Critical Mass in the Affirmative Action Debate*, 85 J. HIGHER EDUC. 36, 38–40 (2014).

74. *See* OiYan Poon & Megan Segoshi, *The Racial Mascot Speaks: A Critical Race Discourse Analysis of Asian Americans and Fisher vs. University of Texas*, 42 REV. HIGHER EDU. 235, 236, 240 (2018).

action and other policies that aim to help marginalized communities gain social and economic mobility.[75] Essentially, this stereotype is used to justify the need for Black, Latinx, and other marginalized people of color to work harder and erases the need for affirmative action protections.[76] It would be remiss of us to ignore the various ideological differences in how the Asian American community perceives the effects of affirmative action.[77] However, this Article focuses on the ways in which white backlash frames affirmative action discourse as unnecessary and discriminatory to support white interests.[78]

B. Color-Evasiveness and the Burden of Silent Racism

The use of color-evasiveness to mask racially charged attacks against affirmative action policies as neutral is an underlying tactic that is central to modern instances of white backlash.[79] Color-evasiveness, as defined by sociologist Eduardo Bonilla-Silva, is used to justify racialized oppression and marginalization through a framework of abstract liberalism[80] that characterizes "white [people] as 'reasonable' and even 'moral,' while opposing almost all practical approaches to deal with de facto racial inequality."[81] For example, color-evasive ideology justifies the use of stereotypes and stock stories[82] to explain inherently racialized phenomena,

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75. White plaintiffs position Asian Americans as a "racial mascot" through "model minority" stereotypes that characterize them as meritorious and deserving of admissions, "in opposition to African Americans and other minorities, who are stereotyped as underserving, to reinforce a system of white dominance." *Id.* at 240.

76. *See* Vinay Harpalani, *Asian Americans, Racial Stereotypes, and Elite University Admissions*, 102 B.U. L. REV. 233, 310–12 (2021) (explaining the origin of the model minority stereotype and its use to stereotype other people of color as needing to "work harder to attain social and economic mobility").

77. *See* Jennifer Lee & Van C. Tran, *The Mere Mention of Asians in Affirmative Action*, 6 SOC. SCI. 551, 572–74 (2019) (discussing Asian Americans' differing levels of support towards affirmative action based on generational status); Poon & Segoshi, *supra* note 74, at 261.

78. *See* Jonathan P. Feingold, *SFFA v. Harvard: How Affirmative Action Myths Mask White Bonus*, 107 CAL. L. REV. 707, 720–24 (2019) (revealing that SFFA's allegations of affirmative action as discriminatory against Asian American applicants are the true source of disparity); Barnes & Moses, *supra* note 68, at 338–39.

79. *See* Ward, *supra* note 61, at 316–17 (utilizing critical race theory to critique color-evasive racism against affirmative action).

80. A frame of color-evasive racism that abstracts political and economic liberalism (e.g., equal opportunity, freedom of choice, individualism) to explain matters pertaining to race in a way that perpetuates whiteness and white power structures. BONILLA-SILVA, *supra* note 8, at 75.

81. *Id.* at 56.

82. Jamel K. Donnor, *Lies, Myths, Stock Stories, and Other Tropes: Understanding Race and Whites' Policy Preferences in Education*, 56 URB. EDUC. 1619, 1620, 1627 (2021)

such as the disproportionately low admissions rates of people of color, as actually having nothing to do with racialized systems.[83] Color-evasiveness minimizes structural racism to the point that it is silenced and erased from social and legal discourse, leaving ethnoracially marginalized people to carry the burden of proving the racist intent behind their racialized realities.[84]

Discourses against affirmative action and equitable admissions policies tend to use a color-evasive frame of diversity that allows for a minimal recognition of race within a system that reinforces whiteness.[85] It is important to note that proponents of affirmative action are legally constrained to argue under this color-evasive frame of diversity,[86] since the Court "seems unwilling to entertain anything beyond educational diversity" as a compelling interest for affirmative action.[87] For example, Derrick Bell pointed out how the benefits of "diversity . . . not the need to address past and continuing racial barriers" became a deciding factor in *Grutter v. Bollinger*.[88] As a result, diversity has become a broad ideology that "protects the structural advantages and privileges of those in power" by redirecting the original intent of racial antidiscrimination law to cater to white interests.[89] Diversity is framed as a benefit for all students, where even supporters of affirmative action use the language of abstract liberalism (e.g., increasing competitiveness, marketability, or opportunities for sociocultural growth)

(defining stock stories as fictionalized narratives that serve to justify the racial subordination of "non-[w]hites").

83. *See* Daniel G. Solórzano, *Images and Words that Wound: Critical Race Theory, Racial Stereotyping, and Teacher Education*, 24 TEACH. EDUC. Q. 5, 11–12 (1997) (observing the use of stereotypes to rationalize the unequal outcomes faced by students of color and "plac[ing] the causes for the unequal outcomes on the [s]tudents of [c]olor themselves").

84. *See* Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 319 (1987) ("[A] motive-centered doctrine of racial discrimination places a very heavy, and often impossible, burden of persuasion on the wrong side of the dispute . . . [T]he injury of racial inequality exists irrespective of the decisionmakers' motives.").

85. *See* Kenneth B. Nunn, *Diversity as a Dead-End*, 35 PEPP. L. REV. 705, 731–32 (2008) ("The Court's attention to the interests of 'innocent white victims' in its diversity jurisprudence indicates that above all else, it desires to preserve the status quo."); Ward, *supra* note 61, at 320–22.

86. *See* Ward, *supra* note 61, at 321–22; *see also* Nunn, *supra* note 85, at 708 (suggesting that diversity is a "dead-end" for promoting social justice and equity because the Supreme Court does not "address existing power differentials between Blacks and whites").

87. Meera E. Deo, *The End of Affirmative Action*, 100 N.C. L. REV. 237, 249 (2021); *see also* Meera E. Deo, *Empirically Derived Compelling State Interests in Affirmative Action Jurisprudence*, 65 HASTINGS L.J. 661, 668–73 (2014) [hereinafter *Empirically Derived*] (stating that the Court has not redefined the meaning of educational diversity, nor has it recognized other compelling interests for the use of race in affirmative action policies).

88. *See* Derrick Bell, *Diversity's Distractions*, 103 COLUM. L. REV. 1622, 1625 (2003).

89. *See* Sarah Mayorga-Gallo, *The White-Centering Logic of Diversity Ideology*, 63 AM. BEHAV. SCIENTIST 1789, 1795 (2019).

rather than the language of social justice (e.g., ensuring equitable access and opportunity, combating disparities, addressing systemic racism) to promote its value.[90] Themes of merit also surround a color-evasive frame of diversity, where the assumedly race-neutral predictors of merit and achievement naturally select the most deserving among diverse students.[91] We describe this issue in further detail in the following section.

C. Racialization of High-Stakes Testing

High-stakes testing was and continues to be a means for racially segregating students under the guise of merit and equal opportunity.[92] Measures of merit, such as the standardized tests used in the admissions process, direct focus "away from systemic inequities and toward individual success and failure."[93] These tests, accepted as a measure for intelligence or potential for achievement, reproduce racial inequality in education by recasting the eugenic notions of their inception in a color-evasive and abstract liberalist attitude of the present-day.[94] Viewing the history of standardized testing through a color-conscious lens reveals the racial animus supporting their use as a mechanism of exclusion and marginalization.[95] This Section uses a color-conscious lens to contextualize the development of standardized intelligence tests as a means for educational segregation. It argues that these tests were developed to support eugenic narratives of white supremacy and illustrates how standardized tests continue to act as racialized tools of exclusion.

At its core, the American eugenic movement of the early 20th century sought to improve race through control of what were then thought to be

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90. *See* Amy L. Petts & Alma Nidia Garza, *Manipulating Diversity: How Diversity Regimes at US Universities Can Reinforce Whiteness*, 15 SOCIO. COMPASS 1, 4 (2021).

91. *See* Barnes & Moses, *supra* note 68, at 330–33 (examining how symbols of prestige, merit, and diversity ultimately portray marginalized students of color as undeserving of admissions).

92. *See* Knoester & Au, *supra* note 9, at 5 ("[S]tandardized testing [acts] as the fulcrum upon which education reforms pivot, and as a tool for racializing decisions about children, schools, and communities.").

93. Angelina E. Castagno, *"I Don't Want to Hear That!": Legitimating Whiteness Through Silence in Schools*, 39 ANTHROPOLOGY & EDUC. Q. 314, 328 (2008).

94. *See* Wayne Au, *Meritocracy 2.0: High Stakes Testing as a Racial Project of Neoliberal Multiculturalism*, 30 EDUC. POL'Y 39, 43–46, 48–49 (2016) (discussing the eugenic origins of intelligence testing and the modern use of standardized testing to ultimately segregate or exclude students from access to certain levels of education).

95. *See id.* at 47–48 (describing standardized testing as a racial project in which white advantage and systemic racism are hidden by purportedly objective measures of merit/achievement).

heritable traits.[96] Reflecting racist and xenophobic views of the time, eugenicists looked for ways to protect white Anglo-Saxon racial purity from intermingling with other "deficient" races and peoples.[97] Consequently, prominent psychologists Henry Goddard, Lewis Terman, and Robert Yerkes, among others, turned to intelligence as a key indicator of fitness and worth.[98] Goddard adapted Alfred Binet's intelligence scale to test immigrants for "feeble-minded[ness]" on Ellis Island in 1913.[99] Binet had warned about the dangers of misappropriating his Intelligence Quotient (IQ) scale, refuting the idea of intelligence as solely based on heritability.[100] Regardless, Goddard popularized its use, later working with Terman and Yerkes to develop the Alpha and Beta Army tests in 1917.[101] These tests were designed to assess the mental fitness of incoming soldiers during World War I.[102] However, the tests were structured to fit the eugenic narrative in the United States,[103] resulting in "blatant class, cultural, and ethnic bias" used to support anti-immigration stances.[104] Results from the Alpha and Beta Army tests intensified the use of standardized testing to sort populations by race, ethnicity, gender, and class, with Yerkes warning of the creation of an intellectually inferior race through racial mixing, inciting public calls for segregation, and promoting a belief in a white intellectual superiority.[105] Test designs and their interpretations were inextricably linked to social class and race due to the framing of upper- and middle-class white men as the control or standard used to calculate and analyze scores.[106] In other words,

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96. *See* Alan Stoskopf, *Echoes of a Forgotten Past: Eugenics, Testing, and Education Reform*, 66 EDUC. F. 126, 126–27 (2002).

97. *See id.* at 127.

98. *See, e.g.*, STEPHEN JAY GOULD, THE MISMEASURE OF MAN 176 (1996) (recounting the development of intelligence testing and the resulting advancement of eugenic narratives in the United States).

99. *See* Ajitha Reddy, *The Eugenic Origins of IQ Testing: Implications for Post-Atkins Litigation*, 57 DEPAUL L. REV. 667, 670–71 (2008).

100. *See* GOULD, *supra* note 98, at 181–82, 189.

101. *See* EDWIN BLACK, WAR AGAINST THE WEAK: EUGENICS AND AMERICA'S CAMPAIGN TO CREATE A MASTER RACE 80–82 (2003).

102. *See id.* at 80–82.

103. *See id.* at 81, 83; *see also* Reddy, *supra* note 99, at 672 (Alpha and Beta Tests relied on an individual's knowledge of upper-class and urban pop culture that favored wealthy, white, and English-speaking testers, which "reinscribed Nordic [white] supremacy").

104. Stoskopf, *supra* note 96, at 128.

105. *See* Robert M. Yerkes, *Foreword* to CARL CAMPBELL BRIGHAM, A STUDY OF AMERICAN INTELLIGENCE, at viii (Univ. Press 1923) ("[N]o one of us as a citizen can afford to ignore the menace of race deterioration or the evident relations of immigration to national progress and welfare."); *see also* GOULD, *supra* note 98, at 254–55.

106. *See* John L. Rury, *Race, Region, and Education: An Analysis of Black and White Scores on the 1917 Army Alpha Intelligence Test*, 57 J. NEGRO EDUC. 51, 64–65 (1988) (indicating that the omission of environmental factors, such as "state-level differences in the

the tests were designed to scientifically assess and prove the intellectual superiority of a white, Anglo-centric people and the inferiority of ethno-racial others,[107] indicating that "[t]he assumptions that went into the creation and use of the test were fundamentally eugenic."[108] Flawed from the beginning, these findings were used to support eugenic means of exclusion in the realm of education.[109]

In 1919 the National Academy of Sciences asked Terman to design National Intelligence Tests for school-aged children based on earlier Alpha and Beta tests.[110] Terman agreed and developed biased scoring scales based on a sample of white, middle-class children from the Palo Alto area.[111] Terman's Stanford Achievement Test became widely used to sort students into ability groups in primary and secondary schools across the United States, resulting in educational segregation through the systematic tracking of Black and Latinx students into non-academic or low ability groups.[112] Such tracking enforces a deficit ideology that sets an erroneous expectation of their academic and intellectual inferiority.[113] Despite challenges by prominent sociologists such as Horace Mann Bond[114] and W.E.B. Du

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amount of education black and white children received," skewed the interpretation of test scores and ignored the inherent biases of institutionalized racism).

107. *See* Au, *supra* note 94, at 44.

108. Stoskopf, *supra* note 96, at 129.

109. *See* LEWIS M. TERMAN, THE MEASUREMENT OF INTELLIGENCE: AN EXPLANATION OF AND A COMPLETE GUIDE FOR THE USE OF THE STANFORD REVISION AND EXTENSION OF THE BINET-SIMON INTELLIGENCE SCALE 91–92 (1916) (referring to "[Native Americans], Mexicans, and [African Americans]," Terman claims that "[n]o amount of school instruction will ever make them intelligent voters or capable citizens . . . Children of this group should be segregated in special classes and be given instruction, which is concrete and practical . . . they can often be made efficient workers . . . [t]here is no possibility at present of convincing society that they should not be allowed to reproduce.").

110. *See* Au, *supra* note 94, at 45.

111. *See* Stoskopf, *supra* note 96, at 129.

112. *See* V.P. Franklin, *The Tests Are Written for the Dogs: The Journal of Negro Education, African American Children, and the Intelligence Testing Movement in Historical Perspective*, 76 J. NEGRO EDUC. 216, 217–18 (2007) (documenting efforts to compare student intellect by race and responses from the Black academic community). *See generally* PAUL DAVIS CHAPMAN, SCHOOLS AS SORTERS: LEWIS M. TERMAN, APPLIED PSYCHOLOGY, AND THE INTELLIGENCE TESTING MOVEMENT, 1890–1930 (1988) (interrogating the early use of standardized testing to track and segregate students based on their presumed ability).

113. *See* F. Allan Hanson, *How Tests Create What They are Intended to Measure*, *in* ASSESSMENT: SOCIAL PRACTICE AND SOCIAL PRODUCT 67, 74 (Ann Filer ed., 2000) ("[T]ests transform people by assigning them to various categories . . . and then they are treated, act and come to think of themselves according to the expectations associated with those categories.").

114. *See* Horace Mann Bond, *Intelligence Tests and Propaganda*, 28 CRISIS 61, 61 (1924) (critiquing the use of tests as propaganda that devalues African Americans).

Bois,[115] standardized testing became a central facet of the American education system, influencing a wide range of policies that determined a student's placement and their educational outcomes.[116]

Standardized testing became a cornerstone of admissions policies, acting as a powerful screening tool to determine a student's admission to academically rigorous programs and selective institutions in K-12[117] and higher education settings.[118] Presently, admissions policies aim to evaluate a student's academic potential for success through a variety of measures such as personal statements, recommendation letters, transcripts, Grade Point Average (GPA), and standardized test scores.[119] However, test scores tend to carry more weight compared to most other indicators in admissions decisions.[120] Said scores are presumed to be fair and objective measures of individual ability, advancing an abstract liberal narrative of merit.[121] Under this narrative, individuals are free to compete with each other on equal standing, regardless of personal backgrounds or social contexts.[122] Structural forces such as racism and privilege are ignored or reframed as inconsequential, the existence of an uneven playing field is evaded and erased.[123] Essentially, test performance becomes an unbiased measure of worth in a competition for admissions to prestigious schools, masking factors

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115. *See* ROBERT V. GUTHRIE, EVEN THE RAT WAS WHITE: A HISTORICAL VIEW OF PSYCHOLOGY 55 (2d ed. 1998) ("It was not until I was long out of school and indeed after the [first] World War that there came the hurried use of the new technique of psychological [IQ] tests, which were quickly adjusted so as to put black folk absolutely beyond the possibility of civilization.").

116. *See* Wayne Au, *Hiding Behind High-Stakes Testing: Meritocracy, Objectivity and Inequality in U.S. Education*, 12 INT'L EDUC.: COMPAR. PERSP. J. 7, 10–16 (2013) (outlining the use of standardized testing and their effects on reproducing educational inequality for students of color).

117. *See* CHESTER E. FINN, JR. & JESSICA A. HOCKETT, EXAM SCHOOLS: INSIDE AMERICA'S MOST SELECTIVE PUBLIC HIGH SCHOOLS 37–39 (2012) (indicating that standardized testing, along with student grades are heavily emphasized in admissions decisions to exam schools).

118. *See* Catherine Horn, *Standardized Assessments and the Flow of Students Into the College Admission Pool*, 19 EDUC. POL'Y 331, 339–43 (2005).

119. *See* Michael T. Nettles, *History of Testing in the United States: Higher Education*, 683 ANNALS AM. ACAD. POL. & SOC. SCI. 38, 49–51 (2019).

120. *See* FINN & HOCKETT, *supra* note 117, at 37–39.

121. *See* Au, *supra* note 94, at 46–47.

122. *See* Mazie, *supra* note 11, at 12; *see also* Rodolfo Leyva, *No Child Left Behind: A Neoliberal Repackaging of Social Darwinism*, 7 J. FOR CRITICAL EDUC. POL'Y STUD. 365, 369 (2009) (asserting that a neoliberal market is facially race-neutral where individual merit and hard work will be rewarded, regardless of race).

123. *See* NATASHA WARIKOO, THE DIVERSITY BARGAIN AND OTHER DILEMMAS OF RACE, ADMISSIONS, AND MERITOCRACY AT ELITE UNIVERSITIES 7, 22 (2016); Au, *supra* note 94, at 47–49.

that can affect student performance and disadvantage students of color.[124] Low test scores become markers of personal deficiencies and imply a lack of effort, hard work, or lower academic/intellectual aptitude.[125] High test scores are lauded as examples of personal achievement, giftedness, or worthiness, separated from individual privileges that predict a higher likelihood of success.[126] The myth of meritocracy, in conjunction with an abstract liberal impetus towards individual competition erases the social contexts of race, class, and privilege that test takers bring with them.[127]

Portraying standardized tests as fair and race-neutral measures of achievement and merit obscures their negative impact on the admission of students of color to selective schools.[128] Wealth and privilege contribute to and are directly linked to higher test scores.[129] Privileged parents have the means to provide their children with preparatory resources such as private tutors, test-specific classes, or bootcamps.[130] They have the power of choice when selecting a neighborhood and school for their children, gravitating towards private schools known for best preparing students for admissions to selective programs.[131] Schools are not funded equally, with families of color generally living in areas that receive less funding, thus impacting students' test preparation and performance.[132] Furthermore, standardized tests

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124. *See* Michael W. Apple, *Creating Difference: Neo-Liberalism, Neo-Conservatism and the Politics of Educational Reform*, 18 EDUC. POL'Y 12, 26 (2004) (positing that white and higher socioeconomic status families benefit most from a marketized school system).

125. *See* Gloria Ladson-Billings, *Pushing Past the Achievement Gap: An Essay on the Language of Deficit*, 76 J. NEGRO EDUC. 316, 318–21 (2007) (dispelling several myths that arise from standardized testing and low scores).

126. *See* Roderick L. Carey, *A Cultural Analysis of the Achievement Gap Discourse: Challenging the Language and Labels Used in the Work of School Reform*, 49 URB. EDUC. 440, 446–47, 461 (2014); Mazie, *supra* note 122, at 13.

127. *See* Au, *supra* note 94, at 48–49; Leyva, *supra* note 122, at 369.

128. *See* Barbara J. Love, *Brown Plus 50 Counter-Storytelling: A Critical Race Theory Analysis of the "Majoritarian Achievement Gap" Story*, 37 EQUITY & EXCELLENCE EDUC. 227, 231 (2004).

129. *See* Peter Sacks, *Standardized Testing: Meritocracy's Crooked Yardstick*, 29 CHANGE, 25, 25–27 (1997); *see also* Sigal Alon, *The Evolution of Class Inequality in Higher Education: Competition, Exclusion, and Adaptation*, 74 AM. SOC. REV. 731, 736–37 (2009) ("The privileged group not only seeks to shape the contours and the importance of the admissions criteria (to preserve the collective), but it also devotes considerable effort to cultivating their offspring's stock of academic currencies to ensure succession along kinship lines.").

130. *See* Claudia Buchmann, Dennis J. Condron & Vincent J. Roscigno, *Shadow Education, American Style: Test Preparation, the SAT and College Enrollment*, 89 SOC. FORCES 435, 440 (2010).

131. *See* Ming Ming Chiu & Lawrence Khoo, *Effects of Resources, Inequality, and Privilege Bias on Achievement: Country, School, and Student Level Analyses*, 42 AM. EDUC. RSCH. J. 575, 579 (2005).

132. *See* Emil Marmol, *The Undemocratic Effects and Underlying Racism of Standardized Testing in the United States*, 4 CRITICAL INTERSECTIONS EDUC. 1, 6–7 (2016).

themselves are developed, administered, and analyzed in a racialized context that can shape the performance and assumptions made of test takers.[133] Refusing to acknowledge that test performance is directly tied to wealth, and by extension race, preserves a status quo of systemic white power and privilege.[134] Ultimately, the widespread use of standardized testing in admissions policies can create barriers to educational opportunities for students of color, excluding them on a fallaciously legitimized basis of educational credentials.[135]

This literature highlights the ways in which white backlash operates to maintain a semblance of color-evasive "non-racism" while inhibiting or reversing racial progress in the context of affirmative action and admissions. This Part also detailed how standardized testing has become a tool of choice for perpetuating racial exclusion under seemingly neutral frames of merit and abstract liberalism. Given recent social and legal developments revolving around race and admissions,[136] there is a need for more research on how affirmative action and admissions cases are targeted by white backlash in a K-12 setting. This next Part contributes to the field of law and education by analyzing the *BPCAE v. Boston* controversy as a case study of white backlash against racially equitable admissions policies.

II. THE *BPCAE V. BOSTON* CONTROVERSY AS A CASE STUDY

A. Legal Precedent and Social Context Surrounding the Case

Doctrinal legal developments regarding the use of race in admissions and assignment policies have since *Brown* severely narrowed what school districts can do to advance racial equity.[137] *Brown* explicitly focused on

133. *See* Steven J. Spencer, Christine Logel & Paul G. Davies, *Stereotype Threat*, 67 ANN. REV. PSYCH. 415, 429 (2016) (reviewing the negative effects of stereotype threat on test performance); Au, *supra* note 94, at 47.

134. *See* Marmol, *supra* note 132, at 6–7; Knoester & Au, *supra* note 9, at 10–11 ("Given its racist history and contemporary racist outcomes, high-stakes, standardized testing converts segregation, and its white supremacist impulses, into an 'objective science' . . . and also provides justification for their support of segregation within schools . . . .").

135. *See* Sigal Alon & Marta Tienda, *Diversity, Opportunity, and the Shifting Meritocracy in Higher Education*, 72 AM. SOC. REV. 487, 507–08 (2007) ("The emphasis on test scores in college admissions notably benefits those with more resources and the power to influence how merit is defined, while disadvantaging others.").

136. *See* Soumya Karlamangla, *Following Recall, San Francisco School Board Reverses Course*, N.Y. TIMES (June 24, 2022), https://www.nytimes.com/2022/06/24/us/recall-san-francisco-school-board.html [https://perma.cc/ZVP3-WDNN]; Ginia Bellafante, *N.Y.C. Tried to Fix High School Admissions. Some Parents Are Furious*, N.Y. TIMES (June 17, 2022) https://www.nytimes.com/2022/06/17/nyregion/high-school-admissions-nyc.html [https://perma.cc/84DM-757W].

137. *See* Erica Frankenberg, Sarah Diem & Colleen Cleary, *School Desegregation After Parents Involved: The Complications of Pursuing Diversity in a High-Stakes Accountability*

racial equality as its outcome, but cases after *Brown* shifted the focus from racial equality to a broader concept of diversity.[138] In 2007, the U.S. Supreme Court revisited the issue regarding the use of race in K-12 assignment policies in *Parents Involved*,[139] and its ruling left few avenues for K-12 educational leaders to advance racial equity via similar educational policies.[140] The Supreme Court case involved two school districts in different geographic areas of the country, one with a history of *de jure* segregation.[141] The first district had been under a court decree to desegregate and eventually the court found the district to be unitary, or racially desegregated to the extent possible.[142] The second district did not have a history of *de jure* segregation and was located in the North.[143] Nonetheless, the second district reflected the racially segregated housing patterns in the city and all too common across the country.[144] Both districts used race when deciding how to assign students in the districts, in an attempt to further racial equity and avoid racial segregation in schools.[145] The Court struck down the districts' policies, holding that they were not narrowly tailored to achieve compelling interests.[146]

Scholars have criticized the plurality opinion in *Parents Involved* because of its lack of clarity and the confusion it created for districtwide educational leaders.[147] The Court seemed to distinguish what it was willing to consider a compelling interest in higher education versus in the K-12 context.[148] The Court was willing to recognize student diversity, which they explained could include racial diversity, as a compelling interest in higher education but not in K-12.[149] Moreover, the Court emphasized that when race is used as a

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Era, 39 J. URB. AFF. 160, 160–62 (2017); Erica Frankenberg & Kendra Taylor, *De Facto Segregation: Tracing a Legal Basis for Contemporary Inequality*, 47 J. L. & EDUC. 189, 189 (2018).

138. Derrick Bell argues that the Courts' decisions in *Grutter* and *Gratz* have led to an ill-defined concept of diversity that invites further litigation and distracts from "efforts to achieve racial justice" by refusing to address and diverting attention away from race and class barriers such as the dependence on grades and test scores for admission. Bell, *supra* note 88, at 1622.

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

140. Frankenberg et al., *supra* note 137, at 162–63.

141. *Parents Involved*, 551 U.S. at 715.

142. *Id.* at 715–16.

143. *Id.* at 712.

144. *Id.* at 807 (Breyer, J., dissenting).

145. *Id.* at 819–20.

146. *Id.* at 726.

147. *See* Erica Frankenberg, *Assessing Segregation Under a New Generation of Controlled Choice Policies*, 54 AM. EDUC. RSCH. J. 219S, 246S (2017).

148. *See* Angelo N. Ancheta, *A Constitutional Analysis of Parents Involved in Community Schools v. Seattle School District No. 1 and Voluntary School Integration Policies*, 10 RUTGERS RACE & L. REV. 297, 303 (2008).

149. *See, e.g.*, *Parents Involved*, 551 U.S. at 725.

factor, it must be one of many factors in a holistic review of student applicants.[150] The Justices explained at length that the school districts in the case failed to give any recognized compelling reason for its policy adoption, and also rationalized that the school districts engaged in racial balancing.[151] Thus, after the ruling, it was clear that the Court was willing to accept few rationales to justify the use of race as a factor in K-12 assignment or admissions policies.

Research has documented the implications of the resulting legal framework, which has undermined school districts' ability to further racial equity.[152] Educational leaders have become less likely to single out race as a factor in working towards racial equity via school assignment or admissions policies.[153] Instead, school districts use race as one of many factors in their decision making.[154] The legal constraints are particularly challenging for districts as educational research has continued to identify the importance of furthering racial equity in schools.[155] District families who are aware of the legal constraints have also pushed back when districts consider race in their policies, arguing that its use rises to the level of an impermissible use.[156] This dynamic creates a complex context for school districts who view racial equity as an important goal in education, yet at the same time face legal and community constraints while trying to further this goal.

These dynamics of racial progress and resistance have historically also been present in socially-liberal Boston. After *Brown,* the city was the

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150. *Id.* at 722–23.

151. *Id.* at 727, 729–30.

152. Ancheta, *supra* note 148, at 333–39 ("[T]he Court ha[s] called into question the basic interpretation of *Brown*, with members of the Roberts plurality arguing for an entirely color-blind interpretation of *Brown* and the Equal Protection Clause . . . .").

153. *See* Frankenberg, *supra* note 147, at 225S ("Because of the perceived legal risk of race-conscious policies, many districts now use socioeconomic status (SES) in assigning students, which may not be as effective for racial integration as policies using race.").

154. *See id.* at 221S–22S (discussing a new generation of policies that view racial diversity in broader terms).

155. *See* William E. Thro & Charles J. Russo, *Parents Involved in Community Schools v. Seattle School District No. 1: An Overview With Reflections for Urban Schools*, 41 EDUC. & URB. SOC'Y 529, 540–42 (2009).

156. *See, e.g.*, Comfort v. Lynn Sch. Comm., 560 F.3d 22 (2009). After learning about the Parents Involved ruling, the plaintiffs, parents, and school children, attempted to re-litigate a case in which they argued that the school district used race impermissibly in its assignment policy. The defendant school district had adopted a policy that resembled the policy in the Parents Involved case to increase racial diversity. The Court declined the invitation to re-open the case; Christa McAuliffe Intermediate Sch. PTO, Inc. v. De Blasio, 364 F. Supp. 3d 253, 278 (2019). The plaintiffs argued that the schools implicitly used race, rising to the level of discrimination. The Court retorted, "[t]his conclusion, however, requires one to accept the proposition that a facially neutral policy seeking to improve racial diversity necessarily carries with it a discriminatory intent. That is not the law." *Id.*

epicenter of resistance to efforts of school integration, refusing to have white students and students of color attend integrated schools.[157] White flight was also pronounced in the Boston area such that in the twenty-first century, the Boston area still remains highly racially segregated in its residential housing and consequently across school districts.[158] BPS has faced lawsuits for maintaining segregated schools,[159] as well as lawsuits when seeking to integrate schools.[160] In these legal disputes, the courts have found that BPS has used the exam schools and other mechanisms to maintain racial segregation.[161] Scholars, advocates, and educational leaders have continued to highlight the limitations and challenges of racial segregation in the Boston area and have called for racial integration via intentional educational policies and practices.[162]

In the 2020-2021 academic year, BPS intentionally adopted an admissions policy change for its exam schools in response to the resurfacing racial inequities that were exacerbated by the pandemic.[163] BPS has three exam schools: Boston Latin School (BLS),[164] Boston Latin Academy (BLA),[165] and John D. O'Bryant School of Mathematics and Science.[166] The schools

157. *See* Delmont & Theoharis, *supra* note 15, at 191–92 (outlining social and legal activism against school segregation).

158. *See* Probolus-Cedroni, *supra* note 14, at 669–70.

159. *See* McLaughlin v. Bos. Sch. Comm., 938 F. Supp. 1001, 1017 (D. Mass. 1996) (finding that a 35% racial set aside is not narrowly tailored); Wessmann v. Bos. Sch. Comm., 996 F. Supp. 120, 132 (D. Mass. 1998) (finding that the school admissions policy involves racial preference and therefore violates equal protection).

160. *See* Morgan v. Hennigan, 379 F. Supp. 410, 415 (D. Mass. 1974).

161. *See id.* at 467–70.

162. For instance, the METCO program was adopted in 1966 in an attempt to promote racial integration across districts. Boston Public School students are bused to suburban high schools. The program remains voluntary. *See* Delmont & Theoharis, *supra* note 15, at 192, 196; Chase M. Billingham, *Within-District Racial Segregation and the Elusiveness of White Student Return to Urban Public Schools*, 54 URB. EDUC. 151, 168–69 (2019) (highlighting Boston's within-district segregation)*; see also* SUSAN E. EATON, THE OTHER BOSTON BUSING STORY: WHAT'S WON AND LOST ACROSS THE BOUNDARY LINE xiii–xix (2020) (suggesting that METCO has had little effect in integration efforts).

163. *See* Defendants' Brief for Judgment at 1, Bos. Parent Coal. for Acad. Excellence Corp. v. Sch. Comm. of Bos. et al., No. 1:21-cv-10330-WGY, 2021 WL 6503508 (D. Mass. Apr. 2, 2021).

164. Opened in 1635, Boston Latin for boys became the first public school in the United States. *See McLaughlin*, 938 F. Supp. at 1004.

165. Boston Latin Academy was established in 1878 to serve as the girls' version of Boston Latin School. *See About BLA*, BOS. LATIN ACAD., https://www.latinacademy.org/apps/pages/index.jsp?uREC_ID=445622&type=d [https://perma.cc/8YAP-YKNT] (last visited Aug. 10, 2022).

166. The school was established in 1893 as a Mechanic Arts High School. *See About Us*, JOHN D. O'BRYANT SCH., https://www.obryant.us/apps/pages/index.jsp?uREC_ID=468988&type=d [https://perma.cc/257E-7RE8] (last visited Aug. 10, 2022).

introduced the exam in 1962 as part of their admissions process.[167] At the time, some stakeholders were skeptical of meritocratic admissions by exam given the existing barriers caused by the unequal allocation of educational resources for students who were tracked to "lower-performing" schools because of residential segregation.[168] By the early 1970s, students of color were continually denied admission to the exam schools, in part, because of school tracking.[169]

In 1974, the district court of Massachusetts found in *Morgan v. Hennigan* that the Committee had maintained a racially segregated district and ordered desegregation.[170] White backlash pushed against the court's ruling.[171] Nonetheless, after *Morgan v. Hennigan*, the Committee gradually made changes to desegregate, and eventually set aside certain spots for students of color.[172] But white backlash resurfaced again. The renewed efforts to desegregate were met with a lawsuit seeking to stop the Committee's policies that intended to further racial equity. In 1996, a white student plaintiff and her father, her legal representative, sued the Committee in *McLaughlin v. School Committee*, arguing that she had the same scores as other students of color who were admitted, while she was denied admission.[173] A similarly positioned student sued the Committee in 1998 in *Wessman v. School Committee*, arguing that she was denied admission to Boston Latin in favor of less qualified students of color.[174] These lawsuits counteracted the Committee's intentional efforts to advance racial equity in the exam schools. Since 2000, the Committee has continued to actively recruit and craft policies to retain students of color in the exam schools.[175]

In the two decades leading to the *BPCAE v. Boston* case in 2021, the admissions policies at the exam schools largely relied on entrance exam scores plus students' GPAs.[176] Based on these policies, the enrollment trends in the Boston exam schools have become disproportionately

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167. *See* Probolus-Cedroni, *supra* note 14, at 660.

168. *See id.* at 661–63.

169. *See id.* at 659–60.

170. *See* Morgan v. Hennigan, 379 F. Supp. 410, 466–70, 480–82 (D. Mass. 1974).

171. *See* Probulus-Cedroni, *supra* note 14, at 665–68 (observing that merit became a vehicle to "protect" a quality education).

172. *See id.* at 664.

173. *See* McLaughlin by McLaughlin v. Bos. Sch. Comm., 938 F. Supp. 1001, 1003 (D. Mass. 1996).

174. *See* Wessmann v. Bos. Sch. Comm., 996 F. Supp. 120, 121 (D. Mass. 1998).

175. *See Boston School Committee Meeting 10-8-20 (Virtual)*, *supra* note 24, at 2:52:00-2:53:00.

176. *See* Verified Complaint at 11, Bos. Parent Coal. for Academic Excellence Corp. v. Sch. Comm. of the City of Bos. et al., No. 1:21-cv-10330-WGY (D. Mass. filed Feb. 26, 2021).

disadvantageous for low-income students of color.[177] Non-BPS students account for approximately two-thirds of students admitted to the Boston exam schools, and about 60% of incoming students to BLS.[178] Half of non-BPS students who apply to the exam schools are admitted to BLS — twice the rate of BPS students who apply.[179] Non-BPS students who apply often attend private schools prior to applying to the exam schools.[180] Regardless of background, admitted students with an average GPA of 3.0 or a B average have high rates of continued enrollment in the exam schools.[181] The pandemic exacerbated existing challenges for low-income BPS families of color (e.g., they had no access to the exams), which prompted the Committee to consider what to change in its admissions policies to curb some of the negative repercussions of the pandemic.[182] The Committee created the Exam Schools Admissions Working Group (the "Working Group").[183]

After months of deliberation, the Committee adopted a change to the exam schools' admissions policies for the 2021–2022 academic year. Under the Committee's proposal, the exam schools would allocate 20% of the seats in the exam schools based on GPA, and the remaining 80% of seats would be distributed by combining GPAs and student home zip codes.[184] The Committee predicted that the proposal would distribute the admissions offers more democratically across the city, moderately increasing the number of Black and Latinx students admitted to the school.[185] The proposal would be in place for the 2021–2022 academic year.[186]

The decision drew an immediate backlash from white and Asian parents who argued that the change to the policy was designed to disadvantage white and Asian students and advantage Black and Latinx students.[187] They

177. *See* Plaintiff's Responses to Defendants' Proposed Findings of Fact, *supra* note 27, at 18, 37.

178. *Id.* at 18.

179. *Id.* at 17.

180. *See id.* at 13.

181. *Id.* at 17–18.

182. Verified Complaint, *supra* note 176, at 14.

183. *Id.* at 10.

184. *Id.* at 13.

185. Pre-proposal, white students made up 16% of the K-12 city population but 39% of the 2020–2021 exam schools admitted students. Asian American students comprised 7% of the K-12 city student population but 21% of the admitted students. Black students comprised 35% of the K-12 city population but only 15% of the admitted students. Latinx students made up 36% of the K-12 city population but only 21% of the admitted students. The proposal was estimated to democratize admissions. Under the plan, white students would make up 32% of admitted students, Asian American students would make up 16% of the admitted students, Black students would comprise 22%, and Latinx would comprise 24%. *Id.* at 15.

186. *See* Verified Complaint, *supra* note 176, at 12.

187. *See id.* at 3–8.

contacted Committee members with claims of discrimination, lack of merit, potential lack of rigor if more Black and Brown students were admitted, and some more overtly racialized claims.[188] The parents also attended public Committee meetings discussing the proposal and raised the same arguments.[189] Ultimately, these arguments were unsuccessful and the Committee adopted the proposal.[190]

The parents subsequently escalated their pushback. They sued the Committee in February 2021, seeking a preliminary injunction that would prevent the school district from implementing the proposal.[191] The plaintiffs brought forth two legal claims grounded on claims of racial discrimination via the admissions policies: an Equal Protection Clause violation and a violation of state law that prohibits discrimination based on race in admissions to public schools.[192] They alleged BPS adopted what they termed the "Zip Code Quota Plan" in which Boston zip codes are used as proxies for race to disfavor white and Asian students and favor Latinx and Black applicants.[193] As a relief, they proposed a citywide competition based on "merit" — that the competition for seats at the Boston Exam Schools, for the class entering in the fall of 2021, be conducted on a citywide basis without any consideration of zip codes or other method to subdivide the city and without any use of race or ethnicity in admissions.[194]

The parents' arguments are notable, given the context and history of the exam schools. The use of the exam in admissions has been in place for decades, and it has largely favored white students and certain Asian student populations.[195] Though these student populations make up about 20% of the student populations in Boston, they comprise a majority of enrolled students

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188. *See, e.g.*, *Boston School Committee Meeting 10-8-20*, *supra* note 24, at 2:06:41 ("Please do not dilute the excellence of the exam schools by moving away from the exam."); *see also* Boston City TV, *Boston School Committee Meeting 10-21-20*, (Virtual Part 2), YOUTUBE (Oct 22, 2020), https://www.youtube.com/watch?v=SWkveykoTEY [https://perma.cc/94LD-TZVR] (1:00:00) ("[Y]our support on the proposal is absolutely discrimination . . . all lives matter.").

189. *See, e.g.*, *Boston School Committee Meeting 10-8-20*, *supra* note 24, at 2:06:41; *see also Boston School Committee Meeting 10-21-20, (Virtual Part 2)*, *supra* note 188, at 1:00:00.

190. *See* Plaintiff's Responses to Defendants' Proposed Findings of Fact, *supra* note 27, at 25.

191. *See* Verified Complaint, *supra* note 176, at 23–24.

192. *See* MASS. GEN. LAWS ANN. Ch. 76, § 5 (West) ("No person shall be excluded from or discriminated against in admission to a public school of any town, or in obtaining the advantages, privileges and courses of study of such public school on account of race, color, sex, gender identity, religion, national origin or sexual orientation.").

193. *See* Verified Complaint, *supra* note 176, at 2, 13.

194. *Id.* at 23.

195. *See* Defendants' Brief for Judgment, *supra* note 163, at 8.

in the exam schools.[196] The change the Committee proposed was a short, one-year temporary policy to address that many students were unable to take the admissions exam during the pandemic, an issue that acutely affected low-income students of color.[197] This modest change thus would be a structural measure to further equitable change. What unfolded in the case and the social dynamics surrounding the case gives rise to an intense illustration of how white backlash can weaponize standardized testing to the detriment of racial progress.

B. Conceptual Lens and Analytic Approach

The conceptual lens that frames this case study is white backlash dynamics. As described above, white backlash as a phenomenon refers to the resistance and set of tactics a white majority has historically used to stall and regress social advancements towards racial equity.[198] This backlash has surfaced each time racially minoritized communities have experienced a civil rights gain.[199] For instance, after *Brown*, courts mandated racial integration in schools and white parents resisted busing with protests and violence.[200] Scholars conceptualizing white backlash as a phenomenon emphasize that at its core, white backlash places the emotional needs and discomfort of a white majority over racial equity for people of color.[201] It also reframes the majoritarian narrative such that people of color's advocacy for racial equity is labeled outrageous and as seeking special privileges, rather than as merely seeking long overdue equity.[202] The discourse centers a scarcity, zero sum approach: if Black and Brown marginalized communities gain racial equity, then white people will lose the privileges they have long enjoyed and to which they are presumably entitled.[203]

Using white backlash as a conceptual lens, this Section employed critical discourse analysis[204] as an analytic approach to examine *BPCAE v.*

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196. *See id.* at 6.

197. *See* Plaintiff's Responses to Defendants' Proposed Findings of Fact, *supra* note 27, at 11.

198. *See* Hughey*, supra* note 4, at 721–22.

199. *See* Bell, *supra* note 7.

200. *See generally* MATTHEW F. DELMONT, WHY BUSING FAILED: RACE, MEDIA, AND THE NATIONAL RESISTANCE TO SCHOOL DESEGREGATION (2016) (examining the social and legal white backlash against busing).

201. *See* Hughey, *supra* note 4, at 727; Horwitz, *supra* note 53, at 553.

202. *See* Hughey, *supra* note 4, at 723–24 ("The resonance of the white backlash rests upon the reification of two characters: the underserving non-white recipient of resources and the unfairly victimized white person.").

203. *See* Norton & Sommers, *supra* note 52, at 217.

204. *See* van Dijk, *supra* note 29, at 279–81.

Boston.[205] Critical discourse analysis draws attention to the rhetorical tools used in documents with the idea that the rhetorical choices can offer insights into the social context and phenomena surrounding the text.[206] We focused on publicly available sources, given that our analytic focus remained on the white backlash dynamics, a public pushback against the racial progress advanced by the district. We followed the public discourse into the court. Thus, our data sources included public Committee meetings,[207] in which the district discussed the proposed 2021–2022 admissions policy change and proponents and opponents of the policy change weighed in, the legal briefs in which Plaintiffs argued against the policy change,[208] and Defendants' briefs in which they responded to the Plaintiffs' arguments.[209] Overall, the approach allowed us to construct a rich description of the narrative surrounding the adoption of the policy change from multiple perspectives, allowing for a more complete picture. These documents provided a comprehensive view of the school debate regarding the use of exams in admissions policies in public exam schools in Boston, including their racialized history, advocacy to change the admissions requirements to improve racial equity, and resistance to the proposed change.

While there is no one approach to employ critical discourse analysis, researchers using critical discourse analysis pay particular attention to the

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205. Scholars have applied critical discourse analysis to similar affirmative action cases and other legal issues. *See, e.g.*, Raquel Muñiz & Nate Hutcherson, *The Power of Research Evidence Use in Times of Crisis: How the Klassen v. Indiana University Court Used Extra-Legal Sources to Ground Litigants in Social Realities*, 399 EDUC. L. REP. 435 (2022) (discussing the use of extra-legal sources to socially contextualize the court's opinion); Vanessa Miller, Interpreting Equal Protection and Discrimination: A Critical Analysis of the Use of Social Science Research in U.S. Supreme Court Race-Based Discrimination Cases in Professional and Graduate School Admissions (March 4, 2020) (Ph.D. dissertation, The Pennsylvania State University) (on file with the Graduate School of Education, The Pennsylvania State University) (examining the use of social science research in Court race-based admissions cases); Scott Carter, Cameron Lippard, & Andrew F. Baird, *Veiled Threats: Color-Blind Frames and Group Threat in Affirmative Action Discourse*, 66 SOC. PROBS. 503 (2019) (assessing color-evasiveness in amicus briefs from both parties in *Fisher*).

206. *See* Norman Fairclough, *Critical Discourse Analysis*, *in* ROUTLEDGE HANDBOOK OF DISCOURSE ANALYSIS 9 (James Paul Gee & Michael Handford eds., 2012) (describing critical discourse analysis as a normative and explanatory critique of the intended power of language).

207. *See Boston School Committee Meeting 10-8-20 (Virtual)*, *supra* note 24; Boston City TV, *Boston School Committee Meeting 10-21-20 (Virtual Part 1)*, YOUTUBE (Oct 22, 2020), https://www.youtube.com/watch?v=SOIrMza7Nu8&t [https://perma.cc/F33F-PMQX]; *Boston School Committee Meeting 10-21-20 (Virtual Part 2)*, *supra* note 188; Boston City TV, Boston *School Committee Meeting 11-18-20-Virtual*, YOUTUBE (Nov 19, 2020), https://www.youtube.com/watch?v=G4F9c0LJUYQ&t [https://perma.cc/YT4Y-CV9R].

208. *See generally* Verified Complaint*, supra* note 176*;* Memorandum in Support of Motion for Preliminary Injunction, *supra* note 23; Plaintiff's Responses to Defendants' Proposed Findings of Fact, *supra* note 27.

209. *See generally* Defendants' Brief for Judgment*, supra* note 163.

language and substantive themes across the text in response to the research focus.[210] Our focus remained on the white backlash dynamics in the legal controversy. Scholars have noted that social and legal discourse can reveal implicit actions to maintain white dominance and evade conversations on racial inequity.[211] Thus, we examined the racialized social dynamics at play in the controversy through an iterative process that involved coding, coalescing codes into abstract categories, and identifying core concepts across categories to group categories into themes responsive to our research question.[212] To build trustworthiness in our findings, we engaged in research team discussions throughout the spring and summer of 2022.[213] We focused on what the rhetoric documented in the videos and documents signaled about white backlash, as well as the framing of the narrative the school community employed in seeking to advance racial equity in their schools.

C. White Backlash Dynamics in *BPCAE v. Boston*: Countering Racial Equity

Using critical discourse analysis, we found that the white backlash originally displayed during the public Committee meetings, where opponents of the policy change sought to prevent the change, manifested itself in the legal proceedings through the Plaintiffs discourse by: (1) reframing the case's narrative in a way that decentered racial equity and reframed the Plaintiffs as the real victims of racial discrimination; (2) decoupling race from the discussion; and (3) using covert, coded language that suggested students of color were undeserving of attending the exam schools. We detail these themes below, unpacking the different tactics they used in a concerted fashion that, in the aggregate, functioned to stall racial

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210. *See* Fairclough, *supra* note 206, at 11.

211. *See* van Dijk, *supra* note 29, at 252–53 ("[C]ritique of discourse implies a political critique of those responsible for its perversion in the reproduction of dominance and inequality.").

212. *See generally* JOHNNY SALDAÑA, THE CODING MANUAL FOR QUALITATIVE RESEARCHERS (3d ed. 2016) (describing the coding process used in qualitative research). To illustrate, our initial codes included phrases that we created based on the conceptual framework and literature, such as "white victimhood," "moral panic," "rhetoric insinuating deficit," and "color-evasive rhetoric." We clustered the codes into abstract categories that encompassed the meaning of the codes across the data. For instance, a category that encompassed the four different codes presented above was, "importance of keeping admissions test to maintain 'rigor.'" We coalesced this and other categories into broader themes that captured the core concepts across the categories and answered the research question, such as "[p]laintiffs and opponents of the policy change used covert, coded language that suggested students of color were underserving of attending exam schools."

213. *See generally* REFLEXIVITY: A PRACTICAL GUIDE FOR RESEARCHERS IN HEALTH AND SOCIAL SCIENCES (Linda Finlay & Brendan Gough eds., 2003) (explaining the utility and application of reflexivity to ground sociological research and to examine researchers' biases).

progress. It is important to note at the outset that because we use a critical lens, we amplify the perspectives of racially minoritized students where possible. We also highlight throughout how Defendants, in response to the socio-legal context, were left with few avenues for seeking racial equity and weakened their messaging as compared to the social discourse in favor of the zip code plan during the public Committee meetings. Defendants were (1) forced to argue within the narrative that the Plaintiffs created; and (2) discussed diversity in broad terms, contrary to the approach research supports — that is, the need for intentional approaches towards dismantling racial discrimination and oppression.[214]

i. Reframing the Narrative of Racial Discrimination

Plaintiffs and opponents of the policy change shared similar narratives of reverse discrimination and white victimhood in an act of backlash against a more equitable admissions policy for Boston's exam schools.[215] For instance, the Plaintiffs positioned themselves as innocent white victims who were unfairly affected by the proposed "Zip Code Quota Plan."[216] By labeling the proposed plan as a quota, the Plaintiffs highlighted their supposed victimhood and characterized the plan as both immoral[217] and illegal.[218] Proponents' and Defendants' actions towards racial equity and a more diverse student body were then reframed as discriminatory in a zero-sum assumption that "some students will be denied admission even though their grades are better than other students who are offered admission."[219] The literature has found that similar assertions denounce any future increase

214. We use "Plaintiffs" and "Defendants" to reflect the legal discourse presented through the *BPCAE v. Boston* documents. We also use "opponents'' and "proponents" of the policy change more broadly to reflect the social discourse presented through the Committee meetings. Though these designations could be grouped into broader pro- and anti-affirmative action camps, they are not interchangeable. There are differences between each designation, both in their rhetoric and intent, that we aim to discuss throughout this section.

215. *See* Hughey, *supra* note 4, at 721–22; *See* King, *supra* note 51, at 88–89.

216. *See* Verified Complaint, *supra* note 176, at 2.

217. *See id.* at 2 ("By depriving some school children of educational opportunity based on their race or ethnicity, Defendants do great harm, not only to the children they seek to exclude but also to the Boston Exam Schools, which they would use as the instruments of their discrimination, to the City of Boston, and to this country's cherished principle of equal protection.").

218. *See id.* at 20 (citing *Grutter* and *Parents Involved*).

219. Memorandum in Support of Motion for Preliminary Injunction, *supra* note 23, at 11, Bos Parent Coal for Acad. Excellence Corp. v. Sch. Comm. of Bos. et al., No. 1:21-cv-10330-WGY (D. Mass. Feb. 26, 2021).

in admissions of Black and Latinx students as unfair, suggesting the seats will be taken at the discriminatory expense of more deserving students.[220]

Plaintiffs and opponents also reframed any mention of racial equity and diversity, racial progress and representation, and of race in general as emblematic of anti-white sentiments.[221] Evidence of this tactic were gleaned from messages received by defendant Lorna Rivera, including "your support on the proposal is absolutely discrimination," "it's a criminal act against taxpayers' will," and "all lives matter."[222] Opponents framed racial equity as a loss of white privilege and property—for example, in a public meeting, a critic noted, "as a 20 year plus resident of Boston, a taxpayer, a professional in the city, this is an apparent push to drive out the very families who have contributed to the vibrancy and betterment of our city, our city."[223] Though the Defendants mentioned that their plan accounts for race and other forms of diversity, Plaintiffs reneged and argued that "a great deal of discussion about race"[224] during the Committee meeting is suspicious enough to show discriminatory intent against white and Asian students.

Operating under a narrative of anti-white discrimination, the Plaintiffs decentered the Defendants' goals to improve racial equity by framing white and Asian students as a monolith as the real victims of oppression.[225] This tactic was central to the Plaintiffs' insistence that the zip code plan violated the Equal Protection Clause, since its "purpose and effect . . . are to use zip codes as precisely such a proxy for race and ethnicity, so as to artificially favor Latino and African-American students to the detriment of Asian and White students."[226] During the Committee meeting, opponents expressed their concerns that the zip code plan would act as an unwarranted and unfair lottery system. For example, a BLS alumni commented that "most of us were involved in an academic grind that is unbelievable, and now we are going to a lottery zip code system? . . . I think I speak for the silent majority of my classmates from the middle 70s that this is a Trojan horse . . . ."[227]

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220. *See* Wendy Leo Moore & Joyce M. Bell, *Maneuvers of Whiteness: 'Diversity' as a Mechanism of Retrenchment in the Affirmative Action Discourse*, 37 CRITICAL SOC. 597, 607 (2011) ("[T]he notion of the innocent white relies upon the archetypical person of color who is not meritorious, and who cannot compete without special privileges."); *see also* Norton & Sommers, *supra* note 52, at 217.

221. *See* Gibbons, *supra* note 56, at 732–33.

222. *Boston School Committee Meeting 10-21-20 (Virtual Part 2)*, *supra* note 188, at 1:00:00.

223. *Id.*

224. Memorandum in Support of Motion for Preliminary Injunction, *supra* note 23, at 7.

225. *See* Leong, *supra* note 72, at 91–92.

226. Verified Complaint, *supra* note 176, at 14.

227. *Boston School Committee Meeting 10-21-20 (Virtual Part 1)*, *supra* note 207, at 3:59:02.

These comments elicited a sense of panic and outrage by declaring that the Committee disregarded the needs of the majority.[228] Moreover, the "academic grind" (i.e. personal sacrifice, hard work, individual merit) was in danger of being replaced by a lottery that would benefit *any* applicant regardless of their qualifications.[229]

Additionally, the framing of Asian students as a monolithic group equally burdened by the proposed zip code plan further reinforced claims of white victimhood and validated the Plaintiffs' and opponents' need to maintain the status quo.[230] For instance, during a Committee meeting, a parent expressed her concern over the proposed elimination of the exam, stating that her son "was very confused and kept asking why . . . school admission is not according to the student himself . . . . It's so unfair . . . . He has become a victim of the zip code lottery."[231] Another parent reflected a similar sentiment, lamenting that "studying hard is not important anymore, instead the zip code is more important."[232] However, current students at the exam schools countered the notion that the exams are necessary part of the admissions process, with one Asian BLA student noting in a Committee meeting that "Black, Latinx, and first generation immigrants and refugees do not have the resources or the chance to prep for the exam . . . The fact that students are asked to take exams even during a pandemic to prove they are worthy of a quality education is, honestly, outrageous."[233] Excerpts such as these highlighted the larger systemic issues (i.e., a lack of access to quality education for all students without a standardized test) and the complex positionality of Asian voices in the debate.[234] Proponents of the policy drew attention to the ways in which Asian voices were used to amplify white victimhood and to disguise white privilege. For instance, a BPS teacher cautioned that "white families are literally and figuratively pushing Asian families to the front. It is an ugly continuation of the way the model minority myth has been used to wedge Asians as a human shield in the fight for equity."[235] Essentially, according to proponents of the policy change, Asian voices were used by the opponents and Plaintiffs to dismiss the existence of

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228. *See* King, *supra* note 51, at 88–89; *see* Horwitz, *supra* note 53, at 553 (underlining the political power of white victimhood and outrage).

229. *See* Leyva, *supra* note 122, at 369 (observing that merit is widely accepted as a neutral system that rewards fair effort).

230. *See* Park & Liu, *supra* note 73, at 45; Ward, *supra* note 61, at 319–20.

231. *Boston School Committee Meeting 10-21-20 (Virtual Part 1)*, *supra* note 207, at 3:00:29.

232. *Id.* (3:07:00).

233. *Id.* (3:35:25).

234. *See* Lee & Tran, *supra* note 77, at 572–74; Poon & Segoshi, *supra* note 74, at 261.

235. *Boston School Committee Meeting 10-21-20 (Virtual Part 1)*, *supra* note 207, at 3:50:00.

white privilege and to advance a meritocratic ideal that fair competition and hard work is all that is needed to be accepted to the Boston exam schools.[236]

We also note a particular instance of racism against the Asian community that occurred during a Committee meeting. Boston School Committee Chairman, Michael Loconto mocked the names of Asian members of the community who were going to comment in opposition to the proposed plan.[237] He formally apologized and resigned the following day.[238] Opponents and Plaintiffs later alleged that this occurrence was evident of the zip code plan's discriminatory intent against Asian students.[239] Michael Loconto's statements were impermissibly racist. However, it is important to acknowledge that the Plaintiffs and opponents framed his statements to benefit their narrative.[240] Though he was the Committee Chairman, Michael Loconto was not part of the Working Group that created the zip code plan.[241] That is, his behavior was not representative of the Working Groups' discussions or goals of furthering equity and addressing the ongoing systemic racism that excluded particular student groups from the exam schools.[242]

The relief Plaintiffs sought also went beyond halting the implementation of the Committee's proposed plan; not only did the Plaintiffs ask the Court that the use of zip codes be prohibited in future admissions decisions, they also asked that the consideration of race be prohibited altogether.[243] This request revealed that the true motive of the backlash and claims of victimhood was to obstruct the implementation of a more racially equitable exam school admissions process. Retaining the status quo would protect the privileges that whiteness entails from any future attempts to address racial

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236. *See* Chiu, *supra* note 71, at 444–45 (questioning Asian Americans' recent inclusion to a white rhetoric against affirmative action); Park & Liu, *supra* note 73, at 45.

237. *See Boston School Committee Meeting 10-21-20 (Virtual Part 2)*, *supra* note 188, at 1:17.

238. Plaintiff's Responses to Defendants' Proposed Findings of Fact, *supra* note 27, at 59.

239. *See Boston School Committee Meeting 11-18-20-Virtual*, *supra* note 207, at 3:37:50 (demanding that the Committee cancel their exam schools policy in light of Michael Loconto's remarks); Memorandum in Support of Motion for Preliminary Injunction, *supra* note 23, at 11 n.10.

240. *Id.* at 17 ("These statements . . . provide further evidence of the unlawful discriminatory purpose underlying the actions taken by Defendants.").

241. *See* Plaintiff's Responses to Defendants' Proposed Findings of Fact, *supra* note 27, at 10.

242. *See* Defendants' Brief for Judgment, *supra* note 163, at 9; Memorandum in Support of Motion for Preliminary Injunction, *supra* note 23, at 16–17 (alleging that the Defendants' statements made in favor of racial equity, along with Michael Loconto's statements, are evidence of discriminatory intent).

243. *See* Verified Complaint, *supra* note 176, at 23.

inequities in exam school admissions.[244] The continuation of a status quo as a *remedy* for white victimhood ignored the racial reality behind the policy proponents' and Defendants' intent to ensure that "exam schools . . . more closely reflect the racial and economic makeup of Boston's kids."[245] The Plaintiffs' narrative of white victimhood accomplished this task by hiding notions of white *group* privilege and advantage behind arguments of equal and *individual* competition through standardized testing.[246] This form of white backlash normalizes the use of standardized testing in admissions and defends biased results (i.e., racial disparities in admissions outcomes due to an individual's lack of hard work, preparation, and aptitude in a "fair competition") as true indicators of a student's potential and ability.[247]

In effect, the Plaintiffs' proposed means of redress, "a preliminary injunction to preserve the status quo of a single, citywide competition based on merit . . . and without any use of race or ethnicity in admissions,"[248] silenced the plights of racially minoritized students in Boston's exam school admissions process. The Plaintiffs' control of the narrative limited the actions that the Defendants took towards racial equity because even the mere mention of race, in the context of discrimination against Black and Latinx students, was subject to white backlash and legal aggression.[249] Defendants were forced to focus their arguments on establishing that the proposed changes did not discriminate against white and Asian students.[250] This stood in stark contrast to the nuanced arguments they presented during Committee meetings, where they discussed racial discrimination and rejected the status quo–including the use of standardized testing–because it excluded lower-income students, particularly Black and Latinx students, from the exam schools. Defendants yielded ground in their goal of achieving racial diversity and weakened the central message that proponents had initially adopted in the public meetings.[251] The narrative shifted to favor the

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244. *See* Hughey, *supra* note 4, at 723; Nunn, *supra* note 85, at 731–32.

245. Memorandum in Support of Motion for Preliminary Injunction, *supra* note 23, at 10.

246. *See* Stephanie M. Wildman, *The Persistence of White Privilege*, 18 WASH. U. J.L. & POL'Y 245, 253–54 (2005).

247. *See* Au, *supra* note 94, at 46–49; Alon, *supra* note 129, at 736–37.

248. Memorandum in Support of Motion for Preliminary Injunction, *supra* note 23, at 3–4.

249. *See* Harris, *supra* note 62, at 1768 (noting that the affirmative action doctrine centers on white perceptions of injury).

250. "BPS's acknowledged consideration of the Interim Plan's racial implications, and its stated goal, among others, that the Plan increase socioeconomic, geographic and racial diversity at its Exam Schools is not a racial classification or a proxy therefor[e] that triggers strict scrutiny." Defendants' Brief for Judgment, *supra* note 163, at 1.

251. *See* Defendants' Brief for Judgment, *supra* note 163, at 2 ("[T]he Interim Plan is a carefully considered, narrowly tailored means for achieving that goal [socioeconomic and racial diversity], indeed, one that does not expressly use race at all.").

opponents and Plaintiffs; the proponents' fight to better reflect the racial diversity of BPS in the exam schools,[252] was largely undermined. The Defendants' cautious defense of the zip code plan in Court was not solely focused on racial diversity, but more broadly on socioeconomic and geographic diversity.[253] Thus, Defendants were burdened with proving a reality of racial exclusion while combating and sometimes using the very same color-evasive language employed in the opponents' and Plaintiffs' narrative of white victimhood.[254]

ii. Decoupling Race

The opponents' and Plaintiffs' narrative employed color-evasive tactics to decouple race from the discussion, functionally distracting from concerns of systemic racism and affirming the idea that people who benefit from whiteness have the right to attend the exam schools.[255] This discourse elevated standardized testing as the tool of choice to secure this right.[256] Several opponents spoke in favor of keeping the admissions policy intact during the Committee meetings, such as when one parent argued that "[T]he standardized test is student blind. It is color-blind. [The] standardized test is fair and . . . is reliable . . . [and] can measure the readiness of students who apply for exam schools."[257] Plaintiffs sustained this argument in Court and further developed the color-evasive narrative by asserting that the administration of these exams is the only acceptable citywide competition.[258] This assertion ignored the history of racial discrimination in the Boston area, where housing segregation, standardized testing, and a purposefully unequal distribution of resources have disproportionately excluded Black and Latinx students from a viable opportunity to attend Boston's exam schools.[259]

Plaintiffs revealed an abstract liberalist frame of merit when explaining why the use of testing and GPA are the preferred tools to determine

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252. Alexandra Oliver-Dávila, a proponent of the policy change, summed up the argument as follows: "[A]t the end of the day . . . I want to see those schools reflect the District." Plaintiff's Responses to Defendants' Proposed Findings of Fact, *supra* note 27, at 23. As a Boston Public Schools committee member, Alexandra Oliver-Dávila was later named a Defendant in *BPCEA v. Boston*.

253. Defendants' Brief for Judgment, *supra* note 163, at 1.

254. *See id.*

255. *See* BONILLA-SILVA, *supra* note 8, at 75; *see also* Nunn, *supra* note 85, at 731–32.

256. *See* Au, *supra* note 94, at 48 ("[S]tandardized tests establish the right of individuals of all races to gain access to education through the fair, objective, test-based measurement of them as (de-raced) individuals.").

257. *Boston School Committee Meeting 10-21-20 (Virtual Part 1)*, *supra* note 207, at 4:52:00.

258. *See* Verified Complaint, *supra* note 176, at 6–7.

259. *See* Probulus-Cedroni, *supra* note 14, at 669–70.

admissions decisions.[260] "First, the competition has looked at the students' performance on an admissions exam along with their grade point averages. Second, the competition has been citywide. *No part of Boston has been favored in the admissions process, and none disfavored.*"[261] This statement served a dual purpose. It elevated the use of testing and GPA as a favorably "race-neutral" competition for admission to the exam schools, a presumably fair competition where each student has an equal opportunity and ability to compete.[262] It also denied any instances of racialized exclusion that have continuously occurred with the use of testing and GPA as the sole criteria for admissions.[263]

Plaintiffs employed similar color-evasive methods when explaining why the use of zip codes acts as a proxy for race by vaguely referencing "various socio-economic, cultural, and historical reasons" behind the fact that today's "students of different racial and ethnic backgrounds are not evenly distributed across Boston's zip codes."[264] This statement avoided naming racialized mechanisms as a reason for continued racial segregation.[265] It also framed the reasons as "historical,"[266] suggesting that the effects of racially exclusive laws and actions and their effects were no longer present, and therefore no longer in need of remediation or concern. It was most apparent that the Plaintiffs chose to ignore the racial realities of the present when they argued that an injunction and preservation of the status quo is in the public interest,[267] essentially silencing proponents' and marginalized people of color's counter-narratives and legitimizing the opponents' interest in preserving white privileges and interests.[268]

Interestingly, we found that both the Plaintiffs and Defendants used the concept of diversity to further their respective arguments but largely decoupled it from historic racial discrimination. Plaintiffs adopted a color-evasive definition of diversity and argued that the proposed admissions process, one that "better reflects the racial, socioeconomic, and geographic diversity of all students (K-12) in the City of Boston,"[269] is a veiled attempt

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260. *See* Au, *supra* note 94, at 46–47 (discussing the abstract liberal frame of merit, applying it to standardized testing). We extend the concept here to testing and GPA.

261. Memorandum in Support of Motion for Preliminary Injunction, *supra* note 23, at 3 (emphasis added).

262. *See* Ladson-Billings, *supra* note 125, at 318–21.

263. *See* Castagno, *supra* note 93, at 328; *see also* WARIKOO, *supra* note 123, at 21.

264. Verified Complaint, *supra* note 176, at 14.

265. *Id.*

266. *Id.*

267. *See generally* Kolber, *supra* note 56.

268. *See* FEAGIN, *supra* note 55, at 17–18.

269. Memorandum in Support of Motion for Preliminary Injunction, *supra* note 23, at 13.

at "racial-balancing"[270] and establishing "quotas"[271] for students by race. Plaintiffs also argued that the plan did not meaningfully account for socioeconomic and geographic diversity, alleging that the Defendants' apparent "focus was not on these criteria, but rather on race."[272] To the Plaintiffs, a focus on race and race alone was enough to supplant the overall goal of improving representation and diversity in Boston's exam schools. Plaintiffs decried the use of "diversity [as] an obvious euphemism for promoting racial balancing, which is constitutionally prohibited."[273] Plaintiffs further alleged that any "references to economic background and geographic location are best viewed as a perfunctory attempt to disguise the *true purpose afoot*."[274] Plaintiffs evaded racial context and presented diversity as neutral, where attention to race is trivialized and equated to discriminatory intent.[275] In essence, diversity was framed as merely a commodity that "represents one more good available in the marketplace, rather than a set of practices necessary to combat structural racism and white supremacy."[276]

During the public Committee meetings, several proponents of the policy change acknowledged the racialized reality behind school admissions policies with remarks such as, "keeping the exam sends a signal to families and to the city that you are content with the status quo of hoarding opportunity and upholding systemic racism in education."[277] In spite of such remarks, the Defendants were forced to support the zip code plan within the color-evasive narrative that the Plaintiffs created. Rather than centering race and a need for racial equity, Defendants adopted a broader stance, reiterating that the Working Group's desired outcome "support[s] student enrollment at each of the exam schools such that it better reflects the racial, socioeconomic and geographic diversity of all students (K-12) in the city of Boston."[278] Defendants argued that the plan also accounted for socioeconomic conditions by reverse-ordering zip codes by median family income to address "issues of class, wealth and economic disparities within zip codes" that are exacerbated with the sole use of standardized testing.[279] Here, the Defendants stated their intended actions towards addressing historic and

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270. *Id.* at 2 (citing Wessmann v. Gittens, 160 F.3d 790, 799–800 (1st Cir. 1998)).

271. *Id.* at 2 (referring to the new admissions plan as a Zip Code Quota Plan).

272. *Id.* at 13.

273. *Id.* at 12.

274. *Id.* at 13 (emphasis added).

275. *See* Bell, *supra* note 88, at 1622–25; *see also* Nunn, *supra* note 85, at 727–32.

276. *See* Mayorga-Gallo, *supra* note 89, at 1800.

277. *Boston School Committee Meeting 10-21-20 (Virtual Part 1)*, *supra* note 207, at 4:06:12.

278. Defendants' Brief for Judgment, *supra* note 163, at 11.

279. Plaintiff's Responses to Defendants' Proposed Findings of Fact, *supra* note 27, at 35.

ongoing contexts of exclusion and segregation, where race and racial equity retained some of their significance, but only as a component of a broader sense of diversity.

iii. Using Covert/Coded Language

Plaintiffs' language relied on the covert nature of color-evasiveness to disguise racially charged attacks against the zip code plan as abstract concerns about merit and fairness.[280] For example, Plaintiffs drew attention to their issue (i.e., "meritocratic" admissions) by employing a stock story that characterized the admissions process as unfairly limited to intra-zip code competition.[281] According to the Plaintiffs, this would result in a decrease in academic rigor where "a student with a *lower* GPA residing in one zip code will be *offered* admission, while a student with a *higher* GPA residing in another zip code will be *denied* admission."[282] This hypothetical situation framed the zip code plan as discriminatory towards all Asian and white students who potentially have better GPAs, while also assuming that Black and Latinx students have worse GPAs. Furthermore, this stock story introduced what scholars have labeled racist, deficit narratives that illustrate the consequences of adopting a plan that allegedly favors Black and Latinx students with lower GPAs.[283] Emails received by Defendant Alexandra Oliver-Dávila reflected such sentiments. She noted, "I was offended by some of the e-mails that I received because there was a lot of conversation about how there would be a decrease in rigor."[284] Opponents of the plan and Plaintiffs overtly suggested that an increase in Black and Latinx students admitted will mean a decrease in the academic excellence and rigor of the exam schools. This logic incited further backlash against the adoption of the zip code plan.

Arguments made by the opponents and the Plaintiffs were rationalized under a meritocratic belief that citywide competition through testing alone would provide the most fair and equal admissions process.[285] Their

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280. *See* Au, *supra* note 94, at 48.

281. *See* Donnor, *supra* note 82, at 1620.

282. Verified Complaint, *supra* note 176, at 13.

283. See Ladson-Billings, *supra* note 125, at 318–21 for a discussion on the persistent deficit narratives in education that often assume students of color are to blame for systemic issues.

284. *Boston School Committee Meeting 10-21-20 (Virtual Part 2)*, *supra* note 188, at 1:43:00.

285. *Boston School Committee Meeting 10-8-20*, *supra* note 24, at 2:08:00:

> I want to strongly support keeping the exam . . . this ensures a fair and a common entrance criteria across a variety of schools that our kids come from and also an

emphasis on the status quo as a "single, citywide competition . . . based on the applicants' academic performance,"[286] positioned white and Asian applicants, given their rates of admission, as successful competitors. This emphasis on the status quo also implied that Black and Latinx students were undeserving of the changes presented by the proposed plan. Opponents and Plaintiffs described this status quo in a meritocratic frame of personal responsibility and achievement where "a child, through hard work and excellence, could *win* the right to attend the most prestigious high schools in Boston."[287] This statement drew on the prestige, desirability, and social benefits gained from attending the exam schools to legitimize meritocratic access solely through a citywide comparison of test scores, and to characterize their actions against the zip code plan as morally just.[288] Plaintiffs highlighted how standardized tests offer a race-neutral and equal opportunity for admissions, "[i]f a student competes for admission based on merit and falls short, so be it. But, the process must not be skewed for anyone–or against anyone–based on race or ethnicity."[289] According to the Plaintiffs, the proposed admissions plan effectively "Balkanizes the city,"[290] because seats are now allocated based on zip code, "rather than on merit."[291] Opponents and Plaintiffs used such coded language of deficit, merit, and competition to insinuate Black and Latinx students were academically inferior and undeserving of admission to Boston's exam schools. Such a tactic of using coded language to avoid explicitly naming others as undeserving has a history in white backlash movements.[292] Color-evasive frames of merit normalize white privileges and positions the resulting admissions outcomes as fairly earned.[293]

Defendants challenged the coded language advanced by the opponents and Plaintiffs, arguing that the rigor of the exam schools will not be affected since the "[e]xam [s]chools currently admit students with A and B averages and that students with a 'B' GPA persist and remain enrolled in an exam school at rates similar to those students applying with 'A+' or 'A' GPA."[294] However, this argument used the same language of merit and competition

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absolutely level playing field. The world is increasingly getting competitive, our kids need to stand up to the competition.

286. Memorandum in Support of Motion for Preliminary Injunction, *supra* note 23, at 3, 5.
287. *Id.* at 24 (emphasis added).
288. Barnes & Moses, *supra* note 68, at 330.
289. Memorandum in Support of Motion for Preliminary Injunction, *supra* note 23, at 22.
290. Verified Complaint, *supra* note 176, at 12.
291. *Id.*
292. *See* Ross, *supra* note 70, at 299–301.
293. *See* Au, *supra* note 94, at 46; Leyva, *supra* note 122, at 365–66.
294. Plaintiff's Responses to Defendants' Proposed Findings of Fact, *supra* note 27, at 47.

that assumes particular students are at a deficit and may affect the rigor of their school. Again, this contrasts the social discourse during the Committee meetings where proponents challenged the language of merit and rigor by voicing that underneath the "talk about objectivity and how the only way to maintain rigor is to use a test . . . is a belief that our Black and Latinx students in Boston are less deserving of seats and will struggle at these schools, which is a deeply racist idea."[295] The Defendants did not fully counter the use of coded language in the court proceedings, nor did they emphasize the biases presented from using standardized tests in the context of deficit and rigor.

The Defendants' hesitance to counter this narrative may be partially driven by the legal framework that constrained their arguments before the Court.[296] The courts have generally accepted a broad conception of diversity, and not racial equity, as a compelling reason for using race in admissions policies.[297] This is understood to mean that race is a single component of a broader and more holistic assessment of each applicant.[298] Measures of merit, though they may be color-evasive, are also included in an applicant's holistic assessment and have not been successfully challenged in court.[299] Thus, the Defendants largely argued within white normative narratives of meritocracy as is the norm in the legal doctrine.[300] As a whole, the opponents' and Plaintiffs' language and rhetoric portrayed Black and Latinx students as undeserving of equitable representation in Boston's exam schools. The literature underscores that this type of rhetoric serves to distract from the pernicious long-standing issue at hand: the historic and ongoing measures excluding particular student populations from the schools to benefit white interests.[301]

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295. *See Boston School Committee Meeting 10-21-20 (Virtual Part 1)*, *supra* note 207, at 3:53:41.

296. *See* Ward, *supra* note 61, at 321–32; Nunn, *supra* note 85, at 708.

297. *See Empirically Derived*, *supra* note 87, at 668.

298. *See* Naomi W. Nishi, *Imperialistic Reclamation of Higher Education Diversity Initiatives Through Semantic Co-option and Concession*, 25 RACE ETHNICITY & EDUC. 249, 262 (2022) (cautioning that the broad definition of diversity supports whiteness and derails equitable applications of diversity).

299. *See* Susan Sturm & Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 CAL. L. REV. 953, 987–89 (1996) (finding that standardized tests exclude women, people of color, and those in lower income brackets).

300. *See* Robin West, *Constitutional Fictions and Meritocratic Success Stories*, 53 WASH. & LEE L. REV. 995, 1010–20 (1996) (questioning the Courts' acceptance of meritocracy in legal narratives).

301. *See* Bell, *supra* note 88, at 1622–25.

III. DISCUSSION AND IMPLICATIONS

The *BPCAE v. Boston* controversy serves as a timely and informative case study of white backlash against racial equity efforts in the K-12 context. Through our weekly discussions, we identified that the case study findings raise three salient issues that inform broader racial equity discourses in education: (1) the ease with which white backlash obstructs racial equity through a narrative of victimhood to secure white interests, (2) the ways in which a color-evasive frame of diversity and merit deny the realities of racial exclusion and marginalization experienced by students of color, and (3) the development of legal doctrines that restricts racial equity advocacy. Ultimately, the white backlash enacted in this case is one of many instances in an ongoing struggle to bring racial equity to exam school admissions processes across the United States.[302]

A. White Backlash to Obstruct Racial Equity and Privilege Whiteness

BPCAE v. Boston can be categorized as the latest iteration of a persistent white backlash against equitable admissions practices in Boston's public schools.[303] The case is also emblematic of a larger attack on affirmative action policies in K-12 and higher education.[304] In this case study, we observed how the color-evasive claims of white victimhood were used to deny the existence of white privilege, thereby obstructing accountability for

302. *See, e.g.*, Bellafante, *supra* note 136 (observing parents' discontent with a new admissions system); Karlamangla, *supra* note 136 (reporting backlash against changes to admissions where three school board members were recalled); Tracy Swartz, *Can Selective Enrollment in Chicago Public Schools Be Fairer? Proposed Changes Aim to Make Admissions More Equitable: 'It's a Touchy Subject*,*'* CHI. TRIB. (Mar. 11, 2022), https://www.chicagotribune.com/news/breaking/ct-chicago-public-schools-selective-enrollment-admissions-change-20220311-4pezdtduzfbvto2wv2r7xpxebi-story.html [https://perma.cc/77N8-AS9F] (discussing two different proposals that aim for a more equitable exam school admissions).

303. *See* Dentler, *supra* note 12, at 5–6 (recounting past litigation against Boston's exam school admissions policies).

304. *See, e.g.*, Hannah Natanson, *Court Says Thomas Jefferson Admissions Can Remain as Case Proceeds*, WASH. POST (Mar. 31, 2022), https://www.washingtonpost.com/education/2022/03/31/fourth-circuit-rules-tj-lawsuit/ [https://perma.cc/L2HV-7GJZ] (reporting recent developments on exam school admissions case); Andrew Chung & Lawrence Hurley, *U.S. Supreme Court To Hear Challenge to Race-Conscious College Admissions*, REUTERS (Jan. 25, 2022), https://www.reuters.com/legal/government/us-supreme-court-hear-challenge-race-conscious-college-admissions-2022-01-24/ [https://perma.cc/G4DG-EW4S] (elaborating on two separate affirmative action cases that will be presented before the Court).

racial equity and justice.[305] As scholars have pointed out, claims of white victimhood and reverse discrimination connect whiteness with innocence and incite a moral panic to defend against a perceived unwarranted breach of the status quo.[306] We found similar claims in the case: the Plaintiffs used their supposed innocence to situate themselves as unduly burdened and victimized, alleging that the proposed change in admissions policies ignored their hard work and denied them rightful admission to the exam schools.[307] Through this narrative, the Plaintiffs absolved themselves of any guilt or responsibility for addressing the exam schools' racially exclusionary admissions policies, while also championing a moral plea of stolen rights to their meritoriously earned seats at the exam schools.[308] The rhetoric in this case study is not unique. Rather, it echoes similar efforts to disrupt racially just admissions policies across the country in which the ensuing white backlash dictates the pace of racial progress and centers the preservation of whiteness (i.e. white power, comfort, and privilege) over the needs of minoritized students.[309]

Our findings support this notion. In spite of a social discourse that featured both opponents' narratives and proponents' counter-narratives, the legal discourse converged on white narratives of victimhood and severely diluted the Defendants' counter-narratives, to the point where the Defendants' arguments were amenable to the Plaintiffs' color-evasive narrative.[310] A particularly salient instance of this color-evasiveness presented itself in the Plaintiffs' selective use of racial context.[311] Black and Latinx students' racialized experiences were decontextualized and minimized to ignore the additive effects that have led to disproportionately low admissions rates to the exam schools.[312] White students were similarly

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305. *See* FEAGIN, *supra* note 55, at 17–18; Kolber, *supra* note 56, at 7 ("The interplay of volatile racial narratives serves as a powerful tool that simultaneously denies the existence of the current racial order, while reinforcing it.").

306. *See* King, *supra* note 51, at 88–89; David Simson, *Whiteness as Innocence*, 96 DENV. L. REV. 635, 640 (2019).

307. *See* Simson, *supra* note 306, at 640 ("The concept of innocence plays the critical role of legitimizing these racially biased equality determinations by presenting them as decisions about responsibility, fairness, and desert rather than exercises of racial power and self-interest.").

308. *See id.* at 644 (theorizing that whiteness can claim moral purity and an absence of guilt); Norton & Sommers, *supra* note 52, at 217.

309. *See* Hughey, *supra* note 4, at 727; Flagg, *supra* note 54, at 6 ("Whites often employ strategies that reinstate Whiteness at the center.").

310. *See* Defendants' Brief for Judgment, *supra* note 163, at 2.

311. *See* Flagg, *supra* note 54, at 2 ("Whiteness has the authority not only to define who is and is not White, but also to delineate the boundaries of non-White racial identities.").

312. *See* Rebecca Mason, *Two Kinds of Unknowing*, 26 HYPATIA 294, 302 (2011) (underscoring a tendency for white actors to ignore or purposely misunderstand and misrepresent racial contexts).

presented through a decontextualized manner, which erased any privilege and power that has increased their opportunities for admissions.[313] Conversely, Asian students remained partially connected to their social and racial context,[314] though only when adding weight to allegations of the Defendants' discriminatory zip code plan.[315] In essence, a color-evasive narrative of white victimhood determined *when* and *where* racial context mattered (i.e. whenever and wherever it serves white interests, especially in the color-evasive legal discourse that is seldom challenged).[316]

As we detailed in the findings, we also found that white backlash has adapted its color-evasive tactics to position Asian students as equally burdened, resulting in a deflection of white power and privilege and reinforcing a push to preserve the status quo. Research has noted that this tactic to obstruct racial equity has become increasingly prominent in both K-12 and higher education, where Asian students are characterized and stereotyped as a successful and meritorious foil to unprepared and undeserving Black and Latinx students.[317] The unchecked use of racial stereotypes and stock stories in the legal discourse erases the counter-narratives of marginalized Asian, Black, and Latinx students.[318] To illustrate Asian students as a monolithic example of meritocratic success is to evade the minoritization and exclusion that Asian students also face.[319] Thus, white backlash tokenizes racial experiences by conforming them to an *innocent* narrative of shared victimhood, while covertly seeking to preserve white privileges.[320] This ploy is particularly effective in maintaining a semblance

313. However, it should be noted that claims of white victimhood are generally understood to signify the unjust marginalization or stigmatization of a white person whose claims should be honored and valued as authentic. Hughey, *supra* note 4, at 727.

314. *See* Poon & Segoshi, *supra* note 74, at 240 (remarking on the mascotization of Asian students for white gain).

315. *See* Claire Jean Kim, *The Racial Triangulation of Asian Americans*, 27 POL. & SOC'Y 105, 106–07 (1999) (explaining how "relative valorization" is used to position one group over another by the dominant [white] group "in order to dominate both groups, but especially the latter [group]").

316. *See* Paula K. Miller, *Hegemonic Whiteness: Expanding and Operationalizing the Conceptual Framework*, 16 SOC. COMPASS 1, 7 (2022) ("Because white people occupy a uniquely privileged position in American society, they can deny the relevance of their whiteness if they so choose . . . leading them to declare that race has no significance in shaping their lives or the lives of those around them."); *see also* Gotanda, *supra* note 8, at 16–23 (defining the nonrecognition of race).

317. *See* Harpalani, *supra* note 76, at 273–82 (contextualizing the emergent positioning of Asians within an anti-affirmative action legal discourse that is supported by white backlash).

318. *See* Donnor, *supra* note 82, at 1627; Solórzano, *supra* note 83, at 11–12.

319. Harpalani, *supra* note 76, at 248–49 ("[T]he model minority stereotype also has negative effects: it obscures the vast diversity among Asian Americans and masks the discrimination and inequalities that they face.").

320. *See* Poon & Segoshi, *supra* note 74, at 239–40; Park & Liu, *supra* note 73, at 38–40

of neutrality and evades accusations of a racist obstruction of equity because, as we found, it remains uncontested in the legal discourse.[321] To be clear, whiteness is free to exploit the social and legal power of victimhood in the courts.[322] As a result, racial equity and justice is easily obstructed so long as the legal doctrine unquestioningly accepts white victimhood as the dominant narrative, i.e., the *only* narrative.[323] We expand on the implications of these white backlash tactics in the following sections.

B. A Color-Evasive Framing of Diversity and Merit

Scholars have noted that the color-evasive framing of diversity minimizes the recognition of race and racial inequality to the extent that it no longer serves the equitable intent of racial antidiscrimination law.[324] Merit is similarly abstracted to suggest that all opportunities are universally accessible under a fair and equal competition.[325] The broad color-evasive framing of diversity and merit cater to white interests by decontextualizing race and therefore dismissing a need for racial equity.[326] This case study is one of the many instances where white backlash advances a color-evasive definition of diversity and merit to derail efforts towards a more equitable admissions process for students of color across all levels of education.[327] Color-evasive narratives cast diversity as an educational benefit for the institution, but do not acknowledge the socially and racially-just components of diversity.[328] The color-evasive diversity employed by the Plaintiffs ignored the exclusion and marginalization of students of color from the exam schools, effectively silencing racial injustices and weakening the legal power of groups that favored increasing racial diversity through equitable admissions policies.[329]

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321. *See* Chiu, *supra* note 71, at 444–45; Simson, *supra* note 306, at 640.

322. *See* Chiu, *supra* note 71, at 444–45; Horwitz, *supra* note 53, at 553.

323. *See* Simson, *supra* note 306, at 646–47.

324. *See* Bell, *supra* note 88, at 1622–25 (arguing that diversity avoids addressing racial inequality); Nunn, *supra* note 85, at 727–32 (asserting that diversity ignores racism and operates under white terms).

325. *See* Au, *supra* note 94, at 46–49; Leyva, *supra* note 122, at 369.

326. *See* Ward, *supra* note 61, at 323–25 (finding that a color-evasive rhetoric of diversity and appeals to meritocracy are frequently used to dismiss affirmative action as unnecessary).

327. *See* Dentler, *supra* note 12, at 8; *See also* Ward, *supra* note 61, at 324.

328. *See* Nishi, *supra* note 298, at 253–62.

329. *See* Derrick Bell, SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM 29 (2004) (introducing the concept of silent covenants, arguing that "[t]o settle potentially costly differences between two opposing groups of whites, a compromise is effected that depends on the involuntary sacrifice of black rights or interests" and noting that such covenants include the use of standardized tests in education)*; see also* Nishi, *supra* note 298, at 255; Ward, *supra* note 61, at 324.

As we detailed in the findings above, the Plaintiffs argued that diversity meant that *all* students can share their individual experiences for the educational benefit of their peers and their institution, regardless of their race.[330] Specifically, the Plaintiffs alleged that the Committee's apparent focus on issues of race and racial equity was suspect,[331] suggesting that a student's race and its accompanying contexts do not fit within an acceptable definition of diversity.[332] This color-evasive control over the meaning of diversity reflects a broader trend in social and legal discourse where diversity is commodified and exploited to fit white interests.[333] Scholars have noted that diversity has become a fungible good in the educational marketplace, where the social and cultural enrichment provided by students of color is tolerated as long as white privileges and positions are not threatened.[334] Hence, diversity is treated as a commodity, with its value dependent on whiteness.[335] When diversity is commodified as in this case and others like it, diversity loses its value as a tool for achieving racial equity and instead becomes a white-centric definition of *who* is considered diverse and *what* diverse qualities are favored as educational commodities.[336] In other words, the Plaintiffs' color-evasive definition of diversity, broadly inclusive of *all* students who contributed any difference, was used in an attempt to preserve opportunities and resources (i.e. admissions) for white students.[337] Therefore, the only form of diversity that could be accepted as legitimate is achieved through a color-evasive reliance on grades and test scores for admissions.[338]

Following the Plaintiffs' rhetoric, merit and *not* social or racial justice, becomes the method for achieving a diverse student body, where hard work alone is enough to gain admission to the exam schools, regardless of social

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330. *See* Moore & Bell, *supra* note 220, at 603.

331. *See* Memorandum in Support of Motion for Preliminary Injunction, *supra* note 23, at 12, Bos. Parent Coal. For Acad. Excellence Corp. v. Sch. Comm. Of Bos. Et al., No. 1:21-cv-10330-WGY (D. Mass. Feb. 26, 2021).

332. *See* Nishi, *supra* note 298, at 257–58.

333. *See* Nancy Leong, *Racial Capitalism*, 126 HARV. L. REV. 2151, 2152 (2013).

334. *See id.* at 2206; Mayorga-Gallo, *supra* note 89, at 1800 ("As soon as diversity policies pose a threat to their privileged positions as students and workers, however, whites challenge diversity's value.").

335. *See* Leong, *supra* note 333, at 2206–07.

336. *See* Eboni S. Nelson, *Examining the Costs of Diversity*, 63 U. MIA L. REV. 577, 587–92 (2009).

337. *See* Moore & Bell, *supra* note 220, at 602 ("This conception of 'diversity' relies on a thin and tenuous foundation based in a larger color-blind racist frame that works to simultaneously celebrate perceived cultural contributions of people of color and disavow the existence of historical and contemporary structural and institutional racism.").

338. *See* Bell, *supra* note 88, at 1629–31.

and racial contexts.[339] Not only does merit define *how* diversity is selected, but it also explains *why* individuals are either admitted or rejected from educational institutions.[340] A meritocratic focus on an individual's potential for achievement evades any meaningful interrogation of the racialized and exclusionary obstacles that burden students of color, and of the privileges that benefit white students.[341] Thus, any racial disparities in admissions are rationalized as a student's individual lack of aptitude or as an academic deficiency.[342] This logic is emblematic of a larger social phenomenon where merit is synonymous with the color-evasive abstractions of equal competition and equal opportunity, both of which are generally accepted as infallible American values,[343] in spite of ample evidence throughout decades of research that these meritocratic ideals are used to exclude marginalized students of color from educational institutions.[344] In sum, merit acts as an objective filter that operates in conjunction with the ambiguity of diversity to preserve white power and resources.[345] A failure to interrogate the color-evasive nature of these two concepts has left minoritized communities with few avenues for pursuing racial equity within the current legal doctrine.[346]

C. Legal Doctrinal Developments Restrict Racial Equity Advocacy in K-12

The legal doctrine on racial discrimination in education has shifted dramatically since *Brown v. Board of Education*.[347] The law requires that

339. Barnes & Moses, *supra* note 68, at 330.

340. *See* Richard Delgado, *Rodrigo's Tenth Chronicle: Merit and Affirmative Action*, 83 GEO. L. J. 1711, 1718–19 (1994) ("If society decides to distribute a good to A and not to B, courts will sustain this decision if the government can show that A had more merit than B, that A was more deserving.").

341. *See* Castagno, *supra* note 93, at 328; WARIKOO, *supra* note 123, at 7, 21.

342. *See* Carey, *supra* note 126, 446–47; Ladson-Billings, *supra* note 125, at 318–22 (challenging deficit ideologies).

343. *See* Au, *supra* note 94, at 48 ("[A]n individual free from the constraints of social, economic, historical, institutional, and cultural structures . . . can freely compete (as an individual) against other free individuals, and the hardest working, savviest, most virtuous individual will succeed . . . racism and other forms of systematic power outside of the market are considered obsolete and non-existent, and all that matters for success is individual drive, determination, sacrifice, and hard work.").

344. *See* Alon, *supra* note 129, at 736–37 (observing that privileged groups set the terms of how merit is measured as admissions criteria to benefit their interests).

345. *See id.* at 736.; Alon & Tienda, *supra* note 135, at 507–08 (finding that narrow definitions of merit negatively affect an institutions' diversity); Mayorga-Gallo, *supra* note 89, 1800 (underlining that diversity is defined to conform to white power and privilege).

346. *See generally supra* Section II.C.i–iii.

347. *See* Harris, *supra* note 62, at 1768 (noting that affirmative action policies are acceptable so long as they covertly align with white interests); Nunn, *supra* note 85, at 720–

schools present a compelling reason (i.e., diversity) for using race in their assignment/admissions policies and the policies must be narrowly tailored.[348] In practice this has translated into school leaders interested in furthering racial equity having to frame their goals as simply furthering all types of diversity.[349] School leaders who frame the policies' goals as furthering racial equity may risk the courts ruling their policies unlawful.[350] School leaders are left with few options to further racial equity, which the research has found requires intentional action.[351]

This case study highlighted this dilemma K-12 leaders face across the country. While the Committee discussed racial equity in the public meetings, they shied away from that type of framing in the court proceedings.[352] This finding builds on what other scholars have found: that K-12 leaders are less inclined to pursue racial equity policies to integrate students after *Parents Involved*.[353] In this case study, the educational leaders were interested in taking proactive steps to further racial equity, and stated that much in public meetings, but the legal framework restricted their arguments in favor of furthering racial equity. Their legal arguments were constrained to arguing that the Committee sought to advance diversity, broadly defined.[354] In fact, in some of the briefs, the school argued that they were actually not focused on racial equity.[355] The Plaintiffs countered that with evidence from the meetings where several people mentioned the need and intentionality to address racial equity in the exam schools.[356]

The framing the Defendants adopted in their legal briefs is problematic because it essentially decenters and circumvents intentional approaches to advance racial equity in education.[357] And yet, the Defendants arguments

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21 (suggesting that color-evasive language muddies the equitable application of antidiscrimination doctrine).

348. *See* Ancheta, *supra* note 148, at 302–08 (analyzing the Courts' interpretation of compelling interest and narrow tailoring in *Parents Involved*).

349. *See* Frakenberg, *supra* note 147, at 225S.

350. *See* Bell, *supra* note 88, 1625–29.

351. *See* Ward, *supra* note 61, at 325–26.

352. *See* Defendants' Brief for Judgment, *supra* note 163, at 11 (adopting a broader view of diversity).

353. *See* Frankenberg, *supra* note 147, at 246S ("In the immediate aftermath of *Parents Involved*, considerable confusion existed about what remained legally permissible . . . Not surprisingly, few districts without a history of race conscious policies chose to implement such new policies.").

354. *See* Defendants' Brief for Judgment, *supra* note 163, at 2–3.

355. *See id.* at 2–3.

356. *See* Memorandum in Support of Motion for Preliminary Injunction, *supra* note 23, at 10.

357. *See* Moore & Bell, *supra* note 220, at 607 ("Because protecting innocent whites is a central issue in the framing of affirmative action discourse, people of color must expend 'enormous' amounts of social and political capital in order to justify the policy.").

aligned with what the legal framework required of them—pointing to larger systemic issues related to the development of the doctrines in racial anti-discrimination law in education. Research has shown that such a color-evasive framing decenters students of color and racial equity in the discussion.[358]

The findings from this case study thus raise questions about what such a legal framework means for educational policies that aim to further racial equity. If schools are unable to be transparent or intentional about their efforts to advance racial equity, their efforts to advance educational equity are undermined.[359] As the case study demonstrated, schools may advance racial equity arguments in the public discourse but that language can be subsequently weaponized in legal proceedings, given that the legal framework in this legal context requires a focus on diversity, broadly construed.[360] Thus, school districts seeking to adopt policies that advance racial equity must simultaneously argue that the educational policies advance racial equity but that they mainly advance broad concepts of diversity.[361] And even then, any discussion of race by the schools may be construed as problematic, as the Plaintiffs construed them in this case. In sum, the findings reveal the need for systemic change in the legal doctrine, one that returns to the focus that *Brown v. Board* had: racial equality that accounts for historical oppression.

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358. *See id.*

359. *See generally supra* Section II.C.i–iii.

360. *See supra* Section II.C.ii ("The Plaintiffs' control of the narrative limited the actions that the Defendants took towards racial equity because even the mere mention of race, in the context of discrimination against Black and Latinx students, was subject to white backlash and legal aggression. Defendants were forced to focus their arguments on establishing that the proposed changes did not discriminate against white and Asian students. This stood in stark contrast to the nuanced arguments they presented during the Committee meetings . . . . Defendants yielded ground in their goal of achieving racial diversity and weakened the central message that proponents had initially adopted in the public meetings . . . . The Defendants' cautious defense of the zip code plan was not solely focused on racial diversity, but more broadly on socioeconomic and geographic diversity.") (and accompanying authorities); *see supra* Section II.C.ii ("During the public Committee meetings, several proponents of the policy change acknowledged the racialized reality behind school admissions policies . . . . In spite of such remarks, the Defendants were forced to support the zip code plan within the color-evasive narrative that the Plaintiffs created . . . . Here, the Defendants stated their intended actions towards addressing historic and ongoing contexts of exclusion and segregation, where race and racial equity retained some of their significance, but only as a component of a broader sense of diversity.") (and accompanying authorities).

361. *See id.*; *see also supra* Section II.C.iii ("The Defendants' hesitance to counter this narrative may be partially driven by the legal framework that constrained their arguments before the Court. The courts have generally accepted a broad conception of diversity, and not racial equity, as a compelling reason for using race in admissions policies . . . . Thus, the Defendants largely argued within white normative narratives of meritocracy as is the norm in the legal doctrine.") (and accompanying authorities).

CONCLUSION

Our case study illustrates how white backlash operates to center white privileges and interests in the social and legal discourse over equitable exam school admissions.[362] The case study underscored that tactics of white victimhood and color-evasion serve to obscure the role of racial segregation and marginalization in shaping the current racial and socioeconomic underrepresentation in exam schools.[363] Diversity, as a social and legal concept, can serve as a nexus of contention between opposing parties that wish to either maintain a status quo of racial exclusion and marginalization or to advance an equitable future for all students.[364] Merit, specifically as measured through standardized tests, has also become a point of friction where white backlash has attempted to ignore the racial realities that lead to test score disparities.[365] In sum, white backlash uses a color-evasive frame of diversity and merit to pursue an exclusionary status quo that favors whiteness.[366]

The results of this case are yet to be finalized by the courts, but the outcomes may have a resounding impact on future decisions taken by schools and educational leaders in similar positions. Future research can advance our understanding of the dilemma educational leaders face in seeking racial equity by centering educational leaders' experiences in responding to white backlash in similar contexts. In doing so, scholars and educational leaders can consolidate methods of countering white backlash to enact equitable change towards admissions processes in a K-12 context.

362. *See supra* Section II.C.i–iii.
363. *See id*.
364. *See id*.
365. *See id.*
366. *See id.*