
RESPONSE

ERASING, REMEMBERING COLORBLINDNESS[†]

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[†] An invited response to Robert S. Chang & H. Timothy Lovelace, Jr., *Who Owns Civil Rights History?*, 106 B.U. L. REV. 729 (2026).

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INTRODUCTION

In *Who Owns Civil Rights History?*,¹ Professors Robert S. Chang and H. Timothy Lovelace, Jr., have written a powerful article explaining the way *Students for Fair Admissions v. President & Fellows of Harvard College* (“SFFA”)² not only changed the future but rewrote the past. In a feat of constitutional memory-making, the Roberts Court both reimagined *Brown v. Board of Education*³ and the NAACP’s litigation campaign against Jim Crow as exemplars of colorblindness and also recast the Civil Rights Movement as “only ever animated by fealty to colorblindness.”⁴ Chang and Lovelace offer an alternative history of the Civil Rights Movement that resurrects the commitment to affirmative action by all its leading actors, challenging the Court’s erasure of affirmative action from constitutional memory.⁵

The idea of “constitutional memory” comes from a series of writings by constitutional theorists Reva B. Siegel and Jack M. Balkin, in which they show that the Supreme Court has been a leading voice in shaping the national collective memory of the meaning of the Constitution.⁶ The making and erasure of constitutional memory has played a key role in shaping the Court’s jurisprudence as the erasure of some groups’ memories and perspectives allows the Court to privilege the viewpoints of “a small group of white men” to whom

¹ Robert S. Chang & H. Timothy Lovelace, Jr., *Who Owns Civil Rights History?*, 106 B.U. L. REV. 729 (2026).

² 143 S. Ct. 2141 (2023).

³ 349 U.S. 294 (1955).

⁴ Chang & Lovelace, *supra* note 1, at 729.

⁵ *Id.* at 737 (“SFFA’s argument misunderstands that affirmative action developed because of the civil rights movement—not despite the civil rights movement. Civil rights leaders supported affirmative action as a tool to address systemic inequality that persisted They understood that true equality required more than just dismantling discriminatory laws.”).

⁶ See Reva B. Siegel, *The Politics of Constitutional Memory*, 20 GEO. J.L. & POL’Y 19, 21 & n.5 (2022) (describing “constitutional memory as a form of collective memory forged through constitutional interpretation”); Reva B. Siegel, *Memory Games: Dobbs’s Originalism as Anti-Democratic Constitutionalism—and Some Pathways for Resistance*, 101 TEX. L. REV. 1127, 1132–34 (2023) (discussing originalism as a political project of constitutional memory-making by conservative legal movement in its campaign to reverse achievements of Warren Court); JACK M. BALKIN, *MEMORY AND AUTHORITY: THE USES OF HISTORY IN CONSTITUTIONAL INTERPRETATION* 192 (2024) (“In constitutional disputes, different parties often invoke different accounts of memory. They attempt to reshape memory through persuasive narratives and redescriptions. . . . Lawyers and judges continually invoke and construct memory, and judicial decisions both rely on constitutional memory and produce constitutional memory.”). I discuss constitutional memory in more detail in previous scholarship. See generally Ariela Gross, *Erasing Slavery: The Uses and Misuses of the History of Slavery and Reconstruction in Constitutional Interpretation*, 173 U. PENN. L. REV. 2123 (2025) [hereinafter Gross, *Erasing Slavery*] (recounting efforts to erase history of slavery from national memory denying “slavery’s legacies and after lives”). For a broader discussion of law, constitutionalism, and memory, see Ariela Gross, *The Constitution of History and Memory*, in *LAW AND THE HUMANITIES: AN INTRODUCTION* 416, 423–31 (Austin Sarat, Matthew Anderson & Cathrine O. Frank eds., 2009).

“the American constitutional tradition [purportedly] belongs.”⁷ Siegel has argued that the task of constitutional scholars is not to abandon history as some have counseled, but rather to “democratize constitutional memory” by expanding the field to include “the perspectives of those unjustly denied voice in the making of American law for much of the nation’s history” in the interpretation of constitutional meaning.⁸

Chang and Lovelace have taken up this call, offering an alternative history of civil rights memory—in this case, emphasizing not so much the freedom movement on the streets but rather the progress of civil rights in the executive branch among policymakers.⁹ By telling the little known story of the President’s Committee on Equal Employment Opportunity (“PCEEO”), which preceded President Nixon’s better known affirmative action programs by more than a decade, Chang and Lovelace show how early the commitment to race-conscious remedial government action developed.¹⁰ In doing so, they challenge the Roberts Court’s constitutional memory, which portrays affirmative action as a perversion or regression away from a colorblind principle embedded in the Fourteenth Amendment and restored by *Brown*.¹¹

In this brief Response, I expand on these observations regarding the constitutional memory-work of *SFFA*, placing Chief Justice Roberts’ story in the broader context of the conservative movement’s memory of *Brown* and a colorblind Constitution. I then conclude with a few thoughts regarding the alternative civil rights history Chang and Lovelace sketch that places affirmative action at its center.

I. CONSERVATIVES REMEMBER THE COLORBLIND CONSTITUTION

The conservative legal movement since at least the 1980s has found a way to square the *Brown* decision with originalism by reimagining *Brown* as a

⁷ Gross, *Erasing Slavery*, *supra* note 6, at 2124.

⁸ Reva B. Siegel, *Democratizing Constitutional Memory*, 123 MICH. L. REV. 1011, 1012 (2025). Siegel writes against scholars like Professor Samuel Moyn who argue that progressives should give up not only originalism but historicism. *See, e.g.*, Pranjal Drall & Samuel Moyn, *Birtheright Citizenship and the Politics of Constitutional Law (Part III)*, BALKINIZATION (Mar. 26, 2026, at 09:00 ET), https://balkin.blogspot.com/2026/03/birtheright-citizenship-and-politics-of_01017679663.html [<https://perma.cc/XR9Y-XTXM>].

⁹ Chang & Lovelace, *supra* note 1, at 746-50 (recounting successful efforts by civil rights leaders to pressure President Kennedy to use executive action to implement anti-discrimination policies).

¹⁰ *Id.* (discussing President Kennedy’s affirmative action executive order); *id.* at 769-70 (describing support for and effect of affirmative action in the Nixon Administration on diversity in military).

¹¹ *Id.* at 744-46 (outlining and attacking Chief Justice Roberts’ “false equivalence whereby race-conscious affirmative action becomes the legal, and perhaps even moral, equivalent of racial segregation”).

colorblind decision.¹² This was at first a challenge as conservative originalism made its appearance as an argument against *Brown*.¹³ But, like the conservative movement more broadly, constitutional originalists learned to accommodate *Brown* and to accommodate *Brown* to their approach, reinterpreting it as an anti-integration, colorblind decision, and reimagining the Second Reconstruction in a very different way from its own protagonists.¹⁴

The early backlash to the Second Reconstruction was massive resistance to the *Brown* decision. After *Brown*, publications were filled with articles about the legal concept of “interposition,” a new term for what the secessionists one hundred years earlier had called “nullification.”¹⁵ Interposition was a states’ rights argument that declared any state had the right to “interpose” its own interpretation of the Constitution rather than that of the Supreme Court.¹⁶ Journalist James J. Kilpatrick of Virginia wrote “one opinion piece after another . . . to persuade fellow white southerners that they had a constitutional right to reject the federal mandate to end Jim Crow schools.”¹⁷ He described *Brown* as a “naked and arrogant declaration of nine men” and a “rape of the Constitution.”¹⁸

Northern lawyers and legal scholars who also expressed reservations about *Brown* focused on Chief Justice Warren’s use of sociological jurisprudence, especially the infamous Footnote 11,¹⁹ as a form of judicial activism or judicial legislation. For example, Professor Herbert Wechsler famously critiqued the case, casting the opinion as resting unfortunately on the harm to Black children caused by segregation rather than a neutral legal principle.²⁰ Yet, Weschler also

¹² See, e.g., CLINT BOLICK, *CHANGING COURSE: CIVIL RIGHTS AT THE CROSSROADS* 3-4 (1988) (casting *Brown* as a realization of Founder’s intention to create nation with equal rights to life, liberty, and property and affirmative action as departure from this vision).

¹³ See Calvin TerBeek, “*Clocks Must Always Be Turned Back*”: *Brown v. Board of Education and the Racial Origins of Constitutional Originalism*, 114 AM. POL. SCI. REV. 821, 826-29 (2021) (uncovering emergence of originalism as polished alternative to stridently racist critiques of *Brown*).

¹⁴ The discussion that follows draws from the manuscript of my forthcoming book. See generally ARIELA GROSS, *ERASING SLAVERY, REWRITING FREEDOM: HOW THE SUPREME COURT WHITEWASHES HISTORY TO TRANSFORM THE CONSTITUTION* (forthcoming 2027) (on file with author).

¹⁵ See TerBeek, *supra* note 13, at 826-27 (“Shortly after *Brown*, the [National Review] reported that even ‘barbers and storekeepers’ understood and believed in ‘nullification and interposition and usurpation.’”).

¹⁶ See Brent J. Aucoin, *The Southern Manifesto and Southern Opposition to Desegregation*, 55 ARK. HIST. Q. 173, 183-84 (1996).

¹⁷ NANCY MACLEAN, *DEMOCRACY IN CHAINS: THE DEEP HISTORY OF THE RADICAL RIGHT’S STEALTH PLAN FOR AMERICA* 51 (2023).

¹⁸ *Id.*

¹⁹ See TerBeek, *supra* note 13, at 826 (recalling segregationist backlash to Chief Justice Warren’s citation to sociology studies in *Brown*).

²⁰ See Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 31-34 (1959).

found wanting the only neutral principle he considered as a possible alternative basis for the *Brown* decision, freedom of association, because it could cut either for or against segregation.²¹

Within a few years, however, opponents of *Brown* had begun to articulate a new judicial philosophy of “original intent” as “an ostensibly non-racialized first constitutional principle to delegitimize *Brown*.”²² Although today the Court remembers *Brown* as the embodiment of the original meaning of the Fourteenth Amendment, political scientist Calvin TerBeek argues that originalism actually originated in opposition to *Brown*.²³ As Kilpatrick wrote to William F. Buckley in 1957 in a letter condemning the case, in “constitutional cases clocks must always be turned back.”²⁴ Where *Brown* went wrong, Kilpatrick wrote, was in imposing a contemporary meaning on the original constitution.²⁵ TerBeek and historian Nancy MacLean have chronicled the conservative realignment that took place in the 1950s as “Southern conservatives joined coalition forces with movement conservatives across the nation.”²⁶ Non-legal conservative movement actors first came up with “original intent” as a weapon against the Warren Court, including the *Brown* decision, quite a while before originalism was taken up by “conservative legal elites in the Department of Justice and legal academy” in the 1980s.²⁷

Barry Goldwater’s 1960 book *The Conscience of a Conservative* was the first major work that “repeatedly invoked the intent construct as a key to a conservative understanding of the Constitution. The constitutional problem *Brown* posed was that it ran afoul of the ‘intentions of the founding fathers’ and the ‘intentions of the Fourteenth Amendment’s authors.’”²⁸ After 1960, “*Brown*’s infidelity to the Fourteenth Amendment’s intent widely and quickly diffused throughout movement conservatism.”²⁹ This story spread through the media, in the popular *Dan Smoot Report*,³⁰ and through academia in Professor Alfred Avins’s law review articles.³¹

Yet, conservatives began to realize that massive resistance was unsustainable. They turned to free market principles and limited government as a way to repackage opposition to government intervention in race-neutral terms.³² This

²¹ *Id.* at 34-35.

²² TerBeek, *supra* note 13, at 822.

²³ *See generally id.*

²⁴ *Id.* at 822.

²⁵ *Id.*

²⁶ *Id.*; *see also* MACLEAN, *supra* note 17, at 51.

²⁷ TerBeek, *supra* note 13, at 822.

²⁸ *Id.* at 828.

²⁹ *Id.*

³⁰ *See id.* at 827.

³¹ *See id.* at 830.

³² *See* DONALD COHEN & ALLEN MIKAELIAN, *THE PRIVATIZATION OF EVERYTHING: HOW THE PLUNDER OF PUBLIC GOODS TRANSFORMED AMERICA AND HOW WE CAN FIGHT BACK* 23-25 (2021).

happened at both the elite and grassroots levels across the country. At the elite level, economists James Buchanan and Milton Friedman began to promote school vouchers in the language of economic liberty.³³ In Mississippi, the Christian schools that were colloquially known as “segregation academies” began to focus on religious freedom to justify their claim to public funding.³⁴ These schools were a focal point for the rise of the Christian right in politics in the 1960s. In California, supposedly race-neutral freedom of association and “right to discriminate” arguments were powerful throughout the 1960s, and had a notable win with California’s Proposition 14,³⁵ even though it was overturned by the California Supreme Court.³⁶ Race-neutral arguments joined free market, anti-big government, and anti-tax conservatism with opposition to integration, and these ascendant arguments proved especially effective as segregation battles turned to busing of students across district lines, affirmative action in government programs and in higher education, and other race-conscious efforts to integrate society.

In the constitutional and legal arena, modern conservative lawyers discovered that *Brown*, which many conservatives had opposed on originalist as well as policy grounds, could also be justified by an originalist approach—if it was interpreted narrowly enough. In turn, originalism could be used to attack much of what the Warren Court had been doing on behalf of poor people, criminal defendants, women, racial minorities, and others. In 1971, Professor Robert Bork for the first time found a way to save *Brown* for “neutral principles” and “framers’ intent.”³⁷ Looking to original intent, he argued that “the men who put the amendment in the Constitution intended that the Supreme Court should secure against government action some large measure of racial equality” although they did not agree on what equality required.³⁸ Because of this disagreement “they took refuge in the majestic and ambiguous formula: the equal protection of the laws.”³⁹ However, this does not make original intent unknowable because “one thing the Court does know: it was intended to enforce

³³ See *id.*

³⁴ See JOSEPH CRESPINO, IN SEARCH OF ANOTHER COUNTRY: MISSISSIPPI AND THE CONSERVATIVE COUNTERREVOLUTION 237-38 (2007).

³⁵ See Christopher W. Schmidt, *Defending the Right to Discriminate: The Libertarian Challenge to the Civil Rights Movement*, in SIGNPOSTS: NEW DIRECTIONS IN SOUTHERN LEGAL HISTORY 462, 463-66 (Sally E. Hadden & Patricia Hagler Minter eds., 2013) (discussing backlash to Civil Rights Movement which called for “right to discriminate”); Ariela Gross, *A Grassroots History of Colorblind Conservative Constitutionalism*, 44 LAW & SOC. INQUIRY 58, 61-65 (2018) (telling history of California Proposition 14, a 1964 ballot initiative to overturn Rumford Fair Housing Act of 1963, passed 2-1 by California voters).

³⁶ See *Reitman v. Mulkey*, 387 U.S. 369, 373 (1967) (affirming California Supreme Court’s holding that Proposition 14 violated Equal Protection Clause).

³⁷ See Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 13-15 (1971).

³⁸ *Id.* at 14.

³⁹ *Id.*

a core idea of black equality against governmental discrimination” and the Court must “choose a general principle of equality that applies to all cases. . . . Thus, the no-state-enforced-discrimination rule of *Brown* must overturn and replace the separate-but-equal doctrine of *Plessy v. Ferguson*.”⁴⁰

At this point, legal conservatives could characterize original intent as a purely apolitical methodology, one that “erased [its own] uncomfortable racial origins.”⁴¹ And, as Professor Brad Snyder shows, once conservatives made the switch on *Brown*, the case was “vaulted . . . into the upper canon” of revered cases.⁴² The conservatives also succeeded in reinterpreting *Brown* to mean something quite different than what it had meant to those who litigated and decided it.⁴³

In the 1980s, lawyers in the Reagan Justice Department promoted this marriage of originalism with the memory of a colorblind Constitution,⁴⁴ and when Chief Justice Roberts, who had been one of those lawyers, rose to the Court, he began to articulate it more explicitly than ever before.

For example, in *Parents Involved in Community Schools v. Seattle School District No. 1*,⁴⁵ Chief Justice Roberts elaborated on the new memory of *Brown* to retrofit it to the conservative vision of a timeless colorblind Constitution.⁴⁶ In some ways, *Parents Involved* was the culmination of several decades of the conservative legal movement’s reckoning with *Brown*. As Professor Mark Tushnet wrote, “[w]hat mattered in the Justices’ rhetoric in *Parents Involved* was not the Fourteenth Amendment but the positions taken by the litigants who prevailed in *Brown*.”⁴⁷ And in positioning the debate thus, “Chief Justice Roberts may have successfully seized *Brown v. Board of Education* for the anti-integrationist side in the struggle for *Brown*’s legacy.”⁴⁸ In a part of his opinion joined by three colleagues, Chief Justice Roberts describes the “debate” over “which side is more faithful to the heritage of *Brown*.”⁴⁹ Justice Stevens’s dissent also repeatedly invokes *Brown*, calling an earlier decision blessing the use of race to integrate schools “more faithful to *Brown*” than the majority’s decision.⁵⁰ Justice Stevens further counters Chief Justice Roberts’s memory-

⁴⁰ *Id.* at 14-15.

⁴¹ TerBeek, *supra* note 13, at 832.

⁴² Brad Snyder, *How the Conservatives Canonized Brown v. Board of Education*, 52 RUTGERS L. REV. 383, 414 (2000).

⁴³ *Id.*

⁴⁴ See Sophia Z. Lee, *A Revolution at War with Itself? Preserving Employment Preferences from Weber to Ricci*, 123 YALE L.J. 1964, 2986-87 (2014) (discussing Reagan Administration effort to end affirmative action in federal hiring).

⁴⁵ 551 U.S. 701 (2007).

⁴⁶ See *id.* at 746-48.

⁴⁷ Mark Tushnet, *Parents Involved and the Struggle for Historical Memory*, 91 IND. L.J. 493, 494 (2016).

⁴⁸ *Id.* at 493 (footnote omitted).

⁴⁹ *Parents Involved*, 551 U.S. at 747.

⁵⁰ *Id.* at 803 (Stevens, J., dissenting).

making by concluding that “no Member of the Court [Justice Stevens] joined in 1975 would have agreed with today’s decision.”⁵¹ Tushnet points out that “[a]mong those members were Justice William Rehnquist and Justice Lewis Powell, neither of whom was in the forefront of the fight to achieve integrated public schools.”⁵² In fact, Justice Rehnquist had to forswear his own history of opposition to *Brown* to be confirmed to the Court.⁵³

Justice Breyer’s primary dissent in *Parents Involved*, meanwhile, invoked the history of race discrimination to contextualize *Brown* with more accuracy than we often see in Supreme Court opinions. Joined by Justices Stevens, Souter, and Ginsburg, Justice Breyer identified the segregation at issue in *Brown* as “a caste system rooted in the institutions of slavery and 80 years of legalized subordination”⁵⁴ and saw it as a “‘a cruel distortion of history . . . to equate the plight’ of African Americans forced to attend segregated schools and whites ‘forced’ to attend integrated ones.”⁵⁵

The use of *Brown* in *Parents Involved* by all the Justices demonstrates two aspects of constitutional memory-making. First, as Tushnet explained, *Parents Involved* establishes *Brown* as “what we might call a fixed point in contemporary constitutional thought. No version of constitutional law or theory is acceptable if it casts doubt on *Brown*’s correctness.”⁵⁶ Second, it shows the way actual individual memories give way to those inherited by the next generation. In bolstering his opinion’s faithfulness to *Brown*, the Chief Justice referenced the oral argument in *Brown* made by Robert Carter.⁵⁷ However, why not invoke Thurgood Marshall’s argument in the companion case to *Brown*? As Tushnet points out:

[T]he Chief Justice could readily have extracted quotations from Marshall’s oral presentation in *Briggs* to the same effect as Carter’s. . . . [However,] four members of the Court in 2007 had served with Justice Marshall, and one, Justice Anthony Kennedy, provided the fifth vote to overturn Seattle’s program [Marshall] had written enough opinions dealing with the related issue of voluntary affirmative action programs to make it clear that he would have found Seattle’s program constitutionally permissible (and, in his more expansive moments, perhaps even constitutionally required). Claiming Marshall’s authority for the

⁵¹ *Id.*

⁵² Tushnet, *supra* note 47, at 495.

⁵³ See Brad Snyder & John Q. Barrett, *Rehnquist’s Missing Letter: A Former Law Clerk’s 1955 Thoughts on Justice Jackson and Brown*, 53 B.C. L. REV. 631, 632-35 (2012) (recounting efforts by Justice Rehnquist during nomination hearings to distance himself from memo he wrote as law clerk stating “I think that *Plessy v. Ferguson* was right and should be reaffirmed”).

⁵⁴ *Parents Involved*, 551 U.S. at 807 (Breyer, J., dissenting).

⁵⁵ Tushnet, *supra* note 47, at 495 (quoting *Parents Involved*, 551 U.S. at 807 (Breyer, J., dissenting)).

⁵⁶ *Id.* at 500.

⁵⁷ See *Parents Involved*, 551 U.S. at 747.

result in *Parents Involved*, even if it could have been done with the same kind of evidence from the Briggs oral argument that the Chief Justice used from *Brown*, would have been an insult to Marshall's memory in a way that using Carter's words was not quite insulting to Marshall.⁵⁸

Claiming *Brown* for an imagined timeless colorblind Constitution is consistent with a broader historical teleology promoted by Reagan-era conservatives. By the end of the Reagan Administration, legal conservatives had consolidated a new memory of the Second Reconstruction that provided the justification for aggressive reversals of civil rights policy against all race-conscious efforts to remedy racial injustice.⁵⁹ In the historical arc legal conservatives described, the period from 1954 to 1964 was the pinnacle of colorblindness in U.S. constitutional history, and it has been downhill ever since.⁶⁰

For example, Clint Bolick, a former assistant to Justice Thomas at the Equal Employment Opportunity Commission ("EEOC") and then a prominent conservative litigator, described this historical arc. To Bolick, "[s]lavery was a stark anomaly in the midst of the American conception of civil rights," and the Civil Rights Act of 1964 was "the apex of the golden decade in the quest for civil rights." At that apex, "[e]qual opportunity had triumphed," but unfortunately the apex was immediately followed by "crises" in which the "quest [was] abandoned."⁶¹ Bolick portrayed the Constitution as containing continuous principles of colorblind equality with unfortunate deviations at two historical points: slavery in the pre-Civil War era, and then affirmative action after 1964.⁶² He wrote that "the great triumphs in the quest for civil rights—the abolition of slavery, the constitutional guarantee of equal protection, the repudiation of Jim Crow—all were informed by [the Constitution's colorblind, classically liberal] vision."⁶³ In this constitutional memory, colorblindness was a continuous principle of the Constitution from 1787 forward, but it was abandoned at those two moments. *Brown* and the 1964 Act had restored the Constitution; affirmative action threatened that restoration.⁶⁴

This is exactly the teleology that Roberts draws upon in *Students for Fair Admissions*. With hardly a mention of slavery or Jim Crow, which he characterizes as the "regrettable norm" of "state-mandated segregation,"⁶⁵ Chief

⁵⁸ Tushnet, *supra* note 47, at 501.

⁵⁹ See, e.g., BOLICK, *supra* note 12, at 13.

⁶⁰ See *id.* at 49.

⁶¹ *Id.* at 13, 49.

⁶² See Ariela Gross, *When Is the Time of Slavery? The History of Slavery in Contemporary Legal and Political Argument*, 96 CALIF. L. REV. 283, 293-94 (2008) [hereinafter Gross, *When Is the Time of Slavery?*].

⁶³ CLINT BOLICK, *THE AFFIRMATIVE ACTION FRAUD: CAN WE RESTORE THE AMERICAN CIVIL RIGHTS VISION?* 38 (1996).

⁶⁴ See Gross, *When Is the Time of Slavery*, *supra* note 62, at 295.

⁶⁵ *Students for Fair Admissions v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141, 2159 (2023).

Justice Roberts skips from the Fourteenth Amendment right over *United States v. Cruikshank*⁶⁶ and other Reconstruction-era cases that implicate the violence of Jim Crow. Instead, he mentions only *Strauder v. West Virginia*,⁶⁷ the 1880 case striking down a law excluding Black people from jury service, as an example of “this Court embrac[ing] the transcendent aims of the Equal Protection Clause,”⁶⁸ and then jumps to *Plessy v. Ferguson*,⁶⁹ and then *Brown*.⁷⁰ As Chang and Lovelace chronicle, minimizing the harms of Jim Crow to mere separation makes it easier to characterize the overriding principle of *Brown* as removing all racial classifications, rather than the need to root out white supremacy from every aspect of American life.⁷¹

II. CHANG AND LOVELACE’S ALTERNATIVE CIVIL RIGHTS HISTORY

Understanding the conservative teleology in which affirmative action is a parallel harm to enslavement and Jim Crow makes clear the significance of Chang and Lovelace’s intervention in their article. How does it change our constitutional memory of civil rights if we understand “colorblindness” as simply one rhetorical tool of activists and policymakers who were committed to fighting subordination by every means necessary, including race-conscious affirmative action?

Chang and Lovelace show the wide acceptance of the positive notion that a variety of remedial tools and policies would be needed to redress the broad racial inequality Black Americans faced in the 1960s.⁷² If anything, critiques of the early affirmative action policies of the Kennedy and Johnson Administrations came from the political left for not going far enough and relying too much on voluntary agreements.⁷³ By the time of President Lyndon Johnson’s famous speech at Howard University, affirmative action programs were already well underway.⁷⁴

The evidence Chang and Lovelace present makes clear that both activists and policymakers conceived of affirmative action as an important tool in the effort to dismantle Jim Crow, and that neither *Brown* nor the legislative or administrative civil rights initiatives that followed were based on the colorblind Constitution conservatives remember.

Yet some constitutional scholars have suggested that legal historians should not join the battle for historical memory with the misbegotten conservatives of

⁶⁶ 92 U.S. 542 (1875) (holding statute criminalizing deprivations of constitutional rights by private actors unconstitutionally vague).

⁶⁷ 101 U.S. 303, 307-09 (1880).

⁶⁸ *Students for Fair Admissions*, 143 S. Ct. at 2159.

⁶⁹ 163 U.S. 537, 544 (1896).

⁷⁰ See *Students for Fair Admissions*, 143 S. Ct. at 2159-60.

⁷¹ Chang & Lovelace, *supra* note 1, at 742-45.

⁷² *Id.* at 747.

⁷³ *Id.* at 762.

⁷⁴ *Id.* at 763.

today's Supreme Court. Professor Samuel Moyn suggests that neither legal arguments nor historical ones actually govern the outcomes in cases like *SFFA*—it's politics all the way down.⁷⁵ Are scholars like Chang and Lovelace who write better civil rights histories to better situate affirmative action in our memory of the Constitution pursuing a fool's errand? I think not, and I think their brilliant piece shows exactly why.

CONCLUSION

Because politics is a fight over memory as much as it is a fight over principle, we cannot cede the field to the legal conservatives. That doesn't mean we need to engage in "liberal originalism," or any other type of originalism. But we can tell better histories—histories that capture the full range of constitutional actors beyond the courts and those actors' constitutional visions—and use them to show how wrong the memory of a colorblind Constitution really is, on multiple levels. Those histories also inspire us, and remind us that the Court has traveled very, very far to the right—so that the authors of the "Southern Strategy" look like racial liberals today when it comes to affirmative action.

Conservatives at this very moment are using *SFFA* to attack far more than just affirmative action programs. They are coming for what they call "DEI"—but what we might more accurately call "civil rights"—in higher education, in the military, in law firms and corporations. When progressives stand up for racial justice, we need all our tools, including better histories. Chang and Lovelace have given us one weapon in that fight.

⁷⁵ See Pranjali Drall & Samuel Moyn, *Birthright Citizenship and the Politics of Constitutional Law (Part I)*, BALKINIZATION (Mar. 24, 2026, at 12:30 ET), <https://balkin.blogspot.com/2026/03/birthright-citizenship-and-politics-of.html> [<https://perma.cc/P89U-GP> CD].