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**DOUGLASS, LINCOLN, AND DOUGLAS BEFORE *DRED SCOTT*:
A FEW THOUGHTS ON FREEDOM, EQUALITY, AND
AFFIRMATIVE ACTION**

HENRY L. CHAMBERS, JR.*

In 1854, Senator Stephen Douglas, Abraham Lincoln, and Frederick Douglass delivered speeches about the newly passed Kansas-Nebraska Act.¹ That law opened the Kansas and Nebraska Territories to slavery by extending popular sovereignty, the practice of letting territorial majorities decide whether to allow slavery in a territory, to them.² Given before *Dred Scott v. Sandford*,³ the infamous case in which the Supreme Court ruled that Black Americans—whether freeborn, freed, or enslaved—could not be citizens of the United States absent congressional action or constitutional amendment, the speeches are worth revisiting.⁴ They focus on whether or how slavery should be limited, reflecting three different visions regarding slavery, freedom, equality, and the rights Black Americans might or might not enjoy if slavery were abolished.⁵ They are surprisingly relevant to the Supreme Court’s recent affirmative action decision.⁶

The view expressed by Stephen Douglas and Abraham Lincoln of a Constitution (and an America) that tolerated slavery and would allow a

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1. Kansas-Nebraska Act, ch. 59, 10 Stat. 277 (1854). This Lincoln-Douglas clash presaged the famous 1858 debates in which the two men vied for a U.S. Senate seat from Illinois. Those debates arguably made Abraham Lincoln famous and helped propel him to the Presidency over Stephen Douglas in the 1860 election.

2. For a discussion of the Kansas-Nebraska Act and *Dred Scott*, see Louise Weinberg, *Overcoming Dred: A Counterfactual Analysis*, 24 CONST. COMMENT. 733, 736–37 (2007).

3. 60 U.S. (19 How.) 393 (1857).

4. For a discussion of the effect of treating free Blacks as not fully protected in the constitutional order, see Henry L. Chambers, Jr., *Slavery, Free Blacks and Citizenship*, 43 RUTGERS L.J. 487 (2013).

5. The antebellum constitutional order was complicated. For example, Professor Mark Graber argues that *Dred Scott* was a constitutional evil but may have been correctly decided. MARK A. GRABER, *DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL 1* (2006) (“My claim that the result in *Dred Scott v. Sandford* **may** have been constitutionally correct – and that Stephen Douglas understood the antebellum constitutional order better than Abraham Lincoln – is likely to startle, puzzle, and probably offend readers reared on a steady diet of constitutional advocacy.”) (footnote omitted).

6. *Students for Fair Admissions, Inc. (“SFFA”) v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141 (2023)

limited vision of rights for free Black Americans won over Frederick Douglass's vision of a Constitution that fundamentally rejected slavery and requires full equality for all.⁷ The result, even in the wake of the Reconstruction Amendments' guarantee of freedom and citizenship for Black Americans,⁸ was a society in which race mattered and in which a person's life experiences would often depend significantly on the person's race or color. The Reconstruction Amendments guaranteed freedom, but not full equality.⁹ That led to differing levels of inequality for citizens based in part on race. That past has resulted in the continued salience of race in American society, which is relevant to how the Supreme Court analyzes today's race-inflected issues, such as affirmative action in university admissions.¹⁰

This Essay briefly explores how the discussions of slavery, race, and equality in the Douglas, Lincoln, and Douglass 1854 speeches can help illuminate current discussions of affirmative action. The Essay considers how each 1854 speech addresses freedom and equality. It then considers how the speeches reflect each orator's vision of the 1854 constitutional order and may help explain why race remains salient in American society. Last, it notes how the continued salience of race relates to life experiences Black and multiracial people often have, an issue especially important in how the Supreme Court recently addressed affirmative action in university admissions.

I. SPEECHES ON THE KANSAS NEBRASKA ACT

The 1854 Kansas-Nebraska Act triggered a national discussion on slavery.¹¹ Slavery had been allowed in all thirteen states when the Declaration of Independence was signed, and its status was far from settled in mid-nineteenth century America.¹² In 1787, before the Constitution was ratified, the Confederation Congress passed the Northwest Ordinance, which barred

7. See WALDO E. MARTIN, JR., *THE MIND OF FREDERICK DOUGLASS* 95–96 (1984) (discussing Frederick Douglass's views on race, color, and discrimination).

8. See U.S. CONST. amend. XIII (abolishing slavery); *id.* amend. XIV (providing birthright citizenship to those, like enslaved people, born in the United States); *id.* amend. XV (limiting the denial of the right to vote based on race).

9. See LAURA F. EDWARDS, *A LEGAL HISTORY OF THE CIVIL WAR AND RECONSTRUCTION: A NATION OF RIGHTS* 175 (2015) (noting the nation was governed in the nineteenth century through a web of public and private entities, some not subject to constitutional regulation). For a fascinating discussion of how the Fourteenth Amendment's Privileges and Immunities Clause can be read in various ways to help or not help to provide substantive equality to citizens, see CHRISTOPHER R. GREEN, *EQUAL CITIZENSHIP, CIVIL RIGHTS, AND THE CONSTITUTION: THE ORIGINAL SENSE OF THE PRIVILEGES OR IMMUNITIES CLAUSE* 5–6 (2015).

10. See *SFFA*, 143 S. Ct. at 2141; *infra* Part III.

11. Kansas-Nebraska Act, ch. 59, 10 Stat. 277 (1854).

12. Paul Finkelman, *The Constitution and the Intentions of the Framers: The Limits of Historical Analysis*, 50 U. PITT. L. REV. 349, 374 (1989).

slavery from the Northwest Territory.¹³ Congress enacted the Missouri Compromise in 1820, which limited slavery in new states to those formed from territory south of the 36° 30' parallel.¹⁴ In the wake of disputes regarding slavery's spread, Congress adopted the Compromise of 1850, a set of statutes which included the doctrine of popular sovereignty, which allowed territories organized north of the Missouri Compromise line to decide whether to allow slavery by popular vote.¹⁵ The Kansas-Nebraska Act became law on May 30, 1854, providing popular sovereignty for the Kansas and Nebraska territories and thereby potentially allowing slavery on additional land that had been previously closed to human bondage.¹⁶ Three of America's finest speakers had their say on the law and the Constitution that spawned it.

A. The 1854 Lincoln-Douglas Debates Regarding the Kansas-Nebraska Act

During the summer and fall of 1854, Sen. Stephen Douglas and Abraham Lincoln, both of Illinois, debated the Kansas-Nebraska Act. The two orators spoke on multiple occasions, but their speeches—other than Lincoln's famous Peoria address—are largely cobbled together from incomplete contemporaneous accounts.¹⁷ Douglas's speech referenced below was given at the Illinois State Fair in Springfield on October 3, 1854, and has been reconstructed from newspaper accounts.¹⁸ Lincoln's speech referenced below, which he subsequently published, was delivered in Peoria, Illinois, on October 16, 1854.¹⁹

13. The Northwest Territory was substantial, encompassing Ohio, Indiana, Illinois, Michigan, and Wisconsin. See Juan F. Perea, *Denying the Violence: The Missing Constitutional Law of Conquest*, 24 U. PA. J. CONST. L. 1205, 1241 (2022).

14. The Missouri Compromise, ch. 22, 3 Stat. 545 (1820).

15. The Compromise of 1850 was a set of five statutes: Act to Define the Boundary of Texas, ch. 47, 9 Stat. 446; Act for the Admission of the State of California into the Union, ch. 50, 9 Stat. 452; Act to Establish a Territorial Government for Utah, ch. 51, 9 Stat. 453; Fugitive Slave Act of 1850, ch. 55, 9 Stat. 462; Act to Suppress the Slave Trade in the District of Columbia, ch. 62, 9 Stat. 467.

16. Kansas-Nebraska Act, ch. 59, 10 Stat. 277 (1854).

17. For a discussion of the multiple debates and the difficulty in reconstructing them, see Graham A. Peck, *New Records of the Lincoln-Douglas Debate at the 1854 Illinois State Fair: The Missouri Republican and the Missouri Democrat Report from Springfield*, 30 J. ABRAHAM LINCOLN ASS'N 25, 25–26 (2009).

18. See *id.* at 27.

19. See *id.* at 25.

*1. Sen. Stephen Douglas's Speech*²⁰

Sen. Stephen Douglas defended the Kansas-Nebraska Act as necessary to open areas of the western United States to increased trade.²¹ Doing so, he argued, required settling the Nebraska Territory, which had been divided into the Kansas Territory and the Nebraska Territory.²² Organizing the territories would allow the construction of railroads that would make trade viable.²³ He claimed reigniting the slavery debate was not the point of the Act,²⁴ asserting the law merely confirmed popular sovereignty in the territories as the new understanding regarding slavery consistent with the Compromise of 1850.²⁵

Douglas suggested slavery could be adopted or rejected by the people of the subject territories.²⁶ He argued that whether slavery should be tolerated in a territory should be left to the people of the territory—not Congress.²⁷ For Douglas, the ability to choose was the key, not the moral valence of the choice. Allowing the people to make an evil choice might be necessary: “Our Creator gave us good and evil to choose, and as we choose so must we abide the result. Thus in the Nebraska bill we neither legislate slavery in nor out, but let the people decide for themselves.”²⁸ For Douglas, slavery was a part of the constitutional order that could be used as a bargaining chip to keep the Union together. The rights of slaves and the rights of free Black Americans appeared subject to negotiation, diminution, or augmentation depending on circumstances. Indeed, Douglas’s insensitivity to the rights of Black people was evident as he deemed support for a limitation on the spread of slavery to be proof of overly solicitous support for Black people in general.²⁹

20. The excerpts from Douglas’s speech are from newspaper reports of the speech. *See id.*

21. Stephen Douglas, Speech at Illinois State Agricultural Fair (Oct. 3, 1854), in *MO. REPUBLICAN*, Oct. 6, 1854, reprinted in Peck, *supra* note 17, at 45.

22. *See* Kansas-Nebraska Act, ch. 59, 10 Stat. 277 (1854).

23. Douglas, *supra* note 21, at 49.

24. *See* DANIEL FARBER, *LINCOLN’S CONSTITUTION* 9 (2003) (“Douglas unwittingly reignited the issue of slavery in the territories with his Kansas-Nebraska Act. Douglas was eager to organize these territories in order to pave the way for settlement and a transcontinental railroad.”).

25. Douglas, *supra* note 21, at 52. For a discussion regarding popular sovereignty and compromise, see Weinberg, *supra* note 2, at 765.

26. Douglas, *supra* note 21, at 52.

27. *Id.* at 53.

28. *Id.* at 54.

29. Douglas explicitly linked Black people with the Republican Party: “Now see what they advocate—read their platform! A *negro* appears in every clause! [Great applause.] Therefore I call them the Black Republican Party. [Continued applause.]” *Id.* at 53 (alterations in original).

2. Abraham Lincoln's Speech

Abraham Lincoln's Peoria Speech focused on his desire to limit the expansion of slavery, not its abolition.³⁰ He argued that allowing people to choose whether to accept slavery would encourage its expansion, suggesting backsliding on the country's commitment to limiting slavery to where it was already practiced.³¹ Though Lincoln intended to avoid the broad issue of slavery in his speech, he commented on his hatred of the practice.³² Even as he noted slavery could be used to negotiate to save the Union,³³ he recognized American ideals were inconsistent with slavery.³⁴ The speech was powerful for the time but recognized that freedom and equality were not the same. Though he would have preferred that slavery not exist, he noted he did not know what he would do with the institution of slavery if he had the power to abolish it.³⁵ Some of Lincoln's difficulty in resolving the issue may have rested with his recognition that slaves possessed humanity,³⁶ which he argued Sen. Douglas denied.³⁷ Humanity suggests fair treatment, though Lincoln hastened to add that recognizing the humanity of enslaved people does not suggest they deserve equality.³⁸ It merely suggests limiting the expansion of the inhumanity.³⁹

30. Abraham Lincoln, Speech on the Kansas-Nebraska Act at Peoria, Illinois (Oct. 16, 1854), in *LINCOLN: SPEECHES AND WRITINGS 1832–1858*, at 307, 308 (Don E. Fehrenbacher ed., 1989) (“I wish to MAKE and to KEEP the distinction between the EXISTING institution, and the EXTENSION of it, so broad, and so clear, that no honest man can misunderstand me, and no dishonest one, successfully misrepresent me.”).

31. *Id.* at 308–09.

32. *Id.* at 315 (noting “the monstrous injustice of slavery itself”).

33. *Id.* at 333 (“Much as I hate slavery, I would consent to the extension of it rather than see the Union dissolved, just as I would consent to any GREAT evil, to avoid a GREATER one. But when I go to Union saving, I must believe, at least, that the means I employ has some adaptation to the end. To my mind, Nebraska has no such adaptation.”).

34. *Id.* at 328 (“What I do say is, that no man is good enough to govern another man, *without that other's consent*. I say this is the leading principle—the sheet anchor of American republicanism.”).

35. *Id.* at 316 (“If all earthly power were given me, I should not know what to do, as to the existing institution.”).

36. *Id.* at 326 (“[A]fter all, there is humanity in the negro.”).

37. *Id.* at 346 (“But in this remark of the Judge, there is a significance, which I think is the key to the great mistake (if there is any such mistake) which he has made in this Nebraska measure. It shows that the Judge has no very vivid impression that the negro is a human; and consequently has no idea that there can be any moral question in legislating about him.”).

38. *Id.* at 329 (“Let it not be said I am contending for the establishment of political and social equality between the whites and blacks. I have already said the contrary.”).

39. *Id.* (“I am combating what is set up as MORAL argument for allowing them to be taken where they have never yet been—arguing against the EXTENSION of a bad thing, which where it already exists, we must of necessity, manage as we best can.”).

In addition, Lincoln confessed he did not know what he would do with freedmen if slavery were abolished.⁴⁰ His preference was for freedom, then the export of freedmen to Liberia.⁴¹ However, he realized this desire was unrealistic due both to its expense⁴² and its cruelty.⁴³ His musings largely ignored free Blacks in antebellum America.⁴⁴ He recognized their existence,⁴⁵ though he missed nuance in suggesting free Blacks had all been descended from slaves or had been slaves freed by their masters.⁴⁶ His approach also did not fully consider, or simply ignored, the strong ties freeborn Black people and formerly enslaved free Blacks (like Frederick Douglass) may have had with America and with non-Black family members.⁴⁷

40. Of course, Lincoln recognized the existence of free Blacks, *see id.* at 326–27, but he did not link their treatment to the treatment of slaves potentially freed as a result of abolition.

41. *Id.* at 316 (“My first impulse would be to free all the slaves, and send them to Liberia,—to their own native land.”).

42. *See* DAVID HERBERT DONALD, LINCOLN 166–67 (1995) (“The [colonization] plan was entirely rational—and wholly impracticable. American blacks, nearly all of whom were born and raised in the United States, had not the slightest desire to go to Africa; Southern planters had no intention of freeing their slaves; and there was no possibility that the Northern states would pay the enormous amount of money required to deport and resettle millions of African-Americans.”).

43. Lincoln, *supra* note 30, at 316 (“But a moment’s reflection would convince me, that whatever of high hope, (as I think there is) there may be in this, in the long run, its sudden execution is impossible. If they were all landed there in a day, they would all perish in the next ten days; and there are not surplus shipping and surplus money enough in the world to carry them there in many times ten days.”).

44. Issues of freedom were complex. One could consider the status of Frederick Douglass’s children at their birth given that they were born to a runaway slave father and a free Black mother. *See* Benjamin Quarles, *Introduction* to FREDERICK DOUGLASS 1, 3 (Benjamin Quarles ed., 1968) (noting Douglass’s 1838 marriage to first wife, Anna, a free Black woman from Maryland).

45. Lincoln, *supra* note 30, at 326–27 (“And yet again; there are in the United States and territories, including the District of Columbia, 433,643 free blacks. . . . All these free blacks are the descendants of slaves, or have been slaves themselves, and they would be slaves now, but for SOMETHING which has operated on their white owners, inducing them, at vast pecuniary sacrifices, to liberate them.”).

46. The existence of Black indentured servants prior to the racialization of slavery makes the issue tricky. *See* Paul Finkelman, *The Crime of Color*, 67 TUL. L. REV. 2063, 2081 (1993); Kaimipono David Wenger, *Slavery as a Takings Clause Violation*, 53 AM. U. L. REV. 191, 215 n.98 (2003). In addition, freeborn Black people existed. Indeed, the seminal case *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842), involved, in part, a freeborn Black person. *See* Karla Mari McKanders, *Immigration Enforcement and the Fugitive Slave Acts: Exploring Their Similarities*, 61 CATH. U. L. REV. 921, 929 (2012). In the case of mixed-race children born of one enslaved parent and a free White parent, the child could just as easily have been deemed to have been descended from free people as from enslaved people.

47. For an in-depth discussion of aspects of parentage and mixed-race children in the antebellum period, *see* Mitchell F. Crusto, *Blackness as Property: Sex, Race, Status, and Wealth*, 1 STAN. J. C.R. & C.L. 51 (2005).

Voluntary colonization might have seemed reasonable to Lincoln, but it could trigger substantial dislocation for those who chose it.⁴⁸ Lincoln's colonization suggestion may have stemmed from a belief that free Blacks and Whites could not live together peaceably.⁴⁹ That may have been understandable if White supremacy was assumed and free Blacks were entitled to few, if any, rights. In such a regime, a "voluntary" choice to leave America may not have been much of a choice if the choice was triggered by America's refusal to accept free Black people as full persons worthy of equality.⁵⁰

Lincoln expressed ambivalence regarding whether freeing slaves and treating them as underlings would be better for the slaves than bondage, though it is difficult to take such ambivalence seriously.⁵¹ The possibility of a lesser status suggests multiple levels of personhood or citizenship based on officially-sanctioned differential treatment of free Blacks and Whites.⁵² Nonetheless, Lincoln appeared to endorse only a narrow and limited set of rights for potentially freed slaves.⁵³ He was clear that full equality was not his personal desire, rejecting the possibility that free Blacks could be the political and social equals of Whites, notwithstanding accomplished free Black Americans such as Frederick Douglass.⁵⁴ Ultimately, he conceded in the speech that he had no solutions regarding issues of race and equality.

48. See DONALD, *supra* note 42, at 166 (noting Lincoln favored voluntary colonization rather than involuntary colonization).

49. It may have been that Lincoln did not see Blacks and Whites living together very much. See *id.* at 167 ("His failure to take into account the overwhelming opposition of blacks to colonization stemmed from his lack of acquaintance among African-Americans. Of nearly 5,000 inhabitants of Springfield in 1850, only 171 were blacks . . ."). However, Lincoln had some acquaintance with Black people. See *id.* at 167 (noting that Lincoln employed a Black laundress and advised a Black man on various small legal matters).

50. There was little desire to leave. See Quarles, *supra* note 44, at 4 ("Negroes had vigorously opposed the colonization since the founding of the American Colonization Society in 1816.").

51. Lincoln, *supra* note 29, at 316 ("Free them all, and keep them among us as underlings? Is it quite certain that this betters their condition? I think I would not hold one in slavery, at any rate; yet the point is not clear enough for me to denounce people upon.").

52. For a discussion of multiple levels of citizenship and personhood, see Henry L. Chambers, Jr., Dred Scott: *Tiered Citizenship and Tiered Personhood*, 82 CHI.-KENT L. REV. 209 (2007).

53. See FARBER, *supra* note 24, at 11 ("In his [1858] debates with Douglas, Lincoln made his moral condemnation of slavery clear. He did not contend for complete social or even legal equality for blacks. Nevertheless, he held that blacks were 'entitled to all the natural rights enumerated in the Declaration of Independence, the right to life, liberty, and the pursuit of happiness.'" (quoting First Debate with Stephen A. Douglass at Ottawa, Illinois (Aug. 27, 1858), in 3 COLLECTED WORKS OF ABRAHAM LINCOLN 1, 16 (Roy P. Basler ed., 1953))).

54. Lincoln, *supra* note 30, at 316 ("Free them, and make them politically and socially, our equals? My own feelings will not admit of this; and if mine would, we well know that those of the great mass of white people will not.").

B. Frederick Douglass, "Slavery, Freedom, and the Kansas-Nebraska Act," Chicago, Ill., October 30, 1854

Frederick Douglass was born a slave in Talbot County, Maryland, in 1818, the son of an enslaved Black woman and a White man.⁵⁵ After escaping from slavery in 1838,⁵⁶ Douglass was emancipated in 1846 with the purchase of his freedom.⁵⁷ He became one of the most renowned speakers of his time.⁵⁸ Douglass delivered his speech on the Kansas-Nebraska Act two weeks after Stephen Douglas and Lincoln spoke in Peoria. He explicitly responded to Douglas's arguments but claimed not to intend to insult Douglas or question his character.⁵⁹

Douglass deemed slavery antithetical to the natural rights principles embedded in the Declaration of Independence and the Constitution, the two foundational documents of American liberty.⁶⁰ Douglass argued the documents do not provide for insiders and outsiders among Americans.⁶¹ The Constitution's only distinction between people was among citizens and aliens.⁶² It created a single class of citizens, all of whom were owed equal rights.⁶³ Douglass argued neither race nor color were a bar to state or federal citizenship:

55. DAVID W. BLIGHT, *FREDERICK DOUGLASS: PROPHET OF FREEDOM*, at xiv (2018); MARTIN, *supra* note 7, at 3 (noting Douglass's father was likely his master).

56. BLIGHT, *supra* note 55, at 82–83, 171–72; MARTIN, *supra* note 7, at 14.

57. BLIGHT, *supra* note 55, at 171–72; Quarles, *supra* note 44, at 7 (noting friends in Great Britain purchased Douglass's freedom in 1846–47).

58. BLIGHT, *supra* note 55, at xiv.

59. See Frederick Douglass, *The Kansas-Nebraska Bill, Speech at Chicago (Oct. 30, 1854)*, in *FREDERICK DOUGLASS: SELECTED SPEECHES AND WRITINGS* 298, 300, 305–06 (Philip S. Foner & Yuval Taylor eds., 1999).

60. See MARTIN, *supra* note 7, at x (“The dilemma confronting Afro-American thinkers, like Douglass, was how to square America’s rhetoric of freedom, equality, and justice with the reality of slavery, inequality, and injustice.”).

61. Douglass, *supra* note 59, at 309 (“The only intelligible principle on which popular sovereignty is founded, is found in the Declaration of American Independence The right of each man to life, liberty and the pursuit of happiness, is the basis of all social and political right, and, therefore, how brass-fronted and shameless is that impudence, which while it aims to rob men of their liberty, and to deprive them of the right to the pursuit of happiness—screams itself hoarse to the words of popular sovereignty.”); *id.* at 299 (arguing all non-aliens are citizens under the Constitution). Douglass had not always read the Constitution as an inclusive freedom document. See BLIGHT, *supra* note 55, at 214–17 (discussing Douglass’s evolution regarding his interpretation of the Constitution).

62. Douglass, *supra* note 59, at 299 (“I claim to be an American citizen. The constitution knows but two classes: Firstly, citizens, and secondly, aliens. I am not an alien; and I am, therefore, a citizen. I am moreover a free citizen. Free, thank God, not only by the law of the State in which I was born and brought up but free by the laws of nature.”).

63. *Id.* at 298 (“I have a right to be here and a duty to perform here. That right is a constitutional right, as well as a natural right. It belongs to every citizen of the United States. It belongs not less to the humblest than to the most exalted citizens. The genius of American institutions knows no privileged class or classes.”).

The only question of right connected with my case here respects my citizenship. If I am a citizen, I am clothed all over with the star spangled banner and defended by the American Constitution, in every State of the American Union. That constitution knows no man by the color of his skin.⁶⁴

He suggested his New York citizenship made him a United States citizen,⁶⁵ entitling him to free passage throughout the country.⁶⁶ Though he argued the Declaration of Independence and the Constitution provided equality for all citizens, he understood reality did not always match the theory.⁶⁷

Douglass echoed Lincoln's suggestion that slaves retained humanity, even if they were treated as property under the law.⁶⁸ He was not as sanguine as either Douglas or Lincoln that slavery—in the absence of its abolition—could be managed by limiting it to parts of the Union or by allowing local majorities to decide whether to allow it.⁶⁹ He saw no reason to allow local populations to decide whether to allow slavery. Given that the Kansas and Nebraska Territories were subject to the federal government in all other ways, the people of those territories only had the power the federal government gave them.⁷⁰ Popular sovereignty reflected the federal government's improper willingness to let local majorities adopt slavery. It was not a recognition that local communities had any natural or preexisting right to decide whether to adopt slavery. The power to allow slavery should not be

64. *Id.* at 299.

65. *Id.* (“In the State of New York where I live, I am a citizen and a legal voter, and may therefore be presumed to be a citizen of the United States. I am here simply as an American citizen, having a stake in the weal or woe of the nation, in common with other citizens.”).

66. *Id.* at 298–99 (“I have a right to come into this State to prosecute any lawful business in a lawful manner. This is a natural right, and is a part of the supreme law of the land. By that law the citizens of each state are the citizens of the United States, with rights alike and equal in all the States.”).

67. *Id.* at 298 (“Every inch of ground occupied by the colored man in this country is sternly disputed. At the ballot box and at the altar—in the church and in the State—he is deemed an intruder. He is, in fact, seldom a welcome visitor anywhere.”).

68. *Id.* at 300 (“They have nothing to commend them but their unadorned humanity. They are human—that’s all—only human. Nature owns them as human—God owns them as human; but men own them as property!”); MARTIN, *supra* note 7, at ix (“The guiding assumption unifying Douglass’s thought was an inveterate belief in a universal and egalitarian brand of humanism.”).

69. Douglass, *supra* note 59, at 301 (“It is, I think, pretty well settled, that liberty and slavery cannot dwell in the United States in peaceful relations; the history of the last five and twenty years settles that.”).

70. *Id.* at 309 (“I repeat, that the only seeming concession to the idea of popular sovereignty in this bill is authority to enslave men, and to concede that right or authority is a hell black denial of popular sovereignty itself.”).

given to local majorities because slavery, Douglass noted, was immoral and inconsistent with American principles.⁷¹

II. THE ORATORS' VISION OF FREEDOM IN THE 1854 CONSTITUTIONAL ORDER AND BEYOND

Freedom and equality were contested territory in the 1854 constitutional order. Frederick Douglass rejected any differential treatment of people based on race.⁷² The Constitution, buttressed by the Declaration of Independence, creates a single class of free citizens, with no distinction among free people, he claimed.⁷³ Had Douglass's constitutional vision won in the decades after the Civil War, over time, race might have become a far less salient factor in American life.⁷⁴ Eventually, race might have become a near-irrelevant factor in a truly equal society. Stephen Douglas and Abraham Lincoln were willing to accept a diminished set of rights for free Black Americans. The solutions they could envision arguably reflected an American mindset that created a postbellum America that embraced race-based differential treatment.

The vision of Stephen Douglas and Abraham Lincoln was reflected in the Reconstruction Amendments and their interpretation, though neither survived to see those amendments ratified. The Reconstruction Amendments—the Thirteenth, Fourteenth, and Fifteenth Amendments—rebuilt American democracy and American society on a more racially egalitarian basis, but not on a fully equal basis. The Thirteenth Amendment ended slavery.⁷⁵ The Fourteenth Amendment made American citizens of former slaves and other Black Americans born in the United States.⁷⁶ The Fifteenth Amendment stopped the federal government and states from limiting the right to vote based on race, color, or previous condition of

71. *Id.* at 310 (“Such a truth is man’s right to freedom.—He was born with it. It was his before he comprehended it. The title deed to it is written by the Almighty on his heart, and the record of it is in the bosom of the eternal—and never can Stephen A. Douglas efface it unless he can tear from the great heart of God this truth. And this mighty government of ours will never be at peace with God until it shall, practically and universally, embrace this great truth as the foundation of all its institutions, and the rule of its entire administration.”).

72. See Quarles, *supra* note 44, at 8 (noting Douglass’s participation in the colored convention movement and the request that Blacks not be treated as strangers in their native land).

73. See Douglass, *supra* note 59, at 298.

74. MARTIN, *supra* note 7, at 3 (“[T]he essential aim of [Douglass’s] life was to resolve the problem of race.”).

75. U.S. CONST. amend. XIII, § 1 (“Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.”).

76. U.S. CONST. amend. XIV, § 1 (“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.”).

servitude.⁷⁷ Taken together, they could have been interpreted to make the United States a bastion of freedom consistent with Frederick Douglass's vision of America.⁷⁸ Conversely, viewed through the lens of the ideas embedded in Abraham Lincoln's Peoria Speech, the Reconstruction Amendments could be interpreted to provide a narrow set of rights that would provide formal equality, but not substantive equality for free Blacks. The Thirteenth Amendment freed all slaves, but put them in the same position as free Blacks before the Civil War who did not enjoy full equality.⁷⁹ The Fourteenth Amendment provided citizenship but was interpreted to allow somewhat different treatment for different citizens with respect to rights not deemed legal or civil rights.⁸⁰ However, if citizenship did not require any more equality than could be negotiated with local majorities regarding political or social rights, different sets of rights could be provided to different sets of citizens based on race and the whims of local majorities and state legislatures.⁸¹ Consistent with Abraham Lincoln's refusal to endorse full equality between the races and Stephen Douglas's general unwillingness to guarantee rights to Black people, the provision of some legal rights under the Constitution would not ensure equality across races.

Providing an impoverished set of rights to Black Americans may not seem appropriate given the equality principles embedded in the Constitution, but may be consistent with a Constitution that had been interpreted during the antebellum era to allow territorial majorities to decide to keep Black people in bondage.⁸² Rather than provide full social equality, the Reconstruction Amendments as originally interpreted provided a limited grant of legal equality. The resulting order provided some Americans with a full complement of rights and other Americans with various lesser sets of rights yielding varying degrees of inequality. That has helped keep

77. U.S. CONST. amend. XV, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.").

78. They were not. See EDWARDS, *supra* note 9, at 176 (noting that attempts to interpret the Reconstruction Amendments broadly in the decades following Reconstruction were rejected, leading to limited protection for individual rights).

79. That was a reasonable implication of *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), which deemed free and enslaved Blacks unable to be American citizens without congressional action.

80. For a discussion of how the Supreme Court limited the interpretation of the Fourteenth Amendment's equality provisions, see Henry L. Chambers, Jr., *Colorblindness, Race Neutrality, and Voting Rights*, 51 EMORY L.J. 1397, 1405–07 (2002).

81. See GRABER, *supra* note 5, at 180 ("Throughout his political life, Lincoln maintained that local majorities in any state could vote to legalize slavery and outlaw negro citizenship.").

82. Lincoln may have been unconcerned by that. See *id.* at 180–81 ("Lincoln thought popular majorities could protect slaveholding whenever the relevant constitutional provision was unclear or unsettled.").

substantive equality for Black Americans merely a goal and helped keep race salient in American society.

III. THE CONTINUING SALIENCE OF RACE AND AFFIRMATIVE ACTION

The refusal to provide full substantive equality for Black citizens in the wake of the passage of the Reconstruction Amendments and the decades-long toleration of various levels of race-based inequality among classes of citizens assured those raced as Black would typically have a set of life experiences that differed significantly from those of people not raced as Black. That legacy continues in somewhat muted form today. Race remains a salient feature of American life with Black Americans often experiencing a different America than people of other races in similar stations in life.⁸³ How long different races will face different Americas will depend on how quickly America eliminates race-based inequality in society.

Aggressive affirmative action could have been used in the past and could be used today to help foster a semblance of substantive equality for Black Americans.⁸⁴ However, its role was never incredibly strong and continues to diminish. For example, in the context of university admissions, the Supreme Court quickly jettisoned attempts to foster substantive equality as a justification for affirmative action fewer than two decades after affirmative action was introduced.⁸⁵ The Court limited affirmative action's justification to the "diversity rationale," the proposition that a diverse student body leads to diverse classes that provide a better learning environment for all students.⁸⁶ Though race-based differences in life experiences may lead to different insights that can foster better learning for everyone in a classroom,⁸⁷

83. For a fascinating discussion of the different lives of Black and non-Black law students and graduates, see Sarah J. Schendel, *Listen!: Amplifying the Experiences of Black Law School Graduates in 2020*, 100 NEB. L. REV. 73 (2021).

84. For a discussion of the use of affirmative action to address racial disadvantage, see Angela Onwuachi-Willig, *The Admission of Legacy Blacks*, 60 VAND. L. REV. 1141, 1186–87 (2007).

85. See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 310 (1978) (rejecting remedying societal discrimination as a justification for the affirmative action plan at issue); see also Mark R. Killenbeck, *Pushing Things Up to Their First Principles: Reflections on the Values of Affirmative Action*, 87 CALIF. L. REV. 1299, 1340–41 (1999) ("Modern 'affirmative action' came into being in 1961, when President Kennedy issued Executive Order 10925, a measure that contained what one scholar justifiably described as a 'vague and almost casual reference to "affirmative action."'") (quoting HUGH DAVIS GRAHAM, *THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY 1960-1972*, at 41 (1990)).

86. See *Grutter v. Bollinger*, 539 U.S. 306 (2003) (allowing educational benefits of diversity to serve as a compelling state interest in a case involving use of race in admissions at a public university).

87. Differences in Black and White lives may exist even when, by outward appearances, the lives appear similar. See Beverly I. Moran & William Whitford, *A Black Critique of the Internal Revenue Code*, 1996 WISC. L. REV. 751, 757 ("We believe that even if income is held constant, the Internal Revenue Code systematically disfavors the financial interests of blacks. We believe that,

even the narrow diversity justification has been under attack.⁸⁸ Indeed, some might argue the Supreme Court killed the entire affirmative action enterprise in higher education admissions in *Students for Fair Admissions, Inc. (“SFFA”) v. President & Fellows of Harvard College*.⁸⁹

In *SFFA*, the Court decided the diversity justifications in Harvard’s and University of North Carolina’s admissions programs—which tracked the diversity rationale in prior cases—were commendable, but were insufficiently coherent to allow the admissions programs to survive Fourteenth Amendment strict scrutiny, which allows the use of race only in very narrow circumstances.⁹⁰ The schools could not use race as a proxy to obtain the diversity the schools believed would advance their educational environments.⁹¹ However, the Court ruled universities can consider “an applicant’s discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise.”⁹² Thus, the Court’s decision allows Black and multiracial students to explain why their unique life experiences may make them strong applicants.

In the wake of *SFFA*, diversity appears to remain a legitimate goal, though not one schools can use explicit racial considerations to achieve. However, using an applicant’s explanation regarding how their life experiences have shaped them, including through racial discrimination, appears to be a reasonable non-race-based way to help a school decide whom to admit for diversity purposes. *SFFA* may simplify a school’s search for diversity by leaving applicants to explain the implications of their racial identity.

Racial identity is a tricky issue. Historically, racial identity and its implications were usually clear. Biracial or multiracial people with any Black ancestry tended to be raced as Black and treated as such when their racial lineage was clear, even though their life experiences may have differed somewhat from monoracial Black people.⁹³ Frederick Douglass is an

even at the same incomes, the typical black and the typical white lead different lives, largely as a result of the American history of racial subordination. These different lives, we hypothesize, trigger different tax results.”). The differences may persist. *See generally* DOROTHY A. BROWN, *THE WHITENESS OF WEALTH: HOW THE TAX SYSTEM IMPOVERISHES BLACK AMERICANS—AND HOW WE CAN FIX IT* (2021).

88. For a discussion of the diversity rationale in affirmative action discourse, see Osamudia R. James, *White Like Me: The Negative Impact of the Diversity Rationale on White Identity Formation*, 89 N.Y.U. L. REV. 425 (2014).

89. 143 S. Ct. 2141 (2023).

90. *Id.* at 2166.

91. *Id.* at 2175.

92. *Id.* at 2176.

93. For a discussion of how people with any discernible Black racial ancestry typically were considered Black in the eyes of American law, see F. JAMES DAVIS, *WHO IS BLACK? ONE NATION’S DEFINITION* 4–6 (1991) (discussing the one-drop rule of African ancestry). Of course, some Black

example.⁹⁴ He was of mixed race, but he had been enslaved. Being a mixed-race slave may have yielded a somewhat better life and somewhat different experiences than that of a non-mixed-race slave in the same setting, but it was still the life of an enslaved person.⁹⁵ After his emancipation, Frederick Douglass was a mixed-race free Black man. He had a different set of life experiences, even after his emancipation, than a free White man would have. His experiences may have differed from those of a non-mixed-race free Black man, but he was still Black for legal purposes.⁹⁶

More recently, those with some Black racial ancestry who identify as multiracial (rather than Black) raised complex questions regarding the diversity rationale when race or racial identity was used as a proxy for diversity in university admissions.⁹⁷ At issue was whether the experiences of such multiracial people were sufficiently different than the experiences of White people that their background should trigger an assumption that their multiracial identity is a fair proxy for different life experiences that would make their inclusion in a class beneficial for diversity purposes. That is, should such multiracial people be treated as Black or as non-Black for diversity purposes? How to resolve the issue may have depended on how deeply decisionmakers thought racism or racial difference is embedded in our society. The more racialized our society, the more likely multiracial people would have different experiences than those from the dominant racial class, and the more sensible using their racial background as a proxy for relevant

people had skin that was sufficiently light that they could and did pass as White. See CHARLES FRANK ROBINSON II, DANGEROUS LIAISONS: SEX AND LOVE IN THE SEGREGATED SOUTH 125–27 (2003) (discussing Blacks passing as Whites).

94. Frederick Douglass's experiences as a boy were typical. See MARTIN, *supra* note 7, at 3 (“As an inquisitive and intelligent young slave in a society where blacks were primarily slaves and whites were free, he soon sensed the oppressive reality of racial proscription.”).

95. Douglass noted a specific burden related to being a mixed-race child in the antebellum era. See FREDERICK DOUGLASS, MY BONDAGE AND MY FREEDOM 49 (Nick Bromell & R. Blakeslee Gilpin eds., 2021) (“A man who will enslave his own blood, may not be safely relied on for magnanimity. Men do not love those who remind them of their sins—unless they have a mind to repent—and the mulatto child’s face is a standing accusation against him who is master and father to the child.”); MARTIN, *supra* note 7, at 4 (noting the difficulties Douglass suggested accompanied being the son of a slaveholding White father and enslaved Black mother).

96. For a discussion of how people of mixed-race ancestry were characterized in antebellum America, see Daniel J. Sharfstein, *Crossing the Color Line: Racial Migration and the One-Drop Rule, 1600-1860*, 91 MINN. L. REV. 592 (2007). See also Alex M. Johnson, Jr., *The Re-Emergence of Race as a Biological Category: The Societal Implications—Reaffirmation of Race*, 94 IOWA L. REV. 1547 (2009).

97. For a discussion of the different experiences lighter-skinned and darker-skinned Black people face in today’s America, see Kimberly Jade Norwood & Violeta Solonova Foreman, *The Ubiquitousness of Colorism*, in COLOR MATTERS, SKIN TONE BIAS AND THE MYTH OF A POST-RACIAL AMERICA 9 (Kimberly Jade Norwood ed., 2014). See also Taunya Lovell Banks, *Colorism: A Darker Shade of Pale*, 47 UCLA L. REV. 1705 (2000). Those different experiences may lead some to suggest, often incorrectly, that people who do or appear to have a lesser quantum of Black ancestry should not be treated as Black for diversity purposes.

differential life experiences would be. *SFFA* resolves that issue in university admissions by allowing people with some Black ancestry who identify as multiracial rather than Black to tell their story rather than be assumed to have or not have a set of life experiences that would enhance the diversity of a student body.

However, *SFFA* triggers an irony. The Court suggests everyone, whether from an historically disfavored race or ethnicity or not, can tell the story of why their life experiences make them sensible to admit to increase the diversity of a student body. In addition, the opinion notes that while students can explain how discrimination has shaped them, schools may not use information about applicants as an indirect way to use race for diversity purposes.⁹⁸ Chief Justice John Roberts might deem that a victory, arguing that sorting people by race is problematic.⁹⁹ In many respects, he may be correct. However, the American tradition of sorting people by race has created a society in which the different life experiences people of different races typically possess are relevant in an education setting. Chief Justice Roberts might argue that ignoring race will make race less salient.¹⁰⁰ As of today, he is almost certainly incorrect.

CONCLUSION

After the passage of the Kansas-Nebraska Act, Stephen Douglas, Abraham Lincoln, and Frederick Douglass contemplated an America without slavery. Stephen Douglas and Abraham Lincoln contemplated an America without equality for Black Americans; Frederick Douglass contemplated one with full equality for all. The inequitable vision won in the aftermath of emancipation and for many ensuing decades. That legacy helped create an America in which race was and typically remains relevant in the lives of Black Americans. The Supreme Court's decision in *SFFA* appears to deny the salience of race by eliminating its explicit use in university admissions, but appears to recognize that experiences related to race can be relevant in some circumstances. That recognition is helpful, but misses a larger point. Rather than attempt to ignore or minimize the role of race in American society, the Court ought to consider attempting to make race less salient by leaning into attempts to foster substantive equality. When substantive equality exists, a person's race will be unlikely to trigger disparate life experiences. Only then might ignoring race be sensible.

98. *SFFA v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141, 2176 (2023).

99. See *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 511 (2006) (Roberts, C.J., concurring in part and dissenting in part) ("It is a sordid business, this divvying us up by race.").

100. See *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007) ("The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.").