

RACE IPSA LOQUITUR

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INTRODUCTION

For example, take the National Football League (NFL). At the start of the 2016 NFL season, mixed-race San Francisco 49ers quarterback Colin Kaepernick began the practice of taking a knee during the pregame playing of the national anthem as a silent protest against racial injustice in the United States—injustice exemplified by the numerous fatal shootings of unarmed black men by white police

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officers that created the Black Lives Matter movement.¹ As Kaepernick's protest spread among other players, a vocal, racially correlated backlash emerged among roughly half of the polled American public. Newly elected President Donald Trump condemned the protesters as unpatriotic Americans who did not support our troops during a time of war and urged NFL owners to fire any "son of a bitch" player who took a knee.² Colin Kaepernick has since been left without a job in professional football.³ The message is clear. Whites are allowed to engage in what can amount to lethal discrimination against racial minorities in the United States, but minorities are not allowed even to complain about their mistreatment. To raise such concerns would be disloyal and unpatriotic. It would be un-American. And, of course, this is only one of the myriad examples that provide operative meaning to the "liberty and justice for all" to which members of oppressed racial minority groups are expected to pledge their allegiance without protest.

It is said that the truth will set you free. As Michael Lawrence has pointed out, that seems to be the idea behind the suggestion that a truth and reconciliation process might help the United States transform its enduring attachment to the principle of racial inequality into a more admirable attachment to the principle of racial justice.⁴ But the truth is that the United States is so firmly committed to the doctrine of white supremacy that any escape from the gravitational force of that doctrine seems simply unimaginable. In fact, racial inequality appears to be a constitutive element of United States culture. Even a glimpse at the racially correlated manner in which benefits and burdens are distributed throughout the society makes this inequality apparent. The United States has always placed the interest of whites above the interest of racial minorities. It formally did so in the past. It tacitly does so in the present. And all indications are that it will persistently do so in the future. This conclusion is supported by historical,

1. See AJ Willingham, *The #TakeAKnee Protests Have Always Been About Race. Period.*, CNN (Sept. 27, 2017, 10:24 AM), <https://www.cnn.com/2017/09/27/us/nfl-anthem-protest-race-trump-trnd/index.html> [<https://perma.cc/CEH6-6NQ3>] (discussing Kaepernick's protest against current racial injustice in the United States).

2. See *id.* (discussing President Trump's response to the NFL protests).

3. See Amir Vera, *How National Anthem Protests Took Colin Kaepernick From Star QB to Unemployment to a Bold Nike Ad*, CNN (Sept. 4, 2018, 9:00 AM), <https://www.cnn.com/2018/09/04/us/colin-kaepernick-controversy-q-and-a/index.html> (reporting that Kaepernick's protests have made him a free agent and that no other team has offered him a job).

4. See Michael A. Lawrence, *Racial Justice Demands Truth & Reconciliation*, 80 U. PITT. L. REV. 69, 70 (2018) (arguing for the adoption of a new discourse on the issue of race in the United States in order to facilitate racial justice).

statistical, attitudinal, and judicial evidence attesting to the depth of the culture's commitment to racial inequality. In fact, the unspoken understanding that white people are more entitled than racial minorities to share in the nation's privileges and immunities is simply part of what it *means* to be an American. The strikingly discriminatory distribution of virtually all important societal resources speaks for itself. *Race ipsa loquitur*.⁵

Despite the nation's silent commitment to the concept of white supremacy, another constitutive element of United States culture is the culture's need to deny the existence of its discriminatory inclinations. When a truth becomes so distasteful that it challenges the foundational principles on which a culture erects its moral structure, that truth must be suppressed at all costs. As a result, it is often hardest to convince people of what they already know to be true. When we expend considerable time and energy insisting on the absence of a troublesome truth, we can ourselves come to disregard even its conspicuous presence. The divergence between the equal protection that the United States Constitution guarantees to its racial minorities—and the inferiority that the Constitution routinely permits its privileged whites to inflict on those minorities—is sufficiently striking that reconciling the two has become a formidable task. But the culture has always relied heavily on the Supreme Court to perform that function. By generating constitutional doctrines that marginalize the significance of discrimination, the Supreme Court has successfully redefined the concept of equality in ways that protect the continuing practice of racial subordination. Our cultural commitment to the principle of racial equality has proven to be more rhetorical than real. What now passes for racial reconciliation, therefore, has less to do with reconciling the races than it does with reconciling the divergence between our lofty equal protection values and the baser discriminatory practices in which we habitually engage.

There are remedial actions that the culture could take to reduce discrimination and promote racial equality. Addressing racially disparate impact, rather than engaging in metaphysical debates about the presence or absence of discriminatory intent, would do a lot to reduce the pervasiveness of racial inequality. But one of the social functions that we ask the Supreme Court to perform for us is that of invalidating such remedial actions whenever they threaten to undermine existing white privilege. Obliging, the Court now invokes the equal protection principle to hold unconstitutional the very remedial measures that are most likely to foster racial reconciliation. From

5. Cf. *Res Ipsa Loquitur*, BLACK'S LAW DICTIONARY (10th ed. 2014) (translating the Latin phrase *res ipsa loquitur* as "the thing speaks for itself").

school desegregation, to employment discrimination, voting discrimination, redistricting, and affirmative action, the Court now reads the constitutional conception of equality actually to *require* the perpetuation of racial subordination.⁶ The Court's decisions may seem like sound social policy to some, but they will ring true only in a culture that has committed itself to the maintenance of white supremacy.

I have spent most of my professional career arguing that the Supreme Court helps the white majority oppress racial minorities by deeming such oppression to be something that is compelled by the Constitution.⁷ But the allure of the racial discrimination to which we

6. See, e.g. *Parents Involved in Comm. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 709-11, 720-25, 733-35 (2007) (holding that the resegregation plan did not advance compelling interest in diversity and was not narrowly tailored); *id.* at 709-11, 745-48 (plurality opinion) (reading *Brown* to prevent race-conscious efforts to stop resegregation); *cf. id.* at 798-803 (Stevens, J., dissenting) (noting "cruel irony" in Chief Justice Roberts' invocation of *Brown* to compel resegregation).

7. See, e.g., GIRARDEAU A. SPANN, *RACE AGAINST THE COURT: THE SUPREME COURT & MINORITIES IN CONTEMPORARY AMERICA* 4-5 (1993) (arguing that the function of the Supreme Court is to facilitate white majoritarian oppression of racial minorities); Girardeau A. Spann, *Racial Rights*, in *THE OXFORD HANDBOOK OF THE U.S. CONSTITUTION* 542-43 (Mark Tushnet et al. eds., 2015) (arguing constitutional rights depend on the race of the individuals and groups asserting them); Girardeau A. Spann, *Good Faith Discrimination*, 23 WM. & MARY BILL RTS. J. 585, 585 (2015) (discussing how the Supreme Court adopts conception of colorblind race neutrality that perpetuates racial discrimination by tacitly accepting current baseline distribution of resources); Girardeau A. Spann, *Fisher v. Grutter*, 65 VAND. L. REV. EN BANC 45, 48 (2012) (asserting that the Supreme Court's coquettish conception of racial equality masks ideological opposition to affirmative action); Girardeau A. Spann, *Disparate Impact*, 98 GEO. L.J. 1133, 1135, 1150 (2010) (discussing *Ricci v. DeStefano* to illustrate how the Supreme Court has been complicit in the use of postracialism to normalize continuing "societal discrimination" against racial minorities and to deny recognition of disparate-impact claims); Girardeau A. Spann, *Postracial Discrimination*, 5 MOD. AM. 26 (2009) (arguing that the 2008 election of Barack Obama as President of the United States fortifies the postracial view of the Supreme Court, which is that remedies for discrimination against minorities actually constitute reverse discrimination against whites); Girardeau A. Spann, *The Conscience of a Court*, 63 U. MIAMI L. REV. 431, 432 (2009) (asserting that the Supreme Court's decision in *Parents Involved in Community Schools v. Seattle School District No. 1* illustrates the Supreme Court's ideological opposition to political remedies for school resegregation); Girardeau A. Spann, *Disintegration*, 46 U. LOUISVILLE L. REV. 565, 566 (2008) (arguing that the Supreme Court's decision in *Parents Involved in Community Schools v. Seattle School District No. 1* constituted judicial activism in which formal *Plessy*-type "equality" is used as a tool for racial oppression); Girardeau A. Spann, *Affirmative Inaction*, 50 HOW. L.J. 611, 612 (2007) (asserting that the Supreme Court's decision in *Grutter v. Bollinger* inverted the path of racial discrimination in a way that preserves societal discrimination and invalidates affirmative action under a concept of equality that is itself racially discriminatory); Girardeau A. Spann, *Terror and Race*, 45 WASHBURN L.J. 89, 89, 110 (2005) (arguing

are committed nevertheless remains irresistible. Far from moving us toward a process of racial reconciliation, the current political climate seems only to have revitalized and increased our divisiveness. However, hope springs eternal, and the paradox is this: The one thing that we would have to accept as a prerequisite to achieving any meaningful level of racial reconciliation in the United States is the frank realization that the United States has no desire whatsoever to achieve any meaningful level of racial reconciliation. But perhaps it is *that* truth that may someday set us free. Ironically, if we reconcile ourselves to the inevitability of our discriminatory inclinations, we may be able to counteract those inclinations by fabricating an approximation of the genuine racial equality that we seem otherwise unable to achieve.

The goal of this Article is to make the existence of invidious racial discrimination in the United States so palpable that it can no longer be denied. Part I argues that racial inequality is so pervasive, unconscious, and structural that it has simply become an assumed fixture of United States and is rarely even noticed. Section I.A describes the history of racial subordination in the United States. Section I.B invokes the concept of disparate impact to illustrate the continuing manifestations of invidious discrimination in contemporary culture. Part II describes the manner in which the culture nevertheless chooses to deny the existence of continuing racial discrimination, even in the face of such stark racial disparities. Section II.A attributes this denial to cultural biases that can be conscious, blatant, implicit, or structural. Section II.B describes the way in which the Supreme Court has

that the Supreme Court's tolerance of structural discrimination will cause racial minorities to bear the costs of protecting the white majority from threat of terrorism); Girardeau A. Spann, *Neutralizing Grutter*, 7 U. PA. J. CONST. L. 633, 633 (2005) (asserting that *Grutter v. Bollinger*'s holding that the pursuit of racial balance is "patently unconstitutional" does not promote colorblind race neutrality but rather perpetuates contemporary racial discrimination); Girardeau A. Spann, *The Dark Side of Grutter*, 21 CONST. COMMENT. 221, 222 (2004) (arguing that the concept of colorblind race neutrality advanced by Supreme Court in *Grutter v. Bollinger* is an artificial concept that has become culture's preferred form of engaging in racial discrimination); Girardeau A. Spann, *Just Do It*, 67 L. & CONTEMP. PROBS. 11, 18-19 (2004) (promoting racial proportionality in allocation of resources offers the most promising solution to the problem of racial discrimination, but it is inconsistent with conception of liberalism recognized by Supreme Court); Girardeau A. Spann, *Writing Off Race*, 63 L. & CONTEMP. PROBS. 467, 468 (2000) (arguing that the Supreme Court has been such an impediment to racial equality that political process should seize control of United States racial policy); Girardeau A. Spann, *Affirmative Action and Discrimination*, 39 HOW. L.J. 1, 2-3 (1995) (arguing that the Supreme Court's decision in *Adarand Constructors, Inc. v. Peña*, which subjects racial affirmative action to strict scrutiny, inverts concepts of affirmative action, and discrimination in a way that discriminatorily diverts resources from minorities to the white majority).

invoked the doctrinal distractions of intent and racial balance to sanitize the culture's commitment to racial stratification and divert attention from the Court's de facto protection of white privilege. The Article concludes that meaningful racial reconciliation could be achieved in the United States only if United States culture were willing to act on a truth about its racial values that it is unlikely ever to admit.

I. DISCRIMINATION

The United States pursues myriad social policies that have a racially disparate impact—policies from which there seems to be no means of escape. Those policies benefit whites and adversely affect minorities in ways that are both striking and undeniable. Whether intentional, unconscious, or structural, the discriminatory effect of those policies is the same. And discriminatory effect is what matters. The suggestion that racially disparate impact can simply be disregarded—or deflected by doctrinal inquiries into the presence or absence of discriminatory intent—merely constitutes a mechanism for perpetuating racial oppression. It does nothing whatsoever to make the problem go away. If the problem of racial discrimination in the United States is ever to be solved—and there is no particular reason for optimism in this regard—it seems that the first step must be to stop denying its existence.

A. Then

The United States has been firmly committed to the ideology of white supremacy since before it became the United States.⁸ Belief in the racial inferiority of blacks was an integral part of American chattel slavery, which is traceable to the importation of the first African slaves into the colony of Jamestown in 1619.⁹ Viewing blacks as inferior to whites made it easier for whites to justify the brutal regime of racial subordination that they would adopt in order to depict slaves as

8. See generally Spann, *Racial Rights*, *supra* note 7 (describing an earlier version of the history of white supremacy ideology in the United States).

9. Some have argued that the roots of slavery in what would become the United States actually predate the 1619 date that is commonly cited as its beginning. See Michael Gausco, *The Fallacy of 1619: Rethinking the History of Africans in Early America*, BLACK PERSPECTIVES (Sept. 4, 2017), <https://www.aaihs.org/the-fallacy-of-1619-rethinking-the-history-of-africans-in-early-america/> [https://perma.cc/Q3SH-7HPY].

property rather than human beings.¹⁰ Before the Civil War, even free blacks were subjected to official discrimination based on their racial inferiority.¹¹ Prejudice was also used to create a racial caste system that successfully prevented black and white laboring classes from forming natural coalitions on the basis of shared economic interests that would threaten the interests of white elites.¹² The doctrine of white supremacy was not ultimately limited to blacks. It would eventually mature to justify the nineteenth century exploitation, forced relocation, and eventual genocide of indigenous Indians; the passage of Chinese exclusion laws that barred immigration by a race deemed unfit to become American citizens or compete with American workers for jobs; and discrimination against annexed Mexicans and Irish immigrants (who were then viewed as a separate racial group).¹³

Although the Declaration of Independence recognized the “self-evident” truth that “all men are created equal,”¹⁴ the 1789 United States Constitution contained several provisions that were nevertheless intended to protect the institution of chattel slavery. Article I, § 9, clause 1 prohibited Congress from abolishing the slave trade until 1808, and it authorized the federal taxation of imported slaves.¹⁵ Article I, § 2, clause 3 apportioned seats in the House of Representatives on the basis of population, counting a slave as three-fifths of a white person.¹⁶ Article IV, § 2, clause 3, by clear inference though not in express language, prohibited one state from according free status to slaves who had escaped from another state.¹⁷ The Supreme Court’s decision in *Dred Scott v. Sanford* held that, because slaves were property rather than citizens, Congress could not abolish slavery in the federal territories.¹⁸

The Civil War resulted in the abolition of slavery—during the War by the 1863 Emancipation Proclamation in the seceding southern

10. See ORLANDO PATTERSON, *SLAVERY AND SOCIAL DEATH* 94-97 (1982) (describing how slaveholder sense of honor was dependent on degradation and brutal treatment of slaves).

11. See LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 89 (2d ed. 1985) (discussing society’s treatment of free blacks in the eighteenth century); see also SCOTT L. MALCOMSON, *ONE DROP OF BLOOD: THE AMERICAN MISADVENTURE OF RACE* 191 (2000) (discussing the development of racial attitudes in the United States).

12. See MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 22-26 (2010).

13. See FRIEDMAN, *supra* note 11, at 509-10; RONALD TAKAKI, *A DIFFERENT MIRROR: A HISTORY OF MULTICULTURAL AMERICA* 146, 171-72, 200-01, 233 (1993).

14. The Declaration of Independence para. 2 (U.S. 1776).

15. See U.S. CONST. art. I, § 9, cl. 1.

16. See U.S. CONST. art. I, § 2, cl. 3.

17. See U.S. CONST. art. IV, § 2, cl. 3.

18. See *Scott v. Sandford*, 60 U.S. 393, 393 (1857).

states that were not occupied by Union troops and nationwide after the War by the 1865 ratification of the Thirteenth Amendment.¹⁹ But southern states responded by adopting “black codes,” which denied blacks basic civil rights, including the right to vote, sue, testify in court, serve on juries, and engage in interracial marriages.²⁰ The federal government invalidated most provisions of the black codes through legislation and the adoption of two additional post-Civil War Reconstruction amendments. The 1868 Fourteenth Amendment granted citizenship to former black slaves and nominally guaranteed them the privileges and immunities of citizenship, due process, and equal protection of the laws.²¹ The 1870 Fifteenth Amendment nominally granted former black slaves the right to vote.²² However, when political considerations brought Reconstruction to an end after the 1877 withdrawal of federal troops from the South, southern states adopted a Jim Crow regime of oppressive racial segregation and second-class citizenship for blacks.

The South was able to replace slavery with a racial caste system that restored de facto slavery on the basis of peonage for blacks who entered employment contracts with their former masters and convict labor from vagrancy convictions for blacks who did not enter such contracts.²³ In addition, Ku Klux Klan lynchings and terrorism prevented blacks from exercising the remaining civil rights that they had been granted by the Reconstruction amendments.²⁴ This process was facilitated by Supreme Court invalidation or narrow construction of federal legislation and the Reconstruction amendments that had

19. See U.S. CONST. amend. XIII. President Abraham Lincoln issued a preliminary version of the Emancipation Proclamation on September 22, 1862. Emancipation Proclamation, 12 Stat. 1267, 1267 (1862). He signed the final Proclamation on January 1, 1863. See *id.* at 1268. The Emancipation Proclamation freed the slaves in rebellious territories. However, it did not free the slaves in the North, border states, or southern territories that were under Union control. See *id.* On December 18, 1865, the passage of the Thirteenth Amendment abolished slavery throughout the United States. U.S. CONST. amend. XIII, cl. 1; see also JOHN HOPE FRANKLIN, THE EMANCIPATION PROCLAMATION 104-05, 155 (1963); FRIEDMAN, *supra* note 11, at 504-05.

20. See FRIEDMAN, *supra* note 11, at 504-05.

21. See U.S. Const. amend. XIV, § 1.

22. See U.S. Const. amend. XV, § 1.

23. See ALEXANDER, *supra* note 12, at 26-35; DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK PEOPLE IN AMERICA FROM THE CIVIL WAR TO WORLD WAR II 53-54 (2008).

24. See ALEXANDER, *supra* note 12, at 30-40, 197, 205; BLACKMON, *supra* note 23, at 36, 39, 56, 58, 274, 359”; see also MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 61-97 (2004) (discussing denial of civil rights through other forms of intimidation and fear).

been adopted to protect former black slaves—most notably the 1869 decision upholding official government sponsored racial segregation in *Plessy v. Ferguson*.²⁵ After *Plessy*, racial antagonism and white supremacy escalated in the South and were activated in the North. They took the official form of additional segregation laws, discriminatory administration of voting registration standards, literacy tests and poll taxes for voting, and white primaries. They took the unofficial form of fraud, intimidation, lynchings, and race riots.²⁶

The Supreme Court overruled *Plessy* in its 1954 *Brown v. Board of Education* decision, which invalidated the separate but equal doctrine that permitted racial segregation.²⁷ But after *Brown*, official de jure segregation was simply replaced by unofficial de facto segregation. Although the political response to *Brown* eventually produced the Civil Rights Movement of the 1950s and 1960s that resulted in some desegregation of southern schools, neither the Supreme Court nor the political climate was prepared to tolerate desegregation of schools in the North or the West, where segregation tended to be produced by residential patterns rather than state laws. Subsequently, even southern schools became largely resegregated, this time on a de facto basis that enabled them to circumvent the desegregation requirement of *Brown*.²⁸ The Civil Rights Movement also produced legislative efforts to protect racial minority rights, including the Civil Rights Act of 1964, the Voting Rights Act of 1965, and the Fair Housing Act of 1968. But like the school desegregation effort, the remedial effect of such civil rights legislation was eventually limited

25. See *Plessy v. Ferguson*, 163 U.S. 537, 550-51 (1896); see also ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION: 1863-1877* 529-34 (1988); FRIEDMAN, *supra* note 11, at 505-08; LAWRENCE GOLDSTONE, *INHERENTLY UNEQUAL: THE BETRAYAL OF EQUAL RIGHTS BY THE SUPREME COURT, 1865-1903* 84-87, 118-29, 130-70 (2011); KLARMAN, *supra* note 24, at 8-60; C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* 67-109 (commemorative ed. 2002).

26. See ALEXANDER, *supra* note 12, at 20-35; GOLDSTONE, *supra* note 25, at 171-91; KLARMAN *supra* note 24, at 61-97; WOODWARD, *supra* note 25, at 67-109.

27. See *Brown v. Bd. of Educ.*, 347 U.S. 483, 483 (1954) (*Brown I*) (invalidating maintenance of racially segregated public schools); see also *Brown v. Bd. of Educ.*, 349 U.S. 294, 301 (1955) (*Brown II*) (requiring desegregation of public schools "with all deliberate speed").

28. See SPANN, *RACE AGAINST THE COURT*, *supra* note 7, at 70-82. (discussing school desegregation decisions). In *Parents Involved in Community Schools v. Seattle School District No. 1*, the Supreme Court held that it was unconstitutional for a school board voluntarily to use race-conscious pupil assignment in order to prevent resegregation of the schools, even for schools that had been desegregated under a court order requiring compliance with *Brown*. See *Comty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720-48 (2007).

by a Supreme Court reflecting a political climate that had again become hostile to the interests of racial minorities.²⁹

The real legacy of *Brown* entails its use as a tool that the white majority can use to invalidate remedial measures, such as affirmative action and race-conscious redistricting, that threaten the continuation of white privilege.³⁰ The role that white privilege has played in the history of the United States provides a context in which current United States racial policies can be assessed. The stark racially disparate impact of current policies suggests that the doctrine of white supremacy is still in force.

B. Now

For years, legal experts, political scientists, and judges who pay attention to racial inequality have stressed that racial minorities in the United States are not nearly as well off as whites. This is true with respect to most measures of societal wellbeing—including wealth, income, education, employment, housing, health care, incarceration, and personal safety.³¹ Most people have undoubtedly seen versions of the

29. See SPANN, RACE AGAINST THE COURT, *supra* note 7, at 3 (discussing Supreme Court decisions limiting the scope and effect of civil rights legislation).

30. See GIRARDEAU A. SPANN, THE LAW OF AFFIRMATIVE ACTION: TWENTY-FIVE YEARS OF SUPREME COURT DECISIONS ON RACE AND REMEDIES 156-89 (2000) (discussing Supreme Court affirmative action and Voting Rights cases).

31. See, e.g., Gratz v. Bollinger, 539 U.S. 244, 299-301 (2003) (Ginsburg, J., dissenting); JENNIFER HOCHSCHILD ET AL., CREATING A NEW RACIAL ORDER: HOW IMMIGRATION, MULTIRACIALISM, GENOMICS, AND THE YOUNG CAN REMAKE RACE IN AMERICA 35-41, 73-75, 116-23, 175-81 (2012) (citing political science professors at Harvard, Yale, and Northwestern Universities); Kimberlé Williams Crenshaw, *Twenty Tears of Critical Race Theory: Looking Back to Move Forward*, 43 CONN. L. REV. 1253, 1336-46 (citing a law professor and critical race legal theorist at UCLA). For examples of recent sources discussing the racially disparate impact of United States criminal justice policies, see generally PAUL BUTLER, CHOKEHOLD: POLICING BLACK MEN (2017); DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM (1999); POLICING THE BLACK MAN: ARREST, PROSECUTION, AND IMPRISONMENT (Angela J. Davis ed., 2017); PETER EDELMAN, NOT A CRIME TO BE POOR: THE CRIMINALIZATION OF POVERTY IN AMERICA (2017); JAMES FORMAN JR., LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA (2017); BARRY FRIEDMAN, UNWARRANTED: POLICING WITHOUT PERMISSION (2017); U.S. Dep't of Justice Civil Rights Div., *Investigation of the Ferguson Police Department* (2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf. [https://perma.cc/5RQA-RUGA]. Compare Eugene Scott, *Did the Latest Jobs Report Just Give Republicans an Opening to Win Over Black Voters?*, WASH. POST (Jan. 5, 2018), https://www.washingtonpost.com/news/the-fix/wp/2018/01/05/did-the-latest-jobs-report-just-give-republicans-an-opening-to-win-black-voters/?hpid=hp_hp-cards_hp-card-politics%3Ahomepage%2Fcard&utm_term=

following statistics before. Indeed, many of them simply come from my reading of the daily newspapers. However, my fear is that racial disparities have become so normalized that they now elude meaningful notice. My hope is to confront people with the stark invidiousness of the numbers—magnified by their cumulative effect—so that any tedium that sets in during their recitation will serve as a telling reminder of our lack of concern for the discrimination that the numbers represent and for the routinized white supremacy that we have been conditioned to overlook.

In 1968, the *Kerner Commission Report* concluded that “[o]ur nation is moving toward two societies, one black, one white—separate and unequal.”³² The *Report* suggested that white racism was one of the causes of the urban riots that occurred during the 1960s, and that things would get worse unless de facto segregation was reduced and educational, housing, employment, and social service opportunities for blacks and other minorities were increased.³³ But we did not pay attention. A new study shows that, fifty years later, the underlying problems still exist and are now getting worse.³⁴ As a statistical matter, it is much better to be white than to be a member of a racial minority group in the United States. Whites get more of the benefits that the nation has to offer, and racial minorities are forced to bear more of the burdens. The numbers tell a story that is both stark and disturbing.

.23ba9236b4c4 [https://perma.cc/AHZ6-9WZK] (describing a pessimistic view of the black unemployment rate), with Jared Bernstein, *Good News from Today's Jobs Report: The Tight Labor Market Is Helping to Reduce the Racial Unemployment Gap*, WASH. POST (Jan. 5, 2018), https://www.washingtonpost.com/news/posteverything/wp/2018/01/05/good-news-from-todays-jobs-report-the-tight-labor-market-is-helping-to-reduce-the-racial-unemployment-gap/?hpid=hp_hp-cards_hp-posteverything%3Ahomepage%2Fcard&utm_term=.c6d24b6c6809 [https://perma.cc/25NE-N3BQ] (describing reasons for optimism about black unemployment numbers for recent sources discussing employment).

32. NAT'L CRIMINAL JUSTICE REFERENCE SERV., REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 1 (1968). The Report of the National Advisory Commission on Civil Disorders is commonly referred to as the “Kerner Commission.”

33. See *id.* at 1-2.

34. See Vanessa Williams, *Fifty Years After the Kerner Commission, a New Report Cites Some of the Same Concerns About Race and Poverty*, WASH. POST (Feb. 26, 2018), https://www.washingtonpost.com/news/post-nation/wp/2018/02/26/fifty-years-after-the-kerner-commission-a-new-report-cites-some-of-the-same-concerns-about-race-and-poverty/?hpid=hp_hp-cards_hp-card-business%3Ahomepage%2Fcard&utm_term=.68fb62e7c41f [https://perma.cc/FVL4-AGG2].

1. Money

Racial minorities do not have as much money as whites. Recent governmental statistics show that the black median household income is less than 60% of the median white household income. In addition, the poverty rate for blacks is more than twice the poverty rate for non-Latino whites.³⁵ Because of gaps in banking regulations, it is also more expensive for minorities than whites to maintain bank accounts. Whites need to keep 28% of their paychecks deposited to avoid account fees while the amount for Latinos is 54% and for blacks is 60%.³⁶ Economic racial disparities are dramatically more striking when wealth is considered.

A typical white household has sixteen times the wealth of a black one.³⁷ The *Demos* Racial Wealth Audit tool reveals that the median white household had \$111,146 in wealth in 2011, the median Latino household had only \$8,348, and the median black household had a mere \$7,113.³⁸ Moreover, the median net worth of blacks has gone down rather than up. In 2013, the median wealth of a white household was \$141,900, thirteen times the median wealth of a black household.³⁹ An Urban Institute report described in a November 2, 2016 *Washington Post* article found that the net worth of white households in the Washington, D.C. region was eighty-one times higher than that of black households.⁴⁰ These sorts of numbers get worse ra-

35. See Jessica L. Semega et al., *Income and Poverty in the United States: 2016*, U.S. CENSUS BUREAU (2017), <https://www.census.gov/data/tables/2017/demo/income-poverty/p60-259.html> [<https://perma.cc/4R6F-HBE5>] (citing Table 1 and Table 3).

36. See JACOB FABER & TERRI FRIEDLINE, *NEW AMERICA, THE RACIALIZED COSTS OF BANKING 4-5* (2018), https://s3.amazonaws.com/newamericadotorg/documents/The_Racialized_Costs_of_Banking_2018-06-20_205129.pdf [<https://perma.cc/5ZJ7-BWNJ>].

37. See Laura Shin, *The Racial Wealth Gap: Why a Typical White Household Has 16 Times the Wealth of a Black One*, *FORBES* (Mar. 26, 2015), <https://www.forbes.com/sites/laurashin/2015/03/26/the-racial-wealth-gap-why-a-typical-white-household-has-16-times-the-wealth-of-a-black-one/#32c208b21f45> [<https://perma.cc/77M6-YUXN>].

38. Amy Traub et al., *The Racial Wealth Gap: Why Policy Matters*, *DEMOS* (June 21, 2016), <http://www.demos.org/publication/racial-wealth-gap-why-policy-matters> [<https://perma.cc/3SHF-7EKV>].

39. See BUTLER, *supra* note 31, at 181-82.

40. See Perry Stein, *Net Worth of White Households in D.C. Region is 81 Times that of Black Households*, *WASH. POST* (Nov. 2, 2016), https://www.washingtonpost.com/news/local/wp/2016/11/02/net-worth-of-white-households-in-d-c-region-is-81-times-greater-than-black-households/?hpid=hp_hp-more-top-stories-2_dc-networth-630a%3Ahomepage%2Fstory [<https://perma.cc/N56D-GV5P>].

ther than better over time because the racial wealth gap is increasing rather than decreasing.

If current trends continue, the median household wealth for black Americans will fall to \$0 by 2053 and will fall to \$0 for Latino Americans two decades later.⁴¹ By 2020 median black household wealth will lose nearly 18% of its 2013 value, and median Latino household wealth will lose 12% of its 2013 value.⁴² During the same time period, median white household wealth will increase by 3%, and it is projected to be eighty-six times more than black household wealth and sixty-eight times more than Latino household wealth.⁴³

The average net worth of single black women—women who raise 60% of black children—is \$100.⁴⁴ Twenty-five percent of black families have less than five dollars in savings.⁴⁵ Poor whites have living experiences that are more comparable to the living experiences of middle-class blacks than to poor blacks. Blacks who make more than \$100,000 per year live in neighborhoods that are more disadvantaged than neighborhoods in which whites who make \$30,000 live.⁴⁶ Poor blacks are rivaled in their poverty only by poor indigenous Indians.⁴⁷

Most government handouts go to middle-class and wealthy whites rather than underprivileged minorities.⁴⁸ Half of such government benefits go to the wealthiest 5% of taxpaying households.⁴⁹ The bottom 60% receive only 4% of such benefits.⁵⁰ A new study shows that, when black and white boys grow up in similarly advantaged environments with similar family structures, the white boys as adults will have greater incomes than the black boys as adults.⁵¹ This finding is exacerbated when boys start out in

41. Jamiles Lartey, *Median Wealth of Black Americans “Will Fall to Zero by 2053”*, *Warns New Report*, *GUARDIAN* (Sept. 13, 2017), <https://www.theguardian.com/inequality/2017/sep/13/median-wealth-of-black-americans-will-fall-to-zero-by-2053-warns-new-report> [https://perma.cc/4FUJ-CUT3].

42. *Id.*

43. *Id.*; Chuck Collins et al., *Report: The Road to Zero Wealth: How the Racial Wealth Divide Is Hollowing Out America’s Middle Class*, *INST. POL’Y STUD.* (Sept. 11, 2017), <https://www.ips-dc.org/report-the-road-to-zero-wealth/> [https://perma.cc/V3R2-F5ZX].

44. BUTLER, *supra* note 31, at 141.

45. *Id.*

46. *Id.* at 142.

47. *See id.* at 141.

48. *See id.* at 146.

49. *See id.*

50. *See id.*

51. *See* Emily Badger et al., *Extensive Data Shows Punishing Reach of Racism for Black Boys*, *N.Y. TIMES* (Mar. 19, 2018), <https://www.nytimes.com/>

economically disadvantaged circumstances. The ensuing income gap seems to be traceable entirely to differential treatment based on race. Interestingly, the gap does not exist with black and white girls.⁵²

In his book *Not a Crime to Be Poor*, Peter Edelman has not only illustrated the many ways in which the United States criminalizes poverty but has emphasized that poverty and race are so interconnected that we are often effectively criminalizing race as well.⁵³ The infamous “stay or pay” fleecing phenomenon, under which indigent people arrested for minor traffic or “broken windows” offenses are kept in prison if they cannot afford to pay the money for bail, is a practice that disproportionately affects blacks and Latinos. In Tulsa, Oklahoma, police cars are regularly placed at stop signs in order to arrest people for rolling stops, but they only do this in black neighborhoods.⁵⁴

Minority defendants who cannot pay fines, court costs, public defender fees, probation fees, and various other fees, are disproportionately held in criminal contempt. This further increases their indebtedness, which they are once again unable to pay, which once again results in the imposition of additional fines, costs, fees, and so on—creating a system that has been referred to as “cash register justice.”⁵⁵ The system has also been referred to as “pay to stay” because prisoners are also often charged for room, board, and other administrative fees while they are incarcerated—creating a vicious cycle of fees that indigent prisoners will never be able to repay, thereby putting them in a “cradle-to-coffin pipeline.”⁵⁶ Some indigents are able to escape the system by agreeing to perform versions of community service that bear an alarming resemblance to the post-Reconstruction peonage system that the South used to recreate de facto slavery after the Civil War.⁵⁷

The racially disparate impact of such practices is so striking that it has been referred to as a predatory practice that uses “the courts as a tool to continue systemic racism.”⁵⁸ Racial disparities also exist for

[interactive/2018/03/19/upshot/race-class-white-and-black-men.html](https://perma.cc/HSZ6-KFTN)

[<https://perma.cc/HSZ6-KFTN>] (describing the study).

52. See *id.*; see generally RAJ CHETTY ET AL., RACE AND ECONOMIC OPPORTUNITY IN THE UNITED STATES: AN INTERGENERATIONAL PERSPECTIVE (2018), https://opportunityinsights.org/wp-content/uploads/2018/10/atlas_paper.pdf [<https://perma.cc/4JEX-54FJ>] (identifying the underlying study itself).

53. See EDELMAN, *supra* note 31, at 246-49.

54. See *id.* at 3-7.

55. See *id.* at 3-17.

56. See *id.* at 18-19.

57. See *id.* at 7-19, 46-47.

58. See *id.* at 21-24, 34-35.

indigent minority students who are cited for disciplinary infractions that place them in the school-to-prison pipeline.⁵⁹ Municipalities also use crime-free nuisance ordinances to exclude racial minorities, requiring landlords to evict tenants who do things like make too many 911 calls or arrest people for being homeless.⁶⁰ Racially disproportionate mass incarceration rates also exacerbate indigency by taking incarcerated parents out of the work force, resulting in both family disruptions and an inability to provide child support.⁶¹ Racial discrimination breeds indigency, which in turn breeds more racial discrimination.

2. Education

White people have better educational opportunities than racial minorities in part because countless schools in the United States remain racially segregated. That is important because racially segregated schools also tend to be socioeconomically segregated. The combination of racial and economic isolation in schools attended by minority students creates significant obstacles to quality education, which in turn contributes to racial achievement gaps.⁶² A 2018 National Assessment of Educational Progress study shows that the drop in national student test scores observed in 2015, as well as the racial achievement gap, remained largely unchanged between 2015 and 2017.⁶³

In 1980, 23% of black students in the South attended hyper-segregated schools—schools where the minority student population was 90% or more.⁶⁴ But by 2014 that number had risen to 36%.⁶⁵ Today, more than one-third of black and Latino students attend

59. *See id.* at 126-27.

60. *See id.* at 138.

61. *See id.* at 89-90.

62. *See* Janie Boschma & Ronald Brownstein, *The Concentration of Poverty in American Schools*, ATLANTIC (Feb. 29, 2016), <https://www.theatlantic.com/education/archive/2016/02/concentration-poverty-american-schools/471414/> [<https://perma.cc/3NDL-DW6V>]; *see also* Melinda D. Anderson, *The Promise of Integrated Schools*, ATLANTIC (Feb. 16, 2016), <https://www.theatlantic.com/education/archive/2016/02/promise-of-integrated-schools/462681/> [<https://perma.cc/HYP4-P8FM>].

63. *See* Moriah Balingit, *National Math and Reading Scores Remain Constant, but Disparities Emerge*, WASH. POST (Apr. 10, 2018), https://www.washingtonpost.com/local/education/national-math-and-reading-scores-remain-constant-but-disparities-emerge/2018/04/09/4ad92714-3c0c-11e8-8d53-eba0ed2371cc_story.html?utm_term=.11ae4a281be8 [<https://perma.cc/FFC3-FJSD>].

64. GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 507 (8th ed. 2018).

65. *Id.*

schools that are 90–100% minority, and more than one-third of white students attend schools that are 90–100% white.⁶⁶

Not surprisingly, we spend more money educating white children than we spend educating racial minority children. One Pennsylvania study that reflected national trends showed that, for every income level, school districts with a higher percentage of white students got substantially more educational funding than school districts with more minority students.⁶⁷ In the so-called “corridor of shame” along Interstate 95 in South Carolina, teachers in minority schools are paid \$3,000 to \$12,000 less than teachers in nearby white school districts.⁶⁸

Racial disparities also exist at the college level. White flight from open-access colleges means that the top 500 colleges are disproportionately white.⁶⁹ And of course, we give more money to top 500 colleges—which is like giving the most money to hospitals that treat the healthiest rather than the sickest people. Our post-secondary educational system is separate and unequal.⁷⁰ Even large litigation settlements have been insufficient to achieve desegregation or equal funding for historically black colleges.⁷¹

66. See Halley Potter et al., *A New Wave of School Integration: Districts and Charters Pursuing Socioeconomic Diversity*, CENTURY FOUND. (Feb. 9, 2016), <https://tcf.org/content/report/a-new-wave-of-school-integration/> [<https://perma.cc/434T-GSED>].

67. See Gillian B. White, *The Data Are Damning: How Race Influences School Funding*, ATLANTIC (Sept. 30, 2015), <https://www.theatlantic.com/business/archive/2015/09/public-school-funding-and-the-role-of-race/408085/> [<https://perma.cc/V7AR-P55U>]. But see Jason Richwine, *The Myth of Racial Disparities in Public School Funding*, HERITAGE FOUND. (Apr. 20, 2011), <https://www.heritage.org/education/report/the-myth-racial-disparities-public-school-funding> [<https://perma.cc/K6NQ-U39Z>] (disputing such claims).

68. See Ehime Ohue, *At Duke, I Realized How Badly Many South Carolina Schools Are Failing Students Like Me*, WASH. POST (July 6, 2017), https://www.washingtonpost.com/news/grade-point/wp/2017/07/06/at-duke-i-realized-how-badly-many-south-carolina-schools-are-failing-students-like-me/?utm_term=.c90850e5c415&wpisrc=nl_highered&wpmm=1 [<https://perma.cc/7YEA-Z3NB>].

69. See Anthony P. Carnevale, *White Flight Is Creating a Separate and Unequal System of Higher Education*, WASH. POST (Dec. 7, 2016), https://www.washingtonpost.com/news/grade-point/wp/2016/12/07/white-flight-is-creating-a-separate-and-unequal-system-of-higher-education/?utm_term=.0376d803714e&wpisrc=nl_highered&wpmm=1 [<https://perma.cc/R77N-957B>].

70. See *id.*

71. See Adam Harris, *They Wanted Desegregation. They Settled for Money, and It's About to Run Out.*, CHRON. HIGHER EDUC. (Mar. 26, 2018), <https://www.chronicle.com/article/They-Wanted-Desegregation/242930/>

3. Employment

In the fourth quarter of 2017, the overall unemployment rate in the United States was 3.6%.⁷² But the unemployment rate for Latinos was 4.8%, and the unemployment rate for blacks was 7.1%.⁷³ The unemployment rate for black college graduates age twenty-two to twenty-seven was 12.4%, compared to the overall unemployment rate of 5.6% for all college graduates in the same age range.⁷⁴ This is true even though racial discrimination is illegal in the United States.⁷⁵

According to 2017 statistics, the median woman makes eighty-three cents for every dollar the median man is paid.⁷⁶ Black women are paid sixty-five cents, and Latina women are paid fifty-nine cents.⁷⁷ A more recent set of 2018 statistics on the Equal Pay Day website shows both the wage gaps and the dates in the next year until which women had to work in order to earn the same amount of money that white males earned during the previous year.⁷⁸ White women earned seventy-nine cents for every dollar that white males earned, and white women had to work until April 17, 2018 in order to earn the amount of money that white males earned by December 31, 2017.⁷⁹ For black women, the gap was sixty-three cents, and the equalization date was August 7, 2018.⁸⁰ For indigenous Indian women, the gap was fifty-seven cents, and the date was September 27, 2018.⁸¹ For Latinas, the gap was fifty-four cents, and the date was November 1, 2017.⁸²

?key=yWNyUrseiPjtDmMwAoIBOc4hDmp0qUn90oU2CcWV7wgzITDpCYcdl6T SmNGPa49TU1oYWZycXFjVDRXR0k5WUZrZmhCN0Z0MktVT1p5Vy1YOHpz UVVY5aFI0aw#.WrpNZ6jeYXM.email [https://perma.cc/S5J7-JDS7].

72. *Labor Force Statistics from the Current Population Survey*, BUREAU LAB. STAT., https://www.bls.gov/web/empstat/cpsee_e02.htm [https://perma.cc/HA54-WPDG].

73. *Id.*

74. Janell Ross, *African Americans With College Degrees Are Twice as Likely to Be Unemployed as Other Graduates*, ATLANTIC (May 27, 2014), <https://www.theatlantic.com/politics/archive/2014/05/african-americans-with-college-degrees-are-twice-as-likely-to-be-unemployed-as-other-graduates/430971/> [https://perma.cc/VY54-SCJ4].

75. See BUTLER, *supra* note 31, at 181-82.

76. Elise Gould & Jessica Schieder, *Black and Hispanic Women Are Paid Substantially Less than White Men*, ECON. POL'Y INST. (Mar. 7, 2017), <http://www.epi.org/publication/black-and-hispanic-women-are-hit-particularly-hard-by-the-gender-wage-gap/> [https://perma.cc/3GHS-G5VY].

77. *Id.*

78. See *Equal Pay Day: Overview 2018*, WOMEN'S RTS. COALITION (2018), <http://www.equalpaytoday.org/equalpaydays/> [https://perma.cc/8W57-GUU2].

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

Blacks make up 13% of the population, but only 0.9% of top Senate staffers.⁸³ Only 4.9% of all Senate staffers are black.⁸⁴ After defeating Republican Roy Moore for an open Alabama Senate seat on December 12, 2017, with 96% of the black vote, new Senator Doug Jones became the first Democrat in the Senate to name a black chief of staff.⁸⁵ An April 2018 study by LegiStorm revealed that white congressional staffers also make thousands of dollars per year more than nonwhite staffers.⁸⁶ In the House, white staffers earn annual salaries that are \$900 more than the salaries earned by Asians, \$2,000 more than Latinos, and \$3,500 more than blacks.⁸⁷ In the Senate, white staffers make approximately \$4,800 more than Asians, \$1,800 more than Latinos, and \$7,000 more than blacks.⁸⁸

In his January 30, 2018 State of the Union Address, President Trump announced that unemployment rates for blacks and Latinos were the “lowest in the history of the country.”⁸⁹ Trump was relying on December 2017 statistics, but he did not mention that the unemployment rate for blacks had actually increased in January 2018.⁹⁰ It not only remained twice the unemployment rate for whites, but racial disparities remained in job opportunities and pay.⁹¹

83. James R. Jones, *Racial Diversity Among Top Senate Staff*, JOINT CTR. POLITICAL & ECON. STUDIES 3 (Dec. 2015), <https://jointcenter.org/sites/default/files/Racial%20Diversity%20Among%20Top%20Senate%20Staff%2012-2-15%20140%20pm%20%282%29.pdf> [https://perma.cc/8HSM-V4LM].

84. See Cameron Joseph, *Organized Pushback in U.S. Senate Over Lack of Diversity Among Staffers*, N.Y. DAILY NEWS (Dec. 5, 2016), <http://www.nydailynews.com/news/politics/pushback-u-s-senate-lack-diversity-staffers-article-1.2898741> [https://perma.cc/9FJX-UN2D].

85. See Alex Gangitano, *Doug Jones Took Office Leading Senate Democrats in Diversity*, ROLL CALL (Jan. 3, 2018), <https://www.rollcall.com/news/hoh/doug-jones-took-office-leading-senate-democrats-diversity> [https://perma.cc/VR4X-5L6P].

86. See Keturah Hetrick, *White Congressional Aids Make Thousands More*, LEGISTORM (Apr. 11, 2018), https://www.legistorm.com/pro_news/view/id/2147.html?utm_source=Registered+LegiStorm+Users&utm_campaign=a864a0a78d-COE_Wkly_2018-04-11_non_hill_non_pro_non_trial&utm_medium=email&utm_term=0_aa20686cb5-a864a0a78d-85580257 [https://perma.cc/8VLU-PMC2].

87. *Id.*

88. *Id.*

89. Anne Gearan & John Wagner, *Trump Calls Democratic Lawmakers Who Didn't Applaud Him "Treasonous," "Un-American,"* WASH. POST (Feb. 5, 2018), https://www.washingtonpost.com/politics/trump-to-visit-ohio-company-that-gave-out-1000-bonuses-following-tax-overhaul/2018/02/05/a2cec73c-0a91-11e8-8b0d-891602206fb7_story.html?hpid=hp_hp-more-top-stories_trumpohio-607pm%3Ahomepage%2Fstory&utm_term=.05663c0520f2 [https://perma.cc/W2A9-9FCJ].

90. *See id.*

91. See Natalie Kitroeff & Ben Casselman, *Lowest Ever Black Jobless Rate Is Still Twice That of Whites*, N.Y. TIMES (Feb. 23, 2018),

Historically, black unemployment rates have typically been twice the unemployment rates for whites since the Bureau of Labor Statistics began publishing black unemployment data in 1972.⁹² The February 2018 black unemployment rate of 6.9% is near the December 2017 record low unemployment rate for blacks.⁹³ However, that “low” rate for blacks is still *higher* than the typical unemployment rate for whites.⁹⁴ In fact, the “low” black unemployment rate is higher than what the unemployment rate for whites was in 80% of the months since 1972.⁹⁵ Little of this racial discrepancy is attributable to differing educational levels but rather is the result of racial discrimination in employment. One result of this observation is that the “natural” unemployment rate—often said to be around 3.5%—should actually be measured against the more nondiscriminatory employment rate for college educated whites—which is around 1.7%.⁹⁶

4. Health

White people get better healthcare than racial minorities. In its seminal 2003 report entitled *Unequal Treatment*, the Institute of Medicine noted that blacks and Latinos receive lower quality health services and are less likely to receive routine medical procedures than are white Americans.⁹⁷ This discrepancy exists with respect to cardiac medication, artery bypass surgery, dialysis, kidney transplants, and the quality of basic services, such as intensive care.⁹⁸ The disparities affect cardiovascular care; cancer diagnosis and treatment; HIV therapy; diabetes treatment; pediatric and maternal care; and care relating to child health, mental health, rehabilitation, nursing home services, and many surgical procedures.⁹⁹

<https://www.nytimes.com/2018/02/23/business/economy/black-unemployment.html?hp&action=click&pgtype=Homepage&clickSource=story-heading&module=first-column-region®ion=top-news&WT.nav=top-news> [<https://perma.cc/8X8A-GX7H>].

92. See Ben Spielberg, *The Unemployment Rate Is Low. It Should Be Even Lower*, WASH. POST (Mar. 19, 2018), https://www.washingtonpost.com/news/posteverything/wp/2018/03/19/the-unemployment-rate-is-low-it-should-be-even-lower/?utm_term=.16f63d5dd60c [<https://perma.cc/MKK5-EKQP>].

93. *Id.*

94. *See id.*

95. *Id.*

96. *Id.*

97. See INST. OF MED., *UNEQUAL TREATMENT: CONFRONTING RACIAL AND ETHNIC DISPARITIES IN HEALTH CARE* 1-2 (Brian D. Smedley et al. eds. 2003).

98. *See id.*

99. *See id.* at 5-6.

In *Whitewashing Race*, published the same year, a group of highly regarded academic social scientists noted that black infant mortality rates were twice as high as white rates, and black mortality rates were 1.61 times white rates—a disparity that had persisted since the 1950s and had not been reduced by the civil rights movement.¹⁰⁰ A more detailed *New York Times* article with narrative elaborations shows that the racial gap has existed since infant mortality rates were first kept in 1850.¹⁰¹ Now black infants are more than twice as likely to die as white infants.¹⁰² That racial gap is wider than it was in 1850, fifteen years before the end of slavery. Black women are also three to four times as likely to die from pregnancy-related causes than are white women.¹⁰³ The racial gap transcends socioeconomic and genetic factors and seems to be the result of stress suffered by black women from cumulative incidents of racial discrimination—including medical discrimination during the pregnancy and delivery process itself, which reflects more general disparities between medical care given to whites and blacks. Black and Latina midwife and doula care for mothers during pregnancy and childbirth has helped reduce pregnancy and infant health care problems suffered by black women and their new-born children.¹⁰⁴

In predominantly black and Latino South-Central Los Angeles, the ratio of primary care physicians to population was one to 12,933.¹⁰⁵ The ratio in white and wealthier Bel Air a few miles away was one to 214.¹⁰⁶ Although these statistics are now fifteen years old, such seminal statistics remain relevant because they help convey a sense of how stubbornly persistent the problem has been.¹⁰⁷

Black women are two to three times more likely to die during, or shortly after, childbirth than white women, even after correcting for

100. MICHAEL K. BROWN ET AL., *WHITEWASHING RACE: THE MYTH OF A COLOR-BLIND SOCIETY* 14 (2005).

101. See Linda Villarosa, *Why America's Black Mothers and Babies Are in a Life-or-Death Crisis*, N.Y. TIMES (Apr. 11, 2018), <https://www.nytimes.com/2018/04/11/magazine/black-mothers-babies-death-maternal-mortality.html> [<https://perma.cc/9KLV-P3AX>].

102. See *id.*

103. See *id.*

104. See *id.*

105. BROWN ET AL., *supra* note 100, at 14.

106. *Id.*

107. See David R. Williams & Michelle Sternthal, *Understanding Racial/Ethnic Disparities in Health: Sociological Contributions*, 51 J. HEALTH SOC. BEHAV. S15, S15 (2010); see also David R. Williams et al, *Race Socioeconomic Status and Health: Complexities, Ongoing Challenges and Research Opportunities*, 1186 ANNALS N.Y. ACAD. SCI. 69, 70 (2010).

socioeconomic factors.¹⁰⁸ Black women in the United States die at the same rate as women in countries such as Mexico and Uzbekistan.¹⁰⁹ In addition, a May 21, 2018 *Washington Post* article reported on a study in the *Journal of the American Medical Association Pediatrics* showing that suicide rates for black children age five to twelve was twice as high as the suicide rates for white children of the same age, and the gap is widening.¹¹⁰ A 2018 study showed that, as a result of environmental and psychological stress factors related to racial discrimination, whites even get more and better quality sleep than blacks and Asians, with ensuing effects on health and academic performance.¹¹¹

Legal immigrants from Latin America now forego public health services and enrollment in federally subsidized insurance plans because they fear that their information will be used by the Trump administration to identify and deport their relatives.¹¹² Latinos are more than three times as likely to go without health insurance as whites.¹¹³ Whites made up 63% of those who signed up for the Affordable Care Act in 2017, while Latinos made up only 15%.¹¹⁴ News stories about border patrol agents following a ten-year-old immigrant with cerebral palsy into a Texas hospital and taking her into

108. See Sheela Nimishakavi, *Racial Healing Disparities Are Well Documented*, NON PROFIT Q. (Dec. 12, 2017), <https://nonprofitquarterly.org/2017/12/12/racial-health-disparities-well-documented/> [<https://perma.cc/68FJ-93ZU>]; Sy Mukherjee, *Serena Williams Almost Died after Giving Birth. Her Story Is Shared by Black Women Across America*, L.A. TIMES (Jan. 12, 2018), <http://fortune.com/2018/01/12/serena-williams-birth-story-black-women/> [<https://perma.cc/BDA4-339Y>].

109. See Nimishakavi, *supra* note 108.

110. See Amy Ellis Nutt, *Suicide Rates for Black Children Twice that of White Children*, *New Data Show*, WASH. POST (May 21, 2018), https://www.washingtonpost.com/news/to-your-health/wp/2018/05/21/suicide-rates-for-black-children-twice-that-of-white-children-new-data-show/?utm_term=.7a2421ebdde3 [<https://perma.cc/9S8T-288C>].

111. See Spenser Mestel, *Study Finds Connection Between Race and Sleep*, WASH. POST (June 19, 2018), https://www.washingtonpost.com/lifestyle/home/another-aspect-of-white-privilege-better-sleep/2018/06/18/c8f9277c-6423-11e8-99d2-0d678ec08c2f_story.html?utm_term=.5edff800a762 [<https://perma.cc/TJV5-PJUW>].

112. See Kelli Kennedy, *Hispanics Forego Health Services to Avoid Officials' Attention, Advocates Say*, WASH. POST (Jan 21, 2018), https://www.washingtonpost.com/politics/hispanics-forgo-health-services-to-avoid-officials-attention-advocates-say/2018/01/21/3555412e-ff1d-11e7-9d31-d72cf78dbeee_story.html?hpid=hp_hp-top-table-main-immigranthealth-1150pm-1-duplicate%3Ahomepage%2Fstory&utm_term=.1b6c50f0eea4 [<https://perma.cc/2SHC-CQLM>].

113. See *id.*

114. See *id.*

custody after her surgery are likely to have a chilling effect on the willingness of undocumented immigrants to seek medical care.¹¹⁵

5. Housing

Residential segregation also exists in the United States.¹¹⁶ In their classic 1993 book, *American Apartheid*, Douglas Massey and Nancy Dent argued that black residential segregation in the United States is so extreme that they coined the term “hypersegregation” to capture its pervasiveness.¹¹⁷ Segregation became a structural force that both reflected and perpetuated individual racial prejudices, institutional practices, and official governmental policies.¹¹⁸

Recent Census data now suggest a modest decline in the degree of black–white segregation. However, in the nation’s largest metropolitan areas, black segregation levels remain so high that more than half of the blacks who currently reside there would have to move out in order to achieve complete integration. The most segregated areas in the nation are not in the South but are in Northeastern and Midwestern cities, such as Milwaukee, New York, Chicago, Detroit, Cleveland, and Buffalo.¹¹⁹

Blacks who want to rent an apartment are informed of 11.4% fewer units and shown 4.2% fewer units than white renters.¹²⁰ Black homebuyers are informed of 17% fewer homes and shown 17.7% fewer homes than white homebuyers.¹²¹ On Airbnb, there was a 16% negative disparity in ultimate acceptance rates for guests with black-sounding names.¹²²

Home ownership rates also vary by race. Black home ownership rates have now returned to the levels that preceded enactment of the Fair Housing Act in 1968. This means that the black home ownership gains achieved by that statute have now been erased, and black home ownership rates are now the same as they were when racial

115. *See id.*

116. *See* DOUGLAS S. MASSEY & NANCY A. DENT, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* 1 (1993).

117. *See id.* at 10.

118. *See id.* at 16.

119. *See* William H. Frey, *Census Shows Modest Declines in Black-White Segregation*, BROOKINGS (Dec. 8, 2015), <https://www.brookings.edu/blog/the-avenue/2015/12/08/census-shows-modest-declines-in-black-white-segregation/> [<https://perma.cc/7T62-E9UY>].

120. BUTLER, *supra* note 31, at 182.

121. *Id.*

122. *Id.*

discrimination in housing and mortgage lending were legal.¹²³ In some areas, 40% of housing units were owned by black residents whereas white homeownership rates exceeded 70%.¹²⁴ An April 2018 Zillow study showed that racial disparities in home ownership had remained nearly the same for the past 100 years.¹²⁵ In Washington, D.C., whites earning the median 2017 salary could afford 77.6% of the homes listed for sale on the market, Latinos could afford 64.9%, and blacks could afford only 55.3%.¹²⁶ Asians, however, could afford 85.2%.¹²⁷

Leading up to the recent mortgage foreclosure crisis, racial disparities correlated with race and zip code showed mortgage discrepancies so great that black families with \$230,000 annual earnings were more likely in 2006 to be given subprime mortgage loans than were white families with \$32,000 annual earnings.¹²⁸ Even using home ownership rates occurring before the subprime mortgage crisis, it would have taken more than 5,423 years for black homeownership rates to achieve parity with white homeownership rates.¹²⁹

A February 15, 2018 article in *Reveal* describes a new study by the Center for Investigative Reporting that shows that banks in sixty-one metropolitan areas continue to engage in a pattern of redlining in their mortgage practices, charging higher mortgage rates to blacks and Latinos than to whites.¹³⁰ A March 7, 2018 editorial in the *New York*

123. See Michelle Singletary, *Black Homeownership Is as Low as it Was When Housing Discrimination Was Legal*, WASH. POST (Apr. 5, 2018), https://www.washingtonpost.com/news/get-there/wp/2018/04/05/black-homeownership-is-as-low-as-it-was-when-housing-discrimination-was-legal/?utm_term=.0aa9eeec1ed6 [<https://perma.cc/88M4-ABMM>].

124. Alexander Kent & Thomas C. Frohlich, *The 9 Most Segregated Cities in America*, HUFFINGTON POST (Aug. 27, 2015), https://www.huffingtonpost.com/entry/the-9-most-segregated-cities-in-america_us_55df53e9e4b0e7117ba92d7f [<https://perma.cc/96MY-BNGM>] (relying on research by Richard Rothstein).

125. See Michele Lerner, *Homeownership Gap Between Blacks and Whites Unchanged in a Century*, ZILLOW STUDY SAYS, WASH. POST (Apr. 26, 2018), https://www.washingtonpost.com/news/where-we-live/wp/2018/04/26/homeownership-gap-between-blacks-and-whites-unchanged-in-a-century-zillow-study-says/?utm_term=.4740e96bce15 [<https://perma.cc/G7JP-XH6R>].

126. *Id.*

127. *Id.*

128. See Emily Badger, “*This Can’t Happen by Accident.*”, WASH. POST (May 2, 2016), https://www.washingtonpost.com/graphics/business/wonk/housing/atlanta/?hpid=hp_hp-top-table-main_housing-atlanta%3Ahomepage%2Fstory [<https://perma.cc/PUV8-SWYK>].

129. See AMAAD RIVERA ET AL., FORECLOSED: STATE OF THE DREAM 2008 vii (2008), https://d3n8a8pro7vhm.cloudfront.net/ufe/pages/2157/attachments/original/1442675896/StateOfDream_01_16_08_Web.pdf?1442675896 [<https://perma.cc/3TTE-NSJZ>].

130. See Aaron Glantz & Emmanuel Martinez, *For People of Color, Banks Are Shutting the Door to Homeownership*, REVEAL (Feb. 15, 2018),

Times emphasizes the *Reveal* study finding that, in many instances, black and Latino home seekers were simply denied mortgages altogether.¹³¹ In Philadelphia whites got ten times more conventional mortgages than blacks during 2015 and 2016.¹³² A bill pending in the Senate would exempt 85% of banks from even reporting mortgage data that reveal these discriminatory practices.¹³³ A March 20, 2018 study issued by the National Community Reinvestment Coalition found that three out of four neighborhoods that had been discriminatorily “redlined” by the Federal Housing Administration in the 1930s remain largely segregated by race today and continue to experience racial wealth gaps produced by lending practices that continue to be racially discriminatory.¹³⁴ Black families making \$100,000 or more may well end up living in poorer neighborhoods than white households making less than \$25,000.¹³⁵

Despite all this, Secretary Ben Carson of the Trump Department of Housing and Urban Development recently proposed changes to the agency’s website that would remove existing antidiscrimination language from its mission statement.¹³⁶ A March 28, 2018 *New York Times* article reported that, under Secretary Carson, HUD had scaled back fair housing enforcement initiatives begun by the Obama administration, transferred agency staff who favored fair housing enforcement, and facilitated efforts by Houston, Texas to block the de-

<https://www.revealnews.org/article/for-people-of-color-banks-are-shutting-the-door-to-homeownership/> [https://perma.cc/B6UY-8PXZ].

131. See Editorial Bd., *The Race-Based Mortgage Penalty*, N.Y. TIMES (Mar. 7, 2018), <https://www.nytimes.com/2018/03/07/opinion/mortgage-minority-income.html?rref=collection%2Fsectioncollection%2Fopinion-editorials> [https://perma.cc/UY7M-76NN].

132. *Id.*

133. *Id.*

134. See Bruce Mitchell & Juan Franco, *HOLC “Redlining” Maps: The Persistent Structure of Segregation and Economic Inequality*, NAT’L COMM’N REINVESTMENT COALITION (2018), <https://ncrc.org/holc/> [https://perma.cc/R8VG-4TW9] (identifying a study); Tracy Jan, *Redlining Was Banned 50 Years Ago. It’s Still Hurting Minorities Today*, WASH. POST (Mar. 28, 2018), https://www.washingtonpost.com/news/wonk/wp/2018/03/28/redlining-was-banned-50-years-ago-its-still-hurting-minorities-today/?utm_term=.b42ad6b5b728 [https://perma.cc/4NNG-VJ2G].

135. See John Eligon & Robert Gebeloff, *Affluent and Black, and Still Trapped by Segregation: Why Well-off Black Families End Up Living in Poorer Areas Than White Families with Similar or Even Lower Incomes*, N.Y. TIMES (Aug. 20, 2016), <https://www.nytimes.com/2016/08/21/us/milwaukee-segregation-wealthy-black-families.html> [https://perma.cc/RJZ3-XSC3].

136. Amanda Terkel, *Ben Carson Removes Anti-Discrimination Language from HUD Mission Statement*, HUFFINGTON POST (Mar. 7, 2018), https://www.huffingtonpost.com/entry/hud-mission-statement_us_5a9f5db0e4b002df2c5ec617 [https://perma.cc/24M6-ZQX5].

velopment of a mixed-income housing plan in an affluent white neighborhood.¹³⁷ On the fiftieth anniversary of the Fair Housing Act in 2018, there remain insufficient advocates or funding to combat housing discrimination, and HUD enforcement efforts have decreased rather than increased.¹³⁸ And, of course, Trump was himself sued by the federal government for Fair Housing Act violations.¹³⁹ HUD has now been sued by fair housing advocates for suspending the Obama efforts to enforce the agency's fair housing integration rules.¹⁴⁰

6. Voting

There are also racial disparities in voting. Minority voter turnout has traditionally lagged behind white voter turnout.¹⁴¹ U.S. Census Bureau data for 2014 shows that the voting rate for white adults was 45.8%, the rate for black adults was 39.7%, and the rate for Latino adults was 27%.¹⁴² Black and Latino voting rates increase as each group makes up a larger proportion of the electorate in particular voting districts, and that factor is more significant than whether a minority candidate of the same race is on the ballot.¹⁴³ Indigenous

137. See, e.g., Glenn Thrush, *Under Ben Carson, HUD Scales Back Fair Housing Enforcement*, N.Y. TIMES (Mar. 28, 2018), <https://www.nytimes.com/2018/03/28/us/ben-carson-hud-fair-housing-discrimination.html?smprod=nytcore-ipad&smid=nytcore-ipad-share> [<https://perma.cc/B6B7-4FK6>].

138. See Melissa Heelan Stanzione, *Fair Housing Act at 50: Bias, Lapses Persist, but Groups Fight On*, BLOOMBERG L. (Apr. 12, 2018, 4:24 PM), <https://bit.ly/2ATE2b7> [<https://perma.cc/6BJ2-67VF>].

139. See Joe Davidson, *Trump Doesn't Ignore Fair Housing and Public Assistance Programs—Unfortunately*, WASH. POST (Apr. 13, 2018), https://www.washingtonpost.com/news/powerpost/wp/2018/04/13/trump-doesnt-ignore-fair-housing-and-public-assistance-programs-unfortunately/?utm_term=.5bdc40a3c393 [<https://perma.cc/RK6V-53G8>].

140. See Tracy Jan, *HUD Secretary Ban Carson to Be Sued for Suspending Obama-Era Fair-Housing Rule*, WASH. POST (May 7, 2018), https://www.washingtonpost.com/business/economy/hud-secretary-ben-carson-to-be-sued-for-suspending-obama-era-fair-housing-rule/2018/05/07/ef72db8a-523c-11e8-a551-5b648abe29ef_story.html?utm_term=.0bb32dde19d3 [<https://perma.cc/35WA-KXED>]. For an excellent discussion of the way in which HUD has failed to implement remedies for the government's prior *de jure* insistence on the creation and maintenance of segregated neighborhoods, see RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* 200-01 (2017).

141. See Lauren Leatherby, *The Role of Race in Voter Turnout*, JOURNALIST'S RESOURCE (Nov. 6, 2016), <https://journalistsresource.org/studies/politics/elections/minority-voter-turnout-research> [<https://perma.cc/Q3GK-P6VJ>].

142. *Id.*

143. See *id.*

Indian voting rates are from 5–14% lower than the rates for other minorities.¹⁴⁴ In states with large indigenous Indian populations, officials have used a variety of techniques to suppress Indian voting—many of which have now been declared illegal.¹⁴⁵

The 2014 Minnesota statistics illustrate how significant voting disparities can be. That year, Minnesota ranked forty-fifth in the nation for black voter turnout, with voting rates of 74% for whites, 56.2% for Asian-Americans, 49.2% for blacks, and 32.5% for Latinos.¹⁴⁶ The low minority turnout rates in Minnesota were thought to reflect racial disparities in poverty, education, and incarceration.¹⁴⁷ A 2003 study of voting patterns in South Carolina and Louisiana reaffirm the broader finding that ballots cast by black voters are invalidated at higher rates than ballots cast by white voters.¹⁴⁸ Low minority voting rates also reduce minority political power to challenge employment, housing, and policing policies that adversely affect them.¹⁴⁹

Voter ID laws also have the effect of suppressing minority votes. At the time of the 2016 election, thirty-three states had voter ID laws, twelve of which were considered “strict.”¹⁵⁰ New studies have shown that strict voter ID laws double the turnout gap between whites and Latinos in general elections and almost double the turnout gap between whites and blacks in primary elections.¹⁵¹ Voter ID laws tend to benefit Republicans, and they tend to be passed by Republican legislatures¹⁵² after conservative political efforts funded by billionaires such as the Koch brothers.¹⁵³ Nationally, up to 25% of voting age blacks lack government-issued ID, whereas only 8% of whites lack

144. Kira Lerner, *Native Americans' Right to Vote Is Under Attack*, THINKPROGRESS (June 20, 2018, 8:00 AM), <https://thinkprogress.org/for-native-americans-the-right-to-vote-is-under-attack-f667a402d63c> [<https://perma.cc/2HJA-KXCV>].

145. *See id.*

146. David Schultz, *Minnesota's Other Racial Disparity: Voting*, MINN. POST (Oct. 24, 2016), <https://populardemocracy.org/news-and-publications/minnesota-s-other-racial-disparity-voting> [<https://perma.cc/EX42-RYJV>].

147. *See id.*

148. *See* Michael Tomz & Robert P. Van Houweling, *How Does Voting Equipment Affect the Racial Gap in Voided Ballots?*, 47 AM. J. POL. SCI. 46, 46 (2003).

149. *See* Schultz, *supra* note 146.

150. Vann R. Newkirk II, *How Voter ID Laws Discriminate: A New Comprehensive Study Finds Evidence that Strict Voting Laws Do Suppress the Ballot Along Racial Lines*, ATLANTIC (Feb. 18, 2017) <https://www.theatlantic.com/politics/archive/2017/02/how-voter-id-laws-discriminate-study/517218/> [<https://perma.cc/9ASV-5CST>].

151. *See id.*

152. *See id.*

153. *See* JANE MAYER, DARK MONEY: THE HIDDEN HISTORY OF THE BILLIONAIRES BEHIND THE RISE OF THE RADICAL RIGHT 328-53 (2016).

such IDs.¹⁵⁴ The voting fraud that voter ID laws are said to combat seems largely not to exist, leading to legal challenges to those laws in states such as Pennsylvania, Arkansas, Wisconsin, and North Carolina.¹⁵⁵

Racial disparities also exist in voting lines.¹⁵⁶ Minorities in the 2016 presidential election had to wait twice as long as whites to vote.¹⁵⁷ For the 2012 presidential election, voters in some black communities waited in line up to seven hours to vote.¹⁵⁸ Nationally, white voters wait an average of twelve minutes to vote, compared to nineteen minutes for Latinos and twenty-three minutes for blacks.¹⁵⁹ Minority voters are six times more likely than whites to wait longer than one hour to vote.¹⁶⁰ In 2014, 200,000 people did not vote because of the long voting lines they encountered in 2012.¹⁶¹

The decennial Census commonly undercounts minority residents and overcounts white residents.¹⁶² This has the effect of reducing minority political power in Congress and the Electoral College, and it reduces the amount of federal tax funds that are returned to minority communities for things like roads and schools.¹⁶³

And, of course, felony disenfranchisement disproportionately reduces minority voting rates.¹⁶⁴ A report issued on October 6, 2016,

154. See *Oppose Voter ID Legislation—Fact Sheet*, ACLU, <https://www.aclu.org/other/oppose-voter-id-legislation-fact-sheet> [<https://perma.cc/EZ5P-FVUT>] (last visited Dec. 3, 2018).

155. See *id.*

156. See Mary Kuhlman, *Research Uncovers Racial Disparities in Voting Lines*, PUB. NEWS SERV. (Oct. 3, 2016), <https://www.publicnewsservice.org/2016-10-03/civic-engagement/research-uncovers-racial-disparities-in-voting-lines/a54278-1> [<https://perma.cc/SZ3A-C4MX>].

157. See Emily Badger, *Why Long Voting Lines Could Have Long-Term Consequences*, N.Y. TIMES (Nov. 8, 2016), <https://www.nytimes.com/2016/11/09/upshot/why-long-voting-lines-today-could-have-long-term-consequences.html> [<https://perma.cc/J72F-XG44>].

158. Kuhlman, *supra* note 156.

159. See *id.*

160. Badger, *supra* note 157.

161. See *id.*

162. See Tara Bahrapour, *NAACP Lawsuit Seeks to Prevent Undercount of Minority Communities*, WASH. POST (Mar. 28, 2018), https://www.washingtonpost.com/local/social-issues/naacp-lawsuit-seeks-to-prevent-undercount-of-minority-communities/2018/03/27/a400af48-31fc-11e8-8bdd-cdb33a5eef83_story.html?utm_term=.e90970c7849f [<https://perma.cc/D9MK-3565>].

163. See *id.*

164. See Joe Davidson, *6 Million Citizens, Including 1 in 13 African Americans, Are Blocked from Voting because of Felonies*, WASH. POST (Oct. 7, 2016), <https://www.washingtonpost.com/news/powerpost/wp/2016/10/07/6-million->

by The Sentencing Project stated that felony disenfranchisement had a disproportionate impact on blacks so that one in thirteen blacks are excluded from voting.¹⁶⁵ In March 2018, a woman was convicted of voting illegally when she voted while on parole after completing a 2012 prison sentence for tax fraud.¹⁶⁶ She said that she did not realize she was still precluded from voting after her release, and her provisional ballot was never counted.¹⁶⁷ Nevertheless, she was sentenced to five years in prison in the state of Texas, and the woman was black.¹⁶⁸

Even the Democratic Party gives more money to traditional white candidates than to black candidates despite the fact that blacks, and black women in particular, have become the backbone of the Democratic Party.¹⁶⁹

7. Criminal Justice

It is now widely recognized that the United States criminal justice system is characterized by racial disparities that are stark, pervasive, intentional, and often fatal.¹⁷⁰ In a poignant April 17, 2018 *Washington Post* perspective article, Mikki Kendall describes how there are two Americas: a white America in which the police are

citizens-including-1-in-13-african-americans-are-blocked-from-voting-because-of-felonies/?utm_term=.3ca4ec8231f4 [https://perma.cc/EL92-JPEA].

165. See *id.*; see also Jean Chung, *Felony Disenfranchisement: A Primer*, THE SENT'G PROJECT (July 17, 2018), <https://www.sentencingproject.org/publications/felony-disenfranchisement-a-primer/> [https://perma.cc/D5VB-EZZQ].

166. See Meagan Flynn, *Texas Woman Sentenced to 5 Years in Prison for Voting While on Probation*, WASH. POST (Mar. 30, 2018), https://www.washingtonpost.com/news/morning-mix/wp/2018/03/30/texas-woman-sentenced-to-5-years-in-prison-for-voting-while-on-probation/?utm_term=.4724551c66cb [https://perma.cc/2EUU-69ZB].

167. See *id.*

168. See *id.*

169. See Marcia Davis, *Black Politics 2.0: The Post-Obama Generation Is So Done with the Democratic Party's Old Ways*, WASH. POST (Mar 6, 2018), https://www.washingtonpost.com/lifestyle/magazine/black-politics-20-the-post-obama-generation-is-so-done-with-the-democratic-partys-old-ways/2018/03/05/20ae7390-1583-11e8-92c9-376b4fe57ff7_story.html?utm_term=.6cbeefcbc25d [https://perma.cc/M4VG-USNS].

170. See Nikki Kendall, *There Are Two Americas. In One, You Can Get Arrested for Sitting in a Starbucks*, WASH. POST (Apr. 17, 2018), https://www.washingtonpost.com/news/posteverything/wp/2018/04/17/there-are-two-americas-in-one-you-can-get-arrested-for-sitting-in-a-starbucks/?utm_term=.da2a6f254123 [https://perma.cc/UA3N-SPMV].

trusted civil servants and a non-white America in which the police are viewed as practitioners of racial oppression.¹⁷¹

The national problem is illustrated perhaps most famously by the 100-page *Ferguson Report* that the United States Department of Justice issued in 2015 after its investigation of the August 2014 fatal police shooting of an unarmed black man named Michael Brown by a white Ferguson police officer named Darren Wilson.¹⁷² The *Report* condemned the Ferguson criminal justice system for its unconstitutional pattern and practice of violating the civil rights of its black citizens.¹⁷³

For example, blacks comprised 67% of the population in Ferguson.¹⁷⁴ But Ferguson Police Department data show that, from 2012 to 2014, blacks accounted for 85% of vehicle stops, 90% of citations, and 93% of arrests.¹⁷⁵ Blacks were more than twice as likely as whites to be searched during vehicle stops even though blacks are 26% less likely than whites to be in possession of contraband when they are stopped.¹⁷⁶ Blacks were issued four or more citations on seventy-three occasions, while non-blacks were issued four or more citations only twice.¹⁷⁷ From 2011 to 2013, blacks accounted for 95% of Manner of Walking in Roadway charges and 94% of Failure to Comply charges.¹⁷⁸ The racially disparate impact was 48% larger when citations were issued on the basis of subjective officer assessments than on the basis of radar or laser readings.¹⁷⁹ Blacks were the victims of 90% of documented uses of force by Ferguson police officers, and every recorded canine bite was inflicted on a black person.¹⁸⁰ The *Report* concluded that these disparities were not the result of differential rates at which blacks violate the law but were instead the product of racial bias, stereotypes, and intentional discrimination.¹⁸¹

171. *See id.*

172. *See* U. S. Dep't. of Justice, *Justice Department Announces Findings of Two Civil Rights Investigations in Ferguson, Missouri* (Mar. 4, 2015), <https://www.justice.gov/opa/pr/justice-department-announces-findings-two-civil-rights-investigations-ferguson-missouri> [<https://perma.cc/2WH5-SNS6>] [hereinafter *Ferguson Announcement*].

173. *See id.*

174. U.S. DEP'T OF JUSTICE, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 4 (2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report_1.pdf [<https://perma.cc/Z276-JSAH>].

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.* at 5.

180. *Id.*

181. *See id.*

Nationally, blacks are 2.5 times more likely than whites to be killed by the police, and black men are 6.7 times more likely to be incarcerated than white men.¹⁸² More subtly, police pursue black drivers when there is enough light to see the race of the driver but pursue more white drivers when it is too dark to see the race of the driver.¹⁸³ The police stop blacks and Latinos more often than whites even though whites possess more contraband than blacks and Latinos.¹⁸⁴ Hillary Clinton famously asked whether the culture would tolerate a criminal justice system in which whites were three times more likely than blacks to be searched during a traffic stop, white offenders received prison sentences 10% longer than sentences imposed on blacks for the same crimes, and a third of all white men went to prison during their lifetimes.¹⁸⁵

Minority mass incarceration rates and the ensuing loss of voting and civil rights that incarceration entails are now so high that Michelle Alexander has described them as creating a “New Jim Crow” racial caste system of social control.¹⁸⁶ In school, black boys are 9.3 times more likely to be placed in juvenile detention than white boys.¹⁸⁷ Black students constitute 16% of student enrollments but 27% of students referred to law enforcement and 31% of students subject to in-school arrests.¹⁸⁸ Of the black men born in 2001, one in three can expect to be incarcerated during his lifetime.¹⁸⁹ While blacks make up 13.6% of the overall population, blacks constitute 42% of the people on death row.¹⁹⁰

Racial profiling persists even though it does little to reduce crime. Studies of profiling on the New Jersey Turnpike during the 1990s show that black drivers constituted 42% of the stops and 73.2% of the arrests even though blacks constituted only 15% of Turnpike drivers.¹⁹¹ The disparities existed despite the fact that blacks and whites violated traffic laws at almost identical rates.¹⁹² In addition, after an investigatory stop, police are five times more likely to search a vehicle if the driver is black than if the driver is white even though

182. BUTLER, *supra* note 31, at 54, 161.

183. *See id.* at 49.

184. *See id.* at 64-66.

185. *See id.* at 67.

186. *See* ALEXANDER, *supra* note 12, at 173-208.

187. ANGELA J. DAVIS, *Introduction*, in *POLICING THE BLACK MAN*, *supra* note 31, at xiv.

188. *Id.* at xv.

189. *Id.* at xvi.

190. *See id.*

191. Renée McDonald Hutchins, *Racial Profiling: The Law, The Policy, and the Practice*, in *POLICING THE BLACK MAN*, *supra* note 31, at 95, 103.

192. *See id.*

the “hit rate” for finding contraband is twice as high for whites as for blacks.¹⁹³ Reminiscent of the Jim Crow *Green Book* era, many black people are still afraid to travel in their own country.¹⁹⁴

Black men are also disproportionately more likely to be the victims of crime. Homicide is the leading cause of death for young black males between the ages of fifteen and thirty-four.¹⁹⁵ However, perpetrators of black-victim crimes are not punished as harshly as perpetrators of white-victim crimes.¹⁹⁶ As recent media coverage reveals, prosecutors often fail to prosecute or obtain convictions of police officers who fatally shoot unarmed blacks.¹⁹⁷ Fewer than 5% of chief prosecutors in the United States are black.¹⁹⁸

The racial disparities produced by police misconduct are often fatal. Black men are twenty-one times more likely to be killed by police than white men.¹⁹⁹ Black men killed by police during the first five months of 2015 were twice as likely to be unarmed than whites.²⁰⁰ Since 2015, the *Washington Post* has maintained an annual database of people who have been shot and killed by police.²⁰¹ In 2018, the number of people who were shot and killed by police was 995.²⁰² Police are still killing black people, but reduced news coverage has largely eliminated the issue from the nation’s political conversation.²⁰³

Of course, police misconduct can be brutally violent even when it is not fatal. A March 9, 2018 *New York Times* article reported that a video had just been leaked showing an August 25, 2017 brutal beating and tasing of an unarmed black man named Johnnie Jermaine Rush

193. *Id.* at 103-04.

194. See Rhonda Colvin, *Traveling While Black*, WASH. POST (Jan. 26, 2018), https://www.washingtonpost.com/news/national/wp/2018/01/26/feature/traveling-while-black-why-some-americans-are-afraid-to-explore-their-own-country/?utm_term=.0bd28724697d [<https://perma.cc/4GPN-SN94>].

195. See Angela J. Davis, *The Prosecution of Black Men*, in POLICING THE BLACK MAN, *supra* note 31, at 178, 192.

196. *See id.*

197. *See id.*

198. See Ronald F. Wright, *Elected Prosecutors and Police Accountability*, in POLICING THE BLACK MAN, *supra* note 31, at 234, 235.

199. See DAVIS, *supra* note 187, at xv.

200. *See id.* at xvi.

201. See *Fatal Force*, WASH. POST, https://www.washingtonpost.com/graphics/2018/national/police-shootings-2018/?utm_term=.96719a732385 [<https://perma.cc/DK6M-GQXM>] (last updated Jan. 18, 2019, 3:57 PM).

202. *See id.*

203. See Wesley Lowery, *Police Are Still Killing Black People. Why Isn’t It News Anymore?*, WASH. POST (Mar. 16, 2018) https://www.washingtonpost.com/outlook/police-are-still-killing-black-people-why-isnt-it-news-anymore/2018/03/12/df004124-22ef-11e8-badd-7c9f29a55815_story.html?utm_term=.3f5273aff0c0 [<https://perma.cc/TJZ7-ZNTY>].

by a white Asheville, North Carolina police officer named Chris Hickman. The victim was suspected of jaywalking for not using a crosswalk.²⁰⁴ Subsequently released videos suggest that Hickman began beating Rush when Rush complained about police harassment and then continued beating Rush even though Rush complained that he could not breathe.²⁰⁵ A new study shows that indigenous Indian women in Minneapolis are stopped more frequently by police than even black men.²⁰⁶ Not only does that remind us that Indians, too, are victims of racially disparate impact discrimination, but that the level of police discrimination against black males now seems to have become the metric for comparing the level of discrimination against other racial groups.

II. DENIAL

Despite the stark racially disparate impact that characterizes the distribution of most societal benefits and burdens, we still think of ourselves as a culture that strives not to “deny to any person within its jurisdiction the equal protection of the laws.”²⁰⁷ We mediate the tension that exists between our equality rhetoric and our racially disparate allocation of resources by simply denying that racial disparities are evidence of discrimination. That rationalization both reflects and reinforces cultural biases that are sometimes blatant and sometimes subtle but are always convincing enough to dissipate the dissonance that would otherwise exist. That has been especially true in the divisive racial climate unleashed by the campaign and election of Donald Trump as President of the United States. Our cultural ability to accept this conceptual sleight of hand is facilitated by the Supreme Court, one of the primary functions of which is to legitimate our discriminatory behavior by explaining how such concrete

204. See *id.*; see also Jonathan Drew, *Officer Charged with Assaulting Black Jaywalking Suspect*, ASSOC. PRESS (Mar. 9, 2018, 10:16 AM), <https://www.businessinsider.com/ap-officer-charged-with-assaulting-black-jaywalking-suspect-2018-3?r=UK&IR=T> [<https://perma.cc/7BFA-STSS>].

205. See Meagan Flynn, *‘I Can’t Breathe’: Asheville Police Video Shows White Officer Beating, Choking Black Jaywalking Suspect*, WASH. POST (Apr. 3, 2018), https://www.washingtonpost.com/news/morning-mix/wp/2018/04/03/i-cant-breathe-asheville-police-video-shows-white-officer-beating-choking-black-jaywalking-suspect/?utm_term=.225841e83ce5 [<https://perma.cc/TKZ9-YA6D>].

206. See Libor Jany, *Study: American Indian Women in Minneapolis Disproportionately Drawing Police Attention*, STAR TRIB. (Feb. 19, 2018, 10:56 PM), <http://www.startribune.com/study-native-women-in-minneapolis-disproportionately-targeted-in-police-stops/474512523/> [<https://perma.cc/2KDR-FUZJ>].

207. See U.S. CONST. amend XIV, § 1.

discrimination is consistent with the constitutional doctrine of equality. The Court has done this by diverting our attention from the actual consequences of our discriminatory practices and by convincing us instead that the constitutional concept of equality prohibits only intentional discrimination and precludes the pursuit of racial balance in the allocation of resources. More succinctly, we have happily allowed the Supreme Court to persuade us that the Constitution requires the perpetuation of existing racial inequalities. And recognition of that truth is a prerequisite to any meaningful chance at racial reconciliation.

A. Rationalizations

As a culture, there are a number of rationalizations that we invoke to convince ourselves that our racially disparate actions are not really racially discriminatory. Perhaps the most striking is our invocation of the concept of postracialism. The culture has used President Obama's election and the concept of postracialism to camouflage continuing discrimination against racial minorities and to utilize charges of reverse discrimination as a means of insulating white privilege from efforts that are designed to promote racial equality.²⁰⁸ There is, of course, a logical problem with this rationalization: Because the racially disparate impact of our myriad cultural practices has preceded, coincided with, and continued to exist beyond the Obama presidency, the election of a black president seems to have no bearing on the problem.

Eighty-eight percent of blacks say that the country needs to continue making changes for blacks to have equal rights with whites, and 43% doubt that those changes will ever occur.²⁰⁹ In contrast, only 53% of whites say the country still needs to make changes for blacks to have equal rights with whites, and only 11% express doubts about whether those changes will occur.²¹⁰ Despite our racially disparate allocation of resources, roughly half of the white population in the United States thinks that racial discrimination is no longer a problem.²¹¹ So, it turns out that there is also a racially disparate impact

208. See Spann, *Postracial Discrimination*, *supra* note 7, at 26; see also Crenshaw, *supra* note 31, at 1312-13.

209. See *On Views of Race and Inequality, Blacks and Whites Are Worlds Apart*, PEW RES. CTR. (June 27, 2016), <http://www.pewsocialtrends.org/2016/06/27/on-views-of-race-and-inequality-blacks-and-whites-are-worlds-apart/> [<https://perma.cc/W4AA-A24V>].

210. See *id.*

211. See *id.*

in cultural beliefs about the significance of the culture's own racially disparate distribution of resources.

When states or localities wish to dilute minority voting strength by assigning voters to particular voting districts based on their race, they deny that they are engaged in racial discrimination. Rather, they assert that their racially disparate assignment of voters to particular voting districts merely uses race as a proxy for political affiliation and is not, therefore, unconstitutional. This is an argument that has not only been accepted by the Supreme Court, but it has now become part of the Supreme Court's standard redistricting jurisprudence.²¹²

In recent years, legislatures in predominantly Republican states have adopted numerous measures that make it more difficult for minority voters to vote.²¹³ Those measures include strict voter ID laws, restrictions on voting hours, and regulating polling places so that some voters have to endure long lines to vote.²¹⁴ Supporters of those measures deny that they are engaged in racial discrimination but rather argue that they are trying to prevent voter fraud. However, there have been so few recorded cases of such voter fraud that the voter fraud rationalization is simply implausible.²¹⁵ The fraud rationalization for minority voter suppression efforts not only denies responsibility for past and present racial disparities in voting, but it also actively seeks to increase the racial gap in voting for future elections.²¹⁶

The violent white nationalist rally that took the life of thirty-two-year-old Heather D. Heyer in Charlottesville, Virginia on August 12,

212. See, e.g., *Abbott v. Perez*, 138 S. Ct. 2305, 2314 (2018) (distinguishing between unconstitutional racial gerrymandering and constitutionally permissible gerrymandering based on political party preference); Brief for Appellants at 54-56, *Abbott v. Perez*, 138 S. Ct. 2305 (2018) (raising defense of partisan rather than racial gerrymandering); *Cooper v. Harris*, 137 S. Ct. 1455, 1472-81 (2017) (raising partisan gerrymandering as a defense to allegations of racial gerrymandering in North Carolina); *Easley v. Cromartie*, 532 U.S. 234, 257-58 (2001) (permitting use of race as proxy for political affiliation).

213. See, e.g., William Wan, *North Carolina's Battle over Voting Rights Intensifies*, WASH. POST (May 29, 2017), https://www.washingtonpost.com/national/north-carolinas-battle-over-voting-rights-intensifies/2017/05/29/7c9fa05e-4214-11e7-8c25-44d09ff5a4a8_story.html?hpid=hp_hp-cards_hp-card-politics%3Ahomepage%2Fcard&utm_term=.43821b22ed96 [<https://perma.cc/V595-HKGS>].

214. See, e.g., Kuhlman, *supra* note 156.

215. See Wan, *supra* note 213.

216. See Sherrilyn Ifill, *The President Lays the Groundwork for a Nationwide Voter Intimidation Program*, WASH. POST (Feb. 14, 2017), https://www.washingtonpost.com/opinions/the-president-lays-the-groundwork-for-a-nationwide-voter-intimidation-program/2017/02/14/ef524326-f2dd-11e6-a9b0-ecce7ce475fc_story.html?hpid=hp_no-name_opinion-card-d%3Ahomepage%2Fstory&utm_term=.fe9dfca3dfac [<https://perma.cc/53LM-VP73>].

2017, was nominally about expressing opposition to the removal of a statue honoring Confederate General Robert E. Lee from Emancipation Park in Charlottesville.²¹⁷ Although some opponents of removal state their opposition in explicitly racist terms, most deny that they are motivated by racial prejudice.²¹⁸ Instead, they insist that they are simply trying to maintain respect for the nation's southern history and heritage.²¹⁹ But, as Paul Butler has pointed out, the nation's southern history and heritage *is* the history and heritage of slavery, Jim Crow, and racial oppression.²²⁰

Many whites oppose racial affirmative action programs that are designed to address existing racial disparities in the allocation of resources, such as jobs, educational opportunities, or government construction contracts.²²¹ The rationalization that opposition to affirmative action is justified by the goal of colorblindness and by lofty neutral principles reflected in test scores or seniority requires opponents of affirmative action to overlook the fact that they are simply choosing to disregard the continuing racial inequalities on which those supposedly neutral principles rest.²²² Rather than describing the inability to see color, "colorblindness" has now come to encapsulate the desire to ignore color when it illuminates inconvenient truths.²²³

Former Attorney General Jeff Sessions decided to roll back Obama civil rights enforcement initiatives, such as the pattern and

217. See Maggie Astor et al., *A Guide to the Charlottesville Aftermath*, N.Y. TIMES (Aug. 13, 2017), <https://www.nytimes.com/2017/08/13/us/charlottesville-virginia-overview.html> [<https://perma.cc/ND9T-5HZL>].

218. See Logan Strother et al., *The Confederate Flag Largely Disappeared after the Civil War. The Fight against Civil Rights brought it Back.*, WASH. POST (June 12, 2017), https://www.washingtonpost.com/news/monkey-cage/wp/2017/06/12/confederate-symbols-largely-disappeared-after-the-civil-war-the-fight-against-civil-rights-brought-them-back/?hpid=hp_hp-cards_hp-card-politics%3Ahomepage%2Fcard&utm_term=.9b1246d0c94a [<https://perma.cc/5QJE-74TV>].

219. See *id.*

220. See Paul Butler, *I Have No Respect for Your Ancestors*, MSNBC (June 25, 2015), <https://www.msnbc.com/all-in/watch/i-have-no-respect-for-your-ancestors-471529027890> [<https://perma.cc/9D7J-M5AG>].

221. See, e.g., Ricci v. DeStefano, 557 U.S. 557, 562-63 (2009) (discussing opposition to affirmative action in employment); see also Fisher v. Univ. of Tx., 136 S. Ct. 2198, 2202 (2016) (*Fisher II*) (discussing opposition to affirmative action in education); Adarand Constructors v. Peña, 515 U.S. 200, 200 (1995) (discussing opposition to affirmative action in government contracts).

222. Theodore R. Johnson, "Colorblind Society" in *Ten Things To Toss*, WASH. POST (Apr 27, 2018), https://www.washingtonpost.com/news/opinions/wp/2018/04/27/feature/spring-cleaning-2018-10-things-to-toss/?utm_term=.204cd3bf37c3&wpisrc=nl_most&wpmml=1#colorblind-society [<https://perma.cc/U2JT-TGNP>].

223. See *id.*

practice initiative that produced the Ferguson Report and that produced similar remedial investigations of other police departments with histories of racially disparate policing practices.²²⁴ The change was said to be necessary to put the Department of Justice on a more pro-police footing and to reduce Department actions that could hurt police officer morale.²²⁵ Sessions seemed pretty clearly to have been elevating the interests of police departments that engage in racially discriminatory policing above the interests of the minority victims of that discriminatory policing.²²⁶ But he denied that he was doing so.²²⁷

Like most neighborhoods, most schools remain highly segregated, and many are now becoming resegregated as a result of shifts in residential housing patterns. Some parents challenge the constitutionality of the voluntary efforts that school boards make to resist the resegregation of their schools.²²⁸ Some white parents also use private schools, charter schools, and school voucher programs as techniques for keeping their children out of schools with significant minority student populations. However, such “white flight” efforts to participate in de facto racial segregation are rarely described as such. Rather they are typically defended as efforts to promote school choice and local control of schools.²²⁹

Donald Trump chose to shore up support among the white nationalist segment of his political base by condemning NFL football players as “sons of bitches” for their silent kneeling protests against racial oppression while the national anthem was played before NFL football games. He did not, of course, announce that he was engaged in a conspicuous appeal to racism. Rather, he chose to characterize his rebuke as indignation at the lack of patriotism and respect for the military that the NFL protests represented.²³⁰

224. See Devlin Barrett, *Justice Department Ends Program Scrutinizing Local Police Forces*, WASH. POST (Sept 15, 2017), https://www.washingtonpost.com/world/national-security/justice-department-ends-program-scrutinizing-local-police-forces/2017/09/15/ee88d02e-9a3d-11e7-82e4-f1076f6d6152_story.html?utm_term=.6daaaa415917 [https://perma.cc/7K3W-EGUL].

225. See *id.*

226. See *id.*

227. See *id.*

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

229. See, e.g., *Milliken v. Bradley*, 418 U.S. 717, 741-44 (1974) (relying on local control considerations to prohibit interdistrict remedies for school segregation remedies).

230. See Kent Babb et al, *President Trump Is Over the NFL (Mostly). But the League Still Is Feeling the Fallout.*, WASH. POST (Feb 3, 2018), <https://www.washingtonpost.com/sports/president-trump-is-over-the-nfl-mostly-but-the-league-still-is-feeling-the-fallout/2018/02/02/ebb35eaa-0770-11e8-94e8->

The response of many whites to the Black Lives Matter movement was to align themselves with a backlash movement that insisted that all lives matter; blue lives matter; or, even more confrontationally, white lives matter. Donald Trump was among those who spearheaded the backlash.²³¹

B. Bias

One reason that the racially disparate distribution of societal resources has not been more troubling to more people is that racial disparities seem to coincide with conscious and unconscious racial biases that many people possess. Some of those biases are blatant. Other biases are more subtle. Donald Trump seems to have made even the explicit expression of invidious racial bias more culturally permissible than it was before his 2016 presidential campaign and election. If people harbor a white supremacist belief in the inferiority of racial minorities, racial disparities in resource allocation do not seem all that troubling.

1. *Blatant*

As the unabashed actions of white supremacist, white nationalist, and neo-Nazi groups demonstrate, some segments of the United States population are proudly racist. A January 17, 2018 report of the Anti-Defamation League stressed that the number of white supremacist murders in the United States more than doubled in 2017, which was the fifth deadliest year for extremist violence since 1970.²³²

Not even accomplished minorities can escape the effects of blatant racial discrimination. In an April 29, 2018 *Chronicle of Higher Education* article, black Emory philosophy Professor George Yancy related an old Malcolm X warning: “What does a white man call a

e8b8600ade23_story.html?hpid=hp_hp-more-top-stories_trumpnfl1927pm%3Ahomepage%2Fstory&utm_term=.1b59009d7e28.

231. See David Weigel, *Three Words that Republicans Wrestle with: “Black Lives Matter”*, WASH. POST (July 12, 2016), https://www.washingtonpost.com/politics/three-words-that-republicans-wrestle-with-black-lives-matter/2016/07/12/f5a9dfdc-4878-11e6-90a8-fb84201e0645_story.html?hpid=hp_hp-more-top-stories_gopblm-830pm%3Ahomepage%2Fstory&utm_term=.dfa555f513d8 [https://perma.cc/53GV-TZWM].

232. See ADL Report: *White Supremacist Murders More than Double in 2017*, ADL (Jan. 17, 2017), <https://www.adl.org/news/press-releases/adl-report-white-supremacist-murders-more-than-doubled-in-2017> [https://perma.cc/5P5V-XV9T] (summarizing *Murder and Extremism in the United States in 2017*, ADL, (Jan. 17, 2017), <https://www.adl.org/education/resources/reports/murder-and-extremism-in-the-united-states-in-2017> [https://perma.cc/7JU3-8PAH]).

black man with a Ph.D.? A nigger with a Ph.D.”²³³ Yancy was reminded of the warning when he received a protest letter after having published a *New York Times* op-ed piece about structural white racism.²³⁴ The letter to Yancy began, “Dear Nigger Professor.”²³⁵ It was only one of the many explicitly racist letters that Yancy received in response to his structural racism claim.²³⁶

In April 2018, Syracuse University suspended the engineering fraternity Theta Tau when a video surfaced showing fraternity members taking an oath to “f--- black people” and “to always have hatred in my heart for . . . [adding racial slurs referring to blacks, Latinos and Jews].”²³⁷ Other recordings showed students mocking women, gays, and people with disabilities, while other students watched and laughed. The student newspaper reported that the social environment at the school was such that the recorded statements were not particularly surprising.²³⁸ Although the fraternity later apologized and said that the video was intended to be satire, the fraternity’s suspension was later turned into an expulsion.²³⁹ A few days later, another video emerged showing fraternity members engaged in a mock sexual assault of a disabled person.²⁴⁰ Also, in April 2018, all fraternities and sororities at California Polytechnic State University in San Luis Obispo were suspended indefinitely for anti-black and anti-Latino racist behavior, including blackface and racial epithets, sexist behavior, and underage alcohol abuse.²⁴¹

233. George Yancy, *The Ugly Truth of Being a Black Professor in America*, CHRON. HIGHER EDUC. (Apr. 29, 2018), https://www.chronicle.com/article/The-Ugly-Truth-of-Being-a/243234/#.Wuip8x_HaQM.email [<https://perma.cc/36XM-HFEX>].

234. *See id.*

235. *Id.*

236. *See* Yancy, *supra* note 233.

237. Samantha Schmidt, *Syracuse Suspends Engineering Fraternity for “Racist, Anti-Semitic, Homophobic” Video*, WASH. POST (Apr. 19, 2018) https://www.washingtonpost.com/news/morning-mix/wp/2018/04/19/syracuse-suspends-engineering-fraternity-for-racist-anti-semitic-homophobic-video/?utm_term=.331adfc8b8d2&wpisrc=nl_most&wppmm=1 [<https://perma.cc/4MAX-TSKT>].

238. *See id.*

239. *See* Allyson Chiu, *Syracuse Fraternity: Second Video Shows Mock Sexual Assault of Disabled Person*, WASH. POST (Apr. 23, 2018), https://www.washingtonpost.com/news/morning-mix/wp/2018/04/23/second-syracuse-fraternity-video-shows-mock-sexual-assault-of-disabled-person-members-disciplined/?utm_term=.101fc1cad3a1 [<https://perma.cc/UG9R-YXYM>].

240. *See id.*

241. *See* Rob Kuznia, *It’s Happened Again: A Fraternity Is under Fire for Racist Behavior, and a University Has Cracked Down*, WASH. POST (Apr. 25, 2018), <https://www.washingtonpost.com/news/grade-point/wp/2018/04/25/its-happened-again-a-fraternity-is-under-fire-for-alleged-racist-behavior-and-a-university-has>

In January 2018, President Trump managed to make headlines and shock Senators attending a meeting to discuss a bipartisan immigration proposal that had been designed to codify Deferred Action for Childhood Arrivals (DACA) protections for immigrants brought to the United States by their parents while they were children.²⁴² During the meeting, President Trump objected to protections for immigrants from Haiti and African countries, which he allegedly referred to as “shithole countries,” and instead favored accepting immigrants from places like Norway.²⁴³ Trump has previously complained about admitting Haitians and Nigerians, who he said all had AIDS and would never go back to their “huts.”²⁴⁴

In December 2017, when Republican Roy Moore was running for an open U.S. Senate seat in Alabama, he answered a campaign question about when he thought America was last great by referring back to the time in which we still had slavery.²⁴⁵ The contemporary revival of such blatant racism is reminiscent of the vitriolic joy that

cracked-down/?utm_term=.1ea1b4428b64&wpisrc=nl_highered&wpm=1
[https://perma.cc/8YQC-JSLD].

242. See Michael Shear, *Trump Immigration Plan Demands Tough Concessions From Democrats*, N.Y. TIMES (Jan. 25, 2018), <https://www.nytimes.com/2018/01/25/us/politics/trump-immigration-plan-white-house.html> [https://perma.cc/5B3W-5QNG].

243. See Josh Dawsey, *Trump Attacks Protections for Immigrants from “Shithole” Countries*, WASH. POST (Jan. 11, 2018), https://www.washingtonpost.com/politics/trump-attacks-protections-for-immigrants-from-shithole-countries-in-oval-office-meeting/2018/01/11/bfc0725c-f711-11e7-91af-31ac729add94_story.html?utm_term=.7efd19c35674 [https://perma.cc/5K5F-VL6K].

244. See *id.*; see also Julie Hirschfeld Davis & Sheryl Gay Stolberg, *Trump Alarms Lawmakers with Disparaging Words for Haiti and Africa*, N.Y. TIMES (Jan. 11, 2018), https://www.nytimes.com/2018/01/11/us/politics/trump-immigration-norway-haiti.html?hp&action=click&pgtype=Homepage&clickSource=story-heading&module=first-column-region®ion=top-news&WT.nav=top-news&_r=0 [https://perma.cc/RG6Z-T9N2]; Ed O’Keefe, Erica Werner & Josh Dawsey, *Immigration Talks Founder after White House Rejects Deal and Trump Insults Foreign Countries*, WASH. POST (Jan 12, 2018), https://www.washingtonpost.com/politics/talks-on-a-potential-immigration-deal-continue-with-deep-skepticism-on-both-sides/2018/01/11/d9f53ae8-f6cd-11e7-a9e3-ab18ce41436a_story.html?hpid=hp_hp-top-table-main_dacadeal830pm%3Ahomepage%2Fstory&utm_term=.18efd07458d0 [https://perma.cc/WJG3-RDH6].

245. See Philip Bump & Roy Moore: *America Was Great in Era of Slavery, Is Now “Focus of Evil in the World”*, WASH. POST (Dec 8, 2017), https://www.washingtonpost.com/news/politics/wp/2017/12/08/roy-moore-america-was-great-in-era-of-slavery-is-now-focus-of-evil-in-the-world/?utm_term=.d7356006b8e6 [https://perma.cc/F8HR-VS7G].

many white Americans felt after the April 4, 1968 assassination of Dr. Martin Luther King, Jr. in Memphis, Tennessee.²⁴⁶

ABC abruptly cancelled its show *Rosanne* on May 29, 2018, after the show's star, Roseanne Barr, issued an explicitly racist tweet directed at President Obama's former advisor Valery Jarrett.²⁴⁷ The Barr tweet was "mulsim brotherhood & planet of the apes had a baby=vj."²⁴⁸ The tweet was widely condemned, and it was the latest in a history of prior offensive tweets made by Barr.²⁴⁹ In a *Washington Post* op-ed, Eugene Scott noted that President Trump's efforts to minimize the significance of the Barr tweet displayed an alarming lack of appreciation for the way that white culture has historically characterized blacks as subhuman animals who were sexually promiscuous and was reminiscent of earlier characterizations of Michelle Obama as an "[a]pe in heels."²⁵⁰ Even more disturbing, *Washington Post* columnist Colbert King noted that the existence of a large and sympathetic audience for Barr's racist tweet highlights the continued commitment that a significant portion of American culture has to everyday forms of microaggression and subtle acts of discrimination against racial minorities.²⁵¹ The problem has become so pervasive that it has generated its own hashtag, #LivingWhileBlack, which has prompted a request for congressional hearings on the everyday racism problem of black people being profiled and targeted for police

246. See Jason Sokol, *From MLK's Death to Trump's Election, Racism Continues to Scar America's Identity*, WASH. POST (Mar. 30, 2018), https://www.washingtonpost.com/news/post-nation/wp/2018/03/30/startled-and-stunned-that-some-people-celebrated-the-assassination-of-martin-luther-king-jr/?utm_term=.bdf354be337b [<https://perma.cc/N8UQ-5GQH>]; see also JASON SOKOL, *THE HEAVENS MIGHT CRACK: THE DEATH AND LEGACY OF MARTIN LUTHER KING JR.* (2018).

247. See Emily Heil, *ABC Cancels "Roseanne" after Its Star, Roseanne Barr, Went on a Vitriolic and Racist Twitter Rant*, WASH. POST (May 29, 2018), https://www.washingtonpost.com/news/reliable-source/wp/2018/05/29/roseanne-went-on-a-vitriolic-and-racially-charged-twitter-rampage-now-shes-apologizing/?utm_term=.e72e1caffb04 [<https://perma.cc/3ZWJ-27A4>].

248. *Id.*

249. See *id.*

250. See Eugene Scott, *Trump's Response to the Roseanne Incident Betrayed a Lack of Knowledge about Black History*, WASH. POST (June 2, 2018), https://www.washingtonpost.com/news/the-fix/wp/2018/06/02/trumps-response-to-the-roseanne-incident-displayed-a-lack-of-knowledge-about-black-history/?utm_term=.8ab77a67d272 [<https://perma.cc/EF6X-H6LC>].

251. See Colbert I. King, *Roseanne Barr Is not the Problem. She's Just a Symptom.*, WASH. POST (June 1, 2018), https://www.washingtonpost.com/opinions/roseanne-barr-is-not-the-problem-shes-just-a-symptom/2018/06/01/2fcbc8d8-64f6-11e8-a69c-b944de66d9e7_story.html?utm_term=.eee96e131e60 [<https://perma.cc/7BBM-9NXM>].

intervention while doing innocuous things.²⁵² Many innocuous activities become suspicious when blacks engage in them. For example, a *Washington Post* article noted:

Other entrants include: couponing while black, graduating too boisterously while black, waiting for a school bus while black, throwing a kindergarten temper tantrum while black, drinking iced tea while black, waiting at Starbucks while black, AirBnB'ing while black, shopping for underwear while black, having a loud conversation while black, golfing too slowly while black, buying clothes at Barney's while black, or Macy's, or Nordstrom Rack, getting locked out of your own home while black, going to the gym while black, asking for the Waffle House corporate number while black and reading C.S. Lewis while black, among others.²⁵³

Even swimming while black with your five-year-old daughter at a hotel pool has now become suspicious.²⁵⁴

2. *Subtle*

Not all racial biases are blatant. As Charles Lawrence has taught us, more subtle forms of racial bias often act in ways that are unconscious.²⁵⁵ On October 9, 2016, a black female physician named Tamika Cross, on a Delta Airlines flight, responded to a request for medical assistance concerning a passenger who had become ill.²⁵⁶ The

252. See Cleve R. Wootson Jr., *#LivingWhileBlack Victims Want Congressional Hearing on Racial Profiling*, WASH. POST (June 4, 2018), https://www.washingtonpost.com/news/post-nation/wp/2018/06/04/they-were-harassed-for-livingwhileblack-now-they-want-congressional-hearings-on-racial-profiling/?utm_term=.128e86fac43e [<https://perma.cc/TY3M-GSLJ>].

253. See Cleve R. Wootson Jr., *A Black Yale Student Fell Asleep in Her Dorm's Common Room. A White Student Called Police.*, WASH. POST (May 11, 2018), https://www.washingtonpost.com/news/grade-point/wp/2018/05/10/a-black-yale-student-fell-asleep-in-her-dorms-common-room-a-white-student-called-police/?utm_term=.08ead69df007 [<https://perma.cc/XPJ3-N8TG>].

254. See Eli Rosenberg, *A Black Woman Was at the Pool on Vacation. A White Man Asked Whether She Showered Before Swimming*, WASH. POST (June 15, 2018), https://www.washingtonpost.com/news/post-nation/wp/2018/06/15/a-black-woman-was-at-the-pool-on-vacation-then-a-man-insisted-she-shower-before-swimming/?utm_term=.014cdf781c5b [<https://perma.cc/NX8Z-T2U5>].

255. See Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 335 (1987); see also Charles R. Lawrence, *Unconscious Racism Revisited: Reflections on the Impact and Origins of "The Id, the Ego, and Equal Protection"*, 40 CONN. L. REV. 931, 963 (2008).

256. See Derek Hawkins, *Flight Attendant to Black Female Doctor: "We're Looking for Actual Physicians"*, WASH. POST (Oct. 14, 2016), https://www.washingtonpost.com/news/morning-mix/wp/2016/10/14/blatant-discrimination-black-female-doctor-says-flight-crew-questioned-her-credentials-during-medical-emergency/?hpid=hp_hp-morning-mix_mm-doc%3Ahomepage%2Fstory [<https://perma.cc/EC8J-K5MM>].

white flight attendant responded to Dr. Cross's offer of help by saying, "Oh no, sweetie, put [your] hand down. We are looking for actual physicians or nurses or some type of medical personnel, we don't have time to talk to you."²⁵⁷ The flight attendant then chose a white male physician over Cross.²⁵⁸

Implicit biases, and the online Implicit Association Test that can be used to reveal those biases, have now become highly regarded ways of documenting the existence and scope of unconscious discrimination on the basis of race, gender, sexual orientation, and other traits.²⁵⁹ As a result of acculturation and structural discrimination, it turns out that 75% of the people who have taken the online Implicit Association Test reveal a preference for whites over blacks.²⁶⁰ An August 15, 2017 article in the *ABA Journal* reported that the House of Delegates of the American Bar Association, without any apparent dissent, has now adopted a resolution urging judges and judicial officers to receive training on implicit bias and debiasing strategies.²⁶¹

A telling example of implicit bias is provided by the March 14, 2018 public apology that a Starbucks store in Philadelphia, Pennsylvania was forced to make when the white manager of the store had two black men arrested for sitting in the store without ordering anything.²⁶² It turned out that the men were waiting for a third person to arrive, and Starbucks often permits white people to sit in its stores for long periods of time without ordering anything.²⁶³ The arrests garnered national attention, prompting protests at the store involved and a call for unconscious bias training of store managers from the Starbucks Chief Operating Officer.²⁶⁴ A few days after the

257. *Id.*

258. *See id.*

259. *See Project Implicit*, HARVARD, <https://implicit.harvard.edu/implicit/aboutus.html> [<https://perma.cc/Y4SM-D3QB>].

260. *See* MAHZARIN R. BANAJI & ANTHONY G. GREENWALD, *BLINDSPOT: HIDDEN BIASES OF GOOD PEOPLE* 32, 39-47, 105, 109-10 (2013).

261. *See* Lee Rawles, *Judges Should Receive Anti-Bias Training*, *ABA House Says*, *ABA J.* (Aug. 15, 2017), http://www.abajournal.com/news/article/judges_should_receive_anti-bias_training_aba_house_says [<https://perma.cc/2SNX-468N>].

262. *See* Alex Horton, *Starbucks CEO Apologizes after Employee Calls Police on Black Men Waiting at a Table*, *WASH. POST* (Apr. 15, 2018), https://www.washingtonpost.com/news/business/wp/2018/04/14/starbucks-apologizes-after-employee-calls-police-on-black-men-waiting-at-a-table/?utm_term=.f680c61f3e4e [<https://perma.cc/5PQP-288D>].

263. *See id.*

264. *See* Rachel Siegel & Alex Horton, *"I Will Fix This," Starbucks CEO Vows after "Reprehensible" Arrest of Two Black Men at Store*, *WASH. POST* (Apr. 17, 2018), <https://www.washingtonpost.com/news/business/wp/2018/04/16/two-black->

Philadelphia arrests, a cell phone video surfaced showing that, in January 2018, a Starbucks store in Torrance, California had denied restroom access to a black man but granted access to a white man even though neither man was a paying customer.²⁶⁵ When the black patron complained to the store manager, the manager told him to stop recording the incident and to leave the store.²⁶⁶ Starbucks subsequently announced that it would close 8,000 stores for the afternoon on May 29, 2018, so that 175,000 Starbucks employees could participate in “racial-bias education” training.²⁶⁷ Starbucks also announced that its restrooms would thereafter be open to everyone regardless of whether they had made a purchase.²⁶⁸

A similar incident occurred in April 2018 at an LA Fitness club in Secaucus, New Jersey, where club employees called the police after erroneously accusing two black club patrons of not paying for their workout.²⁶⁹ LA Fitness has since reported that the accusing employees are no longer associated with the club.²⁷⁰ Another incident occurred in April 2018 when the white owners of a York County, Pennsylvania golf club asked five black women to leave because the women were playing too slowly—an assertion that does not appear to be consistent with the facts.²⁷¹ The club representative also suggested that the

men-were-arrested-at-starbucks-ceo-now-calling-for-unconscious-bias-training/?utm_term=.fa0b08347093 [https://perma.cc/Q4RW-42JR].

265. See Marwa Eltagouri, *A Starbucks in California Treats Black and White Men Differently According to this Video*, WASH. POST (Apr. 17, 2018), https://www.washingtonpost.com/news/business/wp/2018/04/17/a-starbucks-in-california-treats-black-and-white-men-differently-according-to-this-video/?utm_term=.96097496bd80 [https://perma.cc/8PA2-E4TV].

266. See *id.*

267. See Rachel Siegel & Alex Horton, *Starbucks to Close 8,000 Stores for Racial-Bias Education on May 29 After Arrest of Two Black Men*, WASH. POST (Apr. 17, 2018), https://www.washingtonpost.com/news/business/wp/2018/04/17/starbucks-to-close-8000-stores-for-racial-bias-education-on-may-29-after-arrest-of-two-black-men/?utm_term=.90851421b57a [https://perma.cc/4RWR-PAT3].

268. See Tracy Jan, *Starbucks Chairman Opens Up about Company’s Race Failures—and Says Its Bathrooms Are Now Open to All*, WASH. POST (May 10, 2018), https://www.washingtonpost.com/news/wonk/wp/2018/05/10/starbucks-chairman-opens-up-about-the-companys-race-failures-and-says-its-bathrooms-are-now-open-to-all/?utm_term=.291f24ac9f48 [https://perma.cc/9XT3-GHWG].

269. See David Porter, *Gym Employees Accuse Black Member of Not Paying, Call Cops*, MORNING CALL (Apr. 19, 2018, 5:35 P.M.), <https://www.mcall.com/news/nationworld/pennsylvania/mc-nws-lafitness-black-customer-police-20180419-story.html> [https://perma.cc/B45D-G4SZ].

270. See *id.*

271. See Rachel Siegel, *White Golf Course Owners Said Five African American Women Were Playing Too Slowly. Then They Called the Police.*, WASH. POST (Apr. 24, 2018), <https://www.washingtonpost.com/news/business/>

women relinquish their club memberships, and then he called the police, who arrived but left without filing any charges.²⁷² On April 27, 2018, a black former Obama White House staffer was moving into his new apartment in New York City when another resident of the building called the police to report that a black man with a weapon was committing a burglary that was in progress.²⁷³ Once again, the half dozen police officers who responded to the 911 call eventually let the staffer back into his new apartment and left without filing any charges.²⁷⁴

University of Virginia Law School Dean Risa Goluboff has stressed that the Starbucks and LA Fitness incidents reflect the long and continuing history of racist enforcement of loitering laws.²⁷⁵ She concluded, “So long as discrimination exists in our society it will find outlets in policing as elsewhere.”²⁷⁶ The Starbucks and LA Fitness incidents are only a few examples of the “epidemic of discrimination by American companies . . . exhibit[ing] racial bias in the quality of customer service they provide.”²⁷⁷ Studies have shown that service industry employees are three times more likely to be polite when responding to phone or email requests by people with white-sounding

wp/2018/04/24/white-golf-course-owners-said-five-african-american-women-were-playing-too-slow-then-they-called-the-police/?utm_term=.4e079a3aa39f [https://perma.cc/2DR9-LTG8].

272. See *id.*; see also Rachel Siegel, *Golf Course that Called the Police on Black Women Loses Business, Faces Call for State Investigation*, WASH. POST (Apr. 27, 2018), https://www.washingtonpost.com/news/business/wp/2018/04/27/golf-course-that-called-the-police-on-black-women-loses-business-faces-call-for-state-investigation/?utm_term=.796b59da2da0 [https://perma.cc/Q786-Q5XK].

273. See Eli Rosenberg, *A Black Former White House Staffer Was Moving into a New Apartment. Someone Reported a Burglary.*, WASH. POST (May 1, 2018), https://www.washingtonpost.com/news/post-nation/wp/2018/05/01/a-black-former-white-house-staffer-was-moving-into-a-new-apartment-someone-reported-a-burglary/?utm_term=.8677d5091fb0 [https://perma.cc/AA5S-DTVG].

274. See *id.*

275. See Risa Goluboff, *Starbucks, LA Fitness and the Long, Racist History of America's Loitering Laws*, WASH. POST (Apr 20, 2018), https://www.washingtonpost.com/news/post-nation/wp/2018/04/20/starbucks-la-fitness-and-the-racist-history-of-trespassing-laws/?utm_term=.d7798f47b245 [https://perma.cc/XLC3-ANRU].

276. See *id.*

277. Alexandra C. Feldberg & Tami Kim, *Beyond Starbucks: How Racism Shapes Customer Service*, N.Y. TIMES (Apr. 20, 2018), <https://www.nytimes.com/2018/04/20/opinion/starbucks-racism-customer-service.html?rref=collection%2Fsectioncollection%2Fopinion&action=click&contentCollection=opinion®ion=rank&module=package&version=highlights&contentPlacement=7&pgtype=sectionfront> [https://perma.cc/A8V2-Q3QX].

names than when responding to requests from people with black- or Asian-sounding names.²⁷⁸

Computers can also engage in subtle forms of racial bias. In 2005, Google image recognition software had racial inaccuracies so dramatic that it identified blacks as gorillas rather than human beings.²⁷⁹ Human racial bias managed to infiltrate the process of human computer programming, and racial biases now infect recognition software that is increasingly moving into mainstream use.²⁸⁰

Blacks make up 59% of poor families depicted in the news even though they account for only 27% of Americans in poverty.²⁸¹ Whites make up 17% of the poor depicted in news stories although they make up 66% of the American poor.²⁸² Blacks represent 37% of criminals shown in the news even though they constitute only 26% of those arrested for crimes.²⁸³ Whites are portrayed as criminals in the news 28% of the time even though FBI statistics show that whites make up 77% of crime suspects.²⁸⁴ Similar distortions affect the way blacks are portrayed as dependent on welfare.²⁸⁵

3. *Trump*

Donald Trump has not helped. In fact, he has exacerbated the problem of racial divisiveness in the United States. He chose to run his 2016 presidential campaign in a way that would overtly appeal to the racist and xenophobic segments of the American electorate. The fact that Trump was elected President reflects the depth of the nation's racial bias into which he tapped. The day after Trump was elected President, the number of daily hate crimes in the United States jumped

278. *See id.*

279. *See* Steve Lohr, *Facial Recognition Is Accurate, if You're a White Guy*, N.Y. TIMES (Feb. 9, 2018), <https://www.nytimes.com/2018/02/09/technology/facial-recognition-race-artificial-intelligence.html> [<https://perma.cc/B96M-ZD9G>].

280. *See id.*

281. Tracy Jan, *News Media Offers Consistently Warped Portrayals of Black Families, Study Finds*, WASH. POST (Dec. 13, 2017), https://www.washingtonpost.com/news/wonk/wp/2017/12/13/news-media-offers-consistently-warped-portrayals-of-black-families-study-finds/?hpid=hp_hp-cards_hp-card-national%3Ahomepage%2Fcard&utm_term=.afc05d776d27 [<https://perma.cc/PC9W-J3G6>].

282. *Id.*

283. *Id.*

284. *Id.*

285. *See id.*

from ten to twenty-seven.²⁸⁶ And anti-Muslim hate crimes have also been linked to Trump's election.²⁸⁷ Trump has even become a symbol of anti-immigrant, white identity politics in Europe.²⁸⁸

Responding to President Trump's decision to give aid and comfort to white supremacists after the violent August 12, 2017 white nationalist rally in Charlottesville, Virginia, Reverend Al Sharpton said:

But what we must keep in mind is that Charlottesville is a symptom and we must deal with the cause: hate, bias and racism have been empowered and taken from the margins into the mainstream. Now we must come to terms with the fact that the president of the United States has played a role in emboldening these hate groups to come out of the shadows.²⁸⁹

He added that President Trump's willingness to foster racial polarization was illustrated by his support for the death penalty for black and Latino kids who were later exonerated in the Central Park jogger rape case; his repeated insistence during the 2016 presidential campaign that Barack Obama was not a natural-born US citizen; his disparaging 2016 campaign comments about Mexicans being criminals, drug users, and rapists; and his campaign call for a "total and complete shutdown of Muslims entering the United States."²⁹⁰ Sharpton concluded that Trump's Charlottesville comments were perceived as giving a pass to white supremacist hate groups.²⁹¹

286. See Aaron Williams, *Hate Crimes Rose the Day after Trump Was Elected, FBI Data Show*, WASH. POST (Mar. 23, 2018), https://www.washingtonpost.com/news/post-nation/wp/2018/03/23/hate-crimes-rose-the-day-after-trump-was-elected-fbi-data-show/?utm_term=.01002ba3f167 [https://perma.cc/976W-DKBV]. Interestingly, hate crimes also jumped the day after Barack Obama was elected President in 2008, thereby suggesting that presidential elections can inspire new expressions of racial hostility as well as license the expression of existing racial hostility. See *id.*

287. See, e.g., Ishaan Tharoor, *The Threat of White Radical Extremism in the Age of Trump*, WASH. POST (Apr. 20, 2018), https://www.washingtonpost.com/news/worldviews/wp/2018/04/20/the-threat-of-white-radical-extremism-in-the-age-of-trump/?noredirect=on&utm_term=.49c493b11edd [https://perma.cc/7RQ5-V2RA].

288. See John Sides & Michael Tesler, *Donald Trump Is a Symbol of White Identity Politics in Europe, Too*, WASH. POST. (June 21, 2018), https://www.washingtonpost.com/news/monkey-cage/wp/2018/06/21/donald-trump-is-a-symbol-of-white-identity-politics-in-europe-too/?utm_term=.9fe8121a899c [https://perma.cc/2662-KGUQ].

289. Al Sharpton, *In America, Bias, Hate and Racism Move from the Margins to the Mainstream*, GUARDIAN (Aug. 14, 2017), <https://www.theguardian.com/commentisfree/2017/aug/14/donald-trump-hate-mainstream-charlottesville> [https://perma.cc/C4AV-38SB].

290. *Id.*

291. See *id.*

Speaking after the Charlottesville rally, former Ku Klux Klan leader David Duke seemed to prove Sharpton's point. Duke declared that the aim of the rally was to "fulfill the promises of Donald Trump."²⁹² Moreover, on February 17, 2017, an Airbnb host named Tami Barker refused to honor a reservation for a guest named Dyne Suh.²⁹³ Barker explained, "one word says it all. Asian."²⁹⁴ When Suh said that she would report the host for racial discrimination, the host replied, "Go ahead . . . [i]t's why we have [T]rump."²⁹⁵ The Trump administration has now also launched an assault on affirmative action and minority voting that seems designed to shore up support among members of his political base who see themselves as victims rather than perpetrators of racial discrimination.²⁹⁶

Trump's fondness for alternate facts apparently provides him a license to engage in denial. On Sunday, January 14, 2018, in the midst of a DACA immigration controversy, President Trump stated at a dinner in West Palm Beach Florida, "Nah, I'm not a racist. I'm the least racist person you have ever interviewed, that I can tell you."²⁹⁷ After citing numerous examples of Trump's racist behavior, *New York Times* columnist Charles M. Blow responded by quoting James

292. See Jenna Johnson & John Wagner, *Trump Condemns Charlottesville Violence but Doesn't Single Out White Nationalists*, WASH. POST (Aug. 12, 2017), https://www.washingtonpost.com/politics/trump-condemns-charlottesville-violence-but-doesnt-single-out-white-nationalists/2017/08/12/933a86d6-7fa3-11e7-9d08-b79f191668ed_story.html?hpid=hp_hp-top-table-main_trumpreaction421pm%3Ahomepage%2Fstory&utm_term=.07d20d28bb6d [<https://perma.cc/3HFB-7N7S>].

293. See Amy B. Wang, "One Word Says It All. Asian": Airbnb Host Reportedly Leaves Guest Stranded Because of Her Race, WASH. POST (Apr. 7, 2017), https://www.washingtonpost.com/news/business/wp/2017/04/07/one-word-says-it-all-asian-airbnb-host-reportedly-leaves-guest-stranded-because-of-her-race/?tid=a_inl&utm_term=.a39c745bd7a8 [<https://perma.cc/Q4D7-DAPR>].

294. *Id.*

295. *Id.*

296. See, e.g., John Sides, *Resentful White People Propelled Trump to the White House—and He Is Rewarding Their Loyalty*, WASH. POST (Aug. 3, 2017), https://www.washingtonpost.com/news/monkey-cage/wp/2017/08/03/resentful-white-people-propelled-trump-to-the-white-house-and-he-is-rewarding-their-loyalty/?utm_term=.148690dfed45 [<https://perma.cc/P69P-E338>] (discussing affirmative action); Ifill, *supra* note 216 (discussing voter suppression).

297. See Mike DeBonis & Anne Gearan, *Trump Says that He Is "Not a Racist," Denies Souring Chances for Immigration Overhaul by Using Vulgarity*, WASH. POST (Jan. 14, 2018), https://www.washingtonpost.com/powerpost/hopes-for-immigration-deal-fade-as-lawmakers-trade-barbs-and-trump-declares-dreamer-program-probably-dead/2018/01/14/247bd8ee-f8ac-11e7-beb6-c8d48830c54d_story.html [<https://perma.cc/T6A9-GNLR>].

Baldwin, who said, “I can’t believe what you say, because I see what you do.”²⁹⁸

In an October 2017 *Atlantic* article, Ta-Nehisi Coates argues that Donald Trump’s political success is explicitly based on the doctrine of white supremacy, rather than mere working-class resentment and disenchantment.²⁹⁹ In a January 29, 2018 *Washington Post* opinion piece, Eugene Robinson accused President Trump of trying to make America white again by pressing for passage of immigration restrictions that would halt the “browning” of America and restore the Jim Crow attitude that “White is Right.”³⁰⁰

In a March 10, 2018 western Pennsylvania rally, Trump bragged about how he won 52% of the women’s vote in the 2016 election.³⁰¹ He did not mention that the 52% was of only the white women’s vote.³⁰² Trump won just a quarter of the Latino women’s vote and 4% of the black women’s vote.³⁰³ But, apparently, the white vote is the only vote that counts. A March 2018 photo of White House interns reveals that interns in the Trump White House are virtually all white—just like his cabinet and senior advisors.³⁰⁴ This does not bode well for the future.

In June 2018, the Trump administration was criticized for the controversial practice of separating undocumented immigrant children from their parents as part of the administration’s effort to deter illegal

298. See Charles M. Blow, *Trump Is a Racist. Period*, N.Y. TIMES (Jan. 14, 2018), <https://www.nytimes.com/2018/01/14/opinion/trump-racist-shithole.html> [<https://perma.cc/5NZ3-6SD7>].

299. See Ta-Nehisi Coates, *The First White President*, ATLANTIC (Oct. 2017), <https://www.theatlantic.com/magazine/archive/2017/10/the-first-white-president-ta-nehisi-coates/537909/>. [<https://perma.cc/6GCY-7QBN>]

300. See Eugene Robinson, *Trump Is Trying to Make America White Again*, WASH. POST (Jan. 29, 2018), https://www.washingtonpost.com/opinions/trump-is-trying-to-make-america-white-again/2018/01/29/9afa7afa-053d-11e8-8777-2a059f168dd2_story.html?utm_term=.702b64b33927 [<https://perma.cc/LT3W-5YS6>].

301. See Philip Bump, *Trump Celebrates Winning 52 Percent of Women in 2016—Which Is Only How He Did Among Whites*, WASH. POST (Mar. 10, 2018), <https://www.washingtonpost.com/news/politics/wp/2018/03/10/trump-celebrates-winning-52-percent-of-women-in-2016-which-is-only-how-he-did-among-whites/> [<https://perma.cc/97DC-RHP8>].

302. *Id.*

303. See *id.*

304. See Eugene Scott, *The White House Releases a Photo of Its Interns, and the Internet Asks: Why So Few People of Color?*, WASH. POST (Mar. 31, 2018), https://www.washingtonpost.com/news/the-fix/wp/2018/03/31/the-white-house-releases-a-photo-of-its-interns-and-the-internet-asks-where-are-the-people-of-color/?utm_term=.fbf203fcf954 [<https://perma.cc/B2FF-NHP5>].

immigration.³⁰⁵ Former Attorney General Jeff Sessions defended the practice by quoting a biblical passage from Romans 13 requiring citizens to obey the laws of the government.³⁰⁶ The passage is, of course, subject to multiple interpretations, but it was historically invoked to defend the institution of slavery against attacks by abolitionists.³⁰⁷ It was also invoked to defend British rule during the American revolution, Adolph Hitler's regime in Nazi Germany, and racial apartheid in South Africa.³⁰⁸

In a January 11, 2018 *New York Times* op-ed, Charles M. Blow argued that whites support Donald Trump, no matter what he does to undermine their interests, because he reminds them that they are better than black people.³⁰⁹ He said:

That is because Trump is man-as-message, man-as-messiah. Trump support isn't philosophical but theological.

Trumpism is a religion founded on patriarchy and white supremacy.

It is the belief that even the least qualified man is a better choice than the most qualified woman and a belief that the most vile, anti-intellectual, scandal-plagued simpleton of a white man is sufficient to follow in the presidential footsteps of the best educated, most eloquent, most affable black man.

As President Lyndon B. Johnson said in the 1960s to a young Bill Moyers: "If you can convince the lowest white man he's better than the best colored man, he won't notice you're picking his pocket. Hell, give him somebody to look down on, and he'll empty his pockets for you."

Trump's supporters are saying to us, screaming to us, that although he may be the "lowest white man," he is still better than Barack Obama, the "best colored man."

305. See Kyle Swenson, *Sessions Says the Bible Justifies Separating Immigrant Families. The Verses He Cited Are Infamous*, WASH. POST (June 15, 2018), https://www.washingtonpost.com/news/morning-mix/wp/2018/06/15/sessions-says-the-bible-justifies-separating-immigrant-families-the-verses-he-cited-are-infamous/?utm_term=.403f9c6919df [<https://perma.cc/4T5R-8BCT>]; Julie Zauzmer & Keith McMillan, *Sessions Cites Bible Passage Used to Defend Slavery in Defense of Separating Immigrant Families*, Wash. Post (June 15, 2018), https://www.washingtonpost.com/news/acts-of-faith/wp/2018/06/14/jeff-sessions-points-to-the-bible-in-defense-of-separating-immigrant-families/?utm_term=.2c869dff58a6 [<https://perma.cc/TLT3-97P2>].

306. See, e.g., Swenson, *supra* note 305.

307. See, e.g., *id.*

308. See, e.g., *id.*

309. See Charles M. Blow, *The Lowest White Man*, N.Y. TIMES (Jan. 11, 2018), https://www.nytimes.com/2018/01/11/opinion/trump-immigration-white-supremacy.html?_r=0 [<https://perma.cc/GCW9-NUWS>].

In a way, Donald Trump represents white people's right to be wrong and still be right. He is the embodiment of the unassailability of white power and white privilege.

No matter how much of an embarrassment and a failure Trump proves to be, his exploits must be judged a success. He must be deemed a correction to Barack Obama and a superior choice to Hillary Clinton. White supremacy demands it. Patriarchy demands it. Trump's supporters demand it.³¹⁰

III. SUPREME COURT

The racially disparate allocation of societal resources in virtually all important areas of American life is both stark and statistically undeniable. Nevertheless, we deny the undeniable and insist that the strong racial correlation that characterizes our distribution of benefits and burdens does not violate the equality principle that is guaranteed by the Constitution. Although our rationalizations are insubstantial and our biases are self-evident, we nevertheless seem able to tolerate the jarring dissonance that exists between our behavior and our values. As it has done throughout the nation's history, the Supreme Court continues to help us mediate the tension that is generated between the two. The Court has redefined the concept of racial equality so that it is not offended by racial disparities or by the white privilege that those disparities reflect. Moreover, the Court has repeatedly invalidated efforts to achieve racial balance in the distribution of resources, deeming them to be "patently unconstitutional" efforts to remedy "societal discrimination." Because the remedial efforts that the Court does allow have never been adequate to solve the problem of racial disparities, the Supreme Court is successfully reading the Constitution to *require* the perpetuation of white supremacy in the allocation of resources. It is as if the Supreme Court were using esoteric doctrinal rules to distract us from what we would otherwise view as obvious racial discrimination. But we seem happy to acquiesce in the Court's doctrinal distractions.

A. Intent

The Supreme Court has insisted that racial disparities alone are doctrinally insufficient to establish a constitutional violation. The Fourteenth Amendment states that no state "shall deny to any person within its jurisdiction the equal protection of the laws."³¹¹ However, in the 1976 case of *Washington v. Davis*, the Court held that the equal

310. *Id.*

311. U.S. CONST. amend. XIV.

protection guarantee prohibited only intentional discrimination and not the mere racially disparate impact of an official action—no matter how dramatic or foreseeable.³¹² The Court's decision, therefore, had the effect of legitimating all forms of racial discrimination that benefit whites at the expense of racial minorities unless that discrimination was the product of an invidious racial motive. Because most contemporary forms of racial discrimination are incidental, unconscious, or structural in nature, most forms of racial discrimination now fall outside the scope of the equal protection guarantee. Accordingly, the racially disparate distributions of societal resources produced by most forms of modern discrimination remain perfectly constitutional.

The *Washington v. Davis* intentional discrimination gloss on the equal protection guarantee was by no means preordained. Five years earlier, in the 1971 case of *Griggs v. Duke Power Co.*, the Supreme Court had held that a discriminatory effects standard, rather than a discriminatory intent standard, applied to the statutory prohibition on racial discrimination in employment under Title VII of the Civil Rights Act of 1964.³¹³ Not only was disparate impact a viable standard for racial discrimination claims, but *Griggs* had prompted most lower courts—including the Court of Appeals in *Washington v. Davis* itself—to apply the Title VII discriminatory effects standard to equal protection claims as well as statutory discrimination claims.³¹⁴ Indeed, some of the Supreme Court's own prior decisions had intimated that a discriminatory effects standard would apply to the Equal Protection Clause.³¹⁵ The reason that the *Washington v. Davis* Court offered for supplanting the *Griggs* disparate impact standard with a more stringent discriminatory intent standard is consistent with viewing the Court's social function as one of legitimating racial disparities. The Court said a disparate impact standard would recognize as constitutionally valid too broad a range of racial discrimination claims.³¹⁶ Apparently, without channeling ubiquitous social practices through the dampening filter of an intentional discrimination standard, there would simply be too much racial discrimination for the Constitution to cope with.

The Supreme Court further narrowed the scope of the equal protection guarantee by elaborating on the meaning of its *Washington v. Davis* intent requirement. In the 1979 case of *Personnel Adminis-*

312. See generally *Washington v. Davis*, 426 U.S. 229, 238-48 (1976).

313. See generally *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-32 (1971).

314. See *Davis*, 426 U.S. at 236, 244-45, 245 n.12.

315. See *id.* at 242-44.

316. See *id.* at 238-48.

trator v. Feeney,³¹⁷ the Court held that the intent required by *Washington v. Davis* was an actuating motive to take an action “because of” its adverse effect on a protected group, rather than a mere incidental willingness to take an action “in spite of” its known adverse effect on that protected group.³¹⁸ *Feeney* helped to explain the Court’s prior decision in *Washington v. Davis*, where the Court upheld, under the equal protection component of the Fifth Amendment’s Due Process Clause, the use of a verbal skills exam in the selection of District of Columbia police officers. Although the exam had a racially disparate impact—resulting in the selection of a disproportionately high number of white officers and a disproportionately low number of black officers—the use of the exam was not motivated by a desire to discriminate against black applicants.³¹⁹ Rather, the racially disparate impact was merely the incidental effect of a decision to ensure that police officers possessed an adequate level of verbal skills.³²⁰

It is true that the District of Columbia police officer verbal skills exam had not been validated to show its relevance to job performance, but that did not matter. Although such a showing might be required in a Title VII racial discrimination case, it was not required under the Equal Protection Clause. In the absence of discrimination against a suspect class such as race, the Equal Protection Clause applies only the minimal-scrutiny rational basis standard of review that is very deferential to administrative decisions, such as the selection of police officers. Although use of a non-validated exam to hire police officers might not survive the stringent strict scrutiny standard of review that is applied when the government uses a racial classification, the absence of intentional discrimination meant that use of the non-validated exam did not have to be strictly scrutinized—precisely because it failed to qualify as a racial classification, notwithstanding its racially disparate impact.³²¹

Washington v. Davis illustrates another way in which the Supreme Court helps make it easier for the culture to deny existing forms of racial discrimination. In upholding the constitutionality of the racially disparate verbal skills exam used to select District of Columbia police officers, the Court treated the exam as a race-neutral device.³²² But the race neutrality of the exam is far from clear.³²³ Almost certainly, the exam tested verbal skills in standard white

317. See generally *Personnel Administrator v. Feeney*, 442 U.S. 256 (1979).

318. See *id.* at 278-81.

319. See *Davis*, 426 U.S. at 245-46.

320. See *id.*

321. See *id.* at 235-36, 246-48.

322. See *id.* at 245-46.

323. See *id.*

English. It almost certainly did not test verbal skills in Ebonics, the vernacular of American black English. If it had, I suspect any racially disparate impact produced by the exam would have disproportionately favored black applicants rather than white applicants. Accordingly, the decision to test for proficiency in white English rather than black English reflected a choice.

Given that the population of the District of Columbia in the 1970s was over 70% black,³²⁴ it is not immediately apparent why a test of white English verbal skills was more appropriate than a test of black English verbal skills. Statistically, a large majority of the citizens with whom D.C. police officers routinely interacted would have been black rather than white.³²⁵ Nevertheless, the Supreme Court had no difficulty characterizing the white English test as racially neutral. That is because, in contemporary American culture, whiteness is simply assumed to be neutral. Its racial content is present, but that content is typically overlooked. It resides beneath the baseline that separates the things that we actively scrutinize from the things that we simply take for granted. Because deference to whiteness seems so natural, the Supreme Court is able to perpetuate the baseline of existing white privilege without seeming to depart from the principle of colorblind race neutrality. In the eyes of the Court, it is only natural to do things the way that white people do them—even in a majority black city—because whiteness establishes a baseline whose propriety is typically assumed rather than questioned.

One might argue that it is appropriate for police officers to possess white English verbal skills rather than black English verbal skills because the administrators, court personnel, and other governmental figures with whom police officers must interact are proficient in white English. But that argument simply reproduces the white baseline problem at a deeper level. How did it come to pass that such officials are proficient in white English rather than Ebonics in a predominantly black city?

The Supreme Court's assumption of a white neutrality baseline also helps explain why the Court's racial jurisprudence cannot capture the implicit racial bias, unconscious discrimination, and structural discrimination that is now responsible for the bulk of the racial disparities that exist in the allocation of societal resources. Because such forms of discrimination are often not the product of conscious invidious motivation, they simply do not register under the *Wash-*

324. *Demographics of Washington, D.C.*, WIKIPEDIA, https://en.wikipedia.org/wiki/Demographics_of_Washington,_D.C. (last visited Dec. 3, 2018) [<https://perma.cc/7PJD-2AL8>].

325. *See id.*

ington v. Davis and Feeney doctrinal formulations of the equal protection principle.³²⁶ As a result, governmental actions that would otherwise seem like the obvious products of white racial bias do not rise to the level of a constitutionally suspect racial classification.

So, in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,³²⁷ the Court was able to hold that the denial of a rezoning permit for a racially integrated low- and moderate-income housing project in a white, upper-class suburb of Chicago was not an act of racial discrimination because it was motivated by a desire to maintain property values.³²⁸ For constitutional purposes, it apparently did not matter that the very reason a presumed threat to property values existed was “because of” rather than merely “in spite of” the race of the people who would move into the neighborhood.³²⁹ The underlying racial bias was not scrutinized because it subsisted beneath the baseline of supposed white economic neutrality.

In *Hernandez v. New York*, the Supreme Court held that a prosecutor’s use of peremptory jury challenges to remove Latinos from the jury panel that would sit on the criminal trial of a Latino defendant was not a racially discriminatory violation of the Equal Protection Clause.³³⁰ The Court accepted as race neutral the prosecutor’s claim that bilingual Spanish speaking jurors had been removed not because of their race or ethnicity, but because they might not be able to accept uncritically the official translation of Spanish-speaking witnesses.³³¹ However, there is no indication that the prosecutor made any similar effort to eliminate non-Latino bilingual jurors who also spoke Spanish.

In *City of Richmond v. J.A. Croson Co.*, even an extreme racial disparity was not sufficient to support an inference of intentional discrimination. Richmond, Virginia, which had been the capital of the Confederacy, had a population that was 50% black.³³² But only 0.67% of the City’s municipal construction contracts had been awarded to

326. See *Personnel Administrator v. Feeney*, 442 U.S. 256, 278-81 (1979); *Davis*, 426 U.S. at 238-50.

327. See generally *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264-71 (1976) (finding no intentional discrimination); see also *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 373 F. Supp. 208, 211 (N.D. Ill. 1974), *rev’d*, 517 F.2d 409-10, 413, 415 (7th Cir. 1975), *rev’d*, 429 U.S. 252, 262-66 (1977) (finding motive to maintain property values).

328. See *Vill. of Arlington Heights*, 429 U.S. at 263-66.

329. See *id.*

330. See *Hernandez v. N.Y.*, 500 U.S. 352, 369-70 (1991).

331. See *id.* at 363-65.

332. See generally *City of Richmond v. J.A. Croson Co.*, 448 U.S. 469 (1989) (discussing inadequacy of statistical evidence to establish history of discrimination in construction trades in Richmond, Virginia).

minority contractors.³³³ Nevertheless, that statistic was not sufficient to establish a history of racial discrimination in the City because the Court thought that blacks might simply have been less interested in construction work than whites.³³⁴ Even if that implausible rationalization had been true, it is hard to imagine how it could be true for reasons that did not ultimately rest on Richmond's long history of discriminating against blacks. Despite the stark racial disparity that the statistics revealed, the Supreme Court said that it could not *tell* if there had been racial discrimination in the City of Richmond, Virginia.³³⁵ But it seems that what the Court must really have meant was that it did not *care* if there was racial discrimination in Richmond.

There are times when official actions are racially discriminatory on their face, such as the southern school segregation that the Supreme Court held to be unconstitutional in *Brown v. Board of Education*.³³⁶ But the Court sometimes finds doctrinal reasons to delay or deny any meaningful remedy for that discrimination.³³⁷ The equal protection principle ends up being honored in abstract terms but not in actual operation.³³⁸ In *Brown II*, the Court refused to order an immediate remedy for the school segregation that it had invalidated a year earlier, choosing instead to require the desegregation of southern schools "with all deliberate speed."³³⁹ That enabled southern massive resistance to evade the *Brown I* school desegregation mandate for nearly a decade.

When the school segregation effort moved north and west, the Court in *Keyes v. School District No. 1* adopted a distinction between de facto and de jure discrimination, holding that race-conscious school desegregation remedies were constitutionally permissible only to address de jure discrimination.³⁴⁰ Since most school segregation in the North and West resulted from de facto segregated housing patterns, rather than the types of de jure segregation laws that existed in the

333. *Id.* at 479.

334. *See id.* at 470, 479-81, 484.

335. *See id.* at 509-11.

336. *See generally* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (*Brown I*) (rejecting the separate-but-equal doctrine and declaring official school segregation unconstitutional).

337. *See id.* at 493-96.

338. *See id.*

339. *See generally* *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955) (*Brown II*) (tempering effect of *Brown I* by declining to order immediate school desegregation and instead requiring desegregation "with all deliberate speed").

340. *See Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 208-09 (1973) (reaffirming prohibition on use of race-conscious remedies to eliminate de facto segregation).

South, the Court's decision largely precluded the possibility of any actual desegregation of schools in the North and West.³⁴¹

In *Milliken v. Bradley*, the Supreme Court read the Equal Protection Clause to prohibit the race-conscious, interdistrict busing of students between the largely minority inner-city Detroit schools and the largely white schools in the Detroit suburbs.³⁴² Without such interdistrict busing, there was no way to desegregate either the inner-city or the suburban schools.³⁴³ Although both sets of schools remained racially segregated, the Supreme Court held that there was no constitutional violation because segregation of the schools was *de facto* rather than *de jure*.³⁴⁴ Even though the Detroit schools remained virtually all black, there was nothing that could constitutionally be done to desegregate them.³⁴⁵

The dissenters in *Milliken* highlighted yet another way in which the Court's racial jurisprudence facilitated the maintenance of segregated schools.³⁴⁶ There was sufficient evidence of official state involvement in the creation, maintenance, and funding of the Detroit inner-city and suburban schools to warrant a finding of *de jure* segregation.³⁴⁷ However, where the government is integrally involved in what might initially appear to be private action, the distinction between *de facto* and *de jure* status is sufficiently elusive that the racially disparate impact at issue can easily be characterized either way. The supposedly private housing choices made by white residents in the Detroit suburbs were significantly affected by the state's decision to draw school district lines in places that corresponded with segregated neighborhoods.³⁴⁸ That further enhanced the incentives for white parents to move to segregated suburban school districts in order to keep their children from having to go to school with minority children in the inner city.³⁴⁹ The *de facto*–*de jure* distinction is so imprecise that it can easily be manipulated by the Supreme Court. In northern and west-

341. See *Milliken v. Bradley*, 418 U.S. 717, 724, 752-53, 785 (1974).

342. See *id.* at 732-36, 744-47 (refusing to allow inter-district judicial remedies for *de facto* school segregation, thereby permitting suburban schools to remain predominantly white and inner-city schools to remain overwhelmingly minority).

343. See *id.*

344. See *id.*

345. See *id.*

346. See *id.* at 761-62 (Douglas, J., dissenting); *id.* 767-81 (White, J., dissenting); *id.* 783-98, 805-08 (Marshall, J., dissenting).

347. See *id.* at 781-99 (Marshall, J., dissenting).

348. See *id.* at 744-50.

349. See *id.* at 761-62 (Douglas, J., dissenting) (emphasizing the artificiality of the *de facto/de jure* distinction); *id.* at 767-81 (White, J., dissenting) (indicating the same); *id.* at 783-98, 805-08 (Marshall, J., dissenting) (indicating the same).

ern school desegregation cases such as *Milliken*, the Court simply chose to manipulate the distinction in a way that would promote segregation rather than desegregation of the public schools, thereby elevating the exclusionary interests of white parents over the educational interests of minority students.

When residential housing patterns began to shift over time, de jure-segregated schools that had successfully been desegregated under *Brown* became resegregated as more parents moved from the inner city to the suburbs in order to send their children to predominantly white schools. In cases such as *Pasadena City Board of Education v. Spangler*³⁵⁰ and *Freeman v. Pitts*,³⁵¹ the Supreme Court held that such resegregation did not violate the Equal Protection Clause once again because it entailed de facto rather than de jure segregation. Nevertheless, some school districts favored integration enough that they voluntarily chose to resist the resegregation of the schools that they had spent decades successfully trying to desegregate. However, in *Parents Involved in Community Schools v. Seattle School District No. 1*, the Supreme Court held that the Equal Protection Clause prohibited the voluntary school board use of race-conscious pupil assignment to combat resegregation—even in contexts where such efforts seemed to offer the only viable strategy for preserving integration.³⁵² Not only was the Court reading the Constitution to require the resegregation of public schools, but perversely, Chief Justice Roberts invoked *Brown* itself as the doctrinal compulsion for its holding.³⁵³ The efforts of white parents to resegregate the public schools by moving to white suburbs turned out not only to be successful but constitutionally protected as well.³⁵⁴

Sometimes, the Supreme Court just ignores obvious forms of racial discrimination. In *Griffin v. County School Board*, the Court refused to let Prince Edward County, Virginia close its public schools rather than comply with the *Brown* mandate to desegregate them.³⁵⁵

350. See generally *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424 (1976) (holding that the Equal Protection Clause does not require annual adjustment of desegregation plan to prevent resegregation from private housing choices).

351. See *Freeman v. Pitts*, 503 U.S. 467, 495 (1992) (holding that private resegregation does not violate the Equal Protection Clause).

352. See generally *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (plurality opinion) (2007). The resegregation plan did not advance compelling interest in diversity and was not narrowly tailored. See *id.* at 709-11, 720-25, 733-35.

353. See *id.* at 709-11, 745-48 (reading *Brown* to prevent race-conscious efforts to stop resegregation); cf. *id.* at 798-803 (Stevens, J., dissenting) (noting “cruel irony” in Chief Justice Roberts’ invocation of *Brown* to compel resegregation).

354. See generally *id.*

355. See generally *Griffin v. Cty. Sch. Bd.*, 377 U.S. 218 (1964).

But in *Palmer v. Thompson*, the Court did an about face and allowed the city of Jackson, Mississippi to close its public swimming pools rather than desegregate them.³⁵⁶ In *McCleskey v. Kemp*,³⁵⁷ the Supreme Court permitted Georgia to continue applying its death penalty statute even though statistics showed that black defendants were more likely to be sentenced to death than white defendants and were four times more likely to receive the death penalty if their victims were white rather than black.³⁵⁸

Even under statutes such as Title VII that directly invalidate practices having a racially disparate impact, the Court sometimes chooses not to enforce the disparate impact standard.³⁵⁹ In *Ricci v. DeStefano*, the Court invalidated a decision by the New Haven, Connecticut Fire Department to reject the results of a promotion exam that had a racially disparate impact.³⁶⁰ The Court said that it was imposing a saving construction on Title VII because rejection of the test due to its racially correlated results might itself constitute intentional racial discrimination that would violate the Equal Protection Clause.³⁶¹ Justice Scalia's concurring opinion suggested that he had already concluded that the Title VII disparate impact standard was unconstitutional.³⁶²

The *in terrorem* language of *Ricci* concerning the constitutionality of Title VII caused some observers to suspect that the Court would invalidate a similar disparate impact provision in the Fair Housing Act when it issued its 2015 decision in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project*, a case that concerned the legality of using tax credits to concentrate low-

356. See generally *Palmer v. Thompson*, 403 U.S. 217 (1971) (upholding the post-*Brown* decision to close municipal swimming pools rather than desegregate them).

357. See generally *McCleskey v. Kemp*, 481 U.S. 279 (1987). More specifically, all individuals convicted of murder were 4.3 times more likely to receive the death penalty if their victims were white than black. See *id.* at 287. In addition, blacks convicted of murder were, overall, 1.1 times more likely to be sentenced to death than white convicts. See *id.* Accordingly, blacks convicted of murdering white victims were the most likely class of defendants to receive the death penalty, and the differences were statistically significant. See *id.* The raw data also showed that, prior to adjustment for nonracial factors, the death penalty was imposed in 22% of the cases involving black defendants and white victims, but it was imposed in only 1% of the cases involving black defendants and black victims. See *id.* at 286.

358. See *id.* at 286-87.

359. See generally *Ricci v. DeStefano*, 557 U.S. 557 (2009).

360. See generally *id.* (rejecting the disparate impact standard as a saving construction to avoid potential unconstitutionality of Title VII).

361. See *id.* at 563, 582-93.

362. See *id.* at 594-96 (Scalia, J., concurring).

income housing in inner-city neighborhoods rather than suburbs.³⁶³ The Court did not invalidate the statutory disparate impact standard in that case, but it did reiterate its *Ricci* concern that disparate impact standards had to be “properly limited” in order to avoid a constitutional violation.³⁶⁴ The Supreme Court’s sympathy for racial disparities in the allocation of societal resources seems to be so strong that the Court may actually end up invalidating statutory disparate impact standards in order to avoid having to invalidate the practices that produce racially disparate impacts.³⁶⁵

In *Husted v. A. Philip Randolph Institute*, the Supreme Court upheld the federal statutory validity of an Ohio program allowing voters to be purged from the voting rolls after they had not voted in recent elections and had not confirmed their addresses.³⁶⁶ The Court did so despite the fact that the Ohio voter purge program was widely understood as an effort to target minority voters and other voting populations who tend to vote for Democrats in a way that was reminiscent of the historical race-based voter suppression purges that gave rise to the federal statutes at issue.³⁶⁷ It also upheld the Ohio program despite the fact that the supposed danger of voting fraud has been found to be virtually nonexistent.³⁶⁸

B. Racial Balance

The most direct solution to the problem of racial disparities in the allocation of societal resources would be to pursue strategies that were designed to promote racial balance in the allocation of those resources. But that is something that the Supreme Court has expressly, emphatically, and repeatedly read the Constitution to prohibit. In *Grutter v. Bollinger*,³⁶⁹ one of the few cases since 1990 in which the Court has actually upheld a racial affirmative action program, Justice O’Connor’s majority opinion stated that, “The Law School’s interest is not simply ‘to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin.’ . . . That would amount to outright racial balancing, which is

363. See generally *Tx. Dep’t. of Hous. & Cmty. Affairs v. Inclusive Cmty. Project*, 135 S. Ct. 2507 (2015).

364. See *id.* at 2512.

365. See *id.*

366. See generally *Husted v. A. Philip Randolph Inst.*, 138 S. Ct. 1833 (2018).

367. See *id.* at 1850-52 (Breyer, J., dissenting); *id.* at 1863-65 (Sotomayor, J., dissenting).

368. See *Oppose Voter ID Legislation—Fact Sheet*, *supra* note 154.

369. See generally *Grutter v. Bollinger*, 539 U.S. 306 (2003).

patently unconstitutional.”³⁷⁰ Justice O’Connor traced that view back to Justice Powell’s frequently cited opinion in *Regents of the University of California v. Bakke*³⁷¹ and noted that it had been reaffirmed in the subsequent cases of *Freeman v. Pitts* and *City of Richmond v. J.A. Croson Co.*³⁷² The Supreme Court has since repeatedly reiterated that proposition in *Fisher v University of Texas at Austin (Fisher I)*,³⁷³ *Parents Involved in Community Schools v. Seattle School District No. 1*,³⁷⁴ and *Fisher v. University of Texas at Austin (Fisher II)*.³⁷⁵ There is little doubt concerning the depth of the Court’s antipathy to the direct pursuit of racial balance.

One cannot help but wonder why the Supreme Court is so adamantly opposed to the pursuit of racial balance. The Court sometimes says that the use of race-conscious remedies to promote racial balance would be inconsistent with our aspirational objective of achieving a colorblind, race-neutral society.³⁷⁶ The concept is captured perhaps most clearly by the language of Justice Harlan’s dissenting opinion in *Plessy v. Ferguson*, where he says that “[o]ur constitution is color-blind, and neither knows nor tolerates classes among citizens.”³⁷⁷ Indeed, the color-blind Constitution metaphor is invoked most forcefully by Justices who most tenaciously oppose the racial reallocation of resources through affirmative action.³⁷⁸

There are problems with this color-blind Constitution justification for the Court’s hostility to racial balance. As Justice Brennan pointed out in his *Bakke* opinion, the concept of a color-blind Constitution must be aspirational rather than descriptive in nature.³⁷⁹ It

370. *Id.* at 329-30.

371. *See id.* (citing *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 307 (1978) (opinion of Powell, J.)).

372. *See Grutter*, 539 U.S. at 329-30 (citing *Freeman v. Pitts*, 503 U.S. 467, 494 (1992); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 507 (1989)).

373. *See Fisher v. Univ. of Tx.*, 570 U.S. 297, 311 (2013) (*Fisher I*) (finding that pursuit of racial balance would be “patently unconstitutional”).

374. *See Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 723, 730, 732, 740 (2007) (stating that pursuit of racial balance would be “patently unconstitutional”).

375. *See Fisher v. Univ. of Tx.*, 136 S. Ct. 2198, 2225-26 (2016) (*Fisher II*).

376. *See, e.g., Parents Involved*, 551 U.S. at 730.

377. *See Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

378. *See, e.g., Parents Involved*, 551 U.S. at 772, 780 (Thomas, J., concurring) (invoking color-blind Constitution metaphor); *Grutter v. Bollinger*, 539 U.S. 306, 539 (2003) (Thomas, J., concurring in part and dissenting in part) (indicating the same); *id.* at 347 (Scalia, J., concurring in part and dissenting in part) (agreeing with Justice Thomas).

379. *See Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 327 (1978) (Brennan, J., concurring in part and dissenting in part) (emphasizing aspirational nature of color-blind Constitution).

would be difficult to characterize as descriptively color-blind a Constitution that initially protected the institution of slavery and then went on to protect the institution of Jim Crow segregation even after adoption of the Reconstruction amendments.³⁸⁰ It is also worth noting that the conception of a color-blind Constitution that Justice Harlan was invoking in *Plessy* hardly corresponds to anything that we would view as color blindness today. In the first sentence of the paragraph containing his color-blind Constitution admonition, Justice Harlan also said:

The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth, and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage, and holds fast to the principles of constitutional liberty.³⁸¹

A conception of color blindness that tolerates such white supremacy lacks any normative appeal.

But the most serious problem with viewing aspirational color blindness as an impediment to racial balance is that prospective, color-blind race neutrality bears no relationship to racial equality where races are not similarly situated to begin with. If, as in the United States, whites have been given a head start in the race to accumulate societal resources, using a commitment to color-blind race neutrality does not promote racial equality. Rather, it freezes existing inequalities and perpetuates white privilege. There is nothing unequal about telling those who were improperly given a head start that they have to slow down until those without the illegitimate head start have a chance to catch up. When racial groups are not similarly situated to begin with, a color-blind insistence on treating them the same is not treating them equally. It is subjecting them to continued racial discrimination.

The Supreme Court seems to have overlooked this basic truth in *Schuette v. Coalition to Defend Affirmative Action*.³⁸² There the Court upheld a populist voter initiative amendment to the Michigan Constitution that prohibited affirmative action. The Court viewed the amendment as constitutionally unobjectionable because it merely insisted on the same prospective race neutrality that was required by the Equal Protection Clause itself. But the only affirmative action plans that would be barred by the Michigan voter initiative were plans that could survive strict scrutiny as the least restrictive means of achieving a compelling governmental interest. Other affirmative action plans would already be unconstitutional. As a result, the

380. See *supra* Part I.A.

381. See *Plessy*, 163 U.S. at 559 (1896) (Harlan, J. dissenting).

382. See *Schuette v. Coal. to Defend Affirmative Actions*, 134 S. Ct. 1623, 1637-38 (2014); *id.* at 1648 (Scalia, J., concurring).

affirmative action prohibition that the Supreme Court upheld in *Schuette* applied only to plans that were *necessary* to combat the racial discrimination that the now-prohibited affirmative action plans sought to remedy.

The Supreme Court's aversion to racial balance may also be rooted in its belief that the Equal Protection Clause does not permit the use of race-conscious efforts to remedy general "societal discrimination." As with racial balance, the Court has repeatedly and emphatically insisted that the goal of reducing societal discrimination falls outside the scope of constitutionally permissible race-conscious objectives.³⁸³ Once again, however, it is far from clear why the objective of reducing societal discrimination should be deemed illegitimate. I would have thought that the whole point of the Fourteenth Amendment was to reduce the societal discrimination that predictably persisted after the abolition of slavery because of the racial caste system on which slavery was based.³⁸⁴ It seems clear that racial biases continue to permeate American culture.³⁸⁵ But, perversely, it is precisely because those biases are so pervasive, generalized, and structural that the Supreme Court says they do not count as a form of intentional discrimination for constitutional purposes under *Washington v. Davis*.

The Court says that societal discrimination is out of bounds because the Equal Protection Clause is a repository of individual rights and not group rights.³⁸⁶ But that makes little sense. If an individual is discriminated against because of his or her membership in a racial group, that individual is not being harmed because of his or her individual characteristics. The harm is being inflicted precisely because of the individual's membership in a racial group. And the concomitant

383. This position was articulated by Justice Powell in *Bakke*, 438 U.S. at 307-10, and reasserted by Justice Powell in *Wygant v. Jackson Board of Education*, 476 U.S. 267, 274-79 (1986) (plurality opinion). Led by Justice O'Connor, that view has since been adopted by a majority of the full Supreme Court. See *Grutter*, 539 U.S. at 323-25, 330 (citing *Bakke* as rejecting interest in remedying societal discrimination and rejecting racial balancing as "patently unconstitutional"); see also *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 612-14 (1990) (O'Connor, J., dissenting) (rejecting societal discrimination); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 494-96 (1989) (plurality opinion) (indicating the same); *Johnson v. Transp. Agency*, 480 U.S. 616, 647-53 (1987) (O'Connor, J., concurring) (indicating the same); *Wygant*, 476 U.S. at 288 (O'Connor, J., concurring) (indicating the same). Most recently, Chief Justice Roberts reiterated this view in *Parents Involved*, 551 U.S. at 732-33 (plurality opinion) (indicating the same).

384. See *supra* Section I.A.

385. See *supra* Section II.B.

386. See *Grutter*, 539 U.S. at 323 (asserting that the Equal Protection Clause safeguards individual rights rather than group rights).

benefits to whites flow precisely from the fact that they are members of a white racial group. Once again, the Supreme Court's prohibition on efforts to remedy societal discrimination seems best understood as yet another way in which the Court is simply insulating existing white privilege from efforts to achieve a more racially equitable distribution of resources.

If we actually lived in the color-blind, race-neutral society that Justice Harlan envisioned in *Plessy*, resources would be distributed in a racially proportional manner. And there would be no general societal discrimination because, by hypothesis, our society would be nondiscriminatory. That makes it even harder to understand why the Supreme Court does not welcome efforts to approximate the resource allocations that would exist in such a culture rather than deeming such efforts to be "patently unconstitutional."³⁸⁷ It seems that we can aspire to the status of a nondiscriminatory culture, but we cannot actually try to become one.

The Supreme Court's aversion to resource redistribution has now caused it to invalidate most of the affirmative action programs that it has considered since 1990.³⁸⁸ Ignoring the fact that whites and racial minorities are not similarly situated with respect to the distribution of resources, the Court appears to view racial affirmative action as a form of reverse discrimination against whites.³⁸⁹ The Court's will-

387. See *Parents Involved*, 551 U.S. at 701, 730, 732.

388. See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 225-27 (1995) (overruling *Metro Broadcasting* by rejecting the application of intermediate scrutiny to some benign racial classifications and applying strict scrutiny to federal affirmative action programs designed to benefit minority contractors). See generally GIRARDEAU A. SPANN, *THE LAW OF AFFIRMATIVE ACTION: TWENTY-FIVE YEARS OF SUPREME COURT DECISIONS ON RACE AND REMEDIES* 159-63 (2000) (discussing Supreme Court affirmative action decisions and voting blocs). The Court has, however, upheld affirmative action programs to promote educational diversity in *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003), and *Fisher v. Univ. of Tx.*, 136 S. Ct. 2198, 2214 (2016) (*Fisher II*), although it more recently invalidated an educational affirmative action plan in *Parents Involved*, 551 U.S. 701, 730, 732, (2007) (noting that the pursuit of racial balance would be "patently unconstitutional"). The Court's treatment of affirmative action sometimes seems very inconsistent. Compare *Grutter*, 539 U.S. at 327-30, 334 (upholding University of Michigan Law School's affirmative action program for student admissions), with *Gratz v. Bollinger*, 539 U.S. 244, 255-57, 275-76 (2003) (invalidating an arguably indistinguishable University of Michigan undergraduate affirmative action program on same day that *Grutter* was decided).

389. See, e.g., *Ricci v. DeStefano*, 557 U.S. 557, 578-80 (2009) (objecting to burden on whites with higher test scores); *Metro Broad.*, 497 U.S. at 612-17, 621-23, 630-31 (1990) (O'Connor, J., dissenting) (objecting to the over- and under-inclusiveness of remedies that do not narrowly compensate for past discrimination as impermissibly burdening innocent whites); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 279-84 (1986) (opinion of Powell, J.) (opposing layoffs as an impermissible burden on innocent whites); *id.* at 294-95 (White, J., concurring) (opposing layoffs

ingness to protect the interests of whites over the interests of racial minorities has caused it to issue some decisions that seem quite strained. In *Adarand Constructors v. Peña*, the Court subjected to strict scrutiny a federal statutory scheme that gave bonuses to construction contractors if they hired subcontractors who were economically and socially disadvantaged.³⁹⁰ The feature of the statutory scheme that triggered strict scrutiny was its inclusion of a rebuttable presumption that women and racial minorities were socially and economically disadvantaged in the construction industry.³⁹¹ One would have thought that such a presumption was self-evidently correct, and certainly correct enough to warrant a presumption that could be rebutted by contrary facts in individual cases. Nevertheless, the Court held that the presumption was constitutionally suspect under the Equal Protection Clause. The Court apparently thinks that it is now unconstitutional even to believe that racial minorities remain socially and economically disadvantaged. The holding was reminiscent of the Court's earlier decision in *Croson*, where the virtual absence of minorities in the Richmond construction trades did not count as evidence of prior racial discrimination.³⁹²

Adarand also refused to distinguish between benign and invidious racial classifications.³⁹³ *Metro Broadcasting v. FCC*, a 1990 Supreme Court decision, had held that intermediate rather than strict scrutiny applied to benign affirmative action plans.³⁹⁴ However, Justice O'Connor's opinion in *Adarand* overruled *Metro Broadcasting* and held that strict scrutiny applied to all racial classifications whether benign or invidious.³⁹⁵ In his *Adarand* dissent, Justice Stevens characterized Justice O'Connor's opinion as not being able to

of innocent whites to benefit minorities who were not actual victims of discrimination); *See Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 294-99 (1978) (opinion of Powell, J.) (opposing racial preferences that impermissibly burden innocent whites); *cf. Local No. 93, Intern. Ass'n of Firefighters, AFL-CIO v. City of Cleveland*, 478 U.S. 501, 535-45 (Rehnquist, J., dissenting) (noting that Title VII remedies that override seniority must be limited to actual victims of discrimination); *Local 28 of Sheet Metal Workers' Intern. Ass'n v. EEOC*, 478 U.S. 421, 500 (Rehnquist, J., dissenting) (indicating the same); *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 578-83 (indicating the same).

390. *See Adarand*, 515 U.S. at 205-10.

391. *See id.* at 212-13.

392. *See Richmond v. J.A. Croson Co.*, 448 U.S. 469, 498-508 (1989).

393. *See Adarand*, 515 U.S. at 223-27.

394. *See Metro Broad.*, 497 U.S. at 564-66.

395. *See Adarand*, 515 U.S. at 227 (overruling *Metro Broadcasting* and applying strict scrutiny to all racial classifications).

distinguish between a no trespassing sign and a welcome mat.³⁹⁶ For purposes of equal protection scrutiny, it did not matter whether the government was trying to remedy racial disparities or was trying to perpetuate them.

Sometimes it seems as if the Supreme Court actually views its mission as that of perpetuating the oppression of racial minorities. Not only did the Court invalidate voluntary school board efforts to prevent resegregation in *Parents Involved*,³⁹⁷ but the Court seems intent on ensuring that racial minorities remain underrepresented in the electoral process as well. In *Shaw v. Reno*,³⁹⁸ the Court recognized an Equal Protection cause of action for white voters who wished to challenge the creation of majority–minority voting districts—districts that in some jurisdictions had sent the first black representatives to Congress since Reconstruction.³⁹⁹ In *Miller v. Johnson*, the Court actually invalidated such a majority–minority district after it had been adopted to comply with the Voting Rights Act of 1965 because race had been the “predominant factor” used in drawing the district lines.⁴⁰⁰

The *Shaw* Court’s justification for recognizing a cause of action for white voters was that drawing district lines to create majority–minority voting districts perpetuated the racial stereotype that minorities share political interests and vote alike.⁴⁰¹ The stereotype seems true enough, as everyone would concede that racial bloc voting is extremely common. But Justice Stevens pointed out an underlying incoherence in the majority’s reasoning.⁴⁰² In his *Miller* dissent, Justice Stevens noted that the recognition of any injury suffered by a white voter as a result of being placed in a majority–minority voting district rested on precisely the same stereotype about racial voting that the majority was disavowing.⁴⁰³ The only way that a white voter would be injured by being placed in a majority–minority district would be from the fear that minority officials elected from that district would

396. *Id.* at 245 (Stevens, J., dissenting) (“The consistency that the Court espouses would disregard the difference between a ‘No Trespassing’ sign and a welcome mat.”).

397. *See supra* text accompanying notes 352-353.

398. *See generally* *Shaw v. Reno*, 509 U.S. 630, 639-52 (1993).

399. *See id.* at 659 (White, J. dissenting) (noting that majority–minority district resulted in North Carolina sending its first black representative to Congress since Reconstruction); *id.* at 676 (Blackmun, J. dissenting) (noting the same).

400. *See generally* *Miller v. Johnson*, 515 U.S. 900, 916-20 (1995).

401. *See Shaw*, 509 U.S. at 647-49 (majority opinion of O’Connor, J.) (objecting to racial stereotyping in redistricting).

402. *See Miller*, 515 U.S. at 929 (Stevens, J. dissenting).

403. *See id.* at 929-32 (Stevens, J., dissenting).

not adequately represent the interests of the white voter.⁴⁰⁴ Alternatively, a white voter might simply fear that majority–minority districts would allow the election of too many minorities to Congress—a fear that would also rest on the same stereotyped views of racial minorities.

In *Shelby County v. Holder*, the Supreme Court went so far as to invalidate § 4 of the Voting Rights Act in a way that precluded continued use of the § 5 preclearance provision—a provision that had successfully been used to prevent jurisdictions with a history of voting discrimination from making unapproved discriminatory changes to their voting districts or procedures.⁴⁰⁵ The decision seemed both gratuitous and suspect because the Voting Rights Act provisions at issue were not only very effective, but they had frequently, recently, and overwhelmingly been reauthorized by a bipartisan Congress.⁴⁰⁶ The Supreme Court seems intent on helping whites maintain their superiority to racial minorities in the distribution of virtually all of society’s valuable resources, even those that are most fundamental to our democratic form of government.

The Supreme Court’s doctrinal approach to affirmative action is itself racially discriminatory. As Daniel Farber has explained, under the *Washington v. Davis* and *Feeney* intentional discrimination standards, disparate impact that harms racial minorities does not count as a racial classification unless it occurs “because of” an invidious intent to harm racial minorities.⁴⁰⁷ However, the disparate impact that harms whites as a result of affirmative action *does* count as a racial classification, even though it occurs “in spite of” a benign intent to benefit disadvantaged racial minorities.⁴⁰⁸ Accordingly, when the District of Columbia police department in *Washington v. Davis* uses a verbal skills test to hire police officers, the racially disparate impact of that test is not subject to strict scrutiny *because of* the fact that the police department was not intending the incidental harm to blacks. However, when the federal government in *Adarand* gives a bonus to construction contractors for hiring disadvantaged subcontractors, the

404. See *Miller*, 515 U.S. at 929-32 (Stevens, J., dissenting) (highlighting internal inconsistency in the majority’s treatment of racial stereotypes).

405. See *Shelby Cty. v. Holder*, 570 U.S. 529, 550-57 (2013) (invalidating § 4 of Voting Rights Act of 1965).

406. See *id.* at 536-40 (outlining history of reauthorizations); *id.* at 559, 564-66, 593-94 (Ginsburg, J., dissenting) (outlining the same).

407. See DANIEL A. FARBER ET AL., CASES AND MATERIALS ON CONSTITUTIONAL LAW: THEMES FOR THE CONSTITUTION’S THIRD CENTURY 354-58 (5th ed. 2013) (describing a racially-correlated discrepancy in the Supreme Court’s treatment of racial discrimination claims).

408. See *id.*

racially disparate impact of the bonus is subject to strict scrutiny *in spite of* the fact that the government was not intending the incidental harm to whites.⁴⁰⁹ The Court uses a more stringent standard of intentional discrimination when minorities are harmed than when whites are harmed.

It is true that affirmative action tends to make facial use of racial classifications whereas contemporary societal practices that harm racial minorities tend to be facially neutral. But the disparate impact is precisely the same, so it is not clear why the presence or absence of facial discrimination should matter when the underlying intent is the same. That distinction would make sense only if the Supreme Court were more interested in the form rather than the substance of racial discrimination. But it seems that the Supreme Court is primarily concerned with substance. What it cares about most is the race of the victim when it is called upon to decide whether discrimination violates the Equal Protection Clause of the Constitution. White victims usually win. And these days, it seems that minority victims almost always lose.

The Supreme Court appears to be serving as a mere conduit for the private discriminatory biases that permeate the culture. And it is doing so in direct contravention of its holding in *Palmore v. Sidoti* that such judicial behavior is unconstitutional.⁴¹⁰

CONCLUSION

As the title of this Article suggests, everyone knows that we live in a racially discriminatory culture. The racially disparate impact of the manner in which we have allocated virtually all important societal resources simply speaks for itself. Nevertheless, we remain intent on denying that any significant amount of invidious racial discrimination persists. We invoke a variety of rationalizations to deflect the impact of the racial distribution statistics. Moreover, our overt, implicit, and structural biases leave us predisposed to view those rationalizations as legitimate. We call on the Supreme Court to interpret the constitutional concept of equality in ways that will allow us to continue indulging our discriminatory attitudes and practices without feeling that we have abandoned our nobler commitment to the abstraction of racial justice. And the Supreme Court has been

409. See *Adarand Constructors v. Peña*, 515 U.S. 200, 200 (1995).

410. See *Palmore v. Sidoti*, 466 U.S. 429, 432-34 (1984).

remarkably adept at helping us to do this. From its *Dred Scott*⁴¹¹ protection of slavery to its *Parents Involved*⁴¹² conclusion that *Brown*⁴¹³ requires the resegregation of public schools, the Court has succeeded in making racial discrimination appear completely constitutional. Creating a constitutional requirement of *intentional discrimination* and a constitutional prohibition on the pursuit of *racial balance*, the Court has ensured that the Equal Protection Clause will pose no threat to the continued maintenance of general *societal discrimination*.

We know, of course, that all of this is going on. But we are unwilling to admit that we have an addiction to the racial discrimination that it entails. The lure of continued white privilege is simply too strong to be resisted, even when we are told that it constitutes the contemporary form of white supremacy. As long as our discriminatory inclinations can be relegated to unconscious, implicit, and structural modes of operation, they do not threaten our collective self-image. Although whites and racial minorities are far from similarly situated with respect to their access to societal resources, we nevertheless continue to believe that the constitutional requirement of racial equality can be satisfied through a form of prospective, color-blind race neutrality that perpetuates the existing discriminatory distribution of resources.

The culture's denial of its continuing commitment to racial inequality would seem to doom any prospects for a meaningful process of truth and reconciliation in post-Ferguson America. As the post-Ferguson shootings of unarmed blacks by white police officers persist, I cannot help but fear that substantial segments of American culture—including segments that have occupied the Trump and Sessions Departments of Justice—view Ferguson as something that is to be emulated rather than condemned. Ironically, the admission that we have no cultural interest in attaining any meaningful level of racial equality may be a threshold requirement to advancing the goal of racial justice. If we realize that the only way we can ever achieve racial equality is by pre-committing ourselves to take actions that we would otherwise never take on our own, we may be able to achieve a measure

411. See *Dred Scott v. Sandford*, 60 U.S. 393, 393 (1857) (discussing how blacks could not be citizens, and how Congress lacked the power to abolish slavery in federal territories).

412. See *Parents Involved in Cmty. Sch. V Seattle Sch. Dist. No. 1*, 551 U.S. 701, 702 (2007) (noting the resegregation plan did not advance compelling interest in diversity and was not narrowly tailored).

413. See *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (*Brown I*) (invalidating maintenance of racially segregated public schools).

of nondiscriminatory behavioral equality. And in time, maybe a measure of unbiased attitudinal equality might also emerge.