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Race and the Law: The Visible and the Invisible

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"I am an invisible man."

–Ralph Ellison[1]

"I don't see color. People tell me I'm white and I believe them because police call me 'sir.'"

–Stephen Colbert[2]

I. INTRODUCTION

Sometimes the law "sees" race, and sometimes it does not. Sometimes it recognizes race as legally relevant, in other words, and sometimes it does not. Over the centuries, American law has always shown a keen awareness of race as a social fact, but that awareness has not determined when and how the law made that social fact legally relevant. The pivotal questions are when, how, to what extent, and for what purposes does the law decide to "see" or not "see" race.[3]

This essay is divided into seven parts. Part II surveys the period from the seventeenth century to the Civil War and shows that the concept of "race" was evident as a central part of formal American law. Part III discusses the period from the Civil War to World War II and identifies how the law continued to see "race" and accept it as a valid basis for racial discrimination despite the passage of the Thirteenth, Fourteenth, and Fifteenth Amendments. Part IV addresses the social and cultural changes that followed World War II and the Warren Court's pathbreaking equal protection decisions which began to see "race" anew as a legal category that violated the Constitution when used for unjust and "invidious" purposes.

Part V examines the period from the 1970s to the present when opposition to the civil rights movement hardened and spurred the idea that law should never "see" race as a valid legal category but instead be entirely "colorblind," thus suggesting the problematic nature and the partisan political uses that the "colorblind" idea inspired. Part VI examines in detail some of the ways that "colorblind" law, by refusing to "see" race, allows and even encourages the continuation of much de facto racial discrimination and inequality. The essay concludes with Part VII by briefly marking the continuing political struggle between those who insist on a "colorblind" law and those who understand that such an insistence often serves to obscure the discriminatory nature of many of the law's operations and consequences.

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1. Ralph Ellison, Invisible Man 3 (Vintage Books 1972) (1952).

2. *The Colbert Report: Ending Racism* (Comedy Central television broadcast Feb. 1, 2007).

3. "[T]o truly understand America, we must open our eyes to the hidden work of a caste system that has gone unnamed but prevails among us to our collective detriment . . . ." Isabel Wilkerson, Caste 30 (2020). On the issue of what the law "sees," see Kris Franklin, *Meditations on Teaching What Isn't: Theorizing the Invisible in Law and Law School*, 66 N.Y.L. Sch. L. Rev. 387, 392–96 (2021–2022).

II. EXPLOITING RACIAL VISIBILITY: LAW AS CLEAR-EYED AND REPRESSIVE

Race became central to American law in the second half of the seventeenth century when African slavery was formally established and legally enforced throughout England's North American colonies.[4] In the 1660s, Virginia and Maryland passed statutes, the "slave codes," recognizing the lawfulness of Black slavery,[5] and by century's end, almost all of the other colonies had accepted that legal principle.[6] Slave codes existed throughout the South and in New England, New Jersey, New York, and Pennsylvania.[7]

Along with the legalization of slavery came other forms of legalized racial discrimination against Blacks, including those who were legally "free." An early statute prohibited fornication between "negroes" and "Christians,"[8] for example, and in 1691, Virginia criminalized all interracial sexual acts.[9] In the following decades, most colonies followed suit, criminalizing interracial marriage between whites and those identified variously as "negroes," "mulattoes," and "Indians."[10] Other colonial laws prohibited "free" Blacks from carrying handguns; gathering in groups; dancing after dark, traveling without permission, and associating with slaves; and speaking insolently to white persons.[11]

The American Revolution and the Declaration of Independence brought little change, and the Constitution essentially ratified the racial status quo. At the Constitutional Convention disagreements over the institution of slavery divided the "free" and "slave" states, but the participants reached a compromise that recognized race-based slavery even though they refused to identify it by name, making both

4. Joshua J. Mark, *Virginia Slave Laws and Development of Colonial American Slavery*, World Hist. Encyc. (Apr. 27, 2021), https://www.worldhistory.org/article/1740/virginia-slave-laws-and-development-of-colonial-am/.

5. *See generally* 2 Hening's Statutes at Large 170, 260, 266, 270 (New York, William Waller Hening ed., 1823) (collecting Virginia slave laws from 1660 to 1682); Slave Act of 1664, 1664 Md. Laws 533–34 (repealed 1681).

6. A. Leon Higginbotham Jr., *Virginia Led the Way in Legal Oppression*, Wash. Post (May 21, 1978), https://www.washingtonpost.com/archive/opinions/1978/05/21/virginia-led-the-way-in-legal-oppression/664bcdf4-8aaf-475f-8ea7-eb597aee7ecd/; *see also* Edwin Olson, *The Slave Code in Colonial New York*, 29 J. Negro Hist. 147, 147–48 (1944) (tracking slave codes throughout the South and in New England, New Jersey, New York, and Pennsylvania).

7. Olson, *supra* note 6.

8. 2 Hening's Statutes at Large, *supra* note 5, at 170.

9. 3 Hening's Statutes at Large 86–88 (Philadelphia, William Waller Hening ed., 1823) (collecting Virginia slave laws from 1684 to 1710).

10. *Id.*

11. *E.g.*, 7 The Statutes at Large of South Carolina 353–54 (Columbia, S.C., David J. McCord ed., 1840) ("[N]o negro or slave shall carry out of the limits of his master's plantation any sort of gun or fire arms, without his master, or some other white person by his order . . . ."); *id.* at 413 (on group gatherings); 2 Charles Gayarré, History of Louisiana 362, 365 (New York, Redfield 1854) (on dancing, traveling, associating); Ariela J. Gross, What Blood Won't Tell 4 (2010) (on speaking insolently); Paul Finkelman, Slavery in the Courtroom 4 (1998) (same); Kathleen M. Brown, Good Wives, Nasty Wenches, and Anxious Patriarchs 195–97 (1996) (same).

slavery and race, as formal constitutional matters, expressly protected but formally invisible. The Constitution referred to African slaves obliquely by using the seemingly neutral phrase, "Person held to Service or Labour," and by distinguishing whites from Black slaves by referring to the former as "free Persons" and to the latter as "other Persons."[12] However many Founders disapproved of race-based slavery, they drafted and ratified a constitution that accepted it under non-racial verbal masks.

Although the Founders were unwilling to mention race or slavery by name in the Constitution, they had no such hesitation about doing either when they began to enact ordinary legislation. One year after the Constitution's ratification the First Congress adopted the Naturalization Act of 1790 and declared that only "a free white person" was eligible "to become a citizen."[13] Two years later in the Militia Act of 1792, Congress again incorporated explicit racial discrimination into the law by restricting militia service to the "free able-bodied white male citizen."[14] The following year, it passed the first Fugitive Slave Act, authorizing the capture and return of slaves who escaped their bonds.[15]

Under various labels and in a variety of ways both race and slavery remained critical legal categories and grew steadily in importance until the Civil War. By the early nineteenth century the law of race-based slavery had become well established, elaborately detailed, and carefully applied by the judiciary.[16] Federal courts frequently determined the free or slave status of Blacks in ruling on issues arising under the federal Fugitive Slave Act,[17] while the slave states made their laws increasingly explicit and repressive. In the 1820s, for example, South Carolina led other slave states in passing Negro Seamen Acts mandating that free Black sailors aboard ships from other states or countries be seized and imprisoned until their ships left port.[18] Across the South, government-backed "slave patrols" vigorously enforced the region's slave system and its many race-based laws.[19]

Throughout the nation, moreover, the antebellum decades witnessed the continuation and spread of legalized racial discrimination. "In virtually every phase of existence," North and South, "Negroes found themselves systematically separated

12. U.S. Const. art. IV, § 2, cl. 3; *id.* art. I, § 2, cl. 3.

13. Naturalization Act of 1790, ch. 3, 1 Stat. 103 (repealed 1795).

14. Militia Act of 1792, ch. 33, 1 Stat. 271 (corresponds to Militia Act of 1792, ch. 28, 1 Stat. 264) (repealed 1903).

15. Fugitive Slave Act of 1793, ch. 7, 1 Stat. 302 (repealed 1864). The statute did not refer explicitly to race, but it employed the word "slave" repeatedly in its accompanying commentary. *Id.* Its caption used the phrase "persons escaping from the service of their masters," while its formal text used the facially neutral terms "fugitive from justice" and "person held to labor." *Id.*

16. *See* Paul Finkelman, Supreme Injustice 220, 223 (2018).

17. *See, e.g.*, United States v. Copeland, 25 F. Cas. 646, 646 (C.C.D.C. 1862) (No. 14,865a) (applying the Fugitive Slave Act to the District of Columbia to reject a fugitive's habeas claim of unlawful custody).

18. Andrew Kull, The Color-Blind Constitution 11 (1992).

19. *See, e.g.*, Sally E. Hadden, Slave Patrols 6 (2003).

from whites."[20] Formal laws excluded them from stagecoaches, steamships, and railroad cars or restricted them to inferior Jim Crow sections. Eighteen state constitutions classified Blacks as "dependents" with few rights,[21] while the Illinois Constitution of 1848 required its state legislature to "pass such laws as will effectively prohibit free persons of color from immigrating to and settling in this State."[22] In 1850 Congress passed both a new and more stringent federal Fugitive Slave Act[23] and the Oregon Donation Land Claim Act of 1850,[24] which extinguished Indian rights to land in Oregon and made large tracts available to whites while explicitly excluding Blacks and Hawaiians from the law's largesse.[25] Writing in the infamous *Dred Scott* case in 1857, Chief Justice Roger B. Taney declared that the "negro African race" was not a part of the "white race," and therefore not part of the American people.[26] Blacks were "a subordinate and inferior class of beings, who had been subjugated by the dominant race" and had "no rights which the white man was bound to respect."[27]

Before the Civil War people in both the North and South, including many who joined the anti-slavery Free-Soil and then Republican parties,[28] agreed that the United States was properly a "[w]hite man's country."[29] Antebellum American law explicitly ratified and enforced that shared consensus.

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20. Leon F. Litwack, North of Slavery 97 (1961).

21. Matthew Frye Jacobson, Whiteness of a Different Color 31 (1998); *e.g.*, N.C. Const. of 1776, art. I, § 3.3, amend. X (1835) (denying Blacks the right to vote); S.C. Const., art. 1, § 6 (1790) (disqualifying non-whites from running for political office); Fla. Const., art. XVI, § 3 (1839) (granting power to prohibit non-white immigration).

22. Ill. Const. of 1848, art. XIV, § 1 (allowing for whites-only immigration); *see also* Jacobson, *supra* note 21, at 30–31 (noting racist language in the 1848 Illinois Constitution and its emphasis on the "whiteness" of citizenship).

23. Fugitive Slave Act of 1850, ch. 60, 9 Stat. 462 (repealed 1864). For enforcement of the act, see Stanley W. Campbell, The Slave Catchers 110–47 (1970).

24. Oregon Donation Land Claim Act of 1850, ch. 76, 9 Stat. 496 (amended 1853).

25. *See* William G. Robbins, *Oregon Donation Land Law*, Or. Encyc., https://www.oregonencyclopedia.org/articles/oregon_donation_land_act/#.YRWRKdNKgUR (Feb. 2, 2021) (noting that some 30,000 whites arrived in Oregon within five years of the act's passage).

26. 60 U.S. (19 How.) 393, 404–05 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. Const. amend. XIV.

27. *Id.*

28. The Free-Soil Party was a political party formed in 1848, during the pre–Civil War era to oppose the expansion of slavery into western territories when existing political parties (the Democratic and Whig parties) declined to do so. *See Free Soil Party*, *Organizations*, Papers Abraham Lincoln Digit. Libr., https://papersofabrahamlincoln.org/organizations/FR37924 (last visited Apr. 28, 2022). Short-lived support caused Free-Soilers to help establish and then join the Republican Party in 1856. *Id.*

29. *See* Eugene H. Berwanger, The Frontier Against Slavery 125 (1967); Anthony Gronowicz, Race and Class Politics in New York City Before the Civil War 132 (1997); Leonard L. Richards, The Slave Power 32–46 (2000).

III. QUALIFYING RACIAL VISIBILITY: LAW AS RACIALLY ASTIGMATIC

The Civil War changed many things, and for issues of race the passage of three postwar constitutional amendments altered the formal law substantially. The Thirteenth Amendment (ratified 1865) abolished the institution of slavery absolutely, though it did not mention "race" or "color."[30] The Fourteenth Amendment (ratified 1868) extended constitutional rights to Blacks but similarly failed to mention "race" or "color."[31] The Fifteenth Amendment (ratified 1870) provided that no citizen could be deprived of the right to vote by reason of "race, color, or previous condition of servitude."[32] That language marked the first time that the words "race" and "color" appeared in the Constitution itself.

These three Civil War amendments created new legal mandates and consequently raised new legal questions. One that all three of the new additions shared involved the scope of the potentially vast powers conferred on Congress "to enforce" their varied provisions.[33] Congress did use those powers over the succeeding years, though far more often it ignored them. The Court sometimes construed those powers broadly and sometimes quite narrowly.[34] As the politics and values of the nation changed in the late nineteenth century, so too did the willingness of Congress to use those powers

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

31. *Id.* amend. XIV, § 1 ("All persons born or naturalized in the United States . . . are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

32. *Id.* amend. XV, § 1. In the immediate wake of the Civil War most states found ways to prevent Blacks from voting. *Voting Rights for African Americans*, Libr. Cong., https://www.loc.gov/classroom-materials/elections/right-to-vote/voting-rights-for-african-americans/ (last visited Apr. 28, 2022). In Missouri, for example, the state's second constitution adopted in 1865 restricted the suffrage to "every white male citizen of the United States, and every white male person of foreign birth, who may have declared his intention to become a Citizen of the United States." Mo. Const. of 1865, art. II, § 18; *see also* Walter Johnson, The Broken Heart of America 151 (2020).

33. U.S. Const. amend. XIII, § 2 ("Congress shall have power to enforce this article by appropriate legislation."); *Id.* amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."); *Id.* amend. XV, § 2 ("The Congress shall have power to enforce this article by appropriate legislation.").

34. *Compare* Hodges v. United States, 203 U.S. 1, 16–18 (1906) (reading the Thirteenth Amendment narrowly to authorize congressional action only against actual slavery and involuntary servitude), *and* City of Boerne v. Flores, 521 U.S. 507, 519, 528–29, 535–36 (1997) (reading the Fourteenth Amendment narrowly to hold that Congress cannot create rights not yet recognized by the Court as protected under the Free Exercise Clause), *and* United States v. Reese, 92 U.S. 214, 218 (1875) (reading the Fifteenth Amendment narrowly so that Congress cannot legislate upon state elections unless to punish states that refuse the vote of otherwise lawful voters on account of race, color, or previous condition of servitude), *with* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 437–43 (1968) (reading the Thirteenth Amendment broadly to authorize congressional action against public and private practices that constitute a relic of slavery), *and* Katzenbach v. Morgan, 384 U.S. 641, 648–51, 648 n.8 (1966) (reading the Fourteenth Amendment broadly to hold that congressional law can be enacted to correct state laws in conflict with the Equal Protection Clause), *and* Rice v. Cayetano, 528 U.S. 495, 514, 518–19 (2000) (reading the Fifteenth Amendment broadly to imply that Congress can protect against state voting measures that discriminate on the basis of ancestry).

and of the Court to approve their uses. For the most part the provisions of the postwar amendments were little used and largely ignored well into the twentieth century.

Passage of the Thirteenth Amendment raised questions concerning the meaning of "slavery and involuntary servitude" and whether those terms barred the legal devices that Southern states developed to retain firm control over their freed Black populations. So-called "Black codes" and facially neutral laws involving vagrancy, sharecropping, penal labor, and employment contracts were vigorously enforced by criminal sanctions and served in practice as effective tools to maintain discriminatory and repressive racist regimes.[35] Eventually, those devices came under closer legal scrutiny, but well into the twentieth century the Court failed to invalidate many of them while occasionally striking down a few of the most egregious ones.[36]

The Fifteenth Amendment's reference to "race" and "color" required the courts to give meaning to concepts that would increasingly become awkward and contested. Was "race," for example, determined by physiognomy, skin color, biology, culture, language, national origin, religion, economic and social status, or some imprecise and unstable combination of some or all of those factors? In *Plessy v. Ferguson* in 1896, when the Court refused to apply the Fourteenth Amendment to protect Black Americans from racial segregation, it acknowledged the uncertain meaning of "race" and resolved the constitutional question with a classic avoidance technique.[37] The justices simply passed the legal determination of racial status to the states, knowing full well the discriminatory racial results that would follow.

> It is true that the question of the proportion of colored blood necessary to constitute a colored person, as distinguished from a white person, is one upon which there is a difference of opinion in the different states; some holding that any visible admixture of [B]lack blood stamps the person as belonging to the colored race; others, that it depends upon the preponderance of blood; and still others, that the predominance of white blood must only be in the proportion of three-fourths. But these are question to be determined under the laws of each state . . . .[38]

The meaning of "race" continued to confront the Court into the late twentieth century when the law's residual references to the concept began to cause it acute embarrassment. Two Reconstruction era federal civil rights statutes conferred on Blacks the same rights "enjoyed" by persons or citizens who were "white."[39] Thus, the statutes forced the Court to decide whether "whites" could take advantage of the

35. *See* William P. Quigley, *Reluctant Charity: Poor Laws in the Original Thirteen States*, 31 U. Rich. L. Rev. 111, 115, 153, 172–75 (1997).

36. *E.g.*, Bailey v. Alabama, 219 U.S. 219, 243–45 (1911) (invalidating state criminal law imposing penalties for violations of labor contracts as antithetical to the Thirteenth Amendment); Guinn v. United States, 238 U.S. 347, 364–65 (1915) (invalidating grandfather clause in state law designed to prevent Blacks from voting as antithetical to the Fifteenth Amendment).

37. 163 U.S. 537, 548–49 (1896).

38. *Id.* at 552 (citations omitted).

39. 42 U.S.C. §§ 1981(a), 1982.

provisions and, if so, who exactly was "white."[40] The Court could do no better than rely on what it considered a vague nineteenth-century "common understanding" that seemed to make every possible ethnic and national group a separate "race," and it consequently ruled that the statutes protected every such group, including "whites."[41]

The Fourteenth Amendment created the most important and enduring problems. One was the nature of the rights that were included within the phrase "privileges or immunities of citizens of the United States."[42] In the 1872 *Slaughter-House Cases*, the Court construed the clause narrowly and held that it referred primarily to rights controlled by the states, not the federal government.[43] That holding essentially neutered the clause and led to the second problem: a new attention to the amendment's Due Process Clause. By century's end, that focus led to the emergence of "substantive" due process, an idea that allowed the courts to invalidate governmental actions and that took on different meanings over the years, and remained a disputed constitutional issue into the twenty-first century.

A third problem arose from the Fourteenth Amendment's Equal Protection Clause. Although the Court was sensitive to "equality" claims under the clause in cases involving economic regulations,[44] for almost a century after the amendment's ratification the Court gave it relatively little formal heed.[45] Because the Equal Protection Clause failed to refer to race specifically, and because classification is an essential legislative tool, the Court construed the clause to make racial classifications, like other classifications, a matter of their "reasonableness."[46] This gave federal and state courts extensive discretion in applying the mandate of equal protection. For nearly a century, the Supreme Court construed the clause only rarely and, when it did so in cases involving racial discrimination, treated it with exceptional narrowness. Generally, it found racially discriminatory laws "reasonable" and upheld them. It accepted the proposition that the Equal Protection Clause allowed legally-enforced racial segregation and the further proposition that the clause simply did not touch

40. *See, e.g.*, McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 287 (1976) (holding that § 1981 applies to white persons); Saint Francis Coll. v. Al-Khazraji, 481 U.S. 604, 613 (1987) ("[A] distinctive physiognomy is not essential to qualify for § 1981 protection.").

41. *Saint Francis Coll.*, 481 U.S. at 613.

42. U.S. Const. amend. XIV, § 1.

43. 83 U.S. (16 Wall.) 36, 74–80 (1872).

44. *See, e.g.*, Lochner v. New York, 198 U.S. 45, 60–62 (1905).

45. As late as 1927, the Court denied a claim under the Equal Protection Clause and dismissed the provision as "the usual last resort of constitutional arguments." Buck v. Bell, 274 U.S. 200, 208 (1927).

46. *See, e.g.*, Bailey v. Alabama, 219 U.S. 219, 235–39 (1911) (assessing the constitutionality of a labor law in light of its "natural operation and effect"); United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (suggesting that laws with explicit race-based distinctions should be presumed unconstitutional). Usually, though, the Court just dismissed equal protection claims on grounds that states had broad powers of classification that had long been accepted, and sometimes cited *Plessy v. Ferguson*, 163 U.S. 537 (1896). *E.g.*, Gong Lum v. Rice, 275 U.S. 78, 86–87 (1927) (relying on *Plessy* to justify Mississippi's segregated school system).

large realms of both de facto and de jure racial discrimination, repression, and abuse.[47]

Well into the twentieth century, then, the states continued to enforce racially discriminatory laws as constitutionally "reasonable." Many segregated their schools, neighborhoods, and transportation facilities by law, while most authorized or at least allowed all manners of racial discrimination in governmental practices, public activities, and general services open to the public.[48] In 1913, for example, when Woodrow Wilson became president, his administration instituted formal racial segregation in some departments of the national government.[49] Many states, especially in the South, adopted a variety of tactics to prevent Blacks from voting, and state and federal courts commonly upheld their racially restrictive provisions and practices.[50] For its part, the Supreme Court moved only rarely, slowly, and erratically to check the variety of racially abusive state laws that existed across the nation.[51]

So-called "anti-miscegenation" laws, which prohibited interracial marriages, represented the most intensely emotional issue that stemmed from anti-Black racism. They remained common throughout the nation and led to innumerable lawsuits involving wills, inheritances, and other issues of family law. Repeatedly, courts and other legal bodies decided such disputes by determining the "racial identity" of parties.[52] In the early 1950s thirty states still retained such laws on their books, and as late as 1967 sixteen continued to do so.[53]

Virginia's anti-miscegenation law was particularly noteworthy. The state's General Assembly strengthened it in 1924 by passing an "[a]ct to preserve racial integrity."[54] The measure not only prohibited interracial marriage but also required state and local authorities to maintain records identifying the racial composition of the state's population by officially classifying all of its citizens as "white" or "colored." In 1955 Virginia's supreme court upheld the act's constitutionality and defended it on

47. For the classic case decided in 1896, see *Plessy*, 163 U.S. at 537. For later cases, see *South Covington & Cincinnati Street Railway Co. v. Kentucky*, 252 U.S. 399, 403–04 (1920), in which the Court refused to invalidate a racial segregation law dealing with street railways operating across state lines, and *Gong Lum*, 275 U.S. at 87, in which the Court upheld the right of Mississippi to classify a Chinese girl as "colored" and require her to attend a segregated Black school.

48. *See generally* Charles S. Mangum, Jr., The Legal Status of the Negro (1940) (examining court opinions to discuss opportunities available to and denied Blacks).

49. Jennifer D. Keene, *Wilson and Race Relations*, *in* A Companion to Woodrow Wilson 133, 137 (Ross A. Kennedy ed., 2013).

50. *See, e.g.*, Grovey v. Townsend, 295 U.S. 45, 48, 54 (1935); Giles v. Harris, 189 U.S. 475, 486–88 (1903).

51. The Court refused to overturn racial discrimination, for example, in *Corrigan v. Buckley*, 271 U.S. 323, 331 (1926), in the form of restrictive covenants in real property transactions. It also refused to void Texas' "white primary" scheme, which in effect negated Black voting rights, in *Grovey*, 295 U.S. at 54–55.

52. *See* Gross, *supra* note 11, at 4–7; Ian Haney López, White by Law 82–83 (1996).

53. The states retaining such laws in 1967 were Alabama, Arkansas, Delaware, Florida, Georgia, Kentucky, Louisiana, Mississippi, Missouri, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia, and West Virginia. Loving v. Virginia, 388 U.S. 1, 6 n.5 (1967) (citations omitted).

54. 1924 Va. Acts 534; Naim v. Naim, 87 S.E.2d 749, 750 (Va. 1955), *vacated*, 350 U.S. 891 (1955).

grounds that it was designed "to preserve the racial integrity of its citizens" and prevent "a mongrel breed of citizens" and "the obliteration of racial pride."[55] The following year the U.S. Supreme Court, still bowing to racist pressures and fears, refused to review the state court's ruling on a ground that spoke resoundingly about the political and cultural power of anti-Black racism in shaping the nation's constitutional law: The Court dismissed the case as "devoid of a properly presented federal question."[56]

Federal law also remained racist and discriminatory on its face. In 1882, for example, Congress passed the Chinese Exclusion Act and followed it with other anti-Chinese enforcement measures.[57] The government and the courts—including, the Supreme Court[58]—enforced those laws with rigor, denying Chinese immigrants entry and deporting thousands already in the country.[59] Not until 1943 did Congress repeal the act.[60]

More broadly, Congress retained the provision that the First Congress had adopted in 1790 limiting naturalization to "free white person[s]."[61] While the Naturalization Act had been amended shortly after the adoption of the Fourteenth Amendment to make persons of "African nativity" eligible for citizenship, its "free white person" limitation remained in place and barred citizenship to large numbers of potential or actual immigrants from many countries until being eliminated in 1952.[62] In 1910, the U.S. Court of Appeals for the Second Circuit summarized the meaning of the statutory term and illustrated the continuing power of overt racist thinking in American law.

> We think that the words ["free white persons"] refer to race and include all persons of the white race, as distinguished from the [B]lack, red, yellow, or brown races, which differ in so many respects from it. Whether there is any pure white race and what peoples belong to it may involve nice discriminations, but for practical purposes there is no difficulty in saying that

55. *Naim*, 87 S.E.2d at 756.

56. Naim v. Naim, 350 U.S. 985, 985 (1956).

57. Chinese Exclusion Act, ch. 126, 22. Stat. 58 (1882) (repealed 1943); *e.g.*, Geary Act, ch. 60, 27 Stat. 25 (1892) (extending Chinese Exclusion Act ten years and adding onerous new requirements) (repealed 1943).

58. *See, e.g.*, Fong Yue Ting v. United States, 149 U.S. 698, 731 (1893) (leaving the conditions upon which aliens may remain in the United States to the political branches); Chang Chan v. Nagle, 268 U.S. 346, 352–53 (1925) (upholding a federal statute that denied admission to Chinese wives of American citizens).

59. *See* Erika Lee, At America's Gates 151–52 (2003) (discussing immigration practices designed to exclude Chinese immigrants); Lucy E. Salyer, Laws Harsh as Tigers 38 (1995) (tracing contemporary immigration law back to anti-Chinese immigration policies).

60. Magnuson Act, ch. 344, 57 Stat. 600 (1943) (repealed 1965).

61. Naturalization Act of 1790, ch. 3, 1 Stat. 103 (repealed and replaced 1795).

62. Immigration and Nationality Act, ch. 477, § 311, 66 Stat. 163, 239 (1952) (amended 1965); Gross, *supra* note 11, at 6.

> the Chinese, Japanese, and Malays and the American Indians do not belong to the white race.[63]

For its part, the Supreme Court approved and applied the Naturalization Act's race-based provision as well. In the 1920s, it addressed the act's meaning twice and unanimously upheld its racially-rooted and discriminatory purpose. In one case the Court ruled that a light-skinned Japanese man did not qualify for citizenship;[64] in the other it ruled that a "high-caste Hindu, of full Indian blood," equally failed the "white person" requirement.[65] The former was not a member of "what is popularly known as the Caucasian race" and therefore not a "white person,"[66] and the latter was equally not "Caucasian" and therefore equally not "white."[67] The Court's decisions excluded both men from citizenship.[68] Congress repealed the Chinese Exclusion Act in 1943 and ended the Naturalization Act's expressly race-based exclusions with passage of the Immigration and Nationality Act of 1952 (INA). A quota system limiting Chinese immigration, however, ended only in 1965, with passage of the INA amendments.

IV. RE-VISIONING RACE: LAW AS RESPONSIVE TO CHANGING ATTITUDES, POLITICS, AND VALUES

As Congress' 1952 repeal of the overtly racial restriction in the Naturalization Act suggested, both popular and legal attitudes toward race began changing substantially in the years after World War II. Black migration to northern cities began to change the nation's demographics and increase the political influence of Black Americans; the horrific and unprecedented racial policies of Nazi Germany and their catastrophic results repulsed Americans and discredited racist ideas; the civil rights movement gathered strength and rallied public support; and Cold War pressures made American racial laws a significant international embarrassment. In that context the Supreme Court under new Chief Justice Earl Warren began a virtual revolution in the constitutional law of race.[69] In *Brown v. Board of Education*[70] and

63. United States v. Balsara, 180 F. 694, 696 (2d Cir. 1910).

64. Ozawa v. United States, 260 U.S. 178, 197–98 (1922).

65. United States v. Bhagat Singh Thind, 261 U.S. 204, 206, 213–15 (1923).

66. *Ozawa*, 260 U.S. at 197–98.

67. *Bhagat Singh Thind*, 261 U.S. at 213–15.

68. Immigration and Nationality Act, ch. 477, 66 Stat. 163 (1952) (amended 1965). For an examination of the role that ideas of race played in American immigration history, see John Tehranian, *Performing Whiteness: Naturalization Litigation and the Construction of Racial Identity in America*, 109 Yale L.J. 817 (2000).

69. *See generally* Morton J. Horwitz, The Warren Court and the Pursuit of Justice (1998); Michael J. Klarman, From Jim Crow to Civil Rights (2004); Lucas A. Powe, Jr., The Warren Court and American Politics (2000). Warren served as the chief justice from 1953 to 1969. Horwitz, *supra*.

70. 347 U.S. 483, 495 (1954) ("We conclude that in the field of public education the doctrine of 'separate but equal' has no place.").

Bolling v. Sharpe,[71] both decided unanimously in 1954, the Warren Court overturned *Plessy*'s "separate but equal" doctrine,[72] and over the next decade it pressed a concerted judicial campaign to enforce a broad constitutional norm of racial equality under the aegis of the Equal Protection Clause.[73]

After a series of decisions invalidating laws that imposed racial segregation and discrimination in various public services and facilities, the Court finally addressed the constitutionality of anti-miscegenation laws.[74] In 1967 in *Loving v. Virginia* it struck down Virginia's notorious Racial Integrity Act and similar laws in fifteen other states.[75] Apparently embarrassed to acknowledge that it had refused to address that same issue only a decade earlier,[76] the Court in *Loving* was unwilling even to refer to its earlier action. Instead, it declared that "[t]here can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause."[77]

Neither *Brown* nor *Loving*—nor any other Warren Court decision—declared racial classifications always and invariably unconstitutional. "[T]he Equal Protection Clause requires the consideration of whether the classifications drawn by any statute constitute an arbitrary and invidious discrimination," *Loving* declared.[78] It stressed that "[t]he clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States,"[79] and it insisted that the Equal Protection Clause demanded that racial classifications "be subjected to the most rigid scrutiny."[80] Such racial classifications "must be shown to be necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which [. . .] was the object of the Fourteenth Amendment to eliminate."[81]

The nation's newly prevailing attitudes toward race inspired not just the Court but Congress as well. After adopting two weak civil rights laws in 1957 and 1960,[82]

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71. 347 U.S. 497, 498 & n.1 (1954) ("We have this day held that the Equal Protection Clause . . . prohibits the states from maintaining racially segregated public schools." (citing *Brown*, 483 U.S. at 494–95)).

72. 163 U.S. 537, 544, 550–52 (1896).

73. In 1963, for example, the Court banned racial discrimination in courthouses. Johnson v. Virginia, 373 U.S. 61, 62 (1963).

74. *See* Loving v. Virginia, 388 U.S. 1 (1967).

75. *Id.* at 6 & n.5, 12.

76. Naim v. Naim, 350 U.S. 985, 985 (1956).

77. *Loving*, 388 U.S. at 12.

78. *Id.* at 10.

79. *Id.*

80. *Id.* at 11 (citation omitted) (internal quotations omitted).

81. *Id.*

82. Civil Rights Act of 1957, Pub. L. No. 85-315, 71 Stat. 634 (codified as amended in scattered sections of 28 and 42 U.S.C.); Civil Rights Act of 1960, Pub. L. No. 86-449, 74 Stat. 86 (codified as amended in scattered sections of 18 and 42 U.S.C.).

it enacted three far stronger and more effective measures during the 1960s.[83] The Civil Rights Act of 1964 was a sweeping statute designed to prevent racial discrimination—as well as discrimination on the basis of gender, religion, and national origin—in governmental facilities, public accommodations, private employment practices, and programs and activities receiving funds from the federal government.[84] The Voting Rights Act of 1965 (VRA) prohibited the use of voter qualifications that resulted in denying the vote to any person on the basis of race, color, or language minority status, and it prohibited states and localities with histories of voting discrimination from altering their voting laws without the approval of the federal government.[85] The Civil Rights Act of 1968 prohibited discrimination based on race, color, religion, and national origin in the sale or rental of housing, and it imposed restrictions on the practices of real estate agents and on advertising and financing arrangements related to housing.[86]

The three statutes spurred a rush of lawsuits requiring the courts to construe their meaning, and one of the most consequential came down in 1971. Title VII of the 1964 act prohibited discrimination by private employers operating in interstate commerce, and in *Griggs v. Duke Power Co.*, the Court construed it to prohibit not only "intentional" discrimination but also employment practices that were "neutral" on their face yet in operation denied employment to Blacks far more frequently than to whites.[87] A "good intent or absence of discriminatory intent," the Court announced, "does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability."[88] Thus, absent a showing of necessity for proper job performance, all such employment practices would violate the statute if they had a disparate racial impact. "Congress," the Court declared, "directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation."[89]

By the early 1970s, then, the significance of race in American law had changed drastically. The civil rights movement, Supreme Court decisions, congressional actions, and changing social values severely disrupted some of the nation's deeply embedded racial status quo. In many areas, Blacks were enjoying new opportunities and new areas of legal equality.

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83. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 42 and 52 U.S.C.); Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended in scattered sections of 52 U.S.C.); Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 73 (codified as amended in scattered sections of 18, 25, 28, and 42 U.S.C.).

84. 42 U.S.C. § 2000a–e-2(a)(1).

85. 52 U.S.C. § 10301.

86. 42 U.S.C. § 3604. The elaborate Housing and Community Development Act of 1974 added discrimination on the basis of gender to the 1968 act's provisions. Pub. L. No. 93-383, 88 Stat. 633 (codified as amended at 42 U.S.C. § 5301).

87. 401 U.S. 424, 430 (1971).

88. *Id.* at 432.

89. *Id.*

V. CONTESTING THE LEGAL VISIBILITY OF RACE: THE RISE OF "COLORBLIND" CONSTITUTIONALISM

As law and popular attitudes about race changed, so too did general ideas about the nature of the Constitution and the meaning of the Equal Protection Clause. Looking for inspiration from the past to support the nation's newly proclaimed legal commitment to racial equality, many Americans rediscovered and hailed the resounding language of Justice John Marshall Harlan's dissent in *Plessy*. There, standing alone in rejecting the Court's "separate but equal" doctrine, Harlan made a bold declaration.

> Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved.[90]

For many, Harlan's declaration captured the ideal meaning of the Constitution. Indeed, the idea of a "colorblind" Constitution had long antedated Harlan's dissent. It was, in fact, the basic principle that pre–Civil War abolitionists had advanced in condemning slavery and seeking legal protections for Blacks.[91] For a century and a half the idea had failed to win the day, but after *Brown* and the major legal and attitudinal changes that followed in the 1960s and 1970s the idea became newly popular and widely admired.

No sooner had Harlan's idea of a "colorblind" Constitution become prominent, however, than it began to stir intensely felt legal and political controversies. With the racial reorientation of American law and the rise of racial affirmative action efforts, political activists, legal commentators, government officials, and Supreme Court justices began splitting sharply over the meaning of the Equal Protection Clause and the significance of Harlan's "colorblind" language. Affirmative action plans raised the question of whether it was proper for governments and private institutions to use racial classifications in non-invidious ways to remedy the continuing impact of the many burdens and disadvantages the nation had piled onto African Americans. The issue first reached the Supreme Court in *DeFunis v. Odegaard*[92] in 1974 and then again four years later in *Regents of the University of California v. Bakke*.[93] In neither case did the Court settle the constitutionality of affirmative action plans, but together the two brought the sharply contested issue to the forefront of national debate.

As the controversy roiled American politics, those who supported affirmative action plans argued that the Equal Protection Clause prohibited only the kinds of

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

91. *See generally* KULL, *supra* note 18, at 131–81.

92. 416 U.S. 312, 316–20 (1974) (finding the case moot to avoid challenge to a law school's affirmative action plan).

93. 438 U.S. 265, 320 (1978) (plurality opinion) (invalidating an affirmative action plan on statutory and constitutional grounds, with five justices nonetheless confirming that such plans may be upheld in certain circumstances).

"invidious" and repressive racial classifications that Warren Court decisions like *Brown* and *Loving* had struck down. In contrast, those who opposed affirmative action, and those who opposed the civil rights movement more generally, argued that the Constitution should be "colorblind" and that—except for possible short-term emergency measures—it should prohibit any and all laws that contained racial classifications regardless of their "non-invidious" nature and supposedly benign and remedial goals.[94]

Thus, in the context of affirmative action, the question was whether the Constitution could properly "see" race and allow laws that made race a relevant factor not just in banning "invidious" discrimination but also in remedying racial inequalities and the continuing effects of past racial discrimination and oppression. That question continues to challenge the law and public policy, and it is still hotly debated and not wholly settled. Since the 1980s, the Court's opinions have been increasingly critical of race-based affirmative action efforts and have sharply limited the scope of their allowable operation.[95]

Aside from the specific issue of affirmative action, however, the idea of "colorblind" law raised another different and broader issue. To what extent is "colorblind" law—that is, law that contains no racial classifications and gives no formal indication that it implicates race—truly "neutral" in racial terms? To what extent, in other words, does "colorblind" law fail to see racially biased elements that are either embedded in the law's forms and practices or enable racially disparate and unequal results to flow regularly from the law's de facto operations? Though the law may be "colorblind" and race consequently invisible to it, do racial factors nonetheless continue to bias the law in its forms, operations, and consequences?

When read in its entirety, Harlan's *Plessy* dissent suggests disturbing and potentially devastating answers to those questions. In spite of its invocation of the noble-sounding ideal of a "colorblind" Constitution, Harlan's dissenting opinion rested on what he considered a deep social and legal truth. Immediately preceding his famous "colorblind" statement came these three sentences:

> 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.[96]

94. *See* Erwin Chemerinsky, *Making Sense of the Affirmative Action Debate*, 22 Ohio N.U. L. Rev. 1159, 1171 (1996).

95. *See, e.g.*, Fisher v. Univ. of Tex. at Austin, 136 S. Ct. 2198, 2209–10 (2016) (applying strict scrutiny to affirmative action plans in education); Schuette v. Coal. to Defend Affirmative Action, 572 U.S. 291, 314 (2014) (declining to undo Michigan law allowing voters to decide whether racial preferences in education are desired); Gratz v. Bollinger, 539 U.S. 244, 274–76 (2003) (invalidating university admissions policy that gave preference to "underrepresented minority applicant[s]"); Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 227 (1995) (restricting federal, state, and local affirmative action plans); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (extending application of strict scrutiny to state and local affirmative action plans).

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

Harlan's belief, in other words, was that the Constitution could be entirely "colorblind" and still underwrite and sustain white racial supremacy. His opinion was not only overtly racist but also deeply insightful: "Colorblind" law, he understood, could focus on legal forms while ignoring social realities and practical consequence. Thus, "colorblind" law could also be "socially blind" law, and it could ensure that the "white race" remained "dominant" in virtually everything of social and economic significance. "Every true man," Harlan also wrote in *Plessy*, "has pride of race."[97]

After the successes of the civil rights movement in the 1960s, it became clear that those who opposed the movement and fought against the advances it brought—and especially against affirmative action proposals—would need a new political rhetoric and new legal strategies.[98] Beginning in the late 1960s and early 1970s, the administration of President Richard M. Nixon began to develop both. The president's top two political advisors, H. R. Haldeman and John Ehrlichman, acknowledged the nature of their new rhetoric and tactics, an approach that came to be called the "Southern Strategy." Nixon believed that "the whole problem is really the Blacks," Haldeman reported,[99] and Ehrlichman identified their strategy's resulting target: "We'll go after the racists."[100] They recognized, however, that it was essential to keep their rhetoric and tactics indirect and cloaked. "The key," Haldeman explained, was "to devise a system that recognizes this [racial appeal] while not appearing to."[101] Thus, they designed their strategy to make a "subliminal appeal to the anti-Black voter," Ehrlichman confirmed, one that masked the driving racist appeal that "was always present in Nixon's statements and speeches."[102]

Lee Atwater, another Republican strategist who later became President George H. W. Bush's top advisor, explained the party's "Southern Strategy" in the bluntest terms:

> You start out in 1954 by saying, "Nigger, nigger, nigger." By 1968 you can't say "nigger"—that hurts you, backfires. So you say stuff like, uh, forced busing, states' rights, and all that stuff, and you're getting so abstract. Now, you're talking about cutting taxes, and all these things you're talking about are totally economic things and a byproduct of them is, [B]lacks get hurt worse than whites . . . . "We want to cut this," is much more abstract than even the busing thing, uh, and a hell of a lot more abstract than "Nigger, nigger."[103]

97. *Id.* at 554.

98. *See generally* Kevin J. McMahon, Nixon's Court 4–7 (2011) (describing President Nixon's rhetorical strategy against judicial liberalism); David Alistair Yalof, Pursuit of Justices 97–99 (1999) (outlining the politics of Supreme Court nominations).

99. H. R. Haldeman, The Haldeman Diaries 77 (1994).

100. John Ehrlichman, Witness to Power 222 (1982).

101. Haldeman, *supra* note 99.

102. Michelle Alexander, The New Jim Crow 43–44 (2010). "Richard Nixon [was] watching one of his campaign ads warning voters about urban crime and exclaimed, '[t]his hits it right on the nose. It's all about law and order and the damn Negro-Puerto Rican groups out there.'" Paul Butler, Chokehold 13 (2017).

103. Rick Perlstein, *Exclusive: Lee Atwater's Infamous 1981 Interview on the Southern Strategy*, Nation (Nov. 13, 2012), https://www.thenation.com/article/archive/exclusive-lee-atwaters-infamous-1981-interview-southern-strategy/.

The idea of "colorblind" law—an image that on its face suggests the noble principles of legal equality and "blind" justice—provided a ready abstraction that could and did serve that racist strategy.

The fundamental question, then, is when, in what contexts, and in what specific ways, does the "colorblind" idea serve that animating "Southern Strategy" and achieve the unequal racial consequences the strategy was designed to ensure? When, in other words, does the rhetoric and practice of "colorblind" law serve noble ideals and honor egalitarian principles, and when does it serve ignoble purposes and facilitate racist results?

By the third decade of the twenty-first century, three conclusions about race and American law seem beyond dispute. The first is a matter of history. For three centuries, from the early seventeenth century to the middle of the twentieth, American law remained race-based and repressive, effectively enforcing whites as the "dominant" race. Beyond occasions calling for celebratory rhetoric, it had no particular use for the "colorblind" idea. In the 1950s and 1960s, however, the Warren Court transformed racial classifications from instruments used to repress Blacks into instruments used to protect them. Accordingly, the idea of "colorblind" law took on a radically different political and legal salience. While the idea negated the power of whites to use the law openly for explicit racist purposes, it nonetheless offered an effective legal tool to counterattack the civil rights movement and preserve large areas of de facto white supremacy. The mandate that the law must be "colorblind" severely limited the ability of government to remedy the unequal racial consequences that flowed from the overwhelming social, economic, cultural, and political advantages that whites had amassed over those preceding three race-repressive centuries. In the 1970s, then, the legal instrument of abolitionists and those in earlier generations who had sought to protect Blacks became the legal instrument of those in later generations who sought to protect whites.

The second conclusion is a matter of law. By the early twenty-first century, courts subjected racial classifications of all types to "strict scrutiny" and approved them only in the narrowest possible circumstances.[104] The courts, in other words, came to enforce the general principle that law should be "colorblind."

The third conclusion is a matter of fact. Racial bias, inequality, and discrimination remain common in American life. Comparing "whites" and "Blacks" by wealth, income levels, access to credit, educational status, police stops and arrests, incarceration rates, availability of quality health care, desirable residential locations, and leadership positions in private and public institutions reveals essentially the same result on each measure: Across the spectrum of social and economic standing, whites occupy a far more favorable and advantaged position than Blacks.[105]

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104. *E.g.*, Gratz v. Bollinger, 539 U.S. 244, 270 (2003) ("[A]ll racial classifications reviewable under the Equal Protection Clause must be strictly scrutinized." (quoting Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 224 (1995))).

105. For a general discussion of this point, see Frank W. Munger & Carroll Seron, *Law and the Persistence of Racial Inequality in America*, 66 N.Y.L. Sch. L. Rev. 175, 178–79 (2021–2022), and Penelope Andrews,

Apparently, Harlan was right about the formal nature and practical racial significance of "colorblind" law. As one Black writer put it in 2019, "an infantile colorblindness" enables people "to escape the task of having to contemplate the possibility and pervasiveness of real injustice."[106]

VI. THE NEW LEGAL INVISIBILITY OF RACE: "COLORBLIND" LAW AND ITS SUPPLE TECHNIQUES

The intriguing question is how "colorblind" law accomplishes unequal racial results. The answer lies in a variety of techniques that lack racial significance on their face but that nonetheless protect built-in "white privilege,"[107] allow or enable racial discrimination, and welcome differential racial consequences. Those techniques include, among others, abstract doctrines that ignore social realities, formal rules that mask and entrench social inequalities, facially neutral categories that are racially skewed in practice, jurisprudential principles that define race as normatively irrelevant, and delegations of discretion to government officials, especially those operating at lower levels of authority where they are difficult or impossible to searchingly review.

A. Constitutional Jurisprudence

The Supreme Court has utilized or approved several of those techniques. First, it still enforces constitutional rules that it established as part of the racially driven post-Reconstruction settlement that began in the 1870s and triumphed in the 1890s. As a practical matter—and almost certainly as the late nineteenth-century Court originally and clearly intended[108]—those rules severely limit possibilities for obtaining legal relief from racial disparities and inequalities. In particular, the Court has retained restrictive post-Reconstruction era interpretations of both the Eleventh[109] and Fourteenth Amendments.[110] Its continued embrace of a severely limiting

A Commission on Recognition and Reconstruction for the United States: Illusory or Inspirational?, 66 N.Y.L. Sch. L. Rev. 359, 364 (2021–2022).

106. Thomas Chatterton Williams, Self-Portrait in Black and White 134 (2019).

107. The concept of "white privilege," as I use it here, does not mean that white people enjoy special substantive privileges in general or that many or most whites have comfortable and easy lives. It means only that whites are not burdened by the racial biases and discrimination that may oppress Blacks and make Black lives in many ways more difficult than the lives of whites.

108. The Supreme Court in the late nineteenth and early twentieth centuries was packed with overtly racist justices. *See generally* Edward A. Purcell, Jr., *The Particularly Dubious Case of* Hans v. Louisiana*: An Essay on Law, Race, History, and Federal Courts*, 81 N.C. L. Rev. 1927, 2001–38 (2003).

109. For examples of the Court retaining a restrictive post-Reconstruction era interpretation of the Eleventh Amendment, see *Edelman v. Jordan*, 415 U.S. 651, 662–63 (1974); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 54 (1996); and *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 100–01 (1984).

110. For examples of the Court retaining a restrictive post-Reconstruction era interpretation of the Fourteenth Amendment, see *Shelley v. Kraemer*, 334 U.S. 1, 8–18 (1948); *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 721–22 (1961); and *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 195–202 (1989).

interpretation of the former, rooted in a decision made in 1890, blocks suits for damages against states for racial discrimination, and its continued embrace of a decision made in 1883 severely limits the authority of both Congress and the Court to reach racial discriminations that are not the result of "state action."[111] That state action doctrine makes "private" discrimination constitutionally unreachable under the Fourteenth Amendment and hence legally invisible to it, and it thereby protects much of the racial status quo and the highly advantaged position that whites have long enjoyed.[112]

Second, when opponents began to challenge affirmative action plans in the 1970s—and after Nixon had reshaped the Court by putting four new justices on the High Bench[113]—the Court subtly shifted its analysis under the Equal Protection Clause. Instead of invalidating laws and governmental actions that involved "invidious" discriminations against racial and other "suspect classes,"[114] it began to subject all laws that used any racial classification to "strict scrutiny" and invalidate them regardless of their "non-invidious" nature and racially benevolent and remedial purposes.[115] The shift reoriented equal protection law away from examining invidious discriminatory actions against particularly vulnerable groups to applying a socially abstract and near-absolute principle that prohibited the use of racial classifications for any purpose, however benign, socially beneficial, and compensatory in design. The practical result of that doctrinal shift was to undo or bar many or most positive

111. The two decisions that helped establish the post-Reconstruction Constitution and that remain in force today are *Hans v. Louisiana*, 134 U.S. 1, 17 (1890), involving the Eleventh Amendment, and the *Civil Rights Cases*, 109 U.S. 3, 17–19 (1883), involving the Fourteenth Amendment.

112. While the Fourteenth Amendment itself reaches only state action, it does confer on Congress the power to enforce its provisions, and under that power (and similar powers granted in the Thirteenth and Fifteenth Amendments) Congress can reach some kinds of "private" discrimination. U.S. Const. amend. XIV, § 5. During the past quarter century or so, however, the Court has revisited the "colorblind" principle and has also significantly restricted those congressional powers. *Compare* South Carolina v. Katzenbach, 383 U.S. 301, 327–28 (1966) (Warren Court), *and* Katzenbach v. Morgan, 384 U.S. 641, 652–53 (1966) (Warren Court), *with* Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 78–79 (2000) (Rehnquist Court), *and* Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 374 (2001) (Rehnquist Court), *and* Coleman v. Ct. of Appeals of Md., 566 U.S. 30, 37–38 (2012) (Roberts Court).

113. McMahon, *supra* note 98, at 6.

114. The idea of "suspect classes" referred to groups who suffered from discrimination and whose status as "discrete and insular minorities" prevented them from fully participating and protecting themselves in the normal political process. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938); *see also, e.g.*, Bolling v. Sharpe, 347 U.S. 497, 499 (1954) (race-based distinction is suspect); McLaughlin v. Florida, 379 U.S. 184, 191–92 (1964) (same); Loving v. Virginia, 388 U.S. 1, 11 (1967) (same); McDonald v. Bd. of Election Comm'rs of Chi., 394 U.S. 802, 807 (1969) (same). *But see* Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 312 (1976) (age-based distinction not suspect).

115. *See, e.g.*, Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 720 (2007) (subjecting race-based classification to strict scrutiny even though it was designed to benefit racial minorities); Gratz v. Bollinger, 539 U.S. 244, 270 (2003) (same); Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 224 (1995) (same); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493–94 (1989) (same).

government efforts to assist Blacks in overcoming the de facto social inequalities and discrimination they faced.[116]

The shift transformed the Equal Protection Clause from a vibrant safeguard for the vulnerable and disadvantaged into a muscular protection for the nation's whites and the government-assisted head start they had long enjoyed in reaching their position of social and economic advantage. Indeed, the Court began to consider any collateral disadvantage that whites might suffer from affirmative action programs as constitutional injuries sufficient to invalidate programs designed to assist Blacks.[117]

Third, at virtually the same time that it implemented its strict scrutiny analysis, the new Nixon-appointed Court also read into the Equal Protection Clause a highly restrictive requirement of "intent."[118] In doing so, it refused to adopt the "disparate impact" standard it had previously approved for Title VII claims in *Griggs*. It refused as well to stay with its general rule that legislative "intent" was too difficult to identify and that bad legislative motives should therefore be irrelevant in assessing whether government actions violated equal protection.[119] Instead, in 1976 it held that those asserting violations of the clause had to show that they were victims of "intentional" acts of racial discrimination.[120] The decision meant that, except in extreme situations, evidence showing patterns and practices of de facto racial discrimination would fail to establish equal protection claims.[121] The Court has "not held that a law, neutral on

116. *See* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 320 (1978) (proscribing a race-conscious medical school admissions program).

117. The need to protect "innocent" white victims was given voice in *Bakke* and developed in later cases. *Id.* at 298, 307; Fullilove v. Klutznick, 448 U.S. 448, 514 (1980) (Powell, J., concurring) (weighing "the effect of the [race-conscious remedy] upon innocent third parties" in his affirmative action analysis); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 276 (1986) (emphasizing the effect of race-conscious remedies on "innocent people"); *see also* David Chang, *Discriminatory Impact, Affirmative Action, and Innocent Victims: Judicial Conservatism or Conservative Justices?*, 91 Colum. L. Rev. 790, 794–95 (1991) (citing *Wygant*, 476 U.S. at 276).

118. The "intent" standard rejected the previous and more effective interpretation of the Equal Protection Clause that allowed courts to void a measure when, in effect, it "operates as a discrimination against" Blacks. Anderson v. Martin, 375 U.S. 399, 401–02 (1964).

119. *See* Palmer v. Thompson, 403 U.S. 217, 224–25 (1971).

> First, it is extremely difficult for a court to ascertain the motivation, or collection of different motivations, that lie behind a legislative enactment. . . . Furthermore, there is an element of futility in a judicial attempt to invalidate a law because of the bad motives of its supporters. If the law is struck down for this reason, rather than because of its facial content or effect, it would presumably be valid as soon as the legislature or relevant governing body repassed it for different reasons.

Id. (citation omitted) "[I]t simply is 'not consonant with our scheme of government for a court to inquire into the motives of legislators.'" Bogan v. Scott-Harris, 523 U.S. 44, 55 (1998) (quoting Tenney v. Brandhove, 341 U.S. 367, 377 (1951)).

120. Washington v. Davis, 426 U.S. 229, 239–41 (1976). On the Court's shift toward restricting the reach of the Equal Protection Clause and anti-discrimination laws, see, for example, Reva B. Siegel, *Equality Divided*, 127 Harv. L. Rev. 1, 16 (2013).

121. *See* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977) ("[I]mpact alone is not determinative."). The Court has held that a discriminatory purpose can be found only by a showing

its face and serving ends otherwise within the power of government to pursue," it declared in *Washington v. Davis*, "is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another."[122] The Court's new "intent" requirement opened extensive opportunities for individuals and organizations to maintain discriminatory practices, or even to develop new ones, as long as their tactics remained discreet and cleverly indirect.

The Court understood what it was doing and the practical significance of "colorblind" law. One of the reasons it offered for adopting its exacting "intent" standard was that a looser "disparate impact" standard might render a wide range of established legal provisions vulnerable to claims of racial discrimination.[123] In admitting that concern, the Court revealed that it understood that discriminatory racial practices were common and that, for the most part, it had no interest in trying to remedy them. Its "intent" standard would serve to block legal challenges to such practices in a wide variety of legal areas.

In the 1987 case of *McCleskey v. Kemp*, for example, considering the constitutionality of the death penalty in Georgia,[124] the Court confronted an extensive evidentiary record that included massive statistical studies demonstrating the existence of severe racial disparities between Blacks and whites—all to the literally fatal disadvantage of Blacks.[125] The Court responded by simply declaring that the evidence was insufficient to prove an "intent" to discriminate.[126] Indeed, one of the justices in the majority considered the record evidence essentially irrelevant.[127]

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that a decision maker acted "at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979). That requirement of a specific discriminatory intent limited even more severely the ability of plaintiffs to support equal protection claims with evidence of discriminatory impact. *See* Reva B. Siegel, *Blind Justice: Why the Court Refused to Accept Statistical Evidence of Discriminatory Purpose in* McCleskey v. Kemp*—and Some Pathways for Change*, 112 Nw. U. L. Rev. 1269, 1279 (2018).

122. *Davis*, 426 U.S. at 242.

123. *Id.* at 247–48.

> A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far-reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average [B]lack than to the more affluent white.

Id. at 248.

124. 481 U.S. 279, 283 (1987).

125. *Id.* at 286–88.

> [T]he death penalty was assessed in 22[percent] of the cases involving [B]lack defendants and white victims; 8[percent] of the cases involving white defendants and white victims; 1[percent] of the cases involving [B]lack defendants and [B]lack victims; and 3[percent] of the cases involving white defendants and [B]lack victims.

Id. at 286.

126. *Id.* at 297.

127. *Id.* at 313.

"Since it is my view that the unconscious operation of irrational sympathies and antipathies, including racial, . . . is real, . . . and ineradicable," Justice Antonin Scalia wrote, "I cannot honestly say that all I need is more proof."[128] The Court's decision, one commentator concluded, "was driven by a desire to immunize the entire criminal justice system from claims of racial bias."[129]

The fourth technique employed by the Court was the doctrine of "standing" to substantially narrow access to the federal courts in civil rights cases designed to prevent governmental practices that were especially harmful to Blacks.[130] As the post-Reconstruction Court had found ways to ignore race in such notoriously racist cases as 1898's *Williams v. Mississippi*[131] and 1903's *Giles v. Harris*,[132] so did the modern Court similarly refuse to "see" apparent racial discrimination in such late twentieth-century cases as *O'Shea v. Littleton*,[133] in 1974, and *City of Los Angeles v. Lyons*, in 1983.[134] In those cases the Court ruled that the requirement of standing meant that persons injured by certain governmental practices could not seek to enjoin those practices unless they could show that they themselves were likely to suffer from the same practices again in the future.[135] Declaring that the parties in neither case could show the likelihood of such future specific and individual encounters, the Court made it virtually impossible for anyone to obtain injunctive relief against systematic or patterned racial abuses in many governmental administrative processes and in the police use of potentially deadly force against Blacks, regardless of the substantial differential racial impact of these abuses.

In *Lyons*, for example, the Court's majority altogether refused even to mention race or even to acknowledge record evidence of widespread police violence against Blacks. Not only did it fail to respond to the dissent's emphasis on that race-related evidence, but it also totally ignored the fact that the Los Angeles Police Department (LAPD) had a long and well-documented reputation for racial abuse, violence, and discrimination.[136]

128. Richard L. Hasen, The Justice of Contradictions 156–57 (2018) (quoting Justice Scalia in a private memo to his colleagues pending the *McCleskey* ruling, dated January 6, 1987).

129. Alexander, *supra* note 102, at 108; *see also* Lynn Su, *Unpacking the Teaching Potential of a Hypothetical Criminal Case Involving a Cross-Racial Eyewitness Identification*, 66 N.Y.L. Sch. L. Rev. 339 (2021–2022).

130. For the Court's development of procedural tools that similarly disadvantage Blacks, see, for example, Edward A. Purcell, Jr., *Exploring the Interpretation and Application of Procedural Rules: The Problem of Implicit and Institutional Racial Bias*, 169 U. Pa. L. Rev. 2583, 2594–99 (2021).

131. 170 U.S. 213 (1898).

132. 189 U.S. 475 (1903).

133. 414 U.S. 488 (1974). For a similar case, see *Warth v. Seldin*, 422 U.S. 490 (1975).

134. 461 U.S. 95 (1983).

135. *O'Shea*, 414 U.S. at 498; *Lyons*, 461 U.S. at 109.

136. *See, e.g.*, Gerald Horne, Fire This Time 134–37, 150–52 (1995) ("[Even Black officers] felt obliged to heighten brutality against Black LA."); Kelly Lytle Hernández, City of Inmates 189 (2017); Max Felker-Kantor, Policing Los Angeles 25–26 (2018); Anne Gray Fischer, *"Land of the White Hunter": Legal Liberalism and the Racial Politics of Morals Enforcement in Midcentury Los Angeles*, 105 J. Am. Hist. 868, 871 (2019).

"The LAPD was rife with both conscious and common sense racism," explained one commentator, and "[i]n communities like East Los Angeles, racial prejudice produced more than increased arrests; it also fueled high levels of police violence."[137] To the majority in *Lyons*, however, the fact of "race" was quite literally invisible.[138]

A fifth judicial technique admits "seeing" racial discrimination but trumps that fact with some purportedly countervailing constitutional principle. In 2013, *Shelby County v. Holder* exemplified that technique when it invalidated a pivotal provision of the VRA, a statute that had helped secure Black voting rights across the entire South.[139] There, the Court acknowledged that "voting discrimination still exists," and even declared that "no one doubts that."[140] Nonetheless, it held that it was more important to enforce another—and quite novel—constitutional principle than it was to protect Black voting rights from new restrictions that were likely to be imposed by state and local governments.[141] The fact that the statute treated states with histories of voting discrimination differently from states lacking such histories meant that the statute violated a principle of state equality. On that ground, the Court invalidated a pivotal provision of the act[142] and thereby opened the door to efforts in many states to adopt election procedures designed to disproportionally restrict the ability of minorities to vote.[143]

Similarly, in *Trump v. Hawaii* in 2018 the Court used principles of executive power to justify racially-tinged religious discrimination against individuals attempting to enter the United States from certain Islamic countries.[144] Principles and precedents involving race, the majority declared, were "wholly inapt" in judging

137. Ian F. Haney López, Racism on Trial 137, 141 (2003).

138. *See Lyons*, 461 U.S. at 97–98. To the dissent, race was quite visible, and it pointed out the differential and potentially deadly racial impact of the police practice at issue. *See id.* at 114–25 (Marshall, J., dissenting).

139. 52 U.S.C. § 10303, *invalidated by* Shelby County v. Holder, 570 U.S. 529 (2013).

140. *Shelby County*, 570 U.S. at 536.

141. *See id.* at 544 (enforcing the principle of equal sovereignty). In the decision's wake, Republican state legislators introduced hundreds of bills designed to restrict voting rights, and they have passed a number of them in several states, including in those freed from federal oversight by the decision in *Shelby County*. *See Voting Laws Roundup: March 2021*, Brennan Ctr. for Just. (Apr. 1, 2021), https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-march-2021.

142. *See Shelby County*, 570 U.S. at 556–57 (finding that section 4(b) of the VRA, which outlined the federal preclearance formula for state voting laws, infringed upon "equal sovereignty" of the states and was therefore unconstitutional).

143. Lisa Marshall Manheim & Elizabeth G. Porter, *The Elephant in the Room: Intentional Voter Suppression*, 2018 Sup. Ct. Rev. 213, 218–19; Ian Vandewalker & Keith G. Bentele, *Vulnerability in Numbers: Racial Composition of the Electorate, Voter Suppression, and the Voting Rights Act*, 18 Harv. Latino L. Rev. 99, 145–46 (2015); Theodore R. Johnson & Max Feldman, *The New Voter Suppression*, Brennan Ctr. for Just. (Jan. 16, 2020), https://www.brennancenter.org/our-work/research-reports/new-voter-suppression; Edward A. Purcell, Jr., *Reflections on the Fiftieth Anniversary of the March and the Speech: History, Memory, Values*, 59 N.Y.L. Sch. L. Rev. 17, 51–55 (2014–2015).

144. 138 S. Ct. 2392, 2405 (2018) (upholding entry restrictions on certain nationals from Chad, Iran, Libya, North Korea, Syria, Venezuela, and Yemen).

the power of the executive to enforce "a facially neutral policy denying certain foreign nationals the privilege of admission."[145]

B. Conceptual and Administrative Techniques

Beyond the realm of Supreme Court doctrine, the legal system as a whole has also used or accepted other techniques to allow or impose racial discrimination while keeping race itself formally invisible. One is to use surrogate legal categories that are "non-racial" on their face but that, in fact, enable governmental units to achieve disproportionate racial impacts.

Under Southern pressure, for example, many of the basic social programs that the New Deal established included provisions that effectively excluded large numbers of Blacks from the social and economic benefits the programs conferred.[146] The Social Security Act initially excluded farmworkers and domestics from its coverage, thus successfully denying benefits to 65 percent of Blacks nationally and between 70 and 80 percent of Blacks in the South.[147] In the twenty-first century such obvious tactics may no longer pass muster, but other similar and more subtle tactics remain in use:

> Today, government rarely classifies by race or gender, but it conducts a "war on drugs," regulates education and residential zoning, responds to "sexual assault" and "domestic violence," and makes policy concerning "child care," "family leave," "child support," and the "welfare" of "single-headed households" in ways that often perpetuate, or aggravate, historic patterns of race and gender inequality.[148]

Beneath formal legal categories, in other words, the operations of legal administration in a wide range of areas often support disparate racial practices and bring disparate racial consequences.[149]

Similarly, using a different "neutral" category, the federal government was able to continuously funnel lavish sums of money to predominantly white beneficiaries.[150]

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145. *Id.* at 2423. For a discussion of race in the immigration context, see Lenni B. Benson, *Seeing Immigration and Structural Racism: It's Where You Put Your Eyes*, 66 N.Y.L. Sch. L. Rev. 277 (2021–2022).

146. *See* Jim Powell, *Why Did FDR's New Deal Harm Blacks?*, Cato Inst. (Dec. 3, 2003), https://www.cato.org/commentary/why-did-fdrs-new-deal-harm-blacks#.

147. *See* Ira Katznelson, When Affirmative Action Was White 45 (2005). The exclusion was not eliminated until 1954. *Id.* at 43. "In short, each of the old age, social assistance, and unemployment provisions advanced by the Social Security Act was shaped to racist contours." *Id.* at 48.

148. Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 Stan. L. Rev. 1111, 1145–46 (1997).

149. *See, e.g.*, Hannah Dreier & Andrew Ba Tran, *'The Real Damage,'* Wash. Post (July 11, 2021), https://www.washingtonpost.com/nation/2021/07/11/fema-black-owned-property/ (discussing the disparate racial consequences of FEMA's policy to deny disaster relief to Americans who fail to provide proof of property ownership); Richard Chused, *Strategic Thinking About Racism in American Zoning*, 66 N.Y.L. Sch. L. Rev. 307, 310–25 (2021–2022).

150. *See* Emma Fernandez et al., *Fall 2018 Journal: Mortgage Interest Deduction and the Racial Wealth Gap*, Berkeley Pub. Pol'y J. (Aug. 23, 2018), https://bppj.berkeley.edu/2018/08/23/mortgage-interest-deduction-and-the-racial-wealth-gap/.

Privileging the category of "homeowner," it provided tax deductions for home mortgage payments, a seemingly reasonable policy that had enormous—and racially, highly differential—consequences. For nearly a hundred years, "one of the largest federal welfare transfers in the nation remains the home mortgage deduction, an enormous subsidy to middle-class homeowners, the vast majority of whom are suburban and white."[151] At the same time, other ostensibly "neutral" tax policies had comparably disparate racial impacts. "Even half a century after government ceased to promote [residential] segregation explicitly," concluded one scholar, its tax policy "continues to promote it implicitly" through a variety of technical devices.[152]

Another such legal tactic is shifting administrative control over social programs to states and localities and providing those lower-level governmental units with statutory discretion that allows them to discriminate covertly against Blacks in applying the law.[153] For example, the G.I. Bill enacted after World War II used that technique and it brought the expected results.[154] Providing financial support to millions of veterans and spurring the growth of a newly prosperous and expanding middle class, the law authorized local administrative discretion and controls that allowed many states and localities to exclude large numbers of Blacks from its coverage.[155]

In numerous ways, often technical and indirect, other government policies had the same disparate racial consequences.[156] "Racial politics shaped the welfare state in important ways," one analyst concluded.[157] The practical operation of many social programs "helped to redraw lines of division within and between races by sorting both [B]lack and white Americans into categories defined by their relationship to programs of social provision."[158] The "[B]lack ghetto was constructed by institutionalized discrimination in the real estate and banking industries, supported by widespread acts of private prejudice and discrimination," concluded two others.[159] "Rather than combating these forces of segregation, however, during most of the

151. Robert O. Self, American Babylon 329 (2003).

152. Richard Rothstein, The Color of Law 180 (2017).

153. Katznelson, *supra* note 147, at 22, 37–38, 44–47.

154. *See* Servicemen's Readjustment Act of 1944, 38 U.S.C. § 1801 (repealed 2000).

155. *Id.*; Katznelson, *supra* note 147, at 113–41; *see also* Michael K. Brown, Race, Money, and the American Welfare State 372 (1999) [hereinafter Race, Money, American Welfare] ("Nonexclusive, race-neutral policies in America have a way of being particularized along racial lines."); Richard D. Marsico, *The Intersection of Race, Wealth, and Special Education: The Role of Structural Inequities in the IDEA*, 66 N.Y.L. Sch. L. Rev. 207 (2021–2022).

156. For a recent episode of discrimination in the federal government, see Valerie Grim, *Between Forty Acres and a Class Action Lawsuit: Black Farmers, Civil Rights, and Protest Against the U.S. Department of Agriculture, 1997–2010*, *in* Beyond Forty Acres and a Mule (Debra A. Reid & Evan P. Bennett eds., 2012).

157. Robert C. Lieberman, Shifting the Color Line (1998).

158. *Id.*

159. Douglas S. Massey & Nancy A. Denton, American Apartheid 186 (1993).

postwar era federal policies actually abetted them."[160] By using ostensibly "neutral" categories and allowing administrative discretion to local officials, the law became a social "instrument for widening an already huge racial gap in postwar America."[161]

To understand the pervasive nature of present-day racial inequality, it is essential to recognize that the disparate racial consequences that those techniques caused have continued to operate long after their most egregious variations were restricted or abolished. Those earlier discriminatory legal policies combined to give whites substantial head starts in enjoying well-paid union jobs, obtaining college educations, advancing to higher paying white-collar positions, securing mortgages to buy their own homes, entering prestigious and influential professions, ensuring their families better and more readily available health care, moving to highly desirable neighborhoods, guaranteeing advantageous educational opportunities for their children, and amassing financial resources that allowed them to invest in and profit from the nation's booming economic growth. Those benefits, in turn, allowed large numbers of white families to amass over time comparatively larger amounts of inheritable wealth and to use that wealth to pass on their accumulated social advantages to their descendants.[162] By ruling race a forbidden classification, the "colorblind" Constitution of the late twentieth century served to preserve those historically built-in advantages that the law had methodically conferred on whites.[163]

Similarly, allowing local discretion—particularly after *Shelby County* invalidated a pivotal provision of the VRA[164]—has enabled many states and counties to discriminate against Blacks and other minorities by restricting their right to vote. Ostensibly honoring the formal law while warning against oft-imagined voter "fraud," those state and local government units have developed a variety of techniques that appear neutral on their face but in practice impose special burdens on Blacks, the elderly, and other relatively disadvantaged groups.[165] Voter ID laws, restrictions on early voting, redistricting, gerrymandering, purging voter rolls, relocating polling places, reducing the number of polling places, providing misleading information about times and places of voting, and other similar administrative techniques all serve that overriding purpose.[166] Three years after *Shelby County*, for example, the presidential election of 2016 featured 868 fewer polling places in "heavily Black and

160. *Id.*; *see also* Keeanga-Yamahtta Taylor, Race for Profit 122 (2019) (discussing HUD policies "likely to deepen the existing segregation in the community").

161. Katznelson, *supra* note 147, at 121.

162. *See* Rothstein, *supra* note 152, at 210–30; Mehrsa Baradaran, The Color of Money 95–96, 101, 211 (2017); Thomas M. Shapiro, The Hidden Cost of Being African American 42–60 (2004); Lieberman, *supra* note 157, at 12.

163. *See* Jill Quadagno, The Color of Welfare 17–31 (1994); E. D. Hirsch, Jr., The Making of Americans 123–51 (2009); Thomas J. Sugrue, The Origins of the Urban Crisis 150–53 (rev. ed. 2005).

164. Shelby County v. Holder, 570 U.S. 529, 540, 556–57 (2013) (invalidating section 4(b)).

165. *See* Michael Tomasky, *Fighting to Vote*, N.Y. Rev., Nov. 8, 2018, at 8, 8–9.

166. Johnson & Feldman, *supra* note 143; *see also* Jesse H. Rhodes, Ballot Blocked 181–82 (2017).

Latino counties" than there had been in 2012.[167] Such purportedly neutral and often virtually invisible administrative practices disproportionally limited minority voting, distorted election outcomes, and helped preserve a white-advantaged social and political order.[168]

Allowing local discretion has been equally or more effective in producing racially discriminatory results in the criminal justice system.[169] Regardless of the "colorblind" nature of the formal law and the existence of racially neutral constitutional rights, discretion in the hands of police and prosecutors invites and even encourages racial abuses that commonly go unrecorded and unremedied.[170] The LAPD, for example, engaged for decades in racially discriminatory practices against Blacks, especially Black women.[171] Even after the Warren Court's innovative criminal law rulings in the early 1960s, LAPD "officers retained broad discretionary power in [B]lack neighborhoods to conduct vice raids, crackdowns, and mass arrests for morals offenses," identifying "sexual deviance with [B]lackness."[172]

Similarly, for reasons of conscious or unconscious bias, both police and prosecutors have often downplayed or essentially ignored claims that Blacks have been subject to racially motivated violence.[173] They have used their discretion to dismiss offensive and violent actions by whites as mere "pranks" or relatively minor incidents not worthy of serious legal attention. The "extraordinary discretion" that law enforcement officials exercised, a criminal law scholar recently concluded, allowed "a formally colorblind criminal justice system" to regularly achieve "racially discriminatory results."[174]

167. Tomasky, *supra* note 165, at 2.

168. *See* Rhodes, *supra* note 166, at 97, 187.

169. In 2020, the Supreme Court finally invalidated one such abuse of local discretion. Louisiana and Oregon had both enacted statutes that authorized the use of non-unanimous jury verdicts in criminal cases, a practice that allowed white majorities on juries to negate the votes of minority jury members. Ramos v. Louisiana, 140 S. Ct. 1390, 1394 (2020). As Justice Neil Gorsuch wrote for the Court with respect to Louisiana's law, the state had "sculpted a 'facially race-neutral' rule permitting 10-to-2 verdicts in order 'to ensure that African-American juror service would be meaningless.'" *Id.* (quoting State v. Maxie, No. 13-CR-72522 (La. 11th Jud. Dist. Oct. 11, 2018)).

170. The Court has enhanced police discretion substantially. *See, e.g.*, Terry v. Ohio, 392 U.S. 1, 27 (1968) (stop and frisk); Whren v. United States, 517 U.S. 806, 812–13 (1996) (pretextual stops); *see also* Sarah A. Seo, Policing the Open Road 247 (2019) (on pretextual policing); Gretchen Sorin, Driving While Black 119–49 (2020) (citing cars as critical to the civil rights movement).

171. *See* Felker-Kantor, *supra* note 136, at 113–38; Hernández, *supra* note 136, at 170–71, 177; Horne, *supra* note 136, at 136, 143; Fischer, *supra* note 136, at 880.

172. Fischer, *supra* note 136, at 871.

173. Tanya Katerí Hernández, Note, *Bias Crimes: Unconscious Racism in the Prosecution of "Racially Motivated Violence,"* 99 Yale L.J. 845, 851–55 (1990).

174. Alexander, *supra* note 102, at 100; Su, *supra* note 129.

C. Prescriptive Principles and Normative Theories

In support of those various conceptual and administrative techniques, the law has also employed a variety of principles and theories to justify its refusal to "see" racial disparities and inequalities. Revealingly, many of those techniques trace back to the earliest opposition to postwar Reconstruction when Americans first faced the question of how to treat the newly "freed" slaves. President Andrew Johnson led the way in both spearheading and justifying opposition to legal efforts to remedy the consequences of racism and race-based slavery. A vigorous defender of the South, Johnson supported the region's efforts to scuttle Reconstruction and reassert control over its freed Black population.[175] Immediately, Johnson understood that certain ideas could be deployed to make race normatively and therefore legally invisible and, consequently, to undermine and defeat government efforts to aid the freed slaves. In February 1866, when the smoke of the Civil War had barely cleared, Johnson vetoed the Freedmen's Bureau bill, a Republican measure designed to provide substantial social, familial, housing, and economic benefits to tens of thousands of freed slaves.[176] Johnson insisted that such a government effort would be unnecessary, immoral, and harmful to its intended beneficiaries.

First, government efforts to aid the freed slaves would be unnecessary because the free market would solve their problems. "Competition for his services from planters" would enable the former slave "to command almost his own terms" of employment.[177] The "laws that regulate supply and demand will maintain their force," he declared, "and the wages of the laborer will be regulated thereby."[178] Second, Johnson maintained that such government aid would be essentially immoral. To require the freed slaves to succeed "by their own efforts" and to "establish for themselves a condition of respectability and prosperity" was "no more than justice to them."[179] "It [was] certain that they can attain to that condition only through their own merits and exertions."[180] Third, government aid would be harmful and demeaning to the freed slaves themselves. "The idea on which the slaves were assisted to freedom was that on becoming free they would be a self-sustaining population," he explained.[181] "Any legislation that shall imply that they are not expected to attain

175. *See* Annette Gordon-Reed, Andrew Johnson 72, 80 (Arthur M. Schlesinger, Jr. & Sean Wilentz eds., 2011).

176. H.R. 613, 39th Cong. (1866); *see also The Freedmen's Bureau*, Nat'l Archives, https://www.archives.gov/research/african-americans/freedmens-bureau (last visited Mar. 26, 2022); *Freedmen's Bureau Acts of 1865 and 1866*, U.S. Senate, https://www.senate.gov/artandhistory/history/common/generic/FreedmensBureau.htm (last visited Apr. 28, 2022).

177. *February 19, 1866: Veto Message on Freedmen and Refugee Relief Bureau Legislation*, Miller Ctr., https://millercenter.org/the-presidency/presidential-speeches/february-19-1866-veto-message-freedmen-and-refugee-relief (last visited Apr. 28, 2022).

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

a self-sustaining condition must have a tendency injurious alike to their character and their prospects."[182]

Thus, among other criticisms Johnson leveled against the Freedmen's Bureau bill, he introduced three prescriptive claims that remain in common use today. Those claims not only justify rejecting government efforts to combat racial discrimination, but they also provide grounds for insisting that issues of racial discrimination and inequality should properly be and remain invisible to the law.[183]

The first claim is that the law should not attempt to prohibit racial discrimination because the "free market" will, by itself, virtually eliminate such discrimination automatically.[184] "In a world of free access to open markets, systematic discrimination, even by a large majority, offers little peril to the isolated minority," law professor Richard Epstein wrote.[185] "Unconstrained by external force, members of minority groups are free to search for jobs with those firms that do want to hire them."[186] As the market will remedy virtually everything, there is simply no need for the law—absent providing remedies for intentional torts—to even recognize race, racial groups, or racial discrimination.

The second claim is that the law should regard people only as individuals and judge each person not on his or her membership in some group or class but on personal and individual "merit."[187] America has a "widely shared commitment to evaluating individuals upon their individual merit," Justice Sandra Day O'Connor declared.[188] Justice Scalia made the point even more forcefully. "The relevant proposition is not that it was [B]lacks, or Jews, or [the] Irish who were discriminated against," he insisted, "but that it was individual men and women, 'created equal,' who were discriminated against."[189] Racial "entitlement" of any kind evoked "Nazi

182. *Id.* Johnson also advanced another argument that often appears in various forms of attack on affirmative action. He argued that government aid to the freed slaves would lead to "a concentration of power" in Washington, D.C., and allow the executive to exploit the freed slaves "for the attainment of his own political ends" and thereby endanger the nation's democratic form of government. *Id.*

183. *See generally* Richard Delgado, *1998 Hugo L. Black Lecture: Ten Arguments Against Affirmative Action—How Valid?*, 50 Ala. L. Rev. 135 (1998) (arguing against affirmative action).

184. *See* Richard A. Epstein, Forbidden Grounds 32 (1992).

185. *Id.*

186. *Id.*

187. *See, e.g.*, Fullilove v. Klutznick, 448 U.S. 448, 496 (1980) (Powell, J., concurring) ("[I]mmutable characteristics, which bear no relation to individual merit or need, are irrelevant to almost every governmental decision."); *id.* at 519 (Marshall, J., concurring in judgment) (same); Minnick v. Cal. Dep't of Corr., 452 U.S. 105, 128–29 (1981) (Stewart, J., dissenting) ("The color of a person's skin and the country of his origin are immutable facts that bear no relation to ability, disadvantage, moral culpability, or any other characteristics of constitutionally permissible interest to the government.").

188. Metro Broad., Inc. v. FCC, 497 U.S. 547, 604 (1990) (O'Connor, J., dissenting).

189. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 528 (1989) (Scalia, J., concurring in the judgment).

Germany," he declared, and the only ground for legitimate government action was "individual worth and individual need."[190]

The third claim is that governmental actions against de facto racial discrimination harm the minority groups that the efforts seek to help. "So-called 'benign' discrimination teaches many that because of chronic and apparently immutable handicaps, minorities cannot compete with them without their patronizing indulgence," Justice Clarence Thomas wrote.[191] Such "programs stamp minorities with a badge of inferiority and may cause them to develop dependencies or to adopt an attitude that they are 'entitled' to preferences."[192] The law, then, should neither combat nor even "see" racial inequalities in social and economic conditions.

However attractive those claims might appear as social or moral ideals, they all rest on prescriptive abstractions that ill fit the facts of American society. In effect, all three beg the question of the true nature of race relations in America. Each finds a way to render irrelevant the actual social conditions that exist and the complex role that law plays in shaping, supporting, and allowing racially discriminatory practices and consequences.

The first claim has repeatedly been proven wrong.[193] While a truly "free" market might do wonders for Black Americans, the various de facto markets that exist in the United States have never been fully and fairly "free" to Blacks.[194] Indeed, before the Civil War, there was a "free market" in slaves,[195] evidence of the fact that so-called "free markets" are always structured by the values and imperatives of the society that creates, shapes, and honors them. In fact, market practices in America have regularly and substantially advantaged whites. They enjoyed "profits made from housing secured in discriminatory markets" and from "insider networks that channel employment opportunities to the relatives and friends of those who have profited most from present and past racial discrimination."[196] Most important, whites have been enormously advantaged in market terms by "intergenerational transfers of inherited wealth that pass on the spoils of discrimination to succeeding generations."[197]

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190. Antonin Scalia, Commentary, *The Disease as Cure: "In Order to Get Beyond Racism, We Must First Take Account of Race,"* 1979 Wash. U. L.Q. 147, 153–54.

191. Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 241 (1995) (Thomas, J., concurring in part and concurring in the judgment).

192. *Id.*

193. For example, "[w]hite control of labor markets gave them privileged access, progressively, to Works Progress Administration (WPA) jobs, to work-related public social insurance entitlements, and to private social policies extracted by unions from corporations." Race, Money, American Welfare, *supra* note 155, at 365.

194. *See, e.g.*, David Roediger, Towards the Abolition of Whiteness 21 (1994); Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 Harv. L. Rev. 817, 818–19 (1991).

195. Mark C. Schug, *Slavery and Free Markets: Relationships Between Economic Institutions*, 77 Soc. Educ. 82, 82–86 (2013).

196. George Lipsitz, The Possessive Investment in Whiteness, at vii (20th anniv. ed. 2018).

197. *Id.*

All of those factors limit severely the benefits that Blacks can obtain from the operation of "free market" principles.

The second claim, that the freed slaves had to succeed on their own merits, is both arbitrary and obscurantist. By definition, it makes "racial" categories illegitimate regardless of the social facts and conditions that give those categories their operative significance and determine how evaluations of "worth" and "merit" are actually made and how their resulting rewards are actually distributed. By denying the role of social practices and racial biases, the focus on individual "worth" and "merit" willfully blinds itself to the real-world consequences of group classifications and racial categories. It denies the reality of race as a social factor that produces seriously harmful and differential consequences by blinding the nation to the fact that evaluations of individual merit require at least partially subjective judgments that are easily and often made through racially biased lenses.[198]

The third claim, that government aid would be harmful and demeaning to the freed slaves themselves, is at best excessively overbroad. It assumes a general de facto racial equality in America that does not exist. Profound racial inequalities continue to exist and burden Black Americans regardless of their best efforts, and governmental policies are often largely to blame. Toxic waste facilities are regularly located primarily in Black neighborhoods,[199] for example, while highways and transportation facilities are regularly built in ways that best serve white communities and disadvantage Black ones.[200]

All three claims are not only flawed but also similarly result-oriented.[201] As Andrew Johnson immediately understood, each provides a way to erase social conditions from legal consideration and thereby justifies the principle that de facto racial discrimination and inequality should be invisible to the law.

198. *See, e.g.*, Charles R. Lawrence III, *Two Views of the River: A Critique of the Liberal Defense of Affirmative Action*, 101 Colum. L. Rev. 928, 943–47 (2001); Kristen Holmquist et al., *Measuring Merit: The Shultz-Zedeck Research on Law School Admissions*, 63 J. Legal Educ. 565, 568–69 (2014); Aaron N. Taylor, *Reimagining Merit as Achievement*, 44 N.M. L. Rev. 1, 6 (2014).

199. Jim Erickson, *Targeting Minority, Low-Income Neighborhoods for Hazardous Waste Sites*, Univ. Mich. News (Jan. 19, 2016), https://news.umich.edu/targeting-minority-low-income-neighborhoods-for-hazardous-waste-sites/; Robert D. Bullard, Unequal Protection 186–88 (1994) (noting environmental disparities).

200. Darryl Fears & John Muyskens, *Black People Are About to Be Swept Aside for a South Carolina Freeway—Again*, Wash. Post (Sept. 8, 2021), https://www.washingtonpost.com/climate-environment/interactive/2021/highways-black-homes-removal-racism/; Robert D. Bullard et al., Highway Robbery 4–5, 180 (2004) (noting infrastructure disparities).

201. For analyses of some of the ways theorists and courts render race irrelevant or invisible to the law, see Michael K. Brown et al., Whitewashing Race (2005); Eduardo Bonilla-Silva, Racism Without Racists (5th ed. 2017); and Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 Stan. L. Rev. 1 (1991).

VII. CONCLUSION

"In order to get beyond racism, we must first take account of race," Justice Harry Blackmun maintained in 1978.[202] "There is no other way."[203] Some thirty years later Chief Justice John Roberts disagreed, embracing the concept of "colorblind" law: "The way to stop discrimination on the basis of race," he proclaimed, "is to stop discriminating on the basis of race."[204] While debate between advocates of those two positions continues, the real-world lesson of "colorblind" law and "colorblind" constitutionalism seems clear. Blackmun's position, though fraught with difficulties, at least recognizes fundamental social and legal truths; Roberts' position, though sounding noble and idealistic, strikes me as clueless if not simply disingenuous. The choice between the two is the choice that Americans have been making for almost four centuries: When do we wish to have the law "see" race, and when do we wish it to make race invisible? More important, when and why do we wish the law to do one or the other?

202. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 407 (1978) (Blackmun, J., concurring in the judgment in part and dissenting in part).

203. *Id.*

204. Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 748 (2007).