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Beyond the Civil Rights Act of 1964: Confronting Structural Racism in the Workplace

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Beyond the Civil Rights Act of 1964: Confronting Structural Racism in the Workplace

*William M. Wiecek**

*Judy L. Hamilton***

ABSTRACT

Since 1967, sociologists have produced a compelling body of literature on structural racism that explains why severe racial disparities persist throughout American society in all social domains: employment, education, residential patterns, wealth accumulation, and so on. Structural racism perpetuates the effects of past, overt discrimination because it does its work through organizational procedures and social policies that appear to be race neutral. Dealing with structural racism requires us to focus on social structure instead of the intentions of bigoted individuals.

In this Article, we link the disciplines of sociology and constitutional history to demonstrate that the U.S. Supreme Court has refused to recognize the reality of structural racism in the workplace. Instead, the Court has developed legal doctrines that protect this hidden form of racism, assure its continuation, and disable other branches of the federal and state governments from eradicating it. The Court's willful blindness toward race and employment ignores the reality of structural racism and instead embeds the justices' unacknowledged racial policy preferences into constitutional law. Their doctrinal assumptions about intent, colorblindness, facial neutrality, and white innocence enable them not just to ignore structural racism but to perpetuate and affirm it.

In this Article, we first review the sociological literature on structural racism and construct a template of structural racism by identifying its six key components: (1) irrelevance of intent, (2) individualism, (3) belief in structural neutrality, (4) colorblindness, (5) white advantage, and (6) invisibility. We then provide examples of structural racism in the social domain of employment. Next we demonstrate how Supreme Court constitutional decisions regarding employment since 1964 map onto this template of structural racism: (1) the Court demands a showing of intent, (2) the Court insists on

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the notion that racism is inflicted only by individuals upon individuals, (3) the Court persists in its belief in structural neutrality, (4) the Court's anti-classification understanding of equal protection is merely a judicial formulation of colorblindness, (5) the Court's concern for white innocence reaffirms white advantage and white normativity, and (6) the Court's embrace of all five of these components serves to keep structural racism invisible and thereby further maintains it.

We conclude first that the Court has ignored nearly a half-century of substantial research in sociology and instead has clung to outdated assumptions about how racism operates that perpetuate racial inequality. Second, we find that at the same time, the Court does invoke structural social understanding—by ignoring intent, being attentive to group actions and effects on groups, and focusing on inadvertent effects of institutional policies and procedures—but does so only to protect whites' interests.

TABLE OF CONTENTS

Abstract.....	1095
I. Introduction	1097
II. Structural Racism: A Sociological Perspective.....	1101
A. Components of Structural Racism.....	1111
1. Absence of Intent	1112
2. Individualism.....	1118
3. Belief in Structural Neutrality.....	1120
4. White Advantage and White Normativity.....	1122
5. Colorblindness.....	1124
6. Invisibility	1125
B. Structural Racism in the Employment Context.....	1126
1. Information About Job Opportunities Is Disseminated Primarily Through Social Networks	1127
2. Information About Job Opportunities Is Disseminated Selectively	1127
3. Candidate Requirements Structurally Discriminate When Unrelated to Necessary Job Skills	1128

4. Stereotypes About Group Characteristics Affect Perceptions of Job Candidates	1128
5. Once in the Labor Force, People of Color Experience Discomfort and Stress Through the Social Relations They Experience on the Job	1129
6. Social Networks Constrain Job Performance.....	1130
7. Employers Sometimes Apply Seemingly Neutral Workplace Policies in a Differential Manner.....	1131
8. Supervisors Often Exercise Decision-Making Power Based on Subjective Assessments.....	1131
9. The Seniority System Can Structurally Recreate an Organization’s White Workforce Through Lay-Offs	1132
10. Job Opportunities Are Often Lost Because of Incarceration	1132
11. Lack of Education Credentials Diminishes Job Opportunities.....	1133
12. Suburbanization Puts Jobs Out of Reach	1133
III. The Supreme Court and Structural Racism in Employment	1134
A. Intent: <i>Washington v. Davis</i> , <i>Feeney</i> , and <i>McCleskey</i>	1137
B. White Advantage: <i>Wygant v. Board of Education</i>	1142
C. Individualism: <i>Wygant</i> (Again).....	1148
D. Superficial Neutrality: The <i>Annus Horribilis</i> of 1989.....	1149
E. Colorblindness: The Anticlassification Principle	1154
IV. Conclusion.....	1157

I. INTRODUCTION

The Civil Rights Act of 1964, and particularly Title VII,¹ was a product of its time, that time being the Civil Rights Era (1954–1970).² It was the signature piece of legislation for that period, just

1. Act of July 2, 1964, Pub. L. No. 88-352, 78 Stat. 241. Title VII is currently codified as 42 U.S.C. § 2000e-2 (2006).

2. Historians refer to this period as the “Second Reconstruction.” See generally C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* (3d ed.

as the Civil Rights Act of 1866 was the signature legislation of the first Reconstruction.³ The 1964 Act, like *Brown v. Board of Education* in 1954,⁴ addressed itself only to the problem of *explicit* racism: intentional, conscious discrimination on the basis of race by which African Americans⁵ were deliberately excluded from opportunities and benefits that whites enjoyed. The U.S. Supreme Court readily accepted the statute's legitimacy at first,⁶ as well as that of its successors, the Voting Rights Act of 1965⁷ and the Fair Housing Act of 1968.⁸ This trilogy of Civil Rights Acts constituted the statutory heart of the Second Reconstruction.

The 1964 Civil Rights Act was a noble achievement, but it did not comprehend issues of structural racism.⁹ Congress did not then

1974); MANNING MARABLE, RACE, REFORM, AND REBELLION: THE SECOND RECONSTRUCTION AND BEYOND IN BLACK AMERICA, 1945–2006 (2007); ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877 (1988); J. MORGAN KOUSSER, COLORBLIND INJUSTICE: MINORITY VOTING RIGHTS AND THE UNDOING OF THE SECOND RECONSTRUCTION (1999); Harvard Sitkoff, *The Second Reconstruction*, 8 WILSON Q. 48, 48–59 (1984). This is a shorthand allusion to the following thesis: In the first Reconstruction, a tragically short period of time that lasted from 1862 until 1877, all branches of the federal government moved toward a racially egalitarian society. See MARABLE, *supra*, at 3–11. This movement was stymied by the counterrevolution known as “Redemption,” which not only halted the drive toward equality but also imposed a successor regime, Jim Crow, a comprehensive structure of race control and labor coercion that southern white supremacists created to provide a substitute for slavery. See, e.g., NICHOLAS LEMANN, REDEMPTION: THE LAST BATTLE OF THE CIVIL WAR 184 (2006). By an eerie historical parallel, a comparable 15-year period, the Second Reconstruction of 1954–1970, again witnessed an attempt by the federal government to create a genuinely egalitarian society. See MARABLE, *supra*, at 3–11. It too was cut short by a second Redemption, in which, as in the first, the U.S. Supreme Court played a leading role. See J. Morgan Kousser, *The Supreme Court and the Undoing of the Second Reconstruction*, 80 NAT'L F. 25, 25–31 (2000). That role is the subject of this Article.

3. Act of Apr. 9, 1866, ch. 31, 14 Stat. 27.

4. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

5. The seeming focus on African Americans and lack of attention to Latinos, Asian Americans, or Native Americans in the selection of opinions for this Article is not deliberate on our part but arises from the Supreme Court decisions themselves. The selected opinions happen to feature African Americans because the overarching patterns of racialization in our society were initiated with the enslavement of African Americans, and African Americans have commonly been the focus of legal opinions.

6. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 243 (1964); *Katzenbach v. McClung*, 379 U.S. 294, 295 (1964).

7. *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966). *But see* *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2631 (2013).

8. Act of Apr. 11, 1968, Pub. L. No. 90-284, 82 Stat. 73.

9. “Structural racism” refers to the sociological reality that social structures can diminish opportunities for people of color in all spheres of life. See *infra* Part II.

address problems created by implicit discrimination because social scientists had not yet even identified those phenomena or described their workings. We can best honor the accomplishments of the 1964 Act today by carrying forward its egalitarian impetus to attack those issues of structural racism that, in 1964, were yet to be understood.

Slavery, as a system of racial domination and subordination, was succeeded by the comprehensive racial regime that we know as segregation or Jim Crow, which lasted from the end of Reconstruction in 1877 until it began to crumble in the Second Reconstruction after 1954.¹⁰ Under Jim Crow, whites imposed a system of caste that assured the dominant race of superiority in all realms: social, economic, political, cultural, and legal.¹¹ White supremacy was grounded in explicit racism. “Whites Only” signs policed access to public facilities, the white primary assured white political power, and segregated schools excluded people of color¹² from all but the most minimal educational opportunity. Meanwhile, vagrancy laws, chain gangs, and convict labor created a form of crypto-slavery. Segregation ensured that opportunity was reserved for whites only and that the lot of the colored races was one of inferiority, degradation, and exclusion. Explicit racism—overt, deliberate assertions of racial dominance—maintained servitude. It was this regime of oppression that the Civil Rights Act of 1964 was designed to overthrow.

As segregation was being dismantled during the Second Reconstruction, a third racial regime—structural racism—replaced it. In contrast to former slavery and servitude, this new and more subtle system of preference and exclusion is maintained by *implicit* racism—covertly arising from nominally impartial structural arrangements in society assisted by unconscious biases—which assures racially disparate outcomes without the need to rely on overt discrimination.¹³ Neither sociologists nor lawyers had to think much about the implications of implicit racism before 1964 because explicit racism covered the ground entirely. Racial outcomes were wholly determined by overt discrimination, and the operation of unseen bias went submerged and unattended.

10. See WOODWARD *supra* note 2, 31–65.

11. See *id.*

12. A note on usage in this Article: In general, the terms “African Americans” or “blacks” are used in a context where the relevant document—constitutional amendment, statute, or judicial opinion—refers specifically to them. We use the phrase “people of color” in other contexts to indicate that the amendments, statutes, opinions, or social conditions have application to all people not of exclusively European descent.

13. See *infra* Part II.

In this Article, we survey in depth one social domain, the workplace, to demonstrate the necessarily time-bound limitations of the Civil Rights Act of 1964 and its Title VII.¹⁴ We do this not to critique the vast body of Title VII litigation but rather to demonstrate that the cause of racial justice must move beyond the Civil Rights Act's focus on explicit racism and its overt manifestations to grapple with implicit racism and its structural expressions.

Though these oppressive social structures and deeply embedded racial attitudes are invisible, their effects are all too real. Depressing disparities persist between whites and people of color today in all social domains. These differences endure despite the efforts of activists, Congress, some presidents, courts, and others to close the gaps. Public schools across the nation have re-segregated.¹⁵ Traditional, overt racism has receded (though it has by no means disappeared), so what can account for the dismal persistence of racism's effects? The answer is structural racism.

For more than 40 years, sociologists have been producing "an enormous body of published, refereed research,"¹⁶ both theoretical and empirical, that demonstrates the power of social structures to diminish opportunities for people of color in all spheres of life.¹⁷ Sociologists call this phenomenon "structural racism" and invoke it to explain how and why differential racial outcomes persist in American society. Their analyses focus not on the bigoted attitudes of individuals but on institutional and structural barriers that people of color encounter in all social and economic fields.¹⁸ Traditional Jim Crow racism may be fading, but social structures perpetuate its effects. Policies and procedures that appear on their face to be race neutral nevertheless continue to reproduce disparate outcomes.¹⁹

14. This Article deliberately omits consideration of Title VII, concentrating instead on the constitutional (as opposed to statutory) dimensions of workplace racism. Professor Chambers's contribution to this symposium amply covers that ground. See Henry L. Chambers, Jr., *The Supreme Court Chipping Away at Title VII: Strengthening It or Killing It?*, 74 LA. L. REV. 1161 (2014). This Article solely concerns the application of the insights drawn from the social sciences to constitutional interpretation, not the role of social science in statutory enforcement.

15. JONATHAN KOZOL, SHAME OF THE NATION: THE RESTORATION OF APARTHEID SCHOOLING IN AMERICA (2005); GARY ORFIELD & SUSAN E. EATON, DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF *BROWN V. BOARD OF EDUCATION* (1996).

16. Robert L. Nelson et al., *Divergent Paths: Conflicting Conceptions of Employment Discrimination in Law and the Social Sciences*, 4 ANN. REV. L. & SOC. SCI. 103, 116 (2008).

17. See *infra* note 23.

18. See *infra* Part II, note 23.

19. See *infra* Part II.

This manifestation of racism is unseen, automatic, and self-propagating. Unacknowledged white self-interest assures that it remains both effective and elusive.

We will demonstrate in this Article that although sociologists have provided both theory and data to establish the malignant impact of structural racism, the justices of the U.S. Supreme Court have ignored these findings and refused to acknowledge this form of racism. They have foreclosed most possibilities of mitigating its impact on the lives of people of color. Instead, the justices have formulated three doctrines—the purpose-impact distinction of *Washington v. Davis*, the white innocence trope, and the modern colorblindness principle—that assure structural racism’s continued force in our lives and disable other branches of both the federal and state governments from uprooting it.²⁰ The Supreme Court approaches racial controversies in ways that remove them from their social and historical context. The Court mandates instead an abstract and formalistic resolution of race-related issues, while inhibiting other public institutions from devising realistic solutions to inequality.

In this Article, we combine sociological analysis and constitutional history to demonstrate the operation of structural racism in a single area of social relations—that of employment.²¹ In Part II, we summarize the sociological understanding of structural racism and provide examples of it in the domain of employment. In Part III, we review the components of structural racism that manifest themselves in the Supreme Court’s major constitutional precedents dealing with workplace discrimination since 1964, demonstrating how the justices unthinkingly preserve racism and its effects. In conclusion, we critique the Supreme Court’s resultant differential treatment of blacks and whites.

II. STRUCTURAL RACISM: A SOCIOLOGICAL PERSPECTIVE

Most Americans understand racism to be individual, intentional, and overt: “crude, explicit, obvious, and motivated by individual bias.”²² In this form, it is referred to as “traditional” or “Jim Crow”

20. See *infra* Part III.

21. This Article is a preliminary component of a larger work in progress that describes the interaction of structural racism and equal protection doctrine since 1964. In that larger study, we canvass four selected social domains that impact quality of life: employment discrimination, educational opportunity, housing segregation, and wealth accumulation. Space limitations confine us to focusing on only one of them, workplace inequality, in this piece.

22. D. Wellman, *Unconscious Racism, Social Cognition Theory, and the Legal Intent Doctrine: The Neuron Fires Next Time*, in HANDBOOK OF THE

racism. It describes the discriminatory attitudes and behavior of an individual toward others who are different in skin color or ethnicity. However, sociologists have demonstrated for more than four decades that the phenomenon of racism is more complicated than simply the deliberate, bad-attitude behavior of individuals.²³ They

SOCIOLOGY OF RACIAL AND ETHNIC RELATIONS 40, 40 (Hernán Vera & Joe Feagin eds., 2007).

23. See STOKELY CARMICHAEL & CHARLES V. HAMILTON, *BLACK POWER: THE POLITICS OF LIBERATION IN AMERICA* 4 (1967); LOUIS L. KNOWLES & KENNETH PREWITT, *INSTITUTIONAL RACISM IN AMERICA* 5 (1969); ROBERT BLAUNER, *RACIAL OPPRESSION IN AMERICA* 9–10 (1972); JOE R. FEAGIN & CLAIRECE BOOHER FEAGIN, *RACIAL AND ETHNIC RELATIONS* 14–15 (4th ed. 1993); MICHAEL K. BROWN ET AL., *WHITEWASHING RACE: THE MYTH OF A COLOR-BLIND SOCIETY* 43 (2003). For a chronological progression of sociological understanding of how racism is embedded in social structures, see generally PIERRE L. VAN DEN BERGHE, *RACE AND RACISM: A COMPARATIVE PERSPECTIVE* (1967); Edna Bonacich, *A Theory of Ethnic Antagonism: The Split Labor Market*, 37 *AM. SOC. REV.* 547 (1972); WILLIAM J. WILSON, *POWER, RACISM, AND PRIVILEGE: RACE RELATIONS IN THEORETICAL AND SOCIOHISTORICAL PERSPECTIVES* (1973); Mark Chesler, *Contemporary Sociological Theories of Racism*, in *TOWARDS THE ELIMINATION OF RACISM* 21 (Phyllis A. Katz ed., 1975); Edna Bonacich, *Advanced Capitalism and Black/White Relations in the United States: A Split Labor Market Interpretation*, 41 *AM. SOC. REV.* 34 (1976); DAVID T. WELLMAN, *PORTRAITS OF WHITE RACISM* (1977); Jonathan H. Turner & Royce Singleton, *A Theory of Ethnic Oppression: Toward a Reintegration of Cultural and Structural Concepts in Ethnic Relations Theory*, 56 *SOC. FORCES* 1001 (1978); RODOLFO ALVAREZ & KENNETH G. LUTTERMAN, *DISCRIMINATION IN ORGANIZATIONS* (1979); J. M. Jones, *The Concept of Racism and Its Changing Reality*, in *IMPACTS OF RACISM ON WHITE AMERICANS* (Benjamin P. Bowser & Raymond G. Hunt eds., 1986); PHILOMENA ESSED, *UNDERSTANDING EVERYDAY RACISM: AN INTERDISCIPLINARY THEORY* (1991); MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990S* (1994); Joe Feagin & Clairece Feagin, *Theoretical Perspectives in Race and Ethnic Relations*, in *RACE AND ETHNIC CONFLICT: CONTENDING VIEWS ON PREJUDICE, DISCRIMINATION, AND ETHNOVIOLENCE* (F. Pincus & H. Ehrlich eds., 1994); MELVIN L. OLIVER & THOMAS M. SHAPIRO, *BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY* (1995); Fred L. Pincus, *Discrimination Comes in Many Forms: Individual, Institutional, and Structural*, 40 *AM. BEHAV. SCIENTIST* 186 (1996); Lawrence Bobo et al., *Laissez-Faire Racism: The Crystallization of a Kinder, Gentler Anti-Black Ideology*, in *RACIAL ATTITUDES IN THE 1990S: CONTINUITY AND CHANGE* (Steven A. Tuch & Jack K. Martin eds., 1997); Eduardo Bonilla-Silva, *Rethinking Racism: Toward a Structural Interpretation*, 62 *AM. SOC. REV.* 465 (1997) [hereinafter Bonilla-Silva, *Rethinking Racism*]; Lawrence Bobo et al., *From Jim Crow Racism to Laissez-Faire Racism: An Essay on the Transformation of Racial Attitudes in America*, in *BEYOND PLURALISM: THE CONCEPTION OF GROUPS AND GROUP IDENTITIES IN AMERICA* (Wendy F. Katkin et al. eds., 1998); EDUARDO BONILLA-SILVA, *WHITE SUPREMACY AND RACISM IN THE POST-CIVIL RIGHTS ERA* (2001) [hereinafter BONILLA-SILVA, *WHITE SUPREMACY*]; D. Pager & H. Shepherd, *The Sociology of Discrimination: Racial Discrimination in Employment, Housing, Credit, and Consumer Markets*, 34 *ANN. REV. SOC.* 181 (2008); EDUARDO BONILLA-SILVA,

have identified structural racism as founded in ordinary, day-to-day practices of organizations, like business firms and government agencies, and resulting from social policies produced by political decisions.²⁴ An example would be the funding of public schools primarily through local private property taxes.²⁵ These practices and policies are not consciously maintained because someone deliberately intends to discriminate on the basis of race (though they may have originated with that objective in mind). Thus on the surface they appear to be race neutral. But these policies reduce opportunities and outcomes for people of color, for example, by diminishing the quality of education in schools attended by their children. What is sociologically significant here is not anyone's intent to discriminate but rather the non-intended *effects* of decisions that do not on their face implicate race. "Structural racism" is the phrase that sociologists currently use most frequently to describe the negative impact on people of color that is the product of ostensibly race-neutral policies within and among institutions.²⁶ Sociologists have also referred to this by other phrases: "institutional racism,"²⁷ "structural discrimination,"²⁸ "systemic racism,"²⁹ and "racialized social systems."³⁰

RACISM WITHOUT RACISTS: COLORBLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN THE UNITED STATES (3d ed. 2010) [hereinafter BONILLA-SILVA, RACISM WITHOUT RACISTS]. We cite here the relevant social science literature at what might seem to some readers superabundant length. We do this deliberately, to drive home the point to a legal audience that the sociological understanding of structural racism is massively established and has been for four decades. Legal discourse ignores this consensus at its peril. We also hope that these references might prove useful to those litigating workplace discrimination. We do not, however, make any claim that our citation of the social science literature is exhaustive.

24. KNOWLES & PREWITT, *supra* note 23, at 187–88; Chesler, *supra* note 23, at 42; Pager & Shepherd, *supra* note 23, at 196; Barbara F. Reskin, *Including Mechanisms in Our Models of Ascriptive Inequality: 2002 Presidential Address*, 68 AM. SOC. REV. 1, 12 (2003); Vincent J. Roscigno, *Power, Revisited*, 90 SOCIAL FORCES 349, 360 (2011) [hereinafter Roscigno, *Power, Revisited*]; George Wilson, *Racialized Life-Chance Opportunities Across the Class Structure: The Case of African Americans*, 609 ANN. AM. ACAD. POL. & SOC. SCI. 215, 225 (2007).

25. JONATHAN KOZOL, *SAVAGE INEQUALITIES: CHILDREN IN AMERICA'S SCHOOLS* 5–55 (1991); Erin E. Kelly, *All Students Are Not Created Equal: The Inequitable Combination of Property-Tax-Based School Finance Systems and Local Control*, 45 DUKE L. J. 397, 397 (1995).

26. See *supra* note 23.

27. CARMICHAEL & HAMILTON, *supra* note 23, at 4; KNOWLES & PREWITT, *supra* note 23, at 4; ALVAREZ & LUTTERMAN, *supra* note 23, at xii.

28. Fred L. Pincus, *From Individual to Structural Discrimination*, in RACE AND ETHNIC CONFLICT: CONTENDING VIEWS ON PREJUDICE, DISCRIMINATION AND

In contrast to traditional racism, structural racism focuses on differential effects arising from non-intentional causes. For example, African Americans, as a group, have elevated blood lead levels as a result of their higher likelihood of living in older housing that is contaminated with lead-based paint; this has serious health consequences, especially for children.³¹ This racial disparity occurs because of social (and material) structures, yet it has important health, education, social, and economic outcomes. The impact of this type of racism is cumulative and is part of a dynamic process that takes place across social domains and over long periods of time.³²

In all social domains—education, housing, income, employment, wealth, health, environmental degradation, and criminal justice—differential effects appear in racial disparities that persist and in many cases even grow more pronounced over time. People of color, when compared to whites with otherwise equivalent characteristics, have higher death rates from disease³³ and higher

ETHNOVIOLENCE 84 (Fred L. Pincus & Howard J. Ehrlich eds., 1994); Pager & Shepherd, *supra* note 23.

29. Sheri Lyn Schmidt, *More Than Men in White Sheets: Seven Concepts Critical to the Teaching of Racism as Systemic Inequality*, 38 EQUITY & EXCELLENCE EDUC. 110, 116 (2005); J.R. FEAGIN, SYSTEMIC RACISM: A THEORY OF OPPRESSION (2006).

30. OMI & WINANT, *supra* note 23; BONILLA-SILVA, WHITE SUPREMACY, *supra* note 23, at 37, 193; Bonilla-Silva, *Rethinking Racism*, *supra* note 23, at 467, 469.

31. See generally Bruce P. Lanphear et al., *The Contribution of Lead-Contaminated House Dust and Residential Soil to Children's Blood Lead Levels: A Pooled Analysis of 12 Epidemiologic Studies*, 79 ENVTL. RES. 51 (1998); CTRS. FOR DISEASE CONTROL & PREVENTION, FOURTH NATIONAL REPORT ON HUMAN EXPOSURE TO ENVIRONMENTAL CHEMICALS 215 (Department of Health and Human Services ed., 2009), available at <http://www.cdc.gov/exposurereport/pdf/FourthReport.pdf> [<http://perma.cc/UM4R-QN3D>] (archived Apr. 10, 2014); PAUL MUSHAK, LEAD AND PUBLIC HEALTH: SCIENCE, RISK AND REGULATION (2011); ERIK MILLSTONE, LEAD AND PUBLIC HEALTH: THE DANGERS FOR CHILDREN (1997).

32. NAT'L RESEARCH COUNCIL, MEASURING RACIAL DISCRIMINATION 4–5, 11 (Rebecca M. Blank et al. eds., 2004). This study was prepared for the National Research Council, an arm of the National Academy of Sciences, by a panel of distinguished social scientists and may be fairly taken to represent a widely shared understanding among social scientists of the nature of racism and its measurement.

33.

A higher percentage of black women (37.9%) than white women (19.4%) died before age 75 as a result of CHD, as did black men (61.5%) compared with white men (41.5%). The same black-white difference was seen among women and men who died of stroke: a higher percentage of black women (39%) died of stroke before age 75 compared with white women (17.3%) as did black men (60.7%) compared to white men (31.1%).

infant mortality rates,³⁴ have lower high school graduation rates,³⁵ suffer higher unemployment,³⁶ are unemployed for longer periods,³⁷ experience more frequent episodes of joblessness,³⁸ experience less stable employment,³⁹ and accumulate less skill and on-the-job training than whites with comparable human capital.⁴⁰ All of these factors compound job experience deficits⁴¹ and accrue into substantial race differences in earnings over a lifetime.⁴² People of color work in lower-paying occupations than whites with otherwise equivalent characteristics,⁴³ have lower median household income⁴⁴

OFFICE OF THE DIR., CTRS. FOR DISEASE CONTROL & PREVENTION, FACT SHEET—CDC HEALTH DISPARITIES AND INEQUALITIES REPORT—U.S. 2011 3 (2011), available at <http://www.cdc.gov/minorityhealth/reports/CHDIR11/FactSheet.pdf> [<http://perma.cc/QH9V-WE5Q>] (archived Apr. 10, 2014).

34. “The highest infant mortality rate was for non-Hispanic black women with a rate 2.4 times that for non-Hispanic white women. Analysis on trends and variations in infant mortality reveals not only considerable differences in infant mortality rates among racial/ethnic groups but the persistence of disparities over time.” *Id.* at 2.

35. “Across the United States, the AFGR [Averaged Freshman Graduation Rate] was highest for Asian/Pacific Islander students (93.5 percent). The rates for other groups were 83.0 percent for White students, 71.4 percent for Hispanic students, 69.1 percent for American Indian/Alaska Native students, and 66.1 percent for Black students.” NAT’L CTR. FOR EDUCATION STATISTICS, PUBLIC SCHOOL GRADUATES AND DROPOUTS FROM THE COMMON CORE OF DATA: SCHOOL YEAR 2009–2010, available at <http://nces.ed.gov/pubs2013/2013309/findings.asp> [<http://perma.cc/FSV4-VLUP>] (archived Apr. 10, 2014).

36. The unemployment rate for blacks is consistently more than twice that for whites. BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, ECON. NEWS RELEASE, TABLE A-2: EMPLOYMENT STATUS OF THE CIVILIAN POPULATION BY RACE, SEX, AND AGE, available at <http://www.bls.gov/news.release/empst.t02.htm> [<http://perma.cc/PF4R-V648>] (archived Apr. 10, 2014).

37. Average duration of unemployment is considerably longer for black workers (44.9 weeks average duration) and Asian workers (45 weeks) than for white workers (37.7 weeks). BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, LABOR FORCE STATISTICS FROM THE CURRENT POPULATION SURVEY, TABLE 31: UNEMPLOYED PERSONS BY AGE, SEX, RACE, HISPANIC OR LATINO ETHNICITY, MARITAL STATUS, AND DURATION OF EMPLOYMENT (2013), available at <http://www.bls.gov/cps/cpsaat31.htm> [<http://perma.cc/7B87-4S4T>] (archived Apr. 10, 2014).

38. Marta Tienda & Haya Stier, *Generating Labor Market Inequality: Employment Opportunities and the Accumulation of Disadvantage*, 43 SOC. PROBS. 147, 147, 162 (1996).

39. Donald Tomaskovic-Devey et al., *Race and the Accumulation of Human Capital Across the Career: A Theoretical Model and Fixed-Effects Application*, 111 AM. J. SOC. 58, 62–63 (2005).

40. *Id.* at 85.

41. Tienda & Stier, *supra* note 38, at 149, 162–63.

42. Tomaskovic-Devey et al., *supra* note 39, at 64, 82.

43. BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, THE EDITOR’S DESK, EARNINGS AND EMPLOYMENT BY OCCUPATION, RACE, ETHNICITY, AND SEX

and higher poverty rates,⁴⁵ and accumulate significantly lower levels of wealth.⁴⁶ Such racial disparities provide an urgent reminder that people of different races are still not on a level playing field.

Structural racism identifies the cause of such racial disparities in the processes, procedures, policies, historical conventions, assumptions, and beliefs regarding operational functioning that occur within, between, and among the social institutions that make up a society's infrastructure. It is the result of institutional arrangements that distribute resources unequally and inequitably.

Structural racism explains unequal racial outcomes by focusing not on prejudiced individual behavior but on social infrastructure.⁴⁷ A society's infrastructure is made up of all the various and interrelated institutions that affect people's lives and social

(2010), available at http://www.bls.gov/opub/ted/2011/ted_20110914.htm [<http://perma.cc/PF4R-V648>] (archived Apr. 10, 2014).

44. Median income in 2011 dollars for whites alone, not Hispanic, was \$55,412; for blacks alone, \$32,229; American Indian and Alaska Native alone, \$32,625; Asian, \$65,129; Native Hawaiian and other Pacific Islander, \$50,806; Hispanic, \$38,624. U.S. CENSUS BUREAU, HISTORICAL INCOME TABLES: HOUSEHOLDS, TABLE H-16: INCOME OF HOUSEHOLDS BY RACE AND HISPANIC ORIGIN USING 3-YEAR AND 2-YEAR MOVING AVERAGE MEDIANS (2012), available at <http://www.census.gov/hhes/www/income/data/historical/household/index.html> [<http://perma.cc/93SR-L9UP>] (archived Apr. 10, 2014).

45. In 2011, the percentage of blacks aged 18 to 64 years old that were below poverty was 24.1%; Asians, 11.9%; Hispanic of any race, 21.1%; whites alone not Hispanic, 9.8%. U.S. CENSUS BUREAU, HISTORICAL POVERTY TABLES—PEOPLE, TABLE 3: POVERTY STATUS OF PEOPLE, BY AGE, RACE, AND HISPANIC ORIGIN: 1959 TO 2011, available at <http://www.census.gov/hhes/www/poverty/data/historical/people.html> [<http://perma.cc/6BX3-78CD>] (archived Apr. 10, 2014). In 2010, the poverty rate for black children, 38.2%, was twice as high as that for white children, 17%. U.S. CENSUS BUREAU, CHILD POVERTY IN THE UNITED STATES 2009 AND 2010: SELECTED RACE GROUPS AND HISPANIC ORIGIN 3–4 (2011), available at <http://www.census.gov/prod/2011pubs/acsbr10-05.pdf> [<http://perma.cc/6UT8-FC6V>] (archived Apr. 10, 2014). For Hispanic children, the poverty rate was 32.3%; for Asian children, 13.0%. *Id.*

46.

The median wealth of white households [(\$113,149)] is 20 times that of black households [(\$5,677)] and 18 times that of Hispanic households [(\$6,325)], according to a Pew Research Center analysis of newly available government data from 2009. These lopsided wealth ratios are the largest since the government began publishing such data a quarter century ago and roughly twice the size of the ratios that had prevailed between these three groups for the two decades prior to the Great Recession that ended in 2009.

RAKESH KOCHHAR, RICHARD FRY & PAUL TAYLOR, PEW RESEARCH CTR., WEALTH GAPS RISE TO RECORD HIGHS BETWEEN WHITES, BLACKS, HISPANICS: TWENTY-TO-ONE (2011), available at <http://www.pewsocialtrends.org/2011/07/26/wealth-gaps-rise-to-record-highs-between-whites-blacks-hispanics> [<http://perma.cc/D6PS-F2LZ>] (archived Apr. 10, 2014).

47. *See supra* note 23.

relationships. A metaphorical comparison may help here. In the same way that our transportation physical infrastructure is made up of roads, bridges, railroads, ports, and airports, our social infrastructure consists of institutions such as schools, courts, hospitals, homes, and workplaces. Structural components of both of these kinds of infrastructures have a significant, but often unseen, impact on people's lives. To illustrate: the interstate highway system has helped to drastically reduce auto fatalities.⁴⁸ The fatality rates for both urban and rural interstates have been significantly lower than those for all other categories of highways every year.⁴⁹ Because of structural features such as overpasses, divided roadways that separate opposing traffic by median strips, and uniform signage and markings, traveling on interstate highways is safer than traveling on two-lane roads. This is not because individual drivers on secondary roads are worse drivers and certainly not because those drivers intend to cause accidents or nurture hostile attitudes toward other drivers. Rather, the different outcomes are due entirely to structural features. The drivers' states of mind are irrelevant. In the same ways that motorists on secondary roads are impacted by structural features such as intersections and proximity to oncoming traffic, so are people of color affected by social structural features such as dependence on local property taxes for public school funding, reliance on social networks for job information, subjective decision-making that is affected by unconscious assumptions and stereotypes, and business decisions made for rational, profit-oriented reasons.

In a racialized society, racial groups are related to each other by systems of domination and subordination, and social institutions are both structured by and contribute to the maintenance of the racial order.⁵⁰ Racialization is "a set of conditions and norms that are constantly evolving and interacting with the socio-political environment," mutating over time and space.⁵¹

The earliest inquiries into the structural nature of racism focused on institutions. The term "institutional racism" first appeared in

48. See BUREAU OF TRANSP. STATISTICS, U.S. DEP'T OF TRANSP., TABLE 2-18: MOTOR VEHICLE FATALITIES, VEHICLE-MILES, AND ASSOCIATED RATES BY HIGHWAY FUNCTIONAL SYSTEM, *available at* http://www.bts.gov/publications/national_transportation_statistics/#chapter_2 [<http://perma.cc/L2HY-SSQZ>] (archived Apr. 10, 2014).

49. *Id.*

50. See OMI & WINANT, *supra* note 23, at 79; Bonilla-Silva, *Rethinking Racism*, *supra* note 23, at 476; BONILLA-SILVA, *WHITE SUPREMACY*, *supra* note 23, at 11, 12, 67.

51. John A. Powell, *Post-racialism or Targeted Universalism?*, 86 DEN. U. L. REV. 785, 785-86 (2009).

1967 in the writing of Stokely Carmichael⁵² and Charles V. Hamilton, who argued that “[i]nstitutional racism . . . is less overt, far more subtle, less identifiable in terms of *specific* individuals committing the acts. But it is no less destructive of human life. [It] originates in the operation of established and respected forces in the society, and thus receives far less public condemnation.”⁵³ They reinforced this with a compelling illustration:

When . . . five hundred black babies die each year because of the lack of proper food, shelter and medical facilities, and thousands more are destroyed and maimed physically, emotionally and intellectually because of conditions of poverty and discrimination in the black community, that is a function of institutional racism It is institutional racism that keeps black people locked in dilapidated slum tenements, subject to the daily prey of exploitative slumlords, merchants, loan sharks and discriminatory real estate agents. The society either pretends it does not know of this latter situation, or is in fact incapable of doing anything meaningful about it.⁵⁴

African Americans have been injured more by the day-to-day operation of institutions like schools and the job market in the past three decades than they have been by the deliberate actions of bigoted white individuals. Sociologists have demonstrated that not only could racial disparities result from the regular functioning *within* institutions, but racial inequalities could also result from interactions *between* institutions within a social domain such as employment, education, health, wealth, law, and even *among* institutions across social domains.⁵⁵ Our understanding of the

52. Sometime around 1969, when Carmichael went into self-imposed exile in Ghana, he adopted the name Kwame Toure to honor his African patrons Kwame Nkrumah and Sekou Toure. We use his Trinidadian birth name because it is more familiar to general readers and that is how it is universally catalogued.

53. CARMICHAEL & HAMILTON, *supra* note 23, at 4.

54. *Id.*

55. FEAGIN & FEAGIN, RACIAL AND ETHNIC RELATIONS, *supra* note 23; DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS (1993) [hereinafter MASSEY & DENTON, AMERICAN APARTHEID]; NAT'L RESEARCH COUNCIL, *supra* note 32, at 223–46; OLIVER & SHAPIRO, *supra* note 23; Timothy Bates, *Circular Causation in Social Processes: The Case of the Ghetto and Black-Owned Businesses*, in NEW APPROACHES TO ECONOMIC AND SOCIAL ANALYSES OF DISCRIMINATION (Richard R. Cornwall & Phanindra V. Wunnava eds., 1991); T.A. DiPrete & G.M. Eirich, *Cumulative Advantage as a Mechanism for Inequality: A Review of Theoretical and Empirical Developments*, 32 ANN. REV. SOC. 271, 291 (2006); George C. Galster, *A Cumulative Causation Model of the*

cumulative effect across social domains reaches back to Gunnar Myrdal's explication of the cumulative causation principle,⁵⁶ where "there is no single 'cause' [of urban poverty], but rather a web of mutually reinforcing connections in which elements serve both as causes and effects."⁵⁷

Structural racism crops up in all social domains: housing,⁵⁸ health and medical care,⁵⁹ wealth accumulation,⁶⁰ employment,⁶¹

Underclass: Implications for Urban Economic Development Policy, in THE METROPOLIS IN BLACK AND WHITE (George C. Galster & Edward W. Hill eds., 1992); Mark D. Hayward et al., *The Significance of Socioeconomic Status in Explaining the Racial Gap in Chronic Health Conditions*, 65 AM. SOC. REV. 910 (2000); Phillip Lovell & Julia Isaacs, *The Impact of the Mortgage Crisis on Children*, FIRST FOCUS (2008), available at <http://www.firstfocus.net/library/reports/impact-mortgage-crisis-children> [<http://perma.cc/5PUG-C8AZ>] (archived Apr. 10, 2014); Pager & Shepherd, *supra* note 23; David F. Warner & Mark D. Hayward, *Early-Life Origins of the Race Gap in Men's Mortality*, 47 J. HEALTH & SOC. BEHAV. 209 (2006); David R. Williams & Chiquita Collins, *Racial Residential Segregation: A Fundamental Cause of Racial Disparities in Health*, 116 PUB. HEALTH REP. 404 (2001).

56. GUNNAR MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY 75–77 (1944).

57. Galster, *supra* note 55, at 191.

58. See generally MASSEY & DENTON, AMERICAN APARTHEID, *supra* note 55; Gary A. Dymski, *Discrimination in the Credit and Housing Markets: Findings and Challenges*, in HANDBOOK ON THE ECONOMICS OF DISCRIMINATION (William M. Rodgers ed. 2006); Rick Cohen, *A Structural Racism Lens on Subprime Foreclosures and Vacant Properties* (2008), available at http://www.kirwaninstitute.osu.edu/reports/2008/10_2008_StructuralRacismandSubprimeRickCohen.pdf [<http://perma.cc/9Q66-9SWZ>] (archived Apr. 10, 2014).

59. DAVID BARTON SMITH, HEALTH CARE DIVIDED: RACE AND HEALING A NATION (1999); DALTON CONLEY ET AL., THE STARTING GATE: BIRTH WEIGHT AND LIFE CHANCES (2003); Arline T. Geronimus, *To Mitigate, Resist, or Undo: Addressing Structural Influences on the Health of Urban Populations*, 90 AM. J. PUB. HEALTH 867 (2000); Naa Oyo A. Kwate, *Racial Segregation and the Marketing of Health Inequality*, in BEYOND DISCRIMINATION: RACIAL INEQUALITY IN A POSTRACIST ERA (Rodrick C. Harris & Robert C. Lieberman eds., 2013); Vermellia R. Randall, *Racial Discrimination in Health Care in the United States as a Violation of the International Convention on the Elimination of All Forms of Racial Discrimination*, 14 U. FLA. J. L. & PUB. POL'Y 45 (2002); Williams & Collins, *supra* note 55; NAT'L RESEARCH COUNCIL, UNEQUAL TREATMENT: CONFRONTING RACIAL AND ETHNIC DISPARITIES IN HEALTH CARE (2003), available at http://www.nap.edu/catalog.php?record_id=10260 [<http://perma.cc/Q8FT-D69D>] (archived Apr. 10, 2014).

60. DALTON CONLEY, BEING BLACK, LIVING IN THE RED: RACE, WEALTH, AND SOCIAL POLICY IN AMERICA (1999); MEIZHU LUI, THE COLOR OF WEALTH: THE STORY BEHIND THE U.S. RACIAL WEALTH DIVIDE (2006); OLIVER & SHAPIRO, *supra* note 23; THOMAS M. SHAPIRO, THE HIDDEN COST OF BEING AFRICAN AMERICAN; HOW WEALTH PERPETUATES INEQUALITY (2004).

61. BLAUNER, *supra* note 23; BROWN ET AL., *supra* note 23; BONILLA-SILVA, WHITE SUPREMACY, *supra* note 23; ANDREW HACKER, TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL (1995); MASSEY & DENTON,

income,⁶² taxation,⁶³ environmental justice,⁶⁴ and transportation,⁶⁵ among others. Scholars have identified the structural basis of racism in such fields as education,⁶⁶ criminal justice,⁶⁷ economics,⁶⁸

AMERICAN APARTHEID, *supra* note 55; Nelson et al., *supra* note 16; Pager & Shepherd, *supra* note 23; Vincent J. Roscigno et al., *Social Closure and Processes of Race/Sex Employment Discrimination*, 609 ANNALS AM. ACAD. POL. & SOC. SCI. 16 (2007) [hereinafter Roscigno, *Social Closure*]; Steven Shulman, *The Causes of Black Poverty: Evidence and Interpretation*, 24 J. ECON. ISSUES 995 (1990) [hereinafter Shulman, *The Causes of Black Poverty*]; Steven Shulman, *Why is the Black Unemployment Rate Always Twice as High as the White Unemployment Rate?*, in NEW APPROACHES TO ECONOMIC AND SOCIAL ANALYSES OF DISCRIMINATION (Richard R. Cornwall & Phanindra V. Wunnavu eds., 1991) [hereinafter Shulman, *Why is the Black Unemployment Rate Always Twice as High as the White Unemployment Rate?*]; Gregory D. Squires, *Demobilization of the Individualistic Bias: Housing Market Discrimination as a Contributor to Labor Market and Economic Inequality*, 609 ANNALS AM. ACAD. POL. & SOC. SCI. 200 (2007).

62. MEIZHU LUI ET AL., INSIGHT CTR. FOR CMTY. ECONOMIC DEV., LAYING THE FOUNDATION FOR NATIONAL PROSPERITY: THE IMPERATIVE OF CLOSING THE RACIAL WEALTH GAP (2009), available at <http://www.insightced.org/uploads/CRWG/LayingTheFoundationForNationalProsperity-MeizhuLui0309.pdf> [<http://perma.cc/PTP8-N6KL>] (archived Apr. 10, 2014).

63. Douglas S. Massey, *Globalization and Inequality: Explaining American Exceptionalism*, 25 EUR. SOC. REV. 9 (2009); LUI ET AL., *supra* note 62.

64. ROBERT D. BULLARD, UNEQUAL PROTECTION: ENVIRONMENTAL JUSTICE AND COMMUNITIES OF COLOR (1994); ROBERT D. BULLARD, DUMPING IN DIXIE: RACE, CLASS, AND ENVIRONMENTAL QUALITY (2000); ROBERT D. BULLARD, THE QUEST FOR ENVIRONMENTAL JUSTICE: HUMAN RIGHTS AND THE POLITICS OF POLLUTION (2005); LUKE W. COLE & SHEILA R. FOSTER, FROM THE GROUND UP: ENVIRONMENTAL RACISM AND THE RISE OF THE ENVIRONMENTAL JUSTICE MOVEMENT (2001); Luke W. Cole & Caroline Farrell, *Structural Racism, Structural Pollution and the Need for a New Paradigm*, 20 WASH. U. J.L. & POL'Y. 265 (2006).

65. JACOB FABER ET AL., ONE REGION: PROMOTING PROSPERITY ACROSS RACE (2009), available at http://www.centerforsocialinclusion.org/wp-content/uploads/2012/07/One_Region_Promoting_Prosperty_Across_Race_FINAL.pdf [<http://perma.cc/WS7S-V4ZP>] (archived Apr. 10, 2014); ROBERT D. BULLARD ET AL., HIGHWAY ROBBERY: TRANSPORTATION RACISM AND NEW ROUTES TO EQUITY (2004); Raymond A. Mohl, *The Interstates and the Cities: Highways, Housing, and the Freeway Revolt*, in POVERTY AND RACE RESEARCH ACTION COUNCIL (2002), available at <http://www.prrac.org/pdf/mohl.pdf> [<http://perma.cc/8CQ6-QHF3>] (archived Apr. 10, 2014).

66. KOZOL, *supra* note 25; ORFIELD & EATON, *supra* note 15; GARY ORFIELD & C. LEE, WHY SEGREGATION MATTERS: POVERTY AND EDUCATIONAL INEQUALITY (2005); Linda Darling-Hammond, *The Flat Earth and Education: How America's Commitment to Equity Will Determine our Future*, 36 EDUC. RESEARCHER 318 (2007); Lovell & Isaacs, *supra* note 55.

67. MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010); WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE (2011); BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA (2006); R. J. SAMPSON & J. L. LAURITZEN, *Racial and Ethnic Disparities in Crime and Criminal Justice in the United States*, in

political science,⁶⁹ urban geography,⁷⁰ philanthropy,⁷¹ and, of course, law.⁷²

A. Components of Structural Racism

Structural racism has numerous components, but six comprise its core: (1) the irrelevance of intent to discriminate; (2) the ideology of individualism; (3) belief in structural neutrality; (4) the normativity of white advantage; and (5) the myth of colorblindness. Uniting all of these is (6) the invisibility of structural racism.

ETHNICITY, CRIME, AND IMMIGRATION: COMPARATIVE AND CROSS-NATIONAL PERSPECTIVES (M. H. Tonry ed., 1997).

68. OLIVER & SHAPIRO, *supra* note 23; Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV. 991 (2004); Shulman, *The Causes of Black Poverty*, *supra* note 61; Shulman, *Why is the Black Unemployment Rate Always Twice as High as the White Unemployment Rate?*, *supra* note 61.

69. ROBERT C. SMITH, *RACISM IN THE POST-CIVIL RIGHTS ERA: NOW YOU SEE IT, NOW YOU DON'T* (1995); R. C. LIEBERMAN, *SHIFTING THE COLOR LINE: RACE AND THE AMERICAN WELFARE STATE* (1998).

70. Catherine L. Ross & Nancey Green Leigh, *Planning, Urban Revitalization, and the Inner City: An Exploration of Structural Racism*, 14 J. PLAN. LITERATURE 367 (2000); JOHN W. FRAZIER ET AL., *RACE AND PLACE: EQUITY ISSUES IN URBAN AMERICA* (2003); ROBERT D. BULLARD, *THE BLACK METROPOLIS IN THE TWENTY-FIRST CENTURY: RACE, POWER, AND POLITICS OF PLACE* (2007).

71. Keith Lawrence, *Reconsidering Community Building: Philanthropy Through a Structural Racism Lens*, in 4 SOULS: A CRITICAL JOURNAL OF BLACK POLITICS, CULTURE, AND SOCIETY 45 (2002); JULIE QUIROZ-MARTINEZ ET AL., *GRANT MAKING WITH A RACIAL EQUITY LENS* (2007).

72. Kimberle Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988); John Calmore, *Race/ism Lost and Found: The Fair Housing Act at Thirty*, 52 U. MIAMI L. REV. 1067 (1998); Alan D. Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978) [hereinafter Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law*]; Alan Freeman, *Antidiscrimination Law from 1954 to 1989: Uncertainty, Contradiction, Rationalization, Denial*, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE (David Kairys ed. 1998); Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R. & C.L. L. REV. 91 (2003); Andrew Grant-Thomas & John A. Powell, *Toward a Structural Racism Framework*, POVERTY & RACE, Nov./Dec. 2006, at 3; Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CAL. L. REV. 969 (2006).

1. Absence of Intent

A principal difference between individual racism and structural racism is the role of intent. As the sociologist Fred Pincus observed, “[T]he key element in structural discrimination is not the intent but the *effect* of keeping minority groups in a subordinate position.”⁷³ Individual racism is intentional: A bigot means to cause harm to another because of skin color or ethnicity. However, when sociologists analyze structural racism, intent is irrelevant.⁷⁴ Though occasional outbursts of old-style, intentional racism flare disturbingly often, “more often racism consists of routine acts of everyday racism that are not viewed as racist by the person performing them and therefore are not intentional. It is this unintentional racism . . . that produces a good deal of institutional racism and resulting racial inequality.”⁷⁵

Professor John Powell has described structural racism as an example of a complex system of interconnected relationships and processes that operates according to the principles of systems theory,⁷⁶ where causation is not singular, autonomous, and linear but is instead cumulative over time as well as within and across social domains.⁷⁷ Viewing racism through the lens of systems theory, where causation involves “elements of dynamic complexity such as accumulations, time delays, and other nonlinearities,” highlights the senselessness of legal insistence on causation by individuals’ intent.⁷⁸ Professor Powell uses another systems example, that of the ecological understanding of climate change, to point out the futility of trying to place responsibility on individuals alone for problems like structural racism or global warming, noting that both result in

73. Pincus, *supra* note 28, at 84.

74. KNOWLES & PREWITT, *supra* note 23, at 5; Chesler, *supra* note 23, at 45; BLAUNER, *supra* note 23, at 9–10, 187–88; FEAGIN & FEAGIN, *supra* note 23; Pincus, *supra* note 28, at 84; Robert Blauner, *Talking Past Each Other: Black and White Languages of Race*, in RACE AND ETHNIC CONFLICT: CONTENTING VIEWS ON PREJUDICE, DISCRIMINATION, AND ETHNOVIOLENCE 18, 21 (Fred L. Pincus & Howard J. Ehrlich eds., 1984); BROWN, *supra* note 23, at 43; SMITH, *supra* note 59, at 33, 53; Pager & Shepherd, *supra* note 23, at 199.

75. BARBARA TREPAGNIER, SILENT RACISM: HOW WELL-MEANING WHITE PEOPLE PERPETUATE THE RACIAL DIVIDE 3–4 (2006).

76. The scholar acknowledged to be the originator of systems theory provided a remarkably accessible and humanistic introduction to the subject: LUDWIG VON BERTALANFFY, GENERAL SYSTEM THEORY: FOUNDATIONS, DEVELOPMENT, APPLICATIONS 3–53 (rev’d ed. 1968). On its relevance to the social sciences, see John A. Powell, *Structural Racism: Building Upon the Insights of John Calmore*, 86 N.C. L. REV. 791, 795–96 (2007). Note that Professor Powell does not capitalize his name.

77. Powell, *supra* note 76, at 795–96.

78. *Id.*

serious harm because of “cumulative and mutual actions of many actors and institutions.”⁷⁹ Just as requiring a showing of intent to cause global warming is pointless for collective action in responding to climate change, it is useless for reforming the structural bases of racial inequities. “A systems approach changes the focus from assigning culpability to solving a problem and redressing a harm. Parties may be called upon to address harms they may not have directly caused or intended to cause.”⁸⁰

Racial disparities arise without intent through institutional and social policies that are meant to be race neutral.⁸¹ They are implemented by well-intentioned people but nevertheless perpetuate and exacerbate racial inequality. Researchers in a related discipline, psychology, have found that unconscious bias plays a significant role in thought processes and behavior, and they have thereby buttressed the sociological argument that intent is not a requisite component of racism.⁸² Social psychologist Susan Fiske describes

79. *Id.* at 797.

80. *Id.* at 798.

81. See *supra* note 74.

82. For an overview, see NAT'L RESEARCH COUNCIL, *supra* note 32, at 58–61. For a chronological progression of understanding of this subject, see Russell H. Fazio et al., *On the Automatic Activation of Attitudes*, 50 J. PERSONALITY & SOC. PSYCHOL. 229, 229–31, 236–37 (1986); John F. Kihlstrom, *The Cognitive Unconscious*, 237 SCIENCE NEW SERIES 1445 (1987); Patricia G. Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 J. PERSONALITY & SOC. PSYCHOL. 5, 5–7, 15–16 (1989); Daniel T. Gilbert & J. Gregory Hixon, *The Trouble of Thinking: Activation and Application of Stereotypic Beliefs*, 60 J. PERSONALITY & SOC. PSYCHOL. 509, 509–10, 514–16 (1991); Anthony G. Greenwald, *New Look 3: Unconscious Cognition Reclaimed*, 47 AM. PSYCHOLOGIST 766 (1992); John A. Bargh et al., *The Generality of the Automatic Attitude Activation Effect*, 62 J. PERSONALITY & SOC. PSYCHOL. 893, 893–95, 906–08 (1992); John A. Bargh, *The Four Horsemen of Automaticity: Awareness, Intention, Efficiency, and Control in Social Cognition*, in HANDBOOK OF SOCIAL COGNITION 1 (Robert S. Wyer & Thomas K. Srull eds., 1994); Anthony G. Greenwald & Mahzarin R. Banaji, *Implicit Social Cognition: Attitudes, Self-Esteem, and Stereotypes*, 102 PSYCHOL. REV. 4, 14–15 (1995); Russell H. Fazio et al., *Variability in Automatic Activation as an Unobtrusive Measure of Racial Attitudes: A Bona Fide Pipeline?*, 69 J. PERSONALITY & SOC. PSYCHOL. 1013, 1013–15, 1025–26 (1995); John A. Bargh et al., *Automaticity of Social Behavior: Direct Effects of Trait Construct and Stereotype Activation on Action*, 71 J. PERSONALITY & SOC. PSYCHOL. 230, 230–33, 239–42 (1996); John F. Dovidio et al., *On the Nature of Prejudice: Automatic and Controlled Processes*, 33 J. EXPERIMENTAL SOC. PSYCHOL. 510, 510–12 (1997); John F. Dovidio, *On the Nature of Contemporary Prejudice: The Third Wave*, 57 J. SOC. ISSUES 829 (2001); Susan T. Fiske, *What We Know Now About Bias and Intergroup Conflict: Problem of the Century*, 11 CURRENT DIRECTIONS PSYCHOL. SCI. 123 (2002); John F. Dovidio et al., *Implicit and Explicit Prejudice and Interracial Interaction*, 82 J. PERSONALITY & SOC. PSYCHOL. 62, 62–64, 66–67 (2002); Russell H. Fazio & Michael A. Olson, *Implicit Measures in Social*

these biases as “unconscious, subtle biases, which are relatively automatic, cool, indirect, ambiguous, and ambivalent.”⁸³ Social psychologists have demonstrated that the notion of intent does not accurately describe how people actually think and act; they demonstrate that unconscious racial biases⁸⁴ play a causal role in perpetuating inequality.

Negative racial attitudes and perceptions persist in the culture and are learned and reinforced at unconscious levels. These unconscious beliefs and associations continue to shape people’s cognitive, emotional, and behavioral responses in automatic and uncontrollable ways. Unconscious stereotypes are pervasive, predict behavior, vary from one person to another, and affect the judgments, perceptions, and actions of people even when they believe themselves to be free of bias or prejudice.⁸⁵ Individuals may consciously disavow racist attitudes and sincerely support the general goal of racial equality, yet harbor submerged mental associations that link people of color with laziness, crime, poverty, drugs, violence, immorality, and a host of other negative racial stereotypes.⁸⁶ Conscious ideals and unconscious imagery coexist in unacknowledged tension. These unrecognized negative attitudes

Cognition: Their Meaning and Use, 54 ANN. REV. PSYCHOL. 297 (2003); John T. Jost et al., *The Existence of Implicit Bias Is Beyond Reasonable Doubt: A Refutation of Ideological and Methodological Objections and Executive Summary of Ten Studies that No Manager Should Ignore*, 29 RES. ORGANIZATIONAL BEHAV. 39 (2009); John F. Dovidio et al., *Prejudice, Stereotyping and Discrimination: Theoretical and Empirical Overview*, in THE SAGE HANDBOOK OF PREJUDICE, STEREOTYPING AND DISCRIMINATION 3 (John F. Dovidio et al. eds., 2010).

83. Fiske, *supra* note 82, at 123.

84. Social psychologists have used a number of phrases that refer in some way to biases in thought or behavior that are not conscious, including: unintentional, uncontrollable, and occurring outside of awareness, John A. Bargh, *The Four Horsemen of Automaticity: Awareness, Intention, Efficiency, and Control in Social Cognition*, in HANDBOOK OF SOCIAL COGNITION 1, at 2 (Robert S. Wyer & Thomas K. Srull eds., 1994), cognitive unconscious, John F. Kihlstrom, *supra* note 82, unconscious cognition, Greenwald, *supra* note 82, at 766, automatic attitude activation, John A. Bargh et al., *The Generality of the Automatic Attitude Activation Effect*, 62 J. PERSONALITY & SOC. PSYCHOL. 893, 893 (1992), implicit social cognition, Greenwald & Banaji, *supra* note 82, at 4, subtle bias, *id.* at 123, implicit prejudice, John F. Dovidio et al., *supra* note 82, at 62, and implicit bias, John T. Jost et al., *The Existence of Implicit Bias is Beyond Reasonable Doubt: A Refutation of Ideological and Methodological Objections and Executive Summary of Ten Studies That No Manager Should Ignore*, 29 RES. ORGANIZATIONAL BEHAV. 39, 39 (2009).

85. Mahzarin R. Banaji & Anthony G. Greenwald, *Implicit Stereotyping and Prejudice*, 102 PSYCHOL. REV. 4 (1995); NAT’L RESEARCH COUNCIL, *supra* note 32.

86. Banaji & Greenwald, *supra* note 85, at 4–5.

affect their holder's behavior, and this regularly produces discriminatory outcomes that are not intentional.⁸⁷ All people in our culture cannot help but breathe this cultural air pollution, thereby absorbing these negative racial attitudes and perceptions. Thus, people of color also absorb cultural negative images of themselves, a concept described as "internalized subordination."⁸⁸

Since people are not consciously aware of their unconscious biases, psychologists have developed indirect techniques of measuring them, most commonly using priming and latency methods.⁸⁹ The priming method consists of showing a word or image to the subject very briefly before beginning a task. The primed word or image is shown so briefly that it cannot be consciously recognized, so the prime is subliminal.⁹⁰ Research demonstrates that racially primed subjects are more likely to consistently produce racially stereotypical judgments and behaviors.⁹¹ The most common latency method is the Implicit Association Test in which target concepts are paired with attributes on a computer that measures speed at categorizing words or images.⁹² The subject is to match a pairing of, for example, a racially identifiable name (e.g., "Betsy" or "Ebony") and a pleasant or unpleasant concept (e.g., "Flower" or "Poison") with the appropriate category of "Black-Pleasant," "Black-Unpleasant," "White-Pleasant," or "White-Unpleasant."⁹³ Subjects invariably are faster at identifying the pair of concepts when "Black" is matched

87. *Id.* at 5.

88. Teeomm K. Williams, *Understanding Internalized Oppression: A Theoretical Conceptualization of Internalized Subordination* (2012) (Dissertation, on file with the University of Massachusetts); Pat Griffin, *Introductory Module for the Single Issue Courses*, in *TEACHING FOR DIVERSITY AND SOCIAL JUSTICE: A SOURCEBOOK* 76 (Maurianne Adams et al. eds., 1997); Rita Hardiman & Bailey W. Jackson, *Conceptual Foundations for Social Justice Courses*, in *TEACHING FOR DIVERSITY AND SOCIAL JUSTICE: A SOURCEBOOK* 21 (Maurianne Adams et al. eds., 1997); Lee Anne Bell, *Theoretical Foundations for Social Justice Education*, in *TEACHING FOR DIVERSITY AND SOCIAL JUSTICE: A SOURCEBOOK* 5 (Maurianne Adams et al. eds., 1997).

89. Lincoln Quillian, *Does Unconscious Racism Exist?*, 71 *SOC. PSYCHOL. Q.* 6, 7 (2008); Fazio & Olson, *supra* note 82, at 300.

90. Lincoln Quillian, *New Approaches to Understanding Racial Prejudice and Discrimination*, 32 *ANN. REV. SOC.* 299, 315 (2006).

91. *Id.* at 315; Devine, *supra* note 82, at 15.

92. A. G. Greenwald et al., *Measuring Individual Differences in Implicit Cognition: The Implicit Association Test*, 74 *J. PERSONALITY & SOC. PSYCHOL.* 1464 (1998). Visitors to the Project Implicit website are able to test themselves for their own implicit biases. See PROJECT IMPLICIT, <https://implicit.harvard.edu/implicit/demo> (last visited Aug. 18, 2013) [<http://perma.cc/W2K2-YUZE>] (archived Apr. 10, 2014).

93. Quillian, *supra* note 90, at 316; Greenwald, *supra* note 82, at 1473–74.

with “Unpleasant” (e.g., “Ebony–Poison”) and “White” with “Pleasant” (e.g., “Betsy–Flower”) even when they express no black–white preference on explicit measures.⁹⁴ Psychometric studies in the field of psychology disclose racial biases in persons who are not only unaware of them but are disturbed to find that they hold them.⁹⁵ The authors of these studies have concluded that a majority of white Americans harbor unconscious and unwanted negative associations about blacks.⁹⁶

The extensive evidence presented by psychologists on unconscious prejudices is important beyond its confirmation of sociological findings that intent is irrelevant to structural racism. Unconscious prejudices play a role in structural racism because they can be a factor in organizational processes—which are structured on the assumption that decision-making is always conscious and rational—that lead to racial disparities. Unconscious prejudices conflict with conscious attempts to be neutral or objective.

In the employment area, this unconscious–conscious conflict can play a role in the evaluation of resumes of potential employees, potential employees’ performances in interviews, and current employees’ performances toward promotion.⁹⁷ For example, an employer may perceive a job candidate to be competent but feel some reservations that he or she cannot pinpoint consciously and therefore decides against hiring that person. Or someone perceived as racially different may be simultaneously respected (consciously) but disliked (because of unconscious stereotypes), as frequently exemplified by whites’ reactions to black professionals.⁹⁸ The conflict between unconscious prejudices and conscious attempts to be neutral can result in confusing interactions where nonverbal (unconscious) behavior conflicts with verbal messages. For example, our body language may not match what we are saying in words.⁹⁹ This mismatch of unconscious body language and conscious verbal communication can cause social discomfort, the origin of which is impossible to articulate. When this happens in the

94. Quillian, *supra* note 90, at 316; Greenwald, *supra* note 82, at 1473–74.

95. Anthony G. Greenwald & Linda H. Krieger, *Implicit Bias: Scientific Foundations*, 94 CAL. L. REV. 945, 955–56 (2006); Quillian, *supra* note 89, at 10; Quillian, *supra* note 90, at 315.

96. John F. Dovidio et al., *Contemporary Racial Bias: When Good People Do Bad Things*, in THE SOCIAL PSYCHOLOGY OF GOOD AND EVIL 145 (Arthur G. Miller ed. 2004).

97. *Id.* at 148.

98. *See id.* at 130.

99. *Id.* at 151; NAT’L RESEARCH COUNCIL, *supra* note 32, at 59; Quillian, *supra* note 90, at 319.

workplace, such as in a job interview, it could often be the people of color who are held responsible for the discomfort.

Unconscious–conscious conflict can produce discomfort that may lead to racial avoidance,¹⁰⁰ which in turn can lead to a hostile work environment. Racial avoidance also makes it difficult to even talk about racial issues, which further exacerbates racial tensions in workplaces and society generally.

The unconscious–conscious conflict is likely to influence decisions in ambiguous situations¹⁰¹ or decisions that must be made under time pressure.¹⁰² Sociologist Lincoln Quillian suggests that the time pressure to make a “quick decision may prevent conscious inhibition of stereotype activation” as may occur in the urgency of a police officer’s decision of whether to shoot at what may appear to be a threatening subject.¹⁰³ Other occupations are often associated with factors that decrease cognitive capacity as well, such as fatigue, information overload, and time pressure in the provision of healthcare.¹⁰⁴ While some evidence suggests that it may be possible under certain conditions to reduce unconscious stereotypes,¹⁰⁵ it is far from clear that interventions are capable of producing lasting change. Indeed, Banaji and Greenwald observe that unconscious bias appears to be “dauntingly persistent.”¹⁰⁶

Social psychologists have been refining their research on unconscious bias for several decades.¹⁰⁷ The reality of unconscious

100. Dovidio, *supra* note 82, at 146.

101. DEVAH PAGER, MARKED: RACE, CRIME, AND FINDING WORK IN AN ERA OF MASS INCARCERATION 95 (2007); H. A. Sagar & J. W. Schofield, *Racial and Behavioral Cues in Black and White Children’s Perceptions of Ambiguously Aggressive Acts*, 39 J. PERSONALITY & SOC. PSYCHOL. 590, 590 (1980).

102. Quillian, *supra* note 90, at 319.

103. *Id.* See also Joshua Correll et al., *The Police Officer’s Dilemma: Using Ethnicity to Disambiguate Potentially Threatening Individuals*, 83 J. PERSONALITY & SOC. PSYCHOL. 1314, 1325–26 (2002).

104. Diana J. Burgess et al., *Why Do Providers Contribute to Disparities and What Can Be Done About It?*, 19 J. GEN. & INTERNAL MED. 1154, 1157 (2004).

105. C. Neil Macrae & Galen V. Bodenhausen, *Social Cognition: Thinking Categorically About Others*, 51 ANN. REV. PSYCHOL. 93, 112–13 (2000); Nilanjana Dasgupta & Anthony G. Greenwald, *On the Malleability of Automatic Attitudes: Combating Automatic Prejudice with Images of Admired and Disliked Individuals*, 81 J. PERSONALITY & SOC. PSYCHOL. 800, 806–07 (2001); Irene V. Blair et al., *Imagining Stereotypes Away: The Moderation of Implicit Stereotypes Through Mental Imagery*, 81 J. PERSONALITY & SOC. PSYCHOL. 828, 837–38 (2001); Irene V. Blair, *The Malleability of Automatic Stereotypes and Prejudice*, 6 PERSONALITY & SOC. PSYCHOL. REV. 242 (2002); Patricia G. Devine et al., *Long-Term Reduction in Implicit Race Bias: A Prejudice Habit-Breaking Intervention*, 48 J. EXPERIMENTAL SOC. PSYCHOL. 1267, 1276–77 (2012).

106. MAHZARIN R. BANAJI & ANTHONY G. GREENWALD, *BLINDSPOT: HIDDEN BIASES OF GOOD PEOPLE* 502 (2013).

107. See *supra* note 82.

bias is so well established by extensive research that understanding of it has permeated other disciplines including economics,¹⁰⁸ sociology,¹⁰⁹ neuroscience,¹¹⁰ and of course law.¹¹¹ In addition, several books have recently appeared for non-academic audiences that discuss how the human brain functions beyond conscious awareness including the absorption of stereotypes and their impact on behavior.¹¹² It is disturbing to contemplate that general audiences understand this concept while some Supreme Court justices apparently cannot.

Thus, from a sociologist's perspective, reinforced with findings from psychology, any legal doctrine that mandates intentional discrimination as a *sine qua non* for a finding of a constitutional violation, or as a prerequisite for judicial relief, will by definition miss all instances of structural racism. No matter how egregious the social reality, any court maintaining such a posture is thereby protecting the continued oppression caused by structural racism.

2. Individualism

Individualism has long been identified as an essential element of the American character,¹¹³ and this powerful American tradition contributes to a common belief that social phenomena are nothing

108. Marianne Bertrand et al., *Implicit Discrimination*, 95 AMER. ECON. REV. 94 (2005).

109. Quillian, *supra* note 89; Quillian, *supra* note 90.

110. Jennifer T. Kubota et al., *The Neuroscience of Race*, 15 NATURE NEUROSCIENCE 940 (2012).

111. Greenwald & Krieger, *supra* note 95; Jolls & Sunstein, *supra* note 72; Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124 (2012); Linda H. Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995); Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CAL. L. REV. 997 (2006); Kristin A. Lane et al., *Implicit Social Cognition and Law*, 3 ANN. REV. L. SOC. SCI. 427 (2007); Charles R. Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987); Nelson et al., *supra* note 16.

112. BANAJI & GREENWALD, *supra* note 106; MALCOLM GLADWELL, *BLINK: THE POWER OF THINKING WITHOUT THINKING* (2005); LEONARD MLODINOW, *SUBLIMINAL: HOW YOUR UNCONSCIOUS MIND RULES YOUR BEHAVIOR* (2012); SHANKAR VEDANTAM, *THE HIDDEN BRAIN: HOW OUR UNCONSCIOUS MINDS ELECT PRESIDENTS, CONTROL MARKETS, WAGE WARS, AND SAVE OUR LIVES* (2010).

113. YEHOASHUA ARIELI, *INDIVIDUALISM AND NATIONALISM IN AMERICAN IDEOLOGY* (1964); ROBERT N. BELLAH ET AL., *HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE* 142–47 (1985); 2 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 98–105 (photo. reprint 1945) (Henry Reeve trans., 1835).

more than the aggregate of individuals' actions. "Because white America's strong belief in 'rugged individualism' has such a long history, public sentiment in the United States favors individual initiative over social and economic structures as an explanation for poverty and welfare."¹¹⁴ Our understanding of racial disparities has long been dominated by this atomistic approach. This has produced two antithetical ways of accounting for racial disparities. The first blames white individuals' intentional racial prejudices. The second condemns individual people of color for being incompetent, ignorant, or lazy. This second understanding assigns blame to individual victims for being morally, culturally, or psychologically flawed. Numerous studies confirm that such stereotypes about people of color persist today.¹¹⁵ The one thing these two disparate explanations have in common is that they are both individual oriented—that is, they assume that individuals have effective control of their lives—and ignore structural forces that shape peoples' chances in life, forces that are beyond the control of individuals.

One of the earliest explorations of structural racism identified this individualist bias with a clarity that has not since been surpassed:

For too long American society has believed in the mythology that social ills are in truth nothing but the aggregate of individual defects. If a black man is unemployed or uneducated or poorly housed, it must be due to some failure to 'achieve' on his part. Or, if we do not directly place blame on his character defects, we suggest that there is some prejudiced employer or inadequate teacher or bigoted realtor who is bringing about the condition Some social ills are not adequately explained by simply alluding to individual defects. There are social ills which are

114. FRAZIER ET AL., *supra* note 70.

115. LAWRENCE BOBO & JAMES R. KLUEGEL, STATUS, IDEOLOGY, AND DIMENSIONS OF WHITES' RACIAL BELIEFS AND ATTITUDES: PROGRESS AND STAGNATION 98 (Steven A. Tuch & Jack K. Martin eds., 1997); FRAZIER ET AL., *supra* note 70, at 58; IAN F. HANEY-LOPEZ, RACISM ON TRIAL: THE CHICANO FIGHT FOR JUSTICE 63–64 (2003); Patricia G. Devine & Andrew J. Elliot, *Are Racial Stereotypes Really Fading? The Princeton Trilogy Revisited*, 21 PERSONALITY & SOC. PSYCHOL. BULL. 1139, 1144 (1995); Joleen Kirschenman & Kathryn M. Neckerman, "We'd Love to Hire Them, But...": *The Meaning of Race for Employers*, in RACE AND ETHNIC CONFLICT: CONTENDING VIEWS ON PREJUDICE, DISCRIMINATION, AND ETHNOVIOLENCE 115, 119 (F. Pincus & H. Ehrlich eds., 1994); Roscigno, *Social Closure*, *supra* note 61, at 42–43; Donald Tomaskovic-Devey & Kevin Stainback, *Discrimination and Desegregation: Equal Opportunity Progress in U.S. Private Sector Workplaces Since the Civil Rights Act*, 609 ANNALS AM. ACAD. POL. & SOC. SCI. 49, 54 (2007).

structured into the very operations of the society, which are inevitable given the institutional arrangements.¹¹⁶

Viewing the problem of racial disparities through an individual-oriented lens limits the scope of solutions to those that are similarly individual oriented. Such solutions include the unproven belief that racial disparities would disappear if only individual whites could overcome their prejudices or if only individual people of color would become more ambitious, more hard-working, more ethical, etc. If we cannot understand the structural causes of racial disparities, we will not be able to see the possibilities of structural solutions.

3. *Belief in Structural Neutrality*

Numerous social scientists have described the third component of structural racism, the apparent neutrality built into social structures that appears on the surface to be neutral, but in fact, affects people of color in harmful ways.¹¹⁷ Our social structures frequently have devastating negative consequences on communities of color, even though the ways in which these structures operate appear neutral on the surface and have no intent to harm. There are several ways in which neutral social structures operate to reproduce racial disparities. First, historical events can be embedded in present circumstances in such a way that processes that otherwise might be neutral act to perpetuate disparate racial outcomes. Race-neutral economic decisions can be detrimental to poor people generally. Because such a high percentage of people of color are poor,¹¹⁸ such

116. KNOWLES & PREWITT, *supra* note 23, at 133.

117. BROWN, *supra* note 23, at 56–57; HANEY-LOPEZ, *supra* note 115, at 132; PAGER, *supra* note 101, at 89; SMITH, *supra* note 59, at 33, 59; Ryan Light et al., *Racial Discrimination, Interpretation, and Legitimation at Work*, 634 ANNALS AM. ACAD. POL. & SOC. SCI. 39, 39–40, 43, 52, 56 (2011); Nelson et al., *supra* note 16, at 107; Pager & Shepherd, *supra* note 23, at 195; Pincus, *supra* note 28, at 85; Reskin, *supra* note 24, at 12; Roscigno, *Power, Revisited*, *supra* note 24, at 357–61, 364–65; Roscigno, *Social Closure*, *supra* note 61, at 28–29; Wilson, *supra* note 24, at 225; NAT'L RESEARCH COUNCIL, *supra* note 32, at 63–69.

118. In 2011, the percentage of blacks aged 18 to 64 years old that were below poverty was 24.1%. U.S. CENSUS BUREAU, HISTORICAL POVERTY TABLES—PEOPLE, TABLE 3: POVERTY STATUS OF PEOPLE, BY AGE, RACE, AND HISPANIC ORIGIN: 1959 TO 2011, *available at* <http://www.census.gov/hhes/www/poverty/data/historical/people.html> [<http://perma.cc/7R3Q-XVDQ>] (archived Apr. 10, 2014). In 2010, the poverty rate for black children, 38.2%, was twice as high as that for white children, 17%. U.S. CENSUS BUREAU, CHILD POVERTY IN THE UNITED STATES 2009 AND 2010: SELECTED RACE GROUPS AND HISPANIC ORIGIN 3–4 (2011), *available at* <http://www.census.gov/prod/2011pubs/acsbr10-05.pdf> [<http://perma.cc/4587-EGGS>] (archived Apr. 10, 2014).

decisions also have adverse racial consequences.¹¹⁹ For example, because of historical racial segregation, the seemingly neutral policy of financing public schools primarily through local private property taxes has a racially differential effect resulting from the wealth disparities between taxing districts.¹²⁰ Second, decisions made on purely economic grounds can produce racial disparities, as when grocery store chains decide not to locate stores in poorer neighborhoods, contributing to neighborhood food environments that provide challenges to healthy eating, in turn contributing to higher risk of obesity, cardiovascular disease, and diabetes.¹²¹ Similarly, decisions made for non-racial public policy reasons can inadvertently have racial outcomes, such as including an incarcerated population in the census district in which the prison is located instead of the inmates' home districts, resulting in overrepresentation of some white rural communities and underrepresentation of communities of color in state legislatures.¹²²

Lastly, internal organizational processes can also have negative racial outcomes, even though the intent of organizational actors is to be neutral.¹²³ Organizations provide "contexts in which ostensibly race-neutral policies can structure and reinforce existing social inequalities."¹²⁴ Organizational policies and procedures, while intended to be neutral, nevertheless allow for discretionary judgment on the part of supervisors. As described above, unconscious prejudices affect everyone. Unconscious prejudices on the part of supervisors can result in "disparate policing of minority employees"

119. PAGER, *supra* note 101, at 89.

120. KOZOL, *supra* note 25, at 5–55; Kelly, *supra* note 25, at 397.

121. For more information on constraints on grocery store chain location, see FOOD MKTG. INST., ACCESS TO HEALTHIER FOODS: OPPORTUNITIES AND CHALLENGES FOR FOOD RETAILERS IN UNDERSERVED AREAS (2011), available at http://www.fmi.org/docs/health-wellness-research-downloads/access_to_healthier_foods.pdf?sfvrsn=2 [<http://perma.cc/BSM9-773X>] (archived Apr. 10, 2014). For insight on how low-income neighborhood food environments provide challenges to healthy eating, see L.B. Lewis et al., *African Americans' Access to Healthy Food Options in South Los Angeles Restaurants*, 95 J. PUB. HEALTH 668 (2005); Deja Hendrickson et al., *Fruit and Vegetable Access in Four Low-Income Food Deserts Communities in Minnesota*, 23 AGRIC. & HUM. VALUES 371 (2006); R.E. Walker et al., *Disparities and Access to Healthy Food in the United States: A Review of Food Deserts Literature*, 16 HEALTH & PLACE 876 (2010). For information on how unhealthy neighborhood food environments put residents at risk for obesity, see Russ P Lopez, *Neighborhood Risk Factors for Obesity*, 15 OBESITY 2111 (2007); Kai A Schafft et al., *Food Deserts and Overweight Schoolchildren: Evidence from Pennsylvania*, 74 RURAL SOC. 153 (2009).

122. ALEXANDER, *supra* note 67, at 193.

123. William T. Bielby, *Minimizing Workplace Gender and Racial Bias*, in 29 CONTEMPORARY SOCIOLOGY 120, 123–24 (2000); SMITH, *supra* note 59, at 33.

124. Pager & Shepherd, *supra* note 23, at 199.

who are watched “more closely and sanctioned more often and severely” than whites.¹²⁵ Such targeted workplace bullying is often a matter of following organizational procedures.¹²⁶

Likewise, unconscious prejudices are embedded in “assumptions regarding dependability, presentability, communication skills, and work ethic,” and employers using ostensibly neutral criteria in hiring and promotion decisions exercise subjective discretion as they “invoke a relatively flexible set of filters for ‘who fits the job best’ and ‘who might be best for the promotion.’”¹²⁷ Because Vincent J. Roscigno repeatedly found superficially neutral organizational policies that result in significant racial disparities, he wrote that we should “reconsider foundational assumptions of much sociological work relative to structure and agency, [and] the supposed neutrality of bureaucratic organizational forms.”¹²⁸

Just as with internal organizational processes, entire social domains can depend on supposedly neutral processes and procedures that negatively affect people of color and advantage whites. We will provide examples of this in the social domain of the law in our discussion of the 1989 cases in Part III.

4. *White Advantage and White Normativity*

When white Americans do become aware of racial disparities, they perceive people of color to be “disadvantaged” relative to some neutral social norms. Thus we speak of “racial disadvantage” or “underprivileged” to describe racial disparities. But the opposite side of the disadvantaged/underprivileged coin is advantaged/privileged.¹²⁹ Sociologist Peggy McIntosh wrote, “As a white person, I realized I had been taught about racism as something which puts others at a disadvantage, but had been taught not to see one of its corollary

125. Roscigno, *Social Closure*, *supra* note 61, at 28, 41.

126. *Id.* at 41.

127. *Id.* at 31, 41.

128. Roscigno, *Power, Revisited*, *supra* note 24, at 360.

129. The word “privilege” can suggest conscious intent; it thereby provokes strong negative reactions that interfere with dialogue and understanding across race lines. The resulting swarm of uncomfortable connotations, including guilt and self-justification, often prevents whites from considering the advantage–disadvantage dichotomy. For these reasons, we use the phrase white advantage, though the phrase “white privilege” is more commonly encountered. See HALLEY ET AL., *SEEING WHITE: AN INTRODUCTION TO WHITE PRIVILEGE AND RACE* (2011); PAULA S. ROTHENBERG, *WHITE PRIVILEGE: ESSENTIAL READINGS ON THE OTHER SIDE OF RACISM* (2008). The current controversy over “check your privilege” nicely illustrates the perils of attributing privilege. Marc Santora & Gabriel Fischer, *At Princeton, Privilege is: (a) Commonplace, (b) Misunderstood or (c) Frowned Upon*, N.Y. TIMES, May 2, 2014, at A15.

aspects, white privilege which puts me at an advantage.”¹³⁰ McIntosh describes white advantage as “an invisible weightless knapsack of special provisions, maps, passports, codebooks, visas, clothes, tools and blank checks” that she can count on cashing in every day.¹³¹

A simple, everyday example of disadvantage for people of color—and of corresponding advantage for whites—is the underlying assumptions about skin color in “nude” hosiery, in adhesive bandages, and in crayons labeled “flesh.” Such products match European rather than African skin tones. For whites, finding products that do match their skin color is so common, so natural and appropriate, that it seems normal, and it never occurs to them that it is an advantage. Conversely, people of color may be reminded that their skin color is not considered “normal” every time they seek products that approximate their own. This white advantage is difficult for whites to see because for them it is normal.

Another example of white normativity involving skin color can be seen in the text accompanying a picture of First Lady Michelle Obama wearing a gown designed for a White House state dinner in November 2009, which was widely disseminated in print media. The dress designer initially described the gown’s color as “nude,” while the Associated Press referred to it as “flesh” colored.¹³² But accompanying pictures in news stories offered stark visual evidence of the underlying misassumption that white skin should be the default or norm. In response to reader objections to this assertion of white normativity, subsequent descriptions employed truly race-neutral terms like “peach-toned” or “champagne” to describe the gown’s color.¹³³

This unrecognized sense of normality contributes to the invisibility of white advantage and thus of structural racism. While these simple examples of unthinking media bias do not account for the great variety of racial disparities, they do convey the assumption of normality entertained unthinkingly by most whites in other areas. More egregious consequences flow from assumptions that all-white schools, workplaces, neighborhoods, and churches are “normal.”

130. Peggy McIntosh, *White Privilege: Unpacking the Invisible Knapsack*, 49 INDEP. SCH. MAG. 31, 31 (1990).

131. *Id.*

132. See Lisa Wade, *Stunning Example of the Neutrality of Whiteness*, SOC’Y PAGES (Nov. 27, 2009, 10:58 AM), <http://thesocietypages.org/socimages/2009/11/27/stunning-example-of-the-neutrality-of-whiteness> [<http://perma.cc/JZZ6-XBDU>] (archived Apr. 10, 2014); Dodai Stewart, *Why A “Nude” Dress Should Really Be Called “Champagne” Or “Peach”*, JEZEBEL (May 17, 2010, 2:00 PM), <http://jezebel.com/5540784/why-a-nude-dress-should-really-be-called-champagne-or-peach> [<http://perma.cc/583E-BEFY>] (archived Apr. 10, 2014).

133. Wade, *supra* note 132; Stewart, *supra* note 132.

Structural factors invariably ensure that such all-white institutions are significantly better resourced, yet whites generally are not aware of their advantaged positions.

More examples of white advantage come from McIntosh's invisible knapsack and relate to employment: being able to take a job with an affirmative action employer without having coworkers suspect that the hiring was because of race; having a bad day at work and not wondering whether each negative episode has racial overtones; doing well in a challenging work situation without being called "a credit to your race"; not being expected to speak for all the people of your racial group; when pulled aside by the boss, knowing you have not been singled out because of your race; leaving work meetings feeling that you are a welcome member of a team rather than feeling isolated, out-of-place, outnumbered, unheard, held at a distance, or feared; or making occasional mistakes at work without having them attributed to the bad morals, ignorance, or illiteracy of your race.¹³⁴

5. Colorblindness

Colorblindness, the fifth component of structural racism, is an aspiration based on the belief that everyone, white people as well as people of color, should not care about race, or even notice it, in our dealings with each other.¹³⁵ At the individual level, this is admirable, and most people do try to treat others with equal respect.

Although this may be a commendable personal goal, it cannot end racial disparities for two reasons. First, the evidence presented by psychologists described above indicates that our conscious intent cannot override our unconscious programming. Second, colorblindness actually fuels structural racism because it keeps us from noticing racial disparities and their structural causes. Colorblindness "white-washes" the racial status quo because white people of goodwill who understand racism only as intentional prejudice may exempt themselves from responsibility for their participation in the structural system by taking comfort in their own benevolent attitudes toward people of color.¹³⁶ Sociologists and psychologists have demonstrated that a purposeful intent to discriminate is a narrow and unrealistic view of the reality of racism.¹³⁷ A purposeful intent *not* to discriminate—that is, to be

134. McIntosh, *supra* note 130.

135. See BONILLA-SILVA, RACISM WITHOUT RACISTS, *supra* note 23, at 3–4.

136. BROWN, *supra* note 23, at 64.

137. See *supra* note 74 and authorities cited therein; *supra* note 82 and authorities cited therein.

colorblind—is a similarly narrow and unrealistic view of how to combat racism. Colorblindness as an approach to end racism cannot succeed because it encourages people to act only at an individual level and thereby blinds them to their organizational and social roles in perpetuating structural racism.

The colorblindness ideal leads to socially destructive extremes. If we try to be blind to race, we may then try not to talk about race or consciously use race in our thinking. The result is that the colorblind ideal avoids the use of race even to counteract racial inequality (such as hiring practices that aim for equal opportunity or the collection of racial data in the Census). But racism is implicated in any action that sustains racial hierarchy and racial inequality, whether it involves injuring people of color or favoring whites. Avoiding thoughts about race in an effort to be completely colorblind is in reality, therefore, paradoxically racist, perhaps inadvertent but all the more effective for that.

President John F. Kennedy once said, “[T]he great enemy of truth is very often not the lie—deliberate, contrived and dishonest—but the myth—persistent, persuasive, and unrealistic.”¹³⁸ Kennedy aptly described the situation facing us as we struggle to attain racial equality. The myth of colorblindness is the great enemy of racial equity. On its face, colorblindness seems like a morally appropriate response. In reality, colorblindness is a powerful myth that keeps structural racism firmly in place.

6. Invisibility

The structural arrangements that perpetuate racial disparities are so embedded within the social infrastructure that they appear normal and thus effectively invisible to someone who does not know how to look for them. Thus, the fact that they produce racial inequalities goes unnoticed. Because of the high levels of segregation in housing and the workplace in our society,¹³⁹ white Americans are generally

138. John F. Kennedy, Commencement Address, Yale University (June 11, 1962), available at <http://millercenter.org/president/speeches/detail/3370> [<http://perma.cc/CQQ3-TLBC>] (archived Apr. 10, 2014). Kennedy went on to say, “Too often we hold fast to the clichés of our forebears. We subject all facts to a prefabricated set of interpretations. . . . We enjoy the comfort of opinion without the discomfort of thought.”

139. See U.S. CENSUS BUREAU, AMERICAN HOUSING SURVEY FOR THE UNITED STATES: 2011 (2013), available at <http://www.census.gov/content/dam/Census/programs-surveys/ahs/data/2011/h150-11.pdf> [<http://perma.cc/9VKX-6FLJ>] (archived May 18, 2014); see generally Judith K. Hellerstein & David Neumark, *Workplace Segregation in the United States: Race, Ethnicity, and Skill*, 90 REV. ECON. & STAT. 459 (2008).

not exposed to racial disparities in their day-to-day lives and are thus often unaware of the extensive harm caused to people of color. Therefore, white Americans can believe that the playing field is level, while Americans of color know keenly that is not the case. People tend to ignore issues that do not negatively impact their own lives. Racial issues are usually not salient for white people, so they disregard racial issues and assume that those issues are not important.

Each of the facets of structural racism contributes to its invisibility and thus to its perpetuation. The obsolete and deeply flawed idea that racism is exclusively a product of intent allows structural racism to escape notice.¹⁴⁰ Individualism prevents us from noticing social structures.¹⁴¹ Belief in the neutrality of social structures enables those structures to perpetuate racially disparate outcomes.¹⁴² The normativity of white advantage keeps it invisible.¹⁴³ Colorblindness and its current incarnation, post-racialism,¹⁴⁴ share a false belief that the playing field is now level, thus keeping us from comprehending the reality of severe racial disparities in quality of life and seducing us into believing that race-based decision-making or race-based remedies are unnecessary.¹⁴⁵ All of these facets contribute to the invisibility of structural racism, and the invisibility in turn contributes to its perpetuation.¹⁴⁶

B. Structural Racism in the Employment Context

Because structural racism is pervasive yet unseen, a detailed (though non-exhaustive) review of how it functions in one particular social domain, employment, is both necessary and useful to demonstrate how it simultaneously privileges whites and operates to exclude or impede blacks' access to its benefits. We will review examples that occur within organizations, as well as instances of structural racism that occur in the recruitment process, the hiring process, and that continue once people are on the job.

140. *See supra* Part II.A.1.

141. *See supra* Part II.A.2.

142. *See supra* Part II.A.3.

143. *See supra* Part II.A.4.

144. Sumi Cho, *Post-Racialism*, 94 IOWA L. REV. 1589, 1595 (2009).

145. *See supra* Part II.A.5.

146. *See supra* Part II.A.6.

*1. Information About Job Opportunities Is Disseminated
Primarily Through Social Networks*

Many people obtain jobs through social contacts such as relatives, friends, and acquaintances. Because of widespread segregation in American society (residential, educational, occupational, and social), people of color are less likely to hear about job openings because white social networks have few connections with black ones and vice versa.¹⁴⁷ Recruiting new workers via word-of-mouth through friends and friends-of-friends has a racial impact yet is “passive and unobtrusive. One need not be a racist to use one’s position to benefit friends and acquaintances.”¹⁴⁸ A natural inclination toward bias in favor of one’s “ingroup” has as its correlative a disinclination to take chances on hiring a member of an “outgroup.”¹⁴⁹ “Being white is a resource in the sense that it provides access to a segregated network of information, trust, and privilege,” Steven Shulman wrote.¹⁵⁰ Because whites and blacks live in largely segregated neighborhoods and move in different social circles (fraternal and civic organizations, bowling leagues, churches, garden clubs, sports teams, and other private associations), “they have different access to information about jobs, most of which is circulated informally. Furthermore, they have differential access to those in charge of allocating jobs, almost all of whom are white.”¹⁵¹

*2. Information About Job Opportunities Is Disseminated
Selectively*

Even when employers expand their recruitment efforts beyond social networks, they may undertake selective recruitment practices to avoid targeting populations they believe to consist of less

147. Nelson et al., *supra* note 16, at 111; BROWN, *supra* note 23, at 18; Trond Peterson et al., *Offering a Job: Meritocracy and Social Networks*, 106 AM. J. SOC. 763, 810 (2000); Shulman, *The Causes of Black Poverty*, *supra* note 61, at 1011–12; Pager & Shepherd, *supra* note 23, at 196; BIELBY, *supra* note 123, at 120; Eric Grodsky & Devah Pager, *The Structure of Disadvantage: Individual and Occupational Determinants of Black-White Wage Gap*, 66 AM. SOC. REV. 542, 563 (2001); DEIRDRE ROYSTER, RACE AND THE INVISIBLE HAND: HOW WHITE NETWORKS EXCLUDE BLACK MEN FROM BLUE-COLLAR JOBS (2003).

148. BROWN, *supra* note 23, at 18.

149. Susan T. Fiske, *What We Know About the Problem of the Century: Lessons from Social Science to the Law, and Back*, in HANDBOOK OF EMPLOYMENT DISCRIMINATION RESEARCH: RIGHTS AND REALITIES 59, 61 (L. B. Nielsen & R. L. Nelson eds., 2005).

150. Shulman, *The Causes of Black Poverty*, *supra* note 61, at 1011–12.

151. *Id.* at 1011–12.

desirable workers. These selective recruitment practices consist of advertising only in suburban neighborhood papers and avoiding metropolitan newspaper advertisements, posting job notices only at suburban or private schools, and avoiding recruitment through state employment and welfare programs.¹⁵²

3. Candidate Requirements Structurally Discriminate When Unrelated to Necessary Job Skills

When a job can be performed successfully by a person without a college degree and there is no direct connection between a college education and the skills required for the job, the requirement that an employee have a college degree discriminates against people of color, who are less likely to have one.¹⁵³ Similarly, requiring previous job experience can screen out people of color in industries historically dominated by whites.¹⁵⁴ Requiring good credit histories of job applicants structurally discriminates against people of color who are more likely to have faced financial obstacles in trying to pay bills or have not been able to build up credit histories because of other structurally discriminatory practices.¹⁵⁵

4. Stereotypes About Group Characteristics Affect Perceptions of Job Candidates

Most whites perceive people of color through a filter of unconscious assumptions (described above as unconscious bias) about dependability, presentability, communication skills, and work ethic.¹⁵⁶ For example, blacks are viewed as different from whites in terms of language skills.¹⁵⁷

White job applicants often fare better than job applicants of color with equivalent credentials. One well-known study, where fictitious resumes randomly assigned with African-American- or white-sounding names were sent to help-wanted ads in Boston and

152. Kathryn M. Neckerman & Joleen Kirschenman, *Hiring Strategies, Racial Bias, and Inner-City Workers*, 38 SOC. PROBLEMS 433, 438 (1991).

153. Pincus, *supra* note 28, at 84–85.

154. Bielby, *supra* note 123, at 122.

155. John W. Schoen, *Bad Credit Sidelines Some Jobless Workers: Temporary Financial Setback Can Be a Long-Term Barrier*, NBC NEWS (Feb. 23, 2010, 8:07 AM), http://www.msnbc.msn.com/id/35512038/ns/business-eye_on_the_economy [<http://perma.cc/8WJ2-DC8N>] (archived Apr. 10, 2014).

156. Roscigno, *Social Closure*, *supra* note 61, at 31.

157. TREPAGNIER, *supra* note 75, at 24–30 (listing and discussing various racial stereotypes). It was this problem—whites' doubts about blacks' communications aptitudes—that provided the factual background for *Washington v. Davis*, 426 U.S. 229, 232–36 (1976). See *infra* Part III.

Chicago newspapers, found that white names received 50% more callbacks for interviews.¹⁵⁸ The racial gap in this study was consistent across occupation, industry, and employer size.¹⁵⁹ In a similar study with similar results, racially different job applicants, who were matched on demographic characteristics and interpersonal skills and given equivalent resumes, were sent to apply in tandem for hundreds of entry-level jobs: White testers received callbacks and job offers twice as often as black testers.¹⁶⁰ Recent studies demonstrate that unconscious prejudices play a role in screening job applicants¹⁶¹ and interviewing them.¹⁶² Yet other studies have incorporated the Implicit Association Test as part of the research methodology along with the evaluation of resumes, thereby documenting the role of unconscious bias in screening.¹⁶³ “Given that many hiring decisions are presumably based on ‘gut-feelings’, implicit attitudes and stereotypes, more so than their explicit counterparts, may exert a substantial impact on how employers contemplate and make decisions regarding human resources.”¹⁶⁴

5. Once in the Labor Force, People of Color Experience Discomfort and Stress Through the Social Relations They Experience on the Job

Sociologist Vincent Roscigno describes examples of derogatory name-calling, racial slurs, racial jokes, harassment that may or may not be explicitly racial, or refusal to provide resources with which to accomplish the job that are provided to whites in the same position.¹⁶⁵ Such behavior “isolates minority employees in their

158. Bertrand & Mullainathan, *supra* note 68, at 991.

159. *Id.*

160. Devah Pager et al., *Discrimination in a Low-Wage Labor Market: A Field Experiment*, 74 AM. SOC. REV. 777, 777 (2009).

161. Eva Derous et al., *Hiring Discrimination Against Arab Minorities: Interactions Between Prejudice and Job Characteristics*, 22 HUM. PERFORMANCE 297, 312 (2009).

162. Sharon L. Segrest Purkiss et al., *Implicit Sources of Bias in Employment Interview Judgments and Decisions*, 101 ORG. BEHAV. & HUM. DECISION PROCESSES 152, 165 (2006).

163. Dan-Olof Rooth, *Automatic Associations and Discrimination in Hiring: Real World Evidence*, 17 LAB. ECON. 523, 529 (2010); Geoffrey Beattie et al., *An Exploration of Possible Unconscious Ethnic Biases in Higher Education: The Role of Implicit Attitudes on Selection for University Posts*, 197 SEMIOTICA 171, 171 (2013); Lieselotte Bloommaert et al., *Implicit and Explicit Interethnic Attitudes and Ethnic Discrimination in Hiring*, 41 SOC. SCI. RESEARCH 61, 69 (2012).

164. Jens Agerstrom & Dan-Olof Rooth, *Implicit Prejudice and Ethnic Minorities Arab-Muslims in Sweden*, 30 INT’L J. OF MANPOWER 43, 43 (2009).

165. Roscigno, *Social Closure*, *supra* note 61, at 34.

workplaces, undermines their capacity to perform their jobs properly, and impacts their sense of dignity in quite meaningful ways. Moreover, it reifies racial hierarchy on a daily basis, and in ways seldom captured by standard analyses of racial inequalities at work.¹⁶⁶

These behaviors may be instances of overt racism directed at people of color in the workplace, but the structural impact arises in several ways. For example, diminished job satisfaction may lead to reduced job performance, which may affect promotion opportunities for the workers of color.¹⁶⁷ Reduced job performance by workers of color may impact the efficiency and effectiveness of the organization as a whole. Structural implications also arise when the employer does not have appropriate or adequate procedures in place to prevent such behaviors and discipline offenders.

At times, behaviors intended to be positive can be rooted in negative racial assumptions, such as perceiving the competent job performance of an employee of color as remarkable or offering ample praise to subordinates of color while simultaneously withholding raises and promotions.¹⁶⁸ Workplace incidents seen as patronizing disempower workers of color.¹⁶⁹ If employees rebuff what was meant as a generous gesture, they may be seen as difficult or even as troublemakers.¹⁷⁰ If they stay silent about what they see as patronizing behavior, they suffer emotional stress.¹⁷¹ That stress, in turn, may be a factor in the greater turnover in more diverse work groups.¹⁷²

6. Social Networks Constrain Job Performance

In addition to the impact of network communication about job openings described above, social networks also affect people once they are on the job. Segregation of social networks within the workplace reduces informal information sharing, which is important for newcomers in the workplace for achievement and success.¹⁷³ Such segregation also restricts access for people of color to informal

166. *Id.*

167. TREPAGNIER, *supra* note 75, at 66.

168. *See id.* at 64–79.

169. *See id.*

170. *See id.*

171. *See id.*

172. *Id.* at 79.

173. *Id.* at 66.

mentoring, contacts, and relevant knowledge important for advancement.¹⁷⁴

7. Employers Sometimes Apply Seemingly Neutral Workplace Policies in a Differential Manner

Roscigno refers to the application of neutral workplace policies in a differential manner as “disparate policing of minority employees” and gives these examples: A black employee was given a poor performance review for breaking cutters at a metal manufacturing facility but white workers had not been held accountable for the same infraction; a black worker was fired for taking a break in a restricted area when other employees routinely took breaks in the same place; a black employee was demoted for unauthorized use of a company vehicle when all other employees signed out vehicles in the same way for more than 20 years without any discipline.¹⁷⁵

8. Supervisors Often Exercise Decision-Making Power Based on Subjective Assessments

In the same way that unconscious negative assumptions affect perceptions of job candidates, they can also affect subjective assessments of employees of color, thereby reducing the chances of promotion. Supervisors are the “gatekeepers” of the workplace and wield considerable influence on the careers of subordinates.¹⁷⁶ A white manager charged with selecting “management material” who promotes whites with less experience and seniority to managerial positions may well be relying on these unconscious assumptions about potential or competence.¹⁷⁷ Tristin Green eloquently describes the role of unconscious prejudice: “It creeps into everyday impressions of worth and assignment of merit on the job, lurking constantly behind even the most honest belief in equality, perpetuating the very injustice that we decry.”¹⁷⁸

174. Pager & Shepherd, *supra* note 23, at 196; Herminia Ibarra, *Personal Networks of Women and Minorities in Management: A Conceptual Framework*, 18 ACAD. MGMT. REV. 56, 56 (1993).

175. Roscigno, *Social Closure*, *supra* note 61, at 28–30.

176. Barbara F. Reskin & Irene Padavic, *Supervisors as Gatekeepers: Male Supervisors’ Response to Women’s Integration in Plant Jobs*, 35 SOC. PROBLEMS 536, 536 (1988).

177. Roscigno, *Social Closure*, *supra* note 61, at 31.

178. Green, *supra* note 72, at 91.

9. *The Seniority System Can Structurally Recreate an Organization's White Workforce Through Lay-Offs*

Because people of color are often among those most recently hired and are not among employees with greater seniority, they are among those who are first laid off.¹⁷⁹ Last-hired-first-fired impacts them disproportionately. The seniority system most affects people of color in organizations with a history of exclusion accompanying recent efforts aimed at inclusion.¹⁸⁰ One of the principal cases considered in Part III, *Wygant v. Jackson Board of Education*, involved just this problem, and the facts of that case provide a textbook example of how structural racism operates without malignant intent on anyone's part.¹⁸¹ Seniority-related issues provide much of the fodder for the innumerable white firefighters' suits that have become a major vehicle for challenging affirmative action programs.¹⁸²

Countless instances of all the above examples of structural racism in the domain of employment occur in organizations across the country. Structural racism in other social domains reduces employment opportunities even further.

10. *Job Opportunities Are Often Lost Because of Incarceration*

Due to structural racism in the justice system, blacks are imprisoned at rates that far exceed their representation in society overall.¹⁸³

Nearly 60% of the prison and jail population is African American or Latino, far out of proportion to their overall share of the national population [I]f current trends continue, one in three black males born today can expect to go to prison in his lifetime, as can one in six Latino males.¹⁸⁴

Among the factors contributing to the extreme racial disparities in incarceration is the impact of supposedly race neutral policies. "[W]hile greater involvement in some crimes is related to higher rates of incarceration for African Americans, the weight of the evidence to date suggests that a significant proportion of the

179. Bielby, *supra* note 123, at 123.

180. SMITH, *supra* note 59, at 60–61.

181. See *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274 (1986).

182. See, e.g., *Martin v. Wilks*, 490 U.S. 755 (1989).

183. ALEXANDER, *supra* note 67, at 6.

184. Marc Mauer, *Two-Tiered Justice: Race, Class, and Crime Policy*, in *THE INTEGRATION DEBATE: COMPETING FUTURES FOR AMERICAN CITIES* 169, 170 (Chester Hartman & Gregory D. Squires eds., 2010).

disparities we currently observe is not a function of disproportionate criminal behavior.”¹⁸⁵

The high incarceration rate of black and Latino males means that while incarcerated, they are not developing resumes through work experiences and are missing educational opportunities that may have been stepping stones to employment. They are not in the pipeline to take on positions of further responsibility in those occupations in the future. In addition to extended absence from routines of work and skill building, lengthy exposure to the physical and psychological trauma prevalent in prison environments affects an individual’s ability to work.¹⁸⁶ Incarceration disrupts social and family ties, which are crucial to finding a job, and employment opportunities are greatly diminished because of overt institutional policies and employer assumptions.¹⁸⁷

11. Lack of Education Credentials Diminishes Job Opportunities

Structural racism in education has resulted in a substantial racial disparity in high school graduation¹⁸⁸ and dropout rates.¹⁸⁹ Racial disparities in income levels affect the percentage of high school graduates who can afford to go to college. Both impact the racial disparity in education credentials of people looking for employment.

12. Suburbanization Puts Jobs Out of Reach

“Relocation of employment opportunities to the suburbs created a spatial mismatch between inner-city minorities and outer-city jobs.”¹⁹⁰ Disinvestment and accompanying lack of retail business in

185. MARC MAUER, RACIAL DISPARITIES IN THE CRIMINAL JUSTICE SYSTEM, TESTIMONY PREPARED FOR THE HOUSE JUDICIARY SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY 3 (2009), *available at* http://www.sentencingproject.org/doc/publications/rd_mmhousetestimonyonRD.pdf [<http://perma.cc/7DGQ-A7YG>] (archived Apr. 10, 2014). *See* ALEXANDER, *supra* note 67.

186. PAGER, *supra* note 101, at 31. (“Incarceration may further damage an individual’s ability to work through prolonged exposure to physical or psychological trauma endemic to prison environments.”).

187. PAGER, *supra* note 101, at 37–39.

188. For information on high school graduation rates, see *supra* note 35.

189. Dropout rates for 2009–2010: for American Indian/Alaska Native, 6.7; Asian/Pacific Islander, 1.9; Hispanic, 5.0; Black, 5.5; White, 2.3. NAT’L CTR. FOR EDUC. STATISTICS, TABLE 6 PUBLIC SCHOOL GRADUATES AND DROPOUTS FROM THE COMMON CORE OF DATA: SCHOOL YEAR 2009-10, *available at* http://nces.ed.gov/pubs2013/2013309/tables/table_06.asp [<http://perma.cc/SC7W-27QF>] (archived Apr. 10, 2014).

190. FRAZIER ET AL., *supra* note 70, at 58. *See also* Michael A. Stoll et al., *Within Cities and Suburbs: Racial Residential Concentration and the Spatial*

communities of color greatly reduce accessible job opportunities. Structural racism in transportation exacerbates the difficulty of physically getting to work when a job is found: Automobile ownership is lower in poor neighborhoods because of cost, and public transportation is often underfunded, inadequate, and stressed by high demand.¹⁹¹

These examples of structural racism in employment demonstrate multiple ways in which social structures operate to produce racial disparities in employment that do not necessitate intentional, individual racism.

III. THE SUPREME COURT AND STRUCTURAL RACISM IN EMPLOYMENT

Ivan Bodensteiner considers the Supreme Court itself to be “the major barrier to racial equality” in America today.¹⁹² Girardeau Spann believes that “[t]he [Roberts] Court wants to preserve existing racial inequalities.”¹⁹³ At first, such judgments seem harsh and extravagant, but sober reflection in the light of the analysis below only confirms them.

Since 1971, the U.S. Supreme Court has promulgated doctrines in the field of workplace discrimination that make it impossible for the justices to see structural racism, much less take it into account in formulating doctrine. As a rough index of the Court’s myopia, a Westlaw search undertaken on March 3, 2014, disclosed that the phrase “structural racism” has never appeared in the opinions of the United States Supreme Court. Nor do the synonymic phrases “aversive racism,” “structural discrimination,” or “systemic racism” make an appearance in its opinions.¹⁹⁴ Lest we conclude that this merely reflects the lack of awareness of social science findings in legal scholarship generally, we should note that the search turned up 350 law review hits for the same phrase, “structural racism,” along

Distribution of Employment Opportunities Across Sub-metropolitan Areas, 19 J. POLICY ANALYSIS & MANAGEMENT 207 (2000).

191. BULLARD ET AL., *supra* note 65.

192. Ivan E. Bodensteiner, *The Supreme Court as the Major Barrier to Racial Equality*, 61 RUTGERS L. REV. 199, 199 (2009).

193. Girardeau A. Spann, *The Conscience of a Court*, 63 U. MIAMI L. REV. 431, 432, 449 (2009) (“I have been driven to the conclusion that the Supreme Court, as a matter of conscience, considers racial discrimination to be good for America. That conclusion offers the only plausible account of the Court’s repeated insistence on displacing populist efforts to promote racial equality with the Court’s own, more-regressive, version of expedient racial politics.”).

194. The sole exception, a reference to “institutional racism” by Justice Thomas, is discussed *infra* note 198.

with 219 for “aversive racism,” 407 for “systemic racism,” and 1,185 for “institutional racism.”

In addition, the U.S. Supreme Court has promulgated doctrines in the field of workplace discrimination that:

- lead it to explicitly, resolutely reject what it call “societal discrimination” as a basis for legal relief;
- ignore entirely the problem of implicit bias;
- invent doctrines like the purpose–impact distinction that ensconce structural racism as legally protected and invulnerable to challenge, so that for constitutional analysis, the justices recognize only intent, not effects;
- adopt the perpetrator’s perspective rather than the victim’s;
- make judging in the new order formalistic and frequently acontextual;
- denounce relief aimed at groups and mandate individual-based remedies; and
- disable other institutions, like Congress and the states, from eradicating structural racism.

This has resulted in an inversion of the fundamental values of the Civil Rights Era into a witches’ Sabbath of equal protection doctrine.¹⁹⁵ The Court’s new reading shields racially discriminatory effects from constitutional challenge, while the justices condemn efforts to achieve true equality and racial justice by taking race into account as violative of equal protection. Where the Equal Protection Clause of the Fourteenth Amendment was originally meant to protect blacks and other people of color from oppression, the Court now deploys it to protect whites from threats to white advantage.

Since 1971, the justices have been extraordinarily obtuse in matters of race, particularly structural racism. Most of them do not recognize or acknowledge it.¹⁹⁶ The Court’s majority has unfailingly protected structural racism in cases where it has been challenged, especially those involving workplace discrimination. The members of the conservative bloc, Chief Justices William H. Rehnquist and John Roberts, Justices Antonin Scalia, Sandra Day O’Connor, Lewis Powell, Clarence Thomas, and Samuel Alito, have gone out of their way to confirm the legitimacy of all instances of structural racial inequality. They seem to be disciples of Justice Felix Frankfurter, who opined that the “Constitution does not require legislatures to

195. A musical analogy may be suggestive to some: This inversion of values is like the degeneration of the beloved motif, the *idée fixe*, in the first movement of Berlioz’s “Symphonie Fantastique” into the grotesque, hideous parody of itself in the fifth movement.

196. The exceptions were Justices William J. Brennan, Thurgood Marshall, the later Harry Blackmun, and David Souter, with Ruth Bader Ginsburg, John Paul Stevens, and Stephen Breyer frequently joining in.

reflect sociological insight, or shifting social standards.”¹⁹⁷ Justice Clarence Thomas has mocked those who seek to devise legal remedies for institutional or structural racism as “conspiracy theorists.”¹⁹⁸

A landmark moment occurred when the Court first encountered the related problem of affirmative action in university admissions. In his solo opinion in *Regents v. Bakke*, Justice Lewis Powell dismissed “societal discrimination” (his phrase for structural racism) as “an amorphous concept of injury that may be ageless in its reach into the past.”¹⁹⁹ (Why antiquity should justify an injustice he did not bother to explain.) He doubled down on that dismissive attitude in *Wygant v. Jackson Board of Education*, insisting that “this Court never has held that societal discrimination alone is sufficient to justify a racial classification.”²⁰⁰ As a justification for redress, he said, it is “insufficient and over expansive.”²⁰¹ Justice Sandra Day O’Connor repeatedly rejected “societal discrimination” as a basis for relief in *Richmond v. Croson*.²⁰² Chief Justice John Roberts capped this refusal to recognize structural racism as a legitimate subject of the Court’s concern in *Parents Involved in Community Schools v. Seattle School District* by insisting with as much finality as he could muster that “assertions of general societal discrimination are plainly insufficient.”²⁰³ These tiresomely redundant claims miss the point, perhaps intentionally. Admittedly, generalized racist attitudes at large “out there” cannot be a basis for relief, even for a clearly proven wrong. But structural racism is something else altogether: a proven social reality that harms millions of Americans every day in ways that are obvious and have been demonstrated beyond cavil in the literature of social science.²⁰⁴ The Court has thereby placed itself in the untenable position of rejecting an understanding that for four decades has commanded unanimity among social scientists, has been validated countless times by empirical studies as we have

197. *Goesaert v. Cleary*, 335 U.S. 464, 466 (1948) (dictum).

198. *Grutter v. Bollinger*, 539 U.S. 306, 377 (2003) (Thomas, J., concurring) (denouncing affirmative action in law school admissions because it might “confirm the conspiracy theorist’s belief that ‘institutional racism’ is at fault for every racial disparity in our society”).

199. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 307 (1978).

200. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274 (1986). *See infra* notes 258–288.

201. *Wygant*, 476 U.S. at 276.

202. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 471, 473, 497, 499 (1989).

203. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 755 (2007).

204. *See supra* Part II, note 23.

demonstrated at length in Part II, and identifies the principal form of racial discrimination in American society today.

What can account for this extraordinary performance? The justices are captives of a mindset produced by a conservative ideological and political revolution that has taken place since 1964. In its doctrinal components, the Court's race-related cases reinstate a Lochnerian formalism that masks a determination by the conservative wing of the Court to advance that ideological agenda, the program of what Paul Krugman has called "movement conservatism."²⁰⁵

A. Intent: Washington v. Davis, Feeney, and McCleskey

In *Washington v. Davis*, the District of Columbia Metropolitan Police Department administered tests to recruits for the police academy that gauged reading ability and comprehension, as well as verbal ability.²⁰⁶ The test filtered out a disproportionate number of black applicants, and the trial court found that it had not been proven to measure subsequent performance on the job.²⁰⁷ It nevertheless upheld the use of the exam as non-discriminatory and reasonably related to job requirements.²⁰⁸ The U.S. Court of Appeals for the D.C. Circuit reversed,²⁰⁹ relying on the *Griggs v. Duke Power Co.* disproportionate impact test (which was a statutory, not a constitutional, criterion).²¹⁰ In *Washington v. Davis* (1976), the Supreme Court, in turn, reversed the court of appeals, stating that "we have not held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another."²¹¹ Justice Byron White invoked by way of explanation "the basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose."²¹² He linked that to the anti-classification principle, which interprets the Equal Protection Clause to forbid any state classification by race unless it meets stringent strict scrutiny requirements:

205. PAUL R. KRUGMAN, *THE CONSCIENCE OF A LIBERAL* ch. 6 (2007).

206. *Washington v. Davis*, 426 U.S. 229, 229–38 (1976).

207. *Id.*

208. *Id.* at 232–36.

209. *Davis v. Washington*, 512 F.2d 956 (D.C. Cir. 1975).

210. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

211. *Washington*, 426 U.S. at 242.

212. *Id.* at 240.

Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution. Standing alone, it does not trigger the rule that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations.²¹³

Justice White did make one concession to civil rights plaintiffs: “Necessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another.”²¹⁴ He admitted that “we have difficulty understanding” how any facially neutral statute could be discriminatory simply because it generated unequal results, thereby conceding for the first time that the Court did not understand the workings of structural racism.²¹⁵ (To be fair, sociologists were only beginning to work out the theory at that time.²¹⁶) The triumph of the purpose–impact doctrine announced in *Washington v. Davis* solidified the racial stratification of American society. In this sense, it was the *Plessy v. Ferguson* of the 20th century.²¹⁷

Washington v. Davis demonstrates the workings of Alan Freeman’s distinction between the perpetrator perspective and the victim perspective in the law of equal protection.²¹⁸ Under the perpetrator perspective, racial discrimination consists of a willful violation of some legally binding norm.²¹⁹ To show an actionable wrong, a civil-rights petitioner must prove the respondent’s wrongful intent plus actions by a specific person who committed an identifiable discriminatory act.²²⁰ In analogous criminal law terms,

213. *Id.* at 242.

214. *Id.* at 242. A year later, the Court identified other indicia of discriminatory purpose, thereby slightly easing the burden of proving a prima facie case of discrimination, but in dicta Justice Powell’s majority opinion required that the disparate effects be “stark” to constitute determinative proof of intent. *Village of Arlington Heights v. Metro. Dev. Corp.*, 429 U.S. 252, 266 (1977) (involving exclusionary zoning rather than employment discrimination).

215. *Washington*, 426 U.S. at 245.

216. The concept of structural racism began to emerge in sociological literature in the works of van den Berghe, and Louis L. Knowles and Kenneth Prewitt, published in 1967 and 1969, respectively. *See supra* note 23.

217. Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status Enforcing State Action*, 49 STAN. L. REV. 1111 (1997).

218. Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law*, *supra* note 72, at 1052–56.

219. *Id.*

220. *Id.*

there must be both mens rea and actus reus.²²¹ The remedy must be limited to punishing the violation and be no broader than that particular violation.²²² This understanding of “discrimination” is based on ideas of causation and fault, which sound in tort. There must be a blameworthy cause of the harm complained of (the discriminatory act), a purpose to discriminate, and a harmful effect (a measurable wrong to the victim).²²³ The perpetrator perspective is blind to structural racism because it requires intent, stringently defined.²²⁴ The victim perspective, on the other hand, looks to the effects of societal structures.²²⁵ It asks whether the conditions complained of (e.g., workplace disadvantage) are the product of racial oppression, understood both sociologically and historically.²²⁶

Washington v. Davis had immediate, far-reaching, and deleterious effects on civil rights litigation. At the doctrinal level, its pernicious purpose requirement metastasized to frustrate Thirteenth Amendment badges-of-slavery claims of racial discrimination based on anti-black animus²²⁷ and voting rights claims based on the Fifteenth Amendment.²²⁸ It restrained lower courts from vigorous civil rights enforcement, thus becoming the foremost setback to the movement since 1954.²²⁹ It “places the nearly impossible burden of proof and persuasion on those who have experienced the exclusion . . . [I]t asks the victim to go into the mind of the perpetrator and demonstrate that there exists an unconstitutional motivation.”²³⁰ Its “discriminatory purpose” requirement severely reduced both the volume and the success rates of constitutionally based civil rights litigation.²³¹ Few claims based on intent were filed thereafter, even fewer were successful, and almost none were awarded damages. At the appellate level, virtually no appeals (less than 1%) were

221. Pamela Karlan, *Discriminatory Purpose and Mens Rea: The Tortured Argument of Invidious Intent*, 93 YALE L.J. 111, 118–28 (1989) (comparing the *Davis* purpose requirement with the criminal standard of mens rea).

222. RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 29 (2010).

223. Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law*, *supra* note 72, at 1055.

224. *Id.* at 1054–55.

225. *Id.* at 1052–53.

226. *Id.*

227. *City of Memphis v. Greene*, 451 U.S. 100 (1981).

228. *City of Mobile, Ala. v. Bolden*, 446 U.S. 55 (1980).

229. JACK BASS, UNLIKELY HEROES 326 (1981).

230. MARGARET RICHARDSON & TODD L. PITTINSKY, THE MISTAKEN ASSUMPTION OF INTENTIONALITY IN EQUAL PROTECTION LAW: PSYCHOLOGICAL SCIENCE AND THE INTERPRETATION OF THE FOURTEENTH AMENDMENT, in 14 JOHN F. KENNEDY SCHOOL OF GOVERNMENT: FACULTY RESEARCH WORKING PAPERS SERIES (2005).

231. See Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law*, *supra* note 72, at 1056.

successful, while few trial court decisions were appealed.²³² The resulting disparity between the volume of potential claims (vast) and the number litigated to a successful conclusion (few) conforms to the Miller/Sarat pyramid model of litigation, with the discouraging result that most claims of racial discrimination are not even filed, much less won.²³³ It produced the undesirable and paradoxical result that since 1990, an ever-increasing volume of employment discrimination litigation results in fewer awards in individual cases: more law, less justice. “The typical plaintiff receives neither their day in court nor a meaningful remedy.”²³⁴ It is at best a system of “uncertain justice.”²³⁵ The “discriminatory purpose” requirement of *Washington v. Davis* was the object of unanimous contemporary criticism,²³⁶ and its reputation has not improved over the years.²³⁷

Going beyond *Washington v. Davis*, the Court raised an almost insurmountable barrier to civil rights plaintiffs in employment discrimination cases in a 1979 decision, *Personnel Administrator v. Feeney*.²³⁸ Plaintiff, a woman, challenged the veterans’ preference

232. See Theodore Eisenberg & Sheri Lynn Johnston, *The Effect of Intent: Do We Know How Legal Standards Work?*, 76 CORNELL L. REV. 1151, 1152 (1991). “Plaintiffs infrequently file intent claims. Each year at the district court level, not more than one intent claim per district succeeds. . . . [A]t the appellate level, . . . fewer than one published appellate opinion per year, per circuit, rules favorably for an intent claimant.” *Id.* at 1176–77, 1193. The volume of Title VII litigation increased after 1992 but that was largely due to the rise in non-racial discrimination claims. JOHN J. DONOHUE & PETER SIEGELMAN, *The Evolution of Employment Discrimination Law in the 1990s: A Preliminary Empirical Investigation*, in HANDBOOK OF EMPLOYMENT DISCRIMINATION RESEARCH: RIGHTS AND REALITIES, (Laura Beth Nielsen & Robert L. Nelson eds., 2008).

233. *Id.* (citing R. E. Miller & Austin Sarat, *Grievances, Claims and Disputes: Assessing the Adversary Culture*, 15 LAW & SOC’Y REV. 525 (1981)).

234. Laura Beth Nielsen & Robert L. Nelson, *Uncertain Justice: Litigating Claims of Employment Discrimination in the Contemporary U.S.*, 19 RESEARCHING L. 2, available at <http://ssrn.com/abstract=1093313> [<http://perma.cc/R24V-84PU>] (archived Apr. 10, 2014).

235. See *id.*

236. See Paul Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1 (1976); Theodore Eisenberg, *Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication*, 52 N.Y.U. L. REV. 36 (1977); Michael J. Perry, *The Disproportionate Impact Theory of Racial Discrimination*, 125 U. PA. L. REV. 540 (1977); Robert Schwemm, *From Washington to Arlington Heights and Beyond: Discriminatory Purpose in Equal Protection Litigation*, U. ILL. L.F. 961 (1977); Kenneth L. Karst, *The Costs of Motive-Centered Inquiry*, 15 SAN DIEGO L. REV. 1163 (1978); Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law*, *supra* note 72.

237. See Gayle Binion, *Intent and Equal Protection: A Reconsideration*, 1983 SUP. CT. REV. 397 (1983); see also David A. Strauss, *Discriminatory Intent and the Taming of Brown*, 56 U. CHI. L. REV. 935 (1989).

238. *Personnel Adm’r of Mass. v. Feeney*, 442 U.S. 256 (1979).

program of Massachusetts's civil service hiring practices, which had the effect of excluding women from higher echelons of civil service and confining them to traditionally female clerical occupations.²³⁹ The Court took up any slack that might have been left in *Washington v. Davis*'s intent requirement by holding that it

implies more than intent as volition or intent as awareness of consequences. It implies that the decision maker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group.²⁴⁰

Mere awareness of a possible result, no matter how likely or even certain that result, is insufficient to prove or even infer motivation.

For constitutional purposes, this adopted a standard of intent and foreseeability greater than the torts negligence standard, something closer to malice.²⁴¹ Tort law draws a distinction between intentional torts, where the plaintiff must prove defendant's intent to commit an act that will have particular consequences, and torts of negligence, where the standard is that "the person acts knowing that the consequence is substantially certain to result."²⁴² The latest iteration of the Torts Restatement offers this example to illustrate this negligence concept of intent:

The Jones Company runs an aluminum smelter, which emits particulate fluorides as part of the industrial process. Jones knows that these particles, carried by the air, will land on neighboring property, and in doing so will bring about a range of harms. Far from desiring this result, Jones in fact regrets it. Despite its regret, Jones has knowingly, and hence intentionally, caused the resulting harms.²⁴³

Similarly, the Model Penal Code provides that an individual criminal defendant acts "knowingly" where "he is aware that his conduct is of that nature or that such circumstances exist."²⁴⁴ Why are these standards inoperable and irrelevant for equal protection?

In a contemporary capital sentencing case, *McCleskey v. Kemp*, the Court went even further in exalting intent, making it virtually impossible for a defendant of color to prove that a legislature acted in a way that made it more likely that he or she would be sentenced

239. *Id.* at 260.

240. *Id.* at 279.

241. Siegel, *supra* note 217, at 1135.

242. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 1 (2010).

243. *Id.* at cmt. c. illus. 3 (2010).

244. MODEL PENAL CODE § 2.02 (establishing requirements of culpability).

to death because he or she is not white.²⁴⁵ A person sentenced to death must now “prove that the . . . Legislature enacted or maintained the death penalty statute *because of* an anticipated racially discriminatory effect.”²⁴⁶ Moreover, “to prevail under the Equal Protection Clause, [defendant] must prove that the decisionmakers in *his* case acted with discriminatory purpose.”²⁴⁷ The Court thus moved the goal posts still further away from civil rights plaintiffs: On top of the *Washington v. Davis* purpose requirement, a plaintiff under *Feeney* must show something approaching actual malice and under *McCleskey* that the legislature’s malice was directed specifically at him or her or at least at his or her class of cases.

Once the intent requirement was raised to such alpine heights, the Court ended up with this perverse result: Policies that in their effects discriminate against blacks can be successfully challenged only by proving discriminatory intent by standards almost impossible to satisfy. But programs benefiting blacks and Latinos are subjected to a scrutiny so strict that almost none can meet it, at least for constitutional equal protection claims, including those from other social domains such as education.²⁴⁸

B. White Advantage: Wygant v. Board of Education

A recurrent theme in employment discrimination cases is white innocence.²⁴⁹ This motif was broached in the raucous politics of the northern anti-busing effort in the early ‘70s, where angry middle- and lower-class whites complained that they were forced to bear all the costs of desegregation while the elites who mandated the program sent *their* children to private schools and thereby evaded those burdens.²⁵⁰ White ethnics commonly complained that their ancestors either had nothing to do with slavery and were indeed in some ways as badly off as enslaved people or had migrated to America after the abolition of slavery.²⁵¹ Either way, neither living whites nor their deceased forebears bore any responsibility for the

245. See *McCleskey v. Kemp*, 481 U.S. 279, 281, 292 (1987).

246. *Id.* at 298.

247. *Id.* at 292.

248. Among the few that did were *Bakke* and *Grutter*. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978); *Grutter v. Bollinger*, 539 U.S. 306 (2003).

249. See Thomas Ross, *Innocence and Affirmative Action*, 43 VAND. L. REV. 297 (1990); Kathleen M. Sullivan, *Sins of Discrimination: Last Term’s Affirmative Action Cases*, 100 HARV. L. REV. 78 (1986).

250. RONALD P. FORMISANO, *BOSTON AGAINST BUSING: RACE, CLASS, AND ETHNICITY IN THE 1960S AND 1970S* (1991).

251. *Id.*

sufferings and deprivations of blacks, so it was unjust to force them to compensate for black losses by being deprived of opportunities that they had a racially based right to expect.²⁵² A noisy proponent of these views was an Italian-American law professor who denounced WASP exploitation of his hardworking immigrant father.²⁵³ Drawing on that supposed experience, he categorized “white ethnic groups” as the *real* victims of discrimination who were now having the burdens of racial justice foisted upon them.²⁵⁴ “I owe no man anything, nor he me, because of the blood that flows in our veins,” he trumpeted.²⁵⁵ Professor Antonin Scalia would soon have an opportunity to translate his sentiments into constitutional law.

The idea quickly migrated from the streets to the courts. Justice Powell was the first to invoke white innocence in his *Bakke* opinion of 1978: “There is a measure of inequity in forcing innocent persons in respondent’s position to bear the burdens of redressing grievances not of their making.”²⁵⁶ From there the theme of white innocence returned in one form or another in most affirmative action employment cases. The conservative wing of the Burger Court found the innocence theme irresistible and mandated a balancing of equities between black employees who had actually suffered from discriminatory employment practices and white employees “innocent of any wrongdoing.”²⁵⁷

The trope of white innocence proved decisive in a case that is second only to *Davis* in demonstrating how the Supreme Court protects structural racism: *Wygant v. Jackson Board of Education*.²⁵⁸ Justice Lewis Powell’s plurality opinion in that case is a systematic compendium of the legal–doctrinal affirmation of structural racism.²⁵⁹ The facts of *Wygant* provide a case study of how structural racism operates.²⁶⁰ A substantial minority of the residents of Jackson, a medium-sized city in southern Michigan, were people

252. *Id.*

253. See Antonin Scalia, *The Disease as Cure: “In Order to Get Beyond Racism, We Must First Take Account of Race”*, 1979 WASH. U. L. Q. 147, 153 (1979).

254. *Id.*

255. *Id.*

256. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 298 (1978).

257. See *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 372 (1977); *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984).

258. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986).

259. See *id.* The Court was fractured: Powell delivered a plurality opinion joined by Burger, Rehnquist, and in part by O’Connor; O’Connor wrote a concurring opinion; White concurred only in the judgment; Marshall, joined by Brennan and Blackmun, dissented; and Stevens dissented separately. See *id.*

260. See *id.*

of color, but the city had a long history of racial discrimination in hiring them as teachers.²⁶¹ To deal with simmering racial tensions in the schools, respondent Board of Education negotiated a contract with the teachers' union providing that if layoffs became necessary, they would honor seniority, except that minority layoffs would not exceed the extant ratio of minority employees overall.²⁶²

When layoffs came, the effect of this provision was that some of the most junior white teachers were laid off before some junior black teachers.²⁶³ The Court was therefore faced with the choice of either affirming a nominally race-neutral seniority system that would disproportionately lay off black teachers, or a race-conscious, negotiated agreement that would result in the preservation of recent, modest, and hard-won gains in minority hiring. Either it did not occur to the Powell bloc that a last-hired-first-fired policy would reduce the already thin ranks of black teachers, who were disproportionately few because of recent overt discrimination or they deemed it of no significance. If the burdens of an economic downturn were not proportionately shared by whites and blacks, the automatic operation of the seniority system (established in a context of racial discrimination) would cause white-black teacher ratios to revert back toward Jim Crow era levels, without any need for current racial animus to produce the disparate results. The system blindly, automatically, and invisibly generated racially disparate outcomes that shoved blacks out of recently gained employment opportunities. That is structural racism.

Perhaps sensing this, the lower courts upheld the layoff agreement, emphasizing that it was not necessary for plaintiffs to prove intentional racial discrimination.²⁶⁴ District Judge Charles W. Joiner acknowledged the reality of what he called "societal discrimination" and the consequent need for black "role models" for minority students.²⁶⁵ The Supreme Court plurality would have none of this. "This Court never has held that societal discrimination alone is sufficient to justify a racial classification," Powell rebuked the lower court judges.²⁶⁶ The sole doctrinal function of racially

261. Justice Marshall noted in his dissent that no blacks were hired to teach in the public schools until 1954. *Id.* at 297 (Marshall, J., dissenting). In 1969, when the litigation began, only 4% of the faculty citywide was minority. *Id.*

262. *Id.* at 270-71.

263. *Id.* at 271.

264. *Wygant v. Jackson Bd. of Educ.*, 546 F. Supp. 1195, 1201 (E. D. Mich. 1982), *aff'd*, 746 F.2d 1152 (6th Cir. 1984).

265. *Id.* at 1201.

266. *Wygant*, 476 U.S. at 274, *reaffirmed in Grutter v. Bollinger*, 539 U.S. 306, 373-74 (2003) ("[T]he Court has soundly rejected the remedying of societal discrimination as a justification for governmental use of race." (citing *Wygant*, 476

disparate outcomes was to suggest (though not prove) intentional discrimination. Powell dismissed without consideration the possibility of ever demonstrating structural racism: “Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy.”²⁶⁷ O’Connor concurred: “A governmental agency’s interest in remedying ‘societal’ discrimination, that is, discrimination not traceable to its own actions,” can never satisfy the compelling-interest element of the strict scrutiny test.²⁶⁸

Once unmoored from social realities, the Court drifted off into airy speculation that had no statistical grounding: “Societal discrimination is insufficient and over-expansive” and remedying it would harm “innocent people,” Justice Powell wrote.²⁶⁹ “There are numerous explanations for a disparity between the percentage of minority students and the percentage of minority faculty, many of them completely unrelated to discrimination of any kind.”²⁷⁰ Having thereby foreclosed the possibility of linking doctrine to social reality, the Court has never turned back to rethink its indifference to structural forces. Instead, it withdraws into a fantasy world of wishful or magical thinking: “Absent employment discrimination by the school board, ‘nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired.’”²⁷¹ The Court’s enthusiasm for this idea has not been diminished by the fact that it has no basis in reality and no evidence that such a desirable outcome has ever occurred.

In her *Wygant* concurrence, O’Connor reformulated the strict scrutiny requirement to soften its impact but nevertheless injected the theme of white innocence again: An affirmative action program may not “impose disproportionate harm on the interests, or unnecessarily trammel the rights, of innocent individuals.”²⁷²

Those who, like Powell and O’Connor, voice concern about harm to innocent victims invariably refer to white victims; they

U.S. at 274 and *Richmond v. J.A. Croson Co.*, 488 U.S. 468 (1989)). “Societal discrimination” is the Court’s term for its understanding of a form of racism beyond that of individual bigotry.

267. *Wygant*, 476 U.S. at 276.

268. *Id.* at 288 (O’Connor, J., concurring).

269. *Id.* at 276.

270. *Id.* Justice Powell did not think it necessary to identify any of these explanations.

271. *Id.* at 274–75 (quoting *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 340 (1977)). The justices seem enamored of this quote; they used it again in *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 307 (1977).

272. *Wygant*, 476 U.S. at 287 (O’Connor, J., concurring). Powell also adverted to white innocence. *See id.* at 281–82.

ignore the harm done by structural racism to innocent *black* individuals and groups. In the innocence trope, the victims are always (though implicitly) white. This is not a matter of overt racism but rather of white normativity: To be white is to be automatically exempt from all burdens of unjust discrimination, intentional or structural. When whites do not receive a hoped-for opportunity that they believe is rightfully theirs (protections for seniority on the job, admission to a public university), then by definition they must be victims of some kind of unjust and discriminatory policy. If whites and blacks are seen to be locked in a zero-sum game, where gains for one come at the expense of the other, then it seems intuitive that whites, individually and collectively presumed to be “innocent” of actions that have contributed to black oppression, are treated unfairly if they miss an opportunity where an affirmative action program is in place. It may be intuitive, but it is erroneous. Careful studies have demonstrated that whites stand no better chance of being admitted to selective educational institutions when no affirmative action program is in place than they do under such a program.²⁷³ When she invoked innocence, Justice O’Connor was obviously not thinking about innocent blacks who suffer the effects of structural racism.

In her concurrence, Justice O’Connor seemed to suggest that the strict scrutiny test, in either its uncompromising Scalia version or her softer one,²⁷⁴ can operate only in situations of Pareto inefficiency,²⁷⁵ where it is still possible to make some (blacks) better

273. See Goodwin Liu, *The Causation Fallacy: Bakke and the Basic Arithmetic of Selective Admissions*, 100 MICH. L. REV. 1045 (2002); WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS* (2000). White disappointment is almost always a result of the highly competitive character of the admissions process at such institutions. See Liu, *supra*, at 1046 n.8. The “causation fallacy” posits that if one black is admitted, one white will lose that opportunity. *Id.* at 1046. In reality, the disappointed white missed out because of the large number of whites with superior qualifications to him or her in the candidate pool. *Id.* at 1052–54. He or she probably would not have been admitted anyway, even if no affirmative action program were in place. *Id.* This presents a potentially fatal standing problem when whites challenge affirmative action programs, but the Supreme Court has carefully avoided looking into that issue. *Id.* at 1058–59.

274. *Adarand Constructors v. Peña*, 515 U.S. 200, 237 (1995); *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003).

275. “[U]nder certain specified conditions[,] . . . every competitive market equilibrium is ‘Pareto efficient’ (also called ‘Pareto optimal’). A state of affairs is defined as Pareto efficient if it is the case that compared with it, no one’s utility can be raised without reducing someone else’s utility.” Amartya Sen, *Markets and Freedoms: Achievements and Limitations of the Market Mechanism in Promoting Individual Freedoms*, 45 OXFORD ECON. PAPERS 519, 521 (1993). Sen uses

off while not disadvantaging anyone else (whites). If that is so, then once Pareto optimality is reached—no one can be made better off without someone being made worse off—the abstract logic of strict scrutiny would seem to prohibit any further efforts to meliorate the effects of employment discrimination. In one sense, this is merely a fancy way of suggesting that whites will oppose any affirmative action program that imposes any costs at all on them. Or, to put it another way, the white majority will accede to black gains only if they come cost-free (to whites).²⁷⁶ But if the strict scrutiny test comes with some embedded but unstated Pareto-efficient upper limit, it will severely cripple any affirmative-action effort—which is exactly what happened after 1986.

The white-innocence assumption leads to the logical error of false symmetry, a modern version of Anatole France's "bridges of Paris" argument.²⁷⁷ The flawed assumptions, when unpacked, go as follows: For more than three centuries, blacks suffered overt, explicit oppression under slavery and then in post-Reconstruction servitude. To remediate that in the Civil Rights Era, laws attempted to open up opportunities for them and abolish the lingering effects of past discrimination. To this, whites responded with a claim of "reverse discrimination": it is now *they*, innocent whites, who are victims of overt oppression.²⁷⁸ Thus, as there is an equivalence of wrongs, so there must be an equivalence of remedies. If we prohibit oppression of blacks, we must now prohibit the "oppression" that whites suffer by losing white advantage as blacks are given equal access to opportunities. But this is far-fetched, the logical fallacy of false equivalence again; no white person is discriminated against as blacks were until recently. They lose only the monopoly of benefit

"utility" here in the economist's sense of "well-being." "A Pareto optimum occurs where it is impossible to make any individual better off without making someone else worse off. Pareto optimums are also said to be Pareto efficient." ROBIN P. MALLOY, *LAW IN A MARKET CONTEXT: AN INTRODUCTION TO MARKET CONCEPTS IN LEGAL REASONING* 189 (2004).

276. This would affirm Derrick Bell's "interest convergence" thesis. See Derrick Bell, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 *HARV. L. REV.* 518 (1980).

277. "The majestic equality of the laws, which prohibits the rich as well as the poor from sleeping under bridges, from begging on the streets, and from stealing bread." ANATOLE FRANCE, *LE LYS ROUGE* 118 (1894) (authors' translation). This bridges-of-Paris ("les ponts") argument is a commonplace cultural referent to the concept of false symmetry, equating two things that are not identical.

278. Whites now consider bias against white people as a greater social problem than bias against blacks. See Michael I. Norton & Samuel R. Sommers, *Whites See Racism as a Zero-Sum Game That They Are Now Losing*, 6 *PERSP. ON PSYCHOL. SCI.* 215 (2011).

that had been provided by overt racism and the preferred or exclusive access that comes with white advantage, together with the lingering residues of unearned privilege and opportunity.

The *Wygant* plurality dismissed out of hand a justification for affirmative action plans that promoted black teachers as role models for their students.²⁷⁹ White normativity made it impossible for the plurality to see how vital role models were to people who had previously experienced barriers to opportunity automatically erected because of their race. It did not seem to occur to the justices that black teachers would be role models not only for black students but, as importantly, for white students as well. Underlying this is an assumption that white students will have a whole and complete view of the world with only white faculty—an example of the unexamined belief that white advantage is normative.²⁸⁰ Powell instead imposed a linkage between role models and quotas or percentages. He insisted that the role-model theory would lead to “discriminatory hiring and layoff” policies that would have “no logical stopping point” and would be “ageless in their reach into the past and timeless in their ability to affect the future.”²⁸¹ There was no logical connection between the importance of role models and quotas, nor was it necessary to inject one. The Board could have justified retention of black teachers without demanding proportionality. But the majority’s unthinking impatience with the role model idea deprived equality advocates of an essential argument for affirmative action.

Thus, the Court sees innocence only in whites and is oblivious as to how its perception of innocence is blind to the innocence of people of color. Similarly, the Court sees faculty role models only in whites; because faculty have traditionally been white, white faculty role models became normative. This is white advantage in action.

C. Individualism: *Wygant* (Again)

Justice Powell was at pains to refute Justice Marshall’s lengthy dissent in *Wygant* and challenged one of its core ideas: Marshall “sees this case not in terms of individual constitutional rights, but as an allocation of burdens ‘between two racial groups.’”²⁸² Powell retorted: “This is really nothing more than group-based analysis.”²⁸³

279. See *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 275–76 (1986).

280. Robert St. Martin Westley, *White Normativity and the Rhetoric of Equal Protection*, in *EXISTENCE IN BLACK: AN ANTHOLOGY OF BLACK EXISTENTIAL PHILOSOPHY* 97–98, (Lewis R. Gordon ed. 1997).

281. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 275–76.

282. *Id.* at 281 n.8.

283. *Id.*

“The Constitution does not allocate constitutional rights to be distributed like bloc [sic] grants within discrete racial groups”²⁸⁴ But that assumed the very point in controversy. To deal with structural racism, we—and the Court—must think in group terms because it is groups, not individuals, who have been the principal focus of racialized societies.

Justice Scalia thus got it exactly wrong when he wrote that “[t]he relevant proposition is not that it was blacks, or Jews, or Irish who were discriminated against, but it was individual men and women, ‘created equal,’ who were discriminated against.”²⁸⁵ Similarly, Justice Thomas perverted the meaning of *Brown v. Board of Education I* when he claimed that “[a]t the heart of this interpretation of the Equal Protection Clause lies the principle that the government must treat citizens as individuals, and not as members of racial, ethnic, or religious groups.”²⁸⁶ If we do not think in terms of groups, structural racism will remain invisible to all of us. Powell and his successors refuse to concede that and maintain that only individuals may be rights claimants: “[T]he petitioners before us today are not ‘the white teachers as a group.’ They are Wendy Wygant and other individuals who claim that they were fired from their jobs because of their race.”²⁸⁷ Thus the hyper-individualism that infects American law generally has a particularly distorting effect here, disabling us from seeing the true nature of inequality in American life. Sociologists have identified this insistence on individualism as a key component of structural racism.²⁸⁸

D. Superficial Neutrality: The Annus Horribilis of 1989

Though the Court’s equal protection agenda did not shrink after 1989, few major constitutionally based employment claims like those discussed above came before the High Court,²⁸⁹ as the justices’ attentions shifted to policing racial gerrymanders and shutting down school integration efforts. But 1989 was an active terminal year for constitutional workplace discrimination litigation

284. *Id.*

285. *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 528 (1989) (Scalia, J., concurring).

286. *Missouri v. Jenkins*, 515 U.S. 70, 120–21 (1995) (Thomas, J., concurring).

287. *Wygant*, 476 U.S. at 281 n.8.

288. *See supra* Part II.2.

289. Though not from the lower federal courts. *See* Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. OF EMPIRICAL LEGAL STUD. 429, 432 fig. 1 (2004).

in the High Court, as four major decisions further embedded structural racism by making it more difficult for plaintiffs to identify it and seek the law's aid in rooting it out.²⁹⁰ Three of these cases dealt with procedural questions, which concealed their significance for lay people.²⁹¹ But they were precursors of a trend that has characterized the Rehnquist and Roberts Courts: the use of procedural innovations to make employment discrimination cases more difficult to succeed.²⁹² The technique of restricting or negating substantive rights by erecting devious, technical, procedural hurdles characterized both the Rehnquist and Roberts Courts, providing its conservative members with a stealthy way to frustrate rights claims that they opposed, without incurring the odium that open and direct attacks on the rights themselves might invite.²⁹³ These technical, procedural hurdles are examples of the structural arrangements embedded in social and organizational infrastructure that appear to be neutral. Their assumed neutrality causes them to be invisible; they are nonetheless effective in perpetuating racial disparities.

Through a quarter-century of litigation, the federal courts had worked out a series of rules for allocating the burdens of proof and persuasion in Title VII cases. But in a case that was coeval with this Title VII litigation,²⁹⁴ *Wards Cove Packing Co. v. Atonio*, a five-justice majority made what Justice Stevens's dissent called "changes in [those] elementary and eminently fair rules," making it extremely difficult for plaintiffs to win Title VII disparate impact cases.²⁹⁵ An Alaska salmon cannery employed two tiers of workers: white-collar and skilled technical workers, who were nearly all white, and unskilled cannery floor workers, who were predominantly Filipino

290. See *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642 (1989); *Martin v. Wilks*, 490 U.S. 755 (1989); *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). The significance of this quartet was obscured by the blockbuster affirmative action case of that term, *Richmond v. J.A. Croson Co.*, 488 U.S. 468 (1989).

291. See *Wards Cove*, 490 U.S. 642; *Martin*, 490 U.S. 755; *Hopkins*, 490 U.S. 228.

292. See Melissa Hart, *Procedural Extremism: The Supreme Court's 2008-2009 Labor and Employment Cases*, 13 EMP. RIGHTS & EMP. POL'Y J. 253, 253-56 (2009).

293. For examples from the Roberts Court of this use of procedure to foil substance, which lie beyond the chronological scope of this Article, see *id.*; see also Catherine R. Albiston & Laura Beth Nielsen, *The Procedural Attack on Civil Rights: The Empirical Reality of Buckhannon for the Private Attorney General*, 54 UCLA L. REV. 1087 (2007).

294. The *Wards Cove* litigation had gone on for 24 years before it reached the Supreme Court. See *James v. American International Recovery, Inc.*, 799 F. Supp. 1156, 1167 (1992).

295. See *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642, 679 (1989). (Stevens, Brennan, Marshall, and Blackmun, J., dissenting).

and Alaska Native.²⁹⁶ Justice White for the majority rejected evidence based on that racial imbalance, mandating instead that plaintiff must prove “a specific or particular employment practice that has created the disparate impact,” even though he conceded that the new requirement would be “unduly burdensome.”²⁹⁷ This insistence on identifying specific employment practices as the cause of disparate impacts arises from a misunderstanding of racism as existing only in the form of individual bigotry. It betrays the Court’s misunderstanding of how the superficial neutrality of social structures and policies produce racial disparities. It also reveals the Court’s misunderstanding of how structural racism arises from the interactions between various social structures and policies. To conclude that racism was not taking place at the cannery just because overt racism was not in evidence was to ignore the reality that structural racism was silently operating to produce the same disparate outcome. Any number of factors itemized above as examples of structural racism in the workplace could have been functioning either singly or in combination to produce such a racial disparity in employment. These factors could include: selectively disseminating information about job openings or using social networks to disseminate such information; requiring previous job experience for cannery jobs historically held only by whites; and unconscious attitudes about candidates’ skills and aptitudes affecting hiring decisions, as well as supervisors’ perceptions of employee behavior with respect to job performance.²⁹⁸ The Court’s newly mandated tight linkage between “a particular practice” and results would make proof of discrimination virtually impossible.

Wards Cove was a major setback for voluntary affirmative action programs.²⁹⁹ This led Justice Blackmun in dissent to lament that in the conditions of such a “plantation economy” as that of the cannery, with a proven track record of confining non-whites to lower-paid unskilled positions, “[o]ne wonders whether the majority still believes that race discrimination—or, more accurately, race discrimination against nonwhites—is a problem in our society, or even remembers that it ever was.”³⁰⁰ This apparently stung the majority. Justice White in a footnote dismissed Blackmun’s critique as “hyperbolic.”³⁰¹ Merely because “race discrimination” is

296. *Id.* at 646–48.

297. *Id.* at 657.

298. *See supra* Part II.B.

299. Michael Braswell et al., *Disparate Impact Theory in the Aftermath of Wards Cove Packing Co. v. Atonio: Burdens of Proof, Statistical Evidence, and Affirmative Action*, 54 ALB. L. REV. 1, 2 (1989).

300. *Wards Cove*, 490 U.S. at 662 (Blackmun, J., dissenting).

301. *Id.* at 649 n.4.

extensive in the United States, White averred, “does not mean, however, that it exists at the canneries—or more precisely, that it has been proved to exist at the canneries.”³⁰²

Martin v. Wilks, another in the endless procession of white firefighter suits, provided another example of achieving substantive results—here, weakening consent decrees that had settled Title VII actions—through procedural maneuvers that would be invisible or incomprehensible to casual lay observers.³⁰³ In litigation dating back to 1974, black firefighters in Birmingham, Alabama, reached a consent decree with their municipal employer that mandated remedies for an admitted history of racial discrimination.³⁰⁴ These provided specific goals for the hiring and promotion of black firefighters.³⁰⁵ A group of white firefighters who had declined to participate in the original litigation and hence were not parties to the consent decree then sued to challenge promotions based on the consent decrees as “reverse discrimination” that denied them advancement opportunities because of their race.³⁰⁶ Normally, a party who chooses not to assert his or her right in some litigation that might affect his or her situation is precluded from challenging the result.³⁰⁷ A majority speaking through Chief Justice Rehnquist nevertheless permitted the white firefighters to challenge the consent decrees by making an exception to the decades-long-standing procedural rules regarding impermissible collateral attack.³⁰⁸ The decision cast a long shadow, threatening disruption of existing consent arrangements and discouraging future use of the consent decree by injecting an element of uncertainty and lack of finality into any settlement.

Patterson v. McLean Credit Union was both a substantive and procedural setback for African Americans seeking to challenge workplace discrimination.³⁰⁹ Brenda Patterson brought an action

302. *Id.*

303. *Martin v. Wilks*, 490 U.S. 755 (1989) (Stevens, Blackmun, Brennan, and Marshall, J., dissenting).

304. *Id.* at 758.

305. *Id.*

306. *Id.* at 760.

307. *See id.* at 762 n.3 and authorities cited therein. This is known as “impermissible collateral attack.” The non-participating parties are said to be “sitting on the sidelines” and are precluded from getting into the game after it is over.

308. *See id.* at 791–93.

309. *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989) (Brennan, Marshall, Blackmun, and Stevens concurring in part and dissenting in part). The Court had earlier alarmed civil rights advocates by sua sponte ordering reargument on the question of whether it should reverse its earlier decision in *Runyon v. McCrary*, 427 U.S. 160 (1976), which held section 1981 covered

under 42 U.S.C § 1981 claiming that she had been denied promotion and fired because of her race.³¹⁰ Section 1981, descended from section 1 of the 1866 Civil Rights Act,³¹¹ guarantees that “all persons . . . have the same right . . . to make and enforce contracts” as whites.³¹² The defendant argued, and a five-justice majority agreed, that this language applied only to initial hiring decisions and did not cover subsequent discriminatory acts.³¹³ Justice Anthony Kennedy soothingly suggested that the plaintiff still had remedies available to her under Title VII because it was a later and more comprehensive regulatory scheme.³¹⁴ Thus “we may preserve the integrity of Title VII’s procedures without sacrificing any significant coverage of the civil rights laws.”³¹⁵ But that was cold comfort because section 1981 created an action for damages, thus providing a stronger deterrent to workplace racism, while Title VII authorized only an award of back pay.³¹⁶ The kinds of discrimination Patterson alleged could not be rectified by back-pay awards. Moreover, as Justice Brennan argued in dissent, a capacious reading of section 1981 was more consonant with the Framers’ intentions and the spirit of the First Reconstruction when it was originally enacted.³¹⁷

In its 1989 cases, the Court read expansive and empowering statutes in a crabbed, stingy way, formally and hypertechnically draining off their transformative potential. The justices treated the ideal of equality as a matter of politics rather than constitutionality, tweaking supposedly neutral procedures to attain outcomes benefiting white plaintiffs but thwarting litigants of color. The effect was to enable whites and white institutions to maintain the racial status quo.³¹⁸

The 1989 decisions were so egregious that Congress felt obliged to intervene. Noting that the Supreme Court had cut back dramatically on the scope and effectiveness of civil rights protections in a series of its recent decisions, the Civil Rights Act of

private conduct. *Patterson*, 485 U.S. at 617. It prudently decided in *Patterson* to decline that radical move. The reargument attracted a galaxy of eminent counsel on both sides of that issue on brief and as amici.

310. *Patterson*, 491 U.S. at 168.

311. Civil Rights Act of 1866, 14 Stat. 27 (1866).

312. *Patterson*, 491 U.S. at 176 (quoting 42 U.S.C § 1981).

313. *Id.* at 176.

314. *Id.* at 181.

315. *Id.* at 181–82.

316. 42 U.S.C. § 1981(a)(1) (1989) (discussing damages); *id.* § 2000e(5) (discussing back pay).

317. *Patterson*, 491 U.S. at 191–200 (Brennan, J., dissenting).

318. Linda S. Greene, *Race in the 21st Century: Equality Through Law?*, 64 TUL. L. REV. 1515, 1517 (1990).

1991 overturned each of the four decisions.³¹⁹ Rejecting *Patterson*, it expanded section 1981's "make and enforce contracts" provisions to include performance, modification, termination, and enjoyment of benefits and explicitly stated that the statute applied to private discrimination.³²⁰ It explicitly overruled *Wards Cove* by name.³²¹ It reaffirmed the disparate impact strand of Title VII but produced a weak compromise on the business-necessity defense.³²² It made the employer's independent-motive defense inapplicable to issues of per se liability.³²³ It removed the ability of non-parties to upset a consent decree if they were adequately represented by the original parties or knew or should have known of the proceedings.³²⁴ Finally, it affirmed the *Griggs* validation of a disparate impact reading of Title VII.³²⁵ For good measure, it also authorized punitive damages for malicious discrimination.³²⁶ Seldom has Congress so decisively rebuked the justices' overreaching, though the statute itself was vague and the consequences ineffective and disappointing.³²⁷

E. Colorblindness: The Anticlassification Principle

Current readings of *Brown v. Board of Education* differ as to the exact nature of the right established by that case. Is it the right of people of color to be free of an oppressive disability imposed on

319. See H.R. REP. NO. 102-40 pt. 2, at 1 (1991); Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071. President George H. W. Bush vetoed the measure in 1990, disparaging it as a "quota bill." Steven A. Holmes, *President Vetoes Bill on Job Rights: Showdown Is Set*, N.Y. TIMES (Oct. 23, 1990), available at <http://www.nytimes.com/1990/10/23/us/president-vetoes-bill-on-job-rights-showdown-is-set.html> [<http://perma.cc/V26R-7L8U>] (archived Apr. 10, 2014).

320. Civil Rights Act of 1991, § 101, Pub. L. No. 102-166, 105 Stat. at 1072.

321. *Id.* § 3, 105 Stat. at 1071.

322. *Id.*

323. *Id.* The Civil Rights Act of 1991 "reversed" *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), the fourth of the 1989 employment discrimination suits. In *Price Waterhouse*, a plurality (uncharacteristically speaking through Justice Brennan) determined that when an employee proved that gender (or race) played a role in employment decisions, his or her employer could avoid liability by showing that it had an independent reason for its actions. *Id.* The plurality held that such a showing would constitute a complete defense to the action. *Id.*

324. § 108, 105 Stat. at 1076.

325. *Id.* § 3, 105 Stat. at 1071. Justice Scalia has suggested that he would like to overturn the *Griggs*'s validation of a disparate-impact reading of Title VII. See *Ricci v. DeStefano*, 557 U.S. 557, 594–95 (2009) (Scalia, J., concurring).

326. See § 1977A, 105 Stat. at 1073.

327. JEB BARNES, *OVERRULED: LEGISLATIVE OVERRIDES, PLURALISM, AND CONTEMPORARY COURT-CONGRESS RELATIONS* 12–15 (2004).

them by the State, a denial of opportunity that made them something less than full citizens? Scholars commonly refer to that reading as the “antibusordination value.”³²⁸ Or is it instead something much more narrow and shallow: a right not to have the State determine one’s opportunities in society by an arbitrary classification, such as the chimera of race? That is known as the “anticlassification value.”³²⁹ By 1976, as conservatives began to complain of “reverse discrimination” in response to affirmative action programs, scholars began to explore the differing potentials presented by these inconsistent interpretations. Owen Fiss contended that *Brown* should be read as a guarantee against oppression, recognizing groups as rights-holders.³³⁰ Paul Brest endorsed what he called “the antidiscrimination principle” (referred to here as “antibusordination”) as a “prohibition[] of race-dependent decisions that disadvantage the members of minority groups.”³³¹ But an ambivalence blurred Brest’s formulation: “[T]he antidiscrimination principle disfavors race-dependent decisions and conduct—at least when they selectively disadvantage the members of a minority group.”³³² This formulation, stripped of the qualifying “at least” phrase, can be taken out of context to become the naked anticlassification principle. As Fiss and Brest wrote in 1976, the Supreme Court was beginning to accept the anticlassification reading as canonical for the understanding of equal protection.³³³ This blunted *Brown*’s potential for social transformation and redirected its moral energies to protecting whites’ opportunities.

Anticlassification is not merely a counterpoint perspective to antibusordination. Antibusordination reflects the widely shared understanding that sociologists have developed for more than 40 years of how structural processes produce racial disparities. We must openly acknowledge the racial imbalance inherent in structural forces and take overt racially explicit steps to counter them. Anticlassification, on the other hand, spurns these findings in the fields of both sociology and psychology. It is a lawyer’s and judge’s construct, not a social scientist’s, based on no more than fanciful or

328. Reva B. Siegel, *Equality Talk: Antibusordination and Anticlassification Values in Constitutional Struggles Over Brown*, 117 HARV. L. REV. 1470, 1477 (2004); Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antibusordination?*, 58 U. MIAMI L. REV. 9 (2003).

329. See Siegel, *supra* note 328, at 1541.

330. Owen Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 147–79 (1976).

331. Brest, *supra* note 236, at 2.

332. *Id.* at 6.

333. See Mark Tushnet, *The Return of the Repressed: Groups, Social Welfare Rights, and the Equal Protection Clause*, 2 ISSUES LEGAL SCHOLARSHIP 1, 1 n.214 (2002) (noting the Court’s “complete rejection [of antibusordination] on the level of constitutional doctrine”).

wishful speculation about how some notional society ought to work. Anticlassification is the judicial formulation of colorblindness.

In the generation since Fiss and Brest wrote, a majority of the justices have endorsed the anticlassification approach over antisubordination, with disastrous results.³³⁴ If *Brown* means nothing more than that the State may not classify by race and if that rubric is applied mechanically, then all race-conscious efforts to ameliorate present legacies of racial oppression in the past may be held unconstitutional. If the justices continue to insist on clinging to the notion of anticlassification—which is completely disconnected from the reality of structural and unconscious racism—then we are left with the banal formalism of: “The way to stop discrimination on the basis of race is to stop discriminating on the basis of race,” a bumper sticker trying to pass itself off as a constitutional aperçu.³³⁵ This approach spells disaster not only for efforts to achieve a level playing field in employment but also dooms *Grutter v. Bollinger* to reversal and condemns future generations to replicate an inescapably racist society.³³⁶

The anticlassification reading favored by the Burger, Rehnquist, and Roberts Courts has at least two malignant effects. First, it inverts the original meaning of *Brown v. Board of Education* and subverts the work of those who enacted the Civil Rights Act of 1964. The justices who produced *Brown* and the Congress that passed the 1964 Act understood that they were putting an end to an entire social system in which the dominant and privileged white race used its power to strip African Americans of opportunity, civic status, and dignity. After *Brown*, the Equal Protection Clause was read to prevent official status degradation. The Court’s holdings during the Second Reconstruction, 1954–1970, were mostly consistent with this understanding. When the 39th Congress adopted the Fourteenth Amendment in 1867 and sent it out to the states for ratification, the members intended to protect blacks from the oppressions of whites. When the Fifteenth Amendment banned deprivation of the vote “on account of race, color, or previous condition of servitude,”³³⁷ the Framers were again being race-specific, protecting blacks. Anticlassification readings ignore the Framers’ solicitude for the freed people and substitute a faux constitutional understanding under which government may not take race into account, either to oppress or to protect and equalize.

334. *See id.*

335. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist.*, 551 U.S. 701, 748 (2007).

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

337. U.S. CONST. amend. XV, § 1.

Second, the anticlassification reading provides an effective doctrinal cover for structural racism in all social domains. If the canonical meaning of the 20th century's most important Supreme Court decision is shrunk to the puny and sterile mantra that government may not classify by race, then the only effective remedial actions that the federal and state governments may take to combat the lingering effects of all forms of racism will be illegitimate. In order to deal with the structural effects of workplace inequality, for example, government action must not only be proactive but also explicitly race conscious. The claims of moral equivalence are specious and rest on the fallacy of false symmetry: The races do not stand on an equal footing with respect to three-and-a-half centuries of oppression.³³⁸ Whites enslaved blacks, not the other way around; whites imposed Jim Crow on blacks, not the reverse. Whites continue to benefit in countless ways from past discrimination; blacks do not. Classification by race is essential if remedies are to be effective and trying to avoid it by the self-deception of colorblindness only perpetuates the wrongs of the past.

IV. CONCLUSION

Supreme Court decisions since 1964 involving constitutional challenges to employment discrimination have mapped precisely onto the template of structural racism. These decisions exemplify components of structural racism, thereby cementing it into the social foundations of America. Therefore, one might reasonably conclude that the Court has ignored structural analysis. In reality though, the justices have actually demonstrated that they do think in structural terms—but only to protect whites' interests.

This began in *Washington v. Davis*, where Justice White rejected the *Griggs* statutory criterion of disparate impact for constitutional interpretation.³³⁹ But with unintended irony, he justified his conclusion by a results-oriented test that amounted to a policy-grounded disparate impact test for white people: A holding for the petitioners “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 black than to the more affluent white.”³⁴⁰ For the first but not the last time, the Supreme Court applied a racial double standard for the *Davis* purpose and

338. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 240 (1995) (Thomas, J., concurring).

339. *See supra* Part III.A.

340. *Washington v. Davis*, 426 U.S. 229, 248 (1976).

effects test: Where the status quo of white advantage is threatened, the Court relies on the effects on whites with no requirement of proving malevolent intent. But where blacks challenge policies that disadvantage them, the Court demands proof of wrongful intent under a standard that became ever more daunting. Programs benefiting people of color are subjected to impossibly strict scrutiny.

This began a consistent pattern where the justices refused to do structural analysis when the interests of blacks are adversely affected. At the same time, they invoked structural considerations to protect whites' opportunities and prevent disrupting the status quo of wealth distribution. Under the *Washington v. Davis* effects test, all that white plaintiffs need to do to challenge an affirmative action plan is to demonstrate that they will lose an opportunity (an effect), with no need to demonstrate malignant intent. But blacks challenging discrimination must prove intent under *Davis* by standards that are usually impossible to meet.

People of color asserting a denial of equal protection now face at least four daunting obstacles:

First, the justices mandate a showing of intent for black plaintiffs, which, under the doctrinal progression from *Davis* to *Feeney* to *McCleskey*, is now effectively unattainable. Conversely, the Court permits white plaintiffs to focus solely on the effects on them.

Second, the Court accords only to whites an important advantage: the mantle of innocence. While the Court has repeatedly presented itself since *Bakke* as the paladin of white innocence, the majority (excluding Justices Marshall, Brennan, and Blackmun) has been unable to see people of color as innocent victims—victims of centuries of slavery followed by post-emancipation servitude, with effects that still dominate our society. In the *Civil Rights Cases*, Justice Joseph Bradley demanded that African Americans no longer be “the special favorite of the laws” (as if they ever had been).³⁴¹ But American law has always treated white people as the favorites of the law and continues to do so by securing the structural advantages of whiteness, including innocence and victimhood.

Third, the Court's majority insists that only individual people of color, not groups, can be victims of racial injustice and remedies may only be for individual people of color. The justices have grown increasingly hostile to remedies covering groups and restrict the procedural avenues, such as the class action, that make group remedies possible at all. Yet the justices approve group remedies, but for whites only, whenever they invalidate programs or actions taken to overcome effects of past discrimination in employment.

341. *The Civil Rights Cases*, 109 U.S. 3, 25 (1883).

Most recently in *Ricci v. Stefano*, for example, a five-justice majority held that the employer's decision to discard the results of a civil service examination required for firefighters' promotions constituted a "racial preference" in favor of black candidates.³⁴² It thereby converted whites' disappointment and inconvenience in retaking the exam into the basis for a finding of "intentional discrimination."³⁴³ The white plaintiffs were beneficiaries of a group remedy, though they had demonstrated neither intent to discriminate nor individualized harm.

Fourth, the Court placed nearly insurmountable obstacles to awarding damages for black plaintiffs presenting constitutional claims, by the narrowest possible reading of section 1981 in *Patterson v. McLean*.³⁴⁴ Yet the Court has reduced standing requirements for whites claiming personal injury (such as in *Wygant*), merely presuming injury rather than requiring white plaintiffs to show tight causal linkages.

Besides applying differential criteria to black and white plaintiffs, the justices have repeatedly rejected the possibility of basing claims on what they term "societal racism"—the pervasiveness of racial discrimination throughout American society. Yet, ironically—given the Court's insistence on applying to black plaintiffs the traditional paradigm of racism limited to overt individual bigotry—the Court accords to white plaintiffs the benefit of a structural perspective that focuses attention:

- on groups and away from individuals;
- on effects on those groups as opposed to injury to individuals;
- on assumed injury to each member of the group as a result of the aggregate effect on the group, as opposed to a demand for demonstration of injury to each individual; and
- on inadvertent effects of institutional policies and procedures as opposed to insistence on evidence of intent to discriminate.

The Court has indeed been using a structural understanding of racism *sub rosa*—but has applied this structural approach only to whites. We draw two conclusions here: First, the Court does in fact

342. *Ricci v. DeStefano*, 557 U.S. 557, 585 (2009). *Ricci* was resolved as a Title VII claim; the Court expressly declined to reach the constitutional issue. *Id.*

343. *See id.* Note that among the 18 successful plaintiffs, one was described as "Hispanic."

344. *See Patterson v. McLean Credit Union*, 491 U.S. 164 (1989); *supra* Part III.D.

understand how structural elements affect racial advantage and disadvantage; and second, the Court has not adhered to its self-professed belief in colorblindness when doing so might jeopardize some white interest.

These opportunistic doctrinal inconsistencies suggest that attempts to meet the challenges of structural racism in the American society of the 21st century will fail if we do not move beyond the perspective of the 1964 Civil Rights Act and devise new doctrines for a new day. Just as laws designed to ban denial of suffrage on the basis of race are ineffectual to deal with modern suffrage restrictions like photo identification laws or reduced voting schedules, so the laws of a half-century ago predicated on overt discrimination in the workplace cannot meet the structural problems encountered by the Brenda Pattersons of our time. Colorblindness and anticlassification have led us down a one-way street: The justices forbid taking race into account when doing so would meliorate blacks' situations by relieving the effects of past oppression. But they are alert to distinctions of color when necessary to protect white advantage.

Fifty years on, the Civil Rights Act of 1964 has done its work well. But it has proven effective only when deployed against an evil that was the only known evil of its time. Our challenge now is to go beyond the time-bound vision of 1964 to remove the roadblocks that the Supreme Court keeps erecting that frustrate the quest for racial justice.