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Postracial Remedies

Derrick Darby
University of Michigan

Richard E. Levy
University of Kansas School of Law

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Derrick Darby* & Richard E. Levy*

Abstract

The Supreme Court's equal protection jurisprudence is decidedly postracial. The Court has restricted the Equal Protection Clause to intentional discrimination by the government, concluding that the Constitution does not prohibit private acts of discrimination and rejecting challenges based on disparate impact, even when rigorous statistical analysis indicates that race is likely a factor. It has held that remedying the effects of past societal discrimination is an insufficient basis for race-specific remedies such as affirmative action. It has also ended remedies of this sort designed to combat previous state-sponsored racial discrimination, such as court-ordered desegregation measures in the schools and the preclearance provisions of the Voting Rights Act. Constitutional litigation currently provides little or no recourse to address racial disparities in outcomes that are not demonstrably caused by intentional governmental racial discrimination, and race-specific remedies face a level of judicial scrutiny that is especially difficult to satisfy.

This Article asks what can be done under these circumstances to ameliorate racial inequality in a manner that is politically feasible and does not run afoul of constitutional limits. It argues that "postracial remedies" are a necessary component of an effective strategy to combat racial disparities in areas such as wealth, incarceration, education, and housing. Postracial remedies seek pragmatic solutions for the economic, social, and structural problems that disproportionately burden blacks in the United States. These remedies are not race specific because they do not treat people differently based on race, but they are race sensitive because they target the manifestations of racial inequality and recognize the salience of race in today's political and legal environment. This approach, which seeks legally achievable remedies, is also consistent with "antibalkanization" perspectives associated with "race moderates" whose civil rights equal protection jurisprudence is motivated, in part, by a concern with preserving social cohesion.

Although postracial remedies are necessary within this postracial ethos, pursuing them does not require acceptance of the postracial narrative or the abandonment of advocacy to combat ongoing racial discrimination.

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* Professor of Philosophy, University of Michigan, Ann Arbor. We are grateful to Pamela Karlan, Martha Nussbaum, Richard Posner, Reva Siegel, and workshop participants at the Stanford University Political Theory Workshop, the University of Chicago School of Law, and the University of Kansas School of Law for helpful feedback on previous drafts. Our thanks to Justine Koehle, University of Kansas Class of 2017, for valuable research assistance.

** J.B. Smith Distinguished Professor of Constitutional Law, University of Kansas School of Law.

INTRODUCTION

Talk of a "postracial" America was widespread after Barack Obama won the White House. To many, electing a black man to the nation's highest office signified that the days of slavery, Jim Crow, and the Civil Rights movement were behind us and that race was no longer a barrier to achieving the American Dream. Although it is certainly premature to celebrate the passing of race in America, this postracial narrative is both prominent in our political discourse and deeply entrenched in United States Supreme Court doctrine. We must take this fact seriously, along with the reality of stark polarization about race matters, to pursue politically feasible and constitutionally sound remedies for racial inequality. In this Article, we argue that "postracial remedies," as we shall call them, are essential tools for realizing egalitarian aspirations in our racially exhausted society.

By "postracial remedies," we mean remedies that seek pragmatic solutions for the economic, social, and structural problems that disproportionately burden African Americans without treating people

differently because of their race.[1] Postracial remedies are "race sensitive" but not "race specific."[2] They are race sensitive because they recognize the salience of race in American society, including *both* the existence of racial disparities and the reality of racial polarization. They are not race specific, however. Instead, they operate with the faith that effectively targeting underlying problems such as low wages, underperforming schools, and impoverished neighborhoods will benefit all Americans. Even if such interventions are motivated in part by the desire to ameliorate racial disparities, they are not mere proxies for race-specific benefits if they genuinely address such problems without regard to race.[3] Creating a rising tide to lift all boats can help mitigate racial disparities in America.

Postracial remedies encompass, but are broader than, some other approaches that have been advocated to combat racial inequality. For example, one type of postracial remedy may substitute class (or "place") for race,[4] such as a recent initiative in New York City that establishes admission preferences at seven elementary schools for students who qualify for free and reduced lunch, English Language Learners, or students in the child welfare system.[5] Another type of postracial remedy is universalistic, insofar as it aims to protect all citizens rather than a particular group of them.[6] Enhanced investments in public education or free college tuition would be examples of universalistic responses to educational disparities. Many other pragmatic approaches that do not neatly fall into these categories may help to improve educational achievement for students or schools that lag behind, including improved early childhood education or before and after school programs, programs to enhance parental involvement or encourage students to take more

1. In this Article we focus on the black-white race case. We do not explore implications of our proposal for women, Native Americans, aliens, Latinos/as, and other historically disadvantaged groups.

2. We use the terms "race specific" and "race sensitive" to avoid confusion with other commonly used terms, such as "race conscious" or "race targeted," which have connotations we wish to avoid.

3. For further discussion of this issue, see *infra* notes 407–410 and accompanying text.

4. *See, e.g.*, SHERYLL CASHIN, PLACE, NOT RACE: A NEW VISION OF OPPORTUNITY IN AMERICA (2014).

5. NYC DEPT. OF EDUC., *Chancellor Fariña Announces New Admissions Pilot at Seven Elementary Schools Designed to Promote Diversity* (Nov. 20, 2015), http://schools.nyc.gov/Offices/mediarelations/NewsandSpeeches/2015-2016/Chancellor+Farina+Announces+New+Admissions+Pilot+at+Seven+Elementary+Schools+Designed+to+Promote+Div.htm.

6. Postracial remedies resemble so-called "universalist" remedies, which eschew targeting specific groups of individuals, whether defined by race, ethnicity, class, disability, or some other classification. *See* Samuel R. Bagenstos, *Universalism and Civil Rights (with Notes on Voting Rights after Shelby)*, 123 YALE L.J. 2838 (2014). We compare and contrast postracial remedies with universalist remedies in part V.A. of the Article. *See infra* notes 398–401 and accompanying text.

responsibility for their own education, or changes in curriculum or teaching methods. We are agnostic as to whether such remedies come from the progressive Left or the conservative Right, whether they emphasize public or private initiatives, and whether they rely primarily on public assistance or personal responsibility or some combination of the two. The question of greatest importance is, "What works?"[7]

It is tempting, though mistaken, to assume that advocating postracial remedies implies acceptance of the premises of the postracial narrative. To the contrary, it is precisely because we are conscious of the ways in which race still matters, and pessimistic about overcoming the postracial narrative, that we advance a non-race-specific (not race-blind) approach to addressing racial inequality. Relatedly, we propose postracial remedies out of a genuine concern with minimizing the social divisiveness shaped by the ideological polarization over race matters in America. Thus, this view is also consistent with "antibalkanization" perspectives associated with "race moderates" whose civil rights equal protection jurisprudence is motivated, in part, by a concern with preserving social cohesion.[8]

The United States is hardly a postracial nation. Tragic police encounters with blacks in Baltimore, Ferguson, New York, South Carolina, Texas, and elsewhere remind us that race still matters and that we have a long way to go to achieve the goal of having a postracial society.[9] So, too, does evidence that job applicants with black

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7. A postracial remedy "works" if it remedies the problem that it is meant to address and consequently helps those in society who are adversely affected by the problem. Thus, for example, a remedy that targets underperforming schools "works" if it improves achievement by the students at such schools. A central premise of our approach is that pragmatic solutions that work to ameliorate the underlying social and economic problems that disproportionately burden blacks will, over time, reduce racial disparities. *See infra* notes 333–336 and accompanying text (Part IV.A.1); *see also infra* notes 343–347 (Part V.B.1). Our pragmatic commitment to what works is not merely strategic. It is also principled, in the sense that it is rooted in a normative objective of promoting social consensus, or at least minimizing social divisiveness, in pursuit of effective ways of realizing our common aims as a community. For instance, if a particular remedy such as a higher minimum wage is proposed to address income inequality, low wage workers of various races and ethnicities may form a consensus in support of it. Similarly, if a particular remedy such as a civilian review board is proposed to address police discretionary stops and arrests, persons of various races, ethnicities, and class may achieve consensus in favor of it. *See infra* notes 403–410 and accompanying text.

8. *See* Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278 (2011). Although Siegel is focused on the jurisprudence of Justice Kennedy, who seems to occupy the middle ground on a divided Court, he is representative of a broader group whose views on race are mixed. *See infra* notes 395–396 and accompanying text. In addition, we are concerned with both the political and legal manifestations of postracialism, and so seek an approach that both facilitates coalition building across racial lines and is capable of surviving constitutional scrutiny.

9. *See generally* DAVID THEO GOLDBERG, ARE WE ALL POSTRACIAL YET? (2015); Ta-Nehisi Coates, *There is No Post-Racial America: The United States needs more than a good president to erase*

sounding names like Jamal and Lakisha get fewer callbacks than ones with white sounding names such as Emily and Greg,[10] as well as reports that banks are still discriminating against black communities in the home loan lending market even though redlining is illegal.[11] More broadly, as Dr. Martin Luther King, Jr., once observed, "Of all the good things in life, the Negro has approximately one half those of whites. Of the bad he has twice that of whites."[12] While the numbers may have changed a bit since Dr. King made this observation in 1967, his point still rings true today: substantial disparities endure between whites and blacks on a wide variety of indicators.[13]

Although the reality of racial disparities is undeniable, their implications for racial justice are matters of deep disagreement. This discord, and its intractability, is consequential for understanding our argument. For most blacks and their allies on the Left, these disparities are compelling evidence of racial injustice. From this perspective, while blacks have enjoyed formal legal equality since the middle of the twentieth century, generations of oppression, and its intergenerational effects, have exacted a heavy toll on black society that has not dissipated. Notwithstanding the hard-fought gains of the Civil Rights Era, moreover, intentional discrimination is an ongoing problem, even if it has been driven largely underground and is therefore difficult to document. Furthermore, aside from overt discrimination, implicit biases and systemic barriers also prevent blacks from achieving genuine equality. In view of these considerations, the Left often concludes that race-specific remedies

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centuries of violence, THE ATLANTIC (Aug. 2015), http://www.theatlantic.com/magazine/archive/2015/07/post-racial-society-distant-dream/395255/.

10. *See generally* Alan B. Krueger, *Economic Scene; Sticks and Stones Can Break Bones, but the Wrong Name Can Make a Job Hard to Find*, N.Y. TIMES (Dec. 12, 2002), http://www.nytimes.com/2002/12/12/business/economic-scene-sticks-stones-can-break-bones-but-wrong-name-can-make-job-hard.html; William A. Darity Jr. & Patrick L. Mason, *Evidence on Discrimination in Employment: Codes of Color, Codes of Gender*, 12 J. ECON. PERSPECTIVES 63 (1998); 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); Devah Pager et al., *Discrimination in a Low-Wage Labor Market: A Field Experiment*, 74 AM. SOCIOLOGICAL REV. 777 (2009).

11. Rachel L. Swarns, *Biased Lending Evolves, and Blacks Face Trouble Getting Mortgages*, N.Y. TIMES (Oct. 30, 2015), http://www.nytimes.com/2015/10/31/nyregion/hudson-city-bank-settlement.html?hp&actionclick&pgtypehomepage&modulesecond-column-region&region=top-news&WT.nav=top-news&_r=0.

12. Martin Luther King, Jr., Address to Hungry Club of Atlanta Speech (May 10, 1967), http://www.thekingcenter.org/archive/document/americas-chief-moral-dilemma.

13. For convenience, we will use the terms "black" and "white" as racial designations, with the full knowledge that neither term accurately captures the complex construct that is race. For an insightful philosophical discussion of race and its complexities, see generally LAWRENCE BLUM, I'M NOT A RACIST, BUT. . . THE MORAL QUANDARY OF RACE (2002).

such as affirmative action—and perhaps even black reparations—are necessary to mitigate enduring racial inequality and to achieve racial justice in America.[14]

This perspective contrasts sharply with the postracial narrative that is advanced by politicians and commentators on the Right and embraced by many whites and some conservative blacks.[15] The postracial narrative acknowledges past racial wrongs, but emphasizes racial progress. Slavery was abolished after the Civil War, racial segregation has been unconstitutional since *Brown v. Board of Education*, and civil rights laws in the 1960s outlawed racial discrimination. So, racial disparities can no longer be attributed to America's lamentable history of racial oppression. In short: "That was then, this is now." Under the postracial narrative, even if some intentional discrimination, implicit bias, or systemic barriers remain, racism is no longer a major obstacle to opportunity and success. Nowadays, its proponents argue, unequal outcomes have more to do with personal factors like will, effort, and discipline than with race. Thus, they conclude, it is time for black Americans to take personal responsibility for their own successes and failures and to work their way up the socioeconomic ladder like other minority groups before them. From the postracial perspective, race-specific remedies for racial inequality are not only unnecessary, but are also pernicious, insofar as they breed a culture of dependency, foster racial balkanization, and undermine the ultimate goal of a color-blind society. Thus, as Chief Justice Roberts sums up this perspective in *Parents Involved in Community Schools v. Seattle School*

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14. *See generally* Derrick Darby, *Reparations and Racial Inequality*, 5 PHIL. COMPASS 55 (2010) (documenting the link between racial inequality and reparations in progressive arguments).

15. In general, to describe a society as "postracial" (also post-racial) means that it is a society in which race no longer matters. Postracialism is generally associated with a political narrative whose advocates assert that America has achieved, or has nearly achieved, its postracial ideal. Although the term has become sufficiently common to warrant its own Wikipedia page. *See Post-racial America*, https://en.wikipedia.org/wiki/Post-racial_America (last visited Nov. 15, 2016). Because there is no authoritative definition, however, the postracial narrative described in this paragraph is our own distillation of what we perceive as the common elements of the postracial position, gleaned from a variety of sources, ranging from popular media to scholarly articles. *See, e.g.*, *infra* note 17 (citing exchange between Jon Stewart and Bill O'Reilly on the *Daily Show*); Derrick Darby and Argun Saatcioglu, *Race, Justice, and Desegregation*, 11 DUBOIS REVIEW 87 (2014); Lawrence D. Bobo, *Somewhere Between Jim Crow & Post-Racialism: Reflections on the Racial Divide in America Today*, 140 DAEDALUS 11 (2011). Indeed, postracialism has also been the focus of considerable legal commentary, most of it from the Left and most of it critical of the notion that we have come close to achieving our postracial aspirations. *See, e.g.*, Sumi Cho, *Post-Racialism*, 94 IOWA L. REV. 1589 (2009); Andre Douglas Pond Cummings, *Post Racialism?*, 14 J. GENDER RACE & JUST. 601 (2011); Girardeau A. Spann, *Postracial Discrimination*, 5 MOD. AM. 26 (2009); Sheila Thomas, *Debunking The Myth of a Post-Racial Society*, 37 HUM. RTS. 22 (2010).

District. No. 1, "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[16]

As is the case in other aspects of social and public policy, these diverging accounts suggest that Americans are polarized on matters of race.[17] Blacks and whites, the Left and the Right, and Democrats and Republicans disagree about the causes, meaning, and remedies for racial inequality. Insofar as these divisions have deep philosophical and psychological roots connected with how our social identities shape our perception of race matters, they are unlikely to be overcome in the near future. Notwithstanding this reality, which must be taken seriously in our democratic society, progress can be pursued in a manner that minimizes racial polarization and works toward building coalitions to achieve solutions that work. Of course, getting beyond polarization over race is no guarantee that we can avoid it on other matters such as class. Still, given the fraught history of race in America, sensitivity to racial exhaustion and disagreements about race is an obvious place to begin our search for less contentious common ground so as to curtail the social divisiveness that obstructs the mutual cooperation required for social progress within a democracy.[18]

Those who, like us, believe that we must take steps to alleviate the sobering reality of racial inequality, and are not naïve about the depth and significance of polarization about race matters, face difficult—if not insurmountable—obstacles to race-specific remedies for this purpose. Such remedies are politically divisive and face gridlock at all levels of government. Even when dealing with well-meaning people, they elicit defensive psychological reactions as well as efforts to avoid collective guilt that can undermine finding

16. 551 U.S. 701, 748 (2007).

17. For an illuminating conversation between Jon Stewart and Bill O'Reilly on the "Daily Show" that highlights these competing perspectives, see *The Daily Show—Bill O'Reilly Extended Interview*, YOUTUBE (Oct. 16, 2014), https://www.youtube.com/watch?v=8raaT7SRx18.

18. *See generally* Darren Lenard Hutchinson, *Racial Exhaustion*, 86 WASH. U.L. REV. 917 (2009). The most recent presidential election, which took place during the final stages of the editorial process on this article, underscores this point, as well as the necessity of finding postracial remedies to address racial inequalities. People will be dissecting Donald J. Trump's Electoral College victory for years to come and it is clear that a variety of factors contributed to this outcome, Nonetheless, anyone who has been paying attention will recognize that polarization on race played a major role in his political ascendency and eventual victory. It is especially noteworthy in this regard that one of President-elect Trump's first policy suggestions was a public works program for infrastructure development—a postracial remedy—and that this suggestion received broad support. *See* Steven Mufson, *Trump's call for new roads, bridges and other public works finds wide support*, WASH. POST (Nov. 11, 2016), https://www.washingtonpost.com/business/economy/big-pending-on-roads-bridges-and-other-projects/2016/11/11/6a58d150-a821-11e6-ba59-a7d93165c6d4_story.html?utm_term=.7380b39d8701. In short, there is every reason to think that race-specific remedies will continue to face political and legal obstacles.

common ground and forging productive political coalitions to mitigate racial inequality. Race-specific remedies presume a philosophically contested understanding of the relationship between past racial discrimination and current racial disparities.[19] In addition, and perhaps most significantly, pursuing race-specific remedies for racial inequality faces stiff odds in the courts.

The Supreme Court's equal protection jurisprudence is decidedly postracial, in the sense that decision after decision from the Court rests on postracial doctrinal principles and factual premises.[20] This situation must be acknowledged. The Court has restricted the Equal Protection Clause to intentional discrimination by the government, concluding that the Constitution does not prohibit private acts of discrimination and rejecting challenges based on disparate impact, even when statistical analysis indicates that race is likely a factor.[21] It has held that remedying the effects of past societal discrimination is an insufficient basis for race-specific remedies (i.e., affirmative action).[22] And it has ended remedies of this sort put in place to combat previous state-sponsored racial discrimination, such as court-ordered desegregation measures in schools[23] and the preclearance provisions of the Voting Rights Act.[24]

The Court's postracial orientation limits the pursuit of legal remedies for racial inequality in two substantial ways. First, because the Constitution does not prohibit implicit, systemic, or societal racism, constitutional litigation provides little or no recourse as a means to address racial disparities in outcome that are not demonstrably

19. *See infra* notes 152–157 and accompanying text (Part II.A.3).

20. Although the Justices are often divided in any given case, the results of the decisions over the years have been consistently postracial in terms of both doctrinal principals and factual premises. *See infra* notes 218–286 and accompanying text.

21. *See, e.g.*, McCleskey v. Kemp, 481 U.S. 279 (1987) (rejecting equal protection challenge to capital punishment notwithstanding statistical analysis demonstrating that race was a significant factor in the imposition of the death penalty); Washington v. Davis, 426 U.S. 229 (1976) (holding that racial discrimination claims under the Equal Protection Clause based on disparate impact require proof of intentional discrimination). For further discussion of the postracial premises of these decisions, see *infra* notes 222–240 and accompanying text.

22. *See, e.g.*, City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (applying strict scrutiny to race-based affirmative action programs and concluding that remedying the effects of past societal discrimination was not a sufficient justification to survive strict scrutiny); *see also* Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995) (applying *Croson* to federal affirmative action programs). For further discussion of the postracial premises of these decisions, see *infra* note 261 and accompanying text.

23. *See, e.g.*, Bd. of Educ. of Oklahoma City Pub. Schs., Indep. Sch. Dist. No. 89 v. Dowell, 498 U.S. 237 (1991) (relaxing standards for dissolving injunctions and removing judicial supervision of desegregation efforts in previously segregated school districts); Freeman v. Pitts, 503 U.S. 467 (1992) (same). For further discussion of the postracial premises of these decisions, see *infra* notes 267–275 and accompanying text.

24. *See* Shelby Cty. v. Holder, 133 S. Ct. 2612 (2013). For further discussion of the postracial premises of this decision, *see infra* notes 276–286 and accompanying text.

caused by intentional governmental racial discrimination. Second, race-specific remedies by political actors or governmental institutions are unavailable in practice because they face a level of judicial scrutiny that is difficult to overcome.[25] Even remedies originally put in place to correct intentional discrimination by state actors have been dismantled.

Although we categorically reject the premises of postracialism and recognize the ongoing necessity of confronting those premises with the truth about ongoing discrimination and inequality,[26] there is no denying that the postracial narrative has considerable influence in our political discourse and constitutional doctrine.[27] So, if we take these obstacles to race-specific remedies seriously, and wish to find workable solutions to ongoing racial inequality that are politically and legally achievable, we must answer this pressing question: *What can be done to ameliorate racial inequality in a manner that takes seriously the deep polarization over race matters in America and that does not run afoul of constitutional limits reflecting the Supreme Court's postracial equal protection jurisprudence?* We believe that pursuing postracial remedies provide a promising answer.[28]

The Article proceeds as follows. Part I documents racial disparities in the United States on various indicators, including income and wealth, incarceration and criminal justice, educational achievement, and residential housing segregation. While the disparities are

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25. Similarly, nongovernmental actors—such as employers—are also limited by the Court's postracial premises to the extent that these premises permeate the construction and application of civil rights statutes that prohibit private racial discrimination. *See infra* notes 232–240 and accompanying text.

26. *See infra* Part V.B.3, notes 426–431 and accompanying text (responding to racial purists). *See, e.g.*, Mario L. Barnes, Erwin Chemerinsky & Trina Jones, *A Post-Race Equal Protection?* 98 GEO. L.J. 967 (2010); Ian F. Haney López, *Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, 98 CAL. L. REV. 1023 (2010); Sumi Cho, *Post-Racialism*, 94 IOWA L. REV. 1589 (2009); Thomas F. Pettigrew, *Post-Racism? Putting President Obama's Victory in Perspective*, 6 DU BOIS REV. 279 (2009).

27. For a discussion of the psychology of postracialism, see *infra* notes 160–178 and accompanying text.

28. It might be objected that our approach is weak, giving away too much to those on the other side who subscribe to vicious racism and are acting in bad faith. We can show up to fight them with the "truth" about racial inequality, its history, causes, and consequences, but if all those who subscribe to the postracial narrative are all hell-bent on keeping blacks down relative to whites, then nothing short of a miracle or a successful armed struggle will produce racial progress. We proceed on the premise that this group is the exception rather than the rule, so that it is possible to build alliances in a collective effort to mitigate a social problem with which we all live: racial inequality. Our concern with building strategic alliances resonates with Dr. Martin Luther King, Jr.'s unifying strategy for addressing economic injustice in America. During the Civil Rights Era, King recognized both the possibility and necessity of building interracial alliances to address social problems that disproportionately affected African Americans. THOMAS F. JACKSON, FROM CIVIL RIGHTS TO HUMAN RIGHTS: MARTIN LUTHER KING, JR., AND THE STRUGGLE FOR ECONOMIC JUSTICE 365 (2007).

hardly in dispute, their causes, meaning, and implications are hotly contested. Part I also elucidates the core premises of the postracial narrative. Part II considers the philosophical and psychological roots of ideological polarization over matters of race, discussing the social-psychological research supporting our pessimism about bridging this divide any time soon, and our skepticism about placing all of our faith in race-specific remedies. Part III demonstrates that the Supreme Court's equal protection jurisprudence closely tracks the postracial narrative, both in terms of the controlling doctrinal principles and the Court's underlying factual assumptions. In view of the various barriers to race-specific remedies, Part IV proposes addressing racial inequality through postracial remedies, by which we mean non race-specific remedies that target the underlying social and economic problems that produce racial disparities. Then, with very broad strokes, Part IV describes what such remedies might look like in practice. Part V situates this approach within a family of equal protection jurisprudential approaches concerned with addressing racial inequality while minimizing racial resentment and social divisiveness; Part V then responds to three potential objections. Part VI concludes by summarizing the Article's argument.

I. RACIAL INEQUALITY IN THE UNITED STATES

Blacks have enjoyed formal legal equality with whites for half a century, but substantial inequality persists between these racial groups on leading measures of well-being.[29] We start from the premise that, regardless of its causes, racial inequality is a pressing social problem that warrants the attention of law and policymakers. The costs of social and economic inequality, which have been documented elsewhere,[30] are magnified when race is added to the mix. We will not review these costs here or attempt to persuade those who believe that racial inequality is not a problem worth addressing. Nor will we attend to all of the disparities for which there is compelling data. Instead, we summarize evidence of racial disparities in four key areas: economics, criminal justice, education, and

29. Many people, particularly on the Left, conclude from these disparities that America's unsteady march to genuine racial equality is unfinished business. PHILIP A. KLINKNER AND ROGERS M. SMITH, THE UNSTEADY MARCH: THE RISE AND DECLINE OF RACIAL EQUALITY IN AMERICA (1999); DOUGLAS S. MASSEY, CATEGORICALLY UNEQUAL: THE AMERICAN STRATIFICATION SYSTEM (2007).

30. *See, e.g.*, RICHARD WILKINSON & KATE PICKETT, THE SPIRIT LEVEL: WHY GREATER EQUALITY MAKES SOCIETIES STRONGER (2011); JOSEPH E. STIGLITZ, THE PRICE OF INEQUALITY (2013); DIVIDED: THE PERILS OF OUR GROWING INEQUALITY (David Cay Johnston ed., 2015).

residential segregation.[31] We then consider disagreements about the causes and implications of these disparities.

A. Representative Data on Racial Disparities

It has been well documented that blacks are worse off than whites on a variety of measures.[32] Economically, blacks as a group have lower incomes and less wealth, and suffer from higher rates of poverty and unemployment.[33] They are incarcerated at higher rates than whites,[34] and have disproportionately worse outcomes within the entire criminal justice process from police stops to sentencing. They underperform relative to whites on measures of educational achievement and attainment.[35] They are more likely to live in communities segregated by race and income that are largely composed of black and Latino residents living near or below the poverty line.[36]

1. Economics

Recent data shows scant progress since the civil rights era in closing racial gaps in poverty, wealth, and income—notwithstanding increases in national prosperity. Blacks remain three times as likely to live in poverty as whites, which is more or less the same rate we saw fifty years ago.[37] They are also overrepresented among the

31. We focus here on four areas of racial inequality acknowledging that others may be equally significant. For example, racial disparities in political participation and representation are clearly important. Thus, although we reference *Shelby County* as an example of the postracial factual assumption that past discrimination no longer causes present disparities in political participation and representation and that intentional discrimination is no longer a significant problem, we do not extend our analysis to these disparities. Shelby Cty. v. Holder, 133 S. Ct. 2612 (2013); *see supra* note 24; *infra* notes 121–122 and accompanying text; *infra* notes 276–286 and accompanying text.

32. *See generally* DOUGLAS S. MASSEY, CATEGORICALLY UNEQUAL: THE AMERICAN STRATIFICATION SYSTEM (2007).

33. *See infra* notes 37–48 and accompanying text (Part I.A.1).

34. *See infra* notes 49–68 and accompanying text (Part I.A.2).

35. *See infra* notes 69–74 and accompanying text (Part I.A.3).

36. *See infra* notes 75–94 and accompanying text (Part I.A.4).

37. In 2013, 27.2 percent of black households lived in poverty compared to 9.6 percent of whites. CARMEN DENAVAS-WALT & BERNADETTE D. PROCTOR, INCOME AND POVERTY IN THE UNITED STATES: 2013, CURRENT POPULATION REPORTS 12 (2014), http://www.census.gov/content/dam/Census/library/publications/2014/demo/p60-249.pdf. In 1959, the 55.1 percent black poverty rate was over three times that of whites. Michael A. Fletcher, *Fifty Years After March on Washington, Economic Gap Between Blacks, Whites Persists*, WASH. POST (Aug. 28, 2013), http://www.washingtonpost.com/business/economy/50-years-after-the-march-the-economic-racial-gap-persists/2013/08/27/9081f012-0e66-11e3-8cdd-bcdc09410972_story.html?tid=PM_business_pop.

poorest of the poor: of the nearly twenty million people with family incomes below fifty percent of their poverty threshold, one-fourth (4.963 million) are black.[38] Put differently, blacks are three times more likely to have incomes below fifty percent of poverty,[39] which reflects scant progress over the last fifty years.[40]

Family wealth for both black and white households increased dramatically between 1983 and 2007 (nearly doubling for both groups), but the relative gap between whites and blacks has also increased,[41] even more so since the recession ended in 2009.[42] In 2007, white households had ten times more wealth than black ones.[43] White median wealth was $192,500 compared to $19,200 for blacks. After the Great Recession, in 2013, whites had thirteen times more wealth, $141,900 net worth compared with $11,000 for blacks.[44] Because whites have more assets that appreciate as a result of economic growth, a rising stock market and increased real estate values disproportionally benefit whites.[45] Accordingly, whites have greater wealth to pass on to their progeny than do blacks.[46]

Likewise, there are substantial gaps in other economic indicators. A 2014 U.S. Census Bureau report estimates that the median household income for whites in 2013 was $58,270 compared to $34,598 for blacks.[47] Similarly, blacks continue to have disproportionately

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38. DENAVAS-WALT & PROCTOR, *supra* note 37, at 17.

39. 4.3 percent of whites (8,373,000 out of 195,167,000) as compared with 12.2 percent of blacks (4,963,000 out of 40,615,000) fall into this category. DENAVAS-WALT & PROCTOR, *supra* note 37, at 17.

40. In 1967, blacks were also overrepresented in one of the poorest categories of citizens at three times the rate of whites: nine percent of black families earned less that $5,000 per year compared with three percent of white families. Although the percentages of each group that fell into this category was reduced by 1976 (perhaps as a result of inflation), the relative gap between them remained the same: six percent of black families and two percent of white fell below the threshold. WILLIAM A. DARITY JR. AND SAMUEL L. MYERS JR., PERSISTENT DISPARITY: RACE AND ECONOMIC INEQUALITY IN THE UNITED STATES SINCE 1945, 17 (1998).

41. Rakesh Kochhar & Richard Fry, *Wealth Inequality Has Widened Along Racial, Ethnic Lines Since End of Great Recession*, PEW RESEARCH CTR. (Dec. 12, 2014), http://www.pewresearch.org/fact-tank/2014/12/12/racial-wealth-gaps-great-recession/.

42. *Id.*

43. *Id.*

44. *Id.* This rate approaches that of 1989, when whites had seventeen times the wealth of blacks.

45. For research documenting racial disparities in home equity and how this contributes to the racial wealth gap, *see* Lauren J. Krivo & Robert L. Kaufman, *Housing and Wealth Inequality: Racial-Ethnic Differences in Home Equity in the United States*, 41 DEMOGRAPHY 585 (2004).

46. Some researchers also make the crucial point that middle class black families—who generously provide financial support to poorer family and extended family members—have a harder time accumulating wealth. Thus, we should expect the adverse effects of their generosity to be substantial during times when poverty is taking its greatest toll on their relatives. *See* N. S. Chiteji & Darrick Hamilton, *Family Connections and the Black-White Wealth Gap Among Middle-Class Families*, 30 REV. BLACK POL. ECON. 9 (2002).

47. DENAVAS-WALT & PROCTOR, *supra* note 37, at 5.

higher rates of unemployment. Over the period from 1963–2012, blacks were unemployed at twice the rate of whites.[48]

2. Criminal Justice

The criminal justice system is a complex societal institution with many components. Entry into this system is initiated with police patrols, investigations, and arrests. Judges then decide whether to set bail, what it will be, and under what terms. Prosecutors have discretion regarding whether or not to press charges, what charges to press, and whether to offer plea deals and on what terms. Juries and judges hear evidence and hand down verdicts. Judges set sentences and parole hearing boards decide whether convicts must serve the full sentence or can be set free early. After time has been served, parole officers have discretion to decide whether the terms are being met or violated by ex-cons.

At virtually every stage of the process, researchers have documented disparities between the treatment and outcomes for whites and blacks in which the latter are worse off.[49] In the aftermath of the Michael Brown shooting in Ferguson, Missouri, for example, a Justice Department report documented ways in which black residents in Ferguson were rendered worse off within the criminal justice process than white residents.[50] Rather than review evidence on each aspect of the criminal justice system, we will focus on the evidence of racial disparities in incarceration.

Rates of incarceration in the United States began to increase in the mid-seventies, reaching unprecedented proportions by 2003.[51] Although the incarceration rate was rather small in absolute terms, with less than one percent behind bars, rates of incarceration in the United States were much higher than in Europe,[52] and that rate

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48. In 1963, five percent of whites were unemployed compared to 10.9 percent of blacks. The current rate for blacks is 12.6 compared to 6.6 for whites. Brad Plumer, *These Ten Charts Show That Black-White Economic Gap Hasn't Budged in 50 Years*, WASH. POST (Aug. 28, 2013), http://www.washingtonpost.com/blogs/wonkblog/wp/2013/08/28/these-seven-charts-show-the-black-white-economic-gap-hasnt-budged-in-50-years.

49. *See, e.g.*, CHARLES R. EPP, STEVEN MAYNARD-MOODY & DONALD P. HAIDER-MARKEL, PULLED OVER: HOW POLICE STOPS DEFINE RACE AND CITIZENSHIP (2014) (documenting disparities in police stops).

50. *See* U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 15 (Mar. 4, 2015), http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf.

51. BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA 13, Fig. 1.1 (2006).

52. In 2001, the United States's incarceration rate was 686 per hundred thousand compared to the British rate of 126 per hundred thousand. *Id.* at 14, Fig. 1.2.

represented a substantial increase over previous decades.[53] Nearly 2.1 million persons were behind bars by 2003. By 2007, more than seven million people were locked up, on probation, or on parole.[54] These trends have been aptly described as "mass incarceration."

Imprisonment affects blacks at much higher rates than whites. Current data on incarceration rates indicate that black men were six to eight times more likely to be in prison or jail than whites during the last two decades of the twentieth century.[55] Although twelve percent of the U.S. population was black, they comprised more than forty percent of the prison population.[56] And not long into the current century, blacks made up nearly half of the prison population while representing just below thirteen percent of the total U.S. population.[57] One in three young black men will go to jail in the course of his life, and more than half of the ones that drop out of high school will be imprisoned at some point.[58] By comparison, in 2001, a young white male had only a six percent chance of being incarcerated at some point in his life.[59]

One important contributing factor to the high rate of incarceration among black youth is the war on drugs, which has had a disproportionate impact on blacks in terms of arrest rates, imprisonment rates, and the length of sentences.[60] Devah Pager reports that from 1983 to 1997—the height of the war on drugs waged in urban America—there was a more than twenty-six-fold increase in black incarceration for drug offenses compared to a mere sevenfold one for whites. And by 2001, 139,700 blacks were behind bars for drug crimes with less than half that number of whites (57,300) doing time for drug offenses.[61] Michelle Alexander argues that the war on drugs has contributed to the mass incarceration of people of color more than any other factor.[62] By one estimate there are

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53. In 1975, about one-tenth of one percent of the U.S. population was in prison, while in 2003 seven-tenths of one percent of the population was in jail or in prison. *Id.* at 13. The two figures are not directly comparable because the 2003 figure includes jail as well as prison, the difference nonetheless represents a substantial increase in incarceration rates.

54. MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 60 (2010).

55. WESTERN, *supra* note 51, at 30.

56. DEVAH PAGER, MARKED: RACE, CRIME, AND FINDING WORK IN AN ERA OF MASS INCARCERATION 3 (2007).

57. MARC MAUER, RACE TO INCARCERATE: THE SENTENCING PROJECT 137 (2006).

58. PAGER, *supra* note 56, at 3.

59. MAUER, *supra* note 57, at 137.

60. *See generally* PAUL BUTLER, LET'S GET FREE: A HIP-HOP THEORY OF JUSTICE 41 (2009) (discussing the War on Drugs and its far-reaching consequences for African Americans).

61. PAGER, *supra* note 56, at 31–32, Fig. 1.4.

62. ALEXANDER, *supra* note 54, at 59.

around a half-million people behind bars for drug offenses now.[63] It is reported that whites comprise seventy-five percent of current drug users and blacks twelve percent.[64] However, blacks and Latinos represent seventy-five percent of those locked up for drugs.[65]

Mass incarceration has negative consequences.[66] Being labeled a felon is a social stigma that brings heightened public scrutiny. Incarceration disrupts family and community life. It diminishes employment prospects, which affects convicted felons' ability to find housing, support dependents, secure health benefits, and reap the dignity associated with meaningful work.[67] Similarly, felon disenfranchisement laws, as well as the stigma associated with black criminality, impair black political participation and thus curtail the equal opportunity for blacks to directly advance their interests within the political process.[68]

3. Education

There is compelling evidence of persistent racial disparities in educational achievement and attainment.[69] Proficiency in reading and mathematics is a standard measure of educational achievement. Since the early 1970s, National Assessment of Educational Progress (NAEP) tests have measured the reading and math performance of nine-, thirteen-, and seventeen-year-old students, with average scores aggregated by race and by other background characteristics. Based on 2012 test results, students today score higher than their 1970s cohort.[70] As with other indicators, however, here too we find racial disparities—commonly referred to as the racial achievement gap. There has been progress in closing this gap, but

63. *Id.* at 59.

64. MAUER, *supra* note 57, at 162.

65. ALEXANDER, *supra* note 54, at 96–97.

66. *See generally* United States v. Nesbeth, No. 15-CR-18, 2016 WL 3022073 (E.D.N.Y. May 24, 2016) (detailing various negative consequences of criminal convictions as explanation for giving defendant probation).

67. See *generally* PAGER, *supra* note 56; WESTERN, *supra* note 51; ALEXANDER, *supra* note 54.

68. David C. Wilson, Michael Leo Owens & Darren W. Davis, *How Racial Attitudes and Ideology Affect Political Rights for Felons*, 12 DU BOIS REV. 73, 74 (2015) (explaining how racial resentment reduces black political engagement and empowerment).

69. *See generally* Derrick Darby, *Educational Inequality and the Science of Diversity in Grutter: A Lesson for the Reparations Debate in the Age of Obama*, 57 U. KAN. L. REV. 755 (2009) (summarizing the evidence of black and white disparities in education).

70. NAT'L CTR. FOR EDUC. STATISTICS, *The Nation's Report Card: Trends in Academic Progress 2012* (2013) [hereinafter NCES Report]. Except as otherwise indicated, this report is the source of the comparative statistics discussed in the following paragraphs.

black children still lag behind white children in both reading and math test scores.[71]

Black children have made greater gains in reading than their white peers over time. For example, between 1971 and 2012, the average score for nine-year-old black students rose thirty-six points, compared to a fifteen-point gain for their white peers. As a result, the racial achievement gap in reading dropped from forty-four to twenty-three. It has never been narrower for this age cohort.[72] For thirteen-year-old students the gap has narrowed from thirty-nine to twenty-three points, but this is an increase from the historic low of eighteen points in 1988. For seventeen-year-olds, the gap has been cut in half since 1971, down from fifty-three to twenty-six points, but is currently six points higher than the historic low of twenty in 1988. So, in every age group measured blacks still lag behind whites in reading proficiency.

We see a similar trend in math scores, where the gap has narrowed but black students continue to lag behind. As with reading, nine-year-old black children made greater gains than their white peers, which narrowed the score gap ten points since 1973 (thirty-five to twenty-five). In 2004, it was as low as twenty-three points. Thirteen-year-olds made similar progress, from forty-six points in 1973 to twenty-eight in 2012, which is four points higher than its all-time low of twenty-four in 1986. Black seventeen-year-old students raised their scores substantially more than their age cohort (eighteen points) compared to white students who raised their scores only four points, thus narrowing the gap from forty to twenty-six points since 1973, but this gap is five points higher than its low point in 1990. So, while there has been progress in this area, here too we find that black children continue to lag behind whites.

NAEP test scores are not the only measure of educational achievement. There is evidence of a racial SAT score gap and a GPA gap, with blacks scoring lower than whites.[73] And with respect to educational attainment there is evidence that black children have lower promotion and graduation rates and that they are enrolled in advance curriculum at lower rates. Conversely, black children are disproportionately assigned to special education for behavioral

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71. *See generally* THE BLACK-WHITE TEST SCORE GAP (Christopher Jencks & Meredith Phillips eds., 1998); STEADY GAINS AND STALLED PROGRESS: INEQUALITY AND THE BLACK-WHITE TEST SCORE GAP (Katherine Magnuson & Jane Waldfogel eds., 2008).

72. The reading scores for black children rose from 170 to 206, while the scores for white children rose from 214 to 229. NCES report, *supra* note 70, at 16.

73. The disparities described in this paragraph are documented in Grace Kao & Jennifer S. Thompson, *Racial and Ethnic Stratification in Educational Achievement and Attainment*, 29 ANN. REV. SOC. 417, 420–22 (2003).

problems, and are expelled more often and more harshly sanctioned than white children for school misconduct. All of these disparities are consequential for the life prospects of black children, given the impact that education can have on economic and non-economic welfare, and given that educational achievement and attainment are factors that can make one more or less competitive for limited resources and opportunities.[74]

4. Residential Segregation

Where individuals live and grow up has a profound impact on their social mobility.[75] It is not that certain places (e.g., suburbs) are inherently better than others (e.g., the inner city).[76] Rather, some neighborhoods offer things like physical safety, quality schools, recreational areas, environmental safety, access to reliable and convenient transportation, jobs, healthy food options, lower income inequality and rates of poverty, as well as a higher percentage of neighbors with economic, social, and political capital that make a positive difference to future life prospects. This makes the racial neighborhood gap particularly troublesome. There is compelling evidence that blacks, including middle-income black families, are much more likely than whites to live in places lacking the ancillary characteristics that so profoundly contribute to upward social mobility in America. This has been the case in the past and continues to be so now.[77]

It is no surprise that blacks and whites were spatially segregated during the early twentieth century,[78] when Jim Crow laws and *de facto* discriminatory practices combined to enforce black exclusion from white residential areas.[79] What began as segregation in southern and rural areas shifted to segregation in urban areas as blacks migrated to northern cities.[80] In 1900, in major northern cities,

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74. *See* Harry Brighouse & Adam Swift, *Equality, Priority, and Positional Goods*, 116 ETHICS 471, 484–85 (2006).

75. Raj Chetty et al., *Where is the Land of Opportunity? The Geography of Intergenerational Mobility in the United States*, 129 Q. J. ECON. 1553 (2014).

76. *See* David M. Cutler & Edward L. Glaeser, *Are Ghettos Good or Bad?*, 112 Q.J. ECON. 827 (1997).

77. *See generally* DOUGLASS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS (1993).

78. *See* Douglas S. Massey & Zoltan L. Hajnal, *The Changing Geographic Structure of Black-White Segregation in the United States*, 76 SOC. SCI. Q. 527, 527–28 (1995) (examining of historical trends in black residential segregation).

79. MASSEY & DENTON, *supra* note 77, at 26–42.

80. *See* STANLEY LIEBERSON, A PIECE OF THE PIE: BLACKS AND WHITE IMMIGRANTS SINCE 1880 (1980) (showing that cities became racially segregated with black northern migration).

blacks were more likely to have a white than a black neighbor. They lived in neighborhoods that were nearly ninety percent white.[81] Thirty years later, most resided in cities that were nearly forty percent black, and by 1970 they occupied areas that were at least sixty-six percent black.[82] By 1990, in cities including Chicago, Cleveland, Detroit, Gary, New York, and Newark, most blacks resided in wards that were over eighty percent black. By other estimates, which examine a larger set of cities, there was a decline in overall black segregation by 1990, with the average black living in a neighborhood that was fifty-six percent black.[83] Nonetheless, neighborhood segregation by race remains high, albeit not quite as high as it was decades ago.[84]

Segregation by income has also increased. When considered alongside data on racial disparities in income and wealth, this segregation confirms what we already know: black Americans tend to be concentrated in high poverty, low income, and predominately black residential neighborhoods.[85] Any children—black or white—growing up in such a place are likely to have less upward social mobility than children living elsewhere.[86]

It is natural to assume that blacks with higher incomes will live in less segregated neighborhoods with a lower percentage of poor black residents.[87] But this is not the case. In major U.S. metropolitan areas, one finds that blacks with higher incomes are more likely

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Far less racial segregation existed in the south during the nineteenth century. *See* MASSEY & DENTON, *supra* note 77, at 25.

81. MASSEY & DENTON, *supra* note 77, at 23.

82. *See generally* Douglas S. Massey, *Residential Segregation and Neighborhood Conditions in U.S. Metropolitan Areas*, in 1 AMERICA BECOMING: RACIAL TRENDS AND THEIR CONSEQUENCES 391 (Neil J. Smelser et al. eds., 2001).

83. David M. Cutler, Edward L. & and Jacob L. Vigdor, *The Rise and Decline of the American Ghetto*, 107 J. POL. ECON. 455, 456 (1999).

84. *See generally* Sean F. Reardon, Lindsay Fox & Joseph Townsend, *Neighborhood Income Composition by Household Race and Income, 1990-2009*, 660 ANNALS AM. ACAD. POL. & SOC. SCI. 78 (2015).

85. *See* JOHN R. LOGAN, SEPARATE AND UNEQUAL: THE NEIGHBORHOOD GAP FOR BLACKS, HISPANICS, AND ASIANS IN METROPOLITAN AMERICA 4-9, 15 (2011).

86. Chetty et al., *supra* note 75, at 1607.

87. The reasons for continued neighborhood segregation are complex. To some extent, particularly for higher income blacks, the neighborhood in which they live is a matter of choice. Nonetheless, various factors shape this choice, including racially discriminatory real estate and lending practices and fear of isolation, ostracism, or racism that may come with living in predominantly white, suburban neighborhoods. For further discussion of the causes of racially segregated neighborhoods, see, e.g., Vicki Been, *Residential Segregation: Vouchers and Local Government Monopolists*, 23 YALE L. & POL'Y REV. 33 (2005) (discussing the role of government actors in residential segregation); Christopher Berry, *Land Use Regulation and Residential Segregation: Does Zoning Matter?*, 3 AM. L. & ECON. REV. 251 (2001) (concluding that zoning is not a major factor in residential segregation); Rachel Blake, *Illegal Steering in America: Who's at the Wheel?*, 16 J. AFFORDABLE HOUSING & COM. DEV. L. 95 (2007) (discussing

to live in a poorer neighborhood than much lower income whites.[88] Research on the neighborhood gap, which measures both race and income variables, substantiates this finding. A typical black family earning $60,000 lives in a neighborhood with an income distribution comparable to that of a white family making $11,800.[89] And regardless of their economic status—poor or affluent—whites live in places that are eighty percent white. The average black household lives in places that are forty to fifty percent white and thirty to fifty percent black or Hispanic. Affluent blacks live in neighborhoods with less than fifty percent white residents, and between thirty to forty percent blacks.[90] So, in urban areas, higher incomes are no guarantee that black families can avoid neighborhoods occupied by their less fortunate fellow black citizens.[91] This residential segregation has far-reaching consequences for intergenerational economic mobility where we find further evidence of racial disparities linked to residential segregation.

A recent report presents data on racial disparities in neighborhood poverty rates and their connection with the black-white mobility gap.[92] Patrick Sharkey examines this relationship by tracking blacks and whites born between 1955 through 1970 from childhood into adulthood. His study asks an important question: Does neighborhood poverty affect their ability as adults to move up or down in income relative to their parents? A number of glaring racial disparities emerge from this study. From 1955–1970, sixty-two percent of blacks compared to only four percent of whites grew up in neighborhoods with at least twenty percent poverty. And while three in ten blacks grew up in places with at least thirty percent poverty, no whites did. Even economically better off blacks were exposed to serious poverty. Almost half of black kids whose family income was relatively high resided in places where the poverty rate was at least twenty percent. This was the case for only one percent

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the role of "steering" by real estate agents as a major cause of residential segregation); Camille Zubrinsky Charles, *The Dynamics of Racial Residential Segregation*, 29 ANN. REV. SOC. 167 (2003) (concluding that differences in socioeconomic status and problems of acculturation play a major role in residential segregation); Margery Austin Turner, *Limits on Housing and Neighborhood Choice: Discrimination and Segregation in U.S. Housing Markets*, 41 IND. L. REV. 797 (2008) (discussing housing discrimination in the forty years since the FHA).

88. *See* John Iceland & Rima Wilkes, *Does Socioeconomic Status Matter? Race, Class, and Residential Segregation?*, 53 SOC. PROBLEMS 248 (2006).

89. Reardon et al., *supra* note 84, at 90.

90. *Id.* at 85.

91. To some extent, of course, blacks may choose to live in neighborhoods with a higher proportion of black residents, but that choice requires the sacrifice of the advantages that come from living in wealthier areas.

92. *See generally* PATRICK SHARKEY, ECON. MOBILITY PROJECT, NEIGHBORHOODS AND THE BLACK-WHITE MOBILITY GAP (2009).

of whites.[93] The numbers look rather similar for children born from 1985 through 2000. In this group, six out of ten whites compared to one out of ten blacks have grown up in places with less than ten percent poverty. And thirty percent of blacks live in neighborhoods with a poverty rate of at least thirty percent. The upshot of Sharkey's analysis is that neighborhood poverty leads to greater downward income mobility for blacks than whites.[94]

B. Disagreements About Racial Inequality

While the existence of substantial racial inequality is difficult to deny, Americans remain deeply divided over its causes and implications. For most blacks and their allies on the Left, racial inequality is unjust because it is the product of racial discrimination—past and present, conscious and unconscious, individual and systemic—that denies blacks a fair opportunity for success. Accordingly, race-specific remedies such as affirmative action or reparations are necessary and just. The postracial narrative disputes this premise, attributing racial inequality of outcomes to the failure of blacks, individually and collectively, to take advantage of the equal opportunities secured in the 1950s and 1960s as a result of *Brown* and civil rights legislation.

1. Agent-Neutral and Agent-Relative Causes

Divisions about racial inequality often begin with disagreements about its causes.[95] In general terms, the Left and most blacks tend to attribute racial inequality to *agent-neutral* causes; i.e., causes that are external to and independent of individual choices and actions.[96] Most whites, by way of contrast, emphasize *agent-relative* explanations that place responsibility for racial inequality on factors

93. *Id.* at 9.

94. *See id.* at 3.

95. For general discussion of differing views regarding racial inequality, see JAMES R. KLUEGEL & ELIOT R. SMITH, BELIEFS ABOUT INEQUALITY: AMERICANS' VIEWS ABOUT WHAT IS AND WHAT OUGHT TO BE (1986); HOWARD SCHUMAN ET AL., RACIAL ATTITUDES IN AMERICA: TRENDS AND INTERPRETATIONS (1997); Lawrence D. Bobo & Camille Z. Charles, *Race in the American Mind: From the Moynihan Report to the Obama Candidacy*, 621 AAPSS 243 (2009); Lawrence D. Bobo et al., *The Real Record on Racial Attitudes*, in SOCIAL TRENDS IN AMERICAN LIFE: FINDINGS FROM THE GENERAL SOCIAL SURVEY SINCE 1972 38 (Peter V. Marsden ed., 2012).

96. Derrick Darby & Nyla R. Branscombe, *Egalitarianism and Perceptions of Inequality*, 40 PHIL. TOPICS 7, 9 (2012); Bobo & Charles, *supra* note 95, at 247.

related to individual choices and actions.[97] Of course, a substantial number of people take a mixed point of view, attributing racial inequalities to a combination of agent-neutral and agent-relative causes. It is the existence of this "big middle"—however diverse its members may be in practice—that gives us hope for postracial remedies as a way to build coalitions around pragmatic solutions that work to ameliorate racial inequality.

Ideological disagreements on the causes of racial inequality tend to track broader disagreements regarding the respective roles of individuals and society in ameliorating inequality. The Left links racial disparities to agent-neutral societal causes such as the intergenerational effects of past discrimination, ongoing intentional discrimination, implicit biases, and systemic barriers.[98] This type of explanation takes the spotlight off of blacks—or at least off of them exclusively—and spreads responsibility for closing enduring racial gaps across society. Most conservatives attribute racial disparities to blacks' failure to take advantage of opportunities afforded to them in the wake of school desegregation and the civil rights era.[99] This type of explanation puts the spotlight on blacks individually and collectively and holds them primarily responsible for improving their own situation. While charity and goodwill can help, using public taxpayer dollars, or remedial government action, to support the

97. For example, they might explain high incarceration rates for blacks as a product of higher rates of criminality among blacks. If blacks commit more crimes, there is nothing discriminatory about higher incarceration rates. The data, however, do not back up this assumption, however widely held it may be in some circles. Indeed, indications are that whites use drugs as much or more than blacks, yet blacks are incarcerated for drug offenses at much higher rates. *See generally* Arthur H. Garrison, *Disproportionate Incarceration of African Americans: What History and the First Decade of Twenty-First Century Have Brought*, 2011 J. INST. JUST. INT'L STUD. 87, 98 (2011) (discussing disproportionate incarceration of blacks and contrasting explanations based on "differential involvement (African Americans' disproportionate commission of crime)" with explanations based on "differential selection (African Americans are disproportionately treated within the criminal justice system and disproportionately targeted by policy operations or a combination of both based on race apart from actual criminal activity)").

98. We distinguish intentional discrimination from implicit biases and systemic barriers, which are sometimes referred to as discriminatory or racist. By implicit bias, we refer to unconscious biases that we all have but which operate below the level of awareness and often against our will or beliefs. By systemic barriers, we mean the operation of law, public policy, and institutions built into the structure of society that we may take for granted but that systematically disadvantage blacks. Implicit bias and systemic barriers present a special problem because they are not the product of discriminatory intent, so calling them "racist" is especially likely to produce a defensive psychological reaction and they are not legally cognizable as a form of discrimination. *See infra* note 177 and accompanying text and notes 242–251 and accompanying text.

99. *See generally* Darby & Saatcioglu, *supra* note 15.

effort is impermissible.[100] Political moderates or centrists frequently merge these points of view by offering *mixed* explanations of racial disparities that combine agent-relative and agent-neutral factors.[101]

Racial polarization on the causes of racial disparities is even more firmly entrenched.[102] For instance, with respect to economic disparities, whites are more likely than blacks to attribute black poverty or socioeconomic disadvantage to lack of willpower, poor choices, laziness, or a culture of poverty than to labor market discrimination, white privilege, or economic exploitation.[103] And when considering racial disparities in education we find a similar pattern, with whites more often attributing them to agent-relative factors such as oppositional culture, innate ability, effort, and attitudes to schooling, rather than to discrimination, teacher or test bias, or to inferior schools.[104] Thus, for many areas of racial inequality, research consistently documents a pattern in which whites are much more likely than blacks to embrace agent-relative explanations of racial disparities while blacks attribute them to agent-neutral factors at a much higher rate.[105] To be sure, members of both racial groups also adopt mixed explanations.[106]

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100. This perspective has been defined as a new, post-Jim Crow racial ideology called *laissez-faire racism*, a primary function of which is to legitimize persistent racial disparities. *See, e.g.*, Lawrence Bobo, James A. Kluegel & Ryan A. Smith, *Laissez-Faire Racism: The Crystallization of a Kinder, Gentler Antiblack Ideology*, *in* RACIAL ATTITUDES IN THE 1990S: CONTINUITIES AND CHANGE 15 (Steven A. Tuch & Jack K. Martin eds., 1997).

101. Social scientists have invoked a similar typology to distinguish explanations of racial inequality. *See, e.g.*, James R. Kluegel, *Trends in Whites' Explanations of the Black-White Gap in Socioeconomic Status, 1977–89*, 55 AM. SOC. REV. 512 (1990); Matthew O. Hunt, *African-American, Hispanic, and White Beliefs about Black/White Inequality, 1977–2004*, 72 AM. SOC. REV. 390 (2007); Bobo, *supra* note 15. Person-centered (or what we call agent-relative) explanations appeal to differences in ability, innate characteristics, effort, or willingness to strive. Structuralist (or what we call agent-neutral) explanations appeal to discrimination, opportunity, and societal institutions or processes. Mixed explanations appeal to both.

102. *See, e.g.*, PAUL M. SNIDERMAN & MICHAEL GRAY HAGEN, RACE AND INEQUALITY: A STUDY IN AMERICAN VALUES (1985); LEE SIGELMAN & SUSAN WELCH, BLACK AMERICANS' VIEWS OF RACIAL INEQUALITY: THE DREAM DEFERRED (1991).

103. *See generally* Bobo, Kluegel & Smith, *supra* note 100.

104. *Id.*

105. *See generally* Kluegel, *supra* note 101.

106. For discussion of attitudes on poverty, see generally Matthew O. Hunt, *The Individual, Society, or Both? A Comparison of Black, Latino, and White Beliefs about the Causes of Poverty*, 75 SOC. FORCES 293 (1996); Shayla C. Nunnally & Niambi M. Carter, *Moving from Victims to Victors: African American Attitudes on the "Culture of Poverty" and Black Blame*, 16 J. AFRICAN AM. STUDIES 423 (2012); Candis Watts Smith, *Shifting from Structural to Individual Attributions of Black Disadvantage: Age, Period, and Cohort Effects on Black Explanations of Racial Disparities*, 45 J. BLACK STUDIES 432 (2014).

Research on racial attitudes about crime is especially instructive.[107] One survey uses the following statements to represent agent-relative explanations of causes of criminal conduct: "people become criminals because they do not care about the rights of others or their responsibility to society,"[108] and "people turn to crime because they are lazy."[109] And it uses these statements for agent-neutral ones: "poverty and low income in our society are responsible for much of [the] crime,"[110] and "our society does not guarantee that everyone has regular employment."[111] A greater percentage of whites endorsed both the "people don't care" (88.2 percent to 73.8 percent) and the "people are lazy" explanation (51.4 percent to thirty-seven percent).[112] The reverse is true for agent-neutral explanations where 67.4 percent of blacks and 61.7 percent of whites attribute criminal behavior to poverty and low income.[113] The gap is much greater for "the society doesn't guarantee employment" response, with 49.5 percent of blacks endorsing this explanation compared to 24.8 percent of whites.[114]

Notwithstanding these ideological and racial divisions, the main conclusion drawn from this survey is that most respondents embrace a mixed view of racial inequality by drawing on both agent-relative and agent-neutral factors.[115] In other words, there is a "big middle," however diverse and lacking in cohesion, that can be activated to support the right kinds of remedies for racial disparities. It is this possibility that gives us hope for postracial remedies.

2. The Postracial Narrative and the Causes of Inequality

Most would agree that America aspires to become a postracial society—one in which race no longer determines life prospects or

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107. *See* Victor R. Thompson & Lawrence D. Bobo, *Thinking about Crime: Race and Lay Accounts of Lawbreaking Behavior*, 634 ANNALS AM. ACAD. POL. & SOC. SCI. 16, 21 (2011). This study provides the source for the statistics in this paragraph.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. Nonetheless, among those persons who do adopt exclusively agent-relative or agent-neutral explanations of racial disparities, it is expected that whites will comprise the majority in the former category and blacks will be the majority in the latter. The crime study supports this point too. It finds that 51.7 percent of whites and 28.8 percent of blacks attribute crime entirely to agent-relative factors, while 32.6 percent of blacks and only 15.2 percent of whites attribute it entirely to agent-neutral ones. *Id.* at 24.

imposes barriers to equality of opportunity. The racial divide appears, however, when we ask whites and blacks about whether and to what extent this aspiration has been realized.[116] In view of persistent disparities documented above, the postracial narrative depends on minimizing agent-neutral explanations for inequality and emphasizing agent-relative ones.

Evidence suggests that white Americans generally have a more optimistic perspective on the existence and achievability of racial equality.[117] In a survey taken after President Obama's inauguration in 2009, nearly two thirds of whites (sixty-one percent) professed that blacks are now equal to whites and another 21.5 percent said they would be soon.[118] Black Americans were not so optimistic. Less than twenty percent said that racial equality has been realized, nearly half (46.6 percent) said it never will be, and barely half (53.6 percent) believed that blacks would eventually be equal to whites.[119]

The belief that we have nearly achieved our postracial ideal depends on several factual premises related to the causes of racial inequality. First, the postracial narrative assumes that current inequalities are not attributable to past discrimination in the form of slavery, Jim Crow laws, and other forms of intentional racism. While the premise that the effects of past discrimination have completely dissipated in the decades since *Brown* and the enactment of civil rights legislation seems to us unrealistic, we simply cannot take for granted that blacks and whites, or the Left and the Right, will agree that the ongoing effects of past racial wrongs are a more proximate cause of racial disparities than differences in individual attributes such as will, ambition, and effort.[120]

A second and related premise of postracialism is that intentional discrimination is no longer a widespread problem that presents a significant obstacle to equality of opportunity. In *Shelby County v. Holder*,[121] for example, the liberal and conservative justices differed over the prevalence and impact of racial vote dilution or other measures intended to prevent minorities from a realistic chance of

116. Similar disagreements appear along ideological lines. A recent Pew Center survey, for example, reports that fifty-eight percent of white Republicans compared to forty percent of white Democrats think that the nation has made significant progress on race matters. MICHAEL DIMOCK ET AL., KING'S DREAM REMAINS AN ELUSIVE GOAL; MANY AMERICANS SEE RACIAL DISPARITIES 8 (2013).

117. Lawrence D. Bobo, *Somewhere Between Jim Crow & Post-Racialism: Reflections on the Racial Divide in America Today*, 140 DAEDALUS 11, 29 (2011).

118. *Id.* at 30.

119. *Id.*

120. *See generally* Hunt, *supra* note 106.

121. 133 S. Ct. 2612 (2013).

getting their preferred candidates in office.[122] Similar issues arise in connection with other areas of racial inequality, for which proof of intentional discrimination is hard to come by.

A third premise of the postracial narrative relates to the significance of implicit biases[123] and systemic barriers.[124] From the postracial perspective, even if such problems exist, they do not constitute "racial discrimination" that would justify race-specific remedies. Every disadvantaged group must overcome implicit biases, which are endemic and cannot be solved by legal remedies.[125] Likewise, postracialists may doubt that implicit biases or structural barriers—as opposed to agent-relative considerations—are the proximate cause of racial inequalities.

In sum, whites and conservatives are far more likely than blacks and progressives to accept the premise that we have achieved (or have nearly achieved) our postracial aspirations. The core premises of this postracial narrative include the following: (1) America no longer practices formal exclusion based on racial membership; (2) the legacy of past racial exclusion was largely rectified during the civil rights era and in the aftermath of the Great Society programs; (3) while overt discrimination in private spaces may still be a reality, it is not widespread and pervasive enough to cause persistent black disadvantage; (4) racial disparities are largely the result of agent-

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122. *Compare id.* at 2627 ("Respondents do not deny that there have been improvements on the ground, but argue that much of this can be attributed to the deterrent effect of § 5, which dissuades covered jurisdictions from engaging in discrimination that they would resume should § 5 be struck down. Under this theory, however, § 5 would be effectively immune from scrutiny; no matter how 'clean' the record of covered jurisdictions, the argument could always be made that it was deterrence that accounted for the good behavior."), *with id.* at 2632–33 (Ginsburg, J., dissenting) ("Recognizing that large progress has been made, Congress determined, based on a voluminous record, that the scourge of discrimination was not yet extirpated. . . . With overwhelming support in both Houses, Congress concluded that, for two prime reasons, § 5 should continue in force, unabated. First, continuance would facilitate completion of the impressive gains thus far made; and second, continuance would guard against backsliding. Those assessments were well within Congress' province to make and should elicit this Court's unstinting approbation.").

123. Thus, for example, Justice Kennedy explained that recognition of disparate impact claims was needed to overcome the effects of "unconscious prejudices and disguised animus" in relation to housing. Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2512; *see generally* Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987); Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CAL. L. REV. 997 (2006). For further discussion, *see infra* notes 241–251.

124. For example, the practice of legacy admissions to elite universities has the effect of favoring whites, insofar as prior admissions practices and the educational achievement gap mean that the alumni base of those universities are predominantly white. For further discussion of systemic barriers, see *infra* notes 241–2251.

125. Insofar as everyone confronts some kinds of implicit biases, being affected by implicit biases is simply a type of bad luck to which everyone is equally susceptible.

relative rather than agent-neutral factors such as implicit biases and systemic barriers; and (5) race-specific remedies that may once have been necessary to deal with discrimination, segregation, and anti-black animus are no longer acceptable.[126]

Current events clearly affect public perceptions of racial progress, and survey numbers may change in ways that suggest the prevalence of the postracial narrative is on the decline. For example, recognition of racial issues increased from the Trayvon Martin shooting in 2013 to the Michael Brown shooting in 2014.[127] The general trend, however, is still evident: there remains substantial polarization regarding postracialism. In the aftermath of Ferguson, we remained deeply divided on issues of race. Where postracialists tend to see racial progress, and downplay the role of race in social problems such as police violence, critics reject this. A 2014 survey shows that an overwhelming majority of African Americans (eighty percent) believed the Brown shooting raised issues of race compared to thirty-seven percent of whites.[128] And nearly twice as many blacks (sixty-five percent) believed that police had gone too far compared to whites (thirty-three percent). It also reveals partisan divisions: sixty-eight percent of Democrats indicated that the shooting raised issues of race compared to only twenty-two percent of Republicans; fifty-six percent of Democrats believed the police went too far compared to twenty percent of Republicans.

Survey polls during the last year indicate that growing numbers of people now characterize racism as a "big problem."[129] The percentage of whites (forty-four percent) holding this view has gone up seventeen points since 2010. Yet here too there remains stark racial polarization, as seventy-three percent of African Americans hold this view. And a sharp partisan divide remains on the question of

126. Postracialists need not endorse all of these premises of course, and they may even espouse additional ones including premises that contain agent-neutral considerations. For example, some might deny (2) and add that society must provide greater educational opportunity to rectify past racial injustice. However, they will unequivocally tilt toward placing the onus on black Americans to embrace responsibility for their disadvantage and uplift.

127. A recent survey showed that, although Americans remained divided along racial lines, a higher percentage of both whites and blacks thought that the Michael Brown shooting raised important issues about race than thought same thing about the Trayvon Martin shooting and, conversely, a smaller percentage of both whites and blacks thought that race was getting too much attention. *Stark Racial Divisions in Reactions to Ferguson Police Shooting*, PEW RESEARCH CTR. 4 (2014), http://www.people-press.org/2014/08/18/stark-racial-divisions-in-reactions-to-ferguson-police-shooting/.

128. *Id.* at 1.

129. *Across Racial Lines, More Say Nation Needs to Make Changes to Achieve Racial Equality*, PEW RESEARCH CTR. (2015), http://www.people-press.org/2015/08/05/across-racial-lines-more-say-nation-needs-to-make-changes-to-achieve-racial-equality. This poll is the source of the data throughout the paragraph.

whether the country should go further in affording blacks equal rights, with seventy-eight percent of Democrats saying yes, while fifty-one percent of Republicans say that the nation has done all that it should. The racial gap on this question is even larger, with fifty-three percent of whites saying the nation has not done enough and needs to continue making changes to achieve racial equality, compared to eighty-six percent of blacks.

Although these numbers may give reason to hope that some people can be educated about the extent to which racism remains a serious problem, they hardly constitute a sea-change in the long-standing trend of racial and partisan polarization about race matters and racial progress. The good news is that the increase in the percentage of whites, Democrats, and Republicans that see race as an issue that merits attention, and believe that more progress can be made toward racial equality, creates an opportunity to channel this energy into constructive solutions that work to address persistent racial disparities. The cautionary advice, which we take seriously, is that if these solutions prove to be too divisive they can easily founder on the shoals of polarization. The truth we take seriously in this Article is that many people accept the postracial narrative notwithstanding evidence to the contrary. So if we are to move forward in the face of deep polarization about race matters, we should do so constructively, seeking to find solutions, where we can, that promise to lift all boats.

As we discuss in the following section, the postracial narrative has deep philosophical and psychological roots that contribute to its influence in political discourse and equal protection jurisprudence. Political or legal advocacy that challenges its premises directly is unlikely to succeed, at least in the near term. This does not mean that advocates for racial justice should abandon efforts to challenge the postracial narrative, but it does suggest that we should also consider alternative paths to supplement those efforts because race-specific remedies that fly in the face of postracial premises are unlikely to gain broad-based political support or survive the Supreme Court's postracial equal protection jurisprudence. Part II discusses the philosophical and psychological roots of postracialism; Part III discusses the Court's postracial equal protection jurisprudence.

II. PHILOSOPHICAL AND PSYCHOLOGICAL ROOTS

This Part discusses the philosophical and psychological roots of the postracial narrative. Philosophically, we note that ideological divisions in the United States tend to reflect the tensions between two

distinct streams of American constitutional thought. One stream of thought emphasizes personal liberty (and along with it personal responsibility); the other emphasizes equality, in the sense that every member of society is entitled to equal rights. In general terms, the Right tends to emphasize personal liberty, while the Left tends to emphasize equality. These differences are reflected in two distinct conceptions of racial injustice, which have differing implications for the postracial narrative. We then consider how the psychology of race and racial inequality reinforces the ideological and philosophical appeal of the postracial narrative and complicates advocacy for race-specific remedies.

A. Two Conceptions of Racial Injustice

Do racial disparities constitute racial injustice? For some blacks[130] and progressives,[131] the goal of racial justice is equality of outcomes. Thus, the very existence of the racial disparities documented above establishes the existence of pervasive racial injustice that demands race-specific remedies. But this view of racial justice seems to contravene America's deep commitment to personal responsibility and individual merit, which requires equality of opportunity but not equality of results.[132] Indeed, those on the Right often maintain that life is not fair, so there is no societal obligation to prevent or ameliorate unequal outcomes that are the result of bad luck or other factors that make life equally fair or unfair to all.

Accordingly, we begin by distinguishing two conceptions of racial injustice. The first pertains to the exclusion of blacks from full and equal participation in civic, political, and social institutions that are

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130. *See* Richard P. Eibach & Joyce Ehrlinger, *Keep Your Eyes on the Prize: Reference Points and Racial Differences in Assessing Progress Toward Equality*, 32 PERSONALITY AND SOC. PSYCHOL. BULL. 66 (2006).

131. *See, e.g.*, TIM WISE, COLORBLIND: THE RISE OF POST-RACIAL POLITICS AND THE RETREAT FROM RACIAL EQUITY (2010) (arguing that "colorblind" policies worsen the problem of racial inequality and that achieving racial equality requires greater race consciousness).

132. These values are obviously closely related to capitalism and the Protestant work ethic. Like the commitment to equality, however, these values are not wholly realized in practice; individuals do not succeed without the help of others. One source of deep ideological disagreement is the extent to which individual success is tied to individual merit, as reflected in the controversy stirred by President Obama's assertion that "[i]f you were successful, somebody along the line gave you some help. There was a great teacher somewhere in your life. Somebody helped to create this unbelievable American system that we have that allowed you to thrive. Somebody invested in roads and bridges. If you've got a business, you didn't build that. Somebody else made that happen." *See* Aaron Blake, *Obama's "You Didn't Build That" Problem*, WASH. POST, (July 18, 2012), https://www.washingtonpost.com/blogs/the-fix/post/obamas-you-didnt-build-that-problem/2012/07/18/ gJQAJxyotW_blog.html.

essential to successful outcomes. We refer to this as *participatory racial injustice* (PRI). The second, and more controversial, concerns the unequal distribution of societal benefits and burdens insofar as black Americans as a group disproportionately enjoy fewer benefits and bear greater burdens than their white counterparts. We will call this *distributive racial injustice* (DRI).[133] There is a broad consensus that PRI is improper, but there is disagreement about whether and how much DRI should be legally and morally tolerated, and about how it should and can be addressed in law and public policy within our constitutional democracy.[134]

1. Participatory Racial Injustice

The first form of racial injustice, PRI, pertains to the systemic state-sponsored exclusion of blacks from full and equal participation in society. There is no question that the United States has had a long and unfortunate history of participatory racial injustice—including slavery, Jim Crow laws, and other discriminatory practices that systematically excluded blacks from full participation in the benefits of society. Nor is there disagreement that any current intentional racial discrimination or barriers to full participation would constitute racial injustice.[135]

For well over three centuries, from 1619, when blacks were first brought to the nation's shores in shackles and sold on the market as slaves, through *Brown v. Board of Education*[136] and the Civil Rights

133. The distinction between PRI and DRI is not as sharp as we would like. Suppose that participation in political life with the right to vote, to take just one example, is understood as a benefit which society distributes. Political exclusion can then be equally characterized as a participatory as well as a distributive injustice when the right to vote or otherwise participate in the political process is burdened. More broadly, PRI will generally manifest itself in DRI. We do not have a strong investment in the nomenclature here. But we believe that it captures an important distinction between ways of understanding racial injustice.

134. Moreover, as we will elaborate later, one can also argue that what has been called the Court's "New Equal Protection" jurisprudence has evolved, in part, by reacting to this shift from pre-*Brown* and pre-Civil Rights era concerns about the exclusion of blacks from American society to current concerns about racial disparities. *See* Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747 (2011).

135. For some libertarians on the Right, intentional discrimination by private actors is not unjust. Thus, for example, few would argue that individuals are not allowed to consider race in deciding whom they want to marry. Many would extend a similar liberty of association to other decisions involving private spaces (e.g., decisions about who to adopt or even who to have as a roommate). For those who place the greatest weight on individual liberty, this sort of protected personal choice would extend to a broader range of individual choices, including, for example, whom to hire. *See* RICHARD EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS (1992).

136. 347 U.S. 483 (1954).

Movement of the 1960s, the legal, social, and political status of blacks as subordinate to whites was firmly cemented in law as well as social practice. The Supreme Court's infamous 1857 ruling in *Dred Scott v. Sanford*[137] that blacks were not American citizens and had no capacity to sue in federal court epitomized this pervasive PRI. Chief Justice Taney reviewed the history of racial subordination, concluding that:

> [A] perpetual and impassable barrier was intended to be erected between the white race and the one which they had reduced to slavery, and governed as subjects with absolute and despotic power, and which they then looked upon as so far below them in the scale of created beings, that intermarriages between white persons and negroes or mulattoes were regarded as unnatural and immoral, and punished as crimes, not only in the parties, but in the person who joined them in marriage.[138]

After the Civil War, during the occupation of the South by federal troops, there was some racial progress, particularly in the political realm, insofar as blacks were able to run for and secure public offices. But this limited progress evaporated, virtually overnight, when the troops pulled out of the South in 1877, marking the end of Reconstruction and the beginning of forcefully imposed racial apartheid in the United States, which was deemed constitutional in 1896.[139] Other practices that subordinated blacks also flourished, including peonage systems that effectively reintroduced involuntary servitude,[140] the denial of voting rights through voting practices and requirements applied to disenfranchise blacks,[141] and the tolerance or encouragement of racial violence against blacks.[142]

The "impassable barrier" formally erected first with black enslavement, then with Jim Crow laws, would stand until 1954 when

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137. 60 U.S. 393 (1857).

138. *Id.* at 409.

139. Plessy v. Ferguson, 163 U.S. 537 (1896).

140. *See, e.g.*, Aziz Z. Huq, *Peonage and Contractual Liberty*, 101 COLUM. L. REV. 351 (2001). Under this system, minor offenses, including the inability to pay fines or to repay debts, led to imprisonment and forced labor under conditions that kept people in servitude indefinitely. Although these conditions often ensnared poor and uneducated whites, blacks were disproportionately victimized.

141. *See, e.g.*, Benno C. Schmidt, Jr., *Principle and Prejudice: The Supreme Court and Race in the Progressive Era. Part 3: Black Disfranchisement from the KKK to the Grandfather Clause*, 82 COLUM. L. REV. 835 (1982).

142. *See, e.g.*, UNDER SENTENCE OF DEATH: LYNCHING IN THE SOUTH (W. Fitzhugh Brundage ed., 1997).

the United States Supreme Court unanimously declared the doctrine of "separate but equal" unconstitutional.[143] This began a new chapter in American history, the so-called "Second Reconstruction," marked by landmark civil rights legislation and other measures aimed to secure for blacks full and equal participation in American society.[144] But the significance of this chapter remains a source of great controversy: some take it to have been the dawn of a new era of genuine racial equality in America, while others take it to have been a failure that did not achieve the full promise of equality.

2. Distributive Racial Injustice

The second conception of racial injustice, DRI, is concerned with equality of outcomes, i.e., the distribution of resources that individuals and groups of individuals possess. The relative allotment of the benefits and burdens of social cooperation varies—sometimes quite substantially. Put simply, some people have more and others have less. And as we documented above, racial inequality is prevalent across multiple measures of outcomes.

The identification of racial injustice with racial inequality is informed by what philosopher Timothy Scanlon describes as a moral imperative of *substantive equality*, the idea that "people's lives or fates should be equal in some substantive way: equal in income, for example, or in overall welfare."[145] This view reflects a fundamentally different conception of equality according to which eliminating PRI is a necessary but not sufficient condition for achieving racial justice.

The philosophical literature on egalitarianism is vast. And philosophers have taken up numerous questions on this topic, including what should be equalized.[146] Some have also questioned whether

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

144. *See, e.g.*, MANNING MARABLE, RACE, REFORM, AND REBELLION: THE SECOND RECONSTRUCTION IN BLACK AMERICA, 1945–1982 (1984).

145. T. M. SCANLON, THE DIFFICULTY OF TOLERANCE: ESSAYS IN POLITICAL PHILOSOPHY 202 (2003). Of course proponents of DRI are not merely concerned with income. What's important here is the idea of "substantive equality," or equality of outcomes. There are various ways of answering the "Equality of What?" question. *See generally* Norman Daniels, *Equality of What: Welfare, Resources, or Capabilities?*, 50 PHIL. AND PHENOMENOLOGICAL RES. 273 (1990) (dealing with the question of substantive equality); G. A. Cohen, *Equality of What? On Welfare, Goods and Capabilities*, 56 LOUVAIN ECON. REV. 357 (1990) (dealing with the question of substantive equality). But that question is not central to our argument and we need not enter this dense philosophical terrain.

146. *See, e.g.*, Daniels, *supra* note 145; Cohen, *supra* note 145.

substantive inequality is consistent with general egalitarian principles. Ronald Dworkin famously argued that people have a right to be treated with equal concern and respect.[147] A puzzle that egalitarians face is how to move us from more abstract normative principles like this one to more concrete claims involving how we should distribute welfare, resources, capabilities, or benefits and burdens. Some egalitarians contend that inequalities of outcome are inherently troubling and should be mitigated, but it is unclear that they can make the case for doing so without relying upon other values such as fairness or humanitarian concerns.[148]

Even libertarians can affirm the general normative principle that all persons are owed equal concern and respect, where for them this principle means respect for basic individual rights, without thereby endorsing efforts to achieve the kind of equality of outcomes that some egalitarians call for. So, for example, affording black Americans equal concern and respect is entirely compatible with unequal racial outcomes, so long as those outcomes are not the product of PRI. This position is also consistent with versions of egalitarianism, such as Dworkin's, that seek to reconcile our commitment to equality with our commitment to individual liberty.[149]

Some political philosophers, rejecting this "conservative" turn in egalitarian political thought, have tried to defend the demand for substantive equality in outcomes by shifting our focus to ensuring that persons can relate to one another as equals.[150] From this perspective, inequality of outcomes is unacceptable if it stems from, causes, or perpetuates inegalitarian social relations that leave some persons subordinate to or dominated by others. It has been argued, however, that this way of resolving the puzzle, and rescuing equality, is tantamount to relying upon additional mediating values or principles and taking equality to be something that we value instrumentally not intrinsically.[151]

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147. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY xii, 180–83 (1977).

148. *See, e.g.*, SCANLON, *supra* note 145, at 202–08 (offering various reasons for seeking to reduce inequalities of outcome).

149. *See, e.g.*, Ronald Dworkin, *What is Equality? Part 2: Equality of Resources*, 10 PHIL. & PUB. AFF. 283 (1981); G. A. Cohen, *On the Currency of Egalitarian Justice*, 99 ETHICS 906 (1989).

150. *See, e.g.*, Elizabeth S. Anderson, *What is the Point of Equality?*, 109 ETHICS 287, 308 (1999); Samuel Scheffler, *Choice, Circumstance, and the Value of Equality*, 4 POL., PHIL. & ECON. 5, 25–26 (2005).

151. *See, e.g.*, SCANLON, *supra* note 145, at 212–18 (considering the ways in which even meritocratic differences in outcome that are not unfair might cause experiential harms that adversely affect those who are worse off).

3. The Link Between PRI and DRI?

Given America's polarization on matters of race, claims for race-specific remedies are unlikely to succeed if they are premised on general demands for equal outcomes or on the contention that unequal outcomes are inherently inconsistent with egalitarian justice. Nonetheless, even under a narrower conception focused on PRI, equality of opportunity is an essential component of racial justice.[152] Thus, mainstream egalitarians view equality of opportunity as the best approach to reconcile the competing imperatives of individual liberty and human equality.

Indeed, many liberal egalitarians have associated DRI with the goal of securing equality of opportunity rather than equality of outcomes or achievements.[153] So, if income is the measure, they propose not that people have equal or nearly equal income but that they have the same opportunity to earn income. Hence, from this perspective, racial justice would be a matter of addressing obstacles to equal income opportunities for blacks and whites.[154]

But even on this fairly modest conception, ameliorating racial injustice remains controversial. Part of the controversy is philosophical: it has to do with differences of opinion on what it means to secure equal opportunity and what counts as an impermissible obstacle to it. The Right often associates equal opportunity with removing *de jure* barriers to full and equal participation.[155] And they maintain that *Brown*, the Civil Rights movement, and Johnson's Great Society programs essentially accomplished this goal. The Left takes equality of opportunity to require providing persons with the resources and capabilities necessary to take advantage of opportunity.[156] To paraphrase a sentiment expressed by Martin Luther King, Jr.: What good is having the equal opportunity to sit at a racially integrated lunch counter if a person cannot afford to buy a cup of coffee because he cannot find work or lacks the necessary skills for available jobs?

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152. *See* Richard J. Arneson, *Equality and Equal Opportunity for Welfare*, 56 PHIL. STUD. 77 (1989).

153. *See, e.g.*, BERNARD R. BOXILL, BLACKS AND SOCIAL JUSTICE 73–88 (1984); Lawrence A. Blum, *Opportunity and Equality of Opportunity*, 2 PUB. AFF. Q. 1 (1988).

154. *See generally* JOSEPH FISHKIN, BOTTLENECKS: A NEW THEORY OF EQUAL OPPORTUNITY (2014).

155. For an account of equality of opportunity that focuses on the removal of unequal legal constraints, see Michael E. Levin, *Equality of Opportunity*, 31 PHIL. Q. 110 (1981).

156. For an account of equality of opportunity that focuses on the resources and capabilities to develop one's innate abilities, see Charles Frankel, *Equality of Opportunity*, 81 ETHICS 191 (1971).

Where we part company with the postracialists relates to the causes of racial inequality in America today, which we believe are fairly attributed to unequal opportunities. First, the ongoing effects of generations of slavery and racial oppression continue to take their toll on the black community, even if these effects cannot be directly traced to particular outcomes for particular individuals. Second, intentional discrimination on the basis of race is a persistent problem, even if it has been driven underground and is no longer officially sanctioned or overt and commonplace. Third, implicit biases and structural barriers continue to deny blacks equal opportunities for success, even if that denial is not the product of intentional discrimination.

Postracialists reject or discount each of these points.[157] Current racial disparities, they say, are no longer attributable to past discrimination, and intentional discrimination is an isolated phenomenon, while unconscious biases and structural barriers are not "racism" and are no different from the kinds of obstacles overcome by other minorities. As discussed in the following section, these postracial propositions have deep roots in the psychology of inequality, which concerns how responses to disparities and purported injustice is grounded in efforts to safeguard positive ingroup identity. The psychological underpinnings of postracialism make it especially difficult to change the hearts and minds of those who oppose race-specific remedies for racial inequality.

B. The Psychology of Disagreement about Racial Inequality

Whether racial disparities are deemed unjust turns in part on how they are explained.[158] As we observed, there is factual disagreement over how to explain them as well as philosophical disagreement about their meaning and implications. These disagreements have deep psychological roots: how we interpret and respond to inequality depend in part on how we identify ourselves through group membership. An additional problem stems from psychological obstacles to guilt, which include denial, shifting blame, and differential standards of evidence.[159] The psychological roots of racial polarization give us reason to worry that differences over the causes, meaning, and implications of racial disparities are

157. *See supra* note 15.

158. It also turns on the content and application of philosophical norms of justice. But we will not take up this matter here.

159. Anca M. Miron et al., *Motivated Shifting of Justice Standards*, 36 PERSONALITY AND SOC. PSYCHOL. BULL. 768 (2010).

intractable. Sensitivity to these psychological factors invites us to rethink our strategy for seeking political and legal remedies.

1. Social Identity, Just World Beliefs, and Group Inequality

Group-based social identities influence our beliefs about justice, injustice, equality, and inequality. Human beings have long sorted themselves into "ingroups" (us) and "outgroups" (them) on the basis of gender, age, kinship, race, ethnicity, nationality, religion, and other factors.[160] For much of United States history, both law and social practice sanctioned ingroup and outgroup sorting based on race, with whites being the ingroup and blacks the outgroup.[161] Thus, whites have historically enjoyed a disproportionate share of the benefits of social cooperation (wealth, political power, education, and law) while blacks have borne the lion's share of the burdens (poverty, political powerlessness, inferior education, and punishment).

Notwithstanding this dark history, whites, like all individuals and groups, want to view themselves in a positive light.[162] Whether they are able to do so under circumstances of substantial racial inequality depends in part on whether whites perceive the world that brought about this state of affairs as just. People are generally motivated to view the social world as a just and fair place, where individuals get what they deserve, based on merit and effort, rather than because of injustice, discrimination, systemic barriers, or implicit bias.[163] Sociologists have found that our so-called "just world

160. *See generally* KENT FLANNERY & JOYCE MARCUS, THE CREATION OF INEQUALITY: HOW OUR PREHISTORIC ANCESTORS SET THE STAGE FOR MONARCHY, SLAVERY, AND EMPIRE (2012) (describing the prehistoric roots and historical evolution of social hierarchies).

161. *See, e.g.*, Dred Scott v. Sandford, 60 U.S. 393 (1857) (showing an obvious example of this kind of ingroup and outgroup sorting in which the status of citizenship—the ingroup—was limited to whites while blacks were relegated to the outgroup, noncitizens); *see generally* IBRAM X. KENDI, STAMPED FROM THE BEGINNING: THE DEFINITE HISTORY OF RACIST IDEAS IN AMERICA (2016).

162. *See* Henri Tajfel, *Social Psychology of Intergroup Relations*, 33 ANN. REV. PSYCHOL. 1, 1–4 (1982) (referring to social identity theory, an approach that associates ingroup favoritism with a desire to view group identity in a positive light. An alternative psychological theoretical model, which understands ingroup and outgroup relations based on a generalized desired for group-based dominance, is called social dominance orientation. Although this is a powerful model, we do not address it in our exposition of the psychology of disagreement about racial inequality.); Shana Levin & Jim Sidanius, *Social Dominance and Social Identity in the United States and Israel: Ingroup Favoritism or Outgroup Derogation?*, 20 POL. PSYCHOL. 99, 102 (1999) (discussing differences between social dominance orientation and social identity theory).

163. *See* MELVIN J. LERNER, THE BELIEF IN A JUST WORLD: A FUNDAMENTAL DELUSION vii–viii (1980).

beliefs" vary along multiple dimensions related to our social group identities including race, ethnicity, class, gender, age, and religion.[164]

The perception that the world is not a just place can threaten our ability to view our group in a positive light. So, for example, confronting racial disparities may threaten whites' positive image of their ingroup, particularly if these disparities are thought to result from unjust oppression of blacks or unearned white privilege. Consequently, safeguarding this positive image will require an understanding of the causes, meaning, and implications of racial disparities conducive to preserving the belief in a just world. This imperative can lead advantaged ingroups and disadvantaged outgroups to adopt very different philosophical conceptions of when appropriate egalitarian aims have been realized, which allow them to guard their positive group identity.

This phenomenon is at work with regard to race, so that racial differences may dictate the reference point used to assess progress toward racial equality.[165] Specifically, researchers find that differences in white and black Americans' perceptions of racial progress are rooted in two distinct reference points for judging racial gaps. One study found that whites judge racial progress based on how far we have come relative to our past history of racial injustice.[166] Using this reference point enables whites, as a group, to feel more upbeat about where the nation stands now. More importantly, it fortifies their belief that the world is now just, which protects their positive group identity and justifies their opposition to race-specific remedies.[167] Black Americans, in contrast, judge racial progress relative to an ideal of distributive equality focusing on enduring racial disparities.[168] And their belief that the world is not just has concrete implications for the kinds of law and public policies they typically favor, including race-specific remedies for inequality such as affirmative action and black reparations.

In short, while whites are more likely to judge racial progress based on how far the nation has come from slavery, Jim Crow, and Bloody Sunday (i.e., addressing PRI), blacks are more likely to do

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164. Matthew O. Hunt, *Status, Religion, and the "Belief in a Just World": Comparing African Americans, Latinos, and Whites*, 81 SOC. SCI. Q. 325 (2000).

165. *See, e.g.*, Eibach & Ehrlinger, *supra* note 130, at 70–72; Amanda B. Brodish et al., *More Eyes on the Prize: Variability in White Americans' Perceptions of Progress Toward Racial Equality*, 34 PERSONALITY AND SOC. PSYCHOL. BULL. 513, 514 (2008).

166. *Id.*

167. Joshua L. Rabinowitz et al., *Why Do White Americans Oppose Race-Targeted Policies? Clarifying the Impact of Symbolic Racism*, 30 POL. PSYCHOL. 805, 823–25 (2009).

168. *Id.*

so based on an ideal of where the nation needs to be, and for them genuine progress toward full racial equality must involve mitigating racial disparities (i.e., addressing DRI). Each assessment seems reasonable when each reference point is taken into account. Yet each perspective has radically different implications for law and public policy.

Thus, the philosophical and psychological roots of disagreement over racial inequality are intertwined: (a) our social identities—and the desire to view our ingroup in a positive light by believing in a just world—broadly shape how the nation interprets and responds to racial disparities and what kind of public policies we support for addressing them;[169] and (b) this psychology predicts that ingroups and outgroups will not see eye-to-eye on the causes, meaning, or implications of racial disparities.

2. Guilt, Responsibility, and Defending Identity Threat

Another psychological factor that reinforces the postracial narrative is our desire to avoid feelings of guilt. Although collective guilt may in some cases generate support for race-specific remedies such as reparations,[170] we believe that, on balance, emphasizing collective guilt is more likely to generate defensive reactions than to engender broad support for race-specific remedies among whites.

Some social psychologists argue that engendering collective guilt among whites for historical injustices against blacks from which whites continue to benefit can motivate people to restore justice[171] and contribute to reducing racist attitudes.[172] Critics of this approach, on the other hand, have condemned the appeal to "white guilt" to garner support for policies to promote racial equality.[173] And some liberal philosophers, most notably Martha Nussbaum, have argued that engaging positive emotions, such as love, might

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169. JAMES R. KLUEGEL & ELIOT R. SMITH, BELIEFS ABOUT INEQUALITY 12–14 (1986).

170. *See, e.g.*, Aarti Iyer et al., *White Guilt and Racial Compensation: The Benefits and Limits of Self-Focus*, 29 PERSONALITY AND SOC. PSYCHOL. BULL. 117, 128 (2003); Adam A. Powell et al., *Inequality as Ingroup Privilege or Outgroup Disadvantage: The Impact of Group Focus on Collective Guilt and Interracial Attitudes,* 31 PERSONALITY AND SOC. PSYCHOL. BULL. 508, 518 (2005).

171. *See e.g.*, Bertjan Doosje et al., *Guilty by Association: When One's Group Has a Negative History*, 75 J. PERSONALITY AND SOC. PSYCHOL. 872, 873–74 (1998); Janet K. Swim & Deborah L. Miller, *White Guilt: Its Antecedents and Consequences for Attitudes Toward Affirmative Action*, 25 PERSONALITY AND SOC. PSYCHOL. BULL. 500, 511–13 (1999).

172. Adam A. Powell et al., *supra* note 170, at 519.

173. *See generally* SHELBY STEELE, WHITE GUILT: HOW BLACKS AND WHITES TOGETHER DESTROYED THE PROMISE OF THE CIVIL RIGHTS ERA (2006).

better support efforts to achieve compensatory and egalitarian goals.[174]

From our perspective, a critical question is whether a guilt-based approach will be effective in causing whites to accept collective responsibility for racial inequalities. The answer to this question depends on various factors, including whether people strongly or weakly identify with being white and so are more or less invested in protecting a positive group image,[175] and whether they see repairing historical justices as a zero sum game that may disadvantage them, those closest to them, or ingroup members.[176]

The effectiveness of this approach is questionable because many whites will deploy a range of psychological defenses against feeling collective guilt and accepting collective responsibility for racial inequality.[177] Such defenses include denying responsibility for inequality, minimizing the harm done by it, derogating blacks or blaming them for inequality, attributing blacks' perception that their situation is unfair to envy, and legitimizing inequality by contrasting blacks with other minority groups (e.g., Latinos, Asians, and Caribbean immigrants) that have allegedly made more out of a bad, or relatively disadvantaged, situation.

So, various psychological forces contribute to divisions between whites and blacks (as well as between the Right and the Left)[178] over the causes of racial inequality, the state of progress toward equality, the link between DRI and PRI, and, consequently, views about where we go from here. Social psychology suggests that the roots of racial polarization are deep and unlikely to be amenable to reasoned argument or empirical evidence. Accordingly, an effective

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174. MARTHA C. NUSSBAUM, POLITICAL EMOTIONS: WHY LOVE MATTERS FOR JUSTICE (2013). There is some evidence that engaging sympathy, a softer emotion rooted in "a compassionate concern for the state of the disadvantaged," may offer a broader basis of white support for both compensatory and equal opportunity policy. *See* Iyer et al., *supra* note 170, at 126.

175. Nyla R. Branscombe et al., *Racial Attitudes in Response to Thoughts of White Privilege*, 37 EUR. J. PSYCHOL. 203, 204–05 (2007).

176. Richard P. Eibach & Thomas Keegan, *Free at Last? Social Dominance, Loss Aversion, and White and Black Americans' Differing Assessments of Progress Towards Racial Equality*, 90 J. PERSONALITY & SOC. PSYCHOL. 453, 458–60 (2006) (discussing evidence that when whites think that increasing the welfare of blacks comes at their own expense, they are more inclined to see anti-white racism as a more serious problem than anti-black racism, fueling charges of unfair reverse discrimination); 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, 217 (2011).

177. For a summary of some of these defenses, see Derrick Darby and Nyla R. Branscombe, *Beyond the Sins of the Fathers: Responsibility for Inequality*, 38 MIDWEST STUD. PHIL. 121, 122–23 (2014).

178. *See e.g.*, Jillian C. Banfield et al., *Responding to Historical Injustices: Does Group Membership Trump Liberal-Conservative Ideology*, 44 EUR. J. SOC. PSYCHOL. 30, 35–38 (2014); Sarah Williams, *Left-Right Ideological Differences in Blaming Victims*, 5 POL. PSYCHOL. 573, 579–80 (1984).

strategy to mitigate racial inequality cannot hinge on resolving differences about its causes, meaning, and implications.

3. The Limits of Race-Specific Remedies

How do we advocate for measures to mitigate racial inequality in view of intractable disagreements about the causes, meaning, and implications of racial disparities? The philosophical and psychological underpinnings of the postracial narrative suggest that race-specific remedies are unlikely to garner broad political support.[179] Consider, for example, the case for black reparations, which Ta-Nehisi Coates brought back into the public discourse through an influential article in *The Atlantic*.[180]

A generic way of making the case for black reparations is to link PRI and DRI. The strategy is to argue that the racial injustices of the past (slavery, segregation, and overt discrimination) have had far-reaching consequences, including the substantial distributive racial disparities that persist today. Thus, racial disparities in income, wealth, education, crime, housing, and other areas require reparations because they are the contemporary effects of past racial wrongs.[181]

This argument confronts the immediate problem of establishing the causal linkage between current inequalities and past racial wrongs; this is harder to do the further back in time the racial wrongs occurred. Thus, there is some debate among proponents of reparations whether the case must be made going back to slavery or can be based on more recent examples of racial injustice.[182] Because of the obvious difficulties with identifying actual perpetrators of past racial wrongs and linking their wrongdoing to injuries suffered by particular black persons today, some proponents of reparations have focused on more recent government policies.

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179. *But see* Elizabeth S. Anderson, *Integration, Affirmative Action, and Strict Scrutiny*, 77 N.Y.U. L. REV. 1195, 1197–98 (2002) (advancing a powerful defense of affirmative action as a means of achieving racial integration). While we may agree with the premises and aims of these arguments, we think they are unlikely to gain much political traction today and are almost certain to be rejected by the Supreme Court. *See generally* Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007). Thus, we do not oppose arguments for race-specific remedies, but we doubt that they will be effective, at least in the near term.

180. Ta-Nehisi Coates, *The Case for Reparations*, THE ATLANTIC MONTHLY (June 2014), http://www.theatlantic.com/magazine/ archive/2014/06/the-case-for-reparations/361631/.

181. *See, e.g.*, David Lyons, *Corrective Justice, Equality Opportunity, and the Legacy of Slavery and Jim Crow*, 84 B.U. L. REV. 1375, 1379–80 (2004); Thomas McCarthy, *Coming to Terms With Our Past, Part II: On the Morality and Politics of Reparations for Slavery*, 32 POL. THEORY 750, 752–53 (2004).

182. *See* Darby, *supra* note 14, at 57.

One of the most compelling cases, which received considerable attention, involves the role of the federal government in racial discrimination in housing and lending in the post-World War II era.[183] This more recent racial injustice has had enduring adverse consequences for black Americans as a group, including residential segregation, less wealth, inferior schooling, poorer health, greater exposure to crime, and inferior employment opportunities.

Even though this argument avoids the controversy involved in trying to connect contemporary racial disparities to slavery, it remains backward looking as it turns on attributing a causal connection between this more recent past and the present. Consequently, it will be a difficult sell in today's highly polarized society.[184] If we as a nation wish to "keep it real" by recognizing the implications of behavioral realism,[185] then we cannot ignore the impact of social group psychology and guilt on how individuals may respond to this factual premise and the race-specific policies it underwrites. Whatever else being race-sensitive entails, it certainly demands that we be sensitive to how psychology shapes our understanding and approach to racial inequality.

As this example suggests, support for race-specific policies that redress historical injustice, such as preferential treatment, affirmative action, and reparations, generally depends on accepting a direct causal link between past racial injustice (PRI) and present racial disparities (DRI).[186] However, the social psychology of race and collective guilt described above suggests that many whites will deny that such a link exists. Likewise, conservatives are more likely than liberals to withhold support from race-specific policies that aim to rectify past racial injustice.[187]

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183. *See, e.g.*, Coates, *supra* note 181, at 1; Jonathan Kaplan & Andrew Valls, *Housing Discrimination as a Basis for Black Reparations*, 21 PUB. AFFS. Q. 255, 259–60 (2007).

184. *See generally* Darby, *supra* note 14, at 56–59 (discussing reparations).

185. *See generally* Gary Blasi & John T. Jost, *System Justification Theory and Research: Implications for Law, Legal Advocacy, and Social Justice*, 94 CAL. L. REV. 1119 (2006) (discussing generally the implications of behavioral realism for legal and social justice advocacy).

186. Of course, affirmative action may be understood as a forward-looking strategy to achieve social justice. Even viewed from this perspective, however, the obligation to address the legacy of the past discrimination acts as the moral justification for providing preferential treatment for racial minorities. *See, e.g.*, Kim Forde-Mazrui, *Taking Conservatives Seriously: A Moral Justification for Affirmative Action and Reparations*, 92 CAL. L. REV. 683, 701 (2004). Thus, although affirmative action need not be remedial in the narrow sense of making specific victims of past discrimination whole, and while proponents may be primarily concerned with reducing racial disparities going forward, the moral justification for treating people differently on account of their race depends on a societal obligation to atone for past racial wrongs. *Id.*

187. Indeed, the literature suggests that, by and large, the more conservative people are, the more likely they are to deny any link between PRI and DRI. We say "by and large" because there is evidence that, in the case of black conservatives, racial group membership may

Framing the arguments in ways less likely to provoke defensive reactions might minimize these difficulties.[188] For example, framing racial disparities in terms of white privilege is more conducive to gaining white support for policies that assist minorities than framing them in terms of black disadvantage.[189] Focusing on white privilege may produce support by suggesting that whites' relatively more favorable location is unearned, but whites may nonetheless be motivated to reject this framing because it threatens their positive self-regard and group image.

Likewise, to the extent that engendering collective guilt can generate support for race-specific policies, framing the issue matters.[190] For example, some researchers find that when past harm is framed as contributing to ongoing suffering, then collective guilt is heightened, and willingness to support making amends for historical injustice rises.[191] While this insight supports locating the harm in the more recent rather than more distant past to give credence to the view that suffering is ongoing, it also means that collective guilt can be avoided, and support for reparations weakened, by framing

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trump their conservative ideology—at least when considering their own minority outgroup as opposed to other ones. Banfield et al., *supra* note 178, at 30; *see* Christine Reyna et al., *Examining the Principles in Principled Conservatism: The Role of Responsibility Stereotypes as Cues for Deservingness in Racial Policy Decisions*, 90 J. PERSONALITY & SOC. PSYCHOL. 109, 111 (2005). *See also* Jim Sidanius et al., *Racism, Conservatism, Affirmative Action, and Intellectual Sophistication: A Matter of Principled Conservatism or Group Dominance?*, 70 J. PERSONALITY & SOC. PSYCHOL. 476 (1996). To be sure, conservatives may sometimes go along with such policies, perhaps seeking to appease their liberal or minority critics, to restore their positive social group identity, or to protect the social hierarchy or the status quo from which they benefit, but this is hardly the norm. *See generally*, Rosalind M. Chow et al., *Appeasement: Whites' Strategic Support for Affirmative Action*, 39 PERSONALITY & SOC. PSYCHOL. BULL. 323, (2013); Geoffrey C. Ho & Miguel M. Unzueta, *Antiegalitarians for Affirmative Action? When Social Dominance Orientation is Positively Related to Support for Egalitarian Social Policies*, 45 J. APPLIED SOC. PSYCHOL. 45, 451, 452 (2015).

188. Heather Golden et al., *Reactions to Affirmative Actions: Substance and Semantics*, 31 J. APPLIED SOC. PSYCHOL. 73, 75–78 (2001); *see generally* Brian S. Lowery et al., *Paying for Positive Group Esteem: How Inequity Frames Affect Whites' Responses to Redistribution Policies*, 1 J. PERSONALITY AND SOC. PSYCHOL. 1 (2011), http://rosalindchow.com/wp-content/uploads/2012/07/lowery-et-al-2012-Paying-for-positive-group-esteem.pdf (concluding that framing issue as one of white advantage, as opposed to black disadvantage, increases white support for policies that cause whites economic harm); C. Lausanne Renfro et al., *The Role of Threat in Attitudes Toward Affirmative Action and Its Beneficiaries*, 36 J. APPLIED SOC. PSYCHOL. 41 (2006) (analyzing the relationship between perceived threats and opposition to affirmative action).

189. Brian S. Lowery et al., *Framing Inequity Safely: Whites' Motivated Perceptions of Racial Privilege*, 33 PERSONALITY & SOC. PSYCHOL. BULL. 1237, 1238 (2007).

190. Adam A. Powell et al., *Inequality as Ingroup Privilege or Outgroup Disadvantage: The Impact of Group Focus on Collective Guilt and Interracial Attitudes*, 31 PERSONALITY & SOC. PSYCHOL. BULL. 508, 517–18 (2005).

191. Roland Imhoff et al., *When the Past is Far from Dead: How Ongoing Consequences of Genocides Committed by the Ingroup Impact Collective Guilt*, 69 J. SOCIAL ISSUES 74 (2013), http://onlinelibrary.wiley.com/doi/10.1111/josi.12004/epdf.

the matter differently, which whites may be motivated to do when attending to racial disparities.

Equally important, to the extent that race-specific remedies are perceived as a zero-sum game in which gains for blacks represent an economic loss or decline in social status and political power for whites, whites may only support rather weak remedies such as symbolic reparations (e.g., a national apology or a slavery museum), which fall far short of a significant redistribution of wealth.[192] All of these predictions become more complicated if we also factor in whether whites strongly or weakly identify with their whiteness,[193] and whether they are conservatives or liberals.[194]

As a political matter, then, arguments for race-specific remedies are bound to run into strong opposition.[195] Hence, attempting to ground our collective responsibility to address racial inequality through race-specific remedies in atonement for past sins is unlikely to be successful.[196] Non-race-specific strategies that do not threaten postracial assumptions or positive group identity may stand a better chance at gaining broader political support because they are less polarizing. Whatever the merits of pursuing postracial remedies when dealing with the public at large, this strategy is especially necessary in view of the Supreme Court's postracial equal protection jurisprudence, which imposes formidable legal impediments to race-specific remedies for racial inequality.

III. POSTRACIAL EQUAL PROTECTION

The United States Supreme Court's equal protection jurisprudence is distinctly and decidedly postracial. Whatever ideological divisions exist among the Justices on matters of race, the Court's precedents consistently adopt postracial doctrinal principles and factual premises concerning the causes of current racial disparities.

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192. Kitty Dumont & Sven Waldzus, *Group-Based Guilt and Reparation in the Context of Social Change*, 44 J. APPLIED SOC. PSYCHOL. 331, 339 (2014). Indeed, as discussed further below, see *infra* notes 393–400 and accompanying text, one advantage of our approach is that it changes the nature of the zero sum game in a way that reduces racial tensions. Instead of redistributing advantage from lower class whites to lower class blacks, postracial remedies tend to redistribute advantage from the wealthy to the less wealthy.

193. *See generally* Doosje, *supra* note 171.

194. Bert Klandermans et al., *Redeeming Apartheid's Legacy: Collective Guilt, Political Ideology, and Compensation*, 29 POL. PSYCHOL. 331, 347–48 (2008).

195. This result reflects the psychological evidence suggesting that our conflicting beliefs about racial inequality and its causes are intractable. *See supra* notes 160–178 and accompanying text (Part II.B.1 & 2).

196. *See* Darby & Branscombe, *supra* note 177, at 124 (arguing that psychological defensive strategies can be an obstacle to backward-looking shared responsibility).

The Court's postracial jurisprudence sharply limits the availability of race-specific remedies, whether as a court-ordered response to unconstitutional discrimination or as a political solution for persistent racial disparities. This postracial jurisprudence is deeply rooted in the Court's normative conception of equality that runs through decades of decisions, and is not likely to change dramatically as a result of changes in the Court's composition.

A. The Normative Roots of Postracial Equal Protection

The law must classify people and treat them differently to achieve public policy objectives. So, for example, it cannot be unconstitutional to treat murderers differently from non-murderers. Equality demands that we treat people who are "similarly situated" the same way, but we may (or must) treat people differently if there is a relevant difference between them. Today, many people would argue that race is simply never, or almost never, a morally relevant difference that warrants treating people differently under the law.[197]

1. The Meaning of Equal Protection

Unfortunately, for much of the nation's history, demands of equal protection were ignored, as ideologies of racial superiority rationalized treating whites and blacks differently in law and in practice.[198] Thus, as reflected in cases like *Dred Scott*, racial oppression was reconciled with equality on the theory that blacks (and other people of color) were inferior to whites; i.e., race was a relevant difference. Eventually, the United States came around to accepting that race was indeed an improper classification for denying equality and equal protection.[199] The Court's recognition that racial classifications are improper, however, drew on two distinct conceptions of equal protection that have radically different implications for race-specific remedies. One conception was focused on preventing the subordination of politically powerless groups; the

197. BERNARD WILLIAMS, PROBLEMS OF THE SELF: PHILOSOPHICAL PAPERS 231 (1973). Exceptions to the general rule might include judicial remedies for unlawful racial discrimination or choosing undercover officers of the same race to infiltrate racial gangs.

198. *See generally* DERRICK DARBY, RIGHTS, RACE, AND RECOGNITION 109–32 (2009).

199. Ironically, the Court now voices this pronouncement most loudly when objecting to so-called reverse discrimination against whites. *See, e.g.*, Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007) (invalidating race-conscious school assignments designed to alleviate de facto segregation); City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (invalidating minority preference for government contractors).

other was based on the right of each individual to be treated fairly on the basis of his or her merits. Over time, the latter conception emerged as the Court's primary normative understanding of equal protection.[200] This approach facilitated the development of the Court's postracial jurisprudence.

Left-leaning liberals tend to view the normative demands of equality and the Equal Protection Clause in terms of an antisubordination principle.[201] This approach is grounded in "political process theory" and focuses on laws that disadvantage discrete and insular minorities who are unable to protect themselves in the political process.[202] The antisubordination perspective focuses on laws and policies that adversely affect politically powerless minorities because these groups are not protected by the political process and so are likely to be the victims of prejudice and oppression. Conversely, this understanding of equal protection would suggest a greater tolerance for laws that protect or advance the interests of minorities, which are less likely to be the product of a political process failure.

The countervailing perspective, emphasized by those on the Right, views equal protection as an antidiscrimination principle grounded in individual fairness.[203] This perspective is skeptical of all racial classifications—whether used for ill or good—because race is not a morally relevant basis for treating people differently.

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200. *See, e.g.*, Fisher v. University of Texas at Austin, 570 U.S. 1, 8 (2013) ("Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people, and therefore are contrary to our traditions and hence constitutionally suspect. Because racial characteristics so seldom provide a relevant basis for disparate treatment, the Equal Protection Clause demands that racial classifications . . . be subjected to the most rigid scrutiny.") (internal quotation marks omitted) (citations omitted); *see generally* Richard E. Levy, *Political Process and Individual Fairness Rationales in the U.S. Supreme Court's Suspect Classification Jurisprudence*, 50 WASHBURN L.J. 33 (2010) (discussing the two approaches to equal protection and highlighting the emergence of the individual fairness rationale as the dominant approach in the Court's cases).

201. Thus, for example, Owen Fiss (a liberal icon) famously argued that equal protection should be understood in terms of a "group disadvantaging principle" that focuses on preventing the subordination of groups *See generally* Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFFS. 107, 108 (1976) (arguing that "the group-disadvantaging principle . . . has as good, if not better, claim to represent the ideal of equality" than individual fairness and that it "takes a fuller account of social reality" and "more clearly focuses the issues that must be decided in equal protection cases").

202. The classic statement of this approach came in *U.S. v. Carolene Products*, 304 U.S. 144, 152–53, n.4 (1938), which suggested that "prejudice against discrete and insular minorities may be a special condition" that justified more exacting scrutiny of legislation.

203. *See, e.g.*, Washington v. Davis, 426 U.S. 229, 245 (1976) ("[W]e have difficulty understanding how a law establishing a racially neutral qualification for employment is nevertheless racially discriminatory and denies 'any person . . . equal protection of the laws' simply because a greater proportion of Negroes fail to qualify than members of other racial or ethnic groups.").

From this perspective, laws that disproportionately burden minorities are unfair only if they are the product of discriminatory intent, while race-specific laws that favor minorities are justified only if they are narrowly focused remedies for actual victims of discrimination.

While early decisions invalidating discriminatory laws and policies mixed both rationales, the individual fairness rationale became dominant in the 1970s and 1980s.[204] Thus, for example, in *Loving v. Virginia*,[205] which invalidated the state's law prohibiting interracial marriage, the Court emphasized the way in which the law subordinated blacks and other racial minorities.[206] More recent cases, however, tend to emphasize the right of individuals to be treated fairly without regard to race, which is a morally irrelevant characteristic. This point is especially evident in the Court's affirmative action cases.[207] The emergence of the individual fairness rationale did not require the Court to repudiate cases like *Loving*, however, because the result is also consistent with the individual fairness rationale.[208]

These two conceptions of equal protection, antidiscrimination and antisubordination, are closely linked to PRI and DRI, respectively. The individual fairness rationale, rooted in suspicion toward all racial classifications, focuses on the denial of full participatory rights based on the irrelevant consideration of race (PRI). In contrast, the political process rationale, grounded by concerns to safeguard politically vulnerable groups, suggests that inequality of outcomes (DRI) may be the product of a political process that does

204. *See generally* Levy, *supra* note 200.

205. 388 U.S. 1 (1966).

206. *See id.* at 11 ("The fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy.").

207. *See* Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 227 (1995) (reasoning that "all governmental action based on race—a group classification long recognized as 'in most circumstances irrelevant and therefore prohibited,'—should be subjected to detailed judicial inquiry to ensure that the personal right to equal protection of the laws has not been infringed") (citation omitted); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) ("The Richmond Plan denies certain citizens the opportunity to compete for a fixed percentage of public contracts based solely upon their race. To whatever racial group these citizens belong, their 'personal rights' to be treated with equal dignity and respect are implicated by a rigid rule erecting race as the sole criterion in an aspect of public decisionmaking.") (citation omitted).

208. Ironically, the Court's equal protection cases at times continue to invoke the antisubordination principle in other contexts, particularly in some of its recent cases involving same sex marriage and discrimination on the basis of sexual orientation. *See, e.g.*, United States v. Windsor, 133 S. Ct. 2675, 2693 (2013) ("The Constitution's guarantee of equality 'must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot' justify disparate treatment of that group.") (quoting Dep't of Agric. v. Moreno, 413 U.S. 528, 534–35 (1973)); Romer v. Evans, 517 U.S. 620, 634–35 (1996) (same).

not allow full participation by disadvantaged groups (PRI). Thus, the current dominance of the individual fairness rationale correlates with the postracial understanding that only PRI violates the principle of equality.[209]

2. Postracial Implications

The postracial implications of the individual fairness rational are well illustrated by the following passage from Justice Alito's dissenting opinion in *United States v. Windsor*:[210]

> Underlying our equal protection jurisprudence is the central notion that "[a] classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.'" The modern tiers of scrutiny—on which Windsor and the United States rely so heavily—are a heuristic to help judges determine when classifications have that "fair and substantial relation to the object of the legislation."
>
> So, for example, those classifications subject to strict scrutiny—i.e., classifications that must be "narrowly tailored" to achieve a "compelling" government interest—are those that are "so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy."
>
> In contrast, those characteristics subject to so-called intermediate scrutiny—i.e., those classifications that must be "'substantially related'" to the achievement of "important governmental objective[s]"—are those that are sometimes relevant considerations to be taken into account by legislators, but "generally provid[e] no sensible ground for different treatment," . . . .
>
> Finally, so-called rational-basis review applies to classifications based on "distinguishing characteristics relevant to

209. Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 559 (2003) ("The individualist impulse in equal protection thus offers an escape from confronting the depressing degree to which race influences the lives of members of historically subordinated groups. It invites us instead to bathe in a sunnier worldview informed by ideals of universal human potential.").

210. *Windsor*, 133 S. Ct. at 2675. Reproducing this lengthy block quotation in its entirety is necessary to illustrate the basic point that race has been omitted altogether from Justice Alito's detailed summary of equal protection doctrine.

> interests the State has the authority to implement." . . . We have long recognized that "the equal protection of the laws must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantages to various groups or persons."[211]

Although this passage is taken from a dissenting opinion, Justice Alito's conception of the meaning of equal protection aptly summarizes decades of precedents that will be discussed in greater detail below. The present discussion is meant to highlight the postracial elements of Justice Alito's account of equal protection doctrine.

First, the passage itself is, quite literally, postracial in the sense that Justice Alito does not mention race at all and race is irrelevant to the exposition of equal protection doctrine. Although the passage is stripped down—removing citations, parentheticals, and some text to conserve space—the term "race" (or "racial") does not appear in the discussion at all. Justice Alito did quote *Parents Involved in Community Schools v. Seattle School Dist. No. 1*,[212] a case that involves race, when stating the test for strict scrutiny, but in so doing omitted any mention of race or racial classifications. Justice Alito also cited Justice Stevens's concurring opinion in *Cleburne v. Cleburne Living Center, Inc.*,[213] including a parenthetical quotation that references skin color: " 'It would be utterly irrational to limit the franchise on the basis of height or weight; it is equally invalid to limit it on the basis of skin color.' "[214] But this reference to skin color came in a case involving disabilities, and treats race as functionally equivalent to factors such as height or weight.

While *Windsor* is not a case about race, accounts of equal protection doctrine typically acknowledge the central role of race, especially in relation to strict scrutiny, even when other classifications are involved.[215] Given the importance of race in the history of the Fourteenth Amendment and in the evolution of equal protection doctrine, the complete omission of any mention of race or

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211. *Id.* at 2716–17 (Alito, J., dissenting) (citations omitted).

212. 551 U.S. 701 (2007). It is telling, perhaps, that Justice Alito chose a case invalidating race-specific remedies for segregated schools.

213. 473 U.S. 432 (1985).

214. *Windsor,* 133 S. Ct. at 2717 (quoting 473 U.S. at 452) (Stevens, J., concurring). Justice Stevens's use of skin color in this context tracks Justice Alito's conception of equal protection as prohibiting arbitrary classifications.

215. *See, e.g.*, United States v. Virginia, 518 U.S. 515, 532–33 (1996) (discussing classifications based on sex in relation to classifications based on race); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440–42 (1985) (discussing race in summary of equal protection doctrine in case involving discrimination based on disability).

racial classifications from Justice Alito's discussion of equal protection doctrine is striking.

Second, and relatedly, Justice Alito's description of the doctrine separates the principle of equal protection from its historical origins as a means of protecting blacks from racial injustice. There can be no doubt that the Fourteenth Amendment, including the Equal Protection Clause, was adopted to secure the basic rights of the newly freed slaves and confer congressional authority to prevent racial oppression in the aftermath of the Civil War.[216] But in Justice Alito's account, race has been demoted from the animating purpose of the Equal Protection Clause to one example of the kind of irrelevant considerations that will not justify differences in treatment. This profoundly ahistorical understanding of equal protection is especially striking insofar as Justice Alito is often aligned with other conservative Justices in advocating for an historical approach to constitutional interpretation.[217]

Third, the discussion closely follows the normative perspective that differences in treatment under the law violate equal protection only when they are not justified by differences between people that are relevant to legitimate public policy objectives. This concept of equality is closely aligned with the individual fairness rationale for equal protection and ignores questions of political process or powerlessness. Accordingly, this account of the doctrine is concerned exclusively with differences in treatment (PRI), so differences in outcome (DRI) are not relevant to the equal protection inquiry.

In short, this analysis illustrates the general point, which we develop in the sections that follow, that—whatever ideological divisions exist among the Justices on matters of race—the Court's underlying theory of equal protection is distinctly and decidedly postracial. From this perspective, racial classifications violate the

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216. *See, e.g.*, Washington v. Davis, 426 U.S. 229, 239 (1976) ("The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race."); DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT 342 (1985) (labeling "racial justice" as the "central purpose" of the Reconstruction Amendments).

217. Indeed, in the same dissenting opinion, Justice Alito advanced historical arguments against recognizing the right of same sex couples to marry as protected by the Due Process Clause. *Windsor*, 133 S. Ct. at 2715 ("It is beyond dispute that the right to same-sex marriage is not deeply rooted in this Nation's history and tradition."). One might have expected conservative Justices to argue for a narrow historical understanding of equal protection and oppose an expansive conceptual approach, as they have in regard to the expansion of substantive due process. Such an originalist approach, however, would create complications for other components of equal protection doctrine that conservative Justices favor, such as strict scrutiny of affirmative action programs.

principle of equal protection not because our past history of discrimination tells us they are instruments of racial oppression and injustice, but rather because (in a "postracial world") race is not a legitimate consideration in shaping public policy. This postracial conception of equal protection manifests itself in the Court's precedents through postracial doctrinal principles and postracial factual premises.

B. Postracial Doctrinal Principles

In view of the Court's underlying conception of equal protection, it is hardly surprising that the resulting doctrinal principles are consistently postracial. Under this doctrine, equal protection prohibits only a very narrowly defined category of PRI—intentional (*de jure*) racial discrimination by the state. As a result, judicial remedies for racial disparities are seldom available and, conversely, race-specific political remedies for racial inequality are generally prohibited.

1. The Limited Scope of Equal Protection

From the beginning, the Court construed the Equal Protection Clause as limited to "state action."[218] Accordingly, the Constitution itself affords no remedies for private acts of discrimination that are tolerated by the state, so long as the state itself is not complicit in some way.[219] Indeed, even though the history of the Fourteenth Amendment makes relatively clear that one of its purposes was to authorize congressional action to protect the newly freed slaves from the Ku Klux Klan and other private groups perpetrating racial violence, the Court held that § 5 of the Fourteenth Amendment did not empower Congress to prohibit private acts of discrimination.[220] Accordingly, federal civil rights laws prohibiting private acts

218. *See* The Civil Rights Cases, 109 U.S. 3, 24–25 (1883); United States v. Cruikshank, 92 U.S. 542, 544–45 (1875). A similar limitation applies when asserting individual rights claims against the federal government. *See* Lebron v. Nat'l R.R. Passenger Corp., 513 U.S. 374 (1995) (concluding that Amtrak was an arm of the government for purposes of applying the First Amendment).

219. *E.g.*, Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 178–79 (1972) (holding that Equal Protection Clause did not prohibit racial discrimination by state-licensed private club but that state enforcement of racially restrictive membership rule was invalid).

220. *See The Civil Rights Cases*, 109 U.S. at 53–54 (1883); *see also* United States v. Morrison, 529 U.S. 598 (2000) (holding that record of domestic violence against women did not support creation of federal remedies for violence against women because offenses were committed by private actors, not the state).

of discrimination have generally been upheld under the commerce power instead.[221]

In addition, the Court has held that only explicit or intentional racial discrimination triggers strict scrutiny. Critically, claims based on disparate impact are treated as racial classifications only if the plaintiff can prove that a facially neutral law or policy was adopted "because of" (not merely "in spite of") its racially disproportionate impact.[222] Unless discriminatory intent is proved, the rational basis test applies and state action is ordinarily valid not withstanding its disparate impact.[223] Accordingly, for example, neighborhood school policies that result in de facto school segregation are not unconstitutional unless the plaintiffs can prove that the purpose of the neighborhood school policy was to achieve racial segregation in the schools.[224]

While intentional racial discrimination is clearly prohibited, discriminatory intent is especially difficult to prove. Given its illegality, discriminatory intent is seldom, if ever, explicit. In rare cases, the disparate impact of a law may itself prove discriminatory intent,[225] but only if the result cannot be explained by any nondiscriminatory motive.[226] Although the Court has identified some indirect means of proving intent, such as substantive or procedural irregularities,[227] discriminatory intent is nearly impossible to prove in practice.

Consider the problem of discriminatory exercise of peremptory challenges, which contributes to the disproportionate punishment

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221. *E.g.*, Katzenbach v. McClung, 379 U.S. 294 (1964); Heart of Atlanta Motel, Inc. v. U.S., 379 U.S. 241 (1964).

222. *See* Washington v. Davis, 426 U.S. 229 (1976); McCleskey v. Kemp, 481 U.S. 279 (1987).

223. *See id.*; Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977).

224. Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 211 (1973). Equally important, the creation of separate suburban school districts insulates those districts from desegregation with predominantly black urban districts. *See* Milliken v. Bradley, 418 U.S. 717, 725 (1974) (holding that interdistrict remedies for segregated schools are not available unless there was an interdistrict violation); Cedric Merlin Powell, Milliken*, "Neutral Principles," and Post-Racial Determinism*, 31 HARV. J. ON RACIAL & ETHNIC JUST. ONLINE 1 (2015) (criticizing Milliken as an early example of postracialism). A related consequence is that reliance on local funding for schools perpetuates the advantages of wealthier, predominantly white suburban districts.

225. *See* Gomillon v. Lightfoot, 364 U.S. 339, 347–48 (1960) (concluding that redrawing of city boundaries into a grotesque, twenty-eight-sided shape that excluded virtually all blacks was discriminatory); Yick Wo v. Hopkins, 118 U.S. 356, 373–74 (1886) (concluding that laundry licensure violated equal protection where all applicants of Chinese descent were denied licenses and virtually all others were granted licenses).

226. *See* Pers. Adm'r v. Feeney, 442 U.S. 256 (1979) (concluding that although veteran's preference beneficiaries were over ninety-eight percent male, the statistical pattern did not establish discrimination based on sex because the desire to benefit veterans was a legitimate alternative explanation for the disparity).

227. *See infra* notes 319–322 and accompanying text (discussing proof of discriminatory intent under Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977)).

of black crime discussed above. Recognizing the difficulties of proving discriminatory intent in this context, in *Batson v. Kentucky*[228] the Court established a special burden-shifting regime for equal protection challenges to peremptory challenges in jury selection.[229] In practice, however, the Court's burden-shifting approach has done little to prevent discrimination in jury selection.[230] Indeed, even when the evidence of racial discrimination is overwhelming, criminal defendants often face a variety of hurdles in challenging the racial composition of their juries.[231]

Federal (and state) civil rights statutes fill in some of the gaps in constitutional equal protection principles. For example, various statutes, such as the Civil Rights Acts of 1964[232] and 1870,[233] prohibit private acts of racial discrimination. To the extent that these statutes require proof of intentional discrimination, they suffer from the same problems of proof as constitutional remedies under the Equal Protection Clause. The *Batson* regime described above, for example, is modeled on the burden shifting regime the Court established for employment discrimination claims under Title VII of the Civil Rights Act.[234] Under this regime, black employees can establish a prima facie case of discrimination by showing that they were denied a position or promotion for which they were qualified

228. 476 U.S. 79 (1986).

229. Under this regime, a criminal defendant can make out a prima facie case of discrimination if the prosecution's exercise of peremptory challenges exhibits a pattern of excluding people of a particular race, in which case the burden shifts to the prosecution to provide a race-neutral explanation, at which point the party challenging the exercise of the challenge then must discredit the race-neutral explanation and prove intentional discrimination. *See, e.g.*, Miller-El v. Cockrell, 537 U.S. 322, 328–29 (2003) ("First, a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race[; s]econd, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question[; and t]hird, in light of the parties' submissions, the trial court must determine *whether the defendant has shown purposeful discrimination*." (emphasis added) (citations omitted); *see also* Davis v. Ayala, 135 S.Ct. 2187, 2199 (2015) ("The opponent of the strike bears the burden of persuasion regarding racial motivation . . . .") (citation omitted).

230. The main problem is that it is easy to come up with race-neutral explanation and courts defer to those explanations. *See generally* Nancy S. Marder, Batson *Revisited*, 97 IOWA L. REV. 1585, 1588–91 (2012) (describing ineffectiveness of *Batson*); Kenneth J. Melilli, Batson *in Practice: What We Have Learned about* Batson *and Peremptory Challenges*, 71 NOTRE DAME L. REV. 447 (1996) (analyzing data and concluding that *Batson* has been ineffective).

231. *See* Foster v. Chapman, 136 S. Ct. 1737, 1740 (2016) (reversing state court's denial of *Batson* claim based on clear evidence of discriminatory intent).

232. Civil Rights Act of 1964, Pub. L. No. 88-352, § 201(b),78 Stat. 241 (July 2, 1964).

233. Act of May 31, 1870, ch. 114, § 2, 16 Stat. 140.

234. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) (establishing burden shifting regime for indirect proof of discrimination under Title VII). This sort of claim should be distinguished from disparate impact claims, which are based on statistical evidence that a neutral practice or policy disproportionately burdens a protected class.

and that a white person filled the position or promotion. The burden then shifts to the employer to come forward with a business justification for the decision, at which point the plaintiff bears the ultimate burden of proving that the business justification was a pretext for discrimination.[235] This burden has proven difficult to overcome in practice.[236]

Some statutes go further and provide for claims based upon disparate impact (or discriminatory effects) without proof of discriminatory intent.[237] The recognition of such claims,[238] which are more closely aligned with DRI than PRI, provides some relief from the rigors of proving intent. Nonetheless, the Court has been careful to limit the availability of such remedies through various procedural and other requirements. Thus, for example, although the Court recently recognized disparate impact claims under the Fair Housing Act in *Texas Department of Housing and Cmty. Affairs v. The Inclusive Communities Project, Inc.*,[239] it also emphasized that "disparate-impact liability has always been properly limited in key respects," such as an expansive defense based on business necessity, the need to specifically identify a policy that causes the disparate impact, a "robust" causation requirement, and limitations on remedies.[240]

More fundamentally, as will be discussed more fully below, disparate impact claims are constitutionally suspect to the extent that they entail race-specific remedies that are not narrowly tailored to remedy past intentional discrimination.

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235. Texas Dep't of Cmty. Affs. v. Burdine, 450 U.S. 248, 256 (1981) (explaining that "[t]he plaintiff retains the burden of persuasion" in Title VII cases based on the *McDonnell Douglass* framework).

236. *See* Natasha T. Martin, *Pretext in Peril*, 75 MO. L. REV. 313, 317 (2010) (arguing that "the courts' evidentiary dilution and its procedural reinforcement has become a dangerous force for Title VII plaintiffs to contend against in proving pretext for discrimination"); *see generally.* Barbara Flagg, *Fashioning a Title VII Remedy for Transparently White Subjective Decisionmaking*, 104 YALE L.J. 2009 (1995) (arguing that proof of intent requirement cannot be overcome in cases of "transparently white subjective decision making").

237. Examples include the Voting Rights Act, § 2, 52 U.S.C. § 10301 (prohibiting practices that have the effect of abridging the right to vote on account of race); the Fair Housing Act, 42 U.S.C. § 3604(a), 3605(a); and Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. § 2000e-2.

238. *See* Griggs v. Duke Power Co., 401 U.S. 424 (1971) (recognizing disparate impact claims under Title VII).

239. 135 S. Ct. 250, 2522–24 (2015).

240. *See also infra* notes 291–298 and accompanying text (discussing limitations of disparate impact claims in the context of remedies for economic disparities).

2. Implicit Bias and Systemic Barriers

Intentional discrimination is not the only thing that prevents blacks from full participation in the benefits of society. Of particular concern for present purposes are implicit biases and systemic barriers, which impede black success.[241] The principles governing equal protection doctrine provide little or no basis for challenging these factors that contribute to black inequality and disadvantage.

The effects of implicit biases are well documented by studies showing, for example, that otherwise identical resumes are treated less favorably when job applicants' names appear to be black than when they appear to be white.[242] This sort of bias does not indicate malicious intent; indeed, our implicit biases affect our judgments without our awareness and often against our values and desires.[243]

This sort of implicit bias is the natural byproduct of the way people process knowledge and experience. Cognitive science tells us that we organize and synthesize information into "schemata"—"ordered patterns of mental representations that encapsulate all our knowledge regarding specific objects, concepts, or events."[244] When confronted with a problem or decision, we match the circumstances to an appropriate schema and use it to fill in gaps in the available information. So long as race remains a salient factor, it pervades the schemata we use to evaluate others.[245]

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241. We focus on these concerns because they are socially constructed, in contrast to naturally occurring barriers that may be regarded as "acts of God." As will be discussed below, implicit biases are to some extent "built in" to our mental processes, and in that sense they are naturally occurring as well. Nonetheless, the salience of race as a basis for schemata is in many ways the product of social norms that reinforce it.

242. *See, e.g.,* Bertrand & Mullainathan, *supra* note 10; Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995) (citing studies to argue that current law provides inadequate protection against cognitive biases); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 Colum. L. Rev. 458 (2001) (discussing second generation manifestations of workplace bias as a structural, relational, and situational one); *see generally* MAHZARIN R. BANAJI & ANTHONY G. GREENWALD, BLIND SPOT: HIDDEN BIASES OF GOOD PEOPLE (2013) (discussing the implications from the Implicit Association Test, a computer-based assessment that detects unconscious biases); GEOFFREY BEATTIE, OUR RACIST HEART?: AN EXPLORATION OF UNCONSCIOUS PREJUDICE IN EVERYDAY LIFE (2013) (discussing how implicit biases based around race exist in the psyches of even the most liberal, educated and fair-minded); Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CAL. L. REV. 945 (2006) (discussing implicit bias and its bearing on discrimination law).

243. *E.g.*, Patricia G. Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 J. PERSONALITY & SOC. PSYCHOL. 5 (1989).

244. John Sweller et al., *Cognitive Architecture and Instructional Design*, 10 EDUC. PSYCHOL. 251, 257 (1998).

245. *See generally* Gary Blasi, *Advocacy Against the Stereotype: Lessons from Cognitive Social Psychology*, 49 UCLA L. REV. 1241 (2002) (discussing recent science developments that suggest

By definition, however, this sort of unconscious or implicit bias is unintentional and therefore cannot violate equal protection under current doctrine. This is true even when statistical analysis demonstrates that implicit biases are likely at work, as reflected in *McCleskey v. Kemp*,[246] in which the Supreme Court held that racial disparities in the imposition of the death penalty did not violate the Equal Protection Clause. Although statistical analysis demonstrated that race was a factor in the imposition of the death penalty, it did not show that the specific defendant was the victim of intentional racial discrimination.[247]

A related problem concerns systemic barriers, meaning structures and practices that tend to disadvantage blacks, whether or not they are adopted or maintained with that intent. Examples include reliance on neighborhood school policies and local funding that perpetuates inequality in educational opportunities, use of standardize tests that may be racially biased,[248] or legacy admissions policies at elite institutions of higher education.[249] Systemic barriers and implicit biases may interact, especially when systemic practices afford broad discretion to individual decision makers whose implicit biases may be at work.[250]

While such structures and practices may in some cases be chosen or maintained with discriminatory motives, intentional discrimination is typically impossible to prove. More fundamentally, even in

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implicit bias at work in advocacy situations); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995) (discussing the biased employment decisions arise from unintentional cognitive bias); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987) (discussing unconscious nature of racism and the need for a judicial test reflecting the role of implicit bias).

246. 482 U.S. 279, 286–87 (1987).

247. *Id.* at 297 (concluding that the study in question was "clearly insufficient to support an inference that any of the decision makers in McCleskey's case acted with discriminatory purpose").

248. *See generally* THE BLACK-WHITE TEST SCORE GAP (Christopher Jencks & Meredith Phillips eds., 1998) (discussing the role of test bias against minority students as a contributing factor to the standardized test score gap between black Americans and white Americans). *But see* Jennifer C. Braceras, *Killing the Messenger: The Misuse of Disparate Impact Theory to Challenge High-Stakes Educational Tests*, 55 VAND. L. REV. 1111 (2002) (arguing against use of disparate impact theory to challenge standardized tests, because the tests are only tools that have both costs and benefits to the minority students achievement, and discounting the tests entirely would be the equivalent of "killing the messenger" by ignoring the educators' ability to exercise discretion in utilizing the tool).

249. *See, e.g.*, John D. Lamb, *The Real Affirmative Action Babies: Legacy Preferences at Harvard and Yale*, 26 COLUM. J.L. & SOC. PROBS. 491 (1993).

250. Thus, for example, the discretion afforded to police officers in regard to traffic stops may facilitate the influence of implicit biases. *See, e.g.*, EPP, MAYNARD-MOODY & HAIDER-MARKEL, *supra* note 49.

the absence of discriminatory intent, policies and practices that perpetuate the effects of past discrimination or reinforce existing inequalities erect systemic barriers to full participation by blacks. Doctrinally, however, they do not violate equal protection. Conversely, race-specific responses to these effects may be held invalid under equal protection doctrine.[251]

3. Race-Specific Remedies

Equal protection doctrine places severe restrictions on race-specific judicial remedies to combat implicit bias and systemic barriers. After some uncertainty about the appropriate level of scrutiny for affirmative action programs and other race-specific policies intended to mitigate racial disparities, the Supreme Court has held that "strict scrutiny" applies.[252] Accordingly, race-specific remedies are nearly always constitutionally invalid.[253]

Strict scrutiny requires that the purposes supporting race-specific remedies must be compelling.[254] As an initial matter, we might consider remedying the effects of racial discrimination to be a compelling purpose and there is little doubt that courts may order race-specific remedies in response to findings of explicit discrimination by state actors.[255] However, the Court has held that such

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251. *See* Ricci v. DeStefano, 557 U.S. 557, 585–87 (2009) (holding that city's refusal to certify results of promotion exam based on concern over disparate impact claims was an insufficient justification for disparate treatment of white firefighters).

252. In *Grutter v. Bollinger*, 539 U.S. 306 (2003), the Court upheld an affirmative action program notwithstanding the purported application of strict scrutiny. Some observers argue that the level of scrutiny in *Grutter* was not truly strict. *See, e.g.,* Ian Ayres & Sydney Foster, *Don't Tell, Don't Ask: Narrow Tailoring After* Grutter *and* Gratz, 85 TEX. L. REV. 517, 565–70 (2007) (arguing that *Grutter* did not properly apply the traditional narrow tailoring requirement under strict scrutiny).

253. Professor Gerald Gunther famously described strict scrutiny as "strict in theory and fatal in fact." *See* Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972). Although this characterization has been challenged as an empirical matter, even this study concluded that race-based affirmative action programs survived strict scrutiny only about twenty-seven percent of the time, and many of those cases involved judicial remedies for government action found to be intentional discriminatory. *See* Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 839, 836–37 (2006).

254. *See, e.g.*, Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 720 (2007) ("[I]n order to satisfy this searching standard of review, the school districts must demonstrate that the use of individual racial classifications in the assignment plans here under review is 'narrowly tailored' to achieve a 'compelling' government interest.") (citation omitted).

255. Thus, for example, race-specific remedies for de jure school segregation are constitutionally valid. *See, e.g.,* Swann v. Charlotte-Mecklenberg Bd. of Educ, 402 U.S. 1 (1971).

purposes are only compelling when the state itself is guilty of intentional discrimination,[256] and few state actors are willing to concede to a constitutional violation to justify their use of affirmative action.[257] Critically, moreover, affirmative action cannot be used as a means to overcome implicit biases or systemic barriers.

Under *Grutter v. Bollinger*,[258] affirmative action programs may be a constitutionally permissible means of achieving diversity in higher education, but this possibility is quite limited.[259] As an initial matter, higher education is a narrow field, and *Grutter* does not extend even to educational opportunities in elementary or secondary schools.[260] More broadly, race-specific remedies are largely off the table in other key areas, particularly employment discrimination.[261]

Even if there is a compelling purpose because of past discrimination by state actors or because diversity in higher education is at issue, the requirement that race-specific remedies be narrowly tailored makes it very difficult to sustain them. Such remedies cannot be over or under inclusive and can only be used if there are no non

256. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 498–506 (1989) (holding that remedying the past societal discrimination was not a compelling governmental interest that could support an affirmative action program, and that such a remedial purpose was compelling only if the state itself was guilty of discrimination or at least a passive participant in it).

257. Nonetheless, race-specific remedies for past discrimination by state actors are sometimes at issue as a result of litigation, in which case the judicial order or consent decree must still meet the narrow tailoring requirement. *See, e.g.*, *In re* Birmingham Reverse Discrimination Emp't Litig., 20 F.3d 1525, 1539–43 (11th Cir. 1994) (concluding that remedying past racial discrimination in employment by city was a compelling interest to support consent decree, but that decree was not narrowly tailored because it unduly trammeled on rights of white workers and did not pursue less discriminatory alternatives).

258. 539 U.S. 306 (2003).

259. *See, e.g.*, Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411 (2013) (remanding for consideration of whether affirmative action program was narrowly tailored to meet the state's compelling interest in educational diversity); Grutter v. Bollinger, 539 U.S. 306 (2003) (upholding consideration of race as a factor in admissions as narrowly tailored to meet the state's compelling interest in educational diversity).

260. *See* Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 724–25 (2007) (emphasizing that *Grutter* "relied upon considerations unique to institutions of higher education" and criticizing the lower courts for ignoring this "limitation[ ] on its holding").

261. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (invalidating state municipal policy favoring minority contractors); *see also* Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995) (remanding federal preference for minority contractors for application of strict scrutiny). Although these cases set aside race-specific remedies for government contractors, they are equally applicable in employment cases. *See, e.g.*, Kohlbek v. City of Omaha, 447 F.3d 552, 556 (8th Cir. 2006) ("Because Omaha employs the use of racial classifications in situations where there is no identified past discrimination, we hold that its affirmative action plan, as it applies to promotional decisions, is not narrowly tailored to further the goal of remedying past discrimination.").

race-specific alternatives.[262] Accordingly, race-specific remedies are seldom available as a means of combating racial inequality.

Indeed, the Court's treatment of race-specific remedies threatens to undermine statutory remedies based on disparate impact, insofar as combatting disparate impact necessarily entails some effort to achieve racially balanced results. Because this sort of effort typically requires explicit consideration of race, such remedies may themselves run afoul of statutory and constitutional limits, as reflected in *Ricci v. DeStefano*.[263] More broadly, Justice Scalia suggested that statutory disparate impact remedies are unconstitutional insofar as they effectively require race-specific responses.[264]

C. Postracial Factual Premises

Although the postracial doctrinal principles of the Supreme Court's equal protection jurisprudence limit its scope, they would permit narrowly tailored race-specific remedies for racial inequality that is the result of intentional discrimination. Even accepting this limitation, many blacks and their allies on the Left believe that race-specific remedies are justified because they attribute racial inequalities such as those we have documented to intentional discrimination, including both the continuing effects of past discrimination and current intentional discrimination. The Supreme

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262. *See Fisher*, 133 S. Ct. at 2420–21 (2013) (emphasizing that, on remand, affirmative action in admissions could be upheld only if less discriminatory alternatives were ineffective). Although *Grutter* suggested a somewhat more lenient version of this requirement, *Fisher* seemed to reassert the strict version of the narrow tailoring requirement. *Compare Grutter*, 539 U.S. at 339 ("Narrow tailoring does, however, require serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks."); *with Fisher*, 133 S. Ct. at 2420–21 (rejecting district court's application of strict scrutiny in part because it "deferr[ed] to the University's good faith in its use of racial classifications").

263. 557 U.S. 557, 585–93 (2009) (holding that city's refusal to certify results of promotion exam based on concern over disparate impact claims was an insufficient justification for disparate treatment of white firefighters).

264. *See id.* at 594–96 (2009) (Scalia, J., concurring); Richard Primus, *The Future of Disparate Impact*, 108 MICH. L. REV. 1341 (2010) (discussing implications of *Ricci* for the constitutional validity of disparate impact); Wencong Fa, *The Trouble with Racial Quotas in Disparate Impact Remedial Orders*, 24 WM. & MARY BILL RTS. J. 1169, 1190 (2015) (arguing that judicially imposed quotas as remedies for Title VII disparate impact claims must satisfy strict scrutiny); Eang L. Ngov, *When "The Evil Day" Comes, Will Title VII's Disparate Impact Provision Be Narrowly Tailored to Survive an Equal Protection Challenge?*, 60 AM. U. L. REV. 535, 541 (2011) (concluding that "the disparate impact provision [of Title VII] is unlikely to pass the narrowly tailored requirement and risks being invalidated"). Although the Court recently interpreted the Fair Housing Act as providing for disparate impact claims in *Texas Dep't of Hous. and Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 135 S. Ct. 2507 (2015), it did so by a slim 5-4 majority.

Court has recognized this point in principle,[265] but has in practice rejected the factual premises that would justify broad use of race-specific remedies. To illustrate this point, we discuss the Court's treatment of school desegregation and the Voting Rights Act.

1. The End of School Desegregation

The need for race-specific remedies for legally segregated schools in the wake of *Brown v. Board of Education* was evident, and the Court approved broad remedial authority for federal district courts overseeing school desegregation lawsuits.[266] These efforts were hampered by resistance from local officials and the inability of courts to order interdistrict remedies (which facilitated "white flight"), but did lead to the end of legally mandated segregation and some progress integrating the schools. In the 1990s, however, a series of decisions made it easier for school districts to end judicial desegregation orders, even though the likely consequence would be the resegregation of schools as a result of segregated housing patterns.[267]

First, *in Board of Educ. of Oklahoma City Public Schools, Independent School Dist. No. 89 v. Dowell*,[268] the Court adopted a relatively lenient standard for dissolving desegregation decrees. Under this standard, "[t]he District Court should address itself to whether the Board had complied in good faith with the desegregation decree since it was entered, and whether the vestiges of past discrimination had been

265. *See* United States v. Fordice, 505 U.S. 717 (1992) (concluding that adoption of race-neutral university admissions policies was insufficient to eliminate the effects of past discrimination and identifying neutral practices that had been retained even though their original purpose was discriminatory).

266. Resisting the retreat from desegregation is also a hard sell politically, insofar as many people, not just some members of the Court, believe that agent-relative factors having to do with blacks themselves rather than racial discrimination or anti-black prejudice best account for racial disparities in education, residential racial segregation, and in other areas. *See* Derrick Darby & Argun Saatcioglu, *Race, Justice, and Desegregation*, 11 DU BOIS REV. 87 (2014).

267. The Governmental Accountability Office has documented the resegregation of schools in a recent study. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-16-345, K–12 EDUCATION: BETTER USE OF INFORMATION COULD HELP AGENCIES IDENTIFY DISPARITIES AND ADDRESS RACIAL DISCRIMINATION (2016), www.gao.gov/assets/680/676745.pdf (discussing recent data showing that from 2000–01 to 2013–14 "the percentage of all K–12 public schools that had high percentages of poor and Black or Hispanic students grew from nine to sixteen percent" and that "[t]hese schools were the most racially and economically concentrated: seventy-five to one hundred percent of the students were Black or Hispanic and eligible for free or reduced-price lunch . . ."); *see also id.* (finding that "compared with other schools, these schools offered disproportionately fewer math, science, and college preparatory courses and had disproportionately higher rates of students who were held back in 9th grade, suspended, or expelled").

268. 498 U.S. 237 (1991).

eliminated to the extent practicable."[269] Moreover, this test does not have to be applied to the system as a whole, but rather requires relinquishment of judicial oversight as to those parts of a previously segregated district that have achieved unitary status.[270]

Second, in applying this test to determine whether a district has achieved partial unitary status, the Court has made clear that good faith compliance and the elimination of the vestiges of past discrimination does not mean that schools have to be desegregated in fact or that predominantly minority schools have to produce equal educational outcomes. Thus, in *Freeman v. Pitts*,[271] the Court held that resegregation of schools as a result of segregated housing patterns was not a reason to maintain judicial supervision of a school system under the *Dowell* standard.[272] Equally important, in *Missouri v. Jenkins*,[273] the Court held that lack of academic progress in predominantly minority schools was not a relevant consideration in determining whether a district had achieved partial unitary status.[274] The Court's analysis in these cases reflects the underlying factual assumption that "demographic forces" and "external factors" are unrelated to past or present intentional discrimination.

This postracial factual premise is analogous to the concept of proximate cause in torts, and places the burden on parties seeking to maintain judicial oversight to prove that current racial disparities are caused by past intentional racial discrimination. Given the complex factors at work in such matters, this burden is impossible to carry in practice. In addition to limiting the ongoing availability of judicial remedies for past racial discrimination, this premise means that voluntary efforts to desegregate schools are constitutionally suspect, as reflected in *Parents Involved in Community Schools v. Seattle School Dist. No. 1*.[275]

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269. *Id.* at 249–50. The Court rejected the traditional standard for dissolving injunctions, which permitted the dissolution of an injunction only upon a showing of a "grievous wrong evoked by new and unforeseen conditions." *Id.* at 246–47 (citing the standard established in United States v. Swift & Co., 286 U.S. 106, 119 (1932)). That standard was too restrictive for the school desegregation context in view of "[c]onsiderations based on the allocation of powers within our federal system . . . ." *Id.* at 248.

270. *See* Missouri v. Jenkins, 515 U.S. 70 (1995); Freeman v. Pitts, 503 U.S. 467 (1992).

271. 503 U.S. 467 (1992).

272. *Id.* at 495–96.

273. 515 U.S. 70 (1995).

274. *Id.* at 102.

275. 551 U.S. 701 (2007) (invalidating race-based school assignment policy intended to overcome de facto school segregation).

2. Voting Rights

Another case in which postracial factual premises were prominently on display is *Shelby County v. Holder*,[276] in which the Supreme Court invalidated the formula for determining the applicability of the preclearance provisions of the Voting Rights Act.[277] These provisions were put in place as a remedy for discriminatory voting procedures and practices that were used to suppress black voting. The provisions were race-specific in the sense that they focused on particular jurisdictions with a history of suppressing black voters.

The preclearance procedure required changes in voting practices to be approved by the Justice Department before they could take effect. This statutory procedure provided enhanced protection against the suppression of black voters in two ways. First, it allowed the federal government to block measures that had the effect of diluting or suppressing black voters without any proof that those measures were intentionally discriminatory. Second, it was a proactive remedy that prevented suppression before it happened, rather than relying on lawsuits challenging the validity of measures after they were adopted.

The Court's reasoning in *Shelby County* began with the postracial factual premise that although "voting discrimination still exists . . . , 'the Act imposes current burdens and must be justified by current needs.' "[278] The coverage formula of the Act failed to meet that requirement because:

> Nearly 50 years later, things have changed dramatically . . . . In the covered jurisdictions, "[v]oter turnout and registration rates now approach parity. Blatantly discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented levels." *Northwest Austin*, 557 U.S., at 202. The tests and devices that blocked access to the ballot have been forbidden nationwide for over 40 years.[279]

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276. 133 S. Ct. 2612 (2013).

277. These provisions, which are found in § 5 of the Act, 42 U.S.C. § 1973c(a), apply to covered jurisdictions as defined in § 4 of the Act. 42 U.S.C. § 1973b(b). By invalidating the coverage formula, the Court prevented the implementation of the preclearance provision as well, although that provision might be reanimated if Congress could craft a coverage formula that would satisfy the Court, which we consider to be an unlikely sequence of events.

278. 133 S. Ct. at 2619 (quoting Northwest Austin Muni. Util. Dist. No. 1 v. Holder, 557 U.S. 193, 203 (2009)). In other words: "That was then; this is now."

279. *Shelby Cty.*, 133 S. Ct. at 2625; *see also id.* at 2627–28 (citations omitted):

> The formula captures States by reference to literacy tests and low voter registration and turnout in the 1960s and early 1970s. But such tests have been banned nationwide for over 40 years. And voter registration and turnout numbers in the covered States

Because the preclearance requirement treated some states differently from others with respect to matters traditionally within the states' sovereign authority, moreover, the Court placed a high burden on Congress to justify the scope of the preclearance requirement under the coverage formula.[280]

The impact of *Shelby County* is substantial even though § 2 of the Voting Rights Act was amended in 1982 to incorporate an "effects" test that would not require proof of discriminatory intent. Under the current provision, no voting practice or procedure "shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right . . . to vote on account of race or color . . . ."[281] Subsection (b) then specified that a violation of subsection (a) is established "if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens . . . in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice."[282]

While these provisions ease the burden of proving intentional discrimination, § 2 has not prevented states from adopting voter ID laws or engaging in political gerrymanders that disproportionately burden black voters. Soon after the decision in *Shelby County*, for example, Alabama, Mississippi, North Carolina, and Texas all implemented or adopted strict voter ID laws that had previously been blocked by § 5.[283] To be sure, some or all of these laws may be eventually ruled invalid under § 2, as in the case of the Texas voter ID law.[284] Nonetheless, the invalidation of § 4, which prevents the enforcement of § 5's preclearance requirement, puts the expense and

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have risen dramatically in the years since. Racial disparity in those numbers was compelling evidence justifying the preclearance remedy and the coverage formula. There is no longer such a disparity.

280. *See id.* at 2827–31 (rejecting government's and dissent's arguments that evidence supported the reauthorization of the preclearance provisions and related coverage formula).

281. 52 U.S.C. § 10301(a) (previously codified at 42 U.S.C. § 1973(a)).

282. *Id.* § 10301(b). This subsection, however, contains a proviso specifying that "nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." *Id.* The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance that may be considered.

283. *See, e.g.*, Tomas Lopez, *'Shelby County': One Year Later*, BRENNAN CTR. FOR JUSTICE (June 24, 2014), http://www.brennancenter.org/analysis/shelby-county-one-year-later. The same article details examples of local redistricting efforts that tended to dilute black voting.

284. Veasey v. Abbott, 796 F.3d 487 (2015). Although *Veasey* concluded that the voter ID law had a discriminatory effect in violation of § 2, the Court of Appeals indicated that such a finding would not necessarily require invalidation of the law:

burden of proving a violation on those who argue against a law, which may remain in effect for a period of time even if eventually invalidated.[285]

The key point for present purposes is that the Court regarded the passage of time and progress towards eliminating racially discriminatory voting practices and procedures as sufficient to require that race-specific remedies for discriminatory voting practices and procedures be justified on the basis of current discrimination.[286] This is a distinctly postracial factual premise.

D. Postracial Equal Protection and Remedies for Racial Inequality

The postracial principles and factual premises of the Supreme Court's equal protection jurisprudence have critical implications for efforts to redress racial inequality. First, and most fundamentally, racial disparities in outcome (DRI) are not regarded as racial discrimination unless there is proof of discriminatory intent. Second, proving intentional discrimination is ordinarily difficult, as it requires either proof that past racial discrimination is the proximate cause of current racial inequality or proof of current intent, which is hard to come by because people now know better than to leave a proverbial "smoking gun." Third, because equal protection is limited to intentional discrimination, implicit biases and systemic barriers that contribute to current racial disparities and black disadvantage do not provide the basis for an equal protection claim.

> After finding that SB 14 was enacted with a racially discriminatory purpose, the district court fully enjoined SB 14's implementation, with the exception of several sections of the law that do not relate to photo identification. . . . That remedy is potentially broader than the one to which Plaintiffs would be entitled if, on remand, the district court only found that [the law] has a discriminatory effect in violation of Section 2 of the Voting Rights Act.

Id. at 517 (citing Crawford v. Marion Cty. Election Bd., 553 U.S. 181, 200, 203 (2008) (noting that, in the Section 2 context, "petitioners have not demonstrated that the proper remedy—even assuming an unjustified burden on some voters—would be to invalidate the entire statute")).

285. In *Veasey v. Abbott*, for example, although the district court enjoined enforcement of the Texas voter ID law shortly before the November 2014 election, the court of appeals stayed that order and allowed the law to be applied for that election. *See id.* at 496 (explaining that "this court granted the State's emergency motion for stay pending appeal, grounding its decision primarily in 'the importance of maintaining the status quo on the eve of an election'").

286. *See, e.g.*, Derrick Darby, *Uncovering the Voting Rights Act: The Racial Progress Argument in Shelby County*, 25 KAN. J.L. & PUB. POL'Y 329 (2015) (documenting the Court's racial progress argument for invalidating the coverage formula of the Voting Rights Act).

Fourth, even if proponents are able to convince politicians or other policymakers that race-specific measures are needed to address the ongoing effects of past discrimination, counterbalance implicit biases, or break down systemic barriers, such remedies are subject to strict scrutiny and likely to be declared unconstitutional.[287]

Given that the Court is narrowly divided,[288] proponents of race-specific remedies might have been tempted to hold out for a change in the Court's composition. But even President Obama's nomination of a moderately liberal Justice to replace Justice Scalia faced obstruction in the Senate and the prospect that the Court will become more liberal any time soon seems increasingly remote, given the results of the most recent election.[289] In any event, a change in the composition of the Court would not be likely to produce a dramatic repudiation of the Court's postracial equal protection jurisprudence. As reflected in the previous discussion, that jurisprudence is grounded in a normative vision of individual fairness that has been developed through a series of precedents that have accumulated since the 1970s. Thus, while a change in the composition of the Court might make it somewhat more receptive to race-specific remedies in marginal cases, a broad based repudiation of postracial equal protection is unlikely. The Court's postracial equal protection jurisprudence is likely to remain a substantial obstacle to the implementation of race-specific remedies to address the racial disparities discussed in Part I.

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287. Under strict scrutiny, however, the only compelling purposes that can sustain such measures are (1) remedying specific acts of intentional discrimination by the state, or (2) diversity in higher education. Even if such purposes exist, moreover, proponents must prove that such measures are necessary in the sense that there are no race-neutral alternatives and that the particular remedy is narrowly tailored in the sense that they are neither over nor under inclusive. *See supra* notes 252–264 and accompanying text.

288. As in many other ideologically charged areas of constitutional law, the key vote seems to be Justice Kennedy. The four "liberal" Justices (Breyer, Ginsburg, Kagan, and Sotomayor) are more receptive to remedies for racial inequality, while the three "conservative" Justices (Alito, Roberts, and Thomas) are not. One advantage of our approach, though not the aim of it, is that it may appeal to Justice Kennedy, who has taken a moderate position that is consistent with what Reva Siegel has called the "antibalkanization" principle. *See infra* notes 420–424 and accompanying text. In view of the election results, Justice Scalia's replacement is likely to be a conservative as well, reinforcing Justice Kennedy's role as the crucial swing vote.

289. *See* Carol E. Lee & Kristina Peterson, *Republican Leaders Stand Firm on Vow to Block Obama's Supreme Court Pick*, WALL STREET J. (March 16, 2016), http://www.wsj.com/articles/obama-to-pick-merrick-garland-to-fill-supreme-court-seat-sources-say-1458136919.

1. Economics

Postracial equal protection limits the available judicial and political remedies for economic inequality. To illustrate this point, we will focus on employment as a key requirement for and indicator of economic success.

Judicial remedies for racial disparities in employment are limited. The Constitution itself provides no remedies at all for private employment discrimination and prohibits only intentional discrimination by government actors. Insofar as intentional discrimination is ordinarily impossible to prove and implicit biases and systemic barriers are constitutionally irrelevant, constitutional litigation provides little or no recourse for economic inequality.[290] Although statutory provisions, particularly Title VII of the Civil Rights Act, prohibit racial discrimination by private employers and permit some disparate impact claims,[291] these statutory remedies are limited in critical ways.[292] Thus, for example, it is especially difficult to challenge discretionary hiring practices,[293] even though studies show that implicit biases adversely affect blacks during hiring decisions.[294]

Conversely, race-specific political remedies for economic inequality are generally unconstitutional. Affirmative action in

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290. *See supra* notes 218–227 and accompanying text.

291. Individual claims based on specific hiring decisions follow the framework from *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801–03 (1973), and *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248 (1981). Under this framework, the plaintiff makes out a prima facie case by showing that he or she is a member of a protected class, that the plaintiff was qualified or performing to expectations, or that the employer took an adverse employment action. If so, then the burden shifts to the employer to produce evidence of a legitimate nondiscriminatory reason for the action, in which case the plaintiff bears the burden of persuasion in establishing that supposedly race-neutral explanation is a pretext. In addition, plaintiffs may rely on statistical evidence of disproportionate impact, if they can identify a specific practice with exclusionary effects.

292. *See, e.g.*, Sandra F. Sperino, *Rethinking Discrimination Law,* 110 MICH. L. REV. 69 (2011) (arguing that the reliance on frameworks to analyze discrimination claims has become a rote sorting process that screens out potentially valid claims); George Rutherglen, *Abolition in a Different Voice*, 78 VA. L. REV. 1463, 1476 (1992) (observing that usefulness of disparate impact remedies was limited by Supreme Court decisions "that imposed procedural barriers in the way of class actions, eliminated seniority systems from the scope of the theory, and made the plaintiff's initial showing of adverse impact much more complicated"); *see generally* MARK A. ROTHSTEIN ET AL., 1 EMPLOYMENT LAW § 2.29, 567 (5th ed. 2014) (discussing various procedural requirements that "are complex and sometimes seem to thwart the overall purpose of federal antidiscrimination laws").

293. *See, e.g.*, Wal-Mart Stores v. Dukes, 131 S. Ct. 2541 (2011) (holding that class certification was inappropriate when employment decisions were made pursuant to discretion of local managers); Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 653 (1989) *superseded by statute on other grounds*, 42 U.S.C. § 2000e-2(k) (concluding that racial imbalance in workforce was insufficient evidence to establish prima facie case).

294. *See supra* notes 242–245 and accompanying text.

government employment must survive strict scrutiny, and is unconstitutional unless the government concedes that it was guilty of racial discrimination and links the remedy to the victims of that discrimination.[295] Voluntary affirmative action by private employers may be permissible under Title VII, but only as a temporary measure "designed to eliminate conspicuous racial imbalance in traditionally segregated job categories,"[296] which limits the ability to adopt race-based hiring practices to counter disparate impact problems.[297] Indeed, the tension between the effective prohibition of affirmative action and the recognition of disparate impact claims has placed statutory disparate impact remedies under a constitutional cloud.[298]

2. Criminal Justice

Likewise, postracial equal protection limits the available judicial and political remedies for racial inequality in the criminal justice system. Difficulty proving discriminatory intent makes it nearly impossible to challenge practices that contribute to policing, prosecution, and punishments that disproportionately burden blacks. Many of these problems are a product of the war on drugs, which has taken a particular toll on blacks.[299]

The criminal justice system is replete with discretionary decisions that allow implicit biases and hidden discrimination to flourish.[300] This begins with racial profiling in policing, which has been documented in interventions such as traffic stops, which all too

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295. Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995) (applying strict scrutiny to federal affirmative action program); City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (applying strict scrutiny to invalidate affirmative action program by state actor); *see supra* notes 252–262 and accompanying text.

296. United Steelworkers of Am., AFL-CIO-CLC v. Weber, 443 U.S. 193, 209 (1979). In addition, such a program may not unduly trammel the rights of the majority. *See also* Johnson v. Transp. Agency, 480 U.S. 616 (1987). *See generally* ROTHSTEIN ET AL., *supra* note 292, at § 2.19.

297. *See* Ricci v. DeStefano, 557 U.S. 557, 594–96 (2009) (invalidating decision to ignore test results so as to hire racial minorities); *see supra* notes 263–264 and accompanying text.

298. *See supra* notes 263–264 and accompanying text.

299. *See* Michael Tonry, *Race and the War on Drugs*, 1994 U. CHI. LEGAL F. 25, 27 ("The War on Drugs foreseeably and unnecessarily blighted the lives of hundreds of thousands of young, disadvantaged Americans, especially black Americans, and undermined decades of effort to improve the life chances of members of the urban black underclass."); *see also supra* notes 60–68 and accompanying text.

300. *See, e.g.*, Darren Lenard Hutchinson, *"Continually Reminded of Their Inferior Position": Social Dominance, Implicit Bias, Criminality, and Race*, 46 WASH. U. J.L. & POL'Y 23, 23–33 (2014).

frequently turn violent and even deadly.[301] Likewise, prosecutorial discretion, the exercise of peremptory challenges, and other discretionary actions contribute to the disproportionate incarceration and execution of blacks. Even legislative actions, such as especially harsh penalties for "crack cocaine"—which fall almost exclusively on blacks—contribute to the problem.[302]

As a constitutional matter, it is difficult, if not impossible, to challenge such actions. Policies that are not explicitly racial, such as harsh sentences for crack, are not subjected to heightened scrutiny absent proof of discriminatory intent. Statistical analysis of discretionary actions is insufficient to prove intentional discrimination under *McCleskey v. Kemp*.[303] And although *Batson v. Kentucky*[304] adopted a kind of indirect proof framework for analyzing peremptory challenges under which a pattern of excluding blacks would require the prosecution to articulate race-neutral justifications, the Court's broad acceptance of subjective justifications as race-neutral and its refusal to find pretext has made this remedy ineffective.[305]

3. Education

Education is a paradigmatic example of postracial equal protection in action. Once *de jure* racial segregation was prohibited in *Brown v. Board of Education*, the focus was on remedying those violations without regard to other factors that impaired educational

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301. *See* EPP, MAYNARD-MOODY & HAIDER-MARKEL, *supra* note 49.

302. Originally, Congress adopted a 100-to-1 ratio, in which one gram of crack cocaine was treated as the equivalent of 100 grams of powder cocaine, which led to disproportionately higher sentences for black drug defendants. *See* Gerald W. Heaney, *The Reality of Guidelines Sentencing; No End to Disparity*, 28 AM. CRIM. L. REV. 161, 205–06 (1991) (arguing that disproportionately higher sentences for black offenders was caused in part by the 100–to–1 ratio between crack and powder cocaine). Some argued that high mandatory minimum sentences for crack were attributable to racism. *See, e.g.*, David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283 (1995); *but see* Randall Kennedy, *The State, Criminal Law, and Racial Discrimination: A Comment*, 107 HARV. L. REV. 1255, 1268–69 (1994) (arguing that because "blacks as a class are disproportionately victimized" by traffic in crack cocaine, "blacks as a class may be helped by measures reasonably thought to discourage such conduct"). Although the Fair Sentencing Act of 2010, Pub. L. No. 111–220, 124 Stat. 2372 (2010), reduced this disparity, crack was still punished at an 18-to-1 ratio, and even this change came too late for those convicted and sentenced under the 100-to-1 ratio.

303. 481 U.S. 279, 297 (1987).

304. 476 U.S. 79, 96 (1986); *see supra* notes 228–231 (describing test). The *Batson* test is based on the *McDonnell Douglas* test from Title VII. *See supra* notes 234–235 and accompanying text.

305. *See, e.g.*, Jeffrey Bellin & Junichi P. Semitsu, *Widening* Batson*'s Net to Ensnare More Than the Unapologetically Bigoted or Painfully Unimaginative Attorney*, 96 CORNELL L. REV. 1075 (2011); Leonard L. Cavise, *The* Batson *Doctrine: The Supreme Court's Utter Failure To Meet the Challenge of Discrimination in Jury Selection*, 1999 WIS. L. REV. 501 (1999).

equality. Equally important, having decided that the vestiges of *de jure* discrimination have been removed to the extent practicable,[306] the Court's equal protection jurisprudence now stands as a barrier to race-specific efforts to integrate schools or mitigate racial disparities in education achievement and attainment.

As a practical matter, for example, the interaction between segregated housing patterns, on the one hand, and policies favoring neighborhood schools and local funding of school districts, on the other, mean that black school children are often concentrated in underfunded and underperforming schools.[307] But under *Milliken v. Bradley*,[308] even de jure discrimination does not ordinarily permit interdistrict remedies that respond to white flight.[309] Equally important, interdistrict funding disparities are generally permissible, insofar as the rational basis test applies unless racial discriminatory intent has been shown.[310] Accordingly, the Court's postracial equal protection jurisprudence provides little recourse against the underfunding of schools that serve predominantly black students.[311] Likewise, as discussed above, voluntary efforts to combat *de facto* segregation through race-based school assignments are impermissible under *Parents Involved in Community Schools v. Seattle School Dist. No. 1*.[312]

To be sure, underfunded and underperforming schools are but one of many factors that contribute to the educational achievement gap. Some of these factors are internal to the educational system, insofar as implicit biases also affect the progress of black school children.[313] Thus, for example, the imposition of discipline tends to fall more heavily on black school children and interfere with their

306. *See supra* notes 268–275 and accompanying text.

307. *See generally* Erwin Chemerinsky, *The Segregation and Resegregation of American Public Education: The Courts' Role*, 81 N.C. L. REV. 1597 (2003).

308. 418 U.S. 717, 744–45 (1974) (holding that interdistrict remedies for segregated schools are not available unless there was an interdistrict violation).

309. *See supra* notes 266–267 and accompanying text.

310. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 55 (1973); Kadrmas v. Dickinson Pub. Schs., 487 U.S. 450, 462–63 (1988).

311. Some state courts have been more receptive to claims based on unequal funding in light of their own constitution's provisions regarding the funding of public schools, which have been interpreted to require equitable and adequate funding. *See generally* Derrick Darby & Richard E. Levy, *Slaying the Inequality Villain in School Finance: Is the Right to Education the Silver Bullet?*, 20 KAN. J.L. & PUB. POL'Y 351 (2011).

312. 551 U.S. 701, 723 (2007) (invalidating race based school assignment policy intended to overcome de facto school segregation); *see supra* notes 252–264 and accompanying text (discussing application of strict scrutiny to race-specific remedies).

313. *See generally* Charles R. Lawrence III, *Unconscious Racism and the Conversation about the Racial Achievement Gap*, *in* IMPLICIT BIAS ACROSS THE LAW 115 (Justin D. Levinson & Robert J. Smith eds., 2012).

educational progress.[314] Other factors, of course, are extrinsic to the educational system, such as family background and educational levels (which correlate strongly to education achievement), health and nutrition, and neighborhood resources.[315] As with other areas of inequality, the Court's postracial equal protection jurisprudence stands as a barrier to race-specific remedies for such problems.

4. Neighborhoods

As reflected in the previous discussion, neighborhood segregation is connected to and has much in common with racial inequality in public schools. Hence the limits of postracial equal protection in the two areas are similar as well. There are few judicial remedies available for housing segregation, and race-specific political remedies are virtually nonexistent in this field.

As a constitutional matter, equal protection prohibits intentional discrimination by public officials, but does not apply to private housing decisions in the absence of state action. Thus, for example, legally mandated neighborhood segregation is clearly unconstitutional.[316] In addition, although the Constitution does not prohibit racially restrictive covenants, it does prevent the state from enforcing them.[317] As in other areas, however, proof of intentional discrimination is difficult to obtain.[318]

Indeed, the leading Supreme Court decision describing the kinds of proof that may support a finding of discriminatory intent is

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314. *See, e.g.*, Janel A. George, *Stereotype and School Pushout: Race, Gender, and Discipline Disparities*, 68 ARK. L. REV. 101, 104 (2015) (describing factors that make "African American girls the fastest-growing segment of the juvenile justice system"); David Simson, *Exclusion, Punishment, Racism, and Our Schools: A Critical Race Theory Perspective on School Discipline*, 61 UCLA L. REV. 506 (2014).

315. *See, e.g.*, Darby & Levy, *supra note* 311, at 374–76 (discussing various factors that contribute to unequal educational outcomes).

316. Ironically, the Court invalidated a residential segregation law in the height of the Jim Crow era. *See* Buchanan v. Warley, 245 U.S. 60 (1917). We say "ironically" because the Court did not rule that the ordinance in question (which prohibited blacks from moving into predominantly white neighborhoods and whites from moving into predominantly black ones) violated equal protection. Instead, the Court concluded that the law violated the property rights of the white owner. *Id.* at 78 (asking, rhetorically, "can a white man be denied, consistently with due process of law, the right to dispose of his property to a purchaser by prohibiting the occupation of it for the sole reason that the purchaser is a person of color intending to occupy the premises as a place of residence?").

317. Shelley v. Kraemer, 334 U.S. 1 (1948).

318. Thus, notwithstanding the FHA, racial discrimination in housing remains a serious problem. *See* Florence Roisman, *Keeping the Promise: Ending Racial Discrimination and Segregation in Federally Financed Housing*, 48 HOW. L. J. 913, 916 (2005) (citing study in 2000 showing substantial discrimination against blacks and hispanics in the rental and sale of housing).

Village of Arlington Heights v. Metropolitan Housing Development Corp.,[319] in which the Court concluded that a city's denial of a rezoning permit for public housing did not violate equal protection. Under *Arlington Heights*, disparate impact is a "starting point" but does not itself prove intentional discrimination in the absence of a "clear pattern, unexplainable on grounds other than race . . . ."[320] In the absence of such a pattern, courts may consider the historical background of a decision, which may "reveal[ ] a series of official actions taken for invidious purposes" in light of the sequence of events or procedural and substantive irregularities.[321] Finally, the legislative or administrative record may contain explicitly discriminatory statements.[322]

The Fair Housing Act prohibits racial discrimination in many private real estate transactions[323] and, in light of *Texas Department of Housing and Community Affairs v. The Inclusive Communities Project, Inc.*,[324] permits disparate impact claims. Nonetheless, as the Court emphasized, "disparate-impact liability has always been properly limited in key respects that avoid the serious constitutional questions that might arise under the FHA, for instance, if such liability were imposed based solely on a showing of a statistical disparity."[325] Among other things, "[j]ust as an employer may maintain a workplace requirement that causes a disparate impact if that requirement is a 'reasonable measure[ment] of job performance,' so too must housing authorities and private developers be allowed

319. 429 U.S. 252 (1977).

320. *Id.* at 266.

321. *Id.* at 267.

322. *Id.* at 268.

323. *See* 42 U.S.C. § 3604 (prohibiting discrimination). The scope of the prohibition is defined by 42 U.S.C. § 3603 to include all dwellings except specified exemptions, which are generally limited to sale or lease of single-family residences or rooms in owner-occupied residences without the use of real estate brokers or agencies. To some extent, these limits reflect the need to ground the FHA in the commerce power by linking it to economic activity with interstate dimensions, because under the state action doctrine the Fourteenth Amendment enforcement power is not available to support regulation of private activity. *See* United States v. Morrison, 529 U.S. 598 (2000) (holding that record of domestic violence against women did not support creation of federal remedies for violence against women because offenses were committed by private actors, not the state).

324. 135 S. Ct. 2507 (2015). The Court concluded that the text and history of the statute indicated that its prohibition on housing discrimination should be construed in the same way that Title VII and the ADEA had been construed. An earlier per curiam decision, Town of Huntington, N.Y. v. Huntington Branch, N.A.A.C.P., 488 U.S. 15 (1988), upheld a circuit court decision finding a violation, based on a disparate impact theory, that the city's only explanation for a zoning requirement was inadequate. In *Huntington*, however, the city conceded the applicability of disparate impact under the statute and the Court did not reach the question whether disparate impact was the proper test. *Id.*

325. *Id.* at 2522 (citation omitted).

to maintain a policy if they can prove it is necessary to achieve a valid interest."[326]

Conversely, the Court's jurisprudence limits the validity of race-specific remedies for discrimination in residential housing, insofar as such remedies must survive strict scrutiny. Thus, for example, in *Walker v. City of Mesquite*,[327] the Fifth Circuit invalidated a lower court remedial order directing that public housing be located in a predominantly white neighborhood.[328] Achieving residential integration through race-specific measures is especially problematic insofar as it may require preferences for whites in black neighborhoods as well as blacks in white neighborhoods.[329] Nonetheless, lower courts appear to be receptive to race-specific outreach and marketing efforts designed to promote integration.[330]

IV. POSTRACIAL REMEDIES FOR RACIAL INEQUALITY

In view of the foregoing considerations, "progressives must retool and think creatively about different approaches to racial justice."[331] Taking this call for action seriously, we argue that postracial remedies, which focus on the manifestations of racial inequality and seek politically feasible and constitutionally sound solutions, offer promise.[332] This is not to say that postracial remedies should replace

326. *Id.* at 2523.

327. 169 F.3d 973 (5th Cir. 1999).

328. *But see* United States v. Sec'y of Hous. & Urban Dev., 239 F.3d 211, 217 (2d Cir. 2001) (upholding the use of credits against housing goals when future housing credits would be awarded to city only when tenants were moved to areas with specified ethnic percentages).

329. *See, e.g.*, United States v. Starrett City Assocs., 840 F.2d 1096 (2d Cir. 1988) (holding that preference for whites could not be justified by duty to integrate housing); United States v. Charlottesville Redevelopment & Hous. Auth., 718 F. Supp. 461 (W.D. Va. 1989) (same); Burney v. Hous. Auth., 551 F. Supp. 746 (W.D. Pa. 1982) (invalidating placements of whites and blacks designed to maintain integration); *see generally* Michelle Wilde Anderson, *Color-blind Segregation: Equal Protection as a Bar to Neighborhood Integration*, 92 CALIF. L. REV. 841 (2004).

330. *See* South-Suburban Hous. Ctr. v. Greater South Suburban Bd. of Realtors, 935 F.2d 868 (7th Cir. 1991); Reese v. Miami–Dade County, No. 01-3766-CIV, 2009 WL 3762994, *11 (S.D. Fla. 2009); Raso v. Lago, 958 F. Supp. 686 (D. Mass. 1997), *aff'd* 135 F.3d 11 (1st Cir. 1998); Tyus v. Robin Constr. Corp., No. 92-C-2423, 1992 U.S. Dist. LEXIS 16736 (N.D. Ill. 1992). Indeed, federal regulations now require federally subsidized housing programs to employ affirmative marketing plans. *See* 24 C.F.R. § 200.620 (providing that all FHA programs to "[c]arry out an affirmative program to attract buyers or tenants" which "shall typically involve publicizing to minority persons the availability of housing opportunities regardless of race, color, religion, sex, handicap or familial status or national origin, through the type of media customarily utilized by the applicant, including minority publications or other minority outlets which are available in the housing market area").

331. Barnes, Chemerinsky & Jones, *supra* note 26, at 1001.

332. Samuel Bagenstos has examined a similar approach that he calls "universalism," recognizing its potential value while noting its limitations as well. *See generally* Bagenstos, *supra*

other strategies for ameliorating racial inequalities, but rather that they are an essential means to achieve near-term benefits for real people in the here and now. Because postracial remedies are not race specific, they take the philosophical, psychological, and jurisprudential reality of the postracial narrative seriously. Nonetheless, building coalitions will require advocacy that is sensitive to the psychology of race, as well as the legal constraints that limit the use of nominally neutral measures as a pretext for racial preferences.

A. Pragmatic Postracial Remedies

The search for postracial remedies is, at bottom, a pragmatic one, in the sense that it seeks to build consensus around solutions that work. This pragmatism has both a methodological and a substantive component.[333] Methodologically, pragmatism begins by identifying the problem to be addressed (in this case black disadvantage), and then takes an incremental, experimental, and evidence-based approach to finding solutions.[334] Substantively, this approach shares pragmatism's commitment to working together to solve problems in pursuit of a common good.

1. Methodological Pragmatism

Methodologically, postracial remedies begin with the problems that plague the black community—such as economic disadvantage and poverty, mass incarceration, lagging educational achievement,

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note 6; *see also* WILLIAM JULIUS WILSON, THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY (1987) (arguing for policies that benefit the underclass of all races).

333. There is a rich philosophical tradition of pragmatist thought with both methodological and substantive elements. Reviewing this tradition and staking out a detailed version of pragmatism is not necessary to our project, which is consistent with the general principles of pragmatism and need not conform to any particular version of it. To be sure, there have been many players on this terrain. *See generally* WILLIAM JAMES, PRAGMATISM: A NEW NAME FOR SOME OLD WAYS OF THINKING (1907); JOHN DEWEY, THE PUBLIC AND ITS PROBLEMS (1927); JOHN DEWEY, LIBERALISM AND SOCIAL ACTION (1935). For an application of pragmatism to race matters, see CORNEL WEST, THE AMERICAN EVASION OF PHILOSOPHY: A GENEALOGY OF PRAGMATISM (1989). Most pragmatists, even those like West whose left-leaning politics take them outside the mainstream of American politics, nonetheless recognize the virtue of pragmatism in building consensus and coalitions to solve problems that advance the cause of justice.

334. This is typically the focus of legal pragmatism. *See generally* RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY (2003) (articulating pragmatic approach to public policy); SYDNEY A. SHAPIRO & JOSEPH P. TOMAIN, ACHIEVING DEMOCRACY: THE FUTURE OF PROGRESSIVE REGULATION (2014) (same).

and residential segregation—and seek to find solutions that will work in the real world. Thus, for example, programs that focus on improving outcomes in underperforming schools hold the potential for helping individual children and, in the process, helping to close the achievement gap, which would tend to increase upward economic mobility.[335]

The causes of racial inequality are complex, interconnected, and disputed. Accordingly, postracial remedies must be multifaceted and address a variety of factors. In keeping with methodological pragmatism, we are agnostic as to the ideological premises of any given remedy, provided that the remedy works in practice.

Here, one oft-cited advantage of our decentralized system of governance is the ability of different jurisdictions to experiment with different policy solutions for social and economic problems.[336] It is expected that conservative states and localities will try conservative solutions premised on agent-relative explanations, focused on personal responsibility, and implemented through the private sector. Conversely, we might expect liberal or progressive states to try progressive solutions that focus on combating discrimination, countering implicit biases, and removing systemic barriers.

This process makes it possible to identify programs and approaches that work, build coalitions to support them, and encourage their adoption in other jurisdictions. Finding postracial remedies will not be easy. Neither ideological nor racial disagreements will magically disappear and postracial remedies cannot eliminate racial inequality overnight. Nonetheless, the pursuit of postracial remedies can provide an effective means for addressing racial inequalities and can provide tangible benefits in the near term for those who bear the brunt of racial inequality.

2. Intentional Discrimination, Implicit Biases, and Structural Barriers

While postracial remedies are not race specific, they do not require society to ignore race or racial inequalities. Thus, postracial

335. *See, e.g.*, PA. ASS'N OF SCH. BDS., EDUC. RESEARCH & POLICY CTR., RAISING ACHIEVEMENT IN UNDERPERFORMING SCHOOLS (2011), https://www.psba.org/wp-content/uploads/2014/09/raising_achievement_in_underperforming_schools-10102011.pdf (identifying a variety of "research-grounded school improvement strategies" for underperforming schools).

336. *See, e.g.*, New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (observing that a "state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country").

remedies include remedies that focus on ways to combat intentional discrimination, ameliorate implicit biases, and dismantle systemic barriers. The critical factor is to address these problems in ways that do not treat people differently based on race and that are cognizant of the philosophical and psychological roots of racial polarization.

Insofar as implicit biases are deeply ingrained and, by definition, unknown to those who hold them, it is unclear whether and to what extent they can be eliminated.[337] Nonetheless, research has shown that some strategies may be effective at reducing implicit bias, such as increasing awareness, self-checking, and the adoption of more concrete standards.[338] These approaches might be extended to various areas in which discretionary decisions may be affected by implicit bias, such as employment decisions or disciplinary actions in public education.

A related strategy is to reform traditional policies and structures that operate as systemic barriers to black progress. This approach requires that we identify those policies and structures and offer alternative means to accomplishing the objectives nominally served by those policies and structures. Thus, for example, if the standardized tests relied on for admission to elite universities and law schools tend to be racially biased, the focus might be on alternative measures that provide a more accurate and racially neutral measure of merit.[339]

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337. *See generally* Calvin K. Lai et al., *Reducing Implicit Racial Preferences: I. A Comparative Investigation of 17 Interventions*, J. EXPERIMENTAL PSYCHOL. (January, 2014) (examining various strategies for reducing unconscious racial biases and identifying characteristics of effective and ineffective strategies).

338. For example, the National Center for State Courts has suggested seven strategies for reducing implicit bias in the courts, including (1) "[r]aise awareness of implicit bias"; (2) "identify and consciously acknowledge real group and individual differences"; (3) "check thought processes and decisions for possible bias"; (4) "[i]dentify distractions and sources of stress in the decision-making environment and remove or reduce them"; (5) "[i]dentify sources of ambiguity in the decisionmaking context and establish more concrete standards before engaging in the decision-making process"; (6) "[i]nstitute feedback mechanisms"; and (7) "[i]ncrease exposure to stigmatized group members and counter-stereotypes and reduce exposure to stereotypes." NAT'L CTR. OF STATE COURTS, STRATEGIES TO REDUCE THE INFLUENCE OF IMPLICIT BIAS, http://www.ncsc.org/~/media/Files/PDF/Topics/Gender%20and%20Racial%20Fairness/IB_Strategies_033012.ashx. This undated document summarizes the results of a more comprehensive report, PAMELA M. CASEY, ROGER K. WARREN, FRED L. CHEESMAN II & JENNIFER K. ELEK, HELPING COURTS ADDRESS IMPLICIT BIAS: RESOURCES FOR EDUCATION (2012), http://www.ncsc.org/~/media/Files/PDF/Topics/Gender%20and%20Racial%20Fairness/IB_report_033012.ashx.

339. *See, e.g.*, Kimberly West-Faulcon, *More Intelligent Design: Testing Measures of Merit*, 13 U. PA. J. CONST. L. 1235 (2011) (discussing shortcomings of traditional standardized tests and describing innovative testing designs based on modern research on the nature of intelligence).

To a certain extent, implicit biases and systemic barriers are interrelated, in the sense that decisional structures that rely on individual discretion may increase the impact of implicit biases. Thus, for example, police and prosecutorial discretion plays a major role in the racial disparities within the criminal justice system. To the extent that this discretion is influenced by unconscious biases, the result is the disproportionate arrest, prosecution, and incarceration of black defendants, as well as the problem of violence against black suspects. Constraining discretion through the adoption of clear (and non race-specific) policies may be one way to combat this problem.[340]

Nonetheless, the psychology of race means that how these issues are framed is critically important.[341] Thus, for example, if the problem is police violence against blacks, rather than accusing police of racism, which produces a defensive reaction, postracial remedies might ask "how can we avoid being the next Ferguson?" This is not to suggest that blacks or the Left should remain silent about racism or cease to advocate for other kinds of remedies. But—given the psychology of race and the Supreme Court's postracial equal protection jurisprudence—those who seek to reduce racial inequalities cannot afford to ignore opportunities to build coalitions for postracial remedies.[342]

B. Postracial Political Remedies

By "political" remedies, we mean measures voluntarily adopted by policymakers at any level, whether federal or state legislatures, administrative agencies, or private actors (in contrast to those achieved as the result of litigation in the courts, which we address in

340. *See supra* note 338 (outlining strategies for reducing implicit biases).

341. *See generally* Germine H. Awad, *Does Policy Name Matter? The Effect of Framing on the Evaluations of African American Applicants*, 42 J. APPLIED SOC. PSYCHOL. 379 (2013) (documenting impact of calling hiring policy diversity-related as opposed to affirmative action on hiring decisions); *see also supra* note 188–191 and accompanying text (discussing the psychological effects of framing arguments).

342. The specific coalition partners would vary depending on context. In some cases, they might include economically disadvantaged blacks and whites along with progressive whites and blacks concerned about economic inequality. In other cases, strategies might produce unexpected coalition partners. For example, people in crime ridden neighborhoods and police departments might have a mutual interest in improving relationships and cooperation, and so they may form productive coalitions. Thus, we do not have a preconceived and inflexible view about what prospective coalitions for postracial remedies might look like. Indeed, we are as pragmatic about these as we are about the remedies. We support coalitions that work to address the underlying problems.

the next section). Political remedies may take the form of laws, programs, or practices that address problems such as poverty, mass incarceration, poor educational achievement, or failing neighborhoods. Political remedies require that proponents convince responsible policymakers, which in turn requires them to build political support so as to influence outcomes. The pursuit of postracial political remedies has two principal advantages—broader appeal and lower risk of constitutional invalidity.

1. Broader Appeal

To be sure, in our ideologically polarized society, the causes of and solutions for problems like poverty, mass incarceration, underperforming schools, or blighted neighborhoods are likely to be contested. Nonetheless, those divisions are exacerbated by arguments that focus on race and solutions that incorporate racial preferences, because such an approach brings additional psychological factors into play. In view of the problem of "ingroup" and "outgroup" thinking,[343] focusing on race may encourage members of the ingroup (whites) to place the responsibility for these problems on the outgroup. Equally important, focusing on race is more likely to produce a defensive reaction from well-intentioned whites.[344]

This is not to say that all postracial political remedies will be acceptable across the range of the ideological spectrum, or even that a large majority will embrace them.[345] Nonetheless, postracial political remedies are more likely to appeal to the broad middle—citizens who may be amenable to practical solutions for real problems. On this point we believe that most Americans see persistent poverty, mass incarceration, failing schools, and disadvantaged neighborhoods as real problems that warrant constructive solutions.[346]

Ultimately, the pursuit of postracial political remedies must be incremental, focusing on what is achievable and initially targeting

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343. *See supra* notes 160–169 and accompanying text.

344. *See supra* notes 170–178 and accompanying text.

345. *See* Bagenstos, *supra* note 6, at 2851–55 (arguing that compassion fatigue and the "coding" of arguments as serving particular groups limit the tactical advantages of universalist approaches).

346. A key point here is that people may support efforts to ameliorate these problems without regard to whether they see the problems as the product of racial discrimination or are motivated by a desire to reduce racial inequalities. Addressing the underlying problem will benefit blacks who are disproportionately burdened by it. To the extent that whites perceive a problem as a "black" issue, they might be less motivated to address it.

receptive audiences and communities to build a record of success. These successes, in turn, can be used to make the case for solutions that work, taking them to a broader audience based on solid evidence that the solutions are practical and workable.

Pursuit of remedies that break down implicit biases and systemic barriers may be a particularly sensitive and difficult undertaking. Programs designed to alleviate implicit biases, for example, require that political actors and the target audience accept the existence of such biases and the need to address them. Without such a recognition, implicit bias training may produce a backlash and be counterproductive.[347] Likewise, tackling systemic barriers may be problematic because doing so requires recognition that longstanding and familiar practices operate as a barrier, and a willingness to seek alternatives that are less exclusionary.

Accordingly, advocating for solutions to implicit biases and systemic barriers cannot be undertaken in a wholly race-blind fashion, which implicates the psychological factors that lead to resistance. Nonetheless, such efforts have already made some headway (as in the case of police departments that have undertaken implicit bias training or the development of more neutral forms of standardized testing). Strategically, it makes sense to focus on receptive communities and policymakers first, so as to build a track record of success that can, over time, help to convince skeptics.

2. Constitutionality

A critical difference between postracial and race-specific political remedies is that postracial political remedies would be less constitutionally vulnerable under the Court's equal protection jurisprudence. So long as the solutions are not race-specific (i.e., do not treat or intend to treat people differently based on race), the postracial remedies would be subject to rational basis scrutiny.[348] The purposes of ameliorating poverty, improving the criminal justice system, improving educational outcomes, revitalizing neighborhoods, and increasing political participation are clearly legitimate. Likewise, political remedies based on what works are easily

347. *See, e.g.*, Destiny Peery, *Implicit Bias Training for Police May Help, but It's Not Enough*, HUFFINGTON POST (Mar. 14, 2016, 9:29 PM) ("Mandatory diversity trainings can lead to backlash effects that increase, rather than decrease, bias and sour participants on diversity as a goal.").

348. *See supra* notes 222–231 and accompanying text (discussing requirement of proof of intent in constitutional disparate impact cases).

defended as rational means to achieve these ends, especially insofar as they are evidence based.

To the extent that the problems identified are disproportionately concentrated in the black community, solving those problems will tend to disproportionately benefit blacks and thus ameliorate racial disparities. Under the Court's postracial equal protection jurisprudence, this sort of disproportionate impact would not trigger strict scrutiny in the absence of proof of racially discriminatory intent. Thus, the primary vulnerability would arise only if there is evidence that the non race-specific approach is a mere pretext for racial preferences or if they are implemented in a race-based manner. In this regard, it is important to distinguish between the permissible and legitimate purpose of redressing racial inequality and the constitutionally suspect purpose of establishing race-based preferences.

Consider the problem of admissions in higher education. The Court recently reaffirmed the consideration of race as a factor in higher education admissions (by a slim 4-3 majority) in *Fisher v. Texas,*[349] but satisfying strict scrutiny remains a difficult task. As an alternative, institutions of higher education might consider poverty, the applicant's family's level of education, and other socio-economic burdens the applicant has overcome as positive factors in deciding on admission.[350] To the extent that a higher proportion of the black community bears such burdens, these preferences would disproportionately benefit black applicants. Nonetheless, because these factors are race-neutral on their face, they would only have to survive the rational basis test—unless the record shows that these considerations were merely a pretext for racial preferences.[351]

Postracial remedies may be vulnerable to this sort of challenge if they simply substitute class for race in an effort to get around limits on affirmative action, especially if their implementation in practice effectively confines the program to racial minorities.[352] On the

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349. 136 S. Ct. 2198 (2016) (upholding lower court finding that University had a sufficient basis for concluding that race-neutral alternatives were not effective).

350. *See* Daria Roithmayr, *Direct Measures: An Alternative Form of Affirmative Action*, 7 MICH. J. RACE & L. 1 (2001) (arguing for race–neutral law school admissions policies that would tend to promote diversity). Note that this approach is similar to the pilot program adopted by the New York City public schools that we discussed in the introduction.

351. This may be one problem with Professor Roithmayr's suggestion that admissions policies focus on whether (1) applicants or their families have experienced discrimination; (2) applicants would offer underrepresented perspectives on racial injustice; and (3) applicants are likely to serve underserved populations. *See id.* at 8–9. To the extent that these criteria are self-consciously adopted to achieve the goals of affirmative action without expressly incorporating race and might tend to overwhelmingly favor blacks and other racial minorities, they might be vulnerable to the argument that these nominally race-neutral criteria are a pretext for racial preferences.

352. For further discussion, see *infra* notes 407–410 and accompanying text.

other hand, solutions like improved early childhood education, technical job training programs, or other problem-oriented solutions are not invalid simply because one argument to support them is that they will help redress racial disparities. Likewise, a jurisdiction's decision to use implicit bias training or to alter its hiring structures to prevent unconscious discrimination is not constitutionally invalid just because it is intended to benefit blacks by combatting racial inequality.[353]

C. Postracial Judicial Remedies

We also believe that it may be possible for the Left to use the Court's postracial equal protection jurisprudence more effectively to advocate for judicial remedies for racial inequality, particularly in respect to systemic barriers and implicit biases. The key on this front is to leverage a more searching review under the rational basis test (i.e., rational basis "with bite") that has emerged in cases like *Cleburne v. Cleburne Living Center*,[354] *Romer v. Evans*,[355] and *United States v. Windsor*.[356] Again, this approach is not a panacea, but it may be useful in some contexts, especially when efforts to secure political remedies are unsuccessful.

The essential feature of this heightened form of rational basis scrutiny is a receptiveness to arguments that the means are not rationally related to the purported ends, which raises an inference that those ends are a mere pretext for invidious discrimination. Thus, for example, in *Cleburne* the Court concluded that the denial of a zoning variance for a group home for developmentally disabled adults was not rationally related to the city's asserted reasons because the city granted variances to other, similarly situated group living arrangements.[357] This inconsistency indicated that these reasons were a mere pretext for animus. Similarly, in *Romer* and

353. If that were true, then the civil rights laws prohibiting racial discrimination would be invalid because they were intended to help blacks and other racial minorities.

354. 473 U.S. 432 (1985).

355. 517 U.S. 620 (1996).

356. 133 S. Ct. 2675 (2013).

357. *See, e.g.*, 473 U.S. at 448 (observing that the differences between developmentally disabled and other adults are "largely irrelevant unless the . . . home and those who would occupy it would threaten legitimate interests of the city in a way that other permitted uses such as boarding houses and hospitals would not"); *see also id.* at 449 (dismissing the city's objection to the home on the ground that it was located in a flood plain because that concern "can hardly be based on a distinction between the . . . home and, for example, nursing homes, homes for convalescents or the aged, or sanitariums or hospitals, any of which could be located on the . . . site without obtaining a special use permit").

Windsor, the Court concluded that laws targeting the LGBT community for unfavorable treatment were not rationally related to a legitimate governmental purpose and therefore must have been the product of animus.[358]

The emergence of more searching rational basis review has been well-recognized in the literature, but little attention has been paid to its potential implications for challenging race-neutral measures that disproportionately burden blacks. These developments offer two interrelated opportunities for challenging facially neutral policies—challenging the ends-means fit and raising inferences of pretext. Thus, for example, it may be possible to challenge systemic barriers by building a record demonstrating that they are not a good fit for their stated ends. At a minimum, this approach puts policymakers to the burden of justifying their decision to maintain practices that operate as barriers.

A useful example might be challenges to voter ID requirements and related policies that may impair voting by the poor and racial minorities. Although these measures have a disproportionate impact on blacks, it may be difficult to prove discriminatory intent or satisfy the effects test under § 2 of the Voting Rights Act. A complementary strategy suggested by the Court's postracial equal protection jurisprudence would be to challenge the ends asserted to support such measures.

Although preventing voter fraud is clearly a legitimate purpose, voter ID requirements are a poor fit for this problem because (1) the documented evidence of fraud that would be prevented by such requirements is minimal at best (and other forms of fraud may be a more serious problem), and (2) the exclusionary effects of such measures far exceed the scope of any such problems.[359] In view of

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358. *See Windsor*, 133 S. Ct. at 2693–95 (concluding that purpose of DOMA's denial of recognition to valid same-sex marriages was motivated by the improper purpose of denying equal dignity to same sex marriages); *Romer*, 517 U.S. at 631–32 (concluding that Colorado constitutional amendment prohibiting adoption of antidiscrimination laws based on sexual orientation failed the rational basis test).

359. Frank v. Walker, 773 F.3d 783 (7th Cir. 2014) (Posner, J., dissenting from the denial of rehearing en banc) (arguing that Wisconsin voter ID law should be invalidated because strict voter ID laws suppress minority turn out and there was no evidence that in-person voting fraud was a problem). A similar argument can be made against other laws that combat nonexistent forms of voter fraud by suppressing turn out. In a recent debate at the University of Kansas Law School, for example, the Secretary of State for the State of Kansas defended recent voter ID and proof of citizenship requirements by citing 220 instances of suspected voter fraud from 1997 through 2010, which averages less than twenty cases per year. Peter Hancock, *Kobach Debates Voter ID Laws with K.U. Law Professor*, LAWRENCE J. WORLD, (Sept. 10, 2015), http://www2.ljworld.com/news/2015/sep/10/kobach-debates-voter-id-laws-ku-law-professor/. As a result of the strict proof of citizenship requirements imposed by Kansas law, over 35,000 prospective voters' registration have been suspended. Kelsey Ryan & Bryan

the disjunction between the need for such laws and their impact on voting rights, it may be possible to challenge them under the rational basis test, without regard to whether the burden on voting rights is sufficient to trigger strict scrutiny[360] or whether there is a racially discriminatory intent.[361] Although preventing fraud would probably satisfy the most deferential forms of rational basis scrutiny, the rational basis "with bite" cases provide at least a plausible basis for challenging voter ID laws.[362]

A related point is the use of a bad fit between the state's asserted purposes and the means as evidence of discriminatory intent. A useful illustration of this approach can be found in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,[363] in which the Supreme Court concluded that an ostensibly neutral law was motivated by religious discrimination. Although the case involved religious rather than racial discrimination, the essential question in the case was identical for analytical purposes. The Free Exercise Clause prohibits religious discrimination in much the same way as the Equal Protection Clause prohibits racial discrimination.[364] Under the Free Exercise Clause, facially neutral laws that burden religious practices

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Lowry, *Young Voters, Wichitans Top Kansas' Suspended Voter List*, WICHITA EAGLE (Sept. 26, 2015), http://www.kansas.com/news/politics-government/article36705666.html. Such a disjunction between the problem and the solution suggests that the justification for the law is a mere pretext.

360. *See* Crawford v. Marion Cnty. Election Bd., 553 U.S. 181 (2008).

361. *Compare* Mobile v. Bolden, 446 U.S. 55 (1980) (holding that plaintiffs had failed to prove that at large voting in municipal elections was maintained for a racially discriminatory purpose), *with* Rodgers v. Lodge, 458 U.S. 613 (1982) (holding that plaintiffs had successfully proved that municipality maintained at large voting for a discriminatory purpose).

362. While this article was in the editorial process, several lower courts struck down voter ID laws or other restrictions as unconstitutional or in violation of § 2 of the Voting Rights Act. *See* N.C. State Conference of NAACP v. McCrory, No. 16-1468, 2016 WL 4053033 (4th Cir. July 29, 2016) (concluding that North Carolina voting restrictions reflected a racially discriminatory intent and therefore violated the VRA, the Equal Protection Clause, and the Fifteenth Amendment); Veasey v. Abbott, No. 14-41127, 2016 WL 3923868 (5th Cir. July 20, 2016) (upholding district court finding that measures had a racially discriminatory effect under § 2 of the VRA, but remanding for further consideration on § 2 claims of discriminatory intent and avoiding constitutional issues); One Wisconsin Institute, Inc. v. Thomsen, 15-cv-324-jdp, 2016 WL 4059222 (W.D. Wi. July 29, 2016) (concluding that Wisconsin voter restrictions violated § 2 of the VRA, the Fifteenth Amendment, and the First and Fourteenth Amendment).

363. 508 U.S. 520 (1993).

364. Indeed, religion is sometimes treated as a suspect classification under the Equal Protection Clause. *See, e.g.*, Burlington N.R.R. Co. v. Ford, 504 U.S. 648, 651 (1992) ("Because the Montana venue rules neither deprive Burlington of a fundamental right nor classify along suspect lines like race or religion, they do not deny equal protection to Burlington unless they fail in rationally furthering legitimate state ends."); New Orleans v. Dukes, La. Concessions, 427 U.S. 297, 303 (1976) (listing suspect "distinctions" for equal protection purposes as "race, religion, or alienage").

do not trigger strict scrutiny unless they have the purpose of discriminating against religions or religious beliefs.[365] Thus, the question in *Babalu Aye* was identical to the question in disparate impact cases, and the same logic would apply to the determination of discriminatory intent.[366]

In *Babalu Aye*, the Court relied on various considerations to conclude that a law banning the slaughter of animals within the city was motivated by a discriminatory intent. Critically, the Court emphasized, among other things, the poor fit between the provisions of the law and its purported purposes. For example, the law was defended as an animal cruelty measure, but included many exceptions so that "although Santeria sacrifice is prohibited, killings that are no more necessary or humane in almost all other circumstances are unpunished."[367] Likewise, insofar as the ordinance was defended as a means to combat the health problems arising from improper disposal, "the city could have imposed a general regulation on the disposal of organic garbage."[368]

These sorts of arguments may be especially powerful in the context of statutory disparate impact claims, in which racially disparate impact may be countered by proffering legitimate justifications for practices that disproportionately burden blacks and other minorities. Producing evidence that the measures in question do not serve the asserted purposes may be a means of exposing those justifications as pretext.

D. Application to Racial Inequalities

In this section we consider how postracial political and judicial remedies might be brought to bear on persistent racial inequalities

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365. *Compare* Emp't Div., Dept. of Human Res. of Or. v. Smith, 494 U.S. 872 (1990) (requiring proof of discriminatory intent to trigger strict scrutiny of neutral laws burdening religious practices), *with* Washington v. Davis, 426 U.S. 229 (1976) (requiring proof of discriminatory intent to trigger strict scrutiny of neutral laws disproportionately burdening racial minorities). Under *Smith*, neutral laws that burden "hybrid rights" combining free exercise with other fundamental rights also receive strict scrutiny, in much the same way that even nonsuspect classification that burden fundamental rights will trigger strict scrutiny under the Equal Protection Clause. *See, e.g.*, Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535 (1942).

366. *Cf.* Romer v. Evans, 517 U.S. 620, 635 (1996) ("The breadth of the amendment is so far removed from [the state's] particular justifications that we find it impossible to credit them."); *McCrory*, 2016 WL 4053033, at *19–21 (4th Cir. 2016) (relying on bad fit between state's asserted interests to support voting restrictions to conclude that racial discrimination was the "but for cause" of their enactment).

367. *Hialeah*, 508 U.S. at 536.

368. *Id.* at 538.

in the areas of economics, criminal justice, education, and neighborhoods. These examples are meant to be illustrative rather than exhaustive, and are at this point provisional. We have also attempted to give examples from both conservative and liberal perspectives. Conservative perspectives tend to focus on self-help, personal responsibility, and the private sector, while liberal or progressive programs emphasize government benefits and other interventions to ameliorate inequality. From a pragmatic perspective, the critical question is whether these approaches work to solve the underlying problems, and if not, what other options might work better.[369]

1. Economics

There are a variety of postracial approaches that might improve racial disparities in income and wealth by addressing the plight of the poor. In general terms, we might address high rates of unemployment and underemployment by expanding job training programs or initiating comprehensive national service requirements.[370] Both approaches would tend to improve the employability of those with limited credentials and experience, and a national service program would also increase demand for workers and reduce the supply of workers competing for available jobs.

Some of these programs appear to enjoy support among conservatives.[371] For example, conservatives have advocated in support of New York City's WeCARE program, which addresses barriers to employment by providing assistance and services to help clients

369. As noted previously, see NYC DEPT. OF EDUC., *supra* note 5, and discussed further *infra* notes 411–412, our premise is that tackling the underlying social and economic problems that disproportionately burden blacks will ameliorate racial inequality. Here, the focus is on whether the remedy addresses the underlying social problem.

370. *See, e.g.*, Sharon L. Harlan & Edward J. Hackett, *Federal Job Training Programs and Employment Outcomes—Effects by Sex and Race of Participants*, 4 POP. RESEARCH AND POL. REV. 235 (1985) (stressing the importance of work programs for minorities to gain employment); Peter Z. Schochet et al., *Does Job Corps Work? Impact Findings from the National Job Corps Study*, 98 AM. ECON. REV. 1864 (2008) (concluding that Jobs Corps is a successful federal job training program for disadvantaged youth).

371. There is some evidence of increased interest by some conservatives in the economic plight of the lower classes. *See* Jackie Calmes, *They Want Trump to Make the G.O.P. a Workers' Party*, N.Y. TIMES (Aug. 5, 2016), http://www.nytimes.com/2016/08/06/us/politics/as-trump-rises-reformocons-see-chance-to-update-gops-economic-views.html?_r=0. These efforts could provide the basis for postracial remedies, such as tax breaks for "low- and middle-income workers through tax credits for children, the earned-income tax credit or a new wage subsidy," or "help[ing] displaced workers" affected by free trade agreements. *Id.*

achieve their highest levels of self-sufficiency,[372] as a potential model for reform of the Supplemental Nutrition Assistance Program (SNAP).[373] This approach has garnered attention in the House Committee on Agriculture, where the Republican Committee Chair, J. Michael Conaway, touted it.[374] Another approach that might enjoy some conservative support would be to promote entrepreneurship through programs that provide "micro loans" and other encouragement for small businesses.[375]

From a more progressive perspective, it might be possible to change the terms and conditions of employment in ways that protect all vulnerable workers.[376] For example, Katie Eyer has suggested that a just cause requirement for termination of employees (i.e., elimination of at-will employment) would tend to protect black workers against hidden or unconscious racism in disciplinary actions.[377] It might also be possible to reform hiring practices in ways that reduce the effects of systemic barriers and implicit biases, perhaps by promoting tests that have been adjusted for racial bias,[378] adopting policies that constrain individual discretion, or

372. For an overview of the program, see *WeCARE*, FEDCAP, http://www.fedcap.org/content/wecare (last visited Nov. 19, 2016).

373. WeCARE has been touted by the American Conservative Union because "[it] is unique among TANF programs in its laser focus on workforce readiness training and job placement." *Grant Collins Testifies About the Future of SNAP*, THE ACU FOUNDATION, (Aug. 29, 2015), http://acufoundation.conservative.org/2015/08/29/grant-collins-testifies-about-the-future-of-snap/. Although WeCARE is focused on clients with disabilities, it could be adapted to address other barriers to employment.

374. *Cf.* Opening Statement of J. Michael Conaway, House Committee on Agriculture Public Hearing: Past, Present, & Future of SNAP (June 10, 2015), http://agriculture.house.gov/news/documentsingle.aspx?DocumentID=1087 (observing that "it is important to have a realistic view of what it takes for many Americans to get back on their feet," that "[s]teady employment makes it possible to climb the economic ladder and rise out of poverty," and that "a greater level of engagement is needed between SNAP and recipients").

375. For example, the Republican Party Platform proclaims, "We will encourage investments in small businesses." *See Republican Platform: Restoring the American Dream: Economy & Jobs*, https://www.gop.com/platform/restoring-the-american-dream/ (last visited Nov. 19, 2016) [https://web.archive.org/web/20160806223918/https://www.gop.com/platform/restoring-the-american-dream/].

376. Thus, for example, greater pay transparency might deter pay discrimination. *See* Gowri Racmachandran, *Pay Transparency*, 116 PENN. ST. L. REV. 1043 (2012) (proposing pay transparency as a defense to pay discrimination claims).

377. Katie R. Eyer, *That's Not Discrimination: American Beliefs and the Limits of Anti-Discrimination Law*, 96 MINN. L. REV. 1275 (2012); *see also* Ann C. McGinley, *Rethinking Civil Rights and Employment at Will: Toward a Coherent National Discharge Policy*, 57 OHIO ST. L.J. 1443 (1996) (advancing a similar argument).

378. *See* Mark Kelman, *Concepts of Discrimination in "General Ability" Job Testing*, 104 HARV. L. REV. 1157 (1991) (discussing discrimination in job testing).

promoting interventions to combat implicit bias among those who make employment decisions.[379]

2. Criminal Justice

Reforming the criminal justice system represents one of the most important and difficult tasks for the amelioration of racial disparities. As a threshold matter, the de-escalation of the war on drugs is an important starting point.[380] Notwithstanding the popularity of the war on drugs in some circles, we think it is an area where libertarian conservatives and progressives may find common ground, as reflected in the legalization of marijuana in some states.[381] Insofar as the war on drugs is disproportionately harming blacks, de-escalation would disproportionately benefit them.[382]

Of course, the criminal justice system necessarily entails many discretionary judgments by police, prosecutors, judges, and juries. Given the prevalence of negative images and stereotypes of blacks—especially young black men—as dangerous, violent lawbreakers, implicit biases in the criminal justice system will be especially difficult to overcome. Training may help to reduce implicit biases, but the effectiveness of interventions is unclear.[383]

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379. *See, e.g.*, Tristin K. Green, *A Structural Approach As Antidiscrimination Mandate Locating Employer Wrong*, 60 VAND. L. REV. 849 (2007) (arguing for a "structural approach" to address implicit biases in the workplace); Susan Sturm, *Second Generation Employment Discrimination—A Structural Approach*, 101 COLUM. L. REV. 458 (2001) (advancing a similar structural approach). *But see* Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CALIF. L. REV. 1 (2006) (critiquing the structural approach).

380. *See, e.g.*, Mona Lynch, *Institutionalizing Bias: The Death Penalty, Federal Drug Prosecutions, and Mechanisms of Disparate Punishment*, 41 AM. J. CRIM. L. 91 (2013) (discussing the war on drugs and the disparate impact on blacks caused by the differences in sentences for crack cocaine versus other drugs); Jonathan Simon, *Ending Mass Incarceration is a Moral Imperative*, 26 FED. SENTENCING REPORTER 271 (2014) (arguing for ending the war on crime and drugs as a means of ending mass incarceration); Cassia Spohn, *Race, Crime, and Punishment in the Twentieth and Twenty-First Centuries*, 44 CRIME AND JUSTICE 49 (2015) (arguing for ending the war on drugs); *see generally supra* notes 299–305 and accompanying text (discussing the role of the war on drugs in the mass incarceration of blacks).

381. Another area of potential common ground would be the abuse of drug forfeiture statutes.

382. More broadly, needless violence against black suspects might be reduced if police methods were reformed to reduce confrontational and militaristic approaches.

383. *See, e.g.*, Jonathan Feingold & Karen Lorang, *Defusing Implicit Bias*, 59 UCLA L. REV. DISCOURSE 210 (2012) (proposing "gun training focused on mitigating the effect of implicit biases"); Brian R. Jones, *Bias-Based Policing in Vermont*, 35 VT. L. REV. 925 (2011) (arguing for enhanced police training to reduce "bias-based policing"); Robert J. Smith, *Reducing Racially Disparate Policing Outcomes: Is Implicit Bias Training the Answer?*, 37 U. HAW. L. REV. 295 (2015) (discussing implicit bias training for police officers); *see generally* Samuel Walker, *Institutionalizing Police Accountability Reforms: The Problem of Making Police Reforms Endure*, 32 ST. LOUIS U.

Another approach would be to limit the role of discretionary judgments. Here, for example, articulating clearer policies that limit discretion in police stops or reducing the number and use of peremptory challenges might be useful illustrations.[384]

One reform that has received the support of the conservative CATO Institute is the use of body cameras by police.[385] It is interesting to note that this report concludes that "[r]educing incidents of police misconduct will require reforms of use-of-force policy and training, and changes to how police misconduct is investigated, in addition to the increased use of body cameras."[386] This conclusion suggests that there may be room for a broader coalition between conservatives and progressives on a variety of police reforms.

3. Education

Educational achievement gaps are among the most critical problems to address. Education is not only a critical factor in employment and economic success, but also an essential means of empowerment that enables us to participate in civil society and defend our interests. *Brown* assumed that eliminating *de jure* segregation would produce integrated schools and that integrated schools would equalize educational outcomes, but the problem is more complex. For example, integration is difficult to achieve in light of housing segregation. Put simply, the achievement gap is a

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PUB. L. REV. 57 (2012) (discussing history of police reform and the problems such reform faces).

384. *See* Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of* Batson*, and Proposed Solutions*, 4 HARV. L. & POL'Y REV. 149 (2010) (proposing solutions for implicit biases in voir dire); *see also* Sarah Jane Forman, *The Ferguson Effect: Opening The Pandora's Box of Implicit Racial Bias in Jury Selection*, 109 NW. U. L. REV. ONLINE 71 (2015) (arguing for educating lawyers and juries to overcome implicit biases). To be sure, many defense attorneys might object on the basis that the availability of peremptory challenges is a necessary safeguard for criminal defendants. *See, e.g.*, Charles J. Ogletree, *Just Say No! A Proposal to Eliminate Racially Discriminatory Uses of Peremptory Challenges*, 31 AM. CRIM. L. REV. 1099, 1100 (1994) (recommending "new restrictions on the use of the challenges, restrictions which should make prosecutorial racist challenges much more difficult while not denying the benefits that well-exercised challenges continue to present for criminal defendants"). The point here is not to advocate for elimination of peremptory challenges, but rather to identify it as one possible pragmatic response to the problem of racial bias in jury selection.

385. *See* Matthew Feeney, *Watching the Watchmen: Best Practices for Police Body Cameras*, CATO INST. POL. ANALYSIS, No. 782, Oct. 27, 2015.

386. *Id.* at 17.

complex problem that cannot be alleviated by the educational system alone.[387]

Liberals and conservatives have different ideas about what steps to take to improve educational achievement. Conservatives often propose school choice—in the form of charter schools and voucher programs—as a means of improving education. From a pragmatic perspective, such programs would be desirable if they work, but the evidence to this point suggests that they do not improve student performance.[388] Liberals, by way of contrast, focus on solutions such as early childhood education, investments in quality schools, and the use of complementary efforts (e.g., before and after school programs) to promote student success.[389]

Education is also an area in which implicit biases and systemic barriers may be important factors. Teachers may unwittingly perpetuate underachievement as a result of implicit biases that attach low expectations to black school children and often result in more aggressive disciplinary actions when black children act out.[390] Equally important, to the extent that black children come from families that lack education, are unstable, and lack resources, they must overcome a variety of barriers to succeed. In view of the complexity of the problem, it is especially important to determine what works in the area of education.

4. Residential Segregation

Residential segregation has also proven to be an especially difficult problem to overcome because there is a natural tendency to

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387. *See generally* DERRICK DARBY & JOHN L. RURY, THE COLOR OF MIND: WHY THE ORIGINS OF THE ACHIEVEMENT GAP MATTER FOR JUSTICE, forthcoming (arguing that racial ideology has also contributed to the achievement gap, historically, and so must be tackled along with structural matters to address this complex problem).

388. *See, e.g.*, Cecilia E. Rouse & Lisa Barrow, *Student Vouchers and Student Achievement: Recent Evidence and Remaining Question*s, 2009 ANN. REV. ECON., No. 1, at 17 (reviewing evidence and concluding that voucher programs do not improve student achievement); Christopher Lubienski & Peter Weitzel, *The Effects of Vouchers and Private Schools in Improving Academic Achievement: A Critique of Advocacy Research*, 2008 BYU L. REV. 447 (same).

389. *See, e.g.*, Michael A. Rebella, *Poverty, "Meaningful" Educational Opportunity, and the Necessary Role of the Courts*, 85 N.C. L. REV. 1467, 1467 (2007) (arguing for "a commitment to 'meaningful educational opportunity' that, in essence, would require school districts and local public and nonprofit agencies to provide a comprehensive range of specific in-school and coordinated out-of-school services to children from backgrounds of concentrated poverty").

390. *See, e.g.*, Douglas B. Downey & Shana Pribesh, *When Race Matters: Teachers' Evaluations of Students' Classroom Behavior*, 77 SOC. EDUC. 267 (2004) (discussing role of race in student discipline); Michael Rocque, *Office Discipline and Student Behavior: Does Race Matter?*, 116 AM. J. EDUC. 557 (2010) (same).

want to live around those who are "like" you. Thus, in many large cities there are distinctive ethnic communities that are concentrated in particular parts of the city. Eliminating these ethnic neighborhoods is not necessarily a good thing, but even if it is, it is likely impossible. The more important problem is ensuring that the particular neighborhood in which people live does not unduly their opportunities, and some postracial approaches might help in this regard.

As an initial matter, the traditional model for low income housing, which often involves large complexes, proved to be disastrous on multiple fronts. Low-income housing projects, whose occupants were disproportionately minorities, tended to attract crime and violence and contributed to the deterioration of surrounding neighborhoods.[391] Accordingly, they reinforced negative racial stereotypes and provoked a NIMBY ("not-in-my-back-yard") reaction, especially in white suburban communities. Alternative approaches that disperse low-income housing across communities and into more prosperous neighborhoods are a possible response, although the impact and effectiveness of such programs has also been criticized.[392]

More broadly, just as investment in our schools will be needed to promote high levels of educational achievement among all children, investment in neighborhoods and neighborhood development is a key to reducing segregation and, equally important, ensuring that all neighborhoods have the necessary resources for their residents, regardless of race. One especially complex aspect of this problem is that revitalizing neighborhoods may tend to drive out the people who live there by increasing housing costs.[393] Thus, neighborhood revitalization efforts must incorporate measures to protect the interests of current residents.[394]

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391. *See* Michael H. Schill & Susan M. Wachter, *The Spatial Bias of Federal Housing Law and Policy: Concentrated Poverty in Urban America*, 143 U. PA. L. REV. 1285 (1995); *see also supra* notes 316–330 and accompanying text (discussing litigation surrounding racial discrimination in public housing).

392. John O. Calmore, *Fair Housing vs. Fair Housing: The Problems with Providing Increased Housing Opportunities Through Spatial Deconcentration*, 14 CLEARINGHOUSE REV. 7 (1980) (arguing that these efforts are too tokenistic to achieve any true integration of neighborhoods, that they undermine the social and political integrity of poor neighborhoods, and reduce the available housing opportunities for the poor).

393. *See, e.g.*, Michael Henry Adams, *The End of Black Harlem*, N.Y. TIMES (May 27, 2016), http://www.nytimes.com/2016/05/29/opinion/sunday/the-end-of-black-harlem.html.

394. Lynn E. Cunningham, *Islands of Affordability in a Sea of Gentrification: Lessons Learned from the D.C. Housing Authority's HOPE VI Projects*, 10 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 353 (2001) (discussing the success of D.C. housing program, but citing the need for modification due to the new housing market in D.C.); Diane K. Levy, et al., *In the Face Of Gentrification: Case Studies of Local Efforts to Mitigate Displacement*, 16 J. AFFORDABLE HOUSING &

V. VINDICATING POSTRACIAL REMEDIES

This Article addressed the philosophical, psychological, political, and jurisprudential challenges that racial inequality poses in a polarized nation by taking up the standpoint of the race moderate. This approach, which draws on both methodological and substantive pragmatism, has much in common with some other recent scholarship on race and racial inequality, although it also has some distinctive features. Like other moderate approaches, criticism of this approach is likely to be forthcoming from both the Left and the Right. After situating postracial remedies in the literature and highlighting its distinctive features, this Part addresses likely objections to this approach.

A. Situating Postracial Remedies

The search for postracial remedies draws on methodological and substantive pragmatism because it seeks to build consensus around workable solutions to common problems. In this sense, our approach fits comfortably within an emerging body of scholarship emphasizing what Reva Siegel has termed the "antibalkanization" principle, under which remedies should "ameliorate racial wrongs without unduly aggravating racial resentments."[395]

When postracial premises prevail, race-specific remedies invite racial resentments and thus violate the antibalkanization principle. However, postracial remedies that are not race specific will not have this shortcoming, precisely because they do not turn on racial classifications.[396] Thus, whether race-specific remedies would, in a

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COMMUNITY DEV. L. 238 (2007) (discussing case studies of efforts to combat housing displacement).

395. Siegel argues that the jurisprudence of swing Justices such as Justice Kennedy—who she characterizes as a race moderate—reflects this principle, which she regards as a sound basis to guide societal efforts to mitigate racial inequality. Siegel, *supra* note 8, at 1302; *see also* Lawrence Rosenthal, *Saving Disparate Impact*, 34 CARDOZO L. REV. 2157 (2013) (arguing that strict scrutiny of all racial classifications, including so-called benign ones, is the best way to link antibalkanization concerns with the normative imperative to treat all persons with equal concern and respect, which undergirds the equal protection principle).

396. To be sure, a commitment to antibalkanization is not incompatible with race-specific remedies, which might be justified when the requirements of strict scrutiny are met. In this regard, Justice Kennedy's jurisprudence is no different from racial conservatives like Justices Scalia and Thomas. Where they part company, however, is in regard to what remedies might satisfy strict scrutiny, as reflected in *Grutter v. Bollinger*, 539 U.S. 306 (2003). This difference is of limited practical significance, since very few race-specific remedies would satisfy even Justice Kennedy's somewhat less restrictive form of strict scrutiny.

perfect world, be the most desirable or direct approach to overcoming racial inequality—an issue some critics will certainly raise—is somewhat beside the point. Such remedies are constitutionally suspect and often politically infeasible in the real world.

Other scholars have also responded to the postracial ethos entrenched in the Supreme Court's jurisprudence by focusing on remedies that are not race specific. As noted above, some have suggested that we should replace race with class or "place" as a means of accomplishing the goals of affirmative action or race-based measures to desegregation schools or neighborhoods.[397] Another approach is to promote what Samuel Bagenstos calls "universalistic" remedies that do not "seek to protect any particular group against discrimination, [but rather] provide uniform protections to everyone (at least as a formal matter)."[398]

Although both of these approaches are examples of postracial remedies, the approach outlined in this Article is distinctive in two ways. First, it is sensitive to race, both in terms of the problem of racial inequality and the psychology of race. Targeting implicit racial bias and systemic barriers need not run afoul of postracial doctrinal and factual premises, provided that we do so in ways that are not race specific and are sensitive to the psychology of race.[399] Second, this approach is not confined to a particular kind of remedy, but rather embraces a broad array of possible remedies—so long as they work. In this regard, it is important to note that we do not argue that postracial remedies should be the exclusive means of combating racial disparities.[400]

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397. *See supra* note 4 and accompanying text.

398. Bagenstos, *supra* note 6, at 2840. For examples of universalistic approaches in other contexts including voting, disability and employment law see Richard H. Pildes, *The Future of Voting Rights Policy: From Anti-Discrimination to the Right to Vote*, 49 HOW. L.J. 741 (2006); Samuel Issacharoff, *Beyond the Discrimination Model on Voting*, 127 HARV. L. REV. 95 (2013); SAMUEL R. BAGENSTOS, LAW AND THE CONTRADICTIONS OF THE DISABILITY RIGHTS MOVEMENT 51–54, 145 (2009) (proposing that universal health insurance and workplace accommodations can address disability inequality); Katie R. Eyer, *That's Not Discrimination: American Beliefs and the Limits of Anti-Discrimination Law*, 96 MINN. L. REV. 1275 (2012) (arguing for extra-discrimination remedies to address discriminatory conduct in workplace); Samuel R. Bagenstos, *Employment Law and Social Equality*, 112 MICH. L. REV. 225 (2013) (arguing that universal provisions of employment law can serve equality interests). And for a universalistic approach to equal protection in general, *see* Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747 (2011).

399. *See supra* notes 337–342 and accompanying text.

400. Thus, our defense of race neutral remedies is compatible with believing that some combination of non-race-specific and race-conscious remedies may, in the final analysis, constitute the best strategy for mitigating racial inequalities. *See* Bagenstos, *supra* note 6 (concluding that race-specific rules and approaches, along with universalistic rules, remain essential to addressing persistent race discrimination and civil rights problems).

Thus, our argument is not that postracial remedies are sufficient for mitigating racial inequality. Rather, it is that they are necessary, in view of the influence of the postracial narrative on our political discourse and the Court's equal protection jurisprudence. Many on the Left have been exclusively preoccupied with arguing that race-specific remedies for racial inequality are still necessary in today's post-civil rights era. We do not argue against such efforts, but rather suggest that non race-specific remedies are also necessary to mitigate racial inequality.

Postracial remedies share certain strengths with universalistic approaches. Because they are not race specific they stand a better chance of gaining political support and surviving judicial scrutiny. They allow us to focus on systemic barriers to equality that impact the life prospects of citizens regardless of racial membership. They do not invoke worries about identity fatigue that have troubled race-specific remedies. And they hold promise to minimize racial resentment and backlash and to promote greater social cohesion, which is vital for securing the social cooperation necessary to address racial disparities.

Postracial remedies can be embraced for different reasons. One can be motivated by the belief that all racial classifications are invidious and thus should be prohibited or viewed with the highest suspicion (anticlassification). One can also be fully invested in the normative ideal of colorblindness and so believe that the way to realize postracialism in practice is simply to stop treating people differently based on race (colorblindness). Or, one can be motivated to avoid or minimize divisions that undermine the social cohesion needed to achieve democracy in a society with a legacy of historical injustice (antibalkanization).

This last motivation, striving for social cohesion, best captures why we pursue postracial remedies, and also connects it with antibalkanization approaches, which similarly embody not just a methodological but also a substantive or principled commitment to pragmatism.[401] We cannot claim the strengths of this family of equal protection approaches without also taking on board similar objections.

B. Three Objections

Insofar as postracial remedies proceed from the standpoint of the race moderate, objections are expected from both ends of the

401. *See infra* notes 420–422 and accompanying text.

political spectrum. These objections might take various forms and focus on various aspects of our approach. For convenience, these potential objections are divided into three categories: pragmatic, principle, and purity. This Part responds to those criticisms, in the process explicating this Article's position in connection with various strands in the literature on racial inequality.[402]

1. Pragmatic

Part of the case for postracial remedies turns on the premise that they have practical value—that is, they allow us to achieve consensus for programs that work. Critics may object that this premise is overly optimistic, both in terms of the prospects of building coalitions for postracial remedies and in terms of those remedies' ability to deliver real progress. This section addresses each of these pragmatic objections in turn.

The first pragmatic objection is that it will not be possible in practice to build coalitions or consensus to support postracial remedies. This objection could take various forms. Given the polarized state of our society, it may be unrealistic to think of a "big middle" or to suppose that the Left and the Right or blacks and whites can agree on anything. Thus, for example, there is little evidence that our currently dysfunctional Congress could ever reach consensus on anything, much less postracial remedies. Although polarized voices seem to dominate our political processes, especially political primaries, the public opinion research cited above indicates that a substantial proportion of the population accept mixed explanations for racial inequalities, and so are potentially amenable to compromise solutions.[403]

Critically, postracial remedies avoid pitting blacks and whites against each other in a zero-sum game in which remedies for racial inequality require redistribution from whites to blacks. Of course, postracial remedies would have redistributional consequences (as do all social programs), insofar as they devote resources to ameliorating poverty, improving schools, or revitalizing neighborhoods, but such redistribution would tend to be from the wealthy (including wealthy blacks) to the less wealthy (including less wealthy whites). Because this sort of redistribution is class based rather than

402. One objection we will not address is the objection that racial inequality is not a problem worth addressing. As noted above, we take this premise as a given. Conversely, we doubt that we could ever persuade those who do not accept this premise and will not burden an already long article in a fruitless attempt to do so. *See supra*, text following note 30.

403. *See supra* notes 95–106 and accompanying text.

race based, it provides an opportunity for alliances between poor or lower class blacks and whites.[404] To be sure, this sort of class-based redistribution is likely to meet opposition and may be ideologically contested, but postracial remedies take race out of the equation and so are less divisive than race-specific remedies. More broadly, ideological divisions and upper class resistance can be minimized if the remedies actually work.

A somewhat different objection is to suggest that the big middle is unwilling or unlikely to support such proposals. Bagenstos, for one, doubts the premise that people are generally willing to back civil rights causes, expressing concern that casting too broad a net for civil rights protections and extending them beyond concrete and urgent cases of need may undermine rather than enhance political support (perhaps due to "compassion fatigue").[405] From this perspective, postracial remedies may undermine rather than build support for efforts to ameliorate racial inequality.

Using voting rights as an example, Bagenstos argues that focusing on removal of restrictions that burden all citizens will trivialize, and take support away from, efforts to eradicate laws that discriminate against and have a disproportionate impact on blacks in particular.[406] A similar objection might be made against remedies that aim to remove barriers to the educational achievement of all students at risk, which may diminish the importance of removing ones that target or have disparate impact on black students in particular.

Conversely, others might object that postracial remedies are simply a pretext for benefitting racial minorities.[407] This point has both a political and a judicial dimension. Politically, it suggests that postracial remedies may come to be seen as "code" for racial

404. *See supra* note 7 (giving examples).

405. Bagenstos, *supra* note 6, at 2852.

406. Bagenstos also suggests that race-specific remedies capitalize on the powerful cachet of "civil rights" discourse in American politics, while universalistic approaches will "lose the support that comes with the civil rights label." Bagenstos, *supra* note 6, at 2853. Given current polarization on matters of race, however, we doubt that the "civil rights" label continues to carry the powerful cachet that Bagenstos attributes to it. Nowadays, under conditions of deep polarization, when civil rights are invoked in ways that highlight black inequality and disadvantage, they are more likely to invoke the sentiment that we are dealing with another case of black grievance or special pleading. In view of the psychology of race, many will respond that these claims are best addressed not by government policies, handouts of more "free stuff," or penalizing the conduct of private businesses, but by blacks taking greater personal responsibility for their successes and failures. *See* Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 748 (2011) ("Many Americans view civil rights as an endless parade of groups clamoring for state and social solicitude.").

407. Bagenstos notes this objection as well. Bagenstos, *supra* note 6.

preferences, thus undermining support for them.[408] The judicial dimension of this objection is based on the concern that judges may conclude that although these remedies are not race specific "on their face," that facial neutrality is merely a pretext for programs adopted with the intent to favor blacks.[409]

Insofar as postracial remedies are race sensitive and seek to ameliorate racial inequalities, this is a real concern that highlights the need to be careful about advocacy, design, and implementation so that remedies really are not race specific. Simply recasting affirmative action programs in terms of class, rather than race, for example, and implementing them in ways that correlate strongly with race, is unlikely to persuade policymakers who do not already support affirmative action or to withstand a legal challenge based on pretext. But programs that focus on addressing underlying problems like poverty, mass incarceration, failing schools, and disadvantaged neighborhoods, based on evidence that they actually work, are less likely to be viewed as a pretext—even if they are promoted in part as a response to the problems that plague the black community.

In this regard, there is an important difference between programs to ameliorate racial inequalities that are a result of ongoing effects of past discrimination, implicit bias, and systemic barriers, and adopting policies with the intent to discriminate against whites and in favor of blacks. If the remedies actually work—that is, if the rising tide does lift all boats—then the worry about coding or pretext is less likely to be problem. These responses highlight the virtues of methodological pragmatism in the design and implementation of remedies, and the importance of showing that there is no tension between being race sensitive and not being race specific.[410]

A second type of pragmatic objection to postracial remedies is that, even if it is possible to generate political support for their adoption, they will not achieve the real world benefits that we claim

408. The extent to which this sort of result is a cause for concern is unclear. In practice, for example, programs to promote "diversity" are often perceived as "code" for affirmative action. Notwithstanding this phenomenon, employment programs to promote diversity have proven to be more effective in practice than affirmative action programs. *See* Awad, *supra* note 327.

409. *See* Bagenstos, *supra* note 6, at 2849.

410. Legally, the former is a legitimate government purpose in the way the latter is not. Consider, for example, the civil rights laws of the 1960s, all of which were adopted in an effort to prevent racial discrimination. These purposes were clearly legitimate.

for them.[411] Critics from the Left might argue, for example, that a rising tide will not lift all boats. Given the problems of ongoing intentional discrimination, implicit biases, and systemic barriers, this argument posits that postracial remedies are likely to help whites while leaving blacks behind.

This sort of objection challenges the basic premise that solving the underlying problems that disproportionately affect blacks will ameliorate racial inequalities. As an initial matter, this strategy is incremental and involves tackling social and economic issues from a variety of angles, including measures to address implicit biases and structural barriers. In addition, even if gaps between blacks and whites remain, ensuring that blacks have some minimal level of opportunity is an essential step toward promoting more equal outcomes.[412] Put differently, the marginal impact of relative inequality decreases as the overall level of opportunity and prosperity rises. Postracial remedies will not magically resolve racial inequalities, but improving outcomes for some substantial number of people in the near term is no small accomplishment.

A related objection is that it is inefficient to try to lift all boats to deal with problems that disproportionately harm blacks—this is simply too expensive and society is better off targeting blacks alone.[413] But postracial remedies need not be expensive, especially if viewed in the longer term, because they are investments that will

411. Another general worry about universalistic approaches, which speculates that they may not be as workable as race-specific ones, pertains to efficiency. Bagenstos raises this objection as well, noting that targeted laws are more efficient and that the political process may reward this efficiency. Bagenstos, *supra* note 6, at 2854.

412. For example, if minority schools are failing, then black students have no chance at success. Raising the quality of education for all may mean that white schools are still better than minority schools, but improving minority schools will at least provide the opportunity for black children to succeed and possibly gain ground, as a whole, on whites.

413. Thus, for example, a recent article examines the practical effect of pursuing universalistic remedies under the Fair Labor Standards Act (FLSA), as opposed to remedies for racial discrimination under Title VII. Zev J. Eigen, Camille Gear Rich & Charlotte S. Alexander, *Post-Racial Hydraulics: The Hidden Dangers of the Universal Turn*, 90 N.Y.U. L. Rev. 1. The authors argue that this turn to universalistic remedies has unfortunate side effects that include the ossification of Title VII law, reinforcing the courts' acceptance of the postracial narrative, lack of attorney availability for race-based claims that do not implicate the FLSA, and suppression of the clients' ability to voice their claims in terms of racial discrimination. *Id.* While such concerns cannot be completely discounted, the side-effects of particular litigation strategies are not necessarily transferable to other contexts. More broadly, these criticisms help to highlight the differences between our approach and universalism: our approach does not demand the acceptance of postracial assumptions or the abandonment of racial discrimination claims, and the remedies we advocate are race sensitive and not limited to universalistic ones. *See supra* notes 395–401 and accompanying text (situating postracial remedies in relation to other, similar approaches).

pay off later on.[414] More fundamentally, one reason that race-specific remedies are so divisive is precisely because resources are limited and providing remedies for blacks means that those resources are not available for other disadvantaged groups.

Ultimately, it is not clear that race-specific remedies are more effectively targeted at racial inequality than postracial ones. From a pragmatic perspective, solutions that target the manifestations of racial inequality are at least as likely to solve them as solutions that target race.[415] Likewise, the postracial approach does not foreclose efforts to address ongoing barriers to black success, and may even provide more effective means to address ongoing problems of intentional discrimination, implicit biases, and structural barriers.[416]

At bottom, it is important to bear in mind the limits of the argument. Postracial remedies will not eliminate racial and ideological polarization or completely solve the problem of racial inequality. Moreover, given the current political climate, seeking major legislation or new initiatives at a national level may be unrealistic. Postracial remedies are most likely to succeed incrementally through local efforts aimed at particular policies and practices. Such incremental efforts can produce immediate gains for some people and help to build momentum for expansion of programs that have a proven record of success.

2. Principle

A second objection that might be raised to the postracial approach is that it is unprincipled. From this perspective, by targeting the race moderate, postracial remedies try to be all things to all people, and so lack any normative foundation in either conservative or progressive thought. In other words, this approach is *merely* a strategic approach to racial inequality, focusing exclusively on what will work more effectively to mitigate it and not on a substantive normative commitment.

Objections based on the lack of principle emphasize the tension between promoting remedies that are race sensitive and asserting

414. Thus, for example, investments in early childhood education, public schools, and wrap around programs may seem expensive, now, but those costs may be offset down the road through declining demands for welfare benefits, reduced law enforcement costs, and increased productivity. Of course, this sort of long-term thinking is not always influential in our current political discourse.

415. We note, for example, that affirmative action programs did not necessarily help the truly disadvantaged blacks, including those who lived in poverty, attended failing schools in impoverished neighborhoods, and were embroiled in the criminal justice system.

416. *See supra* notes 335–342 and accompanying text.

that such remedies should not be race specific. From the perspective of the Left, if we believe that intentional discrimination, implicit biases, and structural barriers cause racial disparities, it follows as a matter of principle that race-specific remedies are essential to achieve racial justice. Conversely, from the perspective of the Right, if society wants to claim race neutrality, it follows that decisions about what problems to address must be colorblind and cannot be race sensitive.

Accordingly, this criticism would continue, our approach lacks a substantive commitment to any normative principle. For example, describing such opportunism as "post-racial pragmatism," Kimberlé Williams Crenshaw writes:

> In the new post-racial moment, the pragmatist may be agnostic about the conservative erasure of race as a contemporary phenomenon but may still march under the same premise that significant progress can be made without race consciousness. This re-alignment brings liberals and some civil rights advocates on board so that a variety of individuals and groups who may have been staunch opponents of colorblindness can be loosely allied in post-racialism.[417]

Crenshaw's point is an important one. It compels pragmatists to explain why they are motivated not *merely* by what works at moving a polarized society forward but also by substantive normative principles.

This objection, however, ignores the principled normative foundations of pragmatism—a commitment to the democratic ideal of social cooperation to achieve common ends. We reject this objection because we reject the premise that pragmatism is unprincipled. As expressed by pragmatic idealists such as Cornel West, the link between methodological and substantive pragmatism expresses hopefulness in the power of strategic thinking for social transformation:

> American pragmatism is a diverse and heterogeneous tradition. But its common denominator consists of a future-oriented instrumentalism that tries to deploy thought as a weapon to enable more effective action. Its basic impulse is a

417. Kimberlé Williams Crenshaw, *Twenty Years of Critical Race Theory: Looking Back to Move Forward*, 43 CONN. L. REV. 1253, 1314 (2011). We will address Crenshaw's broader concern that our approach would concede victory to the postracial narrative and undermine advocacy for racial justice below. *See infra* notes 426–431 and accompanying text.

> plebeian radicalism that fuels an antipatrician rebelliousness for the moral aim of enriching individuals and expanding democracy.[418]

Thus, postracial remedies are grounded in principled pragmatism because they are rooted in a normative concern to make us better individually as well as collectively by realizing our common aims as a community. The normative underpinnings of a pragmatic strategic instrumentalism might be further developed—though we will not pursue this here—by tethering this democratic impulse to a concern with affirming the dignity of persons.[419]

So pragmatism is not unprincipled simply because it contemplates strategic action in pursuit of what works, whether viewed from the philosophical perspective or as a means of appealing to the equal protection jurisprudence of race moderate Justices. In this regard, our approach builds on Reva Siegel's argument that racial conflict and division must be taken seriously given the composition of the Court.[420] She argues that swing Justices on issues of race-conscious civil rights policies embrace an antibalkanization perspective that aims for social cohesion.[421] Siegel argues, and we agree, that the pragmatism reflected in race moderates is a principled normative commitment to social cohesion, not merely a strategic one of negotiating a middle path between conservatives and progressives. This is also a key ingredient in the pragmatic democratic impulse, figuring out how, given that we must live and die together, we can work together to solve problems with which we all live. Postracial remedies take up the standpoint of the race moderates, who are willing to set polarizing commitments about race to one side in the interests of realizing the common good in a democratic society. If social cohesion is a mediating principle, it is best viewed as a democratic one. Similarly, postracial remedies can cultivate social bonds that all members of a democratic society relate to each other as equals.

An essential common ground for social cohesion is the pursuit of equal opportunity for all—a principle uniting the libertarian and egalitarian themes that underlie our political and constitutional discourse. To be sure this commitment cannot be a one-way

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418. WEST, *supra* note 333, at 5.

419. *See* Cornel West, PROPHESY DELIVERANCE! AN AFRO-AMERICAN REVOLUTIONARY CHRISTIANITY (2002).

420. Siegel, *supra* note 8.

421. Siegel distinguishes the antibalkanization approach from the competing extremes of a colorblind anticlassification principle and a race-conscious antisubordination principle. *See id.*

proposition, attending to white resentment without equal regard to black claims for justice.[422] Indeed, insofar as racial discrimination occupies an infamously privileged place in American history, race-sensitive remedies for intentional discrimination, implicit biases, and structural barriers are essential parts of the solution. Indeed, as Justice Kennedy rightly observes: "The enduring hope is that race should not matter; the reality is that too often it does."[423]

But focusing only on equality for blacks (or other racial groups) will most certainly divide us.[424] Thus, as Siegel argues, race-sensitive policies should work from what binds, rather than what divides, us.[425] Hence, our approach should be situated alongside other forms of pragmatism that are motivated by a deep commitment to democracy and that seek to build the social cohesion necessary to sustain it in a highly polarized America where race still matters.

Race matters not only when we consider evidence of overt and implicit anti-black discrimination, systemic barriers to success, and gross racial disparities, but also when we consider how it shapes our psychological responses to inequality and injustice. It is this basic reality, and the obstacles it poses to addressing racial inequality through race-specific means, that motivates our support for postracial remedies.

3. Purity

A further criticism takes the question of principle to another level, arguing that postracial remedies are a form of appeasement

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422. For whites, race-specific remedies seem like they are being unfairly burdened to rectify past wrongs, as Justice Powell explained in his *Bakke* concurrence:

> All state-imposed classifications that rearrange burdens and benefits on the basis of race are likely to be viewed with deep resentment by the individuals burdened. The denial to innocent persons of equal rights and opportunities may outrage those so deprived and therefore may be perceived as invidious. These individuals are likely to find little comfort in the notion that the deprivation they are asked to endure is merely the price of membership in the dominant majority and that its imposition is inspired by the supposedly benign purpose of aiding others. One should not lightly dismiss the inherent unfairness of, and the perception of mistreatment that accompanies, a system of allocating benefits and privileges on the basis of skin color and ethnic origin.
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> Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 294 n.34 (1978) (Powell, J., concurring). To blacks, colorblindness ignores the peculiarity of the black plight and the difference between racial classifications that entrench racial subordination and racial classifications intended to end subordination.

423. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U. S. 701, 787 (2007) (Kennedy, J., concurring in part and concurring in the judgment).

424. *See* Siegel, *supra* note 8, at 1294.

425. *Id.* at 1308 (observing that Justice Kennedy seems mindful of this principle).

that concedes too much to the other side. Although this objection might be made from either end of the political spectrum, it would likely be raised most forcefully and consistently from the Left.[426] As with the pragmatism and principle objection, the purity objection may come in various forms.

At its core, the purity objection criticism argues that we, in effect, "reify" the postracial narrative and thereby undermine efforts to advocate for true racial justice. Crenshaw makes this point forcefully:

> [T]he bargain that post-racial pragmatists strike is silence about the racial barriers that continue to shape the life chances of many people of color. This failure to engage racial power jeopardizes racial justice agendas by giving license to those who seek to stigmatize all discourse pertaining to ongoing inequalities.[427]

Accordingly, postracial remedies proceed from a weak-negotiating position by ceding the issue of race-specific remedies and radical change and asking only for incremental changes that will produce modest gains at best. In political science terms, our approach allows the "Overton window" of the politically feasible to be pushed toward the postracial narrative without a countervailing demand for racial justice.[428]

The purity objection does not allege that race moderates actually endorse the postracial narrative. Rather it contends that by cashing in on "the opportunity to re-align this conservative discourse [postracialism] to more progressive visions of the future,"[429] postracialists relegate race consciousness to the back of the postracial bus and stigmatize advocates of race-specific remedies.[430]

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426. Coming from the Right, the criticism would argue that any attention to racial inequality is unnecessary and counterproductive. As we stated above, however, we start from a different premise—that racial inequality is a problem that must be addressed. *See supra* note 28 and accompanying text. Because we doubt the possibility of building coalitions with those who deny that racial inequality is a problem, but regard the Left as a necessary partner in these efforts, we will focus on the purity objection as it would be advanced from that perspective.

427. Crenshaw, *supra* note 417, at 1333.

428. The Overton window describes the range of polices that the public regards as politically acceptable. *See generally* Joseph G. Lehman, *An Introduction to the Overton Window of Political Possibility*, MACKINAC CTR. FOR PUB. POLICY (Apr. 8, 2010), http://www.mackinac.org/12481.

429. Crenshaw, *supra* note 417, at 1314.

430. The concern about stigma clearly cuts both ways. If it is problematic to stigmatize race-consciousness, it is equally problematic to stigmatize pragmatists as sellouts or capitulators to racial inequality and injustice.

While the hearts of race moderates might be in the right place, the politics of appeasement is wrongheaded.

We are not unmoved by these considerations, insofar as we reject the premises of the postracial narrative and have no desire to silence or undermine demands for racial justice. Indeed, it is critical that demands for racial justice be taken seriously if we are to bring people to the table to address ongoing racial inequalities. In this regard, several aspects of the postracial remedies approach must be underscored.

First, as we have repeatedly emphasized, we do not view the pursuit of racial justice as one that forces us to choose between the two approaches and do not argue that postracial remedies should be the exclusive approach to the problem of racial inequality. Postracial remedies are a necessary supplement to, not a replacement for, race-specific approaches. Both are vital for rooting out racial inequality.

Second, this approach to postracial remedies takes the realities of race and racism seriously. We do not ignore or discount ongoing discrimination, implicit bias, or systemic barriers. Whatever other forms of postracial pragmatism may have to say about these problems, advocates of racial justice should not be silent about them. However, there may be practical advantages to addressing them without race-specific remedies, which are both politically and legally unrealistic at the moment.[431]

Finally, given what is known about human psychology, we must not be overconfident in this postracial moment that race consciousness alone can take us to the Promised Land. Indeed, whatever else "taking race and racism seriously" means, it most certainly involves taking the reality of resistance to race-specific remedies seriously.

VI. CONCLUSION

This Article has argued that pursuing postracial remedies is necessary for mitigating racial inequality in the United States—a nation that many people proclaim to be postracial and in which this ethos is entrenched in the Supreme Court's equal protection jurisprudence. Postracial remedies that are sensitive to the realities of race but are not race specific hold promise as a pragmatic solution that can bring us together around solutions that work to lift all boats.

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431. In this regard, the critical factor may be how these issues are framed. *See supra* notes 188–194 and accompanying text.

From a political and psychological perspective, such remedies can avoid the deeply rooted racial and partisan polarization surrounding race-specific remedies. Accordingly, they fall within the emerging strand of equal protection theory in which concerns about balkanization loom large, particularly among race moderates who do not wish to aggravate racial resentments.

From a constitutional perspective, postracial remedies can target the factors that contribute to racial inequality, including implicit bias and systemic barriers, without running afoul of constitutional doctrine. Indeed, as we have argued, it is possible to seek judicial remedies for these problems using the rational basis "with bite" approach that has figured prominently in the Court's postracial equal protection jurisprudence dealing with other minorities.[432]

From a normative standpoint, insofar as postracial remedies are motivated by sensitivity to the psychological roots of racial and ideological polarization, they minimize social divisiveness. Accordingly, they serve substantive democratic values as well as racial justice by encouraging us to work together to solve underlying social problems that disproportionately burden blacks.

In short, postracial remedies to ameliorate racial disparities constitute a principled pragmatic commitment to what works. And such a commitment is sorely needed in our deeply polarized society in which race and racism remain significant barriers to living the American Dream.

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432. United States v. Windsor, 133 S. Ct. 2675 (2013) (applying rational basis test to invalidate federal statute excluding valid same sex marriages from statutory provisions regarding married couples); Romer v. Evans, 517 U.S. 620 (1996) (applying rational basis test to invalidate Colorado constitutional amendment prohibiting antidiscrimination laws protecting homosexuals); Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985) (applying rational basis "with bite" to invalidate special use permit requirement for group home for adults with developmental disabilities); *see also* Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (invalidating state constitutional ban on same sex marriage without specifying level of scrutiny).