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### SUBORDINATION DISCOURSE: A CRITIQUE OF TRUMP’S DIVERSITY MODEL

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#### INTRODUCTION

“Man’s capacity for justice makes democracy possible, but man’s inclination to injustice makes democracy necessary.”

– Reinhold Niebuhr, 1944

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President Donald Trump's inflammatory, often racist rhetoric and actions,<sup>1</sup> socially divisive policies,<sup>2</sup> and general "disinhibiting" conduct<sup>3</sup> give

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<sup>1</sup> See David Leonhardt & Ian Prasad Philbrick, *Donald Trump's Racism: The Definitive List*, N.Y. TIMES (Jan. 15, 2018), [www.nytimes.com/interactive/2018/01/15/opinion/leonhardt-trump-racist.html](http://www.nytimes.com/interactive/2018/01/15/opinion/leonhardt-trump-racist.html) [<https://perma.cc/4N5K-N79N>] ("Donald Trump is a racist. He talks about and treats people differently based on their race."). Most Americans agree with the authors: "Fifty-seven percent of all adults, including more than 8 in 10 blacks, three-quarters of Hispanics and nearly half of whites, said they think Trump is racist." Emily Swanson & Russell Contreras, *AP-NORC Poll: Most Americans Say Trump Is Racist*, U.S. NEWS & WORLD REP. (February 28, 2018, 4:32 PM), <https://www.usnews.com/news/politics/articles/2018-02-28/ap-norc-poll-most-americans-say-trump-is-racist> [<https://perma.cc/JU39-YGNH>]. See also *infra* note 42 for relevant discussion. The authors back up their charge with facts that go beyond Trump's well-known statement finding moral equivalency between both supporters and opponents of white supremacy at Charlottesville, Virginia in August of 2017:

Donald Trump . . . had a history of making racist comments as a New York real-estate developer in the 1970s and '80s. More recently, his political rise was built on promulgating the lie that the nation's first black president was born in Kenya. He then launched his campaign with a speech describing Mexicans as rapists.

Trump's real-estate company tried to avoid renting apartments to African-Americans in the 1970s and gave preferential treatment to whites, according to the federal government.

Trump treated black employees at his casinos differently from whites, according to multiple sources. A former hotel executive said Trump criticized a black accountant: "Black guys counting my money! I hate it. . . . I think that the guy is lazy. And it's probably not his fault, because laziness is a trait in blacks."

In 1989, Trump took out ads in New York newspapers urging the death penalty for five black and Latino teenagers accused of raping a white woman in Central Park; he argued they were guilty as late as October 2016, more than 10 years after DNA evidence had exonerated them.

He began his 2016 presidential campaign with a speech disparaging Mexican immigrants as criminals and 'rapists.'

In December 2015, Trump called for a "a total and complete shutdown of Muslims entering the United States," including refusing to readmit Muslim-American citizens who were outside of the country at the time. Trump said a federal judge hearing a case about Trump University was biased because of the judge's Mexican heritage.

At the White House on Jan. 11, Trump vulgarly called for less immigration from Haiti and Africa and more from Norway.

Trump called Obama (who was editor in chief of the Harvard Law Review) "a terrible student, terrible."

...

He is quick to highlight crimes committed by dark-skinned people, sometimes exaggerating or lying about them (such as a claim about growing crime from “radical Islamic terror” in Britain). He is very slow to decry hate crimes committed by whites against dark-skinned people (such as the killing of an Indian man in Kansas last year).

...

He has retweeted white nationalists without apology.

He called some of those who marched alongside white supremacists in Charlottesville, Va., last August “very fine people.”

After David Duke, the former leader of the Ku Klux Klan, endorsed him, Trump was reluctant to disavow Duke even when asked directly on television.

Trump hired Steve Bannon as his campaign head and later White House chief strategist. Under Bannon’s leadership, the website Breitbart made white nationalism a central theme. It featured a section, for example, on “black crime.”

...

In a November 2017 meeting with Navajo veterans of World War II, Trump mocked Senator Elizabeth Warren as ‘Pocahontas.’

...

Trump once referred to a Hispanic Miss Universe as “Miss Housekeeping.”

At a June 2016 campaign rally, Trump pointed to one attendee and said: “Oh, look at my African-American over here. Look at him.”

Leonhardt & Philbrick, *supra* note 1. See also Lydia O’Connor & Daniel Marans, *Here Are 16 Examples of Donald Trump Being Racist*, HUFFINGTON POST, (Dec. 13, 2016, 1:12 PM) [https://www.huffingtonpost.com/entry/president-donald-trump-racist-examples\\_us\\_584f2ccae4b0bd9c3dfe5566](https://www.huffingtonpost.com/entry/president-donald-trump-racist-examples_us_584f2ccae4b0bd9c3dfe5566) [<https://perma.cc/K6W9-XQNF>] (offering a litany of examples to support showing a pattern of racism throughout Trump’s personal and professional life). Summarizing Trump’s appeal to racism, Steve Almond remarks:

The story Trump told about America was of a holy land infiltrated by foreigners who lurked beyond, and within, our borders. Whites unsettled by a rising demographic tide flocked to his rallies to partake in a grand drama of national reclamation whose central feature was an orgiastic denunciation of those dark, and dark-skinned, forces aligned against their cause.

...

The rest of us never quite grasped how persuasive this appeal was.

STEVE ALMOND, *BAD STORIES: WHAT THE HELL JUST HAPPENED TO OUR COUNTRY* 42, 45 (2018).

<sup>2</sup> President Trump’s Administration has made numerous troubling proposals affecting housing, education, food stamps, and Medicaid. Perhaps his most controversial proposal would make work a condition for receiving federal aid, including Medicaid. See Tracy Jan, Caitlin Dewey & Jeff Stein, *HUD Secretary Ben Carson to Propose Raising Rent for Low-Income Americans Receiving Federal Housing Subsidies*, WASH. POST: WONKBLOG (Apr. 25, 2018), <https://www.washingtonpost.com/news/wonk/wp/2018/04/25/hud-secretary-ben-carson-to-propose-raising-rent-for-low-income-americans-receiving-federal-housing-subsidies/>

rise to the reasonable belief that the president has no commitment to diversity and inclusion—no respect for racial democracy most especially—in our society. Moving beyond Trump’s fire and fury, this article first unearths elements of what is arguably a coherent vision of diversity and inclusion (hereinafter “Trump’s diversity model”) and then subjects it to a detached, sober critique. Proceeding in this restrained manner reveals no dearth of problems associated with Trump’s approach to diversity and inclusion.

Trump’s diversity model can best be described as socioeconomic diversity. His approach seeks to give the individual citizen opportunities for financial and human capital advancement in our society. Trump’s message is that every American, regardless of race, sex, religion, ethnicity or, to a lesser extent, gender identity, should be able to acquire some measure of socioeconomic success in his or her lifetime.<sup>4</sup> To African Americans in particular, Trump is saying, “Think and Grow Rich.”<sup>5</sup>

What are the chief characteristics of Trump’s socioeconomic diversity model? Is it a unifying force in our society? Can it resolve the problem of racial inequality especially as it relates to African Americans, as Trump persistently claims? What legitimate criticisms can or should one make against Trump’s diversity model? These are some of the questions this article raises and attempts to answer.

But rather than discuss Trump’s diversity model in the way that commentators typically debate his policies—that is, through the filter of racial intolerance or partisan politics—this article proceeds down a different

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noredirect=on&utm\_term=.0b62b756287b [https://perma.cc/36SU-297T] (discussing Trump’s issuance of an executive order as part of an effort to reduce federal assistance programs). Another proposal from HUD Secretary Ben Carson would triple rents paid by the poorest households. *Id.*

<sup>3</sup> By which I mean conduct that gives his followers license to unleash their racial intolerance and racism. Racism is a pronounced cultural trait of the white working class who make up Trump’s political base. ROY L. BROOKS, *THE RACIAL GLASS CEILING: SUBORDINATION IN AMERICAN LAW AND CULTURE* 92 (2017) (discussing sources that posit that “working-class whites draw racial and class boundaries between themselves and groups to whom they feel superior,” which is expressed through a negative cultural tradition of racism). *See id.* at 192, n. 63 (sources indicating that nearly 20% of Trump supporters in the 2016 South Carolina Primary believe that freeing blacks from slavery was a bad idea). With Trump, they no longer feel inhibited; they feel emboldened. For a comparative cultural analysis of the American working- and middle-classes, see generally *id.* at 70–96.

<sup>4</sup> *See infra* Part I (analyzing Trump’s diversity model as applied to job creation and education).

<sup>5</sup> Some African Americans were preaching Trump’s message long before Trump became president. One of the most prominent communicators of this message was Dennis Kimbro. For a discussion of the main tenets of Kimbro’s message, see, e.g., DENNIS KIMBRO & NAPOLEON HILL, *THINK AND GROW RICH: A BLACK CHOICE* (1991). Kimbro, an African American, is associated with the Napoleon Hill Foundation, a controversial self-help organization.

path.<sup>6</sup> Putting aside Trump's putative racism and partisan politics (i.e., giving him the benefit of the doubt) and focusing on African Americans, or blacks, to simplify the discussion, I will critique Trump's diversity model through a unique conceptual scheme—*subordination discourse*. In contrast to conventional *discrimination discourse*, which reacts to racism (a nefarious structural source of racial inequality), subordination discourse focuses on non-nefarious sources of racial inequality.<sup>7</sup> These non-nefarious sources are defined as important, non-racist norms that impede or freeze racial progress. Racial omission (or color blindness), originalism, and federalism are examples of such non-nefarious norms.<sup>8</sup> The critical point to note is that these inherently positive norms are *not* racially innocent. They are, in fact, racially harmful when knowingly deployed in ways that impede or freeze racial progress. Though they are conceptually sound, they can be operationally flawed.<sup>9</sup>

Engaging in subordination discourse in no way minimizes the important place discrimination discourse occupies in civil rights analysis or in our collective understanding of the Trump Administration's policies.<sup>10</sup> Subordination discourse offers an additional level of scrutiny, which yields distinct benefits. First, it separates the message from the messenger—principle is not coextensive with individual character. It may be that Trump is a poor carrier of a fundamentally sound message, something from which African Americans and other subaltern groups might benefit. Second, subjecting Trump's diversity model to non-caustic yet rigorous subordination discourse, with its diverse perspectives and cross-fertilization, enriches our understanding of diversity and inclusion.<sup>11</sup> Finally, if Trump's diversity message founders on the shoals of

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<sup>6</sup> For more familiar takes on Trump, see generally DAVID FRUM, *TRUMPOCRACY: THE CORRUPTION OF THE AMERICAN REPUBLIC* (2018) (offering sharply critical analysis of the Trump administration and its lasting effects); NEWT GINGRICH, *TRUMP'S AMERICA: THE TRUTH ABOUT OUR NATION'S GREAT COMEBACK* (2018) (largely supportive of Trump); MICHAEL WOLFF, *FIRE AND FURY: INSIDE THE TRUMP WHITE HOUSE* (2018) (offering investigative reporting on the Trump administration that is largely critical of Trump).

<sup>7</sup> See BROOKS, *supra* note 3, at 4 (defining racial subordination as follows: "when an individual or institution consciously forgoes an opportunity to advance racial progress and does so for the sake of pursuing an important competing interest"); see also discussion *infra* Part II (describing subordination discourse in a Post-Jim Crow world).

<sup>8</sup> See *id.* at 4–5 (using the exposure of Donald Sterling as a racist and Mark Cuban's response to illustrate the non-nefarious character of important societal interests protected by racial subordinators).

<sup>9</sup> See discussion *infra* Part II B. For detailed discussion of subordination discourse, see generally BROOKS, *supra* note 3 (examining black inequality in America through the lens of subordination discourse).

<sup>10</sup> See, e.g., discussion *supra* note 1 and accompanying text (providing examples and support demonstrating Trump's racism).

<sup>11</sup> See *infra* Part II B (explaining how subordination analysis can provide a more fulsome examination of racial bias in seemingly race-neutral policies).

subordination discourse, it cannot possibly stay afloat under discrimination discourse's more accusatory tone. Trump's diversity model has absolutely no redeeming value if it cannot withstand scrutiny under a framework that suspends disbelief and disgust in the face of substantial evidence of racism. Such generosity would not ordinarily be extended under subordination discourse. This non-accusatory style of inquiry is normally not applied when policies or practices are clearly motivated by racism. In the case of Trump's diversity model, an exception is being made for the sake of intellectual inquiry and enlightenment.<sup>12</sup> Trump as President of the United States cannot be easily ignored.<sup>13</sup>

The main features of Trump's diversity model are set forth in Part I. Jobs and education are the most important components of this model. Part II presents the contours of subordination discourse, which is the framework I will use to critique Trump's diversity model. As applied to African Americans, subordination discourse sees the American race problem as three interrelated problems—socioeconomic, sociolegal, and sociocultural—each of which engages a diversity of perspectives—*traditionalism*, *reformism*, *critical race theory*, and *limited separation*—on how best to resolve the race problem in post-Jim Crow America.<sup>14</sup>

Part III applies subordination discourse to Trump's diversity model. I argue therein that Trump's diversity model speaks directly to socioeconomic diversity and, thus, impacts the socioeconomic race problem. Within that context, his approach fits squarely within traditionalism, as it seeks to vindicate the racial omission norm. This provokes no dearth of criticisms from other post-civil rights theorists.<sup>15</sup> Taken together, the non-traditionalists question the wisdom and effectiveness of a color-blind approach to diversity and inclusion.<sup>16</sup> In the end, this suggests that Trump's diversity model does not represent good social policy in post-Jim Crow America as it fails to enhance our racial democracy as much as it could and should.<sup>17</sup>

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<sup>12</sup> *Id.*

<sup>13</sup> *See id.* (“Trump’s theories are not disdainfully dismissed as the rants of a racist or the dogmatic views of a partisan. They are, instead, respectfully received and accorded elevated engagement.”).

<sup>14</sup> *See, e.g.*, BROOKS, *supra* note 3, at 11–13 (arguing that blacks face a tripartite race problem, and critically examining one of these problems, juridical subordination, in the context of competing non-nefarious normative stances).

<sup>15</sup> *See infra* Part II A.

<sup>16</sup> While Trump's diversity model is socioeconomic, it also has sociolegal and sociocultural implications. *See infra* notes 26–27 for examples of the sociolegal and sociocultural impacts of Trump's diversity model, and the discussion in Part III A for a critique of Trump's traditionalist approach to job creation.

<sup>17</sup> *See infra* note 80 and accompanying text (explaining the duties of American citizens in a democratic society and the importance of measurable achievements for racial progress).

## I. TRUMP'S DIVERSITY MODEL

The National Diversity Coalition For Trump “strongly supports President Donald Trump and his administration.”<sup>18</sup> The NDC’s mission is stated as follows:

Our group represents the voices of our communities. President Trump’s vision for the United States includes creating opportunities for men, women, and children of all racial, economic, and educational back-grounds. We support the President and his solutions that address economic disparities, foster job creation, support small businesses, preserve faith & family principles, and strengthen communities with conservative action. We will recruit, mobilize, and educate citizens to help us support President Trump and his administration throughout his presidency.<sup>19</sup>

Though shamelessly partisan, this statement leans toward a socioeconomic approach to diversity and inclusion. Jobs and education are the key components of this diversity model.

### A. Jobs

On numerous occasions, President Trump has proclaimed: “I will be the greatest president for jobs that God ever created.”<sup>20</sup> There is no doubt that jobs are important for racial advancement in our society. Jobs are the primary determinant of socioeconomic status for most Americans, including African Americans. President Trump believes that having a job is not just about receiving a paycheck; it is about sustaining a way of life. His policies are based on the idea that, “[f]rom [jobs] . . . will follow marriage, mortgages, and children, all the things that make us moral.”<sup>21</sup> Trump wants these benefits to extend to all Americans, blacks and whites alike.<sup>22</sup>

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<sup>18</sup>*NDC Mission*, NAT’L DIVERSITY COAL. FOR TRUMP, <http://ndctrump.com> [<https://perma.cc/KSF3-XJXX>].

<sup>19</sup> *Id.*

<sup>20</sup> See, e.g., S.A. Miller, *Donald Trump: ‘I’ll Be the Greatest President for Jobs That God Ever Created,’* WASH. TIMES (Sept. 28, 2016), <https://www.washingtontimes.com/news/2016/sep/28/donald-trump-ill-be-greatest-president-jobs-god-ev/> [<https://perma.cc/WBM6-EQW5>].

<sup>21</sup> See F.H. Buckley, *Conservatism: Trump and Beyond*, 60 MODERN AGE 7, 8–9 (2018) (arguing for the importance of employment to maintaining a moral identity, and explaining that Trump drew support from working-class voters because of his insistence on job creation).

<sup>22</sup> See *supra* text accompanying notes 18–19 (“President Trump’s vision for the United States includes creating opportunities for men, women, and children of all racial, economic, and educational backgrounds.”).

For Trump, job creation comes through growing the economy, and growing the economy comes in significant part from cutting taxes and regulations, with job-training and educational programs preparing workers to meet expanding economic opportunities. As a statement from the White House announced:

The economy has come roaring back to life under President Trump. The stock market has hit record high after record high, helping more Americans build wealth and secure their futures. Through needed tax cuts and reform, the Administration will bring jobs back to our country. The President is helping U.S. workers by expanding apprenticeship programs, reforming job training programs, and bringing businesses and educators together to ensure high-quality classroom instruction and on-the-job training.<sup>23</sup>

It is not unreasonable to conclude that job-creation is the number one objective of Trump's diversity model.<sup>24</sup>

### *B. Education*

Trump's diversity model includes education. Education Secretary Betsy DeVos and Attorney General Jeff Sessions have been the most conspicuous policy makers on education in the Trump Administration. DeVos champions school choice in K-12 education.<sup>25</sup> School choice gives parents the power to take control of their children's education to meet the unique educational needs of their children.<sup>26</sup> It gives working-class African-American parents, in particular, the option, similar to wealthy white parents, of placing their children in quality schools.<sup>27</sup> I suspect that the thinking is that these schools, in turn, become racially

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<sup>23</sup> *Economy & Jobs*, WHITE HOUSE, <https://www.whitehouse.gov/issues/economy-jobs> [<https://perma.cc/RZG9-6QWY>].

<sup>24</sup> See *infra* Part III A for further discussion of Trump's diversity model.

<sup>25</sup> Secretary's Proposed Supplemental Priorities and Definitions for Discretionary Grant Programs, 82 Fed. Reg. 47484 (proposed Oct. 12, 2017) (finalized Mar. 2, 2018, at 83 Fed. Reg. 9096) (proposing priorities outlining the Secretary's vision for education based on the idea that "[i]mproving education starts with allowing greater decision-making authority at the State and local level," especially for parents choosing schools).

<sup>26</sup> See *id.* at 47484–85 (placing a parent's right to choose a school as the first priority).

<sup>27</sup> See *id.* at 47485 (arguing that "every child, regardless of his or her ZIP code or family income, should have access to a high-quality education," and noting that parents who can choose their education through a private school are more satisfied with their school choice than parents who do not have a similar choice).



diverse as black parents exercise their choice to escape poor-performing schools. Charter schools play a central role in the administration's diversity plans.<sup>28</sup> Publicly funded, privately managed, and exempted from many rules applicable to traditional taxpayer-funded schools, charter schools will be made far more accessible to parents, including black parents, than they are today.<sup>29</sup>

While police reform was a priority in the Obama Justice Department, affirmative-action reform is a priority of the Trump Justice Department. Attorney General Jeff Sessions wants the department to focus on "investigations and possible litigation related to intentional race-based discrimination in college and university admissions."<sup>30</sup> The basis for this action, according to the Justice Department, is an unresolved administrative complaint filed by a group of 64 Asian-American associations during the last year of the Obama administration.<sup>31</sup> The complaint alleged that race-based admissions programs at Harvard and other elite colleges and universities discriminate against Asian American applicants, who tend to have high academic indicators.<sup>32</sup> A spokesperson for the Department commented: "The Department of Justice is committed to protecting all Americans from all forms of illegal race-based discrimination."<sup>33</sup> The fact that the Department specifically mentioned "race-based discrimination" suggests that it is targeting only race-based affirmative action, not class-based affirmative action.

One can certainly find other aspects of Trump's policies that reflect on his approach to diversity and inclusion. The Department of Education and Department of Justice, for example, have issued a joint letter withdrawing an Obama-administration letter protecting transgender students in public schools who wished to use bathrooms and facilities corresponding with their

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<sup>28</sup> See *id.* at 47492 (defining "educational choice" as including opportunities that extend beyond geographically assigned schools such as public charter schools or public magnet schools).

<sup>29</sup> See *infra* Part III B (discussing the characteristics of charter schools and how increasing access to these schools exemplifies Trump's diversity model).

<sup>30</sup> Lydia Wheeler, *Outrage Erupts Over Report DOJ Will Target Affirmative Action*, THE HILL (Aug. 2, 2017, 12:05 PM), <http://thehill.com/regulation/administration/344948-outrage-erupts-over-report-doj-will-target-affirmative-action> [<https://perma.cc/EZ5C-M3JM>] (citation omitted).

<sup>31</sup> *Id.*

<sup>32</sup> Complaint Against Harvard University and the President and Fellows of Harvard College Regarding Discrimination Against Asian-American Applicants in the College Admissions Process, COAL. ASIAN-AMERICAN ASS'N 1 (May 15, 2015), <http://asianamericanforeducation.org/wp-content/uploads/2015/09/Complaint-Against-Harvard-University.pdf>.

<sup>33</sup> *Id.* See also Charlie Savage, *Justice Dept. to Take On Affirmative Action in College Admissions*, N.Y. TIMES (Aug. 8, 2017), <https://www.nytimes.com/2017/08/01/us/politics/trump-affirmative-action-universities.html> [<https://perma.cc/KVS4-D6QB>] (describing the new initiative within the Justice Department and the likely courses of action to be taken by Department officials).

gender identity.<sup>34</sup> What becomes clear as one studies Trump's civil rights policies in whole or in part is that they are intended to be facially neutral. This signifies that Trump's general approach to diversity and inclusion embraces the racial omission, or color-blind, norm articulated by many conservative scholars in the decades after Jim Crow ended. Subordination discourse has much to say about this approach.

## II. A FRAMEWORK FOR THE POST-JIM CROW RACE PROBLEM

### A. *Post-Civil Rights Norms*

President Trump believes that his socioeconomic diversity model is sufficiently responsive to the American race problem and, hence, supportive of our racial democracy. Indeed, the president often touts his record on black unemployment—"African American unemployment is the lowest ever recorded in our country"<sup>35</sup>—as a major victory in the fight for racial equality. After Kanye West and other blacks tweeted approval of Trump's policies toward African Americans, President Trump tweeted: "Kanye West has performed a great service to the Black Community—Big things are happening and eyes are being opened for the first time in Decades—Legacy Stuff! Thank you also to Chance and Dr. Darrell Scott, they really get it (lowest Black & Hispanic unemployment in history)."<sup>36</sup>

The reason President Trump believes his socioeconomic diversity model can resolve the whole of the race problem and enhance our racial democracy is because he defines the race problem as essentially a socioeconomic problem. That may be shortsighted, however. I have argued in the past that there is not one but three interrelated race problems in post-civil rights America: socioeconomic; sociolegal; and sociocultural.<sup>37</sup> Trump's socioeconomic diversity model carries both sociolegal<sup>38</sup> and socio-

<sup>34</sup> Ariane de Vogue, Mary Kay Mallonee, & Emanuella Grinberg, *Trump Administration Withdraws Federal Protections for Transgender Students*, CNN (Feb. 23, 2017), <https://www.cnn.com/2017/02/22/politics/doj-withdraws-federal-protections-on-transgender-bath-rooms-in-schools/index.html> [<https://perma.cc/MB58-Z3DJ>].

<sup>35</sup> Donald J. Trump (@realDonaldTrump), TWITTER (Jan. 8, 2018, 6:20 AM), <https://twitter.com/realdonaldtrump/status/950371619247153154> [<https://perma.cc/9FU3-QD7G>].

<sup>36</sup> See Donald J. Trump (@realDonaldTrump), TWITTER (Apr. 27, 2018, 6:11 AM), <https://twitter.com/realdonaldtrump/status/989854486310113282> [<https://perma.cc/G9UG-KDWN>] (posting in response to tweets from high-profile African American supporters).

<sup>37</sup> BROOKS, *supra* note 3, at ix.

<sup>38</sup> For example, President Trump's policy calling for the abolition of race-based affirmative action in college admissions, *see infra* text accompanying notes 98-100 ("In post-secondary

cultural<sup>39</sup> implications, but he does not deal with these problems directly. To that extent, his diversity model is too narrow to deal with the full range of racial problems African Americans face. Notwithstanding that, it is instructive to look into his socioeconomic vision.

President Trump's basic approach to socioeconomic issues is that of a traditionalist. Traditionalism is one of four theories or strategies for racial progress that African Americans and other supporters of civil rights have articulated since the end of Jim Crow, or the beginning of the post-civil rights era. Competing with traditionalists are reformists, critical race theorists, and limited separatists.<sup>40</sup>

Fully developed elsewhere,<sup>41</sup> the four post-civil rights theories can be summarized as follows. Traditionalists believe at their core that while racism still exists in our society, it is not potent enough to prevent African American from achieving worldly success and personal happiness.<sup>42</sup> To that extent, race no longer matters. Ergo, traditionalists believe in color-blind governmental policies; policies that vindicate the racial omission norm.<sup>43</sup> Reformists just as

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education, Trump's diversity model rejects race-based affirmative action."), runs afoul of Supreme Court cases upholding such affirmative action. *See infra* note 61 and accompanying text. It is worth noting that Trump's Justice Department argues that Title VII of the 1964 Civil Rights Act, the main federal employment discrimination statute, does not protect the LGBTQ community from employment discrimination. *See* Alan Feuer, *Justice Department Says Rights Law Doesn't Protect Gays*, N.Y. TIMES (July 27, 2017), <https://www.nytimes.com/2017/07/27/nyregion/justice-department-gays-workplace.html> [<https://perma.cc/F5L2-KUQC>] (quoting Justice Department filings arguing that Title VII does not reach sexual orientation discrimination, and that "[a]ny efforts to amend Title VII's scope should be directed to Congress rather than the courts").

<sup>39</sup> Trump's diversity model asks blacks to jettison their racial identity by assimilating into a white mainstream culture, one devoid of references to race. Assimilation is the preferred diversity model for traditionalists in the sociocultural context. *See* BROOKS, *supra* note 3, at 107 (identifying traditionalism's core belief that "race no longer matters," and that continued racial disparities are a result of a person's inability to assimilate with white middle-class values). The suppression of black identity in the mainstream constitutes cultural subordination from the perspective of most non-traditionalist theorists. *See id.* at 110–11 (offering the *Cosby Show* as an example of cultural subordination). Some reformists as well as all critical race theorists would insist that black values be blended into our mainstream culture, *see id.* at 118–19, 123–25, and limited separatists would feature black values in one of the stand-alone, mainstream cultures that they envision populating our society, *see id.* at 128.

<sup>40</sup> *See* ROY L. BROOKS, *RACIAL JUSTICE IN THE AGE OF OBAMA* xv (2009) (synthesizing and critiquing theories attempting to explain and resolve racial injustice in our post-Jim Crow society).

<sup>41</sup> For more in-depth analysis of these theories, *see id.* and BROOKS, *supra* note 3, at 107 (providing more resources that give in-depth analysis on the four post-civil rights theories).

<sup>42</sup> BROOKS, *supra* note 3, at 107.

<sup>43</sup> On the basis of their core belief that race no longer matters, traditionalists offer a comprehensive theory of racial equality covering all three dimensions of the race problem. They argue

strongly believe the converse is true: race still matters, and for that reason, governmental policies must be race-conscious to the extent necessary to promote racial integration.<sup>44</sup> Critical race theorists insist that white hegemony matters most, that the problem of race is inextricably linked to power. Based on that core belief, critical race theorists promote governmental policies designed to effectuate social transformation.<sup>45</sup> Finally, limited separatists maintain that

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that blacks can only make progress in today's society: socioeconomically, by taking personal responsibility and stop blaming racism for racial disparities; sociolegally, by the Supreme Court vindicating the racial omission norm in civil rights cases; and socioculturally, by assimilating into the mainstream culture. Viewed in terms of subordination discourse, this means that: socioeconomic subordination arises when individuals or institutions (public or private) suppress the black equality claim by treating blacks as hapless victims in need of special treatment; juridical subordination occurs when the Supreme Court suppresses the racial omission norm in civil rights cases, as in affirmative action decisions wherein the racial integration norm trumps the racial omission norm; and cultural subordination is manifested when individuals or institutions suppress cultural assimilation. *See* BROOKS, *supra* note 3, at 107–118 (examining traditionalism and its tenet of cultural assimilation); BROOKS, *supra* note 40, at 14–34 (distilling and critiquing traditionalist arguments and prescriptions).

<sup>44</sup> On the basis of their core belief that race still matters, reformists offer a comprehensive theory of racial equality that covers all three dimensions of the race problem. They argue that blacks can only achieve racial progress in our post-Jim Crow society socioeconomically through systemic eradication of racism and discriminatory traditions and by blacks creating a family-based self-help program designed to combat racial despair (“black nihilism”); sociolegally, if the Supreme Court prioritizes the racial integration norm in civil rights cases; and socioculturally, by biculturalism (respect cultural identity in private). Viewed in terms of subordination discourse, this means that: socioeconomic subordination is manifested when individuals or institutions (public or private) suppress racial integration, however race-conscious; juridical subordination occurs when the Supreme Court suppresses the racial integration norm in civil rights cases, as in decisions that reject affirmative action on grounds that the racial omission norm should trump the racial integration norm; and cultural subordination takes place the mainstream culture suppresses biculturalism. *See* BROOKS, *supra* note 3, at 123–127 (analyzing biculturalism espoused by reformists); BROOKS, *supra* note 40, at 35–62 (distilling and critiquing reformist arguments and prescriptions).

<sup>45</sup> On the basis of their core belief that white hegemony matters, critical race theorists offer a comprehensive theory of racial equality covering all three dimensions of the race problem. Critical race theorists strongly believe that blacks can only achieve socioeconomic equality, now as in the past, through social transformation (undoing the white-male power structure understood through Marx's determinism or Hegel's dialectic materialism), sociolegal equality when the Supreme Court effectuates social transformation through its civil rights decisions, and sociocultural equality through transculturalism (a blending of all cultures into a new melting pot) in mainstream American institutions. Accordingly, socioeconomic subordination is established when individuals or institutions (public or private) suppress efforts to transform the structural or ideological relationship between race and power within their spheres of influence. Juridical subordination is manifested when the Supreme Court's civil rights decisions perpetuate white hegemony by suppressing social transformation. Cultural subordination takes place when the mainstream culture suppresses transculturalism. *See* BROOKS, *supra* note 3, at 118–123 (defining

black solidarity or identity matters most, that the best place to find a helping hand is at the end of your own arm. They, therefore, champion governmental policies that support black institutions or validate black identity.<sup>46</sup>

### *B. Subordination Discourse*

The critical point to understand about these post-civil rights theories is that each has a duality. On the one hand, each theory seeks to advance racial progress for African Americans in its own way. That is, each theory prescribes norms that are both rhetorical and regulatory. Each norm—racial omission, or color blind (traditionalism), racial integration (reformism), social transformation (critical race theory), and racial identity (limited separation)—tenders a conceptually legitimate strategy for racial equality in post-Jim Crow America. Each norm brings to the table a particular course of governmental or private action and, in the process, creates a vision, albeit contested, of what racial equality looks like in our post-civil rights society.

Although conceptually sound, each post-civil rights norm can be operationally flawed under a given set of circumstances. The problem, in other words, is that anyone of these norms can be a source of racial inequality that is non-nefarious, unlike racism. Each norm has the potential to impede or freeze racial progress for the sake of pursuing its own conceptually legitimate interest. What this means, then, is that racism, a nefarious source we all know and hate, is not the only basis on which racial progress can be blocked or delayed.<sup>47</sup>

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transculturalism and critiquing its utility); BROOKS, *supra* note 40 at 89–108 (distilling and critiquing critical race theory arguments and prescriptions).

<sup>46</sup> On the basis of their core belief that racial solidarity or identity matters most, limited separatists provide a comprehensive theory of racial equality covering all three dimensions of the race problem. They argue that racial progress can only come about in our post-civil rights society socioeconomically through social and economic integration within black society (an internal integration in which all black classes live together), sociolegally when the Supreme Court upholds the legality of black institutions (e.g., HBCUs) designed to benefit blacks without excluding whites, socioculturally when the mainstream culture accepts cultural pluralism (racially identifiable communities or institutions that do not practice racial exclusion). Socioeconomic subordination is thus engendered when individuals or institutions (public or private) suppress black communities or institutions. Juridical subordination occurs when the Supreme Court suppresses black solidarity or identity. And cultural subordination is manifested when the mainstream culture suppresses cultural pluralism. *See* BROOKS, *supra* note 3, at 127–133 (considering the principles behind limited separatism and how it envisions cultural pluralism); BROOKS, *supra* note 40, at 63–79 (distilling and critiquing critical race theory arguments and prescriptions).

<sup>47</sup> *See* BROOKS, *supra* note 3, at 4–5 (providing an example of racial subordination and explaining the harmful effects of failing to address the issue).

Yet conventional civil rights analysis—discrimination discourse—fails to adequately account for non-nefarious sources of racial inequality. Progressive scholars engaged in discrimination discourse treat all structural sources of racial inequality (nefarious and non-nefarious) as illegitimate;<sup>48</sup> while conservative theorists treat non-nefarious structures as racially innocent.<sup>49</sup> The former paint too broadly and the latter paint too narrowly. Subordination discourse, in contrast, recognizes the legitimacy of non-nefarious sources of racial inequality but denies their power to carry the day when they freeze or impede racial progress without an exceedingly important societal reason for doing so. Hence, subordination discourse provides a method that can be used to challenge non-nefarious sources of racial inequality (which at some level might please progressives but not conservatives) while still recognizing the presumptive morality of such sources (which at another level might please conservatives but not progressives). I explained the significance of subordination discourse on another occasion:

I do not argue that racial subordinators should be taken off the hook; I simply argue that they are on a different hook [than racists]. Racial subordination and racism have racial implications . . . but they are not coterminous concepts. There is . . . no racial animus or racial stereotyping motivating . . . [a subordinator's] actions. Hence, challenging the mind-set of . . . [a subordinator]

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<sup>48</sup> See *id.* at 4 (discussing critical race theorists and progressive social scientists who view racial subordination as a form of racism). Perhaps the one person who has been most responsible for shaping this view of racism is Joe Feagin, my dear friend for many years and a mentor to me and, through his more than 70 books, a mentor to countless other legal scholars. See, e.g., *SYSTEMIC RACISM: MAKING LIBERTY, JUSTICE, AND DEMOCRACY REAL* vii (Ruth Thompson-Miller & Kimberley Ducey eds., 2017) (featuring contributions from over two-dozen scholars paying tribute to one of Professor Feagin's most important contributions, "systemic racism," which moves "the sociological study of race from the social-psychological level of individuals' prejudice and discrimination to the social-structural level of institutionally embedded oppression."). I find this line of argument to be compelling except for the fact that it does not allow us to distinguish a white supremacist or prejudiced discriminator from a Supreme Court Justice who, based on traditional legal grounds, such as *stare decisis* or federalism, issues a ruling that disadvantages African Americans.

<sup>49</sup> See BROOKS, *supra* note 3, at 1–2 & 4–5 (discussing Mark Cuban who saw his defense of Donald Sterling's blatant racism, on grounds of privacy and property norms, as racially innocent). Certainly Supreme Court justices see all their civil rights rulings as racially innocent. See, e.g., *Shelby County v. Holder*, 133 S. Ct. 2612 (2013) (overturning Section 4(b) of the 1965 Voting Rights Act). But when a ruling impedes racial progress, as in the case of *Holder*, such "juridical subordination" is not racial innocence because "*it makes it more difficult for blacks to climb out of the abyss of racial degradation wrought by slavery and Jim Crow.*" BROOKS, *supra* note 3, at 3, 5, 9–11. (emphasis in original).

is far more difficult than confronting the motivation of . . . [a racist]. Because of his moral depravity, . . . [a racist's] racially harmful action is easily dismissed. Because he is motivated by what one must admit are legitimate reasons, . . . [a subordinator's] racially harmful conduct cannot be so easily ignored.

We need to look at the process of racial inequality as well as its effects. Reducing all racial inequality to racism artificially simplifies the problem of race as well as its solution: just get rid of all the racists. But African Americans will still face racial inequality even after all the racists leave town. Thus, we unwittingly allow other forms of racial wrongdoing to fly under the radar when we treat racism as the reason for all racial wrongdoing. Furthermore, we give racial wrongdoers a convenient defense that shuts down discussion: "I'm not a racist, so I'm walking away from this insult." Injecting subordination discourse into discussions of racial inequality holds the racial wrongdoer personally accountable for impeding racial progress.<sup>50</sup>

While many of Trump's policies should certainly be subjected to discrimination discourse,<sup>51</sup> I think it makes sense to scrutinize his diversity model under subordination discourse because Trump's approach to diversity and inclusion aligns with traditionalism. Treating Trump as a traditionalist means that the presumption of disdain normally reserved for the views of a suspected racist is removed from our evaluation of the message. Trump's diversity model is accorded moral respect because traditionalists, like other post-civil rights theorists, have respectable motives—the genuine desire for racial progress being the primary one. Thus, if Trump's traditionalist diversity model fails, it does so not because it was silenced or belittled as racist, but because it was given a respectful hearing.

Subordination discourse engages a sustained interaction between the president's views on diversity and post-civil rights theories that challenge those views. All hands are on deck. Unlike discrimination discourse, there is crossover and cross-fertilization involving a diversity of racial perspectives. These exchanges give Trump's message a patina of morality. The president, in effect, is given a seat at a table reserved for truth-seeking civil rights scholars. Sitting at this table, Trump's theories are not disdainfully dismissed as the rants

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<sup>50</sup> *Id.* (alteration in originals added).

<sup>51</sup> See *supra* note 1 for examples of racism, which form the subject-matter of discrimination discourse analysis.

of a racist or the dogmatic views of a partisan. They are, instead, respectfully received and accorded elevated engagement. By endeavoring to analyze Trump's diversity model under subordination discourse, I am, in short, giving his diversity message the benefit of the doubt.<sup>52</sup>

### III. CRITIQUE OF TRUMP'S DIVERSITY MODEL

I shall focus on jobs and education. These are the main components of Trump's socioeconomic diversity model. My analysis will, however, be illustrative rather than comprehensive. I wish to begin a discussion, not end all discussion.

#### A. Jobs

President Trump's socioeconomic diversity model echoes traditionalism. His vision of "creating opportunities for men, women and children of all racial, economic and educational backgrounds"<sup>53</sup> self-consciously eschews race and "identity politics." In response, reformists, critical race theorists, and limited separatists would severely criticize Trump's supposedly race-neutral approach.

First, they would argue that, contrary to his claim of racial neutrality, Trump is, in fact, playing favorites. "Race neutrality" means being friendly or impartial to all races. But, like all traditionalists (as well as limited separatists who happen to be more transparent about it<sup>54</sup>), Trump rejects one form of identity—ethnic identity—in favor of another form—white identity. He labels the former as "identity politics" and touts the latter as "racially neutral."<sup>55</sup> Reformist Michael Eric Dyson writes:

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<sup>52</sup> See *supra* text accompanying notes 7–9 (making the point that, unlike discrimination discourse, subordination discourse assumes non-nefarious motivation behind racial disadvantage).

<sup>53</sup> NATIONAL DIVERSITY COAL. FOR TRUMP, *supra* note 18.

<sup>54</sup> Limited separatists favor black identity for blacks but also recognize and respect other legitimate identities (white supremacy being an example of an illegitimate identity). See note 33 and accompanying text (summarizing the views of limited separatists).

<sup>55</sup> White identity is conventionally informed by white-middle-class values, and these values shape the American mainstream culture more than other set of values. BROOKS, *supra* note 3, at 95–96. Trump has, however, endeavored to elevate white-working-class identity (including its proclivity toward racism) to mainstream status. This has prompted many middle-class whites to complain that they do not recognize Trump's America. See, e.g., *supra* sources cited in note 1 (discussing Trump's racism). See also JON MEACHAM, THE SOUL OF AMERICAN: THE BATTLE FOR OUR BETTER ANGELS 4 (2018) (condemning Trump's attempt to draw moral equivalency between both supporters and opponents of white supremacy who clashed in Charlottesville, Virginia, August 2017); Chris Carroll, 'What the Hell Just Happened to Our Country?' Steve Almond asks, and tries to answer. WASH. POST (Apr. 27, 2018) <https://www.washingtonpost.com/outlook/>



If there is a dirty secret in American life it is this: the real unifying force in our national cultural and political life, beyond skirmishes over ideology and party, is white identity masked as universal, neutral, and therefore quintessentially American. The greatest purveyors of identity politics today, and for the bulk of our country's history, have been white citizens. This means that among the oldest forms of "fake news" in the nation's long trek to democratic opportunity has been the belief that whiteness is identical to the ideal of what it means to be American.<sup>56</sup>

Second, and more substantively, all non-traditionalists would take issue with Trump's color-blind approach to diversity for its failure to give any attention to the structural problem of racial discrimination that African Americans face much more so than whites. But Trump and other traditionalists would counter-argue that color-blind socioeconomic diversity works. They base their position primarily on black unemployment. As BET founder Robert L. Johnson, America's first black billionaire, has said:

You have to take encouragement from what's happening in the labor force and the job market. . . . When you look at African American unemployment, in over 50 years since the Bureau of Labor Statistics has been keeping the numbers, you've never had two things: African American unemployment this low and the spread between unemployment among whites and African Americans narrowing. That absolutely means the jobs market is soliciting employees who have been out of the labor force, some

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what-the-hell-just-happened-to-our-country-steve-almond-asks-and-tries-to-answer/2018/04/26/02512d7e-39ba-11e8-acd5-35eac230e514\_story.html?noredirect=on&utm\_term=.9c1021081722 [https://perma.cc/3CPN-TQ25] (summarizing Steven Almond's new essay collection *BAD STORIES: WHAT THE HELL JUST HAPPENED TO OUR COUNTRY* (2018), in which Almond argues that Trump's racist and authoritarian appeals helped him win the election). Some conservatives also have also denounced Trump's policies overall. See, e.g., Charles J. Sykes, *As a conservative, I despair at Republicans' support for Trump. His vision is not conservatism*, THE GUARDIAN (July 22, 2018), https://www.theguardian.com/commentisfree/2018/jul/22/conservative-despair-republicans-trump [https://perma.cc/8Z2F-YJCE] ("It is hard to refute those who say Trumpism is a product of conservatism but refute them we must. We are better than this."). For a comparison of white working-class and middle-class values, see BROOKS, *supra* note 3, at ch. 3. For a discussion of black values, see *id.* at 98–103.

<sup>56</sup> MICHAEL ERIC DYSON, *WHAT TRUTH SOUNDS LIKE: RFK, JAMES BALDWIN, AND OUR UNFINISHED CONVERSATION ABOUT RACE IN AMERICA* 65 (2018). Certainly, limited separatists also play identity politics, but they are more transparent about it than traditionalists. See *supra* Part II A (discussing the importance of black solidarity for limited separatists).

of it just based on discrimination, some of it based on changes in education, access and technology changes. . . . And so when you look at that, you have to say something is going right.<sup>57</sup>

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<sup>57</sup> Tracy Jan, *America's First Black Billionaire Says Trump Economy Has Been Good for African Americans*, WASH. POST: WONKBLOG (Apr. 7, 2018), <https://www.washingtonpost.com/news/wonk/wp/2018/04/07/americas-first-black-billionaire-says-trump-economy-benefits-black-americans/> [<https://perma.cc/PLM9-SAHL>]. Given Trump's racism, *see supra* note 1, one wonders how African American traditionalists can continue to support Trump. It is possible that these African Americans believe that the president's successful socioeconomic record trumps (pun intended) his racism. For example, Tim Scott, the black Republican Senator from South Carolina, was able to get the president to sign the billion-dollar Investing in Opportunities Act which provides tax incentives for investments in designated "opportunity zones" located in impoverished areas around the country, many of which are black communities. Jim Tankersly, *Tucked into the Tax Bill, a Plan to Help Distressed America*, N.Y. TIMES (Jan. 29, 2018), <https://www.nytimes.com/2018/01/29/business/tax-bill-economic-recovery-opportunity-zones.html> [<https://perma.cc/5KMG-XABE>] (discussing the implications of the Investing in Opportunities Act). This legislation was part of the president's Tax Overhaul Bill. *Id.* The president's support for the legislation may have been reason enough for the senator, a Tea Party conservative, to refrain from disavowing Trump's presidency. While he may have calculated that cutting ties with Trump may have been too harmful to blacks or too punitive for a president who was delivering socioeconomically, the senator has managed to distance himself from the president's racist remarks, though, again, not from the presidency itself. For example, Senator Scott took issue with the president's attempt to find moral equivalency between white supremacists and those who opposed them in the rampage at Charlottesville, Virginia in 2017. *See supra* note 1 for relevant discussion. The senator tweeted: "There is absolutely NO gray area when it comes to condemning groups who breed on racism, hate and division." Tim Scott (@SenatorTimScott), TWITTER (Aug. 15, 2017, 6:50 PM), <https://twitter.com/SenatorTimScott/status/897635665738956800> [<https://perma.cc/7EZW-57NU>]. The Senator has frequently spoken out against racism. The year before that tweet, Senator Scott stood on the floor of the Senate to tell the world that he had been racially profiled by police officers seven times in the year in which he was appointed to fill the legislative seat to which he was subsequently elected. "GOP Sen. Tim Scott on politics, race and Trump," CBS NEWS (Aug. 12, 2018, 10:16 AM), <https://www.cbsnews.com/news/gop-sen-tim-scott-on-politics-race-and-trump/> [<https://perma.cc/2V2Z-TNZP>]. And while he did not speak out against displaying Confederate military leaders or symbols on public land, Senator Scott considered these memorials to be helpful reminders of the progress made against racism. *See* Alex Thompson, *The Fight Over Confederate Statues Could Make or Break Democrats*, VICE NEWS (Aug. 18, 2017), [https://news.vice.com/en\\_us/article/ned987/the-fight-over-confederate-statues-could-make-or-break-democrats](https://news.vice.com/en_us/article/ned987/the-fight-over-confederate-statues-could-make-or-break-democrats) [<https://perma.cc/KP9R-8FEL>] (alteration in original) (quoting Senator Tim Scott's opinion that Confederate markers or monuments do not require removal, but that "keeping the markers and monuments is a wonderful way of reminding us of how dark the human soul can get and how bright the light can be afterwards"). Thus, it would appear that Senator Scott certainly identifies with African Americans, males most particularly. In addition, he suggests that his support for Trump goes beyond trading horses. He says that he believes Trump is not a racist ("I'm in the 20% that does not believe that he's a racist."), and that if he thought otherwise, he would not disrespect himself by supporting Trump's presidency no matter how many socioeconomic

The reformists have at least four responses. First, “[w]hile it’s true that the black unemployment rate reached [during the first year of the Trump Administration], its lowest level in decades, the rate has been in steady decline for about the last seven years.”<sup>58</sup> Second, but for structural conditions, both past and present, the black unemployment rate would be even closer to the white rate.<sup>59</sup> Third, we must not only look at the racial differential in

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goodies Trump brought to the table. See *GOP Sen. Tim Scott on Politics, Race and Trump*, CBS NEWS (Aug. 12, 2018, 10:16 AM), <https://www.cbsnews.com/news/gop-sen-tim-scott-on-politics-race-and-trump/> [<https://perma.cc/WLF3-J6YH>]. For Senator Scott, truth, honesty, and integrity are non-negotiable. *Id.* (“I have a responsibility to who I’m going to be when I leave this office . . . To not [raise uncomfortable issues with Trump] would be to deny a part of who I am. And that’s just unacceptable as an elected official, but more importantly it’s unacceptable as a human being.”). See also TIM SCOTT & TREY GOWDY, *UNIFIED: HOW OUR UNLIKELY FRIENDSHIP GIVES US HOPE FOR A DIVIDED COUNTRY* (2018) (describing the friendship between Tim Scott and Trey Gowdy and their life stories). Yet, it could be argued that the senator is turning a blind eye to the truth about Trump’s racism to give himself cover to support a president whose policies he mostly agrees with. Hence, there may be some horse trading going on here.

<sup>58</sup> Robert Farley, *Trump Takes Undue Credit on Black Unemployment*, FACTCHECK.ORG: THE WIRE (Jan. 30, 2018), <http://www.factcheck.org/2018/01/trump-takes-undue-credit-black-unemployment/> [<https://perma.cc/5WWS-YWC2>].

<sup>59</sup> For example, studies have shown that resumes with “black sounding” names, like Jamal or Lakisha, are less likely to get a response than resumes with “white sounding” names, like Emily or Brendan. Dina Gerdeman, *Minorities Who ‘Whiten’ Resumes Get More Job Interviews*, FORBES (May 17, 2017), <https://www.forbes.com/sites/hbsworkingknowledge/2017/05/17/minorities-who-whiten-resumes-get-more-job-interviews/#361ea8b47b74> [<https://perma.cc/RE4R-FF5T>]. Though the data slightly predates Trump’s presidency, it is worth noting that, “[a]mong all U.S. companies with 100 or more employees, the proportion of black men in management increased just slightly—from 3% to 3.3%—from 1985 to 2014.” Frank Dobbin & Alexandra Kalev, *Why Diversity Programs Fail*, 94 HARV. BUS. REV. 52, 54 (July–Aug. 2016). Another study discussed how “women of color face biases unique to their racial or ethnic background as well as their gender.” Tanzina Vega, *Working While Brown: What Discrimination Looks Like Now*, CNN (Nov. 25, 2015, 12:04 AM), <http://money.cnn.com/2015/11/25/news/economy/racial-discrimination-work/index.html> [<https://perma.cc/WD7N-MPKR>]. In this study, 77% of black women scientists (compared to 66% of women scientists in general) reported having to provide more evidence of competence than men. *Id.* (“Black women often feel like they can't make a single mistake . . . . They would lose all credibility.”). These statistics do not capture the human dimension of racial discrimination. Some of my former black students have had to turn down employment offers received from employers located in racially hostile cities or towns. They would apply for an apartment only to be told that the apartment was no longer available once the manager saw who the person he had been speaking with on the phone was. One of my students even rented a pickup truck to try to fit in. She also purchased lunch at a Mediterranean food truck located outside the courthouse where she was going to begin working in a couple of weeks. But when she asked to join a table of male employees to eat her lunch, instead of staying at the table with her, the men got up to leave. They stood and continued talking and eating their lunch without acknowledging her presence. She had just finished taking the bar exam when this happened to

unemployment, but also in net family wealth, income, home ownership, and other socioeconomic areas.<sup>60</sup> Fourth and perhaps most importantly, reformists would fault the president's diversity model for not including hiring and promotional preferences in the workplace. Historically, such preferences have played a substantial role in creating employment opportunities for blacks, especially in high-level jobs.<sup>61</sup>

Traditionalists, in response, would argue that racial preferences are not needed to create jobs for blacks or to otherwise promote racial diversity in employment. While traditionalists certainly acknowledge the presence of racism in our society, they insist that racial discrimination is not potent enough to prevent African Americans in our post-Jim Crow society from achieving socioeconomic success.<sup>62</sup> Look at all the successful African Americans, including a two-term president of the United States. Look at all the immigrants who come to American with zero or near-zero resources and succeed. Simply put: race no longer matters. We as a society need not and ought not make too much of race lest we ignite racial divisions in our society and undercut the African American claim of racial equality.<sup>63</sup>

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her. This experience made her feel humiliated and embarrassed. Though she realized that, as a black professional woman, she would have to live with racism, she declined the job offer, and was left without employment, because she did not want to start her professional career working and living in a racially hostile environment with so little racial support.

<sup>60</sup> See BROOKS, *supra* note 40, at 37–48 (discussing the many barriers blacks face in all aspects of society).

<sup>61</sup> See *id.* at 50–52 (discussing the critical importance of education in the future employment of black children, and providing examples of reformist responses to racism). Reformists would also note that Trump's rejection of race-based affirmative action in college admissions, *see infra* Part III B, could have a negative impact on unemployment, making blacks less highly educated, and hence, less employable. Reformists have made several sociolegal proposals designed to strengthen our employment discrimination laws. For example, rather than placing the burden of proof as to the defendant's state of mind in cases involving intentional discrimination, reformist would want the burden placed on the defendant as the defendant is in the best position to know its state of mind. The defendant is in the best position to know the truth, which increases the likelihood of getting to the truth. See BROOKS, *supra* note 40, at 51–52 (relating the difficulties of bringing employment discrimination claims for minorities).

<sup>62</sup> “[L]ike Sowell, O’Reilly makes it clear that he does not see race as a material factor in sustaining disparate resources. He believes there are very few racists in our society today who can hurt blacks: ‘Racism is death in corporate America, in law enforcement, in the media, in the military, in politics, and in every other powerful institution in the U.S.A.’ . . . Like O’Reilly, other traditionalists, such as Dinesh D’Souza, do not believe ‘racism today . . . [is] potent enough and widespread enough’ to prevent blacks from accumulating sufficient resources.” BROOKS, *supra* note 40, at 16–17.

<sup>63</sup> See *supra* Part II A (relating President Trump's view of the socioeconomic race problem). For an extensive discussion, see BROOKS, *supra* note 40, at ch. 2 (discussing traditionalist theory in more detail).

Trump the traditionalist is also saying that the socioeconomic race problem is, in reality, an internal problem. It is a problem generated by black values and behavior and, therefore, only blacks can resolve the problem. Like all traditionalists, Trump sees the civil rights movement and all its racially enlightened laws and attitudes as an intervening agent that effectively eradicated any continuing impact slavery or Jim Crow might have exerted on the socioeconomic conditions of blacks in contemporary America. Indeed, traditionalists see a proclivity toward dysfunctional behaviors and attitudes among the poor and working-class in the black community as the only remaining plausible explanation for the resource deficit we see in the African American community.<sup>64</sup> Traditionalists point to the alleged lack of educational drive, out of wedlock children, black-on-black crime, drug use, and other social pathologies as reasons for the racial disparities we see in black society post-Jim Crow.<sup>65</sup>

Reformists flatly reject this line of argument. They assert that traditionalist reasoning over-simplifies the socioeconomic race problem by removing slavery, Jim Crow, and other racial barriers from the diversity equation. This exclusion, made in deference to the racial omission norm, gives Trump's diversity model a Pollyannaish flavor:

Reformists . . . adamantly maintain that slavery and Jim Crow continue to have lingering effects that limit opportunities for resource development. In addition, they insist that white racism has simply moved from the "frontstage" to the "backstage," and societal discrimination is a force to be reckoned with. . . . [R]eformists . . . stress the exogenous nature of th[e] internal problem. Bad behaviors and bad values, they argue, are conditioned by the external factor of race. The dysfunctional cultural orientation that we see in some black communities is, in other words, racialized. Most importantly, reformists, unlike traditionalists, strongly believe that the internal factors are no match for the external ones, that the latter are the major factors that sustain disparate resources.<sup>66</sup>

If the race problem were only an internal problem, reformists continue, then it stands to reason that middle-class African Americans would have exper-

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<sup>64</sup> See BROOKS, *supra* note 40, at 15–16 (describing the traditionalist approach to the socioeconomic race problem, which contends that "capital deficiencies in today's black society are sustained by circumstances for which blacks themselves are responsible").

<sup>65</sup> See *id.* (explaining how traditionalists consider these conditions to be symptoms of a "dysfunctional cultural orientation in black society").

<sup>66</sup> *Id.* at 36.

ience greater socioeconomic success than they have to date.<sup>67</sup> This group of African Americans is doing everything socioeconomically that traditionalists like Trump insist poor and working-class blacks should be doing—getting an education and good jobs—but still there is a substantial socioeconomic disparity between them and their white counterparts. For example, the racial wage gap between college-educated males has gotten *wider* since the end of Jim Crow.<sup>68</sup>

Like the reformists, critical race theorists and limited separatists would point to the failure of Trump's diversity model to give sufficient attention to structural constraints on racial progress. In so doing, these more progressive theorists would raise what may be the critical question regarding the effectiveness of Trump's socioeconomic diversity model. This question emerges in an exchange between critical race theorists and limited separatists. The exchange is responsive to the reformists' critique of Trump's diversity model just explained. It begins with the limited separatist.

Limited separatists would agree with reformists that Trump's diversity model fails to address the exogenous nature of the self-defeating attitudes and behaviors exhibited by many blacks within the lower socioeconomic classes. They would, however, assert that more than the effects of lingering or present-day discrimination, a combination of other factors have had a greater impact on the internal race problem.<sup>69</sup> One such factor is racial integration, which usually came at the expense of racial solidarity. The black community's thirst for racial integration, its socially constructed integrationist impulse has led to the exodus of stable black families and talented black individuals from black communities post-Jim Crow, limited separatists would argue. This intra-racial separation—the separation of middle-class blacks from poor and working-class blacks—has created a socioeconomic and cultural void in once-stable black communities. These weakened communities, with their depleted financial, human, and social resources, are unable to deal effectively with structural forces that have always threatened black communities.<sup>70</sup>

In response, critical race theorists would say that both the reformists and limited separatists' critiques of Trump's diversity model merely skim the surface. Missing from both critiques is the deeper point that Trump's diversity

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<sup>67</sup> *Id.* at 46–47 (offering examples used by reformists including a statistical approach showing greater capital deficiencies and discrimination among middle-class blacks than middle-class whites).

<sup>68</sup> *Id.* at 148 (fig. 38).

<sup>69</sup> *Id.* at 78 (unlike reformists, “limited separatists also argue that nonracial external factors—white self-interest, conformity pressures placed on integrated blacks to be ‘like whites,’ and society’s blame-the-victim color blind rhetoric—are even more responsible for conditioning black nihilism” than the lingering effects of past discrimination). For a more detailed analysis, *see id.* at 73–75.

<sup>70</sup> *See* BROOKS, *supra* note 40, at 73–74 (discussing the structural inequalities that have a psychological effect on black communities).

model is doomed to fail as a means of engendering socioeconomic diversity because it lacks social transformation. It does nothing to change the fundamental relationship between race and power in our society; whites remain on top, and blacks and other outsider groups remain on the bottom.<sup>71</sup> This, they argue, is by design. In other words, Trump has no desire to rearrange society's basic socioeconomic structure from which he and his family have benefitted so handsomely. That's socioeconomic subordination from the critical race theory perspective.<sup>72</sup>

Limited separatists would not disagree with the critical race theorists, but would add the following crucial point: it is not within Trump's self-interest to fundamentally change the racial dynamic in our society, because doing so would disadvantage him and his family socioeconomically. Not just Trump, but anyone (white or black) on top in any society has this mindset, limited separatists maintain.<sup>73</sup> No elites in any society in the world would endeavor to elevate others at the expense of their own socioeconomic well-being. Self-interest is a powerful force in any society. It is basic human nature; more powerful than racism.<sup>74</sup>

Moral fatigue on racial matters is another aspect of human nature that seems to support the limited separatist argument for self-reliance. Whites will get tired of always thinking about race. Blacks have no choice, as the problem is always with them; it is chronic. Moral fatigue is what caused the Radical Republicans to lose interest in the plight of the former enslaved blacks during Reconstruction.<sup>75</sup> Many even "expressed newfound sympathy with southern whites, assailing black legislators in South Carolina as a 'mass of ignorance and barbarism.'" <sup>76</sup> That is why, limited separatists insist, intra-racial integration in African American society is necessary to resolve the socioeconomic race problem.<sup>77</sup>

Thus, rather than pursuing the reformist and critical race theorist strategy of knocking on a door that will never really open for blacks, limited separatists

<sup>71</sup> See *supra* Part II A (discussing the connection between race and power in white hegemony).

<sup>72</sup> See *supra* note 45 (explaining the core beliefs of critical race theorists).

<sup>73</sup> As to self-interest, limited separatists do not expect whites to "act more nobly than African Americans or any other group would act under similar circumstances. It is an extraordinary person who can look beyond his own self-interest when matters of family and financial security are at stake." BROOKS, *supra* note 40, at 88.

<sup>74</sup> Limited separatists maintain that, in our post-Jim Crow society, "[m]ost whites act not out of racism but out of a perceived self-preservation. . . . [W]hite Americans in all social classes are reluctant to disadvantage themselves for anyone, blacks included." BROOKS, *supra* note 40, at 74.

<sup>75</sup> See, e.g., RON CHERNOW, GRANT 742 (2017) (citation omitted).

<sup>76</sup> *Id.*

<sup>77</sup> See BROOKS, *supra* note 40, at 73–75 (relating how limited separatists believe integration in color-blind institutions contributes to black nihilism, and so consider limited separation with intra-racial integration to be a core component in readdressing resource disparity).

prefer to focus their efforts on building their own door. Given that perspective, Trump's diversity model's indisposition toward race-conscious policies hurts blacks. It prevents African Americans from using public funds to help strengthen existing black institutions or to create new ones that would enable African Americans to self-generate racial progress—fend for themselves. While limited separatists would concede the argument that the traditionalist's desire for peace and tranquility in the social order is a legitimate, non-racist position to take, they would also make the point that that norm loses its legitimacy when it functions on the backs of blacks. Peace and tranquility achieved at the expense of racial progress (ending Reconstruction being a prime example), is racial subordination at the very least.<sup>78</sup>

### B. Education

Trump's education plan has two major features: school choice at the elementary and secondary levels, and a rejection of race-based affirmative action at the post-secondary level.<sup>79</sup> Though presented in the socioeconomic context, both aspects of his diversity model have sociolegal implications as well.<sup>80</sup> Again, my focus shall be on the socioeconomic aspect of his model. As with jobs, Trump's approach to diversity in the context of education follows the traditionalist line.

Trump's diversity model in K-12 schools centers on school choice largely effectuated through charter schools.<sup>81</sup> Charter schools are typically publicly funded but privately run.<sup>82</sup> Trump sees charter schools as institutions

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<sup>78</sup> See *supra* note 46 (discussing how limited separatists measure racial subordination in the sociolegal, socioeconomic, and sociocultural contexts).

<sup>79</sup> See *supra* Part I B (discussing Trump's education plan).

<sup>80</sup> For example, Trump's rejection of race-based affirmative action in college admissions on constitutional grounds conflicts with the Supreme Court's finding that such affirmative action programs are constitutional. See, e.g., *Fisher v. University of Texas*, 136 S. Ct. 2198 (2016) (referred to as *Fisher II*); *Grutter v. Bollinger*, 539 U.S. 306 (2003). These decisions could be reversed with Trump's appointment of two traditionalists to the Supreme Court, Neil Gorsuch and Brett Kavanaugh, the latter of whom replaces Justice Kennedy who wrote the majority opinion in *Fisher II*.

<sup>81</sup> See *supra* Part I B (discussing Trump's education plan).

<sup>82</sup> Private schools that receive public funds are prohibited from discriminating on the basis of race under the 14th Amendment. See *Bob Jones University v. United States*, 461 U.S. 574, 593 (1983). In addition, Title VI of the 1964 Civil Rights Act prohibits racial discrimination in private schools that do not receive state funds but received federal funds. 42 U.S.C. 2000(d). See *Alexander v. Sandoval*, 532 U.S. 275 (2001) (ruling on private rights of action under Title VI and its regulations). Also, private schools that discriminate on the basis of race, color, or national origin in admissions or in hiring, can lose their non-profit status from the Internal Revenue Service. See *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983) (upholding IRS ruling denying tax-



of racial empowerment. They are supposed to give poor and working-class African American parents a facially neutral way to escape poor-performing public schools and integrate schools that provide quality education.<sup>83</sup>

Trump self-consciously eschews race-based attendance policies. These policies undercut the traditionalist's core belief that race no longer matters. They also discriminate against white and Asian students, and hurt black students by implying they are not intellectually equal to the other students. Thus, for Trump and other traditionalists, race-conscious attendance policies constitute racial subordination, a condition that ought to be avoided at all costs. A color-blind attendance strategy, traditionalists insist, is the best way for African Americans to climb out of the abyss of racial degradation wrought by slavery and Jim Crow.<sup>84</sup>

Reformists, in response, would argue that Trump's school-choice plan ignores important socioeconomic facts in the lives of blacks that determine their scholastic achievement and, ultimately, the fate of racial progress in our post-civil rights society. Trump's school-choice approach to diversity and inclusion does not speak directly or even indirectly to de facto segregation in our public schools, which are the schools many African American students now attend.<sup>85</sup> School choice, whether effectuated through charter schools or traditional schools, does not ensure school desegregation. Indeed, school choice has often been used in the past to thwart integration.<sup>86</sup> Thus, reformists would argue that public schools are likely to retain their

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exempt status to nonprofit private schools that prescribe and enforce racially discriminatory admissions standards on the basis of religious doctrine). "The IRS regulations enumerate over forty steps that civil rights enforcers should examine when determining if a private school is acting in a racially discriminatory manner." Michael J. Petrilli, *Are Private Schools Allowed to Discriminate?* EDUCATION NEXT (June 5, 2017), <http://educationnext.org/private-schools-allowed-discriminate/> [<https://perma.cc/V9YE-D9G9>].

<sup>83</sup> See *supra* Part I B (discussing the benefits of charter schools for both black and white students across various socioeconomic backgrounds).

<sup>84</sup> See *supra* note 43 (explaining the traditionalist theory of racial equality).

<sup>85</sup> An important study by the UCLA Civil Rights Project found that "the South has not gone back to the level of segregation before Brown," and "[s]egregation for blacks is the highest in the Northeast." Press Release, UCLA's Civil Rights Project/Proyecto Derechos Civiles, *UCLA Report Finds Changing U.S. Demographics Transform School Segregation Landscape 60 Years After Brown v Board of Education*, (May 15, 2014), <https://civilrightsproject.ucla.edu/news/press-releases/2014-press-releases/ucla-report-finds-changing-u.s.-demographics-transform-school-segregation-landscape-60-years-after-brown-v-board-of-education> [<https://perma.cc/GEB2-WFHN>].

<sup>86</sup> See, e.g., *Green v. Sch. Bd. of New Kent Cty*, 391 U.S. 430, 440–441 (1968) (noting that "the general experience under 'freedom-of-choice' to date has been such as to indicate its ineffectiveness as a tool of desegregation" and detailing the lack of desegregation under the school board's "freedom-of-choice program").

racial character under Trump's expansive school choice plan. School choice shifts the burden of desegregating our public schools from school officials to children and their parents.<sup>87</sup>

Reformists would also note that there is no guarantee that charter schools will open their doors to black students. Even though they are subject to anti-discrimination laws,<sup>88</sup> charter schools do in fact discriminate in admissions. A recent report by the ACLU Southern California and Public Advocates flagged "253 California charter schools. . . for discriminatory admissions practices."<sup>89</sup> Reformists, in a word, would consider Trump's plan to diversify quality education by using charter schools to be highly untenable. They would prefer a diversity plan based on race-conscious affirmative action.<sup>90</sup>

Critical race theorists would also find fault with Trump's school-choice plan. They would probably begin with two related empirical observations: most black students will in all likelihood continue to attend public schools rather than private schools, and charter schools drain limited tax-payer funds from public schools.<sup>91</sup> As Trump's diversity model embraces charter schools, it will likely disempower many black students. And that gets to the gravamen of the critical race theorists' charge against the president's diversity model; to wit, it makes no attempt to change the racial dynamics in public schools in a fundamentally positive direction for blacks. The relationship between race and wealth will probably worsen for blacks because of Trump's devotion to charter schools. Given their demand for social transformation,<sup>92</sup> critical race theorists would probably insist that the existing power structure which finances public education be changed. This

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<sup>87</sup> As a sociolegal aside, it should be noted that the Supreme Court has held that this shift of responsibility violates the constitutional mandate for school desegregation. *Id.* at, 441–442. On the other hand, the Supreme Court has recently upheld the use of publicly funded vouchers for private religious schools, which certainly inures to the benefit of school choice plans. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2024–25 (2017).

<sup>88</sup> See *supra* note 82 (reviewing Supreme Court cases that discuss discrimination in private schools).

<sup>89</sup> Joy Resmovits, *Some California Charter Schools Discriminate in Admissions*, *ACLU Report Says*, L.A. TIMES (Aug. 3, 2016, 5:00 AM), <http://www.latimes.com/local/education/la-me-edu-aclu-california-charter-school-discrimination-20160802-snap-story.html> [<https://perma.cc/H43A-G5DY>].

<sup>90</sup> See BROOKS, *supra* note 40, at 48–49 (reviewing reformist belief that further action is required by the government to right racial inequality).

<sup>91</sup> "It has been long recognized that the growth of charter schools creates costs for local school districts." Brian Washington *How to prevent charter schools from draining away public school funding in your community*, NAT. EDUC. ASS'N (May 27, 2018), <https://educationvotes.nea.org/2018/05/27/how-to-prevent-charter-schools-from-draining-away-public-school-funding-in-your-community/> [<https://perma.cc/D3HP-Z2MN>].

<sup>92</sup> See *supra* note 45 (explaining the core beliefs of critical race theorists).

structure is largely based on local property taxes.<sup>93</sup> Because the president leaves this structure intact, tax-rich school districts will continue to thrive under his diversity model.

The absence of any allowance for racial identity in Trump's "race-neutral" school-choice plan makes it a flawed diversity model in the eyes of limited separationists. These theorists strongly believe in quality education. Without quality education, a child is restricted in his or her ability to compete in our society. But limited separatists do not believe quality education inheres only in predominantly white schools. Distinguishing between separate and segregated schools,<sup>94</sup> limited separatists assert that the former (predominantly black schools) can also produce quality education when adequately funded and under the control of African American parents and educators.<sup>95</sup> A black child does not have to sit next to a white child in order to get a quality education. To think otherwise is racist, limited separatists insist. "[T]here is no reason to think that black students cannot learn as well when surrounded by members of their own race as when they are in an integrated environment."<sup>96</sup> No such deference to black schools or racial identity is reflected in Trump's school-choice plan. In fact, Trump's preference for racial omission is inconsistent with the limited separatist's strong desire for racial identity. Limited separatists would, therefore, conclude that Trump's approach to educational diversity subordinates African Americans socioeconomically.<sup>97</sup>

In post-secondary education, Trump's diversity model rejects race-based affirmative action. The president's administration will encourage the nation's school superintendents and college presidents to adopt race-blind admissions standards, "abandoning Obama administration policies that called on universities to consider race as a factor in diversifying their campuses."<sup>98</sup> Trump's view of diversity very much imbibes elements of the traditionalist's perspective; specifically, the beliefs that racial preferences are not only unnecessary (race no longer matters in post-Jim Crow America), but also constitute a form of reverse

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<sup>93</sup> See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 6–7 (1973) (discussing how property taxes fund public education in Texas).

<sup>94</sup> See BROOKS, *supra* note 28, at 71–72 (discussing the limited separatist belief that separate schools can be "equal").

<sup>95</sup> See, *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 763–765 (2007) (Thomas, J., concurring) (discussing successful black schools); see generally ROY L. BROOKS, *INTEGRATION OR SEPARATION? A STRATEGY FOR RACIAL EQUALITY* 221–234 (1996) (reinforcing that black children can receive a quality education in a largely non-diverse education setting).

<sup>96</sup> *Missouri v. Jenkins*, 515 U.S. 70, 121–22 (1995) (Thomas, J., concurring).

<sup>97</sup> See *supra* note 46 (reviewing limited separatist theory).

<sup>98</sup> Erica L. Green, Matt Apuzzo & Katie Benner, *Trump Officials Reverse Obama's Policy on Affirmative Action in Schools*, N.Y. TIMES (July 3, 2018), <https://www.nytimes.com/2018/07/03/us/politics/trump-affirmative-action-race-schools.html> [<https://perma.cc/M62C-86SN>].

racial discrimination against white and Asian college applicants. A traditionalist would also argue that race-conscious policies are racially divisive and stereotype black students as hapless victims in need of special attention, unable to compete toe-to-toe with white and Asian students.<sup>99</sup>

Reformists would disagree, strongly. They would argue that race-based affirmative action has proven to be the most effective means available for diversifying elite colleges and universities.<sup>100</sup> Race-based affirmative action reverses discriminatory traditions in our society that reduce the number of qualified blacks on campus and, in turn, impede racial progress. Due to a felt need to vindicate the racial omission norm over the racial integration norm in higher education, Trump fails to take into account discriminatory traditions that conspire against black applicants and prospective applicants. Societal discrimination, a culturally biased SAT test, and poor-performing public elementary and secondary schools are formidable barriers for most African American students, reformists insist. None of this seems to matter to Trump the traditionalist because, in his mind, race no longer matters.<sup>101</sup>

Critical race theorists would argue that the reformists do not go far enough as the latter do not target the built-in advantage high-income, mostly white families have in the admissions process:

Because high-income families hyper-invest in educational opportunities for their children practically from birth, wealth now tends to correlate . . . with massive pre-collegiate preparation. The link of income to college preparation is one reason why select universities still take a large share of their students from upper-income families.<sup>102</sup>

Thus, critical race theorists would argue that nothing significant can be done about college admissions at elite universities without first addressing income

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<sup>99</sup> See *supra* Part II A & text accompanying notes 59–60 (recounting the tenets of a traditionalist viewpoint on education); see generally BROOKS, *supra* note 40, at 17–21 (discussing the traditionalist belief of a color-blind society and its criticism of affirmative action).

<sup>100</sup> African American and Latino students had the highest ever college participation rate, slightly exceeding their white counterparts, during the heyday of affirmative action in the mid-1970s when racial quotas were legal. See BROOKS, *supra* note 40, at 157–159 (figs 55-60) (depicting the racial disparities in college attendance rates by race from 1972–2004).

<sup>101</sup> See *supra* Part II A & text accompanying notes 59–60 (discussing traditionalist ideas and how they apply in Trump’s policies); see generally BROOKS, *supra* note 3, at 62–63.

<sup>102</sup> Richard H. Brodhead, *How Higher Ed Has Changed. And How it Hasn’t.*, YALE ALUMNI MAG. (May/June 2018), <https://yalealumnimagazine.com/articles/4701-how-higher-edhas-changed-and-how-it-hasnt> [<https://perma.cc/U628-SP7V>]. The author has spent 50 years at Yale University as student, professor, and dean.

inequality in our society. They would also assert that doing away with race-based affirmative action does not help diversify college campuses. In fact, it goes in the opposite direction; it only maintains the status quo. There is no social transformation in adhering to the racial omission norm in higher education.

Rather than less race-conscious admissions or even racial preferences, critical race theorists would opt for stronger measures—quotas. They believe that racial and class quotas, targeted toward promising low-income blacks, will go a long way toward neutralizing hegemonic forces in the admissions process at elite institutions.<sup>103</sup> For empirical support, they would point to the heyday of affirmative action.<sup>104</sup>

Limited separatists have a different take on Trump's rejection of race-conscious affirmative action. For them, the self-reliance norm trumps both the racial omission and racial integration norms pushed by traditionalists and reformists, respectively. White hegemony serves the interest of whites and, therefore, is here to stay.<sup>105</sup> Trump's rejection of race-based affirmative action doesn't really bother limited separatists insofar as it does not appear to undermine HBCUs, the ultimate expression of racial identity in higher education. There is no suppression of racial identity per se in Trump's rejection of race-based affirmative action. While the racial omission norm potentially collides with the racial identity norm, there does not appear to be a conflict in this case. Race-based affirmative action normally applies to predominantly white colleges and universities. It is simply not needed at HBCUs. Limited separatists would also point out that Trump's rejection of conventional affirmative action does not besmirch black identity by suggesting that African American students need to attend predominantly white colleges or universities because HBCUs are inferior institutions. Trump does not denigrate or otherwise suppress black identity in this instance. His position appears to align with traditionalists who support HBCUs, Justice Thomas and the Koch brothers being among the most notable.<sup>106</sup>

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<sup>103</sup> BROOKS, *supra* note 3, at 67 (discussing critical race theorists' support "for affirmative action not just in the form of racial preference but also in the form of racial quotas; in other words, as a means of sustaining an egalitarian response to white hegemony").

<sup>104</sup> See *supra* note 100 (discussing the highest ever college attendance rate of African American and Latino students during the mid-1970s).

<sup>105</sup> See *supra* text accompanying note 72–74 (discussing the limited separatist assertion that it is in the self-interest of President Trump and other elites to keep current power structures in place).

<sup>106</sup> Compare *United States v. Fordice*, 505 U.S. 717, 745 (1992) (J. Thomas, concurring) (supporting HBCUs) with *Fisher v. University of Texas at Austin*, 136 S. Ct. 2198, 2215 (2016) (Thomas, J., dissenting) (rejecting affirmative action). See, e.g., Brentin Mock, *Why Are the Kochs Giving \$25 Million to Poor Black College Students?*, GRIST: POLITICS (June 20, 2014), <https://grist.org/politics/why-are-the-kochs-giving-25-million-to-poor-black-college-students>

## CONCLUSION

This article endeavors to clarify the president's plan for diversity and inclusion and remove it from the realm of racist accusation or dogmatic partisanship for the purpose of elevated engagement. With its cross-pollination of competing post-civil rights norms and recognition of their duality,<sup>107</sup> subordination discourse fits the bill. It positions Trump's diversity model within the traditionalist vision of socioeconomic diversity, with an emphasis on jobs and education. Traditionalists believe race no longer matters in our post-Jim Crow society. Hence, race-conscious socioeconomic policies, whether private or public, exaggerate the contentiousness of race, discriminate against whites and sometimes Asian Americans, and undermine the veracity of the black equality claim by painting African Americans as hapless victims in need of special treatment, unable to compete toe-to-toe with other Americans. In other words, you are not being treated the same as whites, so how can you claim to be equal to whites.<sup>108</sup>

The non-traditionalists theorists are quite critical of Trump's diversity model. Reformists, critical race theorists, and limited separatists condemn Trump for playing identity politics while claiming that he is not. They argue that Trump rejects one form of identity—ethnic or minority identity—for another form of identity—white identity. Reformists, who believe racial integration is the key to socioeconomic diversity, question the effectiveness of Trump's color-blind approach on a number of grounds. They challenge Trump's claims that the decrease in the rate of black unemployment during the Trump Administration is an outlier of a preexisting trend. Reformists also believe that Trump oversimplifies the socioeconomic race problem by removing slavery, Jim Crow, and other racial barriers from his diversity model, and for that reason his diversity model is not potent enough to stimulate broad improvements in the socioeconomic conditions under which most African Americans live. Like the reformists, critical race theorists and limited separatists criticize Trump's diversity model for not giving sufficient attention to structural constraints on racial progress. In their exchange, critical race theorists, who believe socioeconomic transformation is the key to socioeconomic diversity in our society, and limited separatists, who believe black identity (treated *pari passu* with other

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[<https://perma.cc/4SQQ-HGYG>] (discussing the Koch's financial support of HBCUs). Limited separatists are largely indifferent about racial integration except to the extent that racial integration unfolds in a way that undermines black identity. See generally BROOKS, *supra* note 3, at 64.

<sup>107</sup> Each norm has the capacity to both promote and undermine racial equality. In the case of the latter, each norm provides a non-nefarious source of racial inequality. See *supra* Part II B (discussing the various aspects of each norm that can affect racial inequality).

<sup>108</sup> See *supra* note 43 (explaining core beliefs of traditionalism).

non-offensive identities) is the key, raise the critical question of whether white Americans can rise above self-interest and moral fatigue to engineer the type of diversity that is needed to substantially change the extant relationship between race and socioeconomic power in our society. Are white Americans willing to even entertain the possibility of that level of change? Trump's diversity model for jobs exhibits no desire to go far enough to broach this question.

Same with Trump's diversity model for education. In fact, the president seems to be doubling down on the current relationship between race and socioeconomic power in the education context. Trump's diversity model in K-12 schools centers on school choice largely effectuated through charter schools. This strategy will not lead to more diversity in our best schools, reformists argue, because elite charter schools have numerous ways to discriminate in the admissions process. Reformists and critical race theorists, both of whom prefer race-based attendance policies, make the point that Trump's school-choice approach to diversity and inclusion does not deal with *de facto* segregation in our public schools. This is a very important observation because these are the schools the vast majority of African American students will always attend. These non-traditionalists fear that public schools will likely retain their racial character under Trump's school diversity model, especially given the fact that school choice shifts the burden of desegregating our public schools from school officials to children and their parents. Limited separatists argue that Trump's approach to educational diversity subordinates African Americans socioeconomically because the president's announced commitment to the racial omission norm precludes the use of public funds to support schools designed to meet the special needs of black students in a still-racist society. A black child does not need to capture a white child to obtain a quality education, limited separatists insist. These post-civil rights theorists are in favor of school choice but believe real choice means giving black students the option of attending white or black schools, the latter not only being very different from *de facto* segregated schools but also opened to white students.

Reformists and critical race theorists would reject the president's diversity plan for post-secondary education, which would abandon race-based affirmative action in admissions. Reformists argue that the president's adherence to the racial omission norm will surely decrease black enrollment in elite postsecondary schools. Race-based affirmative action reverses discriminatory traditions, such as societal discrimination and poor-performing elementary and secondary schools, that conspire to reduce the number of qualified blacks at elite schools. Race-based affirmative action has proven to be the most effective means of diversifying elite colleges and universities. Reformists, therefore, argue for more affirmative action, specifically preferring racial preferences. Critical race theorists strongly believe that racial and class

quotas are necessary to help neutralize the tremendous advantage high-income families have in the admissions process at elite institutions. Limited separatists think differently. They wish to protect and promote the racial identity norm. This primarily means legitimizing HBCUs as such. Limited separatists believe that these black important institutions of higher education are not necessarily threatened by Trump's decision to abandon race-based affirmative action in college admissions. Race-based affirmative action does not normally apply to HBCUs, and Trump's policies do not otherwise weight on these schools. Moreover, one could certainly make an exception to the racial omission norm to accommodate the racial identity norm in the context of education as Justice Thomas and the Koch brothers have done.

Taken together, then, the non-traditionalists question the wisdom and effectiveness of Trump's diversity model built solely on the racial omission norm. The many criticisms they offer strongly suggest that Trump's approach to diversity and inclusion does not enhance our racial democracy and, hence, does not represent good social policy. Trump's diversity model does little to advance racial equality in our post-Jim Crow society. It envisions very little lateral transmission of racial power. The racial positions in society will pretty much remain where they are today. That's the good news Trump's diversity model offers. The bad news is that the racial positions will likely change in ways that disadvantage African Americans, especially in education. How does this prospect enhance our racial democracy? The answer is that it does not. Much more can and should be done.<sup>109</sup>

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<sup>109</sup> As I explain more fully in BROOKS, *supra* note 3, one might wish to reconcile the post-civil rights norms on the basis of common ground, good social policy. What binds us as Americans is our sense of what we owe each other as citizens and cohabitants of the same society. What is owed to African Americans today is what has been owed to these millions of Americans since the end of the Civil War—real progress toward racial equality. Hence, in reconciling conflicting post-civil rights norms, good social policy simply means that we must enhance our racial democracy by, *inter alia*, striving to prioritize *measurable* racial progress. Individuals and institutions accomplish this goal when, after careful consideration of competing post-civil rights norms, they render decisions that produce maximum racial progress without undermining an exceedingly important societal interest. For example, a faculty could not raise the disqualification GPA to a level that had a significant, disproportionate impact on African American students unless raising the disqualification GPA served an exceedingly important societal interest. A small, incremental increase in the school's national ranking would not, in my view, satisfy this requirement. Arguably, it would not even rise to the level of an institutional interest, a lesser level than a societal interest, if the school had a very bad reputation within the African American community, nationally or locally. The school's image would take a substantial hit in the African American community once news of the school's action got out. Ignoring the glaring racial disparity is like driving a car through a red light while texting. Given the non-traditionalists' challenges to Trump's diversity model, it is difficult to conclude that this approach to diversity and inclusion constitutes good social policy.