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# On the Permanence of Racial Injustice and the Possibility of Deracialization

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# ON THE PERMANENCE OF RACIAL INJUSTICE AND THE POSSIBILITY OF DERACIALIZATION

*Steven A. Ramirez*<sup>†</sup> & *Neil G. Williams*<sup>††</sup>

*“[T]he arc of the moral universe is long but it bends toward justice.”*

*—Dr. Martin Luther King, Jr., Our God is Marching On!, 25  
March 1965, Montgomery, Alabama.*<sup>1</sup>

*“I’m convinced that racism is a permanent part of the American  
landscape.”*

*—Derrick Bell, Faces at the Bottom of The Well: The Permanence  
of Racism, 1993.*<sup>2</sup>

## CONTENTS

CONTENTS.....	299
INTRODUCTION .....	300
I. THE SOCIAL REALITY OF RACE IN THE U.S. IN 2018.....	307
II. THE NEUROLOGICAL BASIS OF RACE AND THE ROLE OF CULTURAL DIVERSITY.....	324
III. DEMOGRAPHIC, ECONOMIC, AND INSTITUTIONAL REALITIES OF RACE IN THE U.S.....	328
CONCLUSION.....	338

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1. Martin Luther King, Jr., *Our God is Marching On!* (Mar. 25, 1965) (transcript available at the STANFORD UNIV. MARTIN LUTHER KING, JR. RESEARCH AND EDUC. INST., <https://kinginstitute.stanford.edu/our-god-marching> [<https://perma.cc/9C5C-L7PX>]).

2. DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL* 92 (1992); *see also id.* at ix (stating “racism is an integral, permanent, and indestructible component of this society”).

## INTRODUCTION

The assessment of the permanence of racism and racial hierarchy within a society necessarily implicates two separate factors.<sup>3</sup> The first factor requires a firm understanding of the precise mechanisms and institutions through which such forces operate to replicate racial hierarchies over time.<sup>4</sup> The second factor must assess the potential of legal innovations that could operate to disrupt the replication of socially significant race-based outcomes.<sup>5</sup> This Article undertakes that assessment and concludes that America's racial hierarchy need not operate permanently given demographic and economic realities. Of course, politics matters much to this assessment; nevertheless, law can condition the body politic and the expression of political pressure in a pro-diversity direction.

Recent learning suggests that the root of much racism lies in the manipulation of innate tribalism as an instrument of political power.<sup>6</sup> Specifically, neuroscientific studies show that race-related stimuli can trigger emotional brain responses of fear in racially conditioned humans.<sup>7</sup> These responses illustrate the operation of implicit or explicit

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3. The assertion that the U.S. maintains a racial hierarchy today generates less controversy than in the past. *See, e.g.*, Darren Lenard Hutchinson, *Who Locked Us Up? Examining the Social Meaning of Black Punitiveness*, 127 *YALE L.J.* 2388, 2393 (2018) (book review) (reviewing JAMES FORMAN, JR., *LOCKING UP OUR OWN* (2017)) (“Today, the contention that criminal law and enforcement subordinate people of color and reinforce racial hierarchy is widely accepted in the academic literature . . . . [R]esearch links contemporary racial hierarchies seen in U.S. crime policy with historical practices that emerged during slavery, Reconstruction, and the Jim Crow era.”).
  4. *See, e.g.*, RICHARD ROTHSTEIN, *THE COLOR OF LAW*, at xvii (2017) (“We have created a caste system in in this country, with African Americans kept exploited and geographically separate by racially explicit government policies.”).
  5. *Id.* at 197–98 (“Our focus can be only to develop policies that promote an integrated society.”).
  6. IAN HANEY LÓPEZ, *DOG WHISTLE POLITICS: HOW CODED RACIAL APPEALS HAVE REINVENTED RACISM AND WRECKED THE MIDDLE CLASS* 32 (2014) (noting “the Southern strategy represents first and foremost the strategic manipulation of racism; indeed, its purposeful reinvention” (*italics omitted*)); *see also* ROTHSTEIN, *supra* note 4, at 195 (bemoaning “racial polarization” and the manipulation of race by governing elites to advocate policies that “perpetuate the inferior economic opportunities that some whites may face”).
  7. Eva H. Telzer et al., *Amygdala Sensitivity to Race is Not Present in Childhood but Emerges over Adolescence*, 25 *J. COGNITIVE NEUROSCIENCE* 234, 234 (2013) (“[W]e used fMRI [functional magnetic resonance imaging] to examine the neurodevelopmental trajectory of the amygdala in response to race across childhood and adolescence ranging

bias at a neurological level.<sup>8</sup> Viewed in this context, racism could well prove to operate as a mechanism for governing elites to divide their opponents and consolidate their power.<sup>9</sup> Thus, racism may be a permanent feature of human civilization—and if racism should wane, governing elites would quickly substitute other mechanisms that exploit human fears and emotional responses to threats and create divisions among the disempowered.<sup>10</sup>

In the U.S., any political pressure for racial reform must contend with the electoral college and the U.S. Senate, which operate to benefit rural rather than urban interests today, and historically operated to

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from 4 to 16 years . . . . Results suggest that differential amygdala response to African-American faces does not emerge until adolescence, reflecting the increasing salience of race across development.”).

8. Adam M. Chekroud et al., *A Review of Neuroimaging Studies of Race-Related Prejudice: Does Amygdala Response Reflect Threat?*, 8 FRONTIERS HUM. NEUROSCIENCE 1, 3 (2014).

In sum, the role of the amygdala in the neural correlates of prejudice has attracted clear interest, but little clarity. Here, we reviewed the social neuroscience literature on race-related amygdala activity against a backdrop of social psychological theories of prejudice and neuroanatomical knowledge of the amygdala. Rather than the dominant interpretation that amygdala activity reflects a racial or outgroup bias *per se*, we argued that this pattern of sensitivity is best considered in terms of potential threat. More specifically, we argued that negative culturally-learned associations between black males and potential threat better explain the observed pattern of amygdala activity than does a wider ingroup/outgroup explanation.

*Id.* at 9.

9. See STEVEN A. RAMIREZ, LAWLESS CAPITALISM 151–53 (2013) (discussing the GOP’s use of the Southern Strategy to court southern voters through coded messages and racial polarization for the benefit of economic elites and noting that two GOP chairs admitted to the use of the strategy).
10. As Martin Luther King, Jr. said:

You know, whenever Pharaoh wanted to prolong the period of slavery in Egypt, he had a favorite, favorite formula for doing it. What was that? He kept the slaves fighting among themselves. But whenever the slaves get together, something happens in Pharaoh’s court, and he cannot hold the slaves in slavery. When the slaves get together, that’s the beginning of getting out of slavery. Now let us maintain unity.

Rev. Martin Luther King, Jr., *Martin Luther King’s Final Speech: ‘I’ve Been to the Mountaintop’—The Full Text*, ABC NEWS (Apr. 3, 1968), <https://abcnews.go.com/Politics/martin-luther-kings-final-speech-ive-been-to-the-mountaintop-full/story?id=18872817> [<https://perma.cc/2KA4-RA5W>].



benefit slave-holding states.<sup>11</sup> Votes in less populous states hold more electoral sway than votes in urban states.<sup>12</sup> This effectively means that white votes in the U.S. hold more electoral sway than votes in urban communities of color.<sup>13</sup> Minority communities also suffer from coordinated efforts to suppress their voting power.<sup>14</sup> Race appears to be hard-wired into the American political system with roots extending to the pro-slavery constitution.<sup>15</sup>

Further, the Supreme Court nearly always weighs in favor of the powerful and further concretizes racial hierarchies.<sup>16</sup> With respect to race, the Court twisted the Fourteenth Amendment long ago to favor entrenched economic power rather than disempowered minorities, such

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11. *E.g.*, Juan F. Perea, *Echoes of Slavery II: How Slavery's Legacy Distorts Democracy*, 51 U.C. DAVIS L. REV. 1081, 1083 (2018) (“One of the proslavery features of the Constitution is the electoral college, enacted as a way to protect the interests of slave owners.”).
  12. *E.g.*, Emily Badger, *As American as Apple Pie? The Rural Vote's Disproportionate Slice of Power*, N.Y. TIMES (Nov. 16, 2016), <https://www.nytimes.com/2016/11/21/upshot/as-american-as-apple-pie-the-rural-votes-disproportionate-slice-of-power.html> [<https://perma.cc/GL72-8K6N>] (“Rural America, even as it laments its economic weakness, retains vastly disproportionate electoral strength.”).
  13. Patrick Thornton, *Trump Is President Because White People's Votes Count More in America*, WASHINGTONIAN (Dec. 8, 2016), <https://www.washingtonian.com/2016/12/08/white-peoples-votes-are-worth-more-electoral-college-donald-trump-hillary-clinton-popular-vote-alt-right/> [<https://perma.cc/FC8E-5WDR>] (“The states with the highest relative weighting in the Electoral College are generally less diverse than the country as a whole. Wyoming is 92 percent white, while California is 42 percent white. A vote in Wyoming is worth almost four times more than a vote in California because of the Electoral College.”).
  14. Perea, *supra* note 11, at 1091–101 (“Felon disenfranchisement, which expanded after Reconstruction to eliminate black voting, today operates in much the same way. Six million otherwise eligible voters were denied the vote in the 2016 presidential election because they were deemed felons.”).
  15. Juan F. Perea, *Race and Constitutional Law Casebooks: Recognizing the Proslavery Constitution*, 110 MICH. L. REV. 1123, 1148 (2012) (“If we ignore the evidence of a proslavery Constitution, we are not likely to inquire into the important present ramifications of the proslavery Constitution.”).
  16. *See* ERWIN CHERMERINSKY, *THE CASE AGAINST THE SUPREME COURT* 293–94 (2014) (concluding that, institutionally, the Court operates to protect the interests of dominant political and economic elites rather than protecting minorities, individual rights, or long-term values); *see also* *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010) (expanding corporations’ electioneering abilities).

as the freed slaves of yesteryear.<sup>17</sup> Left as is, the Court will continue to resist whatever political pressure for racial reform that emerges.<sup>18</sup> Elites may depend upon the Court to continue to act as a brake on democratic efforts to put race in the rearview mirror of U.S. history.<sup>19</sup> The history,

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17. *E.g.*, *Grutter v. Bollinger*, 539 U.S. 306, 343–44 (2003) (upholding the affirmative action plan at the University of Michigan School of Law but suggesting that such programs will not be needed in twenty-five years); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (holding that the federal government may not use racial classifications to mitigate the influence of race without passing “strict scrutiny” from the judiciary); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 511 (1989) (holding minority business set-asides unconstitutional); *Washington v. Davis*, 426 U.S. 229, 239 (1976) (holding that “a law or other official act” is only unconstitutional if it “reflects a racially discriminatory purpose” and is not “unconstitutional *solely* because it has a racially disproportionate impact”); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 271–72 (1978) (striking down the affirmative action program at the Medical School of the University of California at Davis); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 270 (1977) (holding that violations of the Fourteenth Amendment Equal Protection Clause require proof that “discriminatory purpose was a motivating factor”); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 54–55 (1973) (holding that the Texas legislature’s plan for allocating school funding based upon property tax (wealth) did not represent “invidious[] discriminat[ion]” and that the plan does not violate the Equal Protection Clause).
18. The Supreme Court’s role in preserving our racial hierarchy holds more importance today than in the recent past, in light of emerging political pressure for reform:

A majority of Americans believe more needs to be done to eliminate racism. In a poll last year, 53 percent of whites said more changes needed to be made to give blacks equal rights with whites. That was up from just 39 percent a year earlier. Among Hispanics, 70 percent say more change is needed up from 54 percent a year earlier. Eighty-six percent of blacks agreed with that assessment.

- W.K. Kellogg Found. & Ne. Univ. Sch. of Journalism, *Meta-Analysis of Recent Polling Data on the Impact of Racism on American Society Today* 2–3 (2016), <https://www.wkkf.org/resource-directory/resource/2016/01/meta-analysis-of-recent-polling-data-on-the-impact-of-racism-on-american-society-today> [<https://perma.cc/A96Z-5642>]. A more recent survey found that 61 percent of all Americans believe more is needed to achieve racial equality. PEW RESEARCH CENTER, *The Partisan Divide on Political Values Grows Even Stronger* (Oct. 5, 2017), <http://www.people-press.org/2017/10/05/4-race-immigration-and-discrimination/> [<https://perma.cc/MCK2-G3GH>].
19. Because the Supreme Court strikes down laws it deems unconstitutional, it necessarily acts anti-democratically. *E.g.*, George Mace, *The Antidemocratic Character of Judicial Review*, 60 CALIF. L. REV. 1140, 1149 (1972) (“Since to resist a majority the judiciary must be independent of that majority, the character of judicial review is properly antidemocratic.”).

institutional structure, and nature of the Court forms another basis for concluding that, at least in America, racism will persist for many years, and our racial hierarchy will enjoy a long-life expectancy.<sup>20</sup>

We argue that the central problem arises from the need for humans to join tribes to enhance their chances of survival.<sup>21</sup> In other words, tribalism finds its roots in an evolutionary imperative to band together

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20. Other commentators highlight the continuing racial hierarchy in the U.S. without focusing on the permanence of the hierarchy or the legal system's systematic construction of our racial hierarchy. *See, e.g.*, Paul Butler, *The System Is Working the Way It Is Supposed to: The Limits of Criminal Justice Reform*, 104 GEO. L.J. 1419, 1442 (2016) (arguing that criminal law and procedure operate by design to “reinforce[] racial hierarchy and white supremacy”); Barbara J. Flag, “*And Grace Will Lead Me Home*”: *The Case for Judicial Race Activism*, 4 ALA. C.R. & C.L. L. REV. 103, 107–08 (2013) (stating that “racial hierarchy clearly persists”); Kathryn Ladewski, *Preserving a Racial Hierarchy: A Legal Analysis of the Disparate Racial Impact of Legacy Preferences in University Admissions*, 108 MICH. L. REV. 577, 595 (2010) (“Legacy preferences are a common component of university admissions programs that give a boost to applicants whose parents or grandparents attended a particular institution. Such preferences have a negative impact on minority and immigrant applicants, whose parents often did not attend college in the United States.”); Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 494, 587 (2003) (arguing that the Court’s emphasis on intentional discrimination risks preserving “existing racial hierarchies [that] are products of past discrimination and that a level-playing-field approach today could help those hierarchies perpetuate themselves indefinitely”).

21. The human instinct to identify with a group is almost certainly hard-wired, and experimental evidence has repeatedly confirmed how early in life it presents itself. In one recent study, a team of psychology researchers randomly assigned a group of children between the ages of four and six to either a red group or a blue one and asked them to put on T-shirts of the corresponding color. They were then shown edited computer images of other children, half of whom appeared to be wearing red T-shirts and half of whom appeared to wearing blue, and asked for their reactions. Even though they knew absolutely nothing about the children in the photos, the subjects consistently reported that they liked the children who appeared to be members of their own group better, chose to hypothetically allocate more resources to them, and displayed strong subconscious preferences for them. In addition, when told stories about the children in the photos, these boys and girls exhibited systematic memory distortion, tending to remember the positive actions of in-group members and the negative actions of out-group members. Without “any supporting social information whatsoever,” the researchers concluded, the children’s perception of other kids was “pervasively distorted by mere membership in a social group.”

Amy Chua, *Tribal World: Group Identity Is All*, 97 FOREIGN AFF. 25, 25–26 (2018).

in cooperative enterprises.<sup>22</sup> Nevertheless, tribalism could also impede the ability of humans to address a myriad of problems plaguing humanity within nation-states and beyond.<sup>23</sup> As human civilization becomes more complex and interconnected we posit a new humanism must emerge to reduce tribalism.<sup>24</sup> Indeed, this essential humanism must emerge immediately to address urgent problems facing humanity.<sup>25</sup> With respect to problems of race, a new Americanism and ultimately a new humanism must emerge.

New legal innovations can secure the type of educational and behavioral progress that Americans and humanity must make to overcome its racist past and work to resolve extra-tribal challenges.<sup>26</sup>

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22. [T]ribalism is our default value. . . . The ability to quickly and intuitively distinguish “us” from “them”—likely someone from another tribe intent on taking resources or lives—was a tremendous evolutionary advantage. . . . It is slightly less helpful in the halls of Congress. But the history of demagoguery shows how useful it can be in the gaining and holding of power.

Michael Gerson, *Tribalism Triumphs in America*, WASH. POST (Sept. 18, 2017), [https://www.washingtonpost.com/opinions/tribalism-triumphs-in-america/2017/09/18/7c6a841a-9c95-11e7-9083-fbdfdf6804c2\\_story.html?noredirect=on&utm\\_term=.ad440d5bf8db](https://www.washingtonpost.com/opinions/tribalism-triumphs-in-america/2017/09/18/7c6a841a-9c95-11e7-9083-fbdfdf6804c2_story.html?noredirect=on&utm_term=.ad440d5bf8db) [<https://perma.cc/U9HL-PNR4>].

23. See Molly Townes O’Brien, *Criminal Law’s Tribalism*, 11 CONN. PUB. INT. L.J. 31, 31 (2011) (“In every country . . . studied, incarceration rates for members of some minority groups greatly exceed those for the majority population. Disproportionate incarceration is not a problem of a single ethnic group. . . . It is a global problem that is fundamentally connected to social group identity.”).
24. See Daniel L. Shapiro, Ph.D., *Can We Overcome Our Tribalistic Nature?*, PSYCHOL. TODAY (Mar. 7, 2017), <https://www.psychologytoday.com/us/blog/transforming-conflict/201703/can-we-overcome-our-tribalistic-nature> [<https://perma.cc/B7NC-629C>] (“The moment a group feels threatened, they enter into this mindset and start to see the conflict in adversarial terms: it becomes us versus them, and innovative solutions for mutual gain are replaced by myopic policies that satisfy one tribe over another.”).
25. For example, tribal bickering and conflict will not likely foster any global solution to climate change. Leaf Van Boven & David Sherman, *Actually, Republicans Do Believe in Climate Change*, N.Y. TIMES (July 28, 2018), <https://www.nytimes.com/2018/07/28/opinion/sunday/republicans-climate-change.html> [<https://perma.cc/X7VM-JZ2Q>] (“[O]ur research suggests the problem is not so much that Republicans are skeptical about climate change, but that Republicans are skeptical of Democrats—and that Democrats are skeptical of Republicans. This tribalism leads to political fights over differences between the parties that either do not exist or are vastly exaggerated.”).
26. Recent neuroscientific studies show that diversity breaks down racial bias, as demonstrated in amygdala response. *E.g.*, Telzer et al., *supra* note 7, at 234 (“[G]reater peer diversity was associated with attenuated amygdala response to African American faces, suggesting that intergroup racial contact may reduce the salience of race.”).

Specifically, law can facilitate cultural diversity and break down tribalism.<sup>27</sup> While such legal innovations appear straight-forward, they would require a degree of political willpower currently missing in the U.S.<sup>28</sup> Nevertheless, law can operate to condition political realities in a way fundamentally accommodative of further innovations to limit and diminish the continued sway of race as a socio-economic reality and source of political power.<sup>29</sup> We articulate political conditions supportive of this outcome.

Part I of this Article will show that while race is a social construct, it retains tremendous social power in America in accordance with the predictions of Derrick Bell, fifty years after landmark legislation such as the Civil Rights Act of 1964 and the Voting Rights Act of 1965. In sum, the U.S. continues its longstanding racial hierarchy today. Part II will suggest that race continues to hold sway in the U.S. through both explicit and implicit bias, and that law can operate to overcome these impediments to human development, as Martin Luther King suggests, through initiatives to comprehensively embrace cultural diversity. Recent studies in neuroscience fully support this central point. Part III will assess whether the U.S. has the political will necessary to mitigate race as it currently exists or will exist in the near future. While the Supreme Court will likely act (as always) to uphold the current hierarchy, demographic realities and economic truths will ultimately operate to diminish the influence of race in American society. The Article concludes that while the U.S. may still have many fits and starts ahead in wrestling with America's original sin, ultimately the value of

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27. *E.g.*, ROTHSTEIN, *supra* note 4, at 195–213 (advocating aggressive and bold measures to integrate housing in the U.S. and unlock the benefits of cultural diversity); Steven A. Ramirez, *Games CEOs Play and Interest Convergence Theory: Why Diversity Lags in America's Boardrooms and What To Do About It*, 61 WASH. & LEE L. REV. 1583, 1600–13 (2004) (arguing in favor of measures to enhance cultural diversity in corporate boardrooms); Steven A. Ramirez, *The New Cultural Diversity and Title VII*, 6 MICH. J. RACE & L. 127, 137–38, 177–78 (2000) (showing that firms that embrace cultural diversity do not violate Title VII).
28. *See, e.g.*, *Trump Administration Rolls Back Racial Diversity Guidelines for Colleges*, REUTERS (July 3, 2018), <https://www.reuters.com/article/us-usa-education-race/trump-administration-rolls-back-racial-diversity-guidelines-for-colleges-idUSKBN1JT1HO> [<https://perma.cc/JDZ4-LSLM>] (indicating that the Department of Justice during the Trump administration has supported litigation in opposition to race-based affirmative action).
29. It is axiomatic that law conditions political pressure under the U.S. Constitution, as well as through other structures such as the provision of education. *See, e.g.*, James G. March & Johan P. Olsen, *The New Institutionalism: Organizational Factors in Political Life*, 78 AM. POLI. SCI. REV. 734, 738, 740, 744 (1983) (articulating institutional constraints and how these restraints condition actors' behavior).

cultural diversity and the changing demographics in our nation will impel a diminution in the sway of race under current legal and political realities.

## I. THE SOCIAL REALITY OF RACE IN THE U.S. IN 2018

Today in the U.S., race remains an idea with tremendous social power to deter human development within our society.<sup>30</sup> Race operates only as a social construct.<sup>31</sup> Because race responds to the needs of power

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30. Jayne O. Ifekwunigwe et al., *A Qualitative Analysis of How Anthropologists Interpret the Race Construct*, 119 AM. ANTHROPOL. 422, 423 (2017) (stating that a “new anthropological synthesis” views “race as a dynamic, historically situated, culturally constructed folk concept that derives symbolic meaning from specific . . . phenotypic differences, such as skin color, hair texture, nose width, lip thickness, and body type”; and, that these differences “are ranked hierarchically and provide social justifications for inequalities and injustices, such as differential access to power, privilege, and opportunities” (internal quotations omitted)).
31. Of course, science already comprehends what law does not: that race is a social construct with no biological nor genetic meaning. *E.g.*, Angela Onwuachi-Willig, *Race and Racial Identity Are Social Constructs*, N.Y. TIMES (Sept. 6, 2016, 5:28 PM), <https://www.nytimes.com/roomfordebate/2015/06/16/how-fluid-is-racial-identity/race-and-racial-identity-are-social-constructs> [<https://perma.cc/8D36-WNDC>] (“More than 50 years ago, Congress enacted the most comprehensive antidiscrimination legislation in history, the Civil Rights Act of 1964. Half a century later in 2015, the same gaps in racial inequality remain or have grown deeper.”). As the American Association of Anthropologists stated in 1998:

With the vast expansion of scientific knowledge in this century . . . it has become clear that human populations are not unambiguous, clearly demarcated, biologically distinct groups. Evidence from the analysis of genetics (e.g., DNA) indicates that most physical variation, about 94%, lies within so-called racial groups. Conventional geographic “racial” groupings differ from one another only in about 6% of their genes.

*Statement on Race*, AM. ASS’N OF ANTHROPOLOGISTS (May 17, 1998), <http://www.americananthro.org/ConnectWithAAA/Content.aspx?ItemNumber=2583> [<https://perma.cc/RPP2-Y33C>]. The Association further states, with respect to the specific issue of continuing racial disparities in America, that:

The tragedy in the United States has been that the policies and practices stemming from [the racial] worldview succeeded all too well in constructing unequal populations among Europeans, Native Americans, and peoples of African descent. Given what we know about the capacity of normal humans to achieve and function within any culture, we conclude that present-day inequalities between so-called “racial” groups are not consequences of their biological inheritance but products of

elites its social construction and the patterns of racism accompanying it differ from place to place and from time to time.<sup>32</sup> Thus, every ten years when the federal government undertakes its census, it constructs new racial categories from whole cloth based upon new cultural and social realities.<sup>33</sup> Mainstream science rejects race as a scientifically defensible means of categorizing or containing human genetic diversity.<sup>34</sup> Instead, geneticists find genetic diversity and similarity better defined by reference to discrete local populations based upon

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historical and contemporary social, economic, educational, and political circumstances.

*Id.* This article spotlights law (largely imposed through judicial fiat) as well as the political expediency of race as the key culprits in our festering racial hierarchy in accordance with the best science available on the social, not genetic, basis of race. See Michael Yudell et al., *Taking Race out of Human Genetics*, 351 SCI. 564, 564 (2016) (“We believe the use of biological concepts of race in human genetic research—so disputed and mired in confusion—is problematic at best and harmful at worst. It is time for biologists to find another way.”). In short, it is time to take race out of law through the legal deconstruction of a legally constructed racial hierarchy. Racial hierarchy arises from corrupt law.

32. Ifekwunigwe et al., *supra* note 30, at 423 (“Comparative analyses of race in other geopolitical contexts, such as Latin America, the Caribbean, or West Africa, reveal different systems of racialization and color/caste, social hierarchies, and patterns of racism.”); Steven A. Ramirez, *A General Theory of Cultural Diversity*, 7 MICH. J. RACE & L. 33, 46 n.80 (2001) (citing POPULATION REFERENCE BUREAU, RACE AND ETHNICITY IN THE CENSUS: 1860 TO 2000, <https://web.archive.org/web/20020112052140/http://www.prb.org:80/Template.cfm?Section=PRB&template=/ContentManagement/ContentDisplay.cfm&ContentID=3553> [<https://perma.cc/JB93-AKYX>] (last visited Oct. 3, 2018) (showing that racial categories on the U.S. Census forms vary from decade to decade, and that in 1860 there were three categories and in 2000 there were twenty)).
33. The census questionnaires used widely varying racial categories across decades, and differed each decade based upon changing social conditions. “Groups identified by geography (such as Asians, Pacific Islanders, and Aleutian Islanders) have been listed as races, together with groups defined by skin color (blacks and whites).” Beth Jarosz, *Continuity and Change in the U.S. Decennial Census*, POPULATION REFERENCE BUREAU (Mar. 25, 2018), <https://www.prb.org/continuity-and-change-in-the-u-s-decennial-census/> [<https://perma.cc/KY48-C3QM>]. In 1970, Asian Indians counted as members of the white race, but in 1980 counted as Asian and Pacific Islander. *Id.*
34. “Today, the mainstream belief among scientists is that race is a social construct without biological meaning.” Megan Gannon, *Race Is a Social Construct, Scientists Argue*, SCI. AM. (Feb. 5, 2016), <https://www.scientificamerican.com/article/race-is-a-social-construct-scientists-argue/> [<https://perma.cc/F4GW-73XX>].

geography rather than traditional notions of race.<sup>35</sup> As one prominent geneticist stated: “The more we learn about humankind’s genetic differences . . . the more we see that they have almost nothing to do with what we call race.”<sup>36</sup> Thus, all racial disparities arise from social realities and legacies of oppression rather than any putative innate racial differences.<sup>37</sup>

The U.S. legal system today—with the Supreme Court leading the way—imposes a legally constructed racial hierarchy upon U.S. citizens that is economically costly, immoral, socially corrosive, and politically unsustainable.<sup>38</sup> This morally reprehensible and economically suicidal reality promises to continue as far as the eye can see, at least insofar as

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35. Ifekwunigwe et al., *supra* note 30, at 423 (“Although there are small genetic differences that allow geneticists to trace the global migrations of populations, these variations should not be confused with the belief in discrete races because these variations are considered clines, which are gradients of gene frequencies from one population to another based on geography.”).
36. Sharon Begley, *Three Is Not Enough*, NEWSWEEK (Feb. 12, 1995, 7:00 PM), <https://www.newsweek.com/three-not-enough-184974> [<https://perma.cc/J3VW-7N88>] (quoting Human Genome Diversity Project Chair Luigi Luca Cavalli-Sforza); *see also* Jennifer K. Wagner et al., *Anthropologists’ Views on Race, Ancestry, and Genetics*, 162 AM. J. PHYS. ANTHROPOL. 318, 320 (2017) (finding that over 90 percent of all anthropologists reject race as a discrete biological category); Yudell et al., *supra* note 31, at 564 (“In the wake of the sequencing of the human genome in the early 2000s, genome pioneers and social scientists alike called for an end to the use of race as a variable in genetic research.”).
37. RAMIREZ, *supra* note 9, at 144 (“Given that race has no biological or genetic significance, all of the deep race-based disparities that persist in our society can be the consequence of social conditions only, as mediated by law.”).
38. *See, e.g.,* Fisher v. Univ. of Tex. (*Fisher II*), 136 S. Ct. 2198, 2209–10 (2016) (holding that consideration of race to further diversity at state universities must pass “strict scrutiny”; may only proceed in accordance with “educational benefits” to the university; and, must be “narrowly tailored” to achieve such educational benefits). *Fisher II* narrows the use of race to pry open educational opportunities for disempowered groups while simultaneously leaving affirmative action programs (such as legacy admissions) that primarily benefit wealthy whites undisturbed. *Poison Ivy: Not so Much Palaces of Learning as Bastions of Privilege and Hypocrisy*, ECONOMIST (Sept. 21, 2006), <https://www.economist.com/united-states/2006/09/21/poison-ivy> [<https://perma.cc/C9VK-HJPG>] (“[E]lite universities do everything in their power to admit the children of privilege. If they cannot get them in through the front door by relaxing their standards, then they smuggle them in through the back. No less than 60% of the places in elite universities are given to candidates who have some sort of extra ‘hook,’ from rich or alumni parents to ‘sporting prowess.’ The number of whites who benefit from this affirmative action is far greater than the number of blacks.”).



the judiciary is concerned, and fundamentally subverts the possibility of social justice secured under law.<sup>39</sup> Instead of any vision of racial justice, the U.S. judiciary frustrates any political pressure for racial reform.<sup>40</sup> As one scholar recently stated:

Nor has it been unusual in our history for the Supreme Court to stand at the forefront of racial injustice. In fact, except for a short period in our nation's history, 1954 to 1965, from *Brown v. Board of Education* to *Mapp v. Ohio* to *Gideon v. Wainwright* to *Baker v. Carr*, the United States Supreme Court has promoted or facilitated injustice against African Americans.<sup>41</sup>

Maintenance of a socially constructed racial hierarchy within any society entails huge costs because race necessarily involves the mass destruction of human potential and human capital.<sup>42</sup>

The vibrancy of the undeniable racial hierarchy poses a key question haunting America today: will the U.S. ever dismantle the legal foundations of its racial hierarchy? Race must pervade America's consciousness or it would rebuke its racial disparities and reform a system (defined and framed under law) that produces such mass misery, death and oppression.<sup>43</sup> This Part of this Article will highlight the misery our legal system produces as part of the racial fabrication

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39. Most recently, the Supreme Court struck down key elements of the Voting Rights Act of 1965. *Shelby Cty. v. Holder*, 570 U.S. 529, 556–57 (2013) (holding a provision of the Voting Rights Act of 1965 unconstitutional relating to a formula used to determine which states were subject to preclearance requirements before they could implement any changes to their voting procedures).
40. CHERMERINSKY, *supra* note 16, at 41 (stating that the modern Court has “greatly limited the use of the Constitution, and even of government, to achieve racial equality”).
41. Lewis R. Katz, Whren at *Twenty: Systemic Racial Bias and the Criminal Justice System*, 66 CASE W. RES. L. REV. 923, 924–25 (2016) (citations omitted).
42. The internationally renowned consultancy firm of McKinsey & Company found that GDP in 2008 was \$525 billion lower than it would have been if there were no education gap between whites and minorities. Byron G. Auguste et al., *The Economic Cost of the US Education Gap*, MCKINSEY & COMPANY (June 2009), <http://www.mckinsey.com/industries/social-sector/our-insights/the-economic-cost-of-the-us-education-gap> [<https://perma.cc/3QVF-2SWT>]; see also Steven A. Ramirez, *What We Teach When We Teach About Race: The Problem of Law and Pseudo-Economics*, 54 J. LEGAL EDUC. 365, 375 (2004) (estimating macroeconomic costs of race to approach \$1 trillion per year).
43. Jordan R. Axt et al., *The Rules of Implicit Evaluation by Race, Religion, and Age*, 25 PSYCHOL. SCI. 1804, 1804 (2014) (using psychological testing to reveal a festering racial hierarchy in the psyche of the U.S. public in which whites reign supreme).

plaguing our society.<sup>44</sup> In fact, one high-profile economist now posits that America is devolving into a two-tiered society, with most Americans living in conditions similar to a non-developed nation, thanks in large part to continuation of racial oppression.<sup>45</sup> Further, this Part will seek to quantify the staggering macroeconomic costs of this continued racial fabrication under law in a last-ditch effort to convince those with power and influence over this process—the judiciary in particular—that if morality and justice cannot prevail on the issue of racial fabrication and its accompanying oppression, perhaps a desire to avert economic suicide and Third World status for their children will.<sup>46</sup>

Childhood poverty provides a fitting start to this overview of oppression and macroeconomic madness. The U.S. leads the developed world in childhood poverty.<sup>47</sup> According to the Pew Research Center, approximately 35 percent of African American children live in poverty as do 30 percent of Hispanic children.<sup>48</sup> The poverty rate for white children hovers around 10 percent.<sup>49</sup> The International Monetary Fund

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44. According to the MIT economist Peter Temin:

The desire to preserve the inferior status of blacks has motivated policies against all members of the low-wage sector [and] [w]e are not getting the benefits of all the people who could contribute to the growth of the economy, to advances in medicine or science which could improve the quality of life for everyone—including some of the rich people.

Chloe Farand, *US Has Regressed to Developing Nation Status, MIT Economist Warns*, INDEPENDENT (Apr. 21, 2017, 3:06 PM), <https://www.independent.co.uk/news/world/americas/us-developing-nation-regressing-economy-poverty-donald-trump-mit-economist-peter-temin-a7694726.html> [https://perma.cc/V753-RANY].

45. PETER TEMIN, *THE VANISHING MIDDLE CLASS: PREJUDICE AND POWER IN A DUAL ECONOMY* xiii (2017).

46. The United Nations found that nearly 20 million Americans live in extreme poverty, and 5.3 million Americans live in Third World conditions as of its June 2018 report. *Report of the Special Rapporteur on Extreme Poverty and Human Rights on his Mission to the United States of America* ¶ 4, U.N. Doc. A/HRC/38/33 (May 4, 2018) (by Philip Alston) [hereinafter *2018 Report of Special Rapporteur*].

47. *Id.*

48. Eileen Patten & Jens Manuel Krogstad, *Black Child Poverty Rate Holds Steady, Even as Other Groups See Declines*, PEW RES. CTR. (July 14, 2015), <http://www.pewresearch.org/fact-tank/2015/07/14/black-child-poverty-rate-holds-steady-even-as-other-groups-see-declines/> [https://perma.cc/EU5T-PSZA]. More recent statistics suggest a decline in childhood poverty, but racial disparities remain virtually unchanged. See *Child Poverty Still Falling—and Close to Pre-Recession Rate*, ANNIE E. CASEY FOUND. (Sept. 21, 2017), <http://www.aecf.org/blog/child-poverty-still-falling-and-close-to-pre-recession-rate/> [https://perma.cc/WM6B-6KLN].

49. Patten & Krogstad, *supra* note 48.

found that these high childhood poverty rates will exacerbate inequalities in educational opportunity, hamper human capital formation, and erode future productivity.<sup>50</sup> The fact that children of color suffer the risks of childhood poverty at a rate that is three times the rate for white children assures the perpetuation of racial disparities across indicia of social well-being.<sup>51</sup> Even the most hardened soul would wonder why America, with all its wealth and power, allows the massive destruction of human capital implicit in childhood poverty.<sup>52</sup> The race disparities driving childhood poverty only amplifies the moral repugnancy of this American reality.

These racial burdens continue in the form of racial disparities in educational opportunities for children of color. “In almost all major American cities, most African American and Hispanic students attend public schools where a majority of their classmates qualify as poor or low-income.”<sup>53</sup> And, “[r]esearchers have found that the single-most

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50. IMF, *United States: Staff Report for 2017 Article IV Consultation* ¶¶ 17–18 (July 7, 2017).

51. UNICEF, INNOCENTI REPORT CARD 13: CHILDREN IN THE DEVELOPED WORLD 2 (2016), [https://www.unicef-irc.org/publications/pdf/RC13\\_eng.pdf](https://www.unicef-irc.org/publications/pdf/RC13_eng.pdf) [<https://perma.cc/2S63-4ZXB>].

[F]ew dispute that childhood experiences have a profound effect not only on children’s current lives, but also on their future opportunities and prospects. Likewise, social and economic disadvantages in early life increase the risk of having lower earnings, lower standards of health and lower skills in adulthood. This in turn can perpetuate disadvantage across generations. None of this is the fault of the child.

*Id.*

52. [T]here is one area above all others where we should feel a moral obligation to reduce poverty as much as possible and to soften its bite: poverty among children. People may disagree about the choices parents make—including premarital sex and out-of-wedlock births. People may disagree about access to methods of family planning—including contraception and abortion. People may disagree about the size and role of government—including the role of safety-net programs. But surely we can all agree that no child, once born, should suffer through poverty. Surely we can all agree that working to end child poverty—or at least severely reduce it—is a moral obligation of a civilized society.

Charles M. Blow, *Reducing Our Obscene Level of Child Poverty*, N.Y. TIMES (Jan. 28, 2015), <https://www.nytimes.com/2015/01/28/opinion/charles-blow-reducing-our-obscene-level-of-child-poverty.html> [<https://perma.cc/4XZY-VA7E>].

53. Janie Boschma & Ronald Brownstein, *The Concentration of Poverty in American Schools*, ATLANTIC (Feb. 29, 2016), <https://www.theatlantic.com/education/archive/2016/02/concentration-poverty-american-schools/471414/> [<https://perma.cc/375Y-MYZL>].

powerful predictor of racial gaps in educational achievement is the extent to which students attend schools surrounded by other low-income students.<sup>54</sup> Essentially, the U.S. education system still operates as separate and unequal in terms of race,<sup>55</sup> over sixty years after *Brown v. Board of Education*.<sup>56</sup>

According to Beverly Daniel Tatum:

During the two decades between 1970 and 1990, the nation made steady progress toward school desegregation, particularly in the South. At peak, 40% of black southern students attended a formerly all-white school, while less than a third of all black students attended black schools. Since the 1990s, that progress has been reversing in Southern public schools, while the largely intractable segregation of the Northern cities has intensified. Nationwide, nearly 75% of black students attend so-called majority-minority schools, and 38% attend schools with a white population of 10% or less. Similar statistics apply to Latino students: 80% and 40%, respectively. Both black and Latino students are much more likely than white students to attend a school where 60% or more of their classmates are living in poverty, as measured by the percentage of students eligible for free or reduced-price lunch programs. Separate remains unequal as schools with concentrated poverty and racial segregation are more likely to have less-experienced teachers, high levels of teacher turnover, inadequate facilities and fewer classroom resources.<sup>57</sup>

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54. *Id.*; see also Sean F. Reardon, *School Segregation and Racial Academic Achievement Gaps*, 2 THE RUSSELL SAGE FOUND. J. SOC. SCI. 34, 34 (2016), <https://www.rsjournal.org/doi/pdfplus/10.7758/RSF.2016.2.5.03> (“I find clear evidence that one aspect of segregation in particular—the disparity in average school poverty rates between white and black students’ schools—is consistently the single most powerful correlate of achievement gaps,” and “[t]his implies that high-poverty schools are, on average, much less effective than lower-poverty schools and suggests that strategies that reduce the differential exposure of black, Hispanic, and white students to poor schoolmates may lead to meaningful reductions in academic achievement gaps.”).
55. Lindsey Cook, *U.S. Education: Still Separate and Unequal*, U.S. NEWS (Jan. 28, 2015), <http://www.usnews.com/news/blogs/data-mine/2015/01/28/us-education-still-separate-and-unequal> [<https://perma.cc/9GTG-G2D2>].
56. 347 U.S. 483, 495 (1954) (finding that “[s]eparate educational facilities are inherently unequal” and holding that segregated public schools violate the Constitution) (overruling *Plessy v. Ferguson*, 163 U.S. 537 (1896), which upheld state racial segregation in public schools).
57. Beverly Daniel Tatum, *America Is More Diverse than Ever Before, but Its Schools Are Growing More Segregated*, L.A. TIMES (Sept. 12, 2017,

In recent decades the government, with the Supreme Court leading the way, betrayed the promise of *Brown* that all children would enjoy desegregated educational opportunities.<sup>58</sup> As a result, the number of intensely segregated schools (with 0 percent to 10 percent white students) has tripled.<sup>59</sup>

White children also begin with a significant advantage in the form of parental attainment of tertiary education, which plays an important role in student academic achievement.<sup>60</sup> As a direct consequence, African American children face much lower education expectations.<sup>61</sup> As of 2013, these facts translate into lower education attainment across the board for African Americans relative to white Americans.<sup>62</sup> Whites attain a bachelor's degree at a rate approaching nearly twice that of African Americans and over twice that of Hispanics.<sup>63</sup>

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4:00 AM), [http://www.latimes.com/opinion/op-ed/la-oe-tatum-school-segregation-20170912-story.html# \[https://perma.cc/7H6T-H9J7\]](http://www.latimes.com/opinion/op-ed/la-oe-tatum-school-segregation-20170912-story.html# [https://perma.cc/7H6T-H9J7]).

58. *E.g.*, *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 709–11 (2007) (outlawing voluntary racial desegregation plans in school districts in which race was used to determine school placement); *Missouri v. Jenkins*, 515 U.S. 70, 99–100 (1995) (overturning orders that were designed to attract nonminority students from outside the school district and used across-the-board salary increases for teachers and staff in pursuit of attractiveness); *Bd. of Educ. of Okla. City Pub. Schs. v. Dowell*, 498 U.S. 237, 249–50 (1991) (allowing dissolution of desegregation decree upon showing of good faith efforts to comply “and whether . . . vestiges of past discrimination ha[ve] been eliminated to the extent practicable”); *Milliken v. Bradley*, 418 U.S. 717, 752–53 (1974) (striking down the interdistrict busing plan to desegregate schools to resolve de facto segregation).
59. BEVERLY DANIEL TATUM, *WHY ARE ALL THE BLACK KIDS SITTING TOGETHER IN THE CAFETERIA* 4 (3rd paperback ed. 2017).
60. Sean F. Reardon, *The Widening Academic Achievement Gap Between the Rich and the Poor: New Evidence and Possible Explanations*, in *WHITHER OPPORTUNITY? RISING INEQUALITY, SCHOOLS AND CHILDREN’S LIFE CHANCES* 91, 109 (Greg J. Duncan & Richard J. Murnane eds., 2011) (“[A]lthough the association between income and achievement has grown rapidly during the last fifty years, parental educational attainment is still a more powerful predictor of student achievement than is family income.”).
61. Cook, *supra* note 55; see also Gershenson et al., *Who Believes in Me? The Effect of Student–Teacher Demographic Match on Teacher Expectations*, 52 *ECON. EDUC. REV.* 209, 209 (2016) (“[W]e find that non-black teachers of black students have significantly lower expectations than do black teachers. These effects are larger for black male students and math teachers. Our findings add to a growing literature on the role of limited information in perpetuating educational attainment gaps.”).
62. Cook, *supra* note 55.
63. CAMILLE L. RYAN & KURT BAUMAN, U.S. CENSUS BUREAU, *EDUCATIONAL ATTAINMENT IN THE UNITED STATES: 2015* 5 (2016),

Students of color face other educational challenges. For example, the psychologist Claude Steele has shown that stereotype threat, that is, the perception of racial inferiority pervading our society, as internalized in students themselves, leads to underperformance among students of color on high-stakes tests.<sup>64</sup> In controlled experiments, African-American students suffered depressed scores in the presence of stereotype threat; when stereotype threat was lifted scores rose.<sup>65</sup> Naturally, this dynamic negatively effects educational outcomes and opportunities available to minority students in powerful ways from start to finish in post-secondary schools.<sup>66</sup>

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<http://www.census.gov/content/dam/Census/library/publications/2016/demo/p20-578.pdf> [<https://perma.cc/5QZC-5ND8>] (“More than one-third of non-Hispanic Whites had a bachelor’s degree or higher (36 percent), 22 percent of Blacks had this level of education, as did 15 percent of Hispanics.”).

64. Claude M. Steele, *Thin Ice: Stereotype Threat and Black College Students*, ATLANTIC (Aug. 1999), <https://www.theatlantic.com/magazine/archive/1999/08/thin-ice-stereotype-threat-and-black-college-students/304663/> [<https://perma.cc/R7NL-L5DL>] (defining stereotype threat as: “the threat of being viewed through the lens of a negative stereotype, or the fear of doing something that would inadvertently confirm that stereotype”).
65. Claude M. Steele & Joshua Aronson, *Stereotype Threat and the Intellectual Test Performance of African Americans*, 69 J. PERS. & SOC. PSYCHOL. 797, 808 (1995) (“[T]he present experiments show that making African American participants vulnerable to judgment by negative stereotypes about their group’s intellectual ability depressed their standardized test performance relative to White participants, while conditions designed to alleviate this threat, improved their performance, equating the two groups once their differences in SATs were controlled.”).
66. The authors’ explanation of the stereotype threat dynamic would appear to apply to a wide-variety of academic tasks:

Our best assessment is that stereotype threat caused an inefficiency of processing much like that caused by other evaluative pressures. Stereotype-threatened participants spent more time doing fewer items more inaccurately—probably as a result of alternating their attention between trying to answer the items and trying to assess the self-significance of their frustration. This form of debilitation—reduced speed and accuracy—has been shown as a reaction to evaluation apprehension.

*Id.* at 809; see also Steele, *supra* note 64 (“Nonetheless, throughout the 1990s the national college-dropout rate for African-Americans has been 20 to 25 percent higher than that for whites. Among those who finish college, the grade-point average of black students is two thirds of a grade below that of whites.”).

Schools for children of color too frequently operate as a pipeline to prison.<sup>67</sup> Young African Americans suffer 3.8 times as many out-of-school suspensions and expulsions than young whites.<sup>68</sup> Thus, despite studies that show that white students engage in discipline-generating conduct on par with African Americans,<sup>69</sup> this disparity in punishment contributes to gaps in academic achievement because school discipline directly reduces instructional time and creates social stigma.<sup>70</sup> Fundamentally, school in America for children of color differs radically from school for white children—reflecting a key mechanism for the reproduction of our racial hierarchy.<sup>71</sup>

With quality education not widely available to children of color, it should surprise no one that communities of color suffer highly disproportionate incarceration rates and deportation detention.<sup>72</sup> Paul Butler captures the enormity of the incarceration problem:

In 1960, the U.S. imprisonment rate was approximately 126 per 100,000 population. By, 2008, the rate had quadrupled, to 504 per 100,000. African-American defendants are even worse off. In 1960, . . . the black incarceration rate was approximately 660 per 100,000. By 1970, it had fallen some, to slightly under 600 per 100,000. In 2010, the rate of incarceration among black males was an astronomical 3,074 per 100,000.<sup>73</sup>

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67. Meredith S. Simons, Note, *Giving Vulnerable Students Their Due: Implementing Due Process Protections for Students Referred from Schools to the Justice System*, 66 DUKE L.J. 943, 945 (2017).
68. *Id.* at 959.
69. *E.g.*, Russell J. Skiba et al., *The Color of Discipline: Sources of Racial and Gender Disproportionality in School Punishment*, 34 URB. REV. 317, 334–35 (2002) (finding that white students engaged in more objectively violative behavior while students of color engaged in more subjective violations but both groups engaged in misbehavior on par with each other).
70. DERRICK DARBY & JOHN L. RURY, *THE COLOR OF MIND* 134–35 (2018).
71. *Id.* at 1–2 (arguing that racist ideology in the U.S. gives rise to a “Color of Mind” that constitutes an assault on the dignity of students built upon historic notions of racial inferiority and “is the rotten foundation of black-white educational achievement gaps”).
72. Richard Delgado & Jean Stefancic, *Critical Perspectives on Police, Policing, and Mass Incarceration*, 104 GEO. L.J. 1531, 1537–38 (2016) (arguing that governing elites deploy incarceration as well as deportation as tools to control and marginalize minority populations including Latinos and African Americans).
73. Paul D. Butler, *Poor People Lose: Gideon and the Critique of Rights*, 122 YALE L.J. 2176, 2179–80 (2013); *see also* Christopher N. Lasch et al., *Understanding “Sanctuary Cities,”* 59 B.C. L. REV. 1703, 1773 (2018) (“The Obama administration deported a record 2.7 million people over

Butler ties mass incarceration to poverty and our impoverished education system—both key parts of our racial hierarchy.<sup>74</sup> Thus, the disproportionate incarceration rate suffered by minority communities finds its roots in the separate and unequal education system as well as disparities in poverty.<sup>75</sup>

Policing practices exacerbate minority incarceration rates and generally the Court gives police and other law enforcement agents wide-latitude to stop minorities.<sup>76</sup> Prosecutorial discretion also contributes to disparities in criminal justice.<sup>77</sup> Disparate sentencing directly leads to differences in incarceration rates.<sup>78</sup> All of this results in mass

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the course of eight years. The Trump administration promises to ratchet up both the level and modes of enforcement.”).

74. Butler, *supra* note 73, at 2180 (“For men hoping to avoid prison, being both poor and black is a lethal combination. More than two-thirds of black males who do not have college degrees will be incarcerated at some point in their lives. Black male high school dropouts are more likely to be imprisoned than employed.”).

75. *Id.* at 2181–82 (explaining that 70 percent of state prisoners are high-school dropouts and high school dropouts are sixty-three times more likely to be incarcerated than college graduates); *see also, e.g.*, Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, SENT’G PROJECT 3 (2016), <https://www.sentencingproject.org/wp-content/uploads/2016/06/The-Color-of-Justice-Racial-and-Ethnic-Disparity-in-State-Prisons.pdf> [<https://perma.cc/GX6P-U9VQ>] (“African Americans are incarcerated in state prisons at a rate that is 5.1 times the imprisonment of whites.”).

76. *See, e.g.*, *Whren v. United States*, 517 U.S. 806 (1996) (foreclosing arguments that police stops may be based upon a pretext for race so long as there is reasonable suspicion or probable cause); *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975) (allowing roving border patrol to stop based, in part, upon Mexican appearance); *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976) (allowing fixed border patrol checkpoint stops based upon Mexican appearance).

77. *See, e.g.*, Traci Schlesinger, *Racial Disparities in Pretrial Diversion: An Analysis of Outcomes Among Men Charged with Felonies and Processed in State Courts*, 3 RACE & JUST. 210 (2013) (concluding that blacks and Latinos receive pretrial diversion less often than white defendants).

78. Courts are substantially more likely to sentence African American and Latino people to prison than white people in similar circumstances. Federal courts sentence African American men to longer prison sentences than white men arrested for the same offenses and with similar criminal backgrounds, and African American people constitute a disproportionate percentage of prisoners serving life sentences.

Lindsey Webb, *Slave Narratives and the Sentencing Court*, 42 N.Y.U. REV. L. & SOC. CHANGE 125, 133 (2018).



incarceration of people of color.<sup>79</sup> Mass incarceration of young people of color, in turn, leads to forced labor, loss of political rights, restricted economic and educational opportunities, and trauma.<sup>80</sup> Mass incarceration victimizes individuals as well as communities of color and especially children of color.<sup>81</sup> This cycle operates as another mechanism of reproducing our racial hierarchy across generations.<sup>82</sup>

The employment market also operates in discriminatory ways even beyond the profound negative impact of racial disabilities arising from mass incarceration.<sup>83</sup> For example, researchers found that if applicants' names sound "too" African American—such as Jamal or Lakisha—they faced more restricted employment opportunities.<sup>84</sup> When employed, minorities will suffer more negative evaluations for seemingly identical

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79. *Id.* at 129 (stating that the U.S. imposes the highest incarceration rate in the world and that people of color suffer disproportionately high rates of incarceration).

80. Hutchinson, *supra* note 3, at 2394 (citing several authorities identifying the effects of mass incarceration).

81. Studies suggest that “mass incarceration [leads] to negative health impacts on the female partners and children of incarcerated men, and raises concerns that excessive incarceration could harm entire communities and thus might partly underlie health disparities both in the USA and between the USA and other developed countries.” Christopher Wildeman & Emily A. Wang, *Mass Incarceration, Public Health, and Widening Inequality in the USA*, 389 LANCET 1464, 1464 (2017).

82. The rise in incarceration rates in recent decades, especially among racial/ethnic minorities and the poor, has made parental incarceration a common event for already marginalized children. The trauma and stigma involved, as well as the economic and relationship strains faced by family members, often lead to harmful outcomes for children across the domains of behavior, education, health, and hardship and deprivation.

Kristin Turney & Rebecca Goodsell, *Parental Incarceration and Children's Wellbeing*, 28 FUTURE CHILD. 147, 159 (Spring 2018).

83. David S. Kirk & Robert J. Samson, *Juvenile Arrest and Collateral Educational Damage in the Transition to Adulthood*, 86 SOC. EDUC. 36, 54 (2013) (showing that arrest in adolescence narrows education opportunities and hinders the transition to adulthood); Christy A. Visher et al., *Employment After Prison: A Longitudinal Study of Former Prisoners*, 28 JUST. Q. 698, 711–12 (2011) (demonstrating employment restrictions faced by victims of mass incarceration).

84. Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable Than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV. 991, 1011 (2004) (“This paper suggests that African-Americans face differential treatment when searching for jobs and this may still be a factor in why they do poorly in the labor market. Job applicants with African-American names get far fewer callbacks for each resume they send out.”).

performance.<sup>85</sup> Even with respect to mundane transactions such as taxicab tips, minorities suffer discrimination.<sup>86</sup> Economists estimate that up to 25 percent of the gap in pay between African Americans and whites is due to racial bias.<sup>87</sup> Today, African Americans earn about 60 percent of median income of whites, a number that has budged very little since 1966.<sup>88</sup> Further, the employment ratio for black men has plunged from nearly 75 percent in the early 1970s to less than 65 percent today.<sup>89</sup>

In terms of wealth, the median net worth of African American and Latino households is a small fraction of white households and has grown little over the past twenty-seven years—to approximately a meagre \$20,000.<sup>90</sup> Minority communities bore a disproportionate burden of the

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85. David R. Hekman et al., *An Examination of Whether and How Racial and Gender Biases Influence Customer Satisfaction*, 53 ACAD. MGMT. J. 238, 256 (2010) (“Customers tended to be less satisfied with the services provided by women and nonwhite employees rather than by men and white employees, even when objective indicators of performance were controlled for.”).
86. Ian Ayres et al., *To Insure Prejudice: Racial Disparities in Taxicab Tipping*, 114 YALE L. J. 1613, 1674 (2005) (“All in all, the regression analysis suggests that there is strong evidence of customer discrimination against minority drivers measured by tipping and stiffing differences that persists and is statistically significant after controlling for a variety of nonracial factors.”).
87. Kerwin Kofi Charles & Jonathan Guryan, *Prejudice and Wages: An Empirical Assessment of Becker’s The Economics of Discrimination*, 116 J. POL. ECON. 773, 805 (2008) (finding that “racial prejudice among whites accounts for as much as one-fourth of the gap in wages between blacks and whites” and “is associated with a present discounted loss in annual earnings for blacks of between \$34,000 and \$115,000, depending on the intensity of the prejudice of the marginal white in their states”).
88. Brad Plumer, *These Ten Charts Show the Black-White Economic Gap Hasn’t Budged in 50 Years*, WASH. POST (Aug. 28, 2013), [https://www.washingtonpost.com/news/wonk/wp/2013/08/28/these-seven-charts-show-the-black-white-economic-gap-hasnt-budged-in-50-years/?utm\\_term=.5af5d057ab2f](https://www.washingtonpost.com/news/wonk/wp/2013/08/28/these-seven-charts-show-the-black-white-economic-gap-hasnt-budged-in-50-years/?utm_term=.5af5d057ab2f) [https://perma.cc/CLQ9-LDR9].
89. *Employment-Population Ratio: 20 Years and Over, Black or African American Men*, FED. RESERVE BANK OF ST. LOUIS (Sept. 7, 2018), <https://fred.stlouisfed.org/series/LNU02300031> [https://perma.cc/CZ5C-WW2S].
90. “In 2016, white families had a median net worth of \$171,000, compared with \$17,600 for blacks and \$20,700 for Hispanics.” Tracy Jan, *White Families Have Nearly 10 Times the Net Worth of Black Families. And the Gap is Growing.*, WASH. POST (Sept. 28, 2017), [https://www.washingtonpost.com/news/wonk/wp/2017/09/28/black-and-hispanic-families-are-making-more-money-but-they-still-lag-far-behind-whites/?utm\\_term=.cb413066c72f](https://www.washingtonpost.com/news/wonk/wp/2017/09/28/black-and-hispanic-families-are-making-more-money-but-they-still-lag-far-behind-whites/?utm_term=.cb413066c72f) [https://perma.cc/X78D-FKGZ].

costs of the Great Financial Crisis.<sup>91</sup> Wealth operates as a key element to family success as it can finance educational expenses, emergency medical needs, and household formation for young adults.<sup>92</sup> It naturally plays a key role in educational achievement gaps between whites and students of color; in fact, the achievement gap disappears when adjusted for household economic resources.<sup>93</sup>

Childhood poverty, disparities in education and racially driven incarceration policies set the stage for our racial hierarchy's deadliest realities: racial disparities in life expectancy, infant mortality and other health outcomes.<sup>94</sup> Black males can expect to live 4.4 years less than white males.<sup>95</sup> These disparities impose deep costs to our entire society as well as communities of color:

African Americans continue to receive separate and unequal treatment compared to Caucasians, in hospitals, nursing homes, and physician offices. As a result, racial disparities in health status and access to health care persist. Consequently, since 1964, research studies estimate that 4.2 million African Americans have died unnecessarily because of health disparities. Beyond the costs of lost lives, the fiscal costs of racial disparities in health care from 2009 through 2018 is estimated to be approximately \$337 billion, including \$220

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91. *Id.* (“While net worth for all racial groups fell by about 30 percent during the Great Recession, black and Hispanic families experienced an additional 20 percent decline between 2010 and 2013 at a time when wealth stabilized for white families.”).
  92. Adam Harris, *White College Graduates Are Doing Great with Their Parents’ Money*, ATLANTIC (July 20, 2018), <https://www.theatlantic.com/education/archive/2018/07/black-white-wealth-gap-inheritance/565640/> [<https://perma.cc/F8EJ-5EKT>].
  93. Sean F. Reardon et al., *Patterns and Trends in Racial/Ethnic and Socioeconomic Achievement Gaps*, in HANDBOOK OF RES. IN EDUC. FIN. AND POL’Y 491, 501–02 (H.F. Ladd & M.E. Goertz eds., 2nd ed. 2015).
  94. Shervin Assari, *Why Is It so Hard to Close the Racial Health Gap in the US?*, STAT (Jan. 9, 2017), <https://www.statnews.com/2017/01/09/racial-health-gap-united-states/#> [<https://perma.cc/WCV4-EV9T>] (“The racial health gap in the United States is well-documented. The gap starts with the infant mortality rate (11.1 blacks vs. 5.1 whites per 1,000) and extends to almost any health domain.”).
  95. Karen Kaplan, *Black Americans are Closing the Life Expectancy Gap with Whites*, CDC Says, L.A. TIMES (Nov. 5, 2015, 9:05 PM), <http://www.latimes.com/science/sciencenow/la-sci-sn-black-white-life-expectancy-gap-20151105-story.html> [<https://perma.cc/WS3B-GJ8F>].

billion for Medicare, \$27 billion for Medicaid, and \$90 billion for private insurers and individual's out-of-pocket costs.<sup>96</sup>

The durability and pervasiveness of these health disparities powerfully supports the notion that the U.S. legal system operates to perpetuate its racial hierarchy across generations, at the expense of black lives and other social indicia of well-being for people of color.<sup>97</sup>

All of the above evidence proves the continued operation of a racial hierarchy in the U.S. The United Nations Working Group on People of African Descent reported on this hierarchy with respect to African Americans in its 2016 report:

The persistent gap in almost all the human development indicators, such as life expectancy, income and wealth, level of education, and even food security, between African Americans and the rest of the United States population, reflects the level of structural and institutional discrimination that creates de facto barriers for people of African descent to fully exercise their human rights.<sup>98</sup>

The United Nations Human Rights Council recently published a report that found:

The United States remains a chronically segregated society. Blacks are 2.5 times more likely than Whites to be living in poverty, their infant mortality rate is 2.3 times that of Whites, their unemployment rate is more than double that for Whites, they typically earn only 82.5 cents for every dollar earned by a White counterpart, their household earnings are on average well under two thirds of those of their White equivalents, and their incarceration rates are 6.4 times higher than those of Whites. These shameful statistics can only be explained by long-standing structural discrimination on the basis of race, reflecting the enduring legacy of slavery.<sup>99</sup>

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96. Ruqaiijah Yearby, *Sick and Tired of Being Sick and Tired: Putting an End to Separate and Unequal Health Care in the United States 50 Years After the Civil Rights Act of 1964*, 25 HEALTH MATRIX 1, 2–3 (2015).

97. Mary Crossley, *Black Health Matters: Disparities, Community Health, and Interest Convergence*, 22 MICH. J. RACE & L. 53, 60 (2016) (“Health inequality for Black people and other minorities is pervasive—it permeates measures of health care access, health status, and health outcomes.”).

98. *Report of the Working Group of Experts on People of African Descent on its Mission to the United States of America* ¶ 81, U.N. Doc. A/HRC/33/61 (Aug. 18, 2016).

99. *2018 Report of Special Rapporteur*, *supra* note 46, at ¶ 54.

Implicit in the continued operation of this racial hierarchy is the mass destruction of human potential and human capital.

This destruction of human capital plays a central role in estimates of the cost of America's racial hierarchy. McKinsey & Company calculates that if the white-black academic achievement gap disappeared, GDP would increase by as much as \$525 billion.<sup>100</sup> Other estimates based upon wage differentials mount to as high as \$1 trillion per annum.<sup>101</sup> Nevertheless, these estimates may understate the economic benefits of the full embrace of diversity (discussed below) which would support further gains in the form of superior innovation,<sup>102</sup> ethicality<sup>103</sup> and a more rationalized approach to risk and legal compliance.<sup>104</sup> A more innovative, ethical and risk-appropriate economy would lead to economic gains beyond just wage gains for minority workers. All workers would achieve greater productivity.

Further gains may result from perceptions surrounding the rule of law in America. According to the World Justice Project, the U.S. suffers from a perception of weakness in its rule of law due to its legal system's

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100. Auguste, et al., *supra* note 42.

101. Steven A. Ramirez, *What We Teach When We Teach About Race: The Problem of Law and Pseudo-Economics*, 54 J. LEGAL EDUC. 365, 375 (2004).

102. Sylvia Ann Hewlett et al., *How Diversity Can Drive Innovation*, HARV. BUS. REV. (Dec. 2003), <https://hbr.org/2013/12/how-diversity-can-drive-innovation> [<https://perma.cc/6GRX-DPJ8>] (“[N]ew research provides compelling evidence that diversity unlocks innovation and drives market growth—a finding that should intensify efforts to ensure that executive ranks both embody and embrace the power of differences.”); *see also* Katherine W. Phillips, *How Diversity Makes Us Smarter*, SCI. AM. (Oct. 1, 2014), <https://www.scientificamerican.com/article/how-diversity-makes-us-smarter/> [<https://perma.cc/7K6G-9V9K>] (“[I]f you want to build teams or organizations capable of innovating, you need diversity. Diversity enhances creativity. It encourages the search for novel information and perspectives, leading to better decision making and problem solving. Diversity can improve the bottom line of companies and lead to unfettered discoveries and breakthrough innovations.”).

103. Steven A. Ramirez, *Diversity and Ethics: Toward an Objective Business Compliance Function*, 49 LOY. U. CHI. L.J. 581, 586 (2018) (“Diversity also imports rigor into the firm in that the firm’s conduct must pass muster with all culturally diverse perspectives on compliance or ethical issues if diverse voices hold sway.”).

104. Kristin Johnson et al., *Diversifying to Mitigate Risk: Can Dodd-Frank Section 342 Help Stabilize the Financial Sector?*, 73 WASH. & LEE L. REV. 1795, 1803 (2016) (“[W]ell-managed cultural and gender diversity can breakdown . . . cognitive biases. In terms of finance, this translates into superior risk management as diverse groups hold more heterogeneous perspectives on risk, ethics, and market decisions in a way that can lead to superior outcomes on these issues.”).

approach to racial discrimination.<sup>105</sup> More specifically, the U.S. rating on its rule of law suffered from very low perception on the absence of racial discrimination in criminal justice, civil justice, and protection of fundamental rights.<sup>106</sup> Only access to and affordability of civil justice reflected a score as low as the three discrimination scores;<sup>107</sup> but, because of economic differentials between minorities and whites, there cannot be any doubt that communities of color are most likely to be denied access to civil justice.<sup>108</sup> Thus, America's continuing racial hierarchy bears responsibility for all of the lowest scores of the U.S. with respect to its rule of law. The strength of a given nation's rule of law influences the willingness of investors to send money to that nation.<sup>109</sup> The weakness evident in the U.S. rule of law, a weakness directly attributable to discrimination against minorities, deters investment and thereby slows economic growth.

Despite the economic gains available for dismantling the racial hierarchy plaguing the U.S., the Supreme Court consistently turns back political efforts to reduce the impact of the hierarchy and to foster the full embrace of diversity. This profoundly non-democratic reality frustrates key political objectives in terms of equity, social stability, and economic growth, which are all inextricably linked together.<sup>110</sup> In terms of economics, the U.S. faces an enormous challenge that promises to steadily worsen: the corrosive influence of a socially constructed racial hierarchy that leaves millions of young Americans stranded at the margins of our economy and deprives our economy of a rationalized human capital formation function.<sup>111</sup> Our educational system

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105. WORLD JUSTICE PROJECT, RULE OF LAW INDEX 2017–2018 153 (2018) (ranking the U.S. a modest 19 out of 113 nations in adherence to the rule of law).

106. *Id.*

107. *Id.*

108. *See supra* note 90 and accompanying text.

109. WORLD JUSTICE PROJECT, *supra* note 105, at 11. The *World Justice Project's* conception of the rule focuses on containing power and protecting individual rights, including the right to be free from racial discrimination. *Id.* at 5, 11, 15, 17.

110. *E.g.*, BENJAMIN M. FRIEDMAN, THE MORAL CONSEQUENCES OF ECONOMIC GROWTH 399–436 (2006) (“Only with sustained economic growth . . . can even a great nation find the energy, the wherewithal, and . . . the human attitudes that together sustain an open, tolerant, and democratic society.”).

111. Human ingenuity drives all innovation which, in turn, drives sustainable macroeconomic growth. As such, the nation which maximizes the capacity of its human resources will invariably out innovate and outgrow nations that allow human resources to wallow in economically oppressive conditions. In the U.S. today, nearly 40 percent of African American and

propagates and entrenches this irrational economic reality, and the legal academy plays a central role in this deeply suboptimal economic outcome.<sup>112</sup> Our entire society bears the cost of this challenge in the form of trillions in foregone macroeconomic growth.<sup>113</sup> In addition, our entire society suffers the effects of stunted human capital development.<sup>114</sup> Dismantling the racial hierarchy operating in the U.S. and fully embracing our cultural diversity amounts to a compelling state interest.

## II. THE NEUROLOGICAL BASIS OF RACE AND THE ROLE OF CULTURAL DIVERSITY

Psychological and neuroscientific evidence further evidences America's socially and legally constructed racial hierarchy.<sup>115</sup> Psychological studies demonstrate that Americans explicitly rank whites higher than Asians, Asians higher than Hispanics, and Hispanics higher than blacks.<sup>116</sup> Implicit bias tests demonstrate that the

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over 35 percent of Latino children suffer from the devastation of possibilities implicit in poverty. See RAMIREZ, *supra* note 9, at 135.

112. See *supra* notes 52–59 and accompanying text.

113. Impaired macroeconomic growth means we all sell goods and services into a smaller market with less demand. RAMIREZ, *supra* note 9, at 17–30 (“Robust consumption supports the profitability of all businesses.”).

114. Impaired human capital formation leads to lower innovation and thus less growth. *Id.* at 17–20, 23.

115. “[P]sychosocial factors such as prejudicial attitudes, group identification, stereotypes and affective orientations, political ideology/affiliations, and beliefs regarding the nature of race itself can affect the racial categorization process.” Thus, social psychology now recognizes that “racial categorization is far more than a simple matter of physical appearance or biology, but rather a dynamic process informed by any number of sociocultural, motivational, and cognitive factors.” These findings complement findings from across a range of disciplines including history, sociology, genetics, and biology. The social psychological evidence enjoys further support from the fundamental malleability of race across time and space. Jennifer A. Richeson & Samuel R. Sommers, *Toward a Social Psychology of Race and Race Relations for the Twenty-First Century*, 67 ANN. REV. PSYCHOL. 439, 441–43 (2016) (citations omitted). “The malleability of racial categorization at the societal level may be reflected best in the decision by the US Office of Management and Budget to move from the recognition of roughly 5 mutually exclusive racial categories in 1978 to more than 100 possible racial/ethnic combinations in 2010.” *Id.* at 442 (citation omitted). These social factors continue to drive “staggering racial disparities . . . in health, wealth, and overall well-being.” *Id.* at 439.

116. The ordinal relations among racial groups were less consistent for explicit evaluations than for implicit evaluations. Whites, Asians, Blacks, and Hispanics did show an explicit preference for their

“hierarchy of implicit evaluations placed the in-group at the top, followed by Whites, Asians, Blacks, and then Hispanics.”<sup>117</sup> Explicit and implicit biases explain all elements of the racial hierarchy discussed herein—from political decisions to employment realities.<sup>118</sup>

Neurological science now confirms the social psychology of race. Specifically, scientists used functional magnetic resonance imaging (fMRI) to track brain activity and associate neural activity in specific parts of the brain with responses to implicit association tests.<sup>119</sup> In particular, scientists find that amygdala activity (a part of the brain previously identified in emotional, fear and threat assessment)<sup>120</sup> is

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own racial group compared with the others, and most groups’ explicit evaluations showed a hierarchy from Whites to Asians, Hispanics, and then Blacks. Note that for White and Asian participants, the explicit preference for Hispanic people over Black people reversed the order reflected in implicit evaluation. Another reversal was that Black participants explicitly preferred Hispanics to Asians and Whites, on average.

Axt et al., *supra* note 43, at 1806.

117. *Id.* at 1812.

118. The most prominent implicit association test is administered by Project Implicit. It shows a widespread bias across the nation in favor of white Americans and against African Americans. Chris Mooney, *Across America, Whites Are Biased and They Don’t Even Know It*, WASH. POST (Dec. 8, 2014), [https://www.washingtonpost.com/news/wonk/wp/2014/12/08/across-america-whites-are-biased-and-they-dont-even-know-it/?utm\\_term=.bacbbb3c1821](https://www.washingtonpost.com/news/wonk/wp/2014/12/08/across-america-whites-are-biased-and-they-dont-even-know-it/?utm_term=.bacbbb3c1821) [<https://perma.cc/8QNY-7HK6>].

119. Elizabeth A. Phelps et al., *Performance on Indirect Measures of Race Evaluation Predicts Amygdala Activation*, 12 J. COG. NEUROSCIENCE 729, 729 (2000) (“We used fMRI to explore the neural substrates involved in the unconscious evaluation of Black and White social groups. Specifically, we focused on the amygdala, a subcortical structure known to play a role in emotional learning and evaluation.”).

120. [W]e chose to focus on the amygdala, a subcortical structure known to be involved in emotional learning, memory, and evaluation. The amygdala is critically involved in emotional learning as measured by fear conditioning, a task in which a neutral stimulus comes to acquire emotional properties through direct association with an aversive stimulus. In humans, the amygdala’s role extends beyond fear conditioning to the expression of learned emotional responses that have been acquired without direct aversive experience.

*Id.* at 729–30 (citations omitted). “In addition to responding to emotionally salient stimuli based on experience, the amygdala is involved in fear-related learning, detecting and responding to threats, and encoding the hedonic value of learned and unlearned stimuli.” Telzer et al., *supra* note 7, at 235 (citations omitted). In short, the amygdala is central in processing learned information at a subconscious level. *Id.* at 240 (citations omitted).



triggered when implicit biases take hold in response to racialized images.<sup>121</sup> Consequently, neuroscience confirms the validity of implicit associations tests that demonstrate the attitudes underlying America's racial hierarchy.<sup>122</sup>

The neurological responses to racialized stimuli that underlie implicit association tests do not arise innately. Instead, neuroscience demonstrates that the amygdala activity requires social conditioning from a young age.<sup>123</sup> Indeed, the amygdala itself develops rapidly during adolescence in response to social environment.<sup>124</sup> Thus, when neuroscientists assessed amygdala activity in response to racialized stimuli across development ages ranging from 4 to 16.5, they found an absence of such activity in early childhood, and substantial activity in

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121. Phelps et al., *supra* note 119, at 729 (“[T]hese results suggest that amygdala and behavioral responses to Black-versus-White faces in White subjects reflect cultural evaluations of social groups modified by individual experience.”).

122. “Unconscious bias has been identified, observed and validated in brain studies using Magnetic Resonance Imaging (MRI) technology. Unconscious bias is now acknowledged by psychologists and neuroscientists as real and measurable.” Bernard J. Luskin, Ed.D., LMFT, *MRIs Reveal Unconscious Bias in the Brain*, PSYCHOL. TODAY (Apr. 7, 2016), <https://www.psychologytoday.com/us/blog/the-media-psychology-effect/201604/mris-reveal-unconscious-bias-in-the-brain> [<https://perma.cc/PQQ4-FQAY>].

123. Telzer et al., *supra* note 7, at 234 (“Results suggest that differential amygdala response to African American faces does not emerge until adolescence, reflecting the increasing salience of race across development.”).

124. Although structurally mature by early childhood, the amygdala undergoes massive changes in functional processing during adolescence, increasing in responsiveness to social stimuli. For example, the onset of puberty is associated with enhanced amygdala activation to facial stimuli. Adolescence is also a time when race becomes increasingly salient. . . . The social reorientation of the amygdala, coupled with more mature cognitive skills, as well as an increasing salience of race, renders the early adolescent years, particularly amenable to enhanced amygdala response to race.

*Id.* at 235.

adolescents.<sup>125</sup> This suggests that racial responses are learned responses.<sup>126</sup>

In fact, neuroscientists also found that amygdala response is mitigated by cultural diversity among peers.<sup>127</sup> Diversity (independent of age) within a child's peer group predicted diminished amygdala activation to interracial faces.<sup>128</sup> The authors therefore recommend "interventions designed to reduce the development of racial biases could focus on providing children with opportunities to interact with individuals from diverse backgrounds, thereby potentially decreasing the salience of race."<sup>129</sup>

Neuroscience also suggests that these processes influence empathy. Using functional magnetic resonance imaging, scientists scanned twenty Chinese adults with significant life experiences in Western nations with majority Caucasian populations as they viewed videotapes.<sup>130</sup> The videos depicted either Asian or Caucasian models in painful or non-painful stimulations.<sup>131</sup> The scientists concluded:

We found that the neural activity in the pain matrix including the anterior cingulate cortex, anterior insula, inferior frontal cortex and somatosensory cortex was significantly increased in response to painful versus non-painful stimuli applied to both Asian and Caucasian models. Moreover, these empathic neural responses to Asian and Caucasian models did not differ significantly and were positively correlated with each other. Our

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125. [T]he amygdala is particularly amenable to learning about socially constructed values placed on social groups, such as those about race. We find that the amygdala becomes increasingly sensitive to [African American] faces across development, with activation to [African American] faces only becoming significant around 14 years. The heightened amygdala activity to [African American] faces previously reported in adults is not present during early childhood and only becomes evident during adolescence. Thus, amygdala responsivity to race is likely the result of a developmental process in which the amygdala acquires emotional knowledge learned over development, becoming more sensitive to [African American] faces.

*Id.* at 241.

126. *Id.*

127. *Id.* at 234 ("[G]reater peer diversity was associated with attenuated amygdala response to African American faces, suggesting that intergroup racial contact may reduce the salience of race.").

128. *Id.* at 240.

129. *Id.* at 242.

130. Xiangyu Zuo & Shihui Han, *Cultural Experiences Reduce Racial Bias in Neural Responses to Others' Suffering*, 1 CULTURE & BRAIN 34, 34 (2013).

131. *Id.*

results indicate that cultural experiences with racial out-group members may increase the neural responses to the suffering of other-race individuals and thus reduce the racial bias in empathy.<sup>132</sup>

Naturally, this kind of interracial empathy, now pinpointed to arise from significant experiences with culturally diverse people, likely influences a range of political issues subject to citizen decision-making.<sup>133</sup>

The key to overcoming racial bias demonstrated in these neurological studies, and thus overcoming much of our racial hierarchy, would appear to be maximizing the presence of cultural diversity throughout our society as well as the exposure of all citizens to the broadest degree of cultural diversity.

### III. DEMOGRAPHIC, ECONOMIC, AND INSTITUTIONAL REALITIES OF RACE IN THE U.S.

Martin Luther King's hope for America endured into his final days on this planet. When he gave the final speech of his life on April 3, 1968 (the eve of his assassination), Dr. King had an eerie premonition of his impending demise:

And then I got into Memphis. And some began to say the threats, or talk about the threats that were out. What would happen to me from some of our sick white brothers? Well, I don't know what will happen now. We've got some difficult days ahead. But it really doesn't matter with me now, because I've been to the mountaintop. And I don't mind. Like anybody, I would like to live a long life. Longevity has its place. But I'm not concerned about that now. I just want to do God's will. And He's allowed me to go up to the mountain. And I've looked over. And I've seen the Promised Land. I may not get there with you. But I want you to know tonight, that we, as a people, will get to the promised land!<sup>134</sup>

Legal commentators, perhaps chastened by Supreme Court decisions over the past fifty years, are not always as optimistic as Dr. King.

Derrick Bell is regarded as one the founding fathers of critical race theory—many of whom are perceived as falling into a more pessimistic camp. As Professor Bell observes:

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132. *Id.*

133. *Id.* at 35 (“Empathy refers to the ability to understand and share emotional states of conspecific others. Empathy for others’ suffering plays an important role in prosocial behavior.”).

134. *See King, supra* note 10.

Both law and religion, for example, claim to elevate human conduct. Law claims to pursue justice (including racial justice) while religion claims to inspire love and good will among humans (including racial good will). Each also relies on blind faith that it achieves its fundamental goals. It calls upon this faith in defiance of evidence and reason. We know, for example that the Resurrection of Christ could not and did not happen as a matter of science; yet, Christian religion calls upon the faithful to accept the Resurrection. Similarly, we know from history and experience that law will never deliver justice and that law in America will never deliver racial justice; yet we are called upon to believe somehow justice is just around the corner.<sup>135</sup>

On the other hand, the founding author of interest-convergence theory explains that the battle against racism is most likely to succeed (however ephemerally) when the political climate is ripe for “a convergence of interests between what blacks seek and what white policy makers perceive they or the country need.”<sup>136</sup> Regardless of the permanence of racial hierarchy in the U.S., critical race theorists recognize that opportunities for racial reform will present themselves and should be exploited by those seeking further racial progress.<sup>137</sup> Could interest-convergence theory fuel further significant progress toward the promised land of racial equality?

We believe that demographic and economic realities will create opportunities for the kinds of initiatives needed to diminish the perpetuation of our racial hierarchy—specifically, the broadest possible

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135. Derrick Bell, *Law as a Religion*, 69 CASE W. RES. L. REV. 265, 265 (2018).

136. *Id.* at 273 (citing Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest Convergence Dilemma*, 93 HARV. L. REV. 518, 524 (1980) (“Brown . . . cannot be understood without some consideration of the decision’s value to whites, not simply those concerned about the immorality of racial inequality, but also those whites in policy-making positions able to see the economic and political advances at home and abroad that would follow abandonment of segregation.”)).

137. The role of interest convergence in determining the course of minority fortunes is thus a well-known tool of critical analysis, useful both in explaining the course of history and in determining when the time may be right to strike for change. Yet, no Critical Race Theorist has analyzed the possibility that interest convergence may offer opportunities today, when society is confronting the threat of terrorism and re-evaluating its approach to Islam.

Richard Delgado, *Crossroads and Blind Alleys: A Critical Examination of Recent Writing About Race*, 82 TEX. L. REV. 121, 138 (2003) (book review).

embrace of cultural diversity under law.<sup>138</sup> Demographically, people of color will constitute a majority of the population in the U.S. by 2045.<sup>139</sup> “New census population projections confirm the importance of racial minorities as the primary demographic engine of the nation’s future growth, countering an aging, slow-growing and soon to be declining white population.”<sup>140</sup> Specifically, in 2045 the nation is projected to be: 49.7 percent white; 24.6 percent Hispanic; 13.1 percent African American; 7.9 percent Asian American, and 3.8 percent multiracial populations.<sup>141</sup> This will create important changes.

For example, the recent rise in racial hatred and intolerance<sup>142</sup> may be attributed in part to the fear some whites feel when confronted with the racial, social and ethnic changes that will soon relegate them to a minority status in this country.<sup>143</sup> The research earlier presented in this Article shows that one of the sources of racial fear is an overactive amygdala that flares up when some people are confronted with the

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138. One argument for embracing diversity would entail judicially reimagining the Equal Protection Clause of the Fourteenth Amendment as a tool for the deconstruction of subordination and hierarchy rather than as an instrument of perpetuation of the status quo. *See, e.g.*, Steven A. Ramirez, *Foreword: Diversity in the Legal Academy after Fisher II*, 51 UC DAVIS L. REV. 979, 983–84 (2018). Even more effectively, courts could imply a non-discrimination norm into all private contracts under the duty of good faith and fair dealing. Neil G. Williams, *Offer, Acceptance, and Improper Considerations: A Common Law Model for the Prohibition of Racial Discrimination in the Contracting Process*, 62 GEO. WASH. L. REV. 183 (1994). The government could require firms to disclose their diversity policies (and enforce compliance with such policies) and voters of color could form coalitions in favor of policies encouraging diversity and enforcing all anti-discrimination laws aggressively, by taking a zero-tolerance approach to all forms of discrimination (implicit bias included). RAMIREZ, *supra* note 9, at 156–58.

139. William H. Frey, *The US Will Become ‘Minority White’ in 2045, Census Projects*, BROOKINGS (Mar. 14, 2018), <https://www.brookings.edu/blog/the-avenue/2018/03/14/the-us-will-become-minority-white-in-2045-census-projects/> [<https://perma.cc/DC8C-AEUQ>].

140. *Id.*

141. *Id.*

142. Devlin Barrett, *Hate Crimes Rose 17 Percent Last Year, According to New FBI Data*, WASH. POST (Nov. 13, 2018), [https://www.washingtonpost.com/world/national-security/hate-crimes-rose-17-percent-last-year-according-to-new-fbi-data/2018/11/13/e0dcf13e-e754-11e8-b8dc-66cca409c180\\_story.html?utm\\_term=.27cd97500da9](https://www.washingtonpost.com/world/national-security/hate-crimes-rose-17-percent-last-year-according-to-new-fbi-data/2018/11/13/e0dcf13e-e754-11e8-b8dc-66cca409c180_story.html?utm_term=.27cd97500da9) [<https://perma.cc/9JJW-GKSH>].

143. *See* Shapiro, *supra* note 24 (“The moment a group feels threatened, they enter into this mindset and start to see the conflict in adversarial terms: it becomes us versus them, and innovative solutions for mutual gain are replaced by myopic policies that satisfy one tribe over another.”).

unfamiliar.<sup>144</sup> As this research shows, these flare ups of the amygdala are much less likely to happen when people have been exposed to a broad spectrum of human beings in a variety of situations—and the earlier in life this exposure takes place the better.<sup>145</sup> The coming increases in populations of persons of color will ultimately operate to expose more Americans to more diversity.<sup>146</sup> Current peril will inevitably give way to long-term opportunities for real and durable reform.

Economically, this will mean two realities. First, allowing a festering racial hierarchy to persist will entail ever greater costs. An economy that underutilizes the capacity of over half the population will create a need and opportunity for interest convergence.<sup>147</sup> Second, the gains from embracing cultural diversity will increase dramatically.<sup>148</sup> With half the population consisting of people of color, the profits from empowering and unleashing our full potential will also support interest convergence and reform.<sup>149</sup> The law of our country will have to be reimagined to encourage (perhaps in some cases even require) governmental entities and private parties to take proactive steps to deracialize our schools and our living spaces.<sup>150</sup> Singapore proves the point that embracing diversity can drive substantial racial progress, relative to the U.S.<sup>151</sup>

The history of Singapore certainly provides proof that racialized societies can mitigate the influence of race and achieve higher levels of

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144. Phelps et al., *supra* note 119, at 733.

145. *See supra* notes 127–129 and accompanying text.

146. *See supra* note 139 and accompanying text.

147. *See supra* note 141 and accompanying text (indicating that African Americans, Hispanics, Asian-Americans, and multiracial people are predicted to make up over half of the U.S. population by 2045).

148. *See supra* notes 100–104 and accompanying text (stating that the benefits of the full embrace of diversity would support further gains in the form of superior innovation, ethicality, and a more rationalized approach to risk and legal compliance).

149. *See supra* notes 102–105 and accompanying text (discussing how a more innovative, ethical and risk-appropriate economy would lead to economic gains beyond just wage gains for minority workers).

150. *See supra* note 27 and accompanying text.

151. Peter K.H. Chew, *Racism in Singapore: A Review and Recommendations for Future Research*, 12 J. PAC. RIM PSYCH. 2, 3 (2018) (stating that Singapore mandates diversity in its housing policy, education, and national service policies and that 89 percent of Singaporeans believe that all have an equal chance to succeed). In the U.S., about 61 percent of Americans believe more needs to be done to achieve racial equality. *Supra* note 18 and accompanying text.

unity, peace, and prosperity.<sup>152</sup> On August 9, 1965, at a press conference announcing Singapore's new independence from Malaysia, Prime Minister Lee Kuan Yew stated: "We are going to have a multiracial nation in Singapore. We will set the example. This is not a Malay nation, this is not a Chinese nation, this is not an Indian nation. Everybody will have his place: equal; language, culture, religion."<sup>153</sup> According to one Singaporean commentator: "With the dynamic leadership of Singapore's founding fathers and the strong support of its people, this multiracial nation has survived and thrived, against the odds."<sup>154</sup> Indeed, Singapore has even been called "the 20th century's most successful development story."<sup>155</sup> In part, according to long-serving Prime Minister Lee Kuan Yew: "We have had, since 1965, an undivided society, solidly behind a meritocratic system, pushing for higher standards of education, higher standards of performance, and meritocratic at every level."<sup>156</sup> But the turn from racial privilege to meritocracy was not painless, even if economically successful.<sup>157</sup>

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152. Singapore ranks fifth out of 188 nations on the Human Development Index, which measures economic performance, life expectancy and education. UNITED NATIONS DEVELOPMENT PROGRAMME (UNDP), HUMAN DEVELOPMENT REPORT 2016 184 (2016), [http://hdr.undp.org/sites/default/files/2016\\_human\\_development\\_report.pdf](http://hdr.undp.org/sites/default/files/2016_human_development_report.pdf) [<https://perma.cc/UG9M-JHHM>]. The U.S. ranks tenth. *Id.*
153. Edmund Lim, *Behind the Scenes: What Led to Separation in 1965?*, STRAITS TIMES (Aug. 5, 2015, 5:00 AM), <https://www.straitstimes.com/opinion/behind-the-scenes-what-led-to-separation-in-1965> [<https://perma.cc/6BCC-UYXJ>].
154. *Id.*
155. Jim Zarroli, *How Singapore Became One of the Richest Places on Earth*, NPR (Mar. 29, 2015, 7:38 AM), <https://www.npr.org/2015/03/29/395811510/how-singapore-became-one-of-the-richest-places-on-earth> [<https://perma.cc/S2S7-TVHE>].
156. *Id.* In Singapore, students at all government-aided schools (at least) recite the following pledge: "We, the citizens of Singapore, pledge ourselves as one united people, regardless of race, language or religion, to build a democratic society, based on justice and equality, so as to achieve happiness, prosperity and progress for our nation." Singapore National Library Board, *National Pledge*, SINGAPORE INFOPEdia (Aug. 1, 2014), [http://eresources.nlb.gov.sg/infopedia/articles/SIP\\_84\\_2004-12-13.html](http://eresources.nlb.gov.sg/infopedia/articles/SIP_84_2004-12-13.html) [<https://perma.cc/EDN4-FVD4>].
157. The emphasis on meritocracy and education certainly paid off as the city-nation produces more GDP per capita than all but six other countries (and about 60 percent more than the U.S.), despite having very few natural resources, according to the CIA. The World Factbook, CENTRAL INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2004rank.html> [<https://perma.cc/D9QM-RD2P>] (last visited Sept. 28, 2018) (GDP per capita on a purchasing power parity basis amounts to \$94,100 in Singapore and \$59,800 in the U.S.).

In 1964, and again in 1969, Singapore suffered a series of deadly race riots. In the summer of 1964, ethnic Chinese (75 percent of the population at the time) and Malays (15 percent of the population at the time) battled in the streets leading to thirty-one deaths and 520 injuries.<sup>158</sup> In 1969, the death toll fell, but another series of race riots took four lives and led to eighty injuries.<sup>159</sup> Singapore has not suffered any major race riots in the subsequent decades.<sup>160</sup> Today, Singapore continues to face broad cultural diversity challenges but actively pursues racial harmony in ways that work.<sup>161</sup>

Compared to the U.S., its efforts warrant praise—assuming a policy goal of dismantling a racial hierarchy. First, Singapore actively pursues multiculturalism as a constitutional and national policy, alongside meritocracy—even celebrating an annual “Racial Harmony Day” for over twenty years and counting.<sup>162</sup> Second, Singapore makes generous use of affirmative action—in the sense that the government takes action affirmatively to assure minority participation and success.<sup>163</sup> Third,

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158. *8 Killed as Singapore Race Riots Erupt*, N.Y. TIMES (Sept. 5, 1964), <https://www.nytimes.com/1964/09/05/archives/8-killed-as-singapore-race-riots-erupt.html> [<https://perma.cc/5VDW-BVM7>].

159. *A Forgotten Past—Two Decades of Chaos*, REMEMBER SINGAPORE (Sept. 20, 2015), <https://remembersingapore.org/2013/12/09/two-decades-of-chaos/> [<https://perma.cc/C4NX-BBRX>].

160. *Id.*

161. Toh Yong Chuan, *Racial Harmony Day in Singapore: 20 Years On*, STRAITS TIMES (July 23, 2017, 5:00 AM SGT), <https://www.straitstimes.com/singapore/racial-harmony-day-in-singapore-20-years-on> [<https://perma.cc/F79B-TYEE>] (noting the diversity challenges facing Singapore given that “[o]f the 3,408,900 Singapore citizens, 2,595,800 (76.1 percent) are Chinese; 510,200 (15 percent) are Malays; 253,300 (7.4 percent) are Indians; and 49,700 (1.5 percent), including Eurasians, are classified as ‘Others’” in addition to noting the religious and language diversity).

162. *Id.* The Singapore Constitution also specifies special protection for minorities:

(1) It shall be the responsibility of the Government constantly to care for the interests of the racial and religious minorities in Singapore.

(2) The Government shall exercise its functions in such manner as to recognise the special position of the Malays, who are the indigenous people of Singapore, and accordingly it shall be the responsibility of the Government to protect, safeguard, support, foster and promote their political, educational, religious, economic, social and cultural interests and the Malay language.

CONSTITUTION OF THE REPUBLIC OF SINGAPORE, Aug. 9, 1965, pt. XIII art. 152.

163. Mathew Mathews, *Singapore’s Lessons on Affirmative Action: Balancing Meritocracy and Diversity*, FOREIGN AFF. (Sept. 5 2017), <https://>



Singapore aggressively mandates residential and educational integration.<sup>164</sup> Finally, Singapore rates very high on the elimination of discrimination and takes a zero-tolerance approach to racism.<sup>165</sup>

Thus, Singapore far outpaces the U.S. with respect to absence of discrimination and outranks the U.S. on the World Justice Project Report's assessment of its rule of law sturdiness.<sup>166</sup> For example, Singapore rates a score of .85 out of 1 on the absence of discrimination in its criminal justice system, compared to a U.S. score of .37.<sup>167</sup> Its incarceration rate is less than a third of the rate in the U.S.<sup>168</sup> Certainly,

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[www.foreignaffairs.com/articles/singapore/2017-09-05/singapores-lessons-affirmative-action](http://www.foreignaffairs.com/articles/singapore/2017-09-05/singapores-lessons-affirmative-action) [<https://perma.cc/XJ5H-SQHC>] (describing early intervention educational efforts targeting minority students and mandates for diverse political representation). Singapore recently extended affirmative action to the office of the Presidency. Chuan, *supra* note 161 (“Affirmative action . . . has been used to describe changes to the Constitution to guarantee minority representation in the presidency. These will see this year’s presidential election reserved for Malay candidates.”); *see also* CONSTITUTION OF THE REPUBLIC OF SINGAPORE, Aug. 9, 1965, pt. V, art. 19(B) (limiting presidential candidates to one community (either Chinese, Malay or Indian) if that community has not held the office for five terms). This affirmative action resulted in the election of the first Malay president since 1970 and the first woman president in the history of Singapore. Lydia Lam, ‘Historic moment’: PM, DPM, MPs Share Photos from Halimah Yacob’s Swearing-in Ceremony, STRAITS TIMES (Sept. 15, 2017, 9:51 PM SGT), <https://www.straitstimes.com/politics/historic-moment-pm-dpm-share-photos-from-halimah-yacobs-swearing-in-ceremony> [<https://perma.cc/M2AZ-QPJ7>].

164. Residential integration formed a bedrock policy to overcome racial, ethnic and religious divisions. Fareed Zakaria, *What America Can Learn from Singapore About Racial Integration*, WASH. POST (June 25, 2015), [https://www.washingtonpost.com/opinions/from-singapore-lessons-in-harmony-and-diversity/2015/06/25/86fcbfa2-1b72-11e5-93b7-5eddc056ad8a\\_story.html?noredirect=on&utm\\_term=.9054c0c48d77](https://www.washingtonpost.com/opinions/from-singapore-lessons-in-harmony-and-diversity/2015/06/25/86fcbfa2-1b72-11e5-93b7-5eddc056ad8a_story.html?noredirect=on&utm_term=.9054c0c48d77) [<https://perma.cc/WX69-3GZ7>]. Eighty percent of the population lives in subsidized housing and government-imposed “[q]uotas ensure that the mix of Chinese, Indians and Malays in each . . . block reflects the ethnic make-up of the country as a whole, a measure designed to preclude the formation of racial enclaves.” *Why 80% of Singaporeans Live in Government-Built Flats*, ECONOMIST (July 6, 2017), <https://www.economist.com/asia/2017/07/06/why-80-of-singaporeans-live-in-government-built-flats> [<https://perma.cc/2GNJ-GJYD>].

165. Chuan, *supra* note 161.

166. See WORLD JUSTICE PROJECT, *supra* note 105, at 134, 153 to compare Singapore and the U.S.

167. *See id.* Singapore also outscores the U.S. on the absence of discrimination in the protection of fundamental rights (.86 to .50) and the absence of discrimination in the civil justice system (.88 to .48). *See id.*

168. *Highest to Lowest—Prison Population Rate*, WORLD PRISON BRIEF, [http://www.prisonstudies.org/highest-to-lowest/prison\\_population\\_rate?field\\_region\\_taxonomy\\_tid=All](http://www.prisonstudies.org/highest-to-lowest/prison_population_rate?field_region_taxonomy_tid=All) [<https://perma.cc/35E2-W8YR>] (last

Singapore still faces challenges arising from its multicultural reality, and there is evidence that racism continues despite the government's efforts.<sup>169</sup>

Furthermore, Singapore differs from the U.S. in important cultural, historic, and institutional ways. Insofar as law is concerned, Singapore has no electoral college or Senate dominated by rural interests originally *intended* to support the institution of slavery as long as possible.<sup>170</sup> Singapore's constitution requires efforts to deracialize, while the U.S. Supreme Court has interpreted our constitution to enforce the American racial hierarchy as discussed above.<sup>171</sup> Singapore insists on residential integration and the U.S. Supreme Court insists on racial enclaves with schools that are thus similarly segregated.<sup>172</sup> Singapore's institutional reality and history with respect to race and diversity could fill a volume; we simply highlight the fact that Singapore proves that with political will a society can productively manage diversity to achieve social stability and peace, and a high level of human development.

Indeed, Singapore's human development leads the world in many important categories and belies the operation of any racial hierarchy. Its universal health care system (available for all—minority or not) yields an infant mortality rate that amounts to only one-half of the rate of infant mortality in the U.S.<sup>173</sup> Singapore's life expectancy, at about eighty-three years, far out-paces U.S. life expectancy.<sup>174</sup> Singapore's

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visited Feb. 21, 2019) (showing the U.S. incarceration rate leading the world at 655 per 100,000 and Singapore's rate at 201).

169. Charissa Yong, *Singaporeans Respect All Races, but Racism Still an Issue: Survey*, STRAITS TIMES (Aug. 20, 2016, 5:00 AM SGT), <https://www.straitstimes.com/singapore/singaporeans-respect-all-races-but-racism-still-an-issue-survey> [<https://perma.cc/UCK9-FV9B>]. Critics also suggest that the imperative of national economic development dictated a rule of law focused more on individual subordination over empowerment. Jothie Raja, *Rule of Law Lineages: Heroes, Coffins, and Custom*, 13 L. CULT. & HUMS. 369, 371 (2017). A full assessment of the rule of law and its history in Singapore is beyond the scope of this Article, which focuses on the operation of race today.
170. Perea, *supra* note 11, at 1087–91.
171. *See supra* notes 38–40 and accompanying text.
172. *See supra* notes 57–59, 164 and accompanying text (discussing how the Supreme Court betrayed its promise that all children would enjoy desegregated educational opportunities).
173. Aaron E. Carroll & Austin Frakt, *What Makes Singapore's Health Care So Cheap?*, N.Y. TIMES (Oct. 2, 2017), <https://www.nytimes.com/2017/10/02/upshot/what-makes-singapores-health-care-so-cheap.html> [<https://perma.cc/J36X-H5UK>].
174. *Federal Reserve Economic Data ("FRED"), Life Expectancy in the U.S. Compared with Life Expectancy in Singapore*, FED. RESERVE BANK OF

teenagers top the world in standardized test scores.<sup>175</sup> Further, the Singapore government boasts that over 55 percent of the population holds a post-secondary degree or qualification.<sup>176</sup> Excellence in education drives Singapore's economic brilliance.<sup>177</sup>

Looking forward, the World Bank's human capital index ranks Singapore first in the world in terms of the expected productivity of the next generation of workers relative to a baseline productivity of fully educated children enjoying full health.<sup>178</sup> The U.S. ranks well below, at twenty-four.<sup>179</sup> Thus, the U.S. both fails its children and its future economic performance simultaneously.<sup>180</sup> Singapore, on the other hand, achieves stellar human development despite its racist past.<sup>181</sup> In fact,

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ST. LOUIS, <https://fred.stlouisfed.org/graph/fredgraph.png?g=mWUk> [<https://perma.cc/T8UW-HDQ8>] (last visited Feb. 12, 2019).

175. Sean Coughlan, *Pisa Tests: Singapore Top in Global Education Rankings*, BBC (Dec. 6, 2016), <https://www.bbc.com/news/education-38212070> [<https://perma.cc/F74F-KCSL>].

176. *Education, Language Spoken and Literacy*, DEP'T OF STATISTICS SING., <https://www.singstat.gov.sg/find-data/search-by-theme/population/education-language-spoken-and-literacy/latest-data> [<https://perma.cc/HC7Z-NMU2>] (last visited Feb. 12, 2019).

177. JOHN CURTIS PERRY, SINGAPORE: UNLIKELY POWER xxi (2017).

178. WORLD BANK GROUP, HUMAN CAPITAL PROJECT 32 (2018), <https://openknowledge.worldbank.org/bitstream/handle/10986/30498/33252.pdf?sequence=5&isAllowed=y> (scoring Singapore's next generation of workers at 88 percent of potential and the U.S. at 74 percent).

179. *Id.*

180. We do not claim the Singapore is perfect in all respects. For example, one could argue that its progress in creating a deracialized society incurred costs in terms of openness and freedom of speech. See PERRY, *supra* note 177, at 249–51. On the other hand, Richard Delgado argues persuasively that the U.S. fails to appropriately balance the costs of hate speech against freedom of speech at times of racial peril. Richard Delgado, *Legal Realism and the Controversy over Campus Speech Codes*, 69 CASE W. RES. L. REV. 275, 298 (2018) (arguing that contemporary America needs to protect groups under siege from a “tide of hate speech in institutions such as college campuses.”).

181. The Straits Times contextualizes Singapore's achievement regarding its actualization of the potential of its children:

Singapore is the best country for developing human capital, according to a report released by the World Bank on Thursday (Oct. 11). It ranked first out of 157 economies, beating South Korea, Japan and Hong Kong into second, third and fourth positions, respectively. Singapore's effort to invest in its human capital will allow children born today to fulfil 88 per cent of their potential to be productive when they grow up, given that they get a full education and enjoy good health. The report noted that

according to the World Bank, Singapore leads the world in preparing 98 percent of its students for post-secondary education.<sup>182</sup>

Can the U.S. achieve the same level of progress with respect to its diversity? A failure to do so could prove catastrophic, given the economic benefits and costs implicit in the challenge of diversity discussed above.<sup>183</sup> The U.S. could simply continue to forsake democracy in favor of conservative white rule that would relegate communities of color to a permanent racialized status as Derrick Bell may suggest.<sup>184</sup> Nevertheless, we contend that the demographic and economic forces discussed herein are more likely to force positive change than lead to fundamentally irrational outcomes economically and politically.

Perhaps this conclusion reflects some degree of faith in rationality rather than a rationally based conclusion. It is not, however, a “blind faith frozen in time” as Professor Stefancic terms treating law as a “holy relic.”<sup>185</sup> The legal construction of a racial hierarchy need not be permanent or treated as a holy relic fixed forever. Instead, our conclusion rests on demographic and economic facts that we project will cause law to evolve in a way that is different from our racist past. That racist past is frozen in time, but we are not condemned to any perpetual hell of racial hatred with accompanying stunted human development and impaired human capital. The experience of Singapore shows that a very strong leader—Lee Kuan Yew—matters.<sup>186</sup> Further, the possibility

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Singapore’s human capital index (HCI) measure is higher for girls than boys.

Linda Yulisman, *Singapore Tops New World Bank Human Capital Rankings*, THE STRAITS TIMES (Oct. 11, 2018), <https://www.straitstimes.com/asia/se-asia/singapore-tops-new-world-bank-human-capital-rankings-based-on-health-education> [<https://perma.cc/7UVM-VMYB>].

182. WORLD BANK GROUP, *supra* note 178, at 22.

183. *See supra* notes 96–101 and accompanying text.

184. Whites may simply find it in their interest to further disempower people of color to maintain their own privileges regardless of the costs. BELL, *supra* note 2, at 9 (claiming that most whites historically accepted economic losses so long as they maintained white privilege over African Americans).

185. Jean Stefancic, *Law, Religion, and Racial Justice: A Comment on Derrick Bell’s Last Article*, 69 CASE W. RES. L. REV. 341, 354 (2018).

186. Singaporeans viewed Lee as a “demigod” as well as the founding father and longstanding leader of Singapore. PERRY, *supra* note 177, at 253–54. Arguably, Singapore’s government pursued diversity without the restraints on governmental power present in the U.S. Thus, the U.S. outscores Singapore, marginally, on protection of individual rights and constraints on government power. *See* WORLD JUSTICE PROJECT, *supra* note 105, at 134, 153 to compare the U.S. and Singapore. Conversely, the U.S. incarceration rate exceeds that of the entire world, including the

of deracialization, as illustrated by the human development and racial harmony achieved by Singapore, combined with the economic calculus of our racial hierarchy and demographic reality, will inspire other political leaders to pursue efforts to achieve a greater social (and racial) justice.<sup>187</sup> Thus, at some point America's more diverse population will reject its racial hierarchy, cruelty to children as embodied in the wasted potential of stunted human development, and lawless racism as embodied in its weak rule of law.

### CONCLUSION

The continued vibrancy of the racial hierarchy in operation in the U.S. decades after apparent civil rights victories, along with the institutional role of the Supreme Court of preservation of preexisting power structures, suggests that race in America is permanent and indelible. The Supreme Court fails to comprehend the costs of its racial jurisprudence and seems impervious to concerns relating to social justice or economic growth. Instead, it stubbornly operates to protect the preexisting privilege, as shown again and again by its opinions relating to race and a more egalitarian distribution of opportunity.

The reality of the Court, along with the institutional structure of the U.S. Senate and Electoral College, necessarily feeds into a more racialized politics. The Court's efforts to maintain the racial hierarchy reinforces the very fears within the body politic relating to minorities. Thus, the Court effectively conditions the political environment to impede political pressure for racial reform. The Court both legally disables efforts at racial reform, and perpetuates racial mythology muting the political pressure for reform. The unfortunate effect of these realities renders race more permanent by frustrating and suppressing political pressure for reform.

Nevertheless, the staggering economic costs of the Court's reactionary position on our racial hierarchy, combined with demographic realities, suggest the Court's approach is both economically and politically unsustainable. More specifically, as cultural diversity increases in our society and more citizens are exposed to the benefits of cultural diversity, the political power in support of legal innovations relating to embracing diversity will increase. This will change the interest-convergence calculus and open a wider opportunity for reform. This suggests a significant probability that the U.S. legal

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most authoritarian regimes extant. *Supra* note 168 and accompanying text.

187. Singapore has taken deracialization to the next frontier—today the government has actively pursued the forging of a new national identity—Singaporean. Geetha Reddy, *Race Rules in Singapore*, in *SINGAPORE: NEGOTIATING STATE AND SOCIETY, 1965–2015*, at 54, 65–69 (Jason Lim & Terence Lee eds. 2016). One wonders if America could achieve such a universal identity.

system can positively reduce the sway of race in our society and challenge the Court's efforts to maintain the American racial hierarchy, if not completely eliminate it. In sum, perhaps the arc of the universe is an asymptote that may approach racial justice without ever reaching the promised land. Singapore counsels, however, that real progress is possible, and that fact means such a possibility is now more likely in the U.S.