Systemic Racism: Patterns of Black Disadvantage and White Advantage Linked to Slavery

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Every truth passes through three stages before it is recognized. In the first stage it is ridiculed, in the second it is opposed, in the third it is regarded as self-evident.

Arthur Schoppenhauer (1788-1860)[1]

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1. ROY L. BROOKS, ATONEMENT AND FORGIVENESS: A NEW MODEL FOR BLACK REPARATIONS, at ix (2004).

I. INTRODUCTION

Complex ideas are easy targets for ridicule or objection, especially when the distractors, persons or organizations, are politically motivated, ignorant, indifferent, hostile to the subject, or simply indisposed toward nuanced analysis.[2] In this Article, I engage a complex concept—systemic racism.[3] Though complex, systemic racism is not inscrutable to most

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2. The idea of racial justice has certainly run this gauntlet. Some still argue that the country does not have a race problem. While they acknowledge the existence of racial inequality in our country, they attribute this problem to the behavior and values of African Americans. For these detractors, the issue is one of class rather than one of race. With the death of Jim Crow—government-sanctioned or mandated racial discrimination and segregation—and the concomitant rise of equal rights as the law of the land in the 1960s, racial inequality in post-civil rights America is, they assert, sustained by the internal problems of African Americans. If we were facing a race problem, they continue, there is no way an African American could have been elected President of the United States not only once but twice or that an Afro-Indian could have been elected Vice President. In short, race no longer matters in the African American's chances for worldly success and personal happiness. *See generally* ROY L. BROOKS, RACIAL JUSTICE IN THE AGE OF OBAMA 14–34 (2009). I reject this argument without reservation. Race still matters in the push for racial equality or equity in our country today. While African Americans have experienced individual success since the end of Jim Crow, the great majority of African Americans are still limited by their race, by the fact that they are black. For example, since the end of Jim Crow, college educated black men have done everything conservatives say African Americans should be doing, yet during this entire time they have earned less than their white counterparts. *Id.* at 29, 148 (fig. 38). In fact, this racial wage is larger today than it was at the beginning of Jim Crow. *See infra* note 19 and accompanying text. While internal factors may contribute to the problem of racial disadvantage, many of these factors are conditioned by external circumstances. They are exogenous. *See* BROOKS, *supra*, at 30. External circumstances are the main reasons racial disadvantage continues to exist well into the post-Jim Crow period. Some of these structural obstacles are baked into our society or mainstream institutions, which gives an advantage to, or privileges, straight white males. "Systemic racism" refers to this insidious structural condition. *See infra* Part III.

3. The complexity of the concept was brought to light when Vice President Kamala Harris suggested in a nationally televised interview that the country is not racist but systemic racism still exists. Vice President Harris, a Democrat, agreed with Republican Senator Tim Scott—both African Americans—that "[n]o, I don't think America is a racist country," but disagreed with Senator Scott on the matter of whether systemic racism exists. Mark Moore, *Kamala Harris Says US Not a 'Racist Country,' Warns of White Supremacist Threat*, N.Y. POST (Apr. 29, 2021, 11:00 AM) https://nypost.com/2021/04/29/vp-kamala-harris-says-us-is-not-a-racist-country/ [https://perma.cc/RMM4-KYWN]. The senator asserted that although he had experienced plenty of racism, including having his car stopped by the police repeatedly, he did not believe systemic racism existed because he was able to climb out of poverty to become a U.S. Senator. *Text of Sen. Tim Scott's GOP Response to Biden Speech*, ASSOCIATED PRESS (Apr. 28, 2021), https://apnews.com/article/tim-scott-joe-biden-business-race-and-ethnicity-health-789601bb6410b675 6358893 bea33d5a9 [https://perma.cc/2DCL-EGN9]. In response to that argument, Vice President Harris said: "But we also do have to speak truth about the history of racism in our country and its existence today."

African Americans. We have come to understand the concept all-too-well as its meaning is rooted in the black experience. Staying close to that ethos, I define systemic racism in this Article as deeply embedded patterns of racial disadvantage in our country linked to slavery. These patterns of racial inequality are structural rather than behavioral, external rather than internal. They continuously disadvantage African Americans and, concomitantly, advantage white Americans.[4]

My definition of systemic racism as embedded patterns of racial degradation linked to slavery is consistent with other definitions of the term. For example, the Oxford English Dictionary defines systemic racism as: "Discrimination or unequal treatment on the basis of membership in a particular ethnic group (typically one that is a minority or marginalized), arising from systems, structures, or expectations that have become established within society or an institution."[5] Joe Feagin, arguably the leading civil rights scholar in the country, defines systemic racism as the operation of dominant "white-framed perspectives" that disadvantage a racial group.[6]

Moore, *supra* note 3. White supremacists are "one of the greatest threats to our national security." *Id.* It could be argued that the country is not racist in the sense that the vast majority of white Americans no longer think of our country as "a white man's country." *See, e.g.*, ROY L. BROOKS, THE RACIAL GLASS CEILING: SUBORDINATION IN AMERICAN LAW AND CULTURE 104 (2017) (discussing that even the Supreme Court at one time viewed "America as a white society," but, of course, today the Court is committed to racial democracy). Racism refers to a state of mind while systemic racism refers to a state of conditions. *See infra* text accompanying notes 11, 15–24. Critical race theorists would, however, argue that the existence of systemic racism itself—defined by them as "anti-objectivism," or the country's constructed slant in favor of straight white men, "insiders" —renders the country itself "racist." *See, e.g.*, DOROTHY A. BROWN, CRITICAL RACE THEORY: CASES, MATERIALS, AND PROBLEMS 5 (3d ed. 2021). From the victim's perspective, there is no difference in the distinction between racism and systemic racism. *See id.* Most of my students agree with the critical race theorists. Again, this is not a discussion for those who only wish to engage simple ideas.

4. But for racism, systemic racism would not have come into existence in this country. Systemic racism is one of the badges or incidents of slavery to which Justice William O. Douglas referred in his famous opinion in *Jones v. Alfred H. Meyer Co*., 392 U.S. 409, 445 (1968) (Douglas, J., concurring). This case resurrected a statute from the Reconstruction Era which became an important law in the current struggle for racial justice in this country. *Id.* at 412–13.

5. *Systemic Racism*, LEXICO, www.lexico.com/en/definition/systemic_racism [https://perma.cc/77R7-QDD6].

6. *See* KIMBERLEY DUCEY & JOE R. FEAGIN, REVEALING BRITAIN'S SYSTEMIC RACISM: THE CASE OF MEGHAN MARKLE AND THE ROYAL FAMILY, at xi (2021). *See generally* JOE R. FEAGIN & KIMBERLEY DUCEY, RACIST AMERICA: ROOTS, CURRENT REALITIES, AND FUTURE REPARATIONS 18, 98 (4th ed. 2019).

Those who see the world through the white-framed perspective see nothing wrong with the failure of whites to redistribute the poker chips.[7] Thus, systemic racism means racial disadvantage firmly ingrained in the very fiber of our cultural paradigm—our country's traditions, values, beliefs, stories, and myths.

Systemic racism has always had a presence in our country.[8] Its presence was easy to discern during slavery given the horrid treatment of blacks both within and outside the peculiar institution. The same is true of Jim Crow with the ubiquity of "Colored" restrooms or drinking fountains, "white-only" sections of public transportation and lunch counters, window signs that read, "Negroes need not apply."[9] Fifty years after Jim Crow, systemic racism—embedded patterns of racial disadvantage—is perceived or recognized in a different way. It is manifested in less obvious ways.[10] This is mainly because animus is not nearly as associated with system racism today as it was during slavery or Jim Crow. Yet, while animus was correlated with most forms of racial disadvantage in the past, its presence was never necessary to bring systemic racism into existence.[11] Indeed, systemic racism has always been less about racial intent than racial impact.[12] It has been about the proverbial white knee on the proverbial black neck. Animus is simply not a precondition for systemic racism. Systemic racism in post-Jim Crow America is, for the most part, racial disadvantage that nonracists practice or tacitly support.[13]

In this Article, I engage systemic racism in two ways. First, I discuss some of its current manifestations, Part II. In particular, I will offer powerful examples of systemic racism, Section A, and explain the link between slavery and extant systemic racism, Section B. Next, I analyze the forces in this country that sustain systemic racism well into the post-civil rights period, Part III. I will spend a fair amount of time examining *socio-psychological paradigms* and *institutional practices or policies* that

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7. For a discussion of the poker game allegory, *see infra* text accompanying notes 27–30.

8. *See infra* text accompanying notes 27–30.

9. *See, e.g.*, C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW 7 (2002); DAVID K. FREMON, THE JIM CROW LAWS AND RACISM IN AMERICAN HISTORY 28 (2000).

10. *Compare supra* text accompanying note 9, *with infra* Part II.A.

11. Hence, Vice President Harris's distinction between "racism" and "systemic racism" makes perfect sense. *See supra* note 3.

12. Systemic racism "does not require an ideology to sustain it so long as it was taken for granted." GEORGE M. FREDRICKSON, THE ARROGANCE OF RACE: HISTORICAL PERSPECTIVES ON SLAVERY, RACISM, AND SOCIAL INEQUALITY 202 (1988).

13. *See, e.g.*, EDUARDO BONILLA-SILVA, RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN THE UNITED STATES 26 (2d ed. 2006) (challenging the innocence of color-blind thinking). See also *supra* note 3 for a relevant discussion involving Vice President Harris.

perpetuate or contribute to manifestations of systemic racism. The former consists of various forms of racial bias, Section A, and the latter focuses on a few significant legal institutions, Section B. The question of what to do about systemic racism is important. I do not, however, have enough space to address that question here.[14]

II. POST-CIVIL RIGHTS MANIFESTATIONS OF SYSTEMIC RACISM

Systemic racism in post-Jim Crow America appears as capital deficiencies within African American communities throughout the country.[15] These capital deficiencies do not exist in a vacuum. They are liked to prior systems of racial oppression, especially slavery.

A. Capital Deficiencies

African American communities are burdened by the weight of capital deficiencies—financial (e.g., income and property);[16] human (mainly

14. Briefly, the answer lies in reparations and other forms of redressing slavery. S*ee, e.g.*, BROOKS, *supra* note 1, at ix–x (arguing that the United States government should apologize and provide reparations for slavery). Professor Steven Rogers, an African American, suggests that the answer to a large extent lies in the hands of white Americans. Focusing on the racial wealth gap, *see infra* note 16, he argues that whites can help close this gap individually by making deposits to black-owned banks, which provide mortgages to black families, by purchasing goods and services from black businesses, which collectively are the largest private employers of African Americans—the federal government being the largest public employer—and by donating money to one or more of the 101 Historically Black Colleges and Universities, HBCUs, which, despite comprising only 3% of the colleges or universities in the country, "have produced one U.S. vice president, 80% of Black judges, 50% of Black lawyers, 50% of Black doctors, 40% of Black engineers, 40% of the Black members of Congress, and 13% of the Black CEOs in America today." STEVEN S. ROGERS, A LETTER TO MY WHITE FRIENDS AND COLLEAGUES: WHAT YOU CAN DO RIGHT NOW TO HELP THE BLACK COMMUNITY 90, 109, 117–18 (2021). Professor Rogers supports cash reparations in an amount equal to the racial gap in net family wealth paid. *See id.* at 184. This amount calculated for the approximately twenty million descendants of the enslaved is about $3 trillion. *Id.* (calculating the racial wealth gap at $153,000, which is similar to what is reported in *supra* note 16). Professor Rogers points out that this amount "is less than the 2008 bank bailouts, which amounted to more than $4 trillion." *Id.*

15. *See, e.g.*, BROOKS, *supra* note 2, at 125–82 (statistical analysis of racial demographics); JOHN HOPE FRANKLIN, FROM SLAVERY TO FREEDOM: A HISTORY OF AFRICAN AMERICANS (1948).

16. For example, "[a]t $171,000, the net worth of a typical white family is nearly ten times greater than that of a Black family ($17,150) in 2016. Gaps in wealth between Black and white households reveal the effects of accumulated inequality and discrimination,

formal skills and education);[17] and social (the ability to get things done in society).[18] These deficiencies give evidence of embedded racial disadvantage; built-in disadvantages for blacks, built-in advantages for whites. That's systemic racism. Current examples of systemic racism include the following:

- Unconscionable racial disparity in net family wealth—white wealth is ten times greater than black wealth—caused in large part by government housing policies. Begun during slavery, these policies were retooled in the 1950s and 1960s to deny post-World War II African Americans homeownership and, hence, the opportunity to create intergenerational wealth.[19]

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as well as differences in power and opportunity that can be traced back to this nation's inception." Kriston McIntosh et al., *Examining the Black-White Wealth Gap*, BROOKINGS (Feb. 27, 2020), https://www.brookings.edu/blog/up-front/2020/02/27/examining-the-black-white-wealth-gap/ [https://perma.cc/33WA-XNAT].

17. For example, Michael Gee notes that there has been "very little progress in minority executive employment. It seems the national conversation and media focus on the subject have resulted in minimal impact. And yet the ecosystem supporting diversity is quite large — government agencies, formal corporate diversity programs, universities, consultants, and dozens of civil rights advocacy groups. . . . In his July 2015 testimony to the EEOC, Donald Tomaskovic-Devey, a sociology professor at UMass Amherst, commented '[t]here is no evidence that corporate equal opportunity statements are associated with increased employee diversity.' In my opinion, EEOC oversight and enforcement of anti-discrimination laws nationally has also fallen short." Michael Gee, *Why Aren't Black Employees Getting More White-Collar Jobs?*, HARV. BUS. REV. (Feb. 28, 2018), https://hbr.org/2018/02/why-arent-black-employees-getting-more-white-collar-jobs [https://perma.cc/XC5P-GRRX]. For a discussion of the college enrollment disparity, see, for example, *Postsecondary Education: College Enrollment Rates*, NAT'L CTR. FOR EDUC. STAT. (May 2021), https://nces.ed.gov/programs/coe/indicator/cpb [https://perma.cc/4Q8C-5TPR] (reporting that, in 2019, the college enrollment rate for eighteen to twenty-four-year-olds was thirty-seven percent for blacks and forty-one percent for whites).

18. It cannot be gainsaid that white Americans have an easier time getting by and getting ahead than black Americans simply because white power and influence within the social order, "white goodwill," is considerably greater than black goodwill. *See* BROOKS, *supra* note 2, at 20.

19. *See supra* note 16 for discussion of the black/white gap in net family wealth. Steven S. Rogers, retired Harvard Business School professor, explained how the government's housing policies helped whites and simultaneously disadvantaged blacks:

> After World War II, there was a housing boom in America, fueled by the Federal Housing Administration (FHA), which was part of the New Deal. At the time the country had a miniscule middle class. Citizens were either poor or rich. Suburbia did not exist. Most home mortgages were amortized over five years with a balloon payment at the end. For the mortgages that existed during the Depression, almost half were in default. The foreclosure rate was almost 1,000 per day. People primarily lived in cities, but, most significantly, prior to 1934, 20- and 30-year home mortgages did not exist. Therefore, only the wealthy could afford to own homes.
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> This dynamic changed for White citizens with the creation of the FHA, which allowed mortgages to be refinanced and guaranteed for new buyers. Banks could issue mortgages because the federal government was assuming the risk. The

> Economists estimate that for the vast majority of Americans, who are not of the likes of billionaires Jeff Bezos or Bill Gates, "up to 80% of lifetime wealth accumulation results from gifts from earlier generations, ranging from the down payment on a home to a bequest by a parent."[20]

- College educated black men, who have done everything distractors say African Americans should be doing, have earned less than their white counterparts during the entire post-Jim Crow period. In fact, this racial wage is *larger* today than it was at the beginning of Jim Crow.[21]

> results were that White banks issued millions of loans to White citizens, helping them create wealth. However, access to this capital was not available to Black Americans. In fact, the federal government forbade it.

ROGERS, *supra* note 14, at 63. The government's discriminatory housing policies included the imposition of restrictive covenants on white homeowners, preventing them from legally selling their homes to blacks, as well as redlining laws, preventing private lenders from issuing mortgages to black neighborhoods. *Id.* Richard Rothstein discusses the current impact of the government's Jim Crow housing policies:

> By the time the federal government decided finally to allow African Americans into the suburbs, the window of opportunity for an integrated nation had mostly closed. In 1948, for example, Levittown homes sold for about $8,000, or about $75,000 in today's [2016] dollars. Now, properties in Levittown without major remodeling (i.e., one-bath houses) sell for $350,000 and up. White working-class families who bought those homes in 1948 have gained, over three generations, more than $200,000 in wealth.

RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA 182 (2017). The fact that the white increase in home equity, $200,000, approximates the racial gap in net family wealth, $171,000, *see supra* note 16, should not go unnoticed. Whether measured by wealth or by income, the racial gap is huge. *See, e.g.*, Emily Badger, *Whites Have Huge Wealth Edge Over Blacks (but Don't Know It)*, N.Y. TIMES: UPSHOT (Sept. 18, 2017), https://www.nytimes.com/interactive/2017/09/18/upshot/black-white-wealth-gap-perceptions.html [https://perma.cc/V4HC-ZUNM] ("Black families in America earn just $57.30 for every $100 in income earned by white families . . . . For every $100 in white family wealth, black families hold just $5.04.").

20. Dalton Conley, *The Cost of Slavery*, N.Y. TIMES (Feb. 15, 2003), https://www.nytimes.com/2003/02/15/opinion/the-cost-of-slavery.html [https://perma.cc/JA3G-TSJ3].

21. The wage differential between college educated black and white males of similar experience is larger today than it was in 1972 even though black males are doing everything conservatives say blacks should be doing to get ahead. *See* BROOKS, *supra* note 2, at 148 figs. 38 & 39 (displaying disparity in earnings from 1975 to 2003). *See also* The Editorial Board, *Even College Doesn't Bridge the Racial Income Gap*, N.Y. TIMES (Sept. 20, 2017), https://www.nytimes.com/2017/09/20/opinion/college-racial-income-gap.html [https://perma.cc/2Y28-3352] (explaining that the wage gap has grown since

- Racial disparity in our criminal justice institutions, particularly police killings of unarmed African Americans and disproportionately longer prison sentences.[22]

1979 and that in 2016 "black college graduates earned about 21 percent less per hour on average than white college graduates."). A study using similar data—both male and female college graduates—published in 2019 reports that "young black college graduates are paid, on average, 12.2 percent less than their white counterparts." Elise Gould, Zane Mokhiber & Julia Wolfe, *Class of 2019: College Edition*, ECON. POL'Y INST. (May 14, 2019), https://www.epi.org/publication/class-of-2019-college-edition/ [https://perma.cc/E5SK-VVAZ]. To the extent that these wage disparities are largely due to grades, that would suggest that the racial gap in the quality of K-12 education has *grown* since the end of Jim Crow. Yet grades do not tell the whole story. Two researchers report that though "a higher proportion of Asians than whites graduate from the top half of law schools" but "[w]hite law graduates get a median annual boost to earnings . . . that is substantially higher than minority law grads . . . ." Debra Cassens Weiss, *A Law Degree Provides a Larger Earnings Boost to Whites Than Minorities,* A.B.A. J. (Oct. 2, 2017), http://www.abajournal.com/news/article/a_law_degree_provides_a_larger_earnings_boost_to_whites_than_minorities_res [https://perma.cc/2RJL-VWKG].

22. The Washington Post has created a database of every known deadly police shooting in America since 2015. As of May 17, 2021, the paper reports that: "Although half of the people shot and killed by police are White, Black Americans are shot at a disproportionate rate. They account for less than 13 percent of the U.S. population, but are killed by police at more than twice the rate of White Americans. Hispanic Americans are also killed by police at a disproportionate rate." *Fatal Force*, WASH. POST (May 17, 2021), https://www.washingtonpost.com/graphics/investigations/police-shootings-database/ [https://perma.cc/FV2R-LD5L]. A major conservative institute misleads it followers by not clearly differentiating between unarmed and armed killings:

> The evidence is clear: Policing in America is not systemically racist. Nearly every single one of the more than 6k people (of all races) killed by law enforcement officers in recent years was armed. . . . As of this writing [April 14, 2021], 6,211 people have been shot and killed by law enforcement officers. 46% of them—2,883 to be exact—were white, while 24% (1,496 total) were black. Just 6% were unarmed.

Dan O'Donnell, *The Truth About Police Shootings in America*, MACIVER INST. (Apr. 14, 2021), https://www.maciverinstitute.com/2021/04/the-truth-about-police-shootings-in-america/ [https://perma.cc/EWS6-5ED4]. Of course, the issue concerns the percentage of unarmed police killings. This information was readily available in the Washington Post report. The authors knew that because they explicitly referenced that report. It is sometimes argued that "a few bad apples" are responsible for police killings of unarmed African Americans. BEN CRUMP, OPEN SEASON: LEGALIZED GENOCIDE OF COLORED PEOPLE 22 (2019). Even assuming, arguendo, that this is correct, the very fact that bad apples are allowed to remain in police departments year after year is itself an expression of systemic racism. Departmental policies protect bad apples at the expense of black lives. Ben Crump, arguably the leading civil rights lawyer in the country today, has witnessed systemic racial disadvantage in the criminal justice system firsthand. *See id.* at 209. He has represented numerous unarmed black individuals, including George Floyd and Michael Brown, killed by police officers. *Id.* In addition to police killings of unarmed black Americans, Crump points to the fact that African Americans receive disproportionately longer prison sentences. *Id.* at 88, 94. Most black encounters with the criminal justice system do not make headlines, Crump observes. *See generally id.* at 45, 83. He also notes that these acts

- Voter suppression laws enacted by dozens of states that, as a federal appeals court said of one of these laws, targets African Americans "with almost surgical precision."[23]

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are all committed one person at a time rather than all at once; yet the result is the same—systemic racism manifested as "racial genocide." *See id.* at 8.

23. In *N.C. State Conf. of the NAACP v. McCrory*, the appellate court enjoined implementation of several voter restrictions enacted in the state's 2013 Omnibus Law: (1) the elimination of preregistration; (2) the elimination of out-of-precinct provisional voting; (3) the elimination of same-day registration; (4) the reduction of the time for early voting; and (5) the requirement of a photo ID to vote. N.C. State Conf. of the NAACP v. McCrory, 831 F.3d 204, 242 (4th Cir. 2016), *cert. denied sub nom.* North Carolina v. N.C. State Conf. of the NAACP, 137 S. Ct. 1399 (2017). In reversing the district court's judgment, the appellate court found that each of these restrictions had been enacted with racially discriminatory intent. *Id.* at 215. These restrictions "unmistakably" reflected the General Assembly's motivation to "entrench itself . . . by targeting voters who, based on race, were unlikely to vote for the majority party," *id*. at 233, and did so with "*almost surgical precision*" using the data on voting practices, *id*. at 214 (emphasis added). Given the court's finding of a political motivation behind the restrictions, it could be argued that the racial aspect of the law involved the law's effect rather than its intent. Either analysis leads to the same conclusion; to wit, racial disadvantage occurring not in isolation but as part of a pattern of such disadvantage in the form of voter suppression. Importantly, the appellate court noted that the Supreme Court's decision in *Shelby Cnty. v. Holder*, 570 U.S. 529 (2013), gave license to the state legislature to enact the voter suppression law. The Court in *Shelby County* effectively overturned the preclearance provision of the 1965 Voting Rights Act on the ground that the coverage formula Congress used to trigger preclearance was dated and, hence, "irrational." *Id.* at 556. "Things have changed in the South," the Court reasoned, "[v]oter turnout and registration rates now approach parity. Blatantly discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented levels." *Id.* at 540. In dissent, Justice Ginsburg astutely noted: "Volumes of evidence supported Congress' determination that the prospect of retrogression was real. Throwing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet." *Id*. at 590 (Ginsburg, J., dissenting). Indeed, blacks got soaked after *Shelby County*. North Carolina is only one of many states that enacted voter suppression laws following the Court's decision. As the appellate court noted, the General Assembly expanded the Omnibus bill's restrictions and amended the voter ID provision to exclude "many of the alternative photo IDs used by African Americans," and retained "only the kinds of IDs that white North Carolinians were more likely to possess." *McCrory,* 831 F.3d at 216. *Shelby County* is one of many cases that demonstrate an uncomfortable truth about the Supreme Court's decision making in civil rights cases; namely, it sustains or contributes to systemic racism. See *infra* note 24 for a discussion of individual cases which collectively manifest systemic racism. See *infra* Part III.B for a discussion of some of the Court's institutional structures that sustain the Court's systemic racism.

The Brennan Center for Justice reports on systemic racism in voting, specifically the pattern of voter suppression laws that have taken shape just since the 2020 Presidential Election. "As of May 14, 2021, legislators have introduced 389 bills with restrictive

- The parade of major civil rights defeats at the Supreme Court, often by split decisions which indicate the outcomes were not preordained by law.[24]

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provisions in 48 states." *State Voting Bills Tracker*, BRENNAN CTR. FOR JUST. (May 28, 2021), https://www.brennancenter.org/our-work/research-reports/state-voting-bills-tracker-2021 [perma.cc/3UNF-7MS7]. The NAACP LDF reports that, "[t]his concerted effort to diminish the power of the Black vote came in many forms, including the purging of voter rolls, mail-in voting requirements, ID laws, rampant misinformation, and direct attempts to intimidate voters and ballot counters," according to LDF Associate-Director Counsel Janai Nelson. *LDF Releases Preview of Democracy Defended Report Detailing Voter Suppression and Intimidation in 2020 General Election*, NAACP LEGAL DEF. & EDUC. FUND (Mar. 6, 2021), https://www.naacpldf.org/press-release/ldf-releases-preview-of-democracy-defended-report-detailing-voter-suppression-and-intimidation-in-2020-general-election/ [perma.cc/2XS5-4S5J]. In *Brnovich v. Democratic National Committee*, the Supreme Court indicated that it was not inclined to overrule voter suppression laws under Section 2 of the Voting Rights Act, last remaining substantive provision of the Act after *Shelby County*. Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321, 2343–44 (2021). Section 2 provides: "No voting . . . practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgment of the right of any citizen . . . to vote on account of race or color." 42 U.S.C. § 1973(a). Ignoring this command, the Court held that a Section 2 violation is only established if the state's entire electoral system has a disparate impact on minority voting. *Brnovich*, 141 S. Ct. at 2346. Disparate impact can no longer be based on a single voting practice as the statute commands; it must be based on the entire voting system as the Court commands. The conservative justices did what they always accuse the liberal justices of doing; they amended a statute.

24. In addition to *Shelby County v. Holder* and *Brnovich v. Democratic Nat'l Comm*., s*ee supra* note 23, there are numerous decisions by the Court which, taken together, constitute a pattern of racial disadvantage. Because of this systemic racism, African Americans and civil rights scholars look upon the Supreme Court as more foe than friend. *See infra* Part III.B. What follows is a sampling of the Court's decisions. In *Patterson v. McLean Credit Union*, the Supreme Court disadvantaged African Americans by denying employees the right to sue for damages caused by racial harassment on the job. Patterson v. McLean Credit Union, 491 U.S. 164, 189 (1989). The case was decided under a Reconstruction-Era statute, 42 U.S.C. § 1981. *Id.* In arriving at its decision, the Court ruled that the statute, which provides that "[a]ll persons . . . shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens," does not apply to conduct that occurs after the formation of a contract and that does not interfere with the right to enforce established contract obligations. *Id.* at 176. In *Wards Cove Packing Co. v. Atonio*, the Court required the Title VII plaintiff to identify the particular employment policy or practice that produced the alleged disparate impact regardless of whether such a policy or practice could be isolated in that manner. Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 657 (1989). In addition, the Court placed the burden of persuasion on the plaintiff to disprove the employer's assertion of its business necessity defense. *See id.* at 671. Congress overturned these decisions when it enacted the Civil Rights Act of 1991. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071. In *Martin v. Wilks*, the Court permitted white firefighters who had not been parties to the litigation—establishing a consent decree governing hiring and promotion of black firefighters in the Birmingham, Alabama, Fire Department—to bring a lawsuit to collaterally attack the decree even though the white firefighters should have known about the decree or were adequately represented by the original parties. Martin v. Wilks, 490 U.S. 755, 764 (1989). *Grove*

City College v. Bell limited the meaning of "program or activity" for purposes of liability under Title XI, 20 U.S.C. § 1681, and, by extension, Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d–2000d-7. Grove City Coll. V. Bell, 265 U.S. 555, 574 (1984). Again, Congress responded by passing corrective legislation, enacting 29 U.S.C. section 794(b) to overturn the decision. *Milliken v. Bradley* significantly limits the use of metropolitan desegregation plans to integrate highly segregated inner-city schools. Milliken v. Bradley, 418 U.S. 717, 754 (1974). This case, along with *Board of Education v. Dowell* and *Freeman v. Pitts*, both of which allow school districts that have not achieved full unitary status to stop trying, are considered by many civil rights scholars to be tragic decisions for racial progress. *See* Bd. of Educ. v. Dowell, 498 U.S. 237, 249 (1991); Freeman v. Pitts, 503 U.S. 467, 491 (1992). These decisions will allow schools to remain segregated and unequal well into the future. *Regents of the University of California v. Bakke* limits racial integration through college admissions. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 265 (1978). *Shaw v. Reno*, *Shelby County v. Holder*, and *Alabama Legislative Black Caucus v. Alabama* make it more difficult to establish effective political representation for blacks in states with a history of restricting black voting rights. *See generally* Shaw v. Reno, 509 U.S. 630 (1993); Shelby Cnty. v. Holder, 133 S. Ct. 2612 (2013); Ala. Legis. Black Caucus v. Alabama, 135 S. Ct. 1257 (2015). These cases have given a green light to states to pass voter suppression laws. *See supra* note 20 (discussing *Shelby County*). *Richmond v. J. A. Croson Co.* and *Adarand Constructors, Inc. v. Pena* made it difficult for cities to require its contractors to award subcontracts to black businesses. *See generally* Richmond v. J. A. Croson Co., 488 U.S. 469 (1989); Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995). *Missouri v. Jenkins* (Jenkins III) denied the federal courts the authority, absent a showing of segregative intent, to order the state to fund higher teacher salaries to attract better teachers to inner-city schools. Missouri v. Jenkins, 515 U.S. 70, 114 (1995). *United States v. Fordice* threatened the existence of HBCUs, prompting Justice Thomas to write separately, "there exists 'sound educational justification' for maintaining historically black colleges as such." United States v. Fordice, 505 U.S. 717, 748 (1992) (Thomas, J., concurring). *Gratz v. Bollinger* overturned an admission process designed to increase the number of black and Latinx students at a prestigious university. Gratz v. Bollinger, 539 U.S. 244, 275–76 (2003). But *Grutter v. Bollinger*, decided the same day, approved an admission process designed to increase the number of black and Latinx students at a prestigious law school. Grutter v. Bollinger, 539 U.S. 306, 343 (2003). *Parents Involved in Community Schools v. Seattle School District Number 1* squashed integration efforts in de facto segregated school districts. Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 701 (2007). *Schuette v. Coalition to Defend Affirmative Action, Integration and Immigration Rights and Fight for Equality by Any Means Necessary* required blacks to engage in the arduous process of amending the state constitution to implement state affirmative action programs. Schuette v. Coal. to Def. Affirmative Action, Integration & Immigr. Rts. & Fight for Equal. by Any Means Necessary, 572 U.S. 291, 312–14 (2014). Outside of ending slavery and Jim Crow, African Americans made the most racial progress during the heyday of affirmative action, the mid-1970s. *See* BROOKS, *supra* note 2, at 144–51 figs. 30–45, 157–59 figs. 55–60 (showing disparity in earnings and college participation). Again, this is just a sampling of the Court's inglorious decisions. For further discussion, *see generally* ROY L. BROOKS, GILBERT PAUL CARRASCO & MICHAEL SELMI, THE LAW OF DISCRIMINATION: CASES AND PERSPECTIVES 3–25, 480 (2011).

- The record of "deep-rooted racism in the military."[25]
- The denial of equal educational opportunity when racist teachers, whose victims are unlikely to attend office hours or take advantage of other educational opportunities associated with the teacher, are protected by academic freedom.[26]

B. Link to Slavery

Systemic racism is not only omnipresent, embedded, and racially debilitating, it is also linked to slavery and Jim Crow. It is, indeed, a lingering effect of slavery, one of the vestiges, badges, or incidents of slavery. I have often used an allegory of a poker game to visualize the lingering effects of slavery:

> Two persons—one white, the other black—are playing a game of poker. The game has been in progress for almost four hundred years. One player—the white one—has been cheating during much of this time, but now announces: 'From this day forward, there will be a new game with new players and no more cheating.' Hopeful but somewhat suspicious, the black player responds, 'That's great. I've been waiting to hear you say that for some four hundred years. Let me ask you, what are you going to do with all those poker chips that you have stacked up on your side of the table all these years?' 'Well,' says the white player, somewhat bewildered by the question, 'I'm going to keep them for the next generation of white players, of course.'[27]

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25. "[C]urrent and former enlistees and officers in nearly every branch of the armed services described a deep-rooted culture of racism and discrimination [from white subordinates who fail to salute black superiors to hate crimes] that stubbornly festers, despite repeated efforts to eradicate it." Kat Stafford et al., *Deep-Rooted Racism, Discrimination Permeate U.S. Military*, SAN DIEGO UNION TRIB. (May 27, 2021, 5:03 PM), https://www.sandiegouniontribune.com/news/nation-world/story/2021-05-26/ deep-rooted-racism-discrimination-permeate-us-military [perma.cc/ZL5D-3WUS].

26. The institution is not off the hook if the teacher targets all students, black and white; in other words, if the teacher is an equal opportunity offender. The teacher's rants adversely affect black students more than white students because black and white Americans are not at equal risk in our society. "Even blacks who have 'made it' . . . have a sense that they are not equal in social status in spite of their socioeconomic success and the election and reelection of a black president." BROOKS, *supra* note 3, at 6.

27. BROOKS, *supra* note 2, at 10. I used this allegory as a law student at Yale—no doubt not the first person to do so—and employed it in an early civil rights casebook with a slightly different ending in which the black player responds, "[s]o, whites will continue to benefit from past cheating; that's not fair." *See* BROOKS, CARRASCO & MARTIN, *supra* note 24, at 3. Similarly, Professor Steven Rogers argues that practices denying blacks full participation in wealth creation began during slavery and continued thereafter with the enactment of the Black Codes, racially oppressive laws aimed at keeping blacks in a state of slavery and a source of cheap labor, and with discriminatory housing polices enacted in the mid-twentieth century. *See* ROGERS, *supra* note 14, at 53–69. The private sector colluded with the government to achieve this racial outcome. *See id.*

Systemic racism—capital deficiencies in black communities—is rooted in slavery. However, for hundreds of thousands of African Americans, slavery ended not in 1865 but sometime after World War II, into the 1950s.[28] This is within the lifetime of many Americans today. In total, about 800,000 African Americans were forced into involuntary servitude under convict leasing, debt bondage, and other state or municipal laws, often dying before their sentences could be completed.[29] These African Americans were convicted on such trumped-up charges as burglary or grand larceny, or on even more minor charges such as vagrancy. For example, "Black men and women were arrested and found guilty of vagrancies violations for not having jobs, for being unable to show documents proving that they were employed, or for 'having jobs that did not serve the interest of whites. . . . [V]agrancy laws exploited Black adults and their children.'"[30]

This form of slavery was outlawed in 1941 when the United States Attorney General signed an order called Circular No. 3591, which for the first time created federal law enforcing the Thirteenth Amendment's prohibition against involuntary servitude.[31] The Attorney General signed the directive on December 12, 1941, just five days after the bombing of Pearl Harbor.[32] But it took time for the government to enforce the new law. So, for many blacks, slavery did not end until years after World War II. Born into this system of "slavery by another name," Ben Jobe reports:

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28. Kathy Roberts Forde & Bryan Bowman, *Exploiting Black Labor After the Abolition of Slavery*, U.S. NEWS (Feb. 7, 2017, 11:18 AM), https://www.usnews.com/news/national-news/articles/2017-02-07/exploiting-black-labor-after-the-abolition-of-slavery [https://perma.cc/7M74-ZXXQ].

29. *See Douglas Blackmon on Slavery by Another Name*, BILL MOYERS J. (June 20, 2008), http://www.pbs.org/moyers/journal/06202008/watch2.html [https://perma.cc/M2TZ-KHS3]; *see also* DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II (1st ed. 2009). "As many as 200,000 black Americans were forced into back-breaking labor in coal mines, turpentine factories and lumber camps [alone]. They lived in squalid conditions, chained, starved, beaten, flogged and sexually violated. They died by the thousands from injury, disease and torture." Forde & Bowman, *supra* note 28. "In some Alabama prison camps, convicts died at a rate of 30–40% a year." SLAVERY BY ANOTHER NAME (PBS 2012).

30. ROGERS, *supra* note 14, at 61–62.

31. *See* NANCY O'BRIEN WAGNER, SLAVERY BY ANOTHER NAME HISTORY BACKGROUND 1, 6 (2012).

32. *See* BLACKMON, *supra* note 29, at 377–78.

> When we came off the plantation, 1945, I was around 11 years old. . . . [S]lavery ended in 1945, let me make that clear. Most people think it was 1865. Oh no, [it was] 1945, when the federal government finally put some teeth into [Circular No. 3591] . . . and arrested some of the slave owners.[33]

In short, the manifestations of systemic racism that we see in our country today—capital deficiencies in African American communities—began during slavery, whether ending in 1865 or sometime after 1945. They are, thereby, linked to slavery. The question then becomes: what sustains systemic racism today, long after slavery? In answering that question, slavery, once again, presents itself.

III. POST-CIVIL RIGHTS FORCES SUSTAINING SYSTEMIC RACISM

Socio-psychological paradigms and institutional practices or policies sustain or even engender systemic racism in our post-civil rights society. Section A in this part of the Article focuses on socio-psychological (socio-psychological racism) and Section B on institutional (institutional racism) patterns that sustain systemic racism post-Jim Crow. Section B is limited to legal institutions; in particular, textualism, an important legal theory, and, more generally, the Supreme Court's decision-making in civil rights cases. As to the latter, I will limit my analysis to the Court's protection of private acts of racial discrimination under the Fourteenth Amendment and to its dogged adherence to the color-blind norm notwithstanding the degree of racial disadvantage it visits upon African Americans.

A. Socio-psychological Racism

Socio-psychological racism derives from what can be called "the psychology of slavery," by which I mean the "attitudes associated with racist rhetoric used to justify the peculiar institution."[34] These mindsets are among the lingering effects of slavery. But for slavery they would not have such a pervasive presence in Twenty-First Century America. These mindsets sustain behavior or conditions that steadily and chronically disadvantage African Americans. Overt forms of racism—racial antipathy and the belief in white supremacy, both often referred to as old fashioned

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33. JACKIE MACMULLAN, RAFE BARTHOLOMEW & DAN KLORES, BASKETBALL: A LOVE STORY 133 (2018). *See also* BLACKMON, *supra* note 29, at 377–82 (discussing enforcement of Circular No. 3591 by Attorney General Francis Biddle). Biddle, who held racist views of blacks in line with his contemporaries, was no hero. He was simply doing his duty, which was to enforce the compact of freedom forged in the Civil War. "Congress passed even more explicit statutes, making any form of slavery in the United States indisputably a crime. Reports of involuntary servitude continued to trickle in to federal investigators well into the 1950s." *Id.* at 381.

34. BROOKS, *supra* note 1, at 37.

racism—are certainly among the menacing mindsets. So too are covert forms of racism—insider or white privilege and implicit bias. Covert forms of racism are less motivational than cognitive and, therefore, are more difficult for the person harboring these mindsets to detect.

1. Old-Fashioned Racism

Recently, a white male in his early thirties chatted with me about his family. He grew up in a family that espoused a strong belief in black inferiority. His family was not alone. His father, mother, aunts, and uncles were among about one hundred other families living in San Diego and Los Angeles who taught their children that African Americans were inferior. Operating from this racial mindset, these families, who associated with one another on a regular basis, mistreated African Americans in the small businesses that most of these families operated. They typically overcharged black customers for goods and services and provided poor quality goods and services. Interestingly, the same treatment was not accorded to Latinx and Asian customers, perhaps because they are closer to the white phenotype.[35]

Racial antipathy and white supremacy are not relics of a bygone era. What Justice William O. Douglas observed as the country was moving into the post-civil rights period rings true today well into the post-Jim Crow period: "While the institution has been outlawed, [slavery] has remained in the minds and hearts of many white men. Cases which have come to this Court depict a spectacle of slavery unwilling to die."[36] Max Boot, an award-winning columnist, observed that, "GOP state legislators around the country have praised the constitutional provision that enslaved people would count as only three-fifths of a person in determining congressional representation."[37] Similarly, I have noted racism's presence within the white-working-class culture:

35. This conversation took place on May 21, 2021, in San Diego. The young man worked in the family business and was trying to find a way to extricate himself from both the family and its business. He agreed to allow me to mention the contours of his story so long as I did not mention him or his family by name.

36. Jones v. Alfred H. Mayer Co., 392 U.S. 409, 445 (1968) (Douglas, J., concurring).

37. Max Boot, *Opinion: Think Republicans in Washington Are Bad? They're Far Worse at the State Level*, WASH. POST (May 10, 2021, 12:34 PM), https://www.https://www.washingtonpost.com/opinions/2021/05/10/republicans-worse-state-level/ [https://perma.cc/6GBU-JALS].

> Nearly 20 percent of those who voted for Donald Trump in the 2016 South Carolina Republican primary, mostly working-class whites, believed ending slavery was a mistake. No wonder. Many working-class whites believe blacks are lazy, 'welfare cheats' and responsible for an unspecified amount of the economic misfortunes of the white working class.[38]

Racist individuals can engender or sustain systemic racism in at least two ways. The first is by poisoning the social environment with odious opinions about African Americans.[39] These views shape the ways in which blacks are treated by others. They collectively create a toxic environment which makes it more difficult for blacks than for whites to move through life and to get things done. This environment diminishes the power and influence black Americans are able to exercise within the social order. It undermines black goodwill, the group's ability to get by or get ahead in life; in other words, their social capital. Racism, in short, imposes a social burden on blacks—a black tax—that whites simply do not have to shoulder.

The second way in which racial antipathy or white supremacy perpetuates or generates systemic racial disadvantage for African Americans is through the influence powerful individuals who hold these views exert on the ways in which their organizations operate.[40] Unchecked, these "bad apples" effectively turn a personal belief system into institutional policy. Thus, the "good apples" may be the numerical majority, but, in the absence of effective resistance, the "bad apples" exercise effective control over the organization. One does not have to go back to the days of Jim Crow when the KKK influenced local law enforcement in the South to find examples. A recent one is the FBI's arrest of Deputy Cody Griggers of the Wilkinson County, Georgia sheriff's department. This deputy sheriff was "a group member who rationalized violence with rhetoric steeped in White supremacist

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38. BROOKS, *supra* note 3, at 92–93. I also noted the following:

> Given these views, it is not surprising that the white working class tends to view affirmative action as an unfair practice that takes jobs away from deserving white men. Curiously, if a working-class white receives or has received some form of special assistance, whether private (for example, nepotism or union legacy) or public (for example, food stamps, assisted-living allowance, or disability), this is seen as deserving rather than freeloading. A study in 2014 revealed "rampant nepotism" in the Los Angeles County Fire Department despite its antinepotism policy. The working-class view of affirmative action is actually complex. Although many working-class whites complain about the unfairness of affirmative action, they do recognize situations in which it is acceptable. For example, "women should be privileged for *certain* jobs dealing with women and children, and blacks and Hispanics should be privileged in jobs dealing with crime."

Id. at 93.

39. *See supra* Part III.A.1.

40. *See infra* Part III.B.

and far-right ideology."[41] White supremacy is on the rise and spreading in our society.[42]

2. Insider or White Privilege

In addition to widespread racial antipathy or white supremacy, systemic racism—embedded patterns of racial disadvantage linked to slavery—can also be sustained or generated by insider, or white, privilege. This perpetuation of systemic racism, unlike racial antipathy or white supremacy, is not necessarily motivational. In fact, animus is not normally associated with insider privilege. As Robert C. Smith suggests, insider privilege is "*an implicit sense of group position.*"[43] This mindset has a racially discriminatory impact. When individuals trade upon their insider privilege they often sustain racial disadvantage. There is no reason to believe that whites do not constantly trade on their privilege because, as Smith informs us, this is an implicit rather than explicit cognitive state.

Other scholars have also crystallized the concept of white privilege. Peggy McIntosh writes in a famous passage:

> I have come to see white privilege as an *invisible package of unearned assets* which I can count on cashing in each day, but about which I was 'meant' to remain oblivious. White privilege is like an invisible weightless knapsack of special

41. Andrew Dyer & Kristina Davis, *FBI: A San Diego Man's Phone Leads to Extremist Group and Georgia Sheriff's Deputy,* SAN DIEGO UNION TRIB. (Apr. 30, 2021, 3:38 PM), https://www.sandiegouniontribune.com/news/courts/story/2021-04-30/fbi-san-diego-man-extremist-georgia [https://perma.cc/N5C4-8EHF].

42. *See, e.g.*, Rashawn Ray, *What the Capitol Insurgency Reveals About White Supremacy and Law Enforcement*, BROOKINGS (Jan. 12, 2021), www.brookings.edu/blog/how-we-rise/2021/01/12/what-the-capitol-insurgency-reveals-about-white-supremacy-and-law-enforcement/ [https://perma.cc/97FA-55MT]; Carlie Porterfield, *White Supremacist Terrorism 'On The Rise and Spreading*,*'* FORBES (June 25, 2020, 5:00 PM), https://www.forbes.com/sites/carlieporterfield/2020/06/25/white-supremacist-terrorism-on-the-rise-and-spreading/ [https://perma.cc/24NU-KKHY]; Katanga Johnson & Jim Urquhart, *White Nationalism Upsurge in U.S. Echoes Historical Pattern, Say Scholars*, REUTERS (Sept. 4, 2020, 12:09 PM), https://www.reuters.com/article/us-global-race-usa-extremism-analysis/white-nationalism-upsurge-in-u-s-echoes-historical-pattern-say-scholars-idUSKBN25V2QH [https://perma.cc/TM25-S2NW].

43. ROBERT C. SMITH, RACISM IN THE POST-CIVIL RIGHTS ERA 42 (1995) (emphasis added). *See* Mary R. Jackman & Marie Crane, *"Some of My Best Friends Are Black. . .": Interracial Friendship and Whites' Racial Attitudes*, 50 PUB. OP. Q. 459, 481 (1986).

> provisions, assurances, tools, maps, guides, codebooks, passports, visas, clothes, compass, emergency gear, and blank checks.[44]

Cheryl Harris suggests that insider privilege operates in our culture as a property value premised on the right to exclude.[45] Most instructive, Robert Jensen candidly describes insider privilege from an insider's view:

> [W]hen I seek admission to a university, apply for a job, or hunt for an apartment, I don't look threatening. Almost all of the people evaluating me for those things look like me—they are white. They see in me a reflection of themselves—and in a racist world that is an advantage. I smile. I am white. I am one of them. I am not dangerous. Even when I voice critical opinions, I am cut some slack. After all, I'm white.[46]

One of the most impressive discussions of insider privilege appears in Stephanie M. Wildman's book, *Privilege Revealed — How Invisible Preference Undermines America*. Wildman uses an interesting example, slightly modified here, to help us see the privileged identities that can produce societal disadvantage in America. Let us assume a newspaper runs three headlines: (1) "Woman Elected Mayor"; (2) "Black Elected Tax Assessor"; and (3) "Family of 4 Wins Trip to Disneyland." Reading these headlines, the average American, whether insider or outsider, would assume that the new mayor was white, the new tax assessor was male, and the lucky family was binary. "In each case we are demonstrating ingrained awareness of the norms that frame our perceptions."[47] In each case, an invisible yet unmistakable preference is revealed. There is a default mechanism, Wildman argues, through which society categorizes our conceptual tools—words and ideas. Images are formed in our mind's eye, difficult to erase, favor some and disfavor others. Those within the *circle of privilege*—whites, males, and heterosexuals—have a distinct social advantage over those who are not. Being within the circle sustains one's privilege. Most people, however, live at the intersection of privilege and subordination, Wildman suggests.[48] White women are privileged relative to African American women, but not with respect to white men.[49] White

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44. Peggy McIntosh, *White Privilege and Male Privilege: A Personal Account of Coming to See Correspondences Through Work in Women's Studies* 2 (Wellesley Ctrs. for Women, Working Paper No. 189, 1988) (emphasis added).

45. *See* Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1736–37 (1993).

46. Robert Jensen, *White Privilege Shapes the U.S.*, *in* WHITE PRIVILEGE: ESSENTIAL READINGS ON THE OTHER SIDE OF RACISM 116 (Paula S. Rothenberg ed., 2d ed. 2005).

47. KATHLEEN HALL JAMIESON, BEYOND THE DOUBLE BIND: WOMEN AND LEADERSHIP 169 (1995). *See* STEPHANIE M. WILDMAN, PRIVILEGE REVEALED: HOW INVISIBLE PREFERENCE UNDERMINES AMERICA 80, 126–27 (1996).

48. *See* WILDMAN, *supra* note 47, at 21–22.

49. *See id.* at 22.

homosexual men are privileged in relation to African American heterosexual men (particularly when the former choose to hide their sexual orientation) but not when situated against white heterosexual men (again, particularly if they choose not to hide their sexual orientation).[50] The circle of privilege sustains or can even create privilege.

3. Implicit/Unconscious Bias

Implicit bias reflects the way one looks at the world and how one organizes the social environment in which we all live. It consists of mental shortcuts or schema people naturally employ to make sense of the world. Implicit bias occurs when, for example, a supervisor, who does not consciously think about race when making an employment decision, operates on the basis of certain "gut feelings," such as a belief that the white candidate would "fit in more comfortably" than the black candidate.[51] The Implicit Association Test, IAT, measures implicit bias.

A large and diverse group of Americans have taken the IAT. The test asks individuals to associate "black" and "white" with "pleasant" or "unpleasant" words and pictures.[52] Test takers tend to associate "black" with "unpleasant" and "white" with "pleasant" thus preferring whites to African Americans.[53] As Christine Jolls and Cass Sunstein report:

> In fact, implicit bias as measured by the IAT has proven to be extremely widespread. Most people tend to prefer white to African-American, young to old, and heterosexual to gay. . . . [Although] the relationship between IAT and behavior remains an active area of research . . . we know enough to know that some of the time, those who demonstrate implicit bias also manifest this bias in various forms of actual behavior.[54]

Some have argued that the correlation between implicit bias and discriminatory behavior is weak. "[F]actors other than discrimination can often explain observed group disparities."[55] In addition, some employment

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50. *See id.* at 17–18, 24.

51. *See* Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CALIF. L. REV. 969, 970 (2006).

52. *Id.* at 971.

53. *Id.*

54. *Id. See generally* MALCOLM GLADWELL, BLINK: THE POWER OF THINKING WITHOUT THINKING (2005) (defining the adaptive unconscious as a part of the brain that leaps to conclusions and makes quick judgements based off of little information).

55. Amy L. Wax, *The Discriminating Mind: Define It, Prove It*, 40 CONN. L. REV. 979, 1022 (2008). "Many behaviors attributed to unconscious bias could just as well be

defense lawyers argue "that stereotypes come into play primarily in interactions among strangers. When a supervisor has known an employee for months or years, 'individuating information' takes over, allowing the manager to base decisions on specific traits he has come to know, not implicit assumptions."[56]

In contrast, other experts see a clear causal relationship between implicit bias and discriminatory behavior. For example, William T. Bielby, a sociology professor and one of the leading expert witnesses for plaintiffs in implicit bias litigation, has argued that, "'The tendency to invoke gender [or racial] stereotypes in making judgments about people is rapid and automatic. . . . As a result, people are often unaware of how stereotypes affect their perceptions and behavior,' including 'individuals whose personal beliefs are relatively free of prejudice.'"[57]

Some argue that structural changes in the workplace that began to appear in the 1980s have made employment settings ripe for implicit bias. Prior to the 1980s, job responsibilities and organizational structures were fairly well defined. Employees typically advanced within the company through "vertical ladders or pyramids" based on an evaluative process.[58] Today, the workplace is "boundaryless."[59] Jobs are less sharply defined, work is more team-oriented, decision making is less hierarchical, and the evaluative process is more flexible and subjective, all of which provide greater opportunities for implicit biases to influence the evaluation of black and other outsider applicants for employment and promotions.[60]

Charles Lawrence elaborates on implicit bias in a seminal article on the subject:

> [M]ost of us are unaware of our racism. We do not recognize the ways in which our cultural experience has influenced our beliefs about race or the occasions on which those beliefs affect our actions. In other words, a large part of the behavior that produces racial discrimination is influenced by unconscious racial motivation.
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> There are two explanations for the unconscious nature of our racially discriminatory beliefs and ideas. First, Freudian theory states that the human mind defends itself against the discomfort of guilt by denying or refusing to recognize

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explained by old-fashioned 'rational' or 'statistical' discrimination. Such forms of discrimination are nothing new. . . ." *Id.*

56. Michael Orey, *White Men Can't Help It: Courts Have Been Buying the Idea That They Have Innate Biases*, BUSINESSWEEK, May 15, 2006, at 54, 57.

57. *Id.* at 54–57.

58. Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91, 100 (2003).

59. *See id.* at 101.

60. *Id*. at 101, 104–08. *See* KATHERINE V. W. STONE, FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE 165–68 (2004); Rebecca Hanner White & Linda Hamilton Krieger, *Whose Motive Matters?: Discrimination in Multi-Actor Employment Decision Making*, 61 LA. L. REV. 495, 530 (2001).

> those ideas, wishes, and beliefs that conflict with what the individual has learned is good or right. While our historical experience has made racism an integral part of our culture, our society has more recently embraced an ideal that rejects racism as immoral. When an individual experiences conflict between racist ideas and the societal ethic that condemns those ideas, the mind excludes his racism from consciousness.
>
> Second, the theory of cognitive psychology states that the culture—including, for example, the media and an individual's parents, peers, and authority figures—transmits certain beliefs and preferences. Because these beliefs are so much a part of the culture, they are not experienced as explicit lessons. Instead, they seem part of the individual's rational ordering of her perceptions of the world. The individual is unaware, for example, that the ubiquitous presence of a cultural stereotype has influenced her perception that blacks are lazy or unintelligent. Because racism is so deeply ingrained in our culture, it is likely to be transmitted by tacit understandings: Even if a child is not told that blacks are inferior, he learns that lesson by observing the behavior of others. These tacit understandings, because they have never been articulated, are less likely to be experienced at a conscious level.[61]

The Freudian theme in Lawrence's article is consistent with the "aversive racism" thesis presented years ago in a seminal work written by Joel Kovel, *White Racism: A Psychohistory*. The "aversive racism" thesis states that consciously held egalitarian norms often stand in conflict with unacknowledged racial bias.[62] Whites express this conflict when around racial minorities, not by open hostility, but by anxiety and discomfort.[63]

Linda Hamilton Krieger points to groundbreaking research that underscores the cognitive, non-motivational nature of implicit bias.[64] Racial stereotyping is simply a method of categorizing our sensory perceptions, similar in structure and function to categorizing trees, rocks, and other natural objects. Racial stereotypes, then, are "cognitive mechanisms" that all people, "not just 'prejudiced' ones, use to simplify the task of perceiving, processing, and retaining information about people in memory."[65] These biases, Krieger continues, are "unintentional."[66] They "sneak up

61. Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322–23 (1987).

62. *See* JOEL KOVEL, WHITE RACISM: A PSYCHOHISTORY 191–208 (1970).

63. *See id.* at 208. *See generally* PAUL L. WACHTEL, RACE IN THE MIND OF AMERICA: BREAKING THE VICIOUS CIRCLE BETWEEN BLACKS AND WHITES (1999).

64. *See generally* Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995).

65. *Id.* at 1188.

66. *See id.*

on" the individual—"distorting bit by bit the data upon which his decision[s] [are] eventually based"—which is to say they are "*cognitive* rather than *motivational*."[67] Racial stereotypes "operate absent intent to favor or disfavor members of a particular social group," they "operate beyond the reach of [a person's] self-awareness."[68]

The cognitive dimension of unconscious bias can have deadly consequences for African Americans, especially when dealing with the police. Before George Floyd, Eric Garner, Trayvon Martin, and other unarmed blacks murdered by the police, there was the famous case of Amadou Diallo. In 1999, four Bronx police officers, all of them white, fired 41 shots at close range at Amadou Diallo, a young African American, 19 of them finding their target.[69] Several bullets hit the bottom of Diallos' feet as he lay dying in the doorway.[70] Diallo was killed because the police officers "saw" a gun in his hand.[71] The gun turned out to be a wallet Diallo was reaching for.[72] Why did the police officers "see" a gun at such close range? Nothing in the personal histories of the police officers, all relatively inexperienced—which may be why more than half of the shots *missed*[73]—suggests any of them harbored racial hatred. They were average white men who were "predispos[ed] to look into a black face and see 'criminal.'"[74] Part of the risks of being an African American in a society beset by implicit bias is to always be perceived as a suspect, a threat. "Even black plain-clothes cops have been killed by their white fellow officers."[75] If one is black, one is likely to fit the profile of a criminal or one who is up to no good. As the Canadian author Malcolm Gladwell has said in recounting his experiences with the police and others in the United States: "That to the cop looking at you in that split second, or the employer sizing you up as you walk in the door—black is black is black."[76]

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67. *Id.*
68. *Id.*
69. William Raspberry, *Evidence Here That Race Still Matters*, SAN DIEGO UNION TRIB., Mar. 4, 2000, at B8.
70. Dean Meminger, *20 Years Ago: Amadou Diallo Killed by Police in a Hail of 41 Bullets*, SPECTRUM NEWS (Feb. 3, 2019, 5:21 PM), https://www.ny1.com/nyc/all-boroughs/news/2019/02/03/20-years-ago—amadou-diallo-was-killed-by-police-in-a-hail-of-41-bullets [https://perma.cc/L3AP-R2HT].
71. Raspberry, *supra* note 69.
72. *Id.*
73. *See id.*
74. *Id.*
75. *Id.*
76. BROOKS, *supra* note 3, at 72 (quoting Malcolm Gladwell).

B. Institutional Racism

Systemic racism can be perpetuated or generated within institutions as well as within society writ large. At the institutional level, systemic racism is not limited to any particular type of institution. It can arise as a byproduct of any institution's normal operations with or without the knowledge of people in charge.[77] My focus here is on certain legal institutions; specifically, conventional legal theory and civil rights decision-making by the Supreme Court. The two discussions overlap to some extent. Unlike other legal institutions, such as the criminal justice system,[78] legal theory and civil rights decisions are not often associated with systemic racism.[79] Yet far from being racially innocent, there is one major legal theory that sustains or contributes to no dearth of systemic racism. It is textualism. More than any other legal theory,[80] textualism is fashioned from a "white-framed perspective."[81] Textualism yields judicial decisions that systematize

77. *See supra* text accompanying notes 16–26.

78. *See supra* note 22 & accompanying text.

79. The tax code is another legal institution one might be surprised to find institutional racism. For example, single-earner households, which are more likely to be white than black, pay less taxes than households in which both spouses work, which are more common among black families. Dorothy A. Brown, *How the U.S. Tax Code Privileges White Families*, ATLANTIC (Mar. 23, 2021), https://www.theatlantic.com/ideas/archive/2021/03/us-tax-code-race-marriage-penalty/618339/ [https://perma.cc/67WW-UU8H]. Also, black employees contribute less to their retirement accounts than their white counterparts because they are supporting other family members more disadvantaged than them by systemic racism. Stephen Miller, *Black Workers Face Health Care and Retirement Savings Benefits Gaps*, SHRM (July 22, 2020), https://www.shrm.org/resourcesandtools/hr-topics/benefits/pages/black-workers-face-health-care-and-retirement-savings-benefits-gaps.aspx [https://perma.cc/5P3X-LHC5]. These disparities impact the accumulation of intergenerational wealth. Reducing the number of deductions and exclusions, implementing a progressive tax rate for wealthy individuals, and a lower tax rate for those earning less than a living wage are some of the suggestions offered to eliminate systemic racism in the tax code. *See generally* DOROTHY A. BROWN, THE WHITENESS OF WEALTH: HOW THE TAX SYSTEM IMPOVERISHES BLACK AMERICANS—AND HOW WE CAN FIX IT (2021).

80. Judicial pragmatism and judicial nominalism are alternative judicial techniques that generally do not sustain or contribute to systemic racism. The former is the quest for justice disciplined by what comes before the case—rules and extant policies—and by what come after the case, i.e., the consequences of the decision, see ROY L. BROOKS, STRUCTURES OF JUDICIAL DECISION MAKING FROM LEGAL FORMALISM TO CRITICAL THEORY 172–74, 183 (2d ed. 2012), and the latter is the quest for justice disciplined only by the facts of the case. Nominalism is committed to the best results in particular cases, giving every litigant their day in court. Judicial decision making, therefore, comes down to the judge's gut. *See id.* at 174–83.

81. *See supra* text accompanying notes 5–7.

racial disadvantage for African Americans and racial advantage for white Americans. Even without textualism's legal hegemony, however, the Supreme Court's decisions in major civil rights cases consistently disadvantage African Americans. Protecting private discrimination under the Fourteenth Amendment and vindicating the color-blind norm at all costs are some of the institutional structures the Court uses as the basis for issuing civil rights decisions that perpetuate embedded racial disadvantage against African Americans.[82] This is not necessarily a question of judicial animus. Again, in post-civil rights America, animus does not correlate with systemic racism, either its manifestations or sustaining forces.

1. Textualism

Textualism is a theory of legal interpretation that centers judicial decision making on the ordinary meaning of authoritative text at the time of enactment. Extra-textual sources, such as public policies or legislative intent, are ignored. Only the original meaning of the constitutional text (originalism) and the public meaning of statutory text are legitimate sources for judicial interpretation.[83]

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82. There are other mechanisms, the intent test being one of them. "[T]he Supreme Court since at least 1976 has required plaintiffs in racial equal protection and Fifteenth Amendment cases to prove that the laws or practices that they allege discrimination against them were adopted with a discriminatory purpose." J. MORGAN KOUSSER, COLORBLIND INJUSTICE: MINORITY VOTING RIGHTS AND THE UNDOING OF THE SECOND RECONSTRUCTION 317–18 (1999). In a post-Jim Crow world, discriminatory purpose is nearly impossible to prove. Allowing the plaintiff to establish a rebuttable presumption of liability based on discriminatory effects would seem to be a more realistic and fair way of rooting out discrimination in a post-Jim Crow world. *See, e.g.*, Reva B. Siegel, *Blind Justice: Why the Court Refused to Accept Statistical Evidence of Discriminatory Purpose in* McCleskey v. Kemp*—and Some Pathways for Change*, 112 NW. U. L. REV. 1269 (2018) (explaining that the *McClecsky* opinion suggested that restricting statistics, so that they may not be used to prove discriminatory purpose, was done to protect the criminal justice system against discrimination claims). Yet the Supreme Court has "not held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another." Washington v. Davis*,* 426 U.S. 229, 242 (1976). Thus, a classification having a disparate effect, absent a showing of discriminatory purpose, is subject to review under the lenient, rational-basis standard. *Id*. at 246–48; Rogers v. Lodge, 458 U.S. 613, 617 n.5 (1982). For a discussion of the connection between the intent test and the color-blind norm, see *infra* text accompanying notes 129–31.

83. *See* BROOKS, *supra* note 80, at 61–74. Differences among textualists "develop when interpretive difficulties arise, such as when the text is ambiguous or when following the plain meaning of an unambiguous text will lead to an unreasonable outcome. Under these circumstances, some legal theorists are more textualist than others." BROOKS, *supra* note 80, at 61. It was, in my view, the desire to avoid an unreasonable outcome that prompted Justice Gorsuch's "textualist" opinion in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020). This case is discussed next.

Determining the ordinary meaning of authoritative text can, however, be quite subjective. This was evident most prominently in *Bostock v. Clayton County*.[84] In this case, the Supreme Court did the right thing by extending Title VII protection to LGBTQ employees. Justice Gorsuch, a textualist and author of the Court's 6–3 opinion, claimed that his reasoning was faithful to the text of the statute prohibiting discrimination "on the basis of sex."[85] But did the public meaning of the word "sex" when the statute was passed in 1964 include sexual orientation and gender identity? The dissenting justices, who are also self-proclaimed textualists, saw Justice Gorsuch's reasoning as twisted textualism.[86] They vehemently argued that Justice Gorsuch veered off the textualist path, suggesting that he was acting as a pragmatist.[87]

Putting aside the indeterminacy of textualism, the point to make is as follows: textualism's structural limitations consistently work to the disadvantage of African Americans and to the advantage of white Americans, thereby sustaining systemic racism. Nowhere is this more apparent than in constitutional textualism—originalism. This legal theory was brought into the mainstream of judicial thinking by the late Justice Scalia.[88] Such is Justice Scalia's legacy that a law school was named after him, the Antonin Scalia Law School at George Mason University, and a majority of Supreme Court justices—Justices Thomas, Alito, Gorsuch, Kavanaugh, Barrett, and, on occasion, Chief Justice Roberts—have championed his constitutional textualism. Originalism embraces "The Dead Constitution," which instructs judges to give constitutional text the meaning it had at the time the Constitution was first ratified.[89] Justice Scalia justified originalism on the ground that it saves us from the devastations of its opposite constitutional theory—"The Living Constitution," which treats the Constitution as an evolving document.[90] Justice Scalia posited that The Living Constitution threatens the Bill of Rights, an anti-majoritarian

84. *See generally Bostock*, 140 S. Ct. 1731 (2020).
85. *Id.* at 1754.
86. *Id.* at 1755–56 (Alito, J., dissenting); *id.* at 1834 (Kavanaugh, J., dissenting).
87. See *supra* note 80 for an explanation of judicial pragmatism.
88. *See* BROOKS, *supra* note 80, at 61–89. For a more detailed discussion of Scalian textualism, see generally ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1997); ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS (2012); RALPH A. ROSSUM, ANTONIN SCALIA'S JURISPRUDENCE: TEXT AND TRADITION (2006).
89. *See generally* BROOKS, *supra* note 80, at 61–89.
90. *Id.* at 71–72.

prescription, by permitting judges to interpret the Constitution in any way a majority of them want to.[91] What Justice Scalia feared most was that a "moral reading" of the Constitution would lead to "a reduction of the rights of individuals," because the moral precepts of future societies may not be as "moral" as those of the society that originally conceived of the Constitution.[92] The Living Constitution, in short, threatens individual liberties as "the record of history refutes the proposition that the evolving Constitution will invariably enlarge individual rights."[93]

Originalism, it should be noted, has been thoroughly debunked as a theory of constitutional interpretation. Disputing the textualists' reliance on the Founders of the Constitution, our most respected historians have characterized originalism as ahistorical and nontransparent.[94] Justice

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91. *Id.*

92. *See* SCALIA, *supra* note 88, at 149. Justice Scalia has in fact indulged policy through his willingness to join in opinions that are self-consciously policy oriented. For example, Justice Scalia joined the Supreme Court's opinion in *Caterpillar Inc. v. Lewis*, upholding a district court's exercise of federal jurisdiction under the removal statute even though that court completely disregarded the unambiguous text of the statute. Caterpillar Inc. v. Lewis, 519 U.S. 61, 64 (1996). The Justices were guided in their decision by "a main theme of the removal scheme devised by Congress," and, in the end, found these "themes" of "finality, efficiency, and economy [to be] overwhelming." *Id.* at 63. A reliance on such policy considerations sounds a lot like legislative intent or spirit, which is an unacceptable source of statutory interpretation under Scalian textualism. SCALIA, *supra* note 88, at 16–18.

93. SCALIA, *supra* note 88, at 43.

94. For example, historian Ron Chernow writes that Hamilton, the chief author of *The Federalist*, "wanted the Constitution to be a flexible document." RON CHERNOW, ALEXANDER HAMILTON 256 (2004). Hamilton argued that "[t]here ought to be a capacity to provide for future contingencies." *Id.* (quoting THE FEDERALIST NO. 34 (Alexander Hamilton)). Similarly, historian Andrew Shankman makes the point that both Hamilton and Madison, though in different ways, endorsed a flexible Constitution, one that is organic, not originalist, and changes with the times. *See* ANDREW SHANKMAN, ORIGINAL INTENTS: HAMILTON, JEFFERSON, MADISON, AND THE AMERICAN FOUNDING 5–6 (2018) [hereinafter ORIGINAL INTENTS]. *See also* Andrew Shankman, *What Would the Founding Fathers Make of Originalism? Not Much*, HIST. NEWS NETWORK (Mar. 19, 2017), https://historynewsnetwork.org/article/165374 [https://perma.cc/WU2P-K93F]. More broadly, Shankman argues that, "[w]e should not trust any figure of the twenty first century who claims that the Constitution had one meaning for its framers that we can decipher. We should not take seriously the insistence that we can use this alleged original intent to determine what the founders would think about contemporary issues, and so what we should think about them." ORIGINAL INTENTS, *supra*, at 145. Gordon Wood, perhaps our preeminent constitutional historian, has sounded the same note. Commenting on Scalia's thesis, he states that the consensus among the Founders, "culminating in the decisions of the Marshall Court," was to bring:

> the higher law of the Constitution within the realm of ordinary law and subject[] it to the long-standing rules of legal exposition and construction as if it were no different from a lowly statute. In effect, all the wide-ranging power of explication and interpretation traditionally wielded by common-law judges over ordinary statutes in relation to the law could now be applied to the Constitution itself.

Oliver Wendell Holmes was an early critic of the idea of The Dead Constitution, which had been around during his day. He rejected originalism for much of the same reason as today's historians. Holmes argued that the Founders:

> [C]alled into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience, and not merely in that of what was said a hundred years ago.[95]

Thus, Holmes rejected the notion that the Constitution was set in stone, that it was for all times defined by the Founders' eighteenth-century perspective and assumptions. The Constitution's "broad precepts were the very antithesis of the absolutism that those . . . [who] having a 'fetishism of the Constitution' tried to read into it, hoping to give their political views the imprimatur of absolute right."[96] "The Founders had intentionally created a document that was a framework, not a straitjacket, that would allow the nation to meet new challenges which the men wise enough

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> American judges could now construe the all-too-brief words of the Constitution by the rules of construction that Blackstone had laid down—subject-matter, intention, context, and reasonableness. . . .

Gordon S. Wood, *Commentary* on SCALIA, *supra* note 88, at 49, 62. Thus, "the extraordinary degree of discretionary power that American judges now wield" is within rather than outside our country's tradition, *id.* at 62, mainly due to the people's suspicion of state legislators during and after the Revolutionary War, *id.* at 51. More recently, judicial assertiveness was certainly justified to counteract state segregation statutes and the myriad voter suppression laws being passed by the states. *See supra* note 23 and accompanying text. Wood underscores the point that judicial assertiveness falls within the American tradition of judicial decision making:

> [T]hat power is the product of immense changes in our legal and judicial culture which have occurred over the past two hundred years, and these changes cannot be easily reversed. [Scalia's] remedy of textualism in interpretation seems scarcely commensurate with the severity of the problem and may in fact be no solution at all. Textualism, as Justice Scalia defines it, appears to me to be as permissive and as open to arbitrary judicial discretion and expansion as the use of legislative intent or other interpretative methods, if the text-minded judge is so inclined.

Wood, *supra*, at 62–63. This explanation of textualism certainly sheds light on Justice Gorsuch's textualism in *Bostock v. Clayton County*. *See supra* text accompanying notes 84–87.

95. Missouri v. Holland, 252 U.S. 416, 433 (1920) (Holmes, J., dissenting).

96. STEPHEN BUDIANSKY, OLIVER WENDELL HOLMES: A LIFE IN WAR, LAW, AND IDEAS 460 (2019).

to draft its inspiring words were wise enough to know they could not possibly foresee."[97]

For African Americans, originalism (text frozen in time) is more than a misreading of constitutional history. It sustains or generates systemic racism. From the white frame, Justice Scalia's operating premise may make sense; but from the black experience it does not because individual liberties have expanded since the Constitution's ratification. Society has in fact gotten better for African Americans. Slavery is gone. That is no small matter if one is an African American. But in the textualist frame—the insider's frame —black lives do not seem to matter much.

Most tellingly, The Dead Constitution insults African Americans. It does so by prioritizing constitutional meaning taken from a timeframe during which African Americans were, in the words of the Supreme Court itself, "considered as a subordinate and inferior class of beings."[98] African Americans are the unheard and unseen in originalism.

Equally telling, The Dead Constitution, with its implicit judicial minimalism, cannot sustain the Supreme Court's reasoning in the most important civil rights case in history, *Brown v. Board of Education*.[99] Overturning every state school segregation statute, as well as fifty years of its own precedents, enlarged the Court beyond the constraints imposed by Justice Scalia's minimalism. Also, reading the Fourteenth Amendment as a prohibition against segregation in public education does not demonstrate the degree of fealty to the Amendment's original meaning that Justice Scalia's originalism seems to require. Surely the Amendment's framers, the Thirty-ninth Congress, intended the Amendment to be read in harmony with the then-common meaning of racial equality; namely, "separate but equal." Indeed, Congress made no attempt to desegregate the public schools of Washington, D.C. These schools, as well as the public schools in the home districts of virtually every congressman who voted for the Amendment, were segregated both before and after the Amendment's passage and ratification.[100]

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97. *Id.*

98. Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 404–05 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

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

100. The view that *Brown* cannot be squared with originalism is overwhelmingly supported by legal scholars, including Jack Balkin, Alexander Bickel, Alfred Avins, Michael Klarman, Robert Bork, Mark Tushnet, Raoul Berger, Ronald Dworkin, Richard Kluger, Earl Maltz, Bernard Schwartz, Laurence Tribe, Thomas Grey, Donald Lively, Richard Posner, David Richards, and "countless others." For seminal works, *see, e.g.*, Steven G. Calabresi & Michael W. Perl, *Originalism and* Brown v. Board of Education, 2014 MICH. STATE L. REV. 429 (arguing compatibility); Michael J. Klarman, *Brown, Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 VA. L. REV. 1881 (1995) (arguing non-compatibility, the position of most scholars); Michael W. McConnell, *The Originalist Case for* Brown v. Board of Education, 19 HARV. J.L. & PUB.

It is not enough to argue, as some textualists have done, that the Framers' understanding of racial equality "was completely inconsistent with the equal protection of the laws they mandated."[101] Quite obviously, neither Congress nor the average American at the time saw any such inconsistency. "Separate but equal," not desegregation nor certainly integration, was the public understanding of "equality" or "equal protection of the laws" during the years following the Civil War.[102] Otherwise, the Fourteenth Amendment would never have been proposed let alone ratified. Equally significant, Justice Harlan's dissenting opinion in *Plessy v. Ferguson*, arguing that the Constitution is color blind, would have been the majority opinion in that case if color blind, and not "separate but equal," was the public meaning of the Equal Protection Clause during that time.[103] *Plessy*'s decision was only a generation removed from the Fourteenth Amendment's ratification. Given all we know about the aftermath of the Civil War, it is ludicrous to suppose that the lawmakers of that era intended, hoped, or expected that racial mixing, an essential aspect of *Brown*'s meaning, would be within the common, or public, meaning ascribed to the Equal Protection Clause.

A textualist, in short, would be hard pressed to find textual support for the Supreme Court's construction of the Equal Protection Clause in *Brown* on either originalist or minimalist grounds. Incompatibility with *Brown* should, by itself, discredit any judicial theory.[104] But for African Americans, the problem is more than the niceties of judicial legitimacy. It is personal,

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POL'Y 457 (1996) (replying to Klarman's response); Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 951–52 (1995) (arguing compatibility) [hereinafter *Originalism and the Desegregation Decisions*]; Boris I. Bittker, *Interpreting the Constitution: Is the Intent of the Framers Controlling? If Not, What Is?*, 19 HARV. J.L. & PUB. POL'Y 9 (1995) (taking the majority position).

101. ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 169 (1990).

102. Segregation was widely practiced in the North as well as in the South during Reconstruction, 1865–1877. Brown v. Board *at Fifty: "With an Even Hand": A Century of Racial Segregation, 1849–1950*, LIBR. OF CONG., https://www.loc.gov/exhibits/brown/brown-segregation.html [https://perma.cc/A2WS-8FXQ]. *See generally* W.E.B. DU BOIS, BLACK RECONSTRUCTION IN AMERICA (1935).

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

104. "Any theory of constitutional interpretation that is incapable of explaining and justifying *Brown* is *ipso facto* so flawed that the theory of interpretation must, therefore, be invalid." Calabresi & Perl, *supra* note 100, at 431. "Such is the moral authority of *Brown* that if any particular theory does not produce the conclusion that *Brown* was correctly decided, the theory is seriously discredited." *Originalism and the Desegregation Decisions*, *supra* note 100, at 952.

potentially a matter of life and death. If a textualist were standing at the schoolhouse door in 1954, African American children would have been denied entry and, hence, equal educational opportunity. Even though most textualists might have believed in their hearts that segregation was an egregious degradation of black humanity, they would have counseled its eradication through democratic process. How disingenuous when they knew that the democratic process was closed to African Americans in the South, that the process was decidedly undemocratic. For the textualist to claim that the text "made me do it" is simply to hide the fact that text is being constructed from a political perspective. This is nothing more than gaslighting.

2. Civil Rights Decision-Making

Though textualism did not—thankfully—win the day at the Supreme Court in 1954, it has cast a large shadow over the Court's decision-making in civil rights cases since *Brown*. In case after case, the Court has issued decisions that disadvantage African Americans.[105] Not all of these decisions flow from textualism, however. Many are based on the Supreme Court's blind allegiance to the color-blind norm, the racial omission norm.[106] I will focus on decisions rendered in two areas: the Fourteenth Amendment, with its protection of private acts of discrimination, and the Court's dogged adherence to the color-blind norm. Both processes of decision-making have the effect of sustaining or contributing to patterns of racial disadvantage for African Americans.

a. The Fourteenth Amendment

A large part of the Supreme Court's decision-making in civil rights cases today is predicated on a textualist interpretation of the Fourteenth Amendment that traces back to the *Civil Rights Cases*.[107] In these cases, five African American plaintiffs filed separate lawsuits alleging that certain hotels, theaters, and public transit companies had violated the Civil Rights Act of 1875 by denying them services or banning them from areas reserved for whites.[108] Section 1 of the Civil Rights Act of 1875 stated that:

> [A]ll persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theatres, and other places of public amusement; subject only to the conditions and limitations established

105. *See supra* note 24.
106. For a detailed discussion of this norm, see generally KOUSSER, *supra* note 82.
107. *See generally* The Civil Rights Cases, 109 U.S. 3 (1883).
108. *Id.* at 4–5.

> by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude.[109]

Section 2 of the Act imposed a punishment on any person who violated Section 1. Under Section 2, a person who violated Section 1 of the Civil Rights Act would have to pay $500 in damages to the injured party, receive a misdemeanor conviction, and have to pay an additional fine or be given a minimum of thirty days of imprisonment.[110] The five cases were consolidated and came to be known by the name, *Civil Rights Cases*.[111]

Though the Court invalidated the Civil Rights Act of 1875 under both the Thirteenth and Fourteenth Amendments,[112] my focus will be on the latter which provides in relevant part: "nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[113] Giving the amendment a plain reading, the Supreme Court ruled:

> [I]t is clear that the law in question cannot be sustained by any grant of legislative power made to Congress by the Fourteenth Amendment. That amendment prohibits the States from denying to any person the equal protection of the laws, and declares that Congress shall have power to enforce, by appropriate legislation, the provisions of the amendment. The law in question, without any reference to adverse State legislation on the subject, declares that all persons shall be entitled to equal accommodations and privileges of inns, public conveyances, and places of public amusement, and imposes a penalty upon any individual who shall deny to any citizen such equal accommodations and privileges.[114]

In so holding, the Court protected private acts of discrimination, such as the broad range of discrimination visited upon the plaintiffs, from prosecution under the Fourteenth Amendment.

Justice Harlan argued in his dissenting opinion that the Court could have and should have given the amendment a more liberal reading.[115] He argued, specifically, that the Court's reading of the amendment was arbitrary and altogether antithetical to the amendment's design, which was to protect the rights of African Americans who were singularly vulnerable

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109. *Id.* at 9.
110. *Id.*
111. The *Civil Rights Cases* is sometimes known under the first named case, *United States v. Stanley*, 109 U.S. 3 (1883).
112. For the Court's opinion regarding the Thirteenth Amendment, see *The Civil Rights Cases*, at 20–26.
113. U.S. CONST. amend. XIV, § 1.
114. *The Civil Rights Cases*, at 18–19.
115. *Id.* at 26.

to private acts of violence in the aftermath of slavery.[116] In short, the Court's textualist reading of the Fourteenth Amendment undercut the amendment's soaring promise of racial equality:

> The opinion in these cases proceeds, it seems to me, upon grounds entirely too narrow and artificial. I cannot resist the conclusion that the substance and spirit of the recent amendments of the Constitution have been sacrificed by a subtle and ingenious verbal criticism. '*It is not the words of the law but the internal sense of it that makes the law: the letter of the law is the body; the sense and reason of the law is the soul.*'[117]

Taking the meaning of the law from its spirit rather than from its all-too-brief text is certainly within the tradition of the Supreme Court's interpretative powers.[118] By ignoring the spirit of the Fourteenth Amendment, the Supreme Court consigned African Americans to a status of rank oppression, a condition that continues to play out today as a manifestation of systemic racism.

Greatness is often arrived at by choosing a game-changing, morally-based path over Gradgrinding blackletter law.[119] This is how Thurgood Marshall was able to present the Supreme Court with an opportunity to overturn a half-century of blackletter law in *Brown v. Board of Education*.[120] But the initial act of moral courage came less from Marshall than from a white southern, patrician of a federal judge, Waties Waring. This uncommon example of moral courage combined with legal acumen warrants an extensive recounting as it helps one understand systemic racism in textualism and the decision it wrought in the *Civil Rights Cases*:

> On Friday morning, November 17, 1950, Judge Waties Waring held a pretrial conference for the pending Clarendon County schools lawsuit. Beyond a few attorneys and reporters, there was almost no one in the courtroom; it was merely routine business.

But it would become one of the most important hearings in American legal history.

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116. *Id.* at 52–53. For an extensive discussion of the degree of violence, intimidation, and death southerners visited upon African Americans in the years after slavery, see, for example, RON CHERNOW, GRANT 703–11 (2017).

117. *The Civil Rights Cases*, at 26 (Harlan, J., dissenting) (emphasis added).

118. See *supra* note 94 for Professor Gordon Wood's analysis of constitutional history. See also *supra* notes 83–93 and accompanying text for legal and historical debunking of textualism.

119. Gradgrinding refers to a memorable character in a Charles Dickens novel. Thomas Gradgrind is the notorious head of a school who is obsessively dedicated to the pursuit of profit. *See* CHARLES DICKENS, HARD TIMES (1854). "Gradgrind" has taken on the generic meaning of a person who is hard and only cares about cold facts and data points.

120. *See generally Brown*, 347 U.S. 483.

The stakes in *Briggs v. Elliott* could be measured by the legal firepower in the room. Thurgood Marshall and Harold Boulware from the NAACP represented the plaintiffs, and the defendant school district had hired Robert Figg – the Democrats' lawyer in the previous primary lawsuit.

Figg had far more experience in federal court than any Clarendon County schools attorney. He had also faced Marshall before and known Waring for years. Recruiting Figg was a smart move by Clarendon County, possibly a recommendation from state and party officials.

There wasn't going to be any settlement, so both sides simply launched into their lists of issues they wanted resolved before the trial. Figg argued that the lawsuit made false allegations, that the district didn't provide buses to any schools; white parents funded transportation for their children. Marshall complained that inspectors hadn't been allowed into the Summerton schools for a third-party comparison. Waring promised a court order forcing the district to comply.

Just as the hearing appeared to be wrapping up, Marshall mentioned the goal of *Briggs v. Elliott* was to prove that segregation in South Carolina schools was unconstitutional. Waring stopped him immediately. This lawsuit, the judge said, did no such thing.

"You've partially raised the issue," Waring said, "but can and may do what has been done so very, very often heretofore: decide a case on equal facilities — if you can prove what you say you can prove, that the schools aren't at all equal. It's very easy to decide this case on that issue, and not touch the constitutional issue at all, because it is the general policy of American courts not to decide a constitutional issue if it can be decided on some other issue."

Marshall didn't back down right away. He argued the lawsuit did, in fact, raise the question of constitutionality. Again, Waring disagreed. When the judge dismissively shut him down, Figg later said, Marshall looked shocked. But that may have been simple courtroom theatrics for the benefit of the defense — and the press. It's almost impossible the two men hadn't had the exact same conversation before.

* * *

Waring never admitted to any collusion with Marshall or NAACP leader Walter White, even in the years after he left the bench. The Fourth Circuit certainly would have questioned the ethics of abandoning judicial neutrality and overtly working with one side in a lawsuit filed in his court. And South Carolina officials most likely would have stormed the federal

courthouse. But Waring knew he didn't have much time left, and felt he was answering a higher calling.

The judge wanted a case that would bury legal segregation forever, and believed *Briggs* was that lawsuit. Almost. In order to insulate himself from later questions or criticism that he'd unfairly advised the plaintiffs, he laid out his entire strategy from the bench — and in the court record. If no one complained at the time, and they didn't, they could hardly protest later. It played out beautifully. Waring casually told Marshall he could simply amend his lawsuit to address the constitutionality of segregation.

"Or, better still, what you should do is not to amend, because that'll merely complicate the issue," the judge said. "Dismiss without prejudice, and bring a brand new suit, alleging that the schools of Clarendon County, under the South Carolina constitution and statute, are segregated, and that those statutes are unconstitutional, and that'll raise the issue for all time as to whether a state can segregate by race in its schools."

Marshall questioned Judge Waring about the specifics for a minute, but like any good lawyer he already knew the answers. He'd been arguing cases before the U.S. Supreme Court for a decade — he didn't need a primer. But it made for great theater leading up to the moment when Marshall asked if *Briggs v. Elliott* could be dismissed without prejudice.

Waring granted the motion.

After the hearing, Marshall and Boulware explained the next steps to reporters outside the courthouse. The NAACP attorneys would rewrite *Briggs* and bring a suit to abolish racial segregation in South Carolina public schools. Marshall said the plaintiffs had yet to be determined, because he couldn't speak for Clarendon County parents, but pledged to file the lawsuit soon.

And with that, Waring finally had the promise of the case he'd always wanted. Segregation was the root of all evil in America, the judge believed, and public schools were the place to challenge separate-but-equal laws. If the schools were integrated, it would strike at the heart of the race problem and ultimately lead to significant change in society.

"Prejudice doesn't start when you're 18 or 21 years old. You've got it then," Waring later explained. "Prejudice starts when you're a little kid and you go to first grade and you're told that people have to go through different doors and use different toilets and there's something wrong with other people."

Even before Marshall and Boulware filed the lawsuit, state officials began to plot new ways to thwart this coming legal challenge. Nearly everyone in South Carolina realized this was the gathering storm they'd long dreaded. And they feared the state was destined to lose. That afternoon,

The Evening Post reported that Thurgood Marshall had promised the first lawsuit in history "calling for the integration of races in schools."[121]

In the wake of the *Civil Rights Cases*, the Supreme Court decided *Heart of Atlanta Motel, Inc. v. United States*.[122] Though this case does not overrule the *Civil Rights Cases* it does protect against certain private acts of racial discrimination in public places by upholding the constitutionality of Title II of the 1964 Civil Rights Act.[123] Title II proscribes private acts of racial discrimination that occur in places of public accommodations, and does so not on Fourteenth Amendment grounds but under the Commerce Clause.[124] However, the Court today is unlikely to uphold its decision in *Heart of Atlanta Motel*. Statutory textualism is indisposed to upholding civil rights statutes based on the Commerce Clause.[125] Textualism thereby systematizes racial disadvantage by thwarting congressional attempts to eradicate racial discrimination in the social order.

It is important to note that there is nothing ineluctable about the Supreme Court's interpretation of the Fourteenth Amendment in the *Civil Rights Cases*. As Justice Harlan pointed out, the Court could have interpreted the Fourteenth Amendment in a way that was consistent with the amendment's underlying civic and moral purpose—racial equality.[126] And, as Justice Gorsuch's interpretation of Title VII demonstrated,[127] the Court may have to eschew the letter of the law to reach a just result.

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121. Brian Hicks, *Waring Excerpt 5: In Plain Sight*, POST & COURIER (Sept. 20, 2018), https://www.postandcourier.com/columnists/waring-excerpt-5-in-plain-sight/article_6bb66a62-a7c0-11e8-92af-b70b85128655.html [https://perma.cc/SUR8-UZ65]. These lessons were self-taught. Judge Waring and his wife had simply accepted the racial order in the South for the first sixty years of their lives. It took an earth-shattering event to shake the judge and his wife out of their racial ignorance and indifference. Years earlier, Judge Waring presided over a trial in which the jury returned a verdict of not guilty for a police commander who had gauged out both eyes of a black service man after dragging him from a bus as he was returning home from the war in Europe. Judge Waring and his wife started their own personal library of books on the American race problem written not from the white southern perspective, but from the black perspective.

122. Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964).

123. *Id.* at 261–62; 42 U.S.C. § 2000a (1964).

124. U.S. CONST. art. I, § 8, cl. 3.

125. *See, e.g.*, United States v. Morrison, 529 U.S. 598 (2000) (overturning a federal right of action against gender violence under both the Commerce Clause and Fourteenth Amendment). The Court struck down in whole or in part dozens of socially progressive statutes on minimalist grounds. *See, e.g.*, BROOKS, *supra* note 80, at 59.

126. *See* The Civil Rights Cases, 109 U.S. 3, 26 (1883) (Harlan, J., dissenting).

127. *See supra* text accompanying note 83.

One might attempt to justify systemic racism sustained by Court's interpretation of the Fourteenth Amendment—the protection of private discrimination—on privacy grounds. In other words, private racial discrimination falls within a constitutionally protected zone of privacy. But the protection of private discrimination seems unworthy of legal protection when it denies constitutional or statutory protection to victims of such odious conduct. One might feel different about systemic racism if its occurrence were justified by an *exceedingly important societal reason*, such as national security.[128] Private acts of racial discrimination that significantly disadvantage African Americans would not seem to satisfy this standard. If such discrimination did satisfy this standard, that would only justify systemic racism. It would not deny the fact that textualism, the legal theory that protects such discrimination, drives systemic racism.

b. Color-Blind Norm

The Supreme Court's relentless adherence to race-neutral governmental practices at all costs to racial progress—the color-blind norm[129]—is well illustrated in *Ricci v. DeStefano*.[130] This case also demonstrates the Court's preference for the intent test over the effects test, which is another juridical structure that sustains systemic racism.[131] So as not to complicate my analysis, I will focus on the color-blind norm.

Ricci was decided under Title VII of the Civil Rights Act of 1964.[132] The most important employment discrimination law in the land, Title VII prohibits intentional acts of employment discrimination based on race, color, religion, sex, and national origin—called "disparate treatment"[133]—as well as policies or practices that are not intended to discriminate but in fact have a disproportionately adverse effect on protected classes—called "disparate impact."[134] Plaintiffs alleged that the city of New Haven, Connecticut, engaged in intentional racial discrimination when it decided

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128. *See* BROOKS, *supra* note 3, at 48 (broaching this standard as a limited justification for non-nefarious laws that impede racial progress (called "racial subordination")).

129. For a detailed discussion of this norm, *see. e.g.*, BROOKS, *supra* note 2, at 14–34; KOUSSER, *supra* note 82.

130. Ricci v. DeStefano, 557 U.S. 557 (2009).

131. *See id.* at 585. For a further discussion of this point, see *supra* note 82.

132. *Ricci*, 557 U.S. at 557; 42 U.S.C. § 2000e (1964).

133. 42 U.S.C. § 2000e-2(a)(1) (1964).

134. 42 U.S.C. § 2000e-2(k)(1)(A)(i) (1964); *cf.* Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Communities Project, Inc., 576 U.S. 519 (2015) (stating that disparate impact liability under the Fair Housing Act is even more restrictive than under Title VII). *See generally* BROOKS, CARRASCO & MARTIN, *supra* note 24, at 480 (distinguishing disparate impact from disparate treatment). *See supra* note 24 for relevant discussion.

to discard the results of written and oral examinations given to its firefighters.[135] Although facially neutral, the examination results had a disparate impact on black firefighters. At the urging of the union, test scores were weighted sixty percent for the written scores and forty percent for the oral scores.[136] No practical, on-the-job examinations were given. The test results would determine not only which firefighters would be considered for promotions to the ranks of lieutenant and captain but also in what order over a two-year period.[137]

When the results came back, it was discovered that the pass rate for blacks and Hispanics on both exams was about one-half the pass rate of whites.[138] As a result, all ten persons promoted to the lieutenant position were white, and of the nine persons promoted to the rank of captain, seven were white and two were Hispanic.[139] None were black. This established a prima facie case of disparate-impact discrimination under Title VII.[140] Though the exam was racially neutral, it had a disproportionately negative effect on the black candidates.[141]

In an after-the-fact attempt to redress what even the Supreme Court admitted were "significant" racial disparities, the New Haven Civil Service

135. *Ricci*, 557 U.S. at 562–63.
136. *Id.* at 564.
137. *Id.* at 561–68.
138. *Id.* at 612 (Ginsburg, J., dissenting).
139. *Id.*
140. *Id.* After each examination, the New Haven Civil Service Board (CSB), an unelected body, certifies a ranked list of applicants who passed the test. *Id.* at 564 (majority opinion). Under the city's charter, the authority doing the hiring must fill each vacancy by choosing one candidate from the top three scorers on the list. *Id.* This is called the "rule of three." *Id.* Of the seventy-seven candidates who completed the lieutenant examination—forty-three whites, nineteen blacks, and fifteen Hispanics—thirty-four candidates passed—twenty-five whites, six blacks, and three Hispanics. *Id.* at 566. Eight lieutenant positions were vacant at the time of the examination. *Id.* Based on the rule of three, "this meant that the top ten candidates were eligible for an immediate promotion to lieutenant. All ten were white." *Id.* "Subsequent vacancies would have allowed at least three black candidates to be considered for promotion to lieutenant." *Id.* Of the forty-one candidates who completed the captain examination—twenty-five whites, eight blacks, and eight Hispanics—twenty-two candidates passed—sixteen whites, three blacks, and three Hispanics. *Id.* Because seven captain positions were vacant at the time of the examination, nine candidates were eligible for an immediate promotion—seven whites and two Hispanics—based on the rule of three. *Id.* The fact that the city discarded the disparate test results indicates that it would have not given the test in the first place had it known about its consequences.
141. *Ricci*, 557 U.S. at 593.

Board (CSB) threw out the test results.[142] This meant that everyone would have to retake the examinations. Most of the successful candidates, seven white and one Hispanic firefighter, filed a lawsuit claiming that the decision to throw out the test results constituted intentional race-based discrimination, given the fact that the successful candidates were mainly white and the unsuccessful candidates were mainly black.[143] The city, in defense, argued that the sole reason it discarded the test results was to avoid disparate-impact liability under Title VII.[144] The issue, as framed by the Court, in a 5–4 decision written by Justice Kennedy—in which Justices Roberts, Scalia, Thomas, and Alito joined—was "whether the purpose to avoid disparate-impact liability excuses what otherwise would be prohibited disparate-treatment discrimination."[145] The answer according to the Court: it depends.

The city can discard test results without violating Title VII's prohibition against discrimination on race-conscious grounds or disparate treatment, the Court held, only if it can demonstrate by "a strong basis in evidence" that using the disparate exam results would cause it to lose a disparate-impact lawsuit brought, in this instance, by the black test takers.[146] In other words, once the exam has been administered, the employer may discard the exam results on racial grounds only if it can show by "a strong basis in evidence" that had it not taken the action, it would have been found liable by a court either on the basis that the disparate impact could not be justified as a business necessity or that the employer failed to pursue an equally valid but less discriminatory alternative.[147] The Court found that the city could not satisfy any of these conditions, that there was no evidence, let alone strong evidence, of either a problem with the validity of the tests or of the availability of better testing alternatives.[148]

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142. *Id.* at 574.
143. *Id.* at 574–75.
144. *Id.* at 575.
145. *Id.* at 580. "The racial adverse impact here was significant." *Id*. at 586.
146. *Id.* at 585.
147. *Id.*
148. Adverse effects by itself only establish a prima facie case of disparate impact liability under Title VII. *Id.* at 587. Liability is established only if either "the examinations were not job related and consistent with business necessity, or if there existed an equally valid, less discriminatory alternative that served the City's needs but that the City refused to adopt." *Id.* Justice Kennedy relied on the record as the basis for his ruling that the examinations were job related and consistent with business necessity. *Id.* at 577–78. He provided several reasons in support of his ruling. First, IOS, an Illinois company hired by the city to develop and administer the exams, devised the written exam "after painstaking analyses of the captain and lieutenant positions . . . ." *Id.* at 588. They assembled a pool of thirty assessors who were from outside Connecticut and possessed superior rank to the lieutenant and captain positions being tested. *Id.* at 565. Within this pool of assessors, they "made sure that minorities were overrepresented." *Id.* at 588. Second, IOS test-

The Court's decision vindicated the color-blind, or racial omission, norm. Discarding the test results, as the city did, was a race-conscious act and, in the opinion of the Court, *ipso facto* illegal. Some African Americans would agree with the Court's conclusion on the limited ground that race-conscious actions place African Americans in a negative light in that they portray blacks as losers, hapless victims in need of special governmental solicitude. As Justice Thomas has offered, "[i]nevitably, such programs engender attitudes of superiority or, alternatively, provoke resentment among those who believe that they have been wronged by the government's use of race."[149] Arguably, the color-blind norm is also behind the Court's subordination of disparate-impact discrimination to disparate-treatment discrimination. The Court seems to regard the intent test to be less of a fishing expedition for racist motives than the effects test. The subordination of the effects test reinforces the core belief held by proponents of the color-blind norm, which appears to be the main reason behind the Court's decision in *Ricci*, that race no longer matters in a post-civil rights society.[150]

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designed the questions by observing lieutenant and captains perform their duties and by drawing the questions from sources approved by the fire department. *Id.* Third, Vincent Lewis, who was the only outside witness that not only had appeared before the CSB but also had reviewed the exams in any detail and had any firefighting experience, stated that the "questions were relevant for both exams." *Id.* Fourth, Christopher Hornick, who was the only other witness who had seen any part of the examinations and who was one of IOS's competitors, stated that the examinations "appea[r] to be . . . reasonably good" and "recommended that the CSB certify the results." *Id.* Justice Kennedy also found that there was no strong basis in evidence supporting the contention that an equally valid, less discriminatory alternative existed. *Id.* at 589. He ruled that "respondents have produced no evidence to show that the 60/40 weighting was indeed arbitrary." *Id.* Justice Kennedy acknowledged that other ways to weigh the tests exist but concluded that the record presented no evidence that different weighing "would be an equally valid way to determine whether candidates possess the proper mix of job knowledge and situational skills to earn promotions." *Id.* Justice Kennedy also dismissed the respondents' argument that the city could have changed its interpretation of the "rule of three" to produce less discriminatory results. *Id.* at 590. While it is true that had the city employed a "banding" technique, and four black and one Hispanic candidate would have become eligible for officer positions, this technique was not available to the city because, "[h]ad the City reviewed the exam results and then adopted banding to make the minority test scores appear higher, it would have violated Title VII's prohibition of adjusting test results on the basis of race." *Id.* An employer may, however, consider and act to remedy an exam's potential racial impact "during the test-design stage," the majority wrote. *Id.* at 585.

149. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 241 (1995) (Thomas, J., concurring).

150. For further discussion of this core post-civil rights belief, see BROOKS, *supra* note 2, at 14–34.

But clearly, the Court's decision in the case impedes racial progress while advantaging white firefighters. The decision impedes the city's attempt to integrate the command positions in its fire department. By not discarding the test results, qualified black firefighters are denied the opportunity to move up the command structure of the New Haven Fire Department for at least a two-year period.[151] Without more racial integration, the city's fire department will continue to look too much like it did during "the days of undisguised discrimination."[152] This is the sum and substance of the dissenting opinion written by Justice Ginsburg, a reformist.[153]

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151. *Ricci*, 557 U.S. at 562.

152. *Id.* at 609 (Ginsburg, J., dissenting). It should be noted that the Court announced a new legal standard and does not give the city an opportunity to show that it can satisfy that standard. In other words, the strong-basis-in-evidence standard was promulgated by the Court for the very first time in this case. Yet the Court did not remand the case to give the city an opportunity to address the new legal standard. This is bad judicial form, especially because the Court used the standard against the city. What this suggests is that the Court was hell-bent on ruling against the city. As a consequence, blacks were denied employment opportunities. It seems that the Court only wants it one way, that it wants "just us" rather than justice. Justice Ginsburg makes a similar charge against the Court. She accused the Court of underestimating New Haven's legitimate fear of losing a disparate-treatment suit. *See id.* at 629–31. Justice Ginsburg further said of the Court's reasoning, "[l]ike the chess player who tries to win by sweeping the opponent's pieces off the table," she wrote of the majority opinion, "the court simply shuts from its sight the formidable obstacles New Haven would have faced." *Id.* at 636.

153. Justice Ginsburg's dissenting opinion also provides technical arguments that directly challenge the Court's technical reasoning; i.e., the Court's belief that the examinations were a business necessity and that an equally valid and less discriminatory examination was not available. Justice Ginsburg essentially makes four large points in this regard. First, she argues that the written examination was insufficient to satisfy the job-related and business-necessity defense. *Id.* at 633. "Successful fire officers, the City's description of the position makes clear, must have the '[a]bility to lead personnel effectively, maintain discipline, promote harmony, exercise sound judgment, and cooperate with other officials.' . . . These qualities are not measured by written tests." *Id.* Justice Ginsburg cited numerous precedents in support of her position: "Courts have long criticized written firefighter promotion exams for being 'more probative of the test taker's ability to recall what a particular text stated on a given topic than on his firefighting or supervisory knowledge and abilities.'" *Id.* (quoting Vulcan Pioneers, Inc. v. N.J. Dep't of Civ. Serv., 625 F. Supp. 527, 539 (D.N.J. 1985)). "A fire officer's job, courts have observed, 'involves complex behaviors, good interpersonal skills, the ability to make decisions under tremendous pressure, and a host of other abilities—none of which is easily measured by a written, multiple choice test.'" *Id.* at 633–34 (quoting Firefighters Inst. for Racial Equal. v. St. Louis, 616 F.2d 350, 359 (8th Cir. 1980)). The argument, therefore, is that a written test, regardless of whether it is neutrally constructed, is not sufficient to satisfy the job-related and business-necessity standard, because the skills required to be an adequate firefighter are not measurable by this type of test.

One could argue, on the other hand, that a written test might be important in assessing the skills or knowledge of someone commanding a firefighting unit. The following is an example of a written test question given to firefighters:

> After an explosion in the living room of a residential home, a couch and the floor beneath it are found to be severely damaged. While the windows are blown out

> and one of the walls slightly caved in, most of the furniture in the room is only moderately damaged. These circumstances suggest that the damage was caused by:
>
> A) a high order concentrated explosion from some material such as dynamite
> B) a diffuse explosion resulting from the ignition of a volatile liquid
> C) a low order concentrated explosion, probably from a homemade bomb
> D) a gas leak in the basement
> E) gasoline on the couch

See FREE 50 QUESTION EXAM, DON MCNEA FIRE SCH. 3 (2017).

Second, Justice Ginsburg found that the examination in question may not have been facially neutral after all. *See Ricci*, 557 U.S. at 617 (Ginsburg, J., dissenting). It may have been constructed in a racially biased manner. Citing one expert, Janet Helms, a professor of counseling psychology at Boston College, Justice Ginsburg observed that "two-thirds of the incumbent fire officers who submitted job analyses to IOS during the exam design phase were Caucasian. . . . The heavy reliance on job analyses from white firefighters may thus have introduced an element of bias." *Id.* Alternatively, this may have been a situation where unbiased whites simply operated out of their cultural perspective, a perspective that was oblivious to a black perspective on designing tests—e.g., assessment centers, discussion to come. *Id.* at 614–16. Just because most of the test designers were white does not mean that they were racist.

Third, Justice Ginsburg points to the statements made by Christopher Hornick, whose credibility the Court questioned, in support of her belief that an equally valid, less discriminatory evaluation process was available to the city. *Id.* at 615. Hornick, an exam-design expert with more than two decades of relevant experience, informed the CSB that "an assessment center process, which is essentially an opportunity for candidates . . . to demonstrate how they would address a particular problem as opposed to just verbally saying it or identifying the correct option on a written test," was a more valid and less discriminatory way to test candidates than the 60/40 written/oral examination structure. *Id.* Even though, as the Court noted, Hornick ultimately recommended that the CSB should certify the examination results, he was emphatic that "a person's leadership skills, their command presence, their interpersonal skills, their management skills, their tactical skills could have been identified and evaluated in a much more appropriate way." *Id.* at 616. Justice Ginsburg notes that "it is unsurprising that most municipalities do not evaluate their fire officer candidates as New Haven does. Although comprehensive statistics are scarce, a 1996 study found that nearly two-thirds of surveyed municipalities used assessment centers ('simulations of the real world of work') as part of their promotion processes." *Id.* at 634–35. The prevalence of the use of assessment centers by other municipalities, their reliability, and their minimized adverse impact justify their validity as an equally valid, less discriminatory alternative measuring process. *Id.* at 635.

Finally, and perhaps most importantly, Justice Ginsburg points to the Court's failure to take note of the city's racial makeup and racial history. *Id.* at 608–09. New Haven is about 60% African American and Hispanic and has a long history of racial discrimination in the fire department. *Id.* at 609. At the time the examinations were given, only 18% of the command structure in the fire department were minorities. *Id.* at 608–11. Blacks had brought antidiscrimination lawsuits against the fire department in the past. *Id.* at 609. Justice Ginsburg believed that the city's racial makeup and racial history were very relevant because they give context to the city's mindset in throwing out the test results. The defendant's state of mind is the most important element regarding the intent test, which is

Thus, the Supreme Court's decision making in *Ricci* sustains systemic racism by perpetuating a well-established pattern of black disadvantage within the city of New Haven's fire department. African Americans and Latinx comprised about 60% of New Haven's population.[154] The city has a long history of racial discrimination in the fire department, which gave rise to civil rights lawsuits in the past. Only 18% of the command structure in the fire department consisted of minorities at the time of the examinations.[155] The Court's decision in the case ignores or discounts these facts, leaving intact the white power structure in the city's fire department. In using the color-blind norm to perpetuate a specific pattern of racial disadvantage in a minority-majority city, the Court not only sustains systemic racism—perpetuates said pattern of racial disadvantage—but also produces its own, unique systemic racism. It does so by using one of its analytical tools—the color-blind norm—to normalize racial disadvantage in the context of its decision-making. The Supreme Court treats as normal science judicial decision-making that disadvantages African Americans so long as such decision-making is filtered through the color-blind norm.

IV. CONCLUSION

A complex concept describing a complex problem, systemic racism can be defined as deeply entrenched patterns of black disadvantage/white advantage in our country linked to slavery.[156] It is manifested in myriad ways,[157] and it is sustained—protected or perpetrated—by socio-psychological states—racial antipathy, the belief in white supremacy, insider or white privilege, and implicit bias[158]—and institutional practices or policies.[159] This Article focuses on some of the legal institutions, namely textualism and the color-blind norm, complicit in manifestations of systemic racism.[160] I will end with two thoughts.

First, it is a myth to think that racial justice has been achieved with the death of Jim Crow. The passage of color-blind civil rights laws, the proliferation of color-blind court decisions, the election of African Americans to high office, and the presence of blacks in high places of employment are not coextensive with racial justice—*equity* as illustrated in the

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the legal theory on which the plaintiffs brought the action *sub judice*. *Id.* at 557 (majority opinion).

154. *Id.* at 610 (Ginsburg, J., dissenting).
155. *Id.* at 608–11.
156. *See supra* text accompanying notes 3–4.
157. *See supra* Part II.
158. *See supra* Part III.A.
159. *See supra* Part III.B.
160. *See supra* Part III.B.

Appendix. They do not make America a post-racial society such that the opportunities for worldly success and personal happiness for African Americans is no longer limited by race. The fact is that the great majority of African Americans continue to face recurring obstacles that the great majority of white Americans simply do not have to face.[161] Even African Americans who have "made it," such as Republican Senator Tim Scott, continue to face racism.[162] In addition, all African Americans are limited by the Supreme Court's decision making in civil rights cases, such as the Court's protection of private discrimination, in ways that white Americans do not have to be concerned with.[163] The refusal to acknowledge systemic racism blinds one to racial disadvantage that is quite foundational.

Second, blissful ignorance of the full extent of racial disadvantage directly affects one's willingness to support laws and policies that further racial justice, including affirmative action and voting right laws. "White Americans generated more accurate estimates of Black–White equality when asked to consider the persistence of race-based discrimination in American society."[164] If rational and empathetic stakeholders—policymakers, judges, lawyers, and Americans as a whole—are sufficiently educated about both the reality of systemic racism and the myriad ways in which it limits African Americans, then law, though sometimes complicit in maintaining systemic racism, can be used to resist and redress systemic racism. People of probity and intelligence must work to build a coalition of the decent, firmly planting their feet in reality, and pointing them in the direction of racial justice.[165]

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161. *See supra* Part II.A.

162. *See supra* note 3.

163. *See supra* Part III.B.2. The argument that white Americans are also unprotected from private discrimination misses the point, which is that white Americans face far less debilitating private discrimination and racism, *see supra* Part III.A, than African Americans and, hence, the absence of such protection does not impact their lives the way it impacts black lives. African American communities are disproportionately burdened by capital deficiencies. *See supra* Part II.A.

164. Michael W. Kraus, Julian M. Rucker & Jennifer A. Richeson, *Americans Misperceive Racial Economic Equality*, 114 PROC. NAT'L ACAD. SCIS. U.S. AM., 10,324, 10,324 (2017). This important study documents tremendous racial disparities across the board. Its "findings suggest a profound misperception of and misplaced optimism regarding contemporary societal racial economic equality—a misperception that is likely to have important consequences for public policy." *Id.*

165. The progressive pushback comes from the limited separatists who argue that real racial progress is humanly impossible because such progress would disadvantage

whites who, like most human beings, are more self-interested than altruistic. For a more detailed discussion, see BROOKS, *supra* note 2, at 63–88.