

## RANDOM JUSTICE\*

GIRARDEAU A. SPANN\*\*

*As recent Senate confirmation practices suggest, the Supreme Court is best understood as the head of a political branch of government, whose Justices are chosen in a process that makes their ideological views dispositive. Throughout the nation's history, the Supreme Court has exercised its governing political ideology in ways that sacrifice the interests of nonwhites in order to advance the interests of Whites. In the present moment of heightened cultural sensitivity to structural discrimination and implicit bias, it would make sense to use affirmative action to help remedy the racially disparate distribution of societal resources that has been produced by a long history of covert discrimination. But the Supreme Court has held that such efforts to promote racial balance are patently unconstitutional, because the Constitution recognizes only intentional discrimination, and not racially disparate impact, as a form of inequality that can be addressed through affirmative action. However, there is a way in which efforts to both promote racial balance and remedy disparate impact would be permissible, even under the racial jurisprudence of the new six-to-three conservative Supreme Court. Affirmative action plans that used randomized lotteries to allocate resources, such as university admissions, among qualified applicants would constitute race neutral ways of approximating the allocation of resources that would exist in a truly nondiscriminatory culture. By using statistical randomness as a safeguard against structural discrimination and implicit bias, U.S. culture might be able to secure a level of racial justice that it has been unable to achieve through its antidiscrimination laws. The only significant cost of such lottery-based admissions would be the potential loss of some prestige by our elite educational institutions. But certainly, that is a price worth paying to secure a more meaningful level of racial equality.*

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\*\* James and Catherine Denny Professor of Law, Georgetown University Law Center. I would like to thank Elise Boddie, Jack Boger, Osamudia James, Erika Wilson, and participants in the University of North Carolina Center for Civil Rights Symposium on *The Past, Present and Future of the Equal Protection Clause* for their help in developing the ideas expressed in this Article. Research for this Article was supported by a grant from the Georgetown University Law Center.

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## INTRODUCTION

Now that recent Senate confirmation episodes have unapologetically outed the Supreme Court as a political institution, it makes sense to wonder how best to protect democratically adopted social policies from the disapproving partisan preferences of our unelected judiciary. That task takes on particular social significance in the quest for more meaningful levels of racial equality following the deaths of George Floyd, Breonna Taylor, and countless others. The way in which the task is performed can help determine whether society moves forward toward its elusive goal of racial justice—something that has always been more rhetorical than real—or moves backward to recapture a time in which the culture’s chronic commitment to White superiority was as explicit as it was oppressive.

Contemporary U.S. culture has now learned to mask overt racial bias with indirect and structural forms of discriminatory treatment. As a result, neutralizing racially disparate impact offers the most reliable way to end ongoing racial discrimination. But the Supreme Court, in its famous *Washington v. Davis*<sup>1</sup> decision, rejected a discriminatory effects test and held that the Constitution actually protects disparate impact discrimination as long as the intent to privilege Whites is not overly conspicuous.<sup>2</sup> The Court’s decision in *Personnel Administrator of Massachusetts v. Feeney*<sup>3</sup> then constructed such a narrow concept of intentional discrimination that even knowing indifference to racially disparate harm is not intentional.<sup>4</sup> The current law is simply not responsive to contemporary forms of racial subordination. Although reliance on the *Washington v. Davis* intentional discrimination standard has now become the customary way of shielding White privilege from constitutional challenge, I am guessing that a six-to-three racially conservative Supreme Court is nevertheless unlikely to reconsider its rejection of disparate impact as a form of unconstitutional discrimination. But there is a way around the Court’s recalcitrance.

1. 426 U.S. 229 (1976).

2. *See id.* at 244–45.

3. 442 U.S. 256 (1979).

4. *See id.* at 278–79.

All other things being equal, in a nondiscriminatory culture, we would expect the distribution of societal resources to mirror the racial distribution of individuals in the pertinent population. It would, therefore, make sense to utilize so-called affirmative action programs to replicate the proportional distribution of resources that our history of express and implicit racial bias has precluded us from achieving naturally. However, in *Regents of the University of California v. Bakke*,<sup>5</sup> Justice Powell barred race-conscious remedies for what he termed “societal discrimination.”<sup>6</sup> And in *Grutter v. Bollinger*,<sup>7</sup> the Supreme Court reaffirmed its oft-stated view that the pursuit of racial balance through the use of quotas is “patently unconstitutional.”<sup>8</sup> Those views are consistent with a long history of Supreme Court decisions that have sacrificed nonwhite minority interests in order to benefit the White majority. But within the confines of the Court’s current equal protection jurisprudence, proponents of racial equality could still seek to remedy the racially disparate impact of our present resource allocation schemes by relying on chance in lieu of so-called merit in the allocation of resources.

Consider university admissions. Rather than utilize the grade point averages and standardized test scores that we typically view as measures of merit, university admissions could instead be determined by lottery. Statistically, the racial profile of an admitted class would then reflect the racial profile of the applicant pool. Assuming there are no significant barriers to entry, each racial group would get a share of university seats that roughly approximates its proportion of the population. By randomizing admissions and minimizing the degree to which traditional assessments of merit could be used as a proxy for White privilege, lottery-based admissions could emulate the distribution of educational resources that would exist in a nondiscriminatory culture.

Universities could ensure that they were admitting only qualified students by setting minimum standards for participation in the lottery—as long as those standards were not set in a way that simply replicated the racially disparate impact of our current admissions criteria. Nevertheless, there would be a cost to lottery admissions. As Justice Thomas recognized in his *Grutter* opinion, in the absence of selective admissions criteria, prestigious universities would lose one factor on which they rely to establish and perpetuate their elite status.<sup>9</sup> Without being able to brag about the highly selective nature of their admissions criteria, elite educational institutions would have to rely on things like the

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5. 438 U.S. 265 (1978).

6. *Id.* at 307–10.

7. 539 U.S. 306 (2003).

8. *Id.* at 324–25, 329–30.

9. *See id.* at 354–56, 354 n.3 (Thomas, J., concurring in part and dissenting in part); *see also* Girardeau A. Spann, *The Dark Side of Grutter*, 21 CONST. COMMENT. 221, 236–39 (2004) [hereinafter Spann, *The Dark Side of Grutter*] (discussing Justice Thomas’s opinion in *Grutter*).

quality of their instruction, or the scholarly accomplishments of their faculty, in order to maintain their elite reputations. But if we had to choose between an admissions paradigm that allowed prestigious institutions to retain their elite status and a paradigm that remedied the racially disparate impact embedded in our educational system, choosing to remedy pervasive racial discrimination seems plainly preferable. Analogous lottery-based selection strategies could also be used to combat the racially disparate allocation of other societal benefits, such as jobs, construction contracts, mortgages, and health care—all of which have continued to privilege Whites disproportionately, despite our existing legal prohibitions on racial discrimination.

The reason that racially disparate impact remains so pervasive is that our culture has internalized, as one of its unexamined baseline assumptions, the belief that resources are distributed fairly and equitably when Whites possess a disproportionately large share of them. The advantage that Whites possess over nonwhites is simply perceived to be part of the natural order. The Supreme Court has even incorporated that skewed understanding of racial neutrality into its interpretation of constitutional law by insisting that such pervasive societal discrimination does not violate the Equal Protection Clause.<sup>10</sup> That baseline assumption is, of course, a form of White supremacy. And as a culture, we seem to be addicted to the tacit baseline belief that nonwhites are simply inferior to Whites. Accordingly, the history of the nation suggests that we will only be able to practice racial equality if we force ourselves to do so. But, ironically, relying on mere random chance can do a better job of forcing us to promote racial justice than the unsuccessful measures we have tried thus far.

Part I of this Article explains why it is no longer tenable to view the Supreme Court as anything other than the head of a branch of government that is inherently political. Section I.A describes how Republicans have smugly infused politics into the Senate confirmation process for Supreme Court Justices and lower court judges in a way that has removed the fig leaf that formerly camouflaged the political nature of the federal judiciary. Section I.B describes the ways in which the political Supreme Court has historically favored the interests of the White majority over the interests of nonwhites.

Part II discusses the way in which the contemporary Supreme Court has adopted a model of discrimination that utilizes the Constitution to protect White privilege. Section II.A describes the Supreme Court decision to use an intentional discrimination standard to implement the Equal Protection Clause. Section II.B describes how the Court's intentional discrimination jurisprudence has allowed racially disparate impact to persist in the allocation of virtually all significant societal resources. Section II.C explains how Supreme Court

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10. See *Grutter*, 539 U.S. at 326–31.

prohibitions on efforts to remedy such disparate impact actually constitutionalize existing levels of societal discrimination.

Part III argues that racial discrimination is so deeply embedded in U.S. culture that it can only be exorcised through direct efforts to address the disparate impact that racial discrimination produces. Section III.A describes how the Court has generated a discriminatory law of affirmative action that actually sacrifices the interests of nonwhites in order to advance the interests of Whites. Section III.B describes how a lottery-based, randomized allocation of resources offers a more realistic hope of achieving a meaningful level of racial equality.

The Article concludes that we can only achieve racial justice if we are willing to commit ourselves to a strategy that nullifies our tacit baseline belief in White privilege. However, I fear that is a commitment we will be unwilling to make—precisely because it might produce actual, rather than merely rhetorical, equality.

#### I. THE POLITICAL COURT

In a recent *Harvard Law Review* Foreword, noted legal historian Michael Klarman made the point directly:

The Supreme Court is and always has been a political institution, meaning simply that the Justices' legal interpretations are influenced by their personal values and by their perception of the limits placed on their decisionmaking by the contemporary social and political context. . . . [S]ince the Founding, Justices resolving constitutional conflicts have always had to make controversial choices that reflect their own values and political calculations.<sup>11</sup>

As early as *Marbury v. Madison*,<sup>12</sup> Chief Justice John Marshall was tacitly willing to manipulate constitutional doctrine in ways that advanced the political outcomes he favored.<sup>13</sup> The tradition of politically influenced Supreme Court adjudication has continued to the present day. But it has recently become so

11. Michael J. Klarman, *The Degradation of American Democracy—and the Court*, 134 HARV. L. REV. 1, 224 (2020).

12. 5 U.S. (1 Cranch) 137 (1803).

13. Chief Justice Marshall's *Marbury* decision is commonly viewed as sacrificing Marshall's immediate goal of granting judicial commissions to judges appointed by a lame-duck Federalist Congress in order to establish the judicial review power of courts to invalidate acts of the political branches as unconstitutional, thereby giving the outgoing Federalist party the ability to retain some political power over the incoming Jeffersonian Democratic-Republican Party. See JESSE H. CHOPER, MICHAEL C. DORF, RICHARD H. FALLON, JR. & FREDERICK SCHAUER, CONSTITUTIONAL LAW: CASES, COMMENTS AND QUESTIONS 1–2, 11–14 (13th ed. 2019). Ironically, Chief Justice Marshall's opinion in *Marbury* itself stated emphatically that it was rejecting the existence of Supreme Court jurisdiction over questions that were “in their nature political.” *Marbury*, 5 U.S. at 170.

unapologetically salient that it is no longer plausible even to pretend that the Court is anything other than part of a political branch of government.

#### A. *Partisan Politics*

Despite the life tenure and salary protection that Article III of the Constitution confers on federal judges in an effort to insulate them from political influence,<sup>14</sup> Supreme Court decisions have always reflected popular sentiment.<sup>15</sup> It has long been suspected that the Supreme Court follows the election returns.<sup>16</sup> In fact, Justice O'Connor is reported to have feared the election of Al Gore as President in 2000 because she concluded that it would mean she could not retire from the Supreme Court for at least another four years—until a Republican President was in power to name her successor.<sup>17</sup> In addition, as they aged, Justices Ginsburg, Breyer, Thomas, and Alito were all urged by their political supporters to retire from the Supreme Court so that the incumbent President could appoint as their successors younger Justices who shared the President's political views and who would be able to serve longer on the Court.<sup>18</sup>

When President Trump became unhappy with a federal court decision that rejected one of his anti-immigration initiatives, he called the judge a biased “Obama judge.”<sup>19</sup> Chief Justice Roberts publicly responded, stating: “We do not have Obama judges or Trump judges, Bush judges or Clinton judges. What we have is an extraordinary group of dedicated judges doing their level best to do equal right to those appearing before them. . . . The independent judiciary is something we should all be thankful for.”<sup>20</sup> There may be some who actually believe the assurance of judicial independence offered by Chief Justice Roberts. But based on an opinion that they joined, not even Justices Thomas, Gorsuch, or Kavanaugh appear to be among them.<sup>21</sup> Proclamations of judicial

14. See U.S. CONST. art. III, § 1.

15. See generally BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* (2009) (describing how Supreme Court decisions are shaped by popular opinion).

16. See FINLEY PETER DUNNE, MR. DOOLEY'S OPINIONS 26 (1901) (“[N]o matter whether the constitution follows the flag or not, the supreme court follows the election returns.”).

17. See Klarman, *supra* note 11, at 214–15.

18. See, e.g., Robert Barnes, *With Democrats Poised To Take Over Washington, Supreme Court's Breyer Faces Renewed Calls To Retire*, WASH. POST (Jan. 9, 2021, 6:00 AM), [https://www.washingtonpost.com/politics/courts\\_law/stephen-breyer-biden-supreme-court/2021/01/08/a3a49cf2-504f-11eb-bda4-615aaefd0555\\_story.html](https://www.washingtonpost.com/politics/courts_law/stephen-breyer-biden-supreme-court/2021/01/08/a3a49cf2-504f-11eb-bda4-615aaefd0555_story.html) [<https://perma.cc/C8ZY-7E7M> (dark archive)].

19. Katie Reilly, *President Trump Escalates Attacks on 'Obama Judges' After Rare Rebuke from Chief Justice*, TIME, <https://time.com/5461827/donald-trump-judiciary-chief-justice-john-roberts/> [<https://perma.cc/SZYN-UL6Z> (dark archive)] (Nov. 21, 2018, 6:32 PM).

20. *Id.*

21. See *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2576–77, 2582 (2019) (Thomas, J., concurring in part and dissenting in part, joined by Gorsuch, J., and Kavanaugh, J.); see also Editorial Board, *Opinion, John Roberts Said There Are No Trump Judges or Obama Judges. Clarence Thomas Didn't Get the*

independence from the influence of politics are best understood as invitations for all of us to engage in a polite legal fiction. That fiction is necessary to camouflage a threat to the rule of law itself that would be destabilizing if frankly acknowledged. However, the political influence submerged beneath that legal fiction has now been conspicuously exposed.

As Senate majority leader, Republican Senator Mitch McConnell from Kentucky controlled the Senate judicial-confirmation process in ways that seemed intent on actually highlighting, rather than disguising, the political nature of the Supreme Court and the lower courts.<sup>22</sup> Twenty-four hours after the sudden, unfortunate death of Justice Scalia in February 2016, McConnell announced that the Senate would not hold confirmation hearings on anyone whom President Obama nominated to replace Justice Scalia—without even knowing the identity of whomever President Obama would later select.<sup>23</sup> McConnell's stated justification for refusing confirmation hearings was that in a presidential election year, the winner of the November election should select the replacement Justice.<sup>24</sup>

McConnell adhered to this position even after President Obama nominated District of Columbia Court of Appeals Judge Merrick Garland—someone whose qualifications and ideological moderation seemed beyond question.<sup>25</sup> No Republican Senator objected to McConnell's strategy.<sup>26</sup> Indeed, three Republican Senators went so far as to announce that if Hillary Clinton won the 2016 presidential election, they would vote to block her nomination of any Supreme Court Justice—during her entire term of office—as long as Republicans retained control of the Senate.<sup>27</sup> Those three Senators apparently did not feel limited by McConnell's purported principle of denying Supreme

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*Memo.*, WASH. POST (June 28, 2019), [https://www.washingtonpost.com/opinions/john-roberts-said-there-are-no-trump-judges-or-obama-judges-clarence-thomas-didnt-get-the-memo/2019/06/28/00ec5db0-99c6-11e9-8d0a-5edd7e2025b1\\_story.html](https://www.washingtonpost.com/opinions/john-roberts-said-there-are-no-trump-judges-or-obama-judges-clarence-thomas-didnt-get-the-memo/2019/06/28/00ec5db0-99c6-11e9-8d0a-5edd7e2025b1_story.html) [<https://perma.cc/S7JW-QFRG> (dark archive)] (discussing an opinion joined by those Justices in a Census citizenship question case that suggested political bias of a lower court judge). Justice Alito also made an unusual and highly political speech to the Federalist Society on November 12, 2020, that further undermined the assertion of Chief Justice Roberts that Justices are apolitical. See Adam Liptak, *In Unusually Political Speech, Alito Says Liberals Pose Threat to Liberties*, N.Y. TIMES (Nov. 13, 2020), <https://www.nytimes.com/2020/11/13/us/samuel-alito-religious-liberty-free-speech.html?searchResultPosition=2> [<https://perma.cc/XL9B-DWL7> (dark archive)].

22. See Klarman, *supra* note 11, at 247.

23. *Id.*

24. See *id.* But see Peter Baker & Maggie Haberman, *McConnell Vows Vote on Ginsburg Replacement as Her Death Upends the 2020 Race*, N.Y. TIMES (Sept. 22, 2020), <https://www.nytimes.com/2020/09/18/us/politics/mitch-mcconnell-supreme-court-ruth-bader-ginsburg.html> [<https://perma.cc/KY93-XL PQ> (dark archive)].

25. See Klarman, *supra* note 11, at 247.

26. See *id.*

27. See *id.* at 247–48; see also Baker & Haberman, *supra* note 24.

Court confirmation hearings only during an election year. But neither did McConnell himself.

McConnell made this brutally clear when Justice Ginsburg sadly died on September 18, 2020.<sup>28</sup> McConnell had refused to hold hearings on any nominee that President Obama selected to replace Justice Scalia *nine months* before the 2016 presidential election between Hillary Clinton and Donald Trump.<sup>29</sup> But after Justice Ginsburg's death, McConnell immediately announced that he *would* hold hearings to confirm any nominee that President Trump selected to replace her a mere *forty-six days* before the November 3, 2020, presidential election between Joe Biden and Donald Trump.<sup>30</sup> Once again, McConnell did this before even knowing who the Trump nominee would be.<sup>31</sup>

Republican Senate Judiciary Committee Chair Charles Grassley of Iowa and his Republican successor Senator Lindsey Graham of South Carolina also adopted—and then abandoned—McConnell's presidential-election-year principle in 2016 and 2020, respectively.<sup>32</sup> They did this in order to deny a committee hearing to Garland and then grant one to a Trump nominee.<sup>33</sup> Notwithstanding the pretextual election-year explanation, the actual Republican governing principle appears to have been that Supreme Court vacancies should be filled in ways that maximize Supreme Court support for the Republican political agenda. In his own defense, McConnell reminded critics that “[e]lections have consequences.”<sup>34</sup>

On October 26, 2020, eight days before the November 3 presidential election, the Senate rushed to confirm Seventh Circuit Judge Amy Coney Barrett—a conservative Republican protégé of Justice Scalia—as Justice Ginsburg's replacement.<sup>35</sup> Except for one Republican defection, the vote was along party lines.<sup>36</sup> For the first time in 151 years, a Supreme Court Justice was confirmed without support from a single member of the minority party.<sup>37</sup> President Trump would go on to lose the election to Joe Biden, and Republicans

28. Klarman, *supra* note 11, at 248.

29. *See id.* at 247–48; Baker & Haberman, *supra* note 24.

30. Baker & Haberman, *supra* note 24.

31. *See id.*

32. *See id.*

33. *See id.*

34. Paul Waldman, Opinion, *You're Darn Right Biden Has a Mandate. Now He Has To Act Like It.*, WASH. POST (Nov. 9, 2020, 12:04 PM), <https://www.washingtonpost.com/opinions/2020/11/09/youre-darn-right-biden-has-mandate-now-he-has-act-like-it/> [<https://perma.cc/2TF3-ZUXJ>] (dark archive)]; *see also* Mitch McConnell on ACB Vote: Elections Have Consequences, GRABIEN (Oct. 26, 2020), <https://grabien.com/story.php?id=311675> [<https://perma.cc/6SL9-6G9L>].

35. *See* Nicholas Fandos, *Senate Confirms Barrett, Delivering for Trump and Reshaping the Court*, N.Y. TIMES (Oct. 26, 2020), <https://www.nytimes.com/2020/10/26/us/politics/senate-confirms-barrett.html> [<https://perma.cc/5FJ2-D6PR>] (dark archive)] [hereinafter Fandos, *Senate Confirms Barrett*].

36. *See id.*

37. *Id.*



would go on to lose control of the Senate.<sup>38</sup> Accordingly, the confirmation of Justice Barrett had the effect of giving political control over a Supreme Court seat to what shortly became a lame-duck President and a lame-duck Senate.

Indeed, during the Senate confirmation hearings, Democratic Senator Dick Durbin of Illinois stated that President Trump had nominated Judge Barrett to “rule in his favor on any election contest.”<sup>39</sup> And as Durbin predicted, Trump continually blamed his election loss on false claims of widespread voter fraud.<sup>40</sup> However, those claims were sufficiently baseless that they were repeatedly rejected by numerous courts, including a Supreme Court containing three Trump nominees.<sup>41</sup> Nevertheless, Trump’s continued insistence on his false voter fraud claims fueled conspiracy theories among his supporters. That eventually led to Trump’s January 13, 2021, impeachment by the House of Representatives for inciting insurrection, after his supporters violently stormed and took over the U.S. Capitol on January 6, 2021, in an effort to overturn the presidential election.<sup>42</sup> Trump is the only President in U.S. history to have been impeached twice.<sup>43</sup>

McConnell’s Senate confirmation strategy also had the effect of giving Republicans control over a large number of lower federal court judicial appointments.<sup>44</sup> During the last two years of Obama’s presidency, McConnell blocked confirmation of all but two of President Obama’s appellate court nominees.<sup>45</sup> That gave President Trump a very large number of appellate and trial court vacancies to fill when he assumed office.<sup>46</sup> Justice Barrett was

38. See Andrew Solender, *Democrats Take Full Control of Government as Ossoff, Warnock Win Georgia Senate Seats*, FORBES (Jan. 6, 2021, 4:11 PM), <https://www.forbes.com/sites/andrewsolender/2021/01/06/democrats-seize-full-control-of-government-as-ossoff-warnock-win-georgia-senate-seats/?sh=6778ca08737b> [https://perma.cc/6ZTB-LSGA (dark archive)].

39. Evie Fordham, *Trump Rushing Barrett Confirmation Because of Contested Election Fears, Durbin Claims*, FOX NEWS (Oct. 12, 2020), <https://www.foxnews.com/politics/durbin-amy-coney-barrett-confirmation-hearing> [https://perma.cc/C2NE-6X9G].

40. See *id.*; Jim Rutenberg, Nick Corasaniti & Alan Feuer, *Trump’s Fraud Claims Died in Court, but the Myth of Stolen Elections Lives On*, N.Y. TIMES (Oct. 11, 2021), <https://www.nytimes.com/2020/12/26/us/politics/republicans-voter-fraud.html> [https://perma.cc/4QJL-XDB9 (dark archive)].

41. See Rutenberg et al., *supra* note 40.

42. See Mike DeBonis & Paul Kane, *House Hands Trump a Second Impeachment, This Time with GOP Support*, WASH. POST (Jan. 13, 2021, 7:47 PM), [https://www.washingtonpost.com/politics/house-impeachment-trump/2021/01/13/05fe731c-55c5-11eb-a931-5b162d0d033d\\_story.html](https://www.washingtonpost.com/politics/house-impeachment-trump/2021/01/13/05fe731c-55c5-11eb-a931-5b162d0d033d_story.html) [https://perma.cc/W3EP-QQ4P (dark archive)]; Nicholas Fandos, *Trump Impeached for Inciting Insurrection*, N.Y. TIMES (Jan. 13, 2021), <https://www.nytimes.com/2021/01/13/us/politics/trump-impeached.html?action=click&module=Spotlight&pgtype=Homepage> [https://perma.cc/TN9L-AKPP (dark archive)] [hereinafter Fandos, *Trump Impeached*].

43. See DeBonis & Kane, *supra* note 42; Fandos, *Trump Impeached*, *supra* note 42.

44. See Klarman, *supra* note 11, at 250–51.

45. *Id.*

46. See *id.*

Trump's third Supreme Court addition, but McConnell also enabled Trump to fill 162 federal district court seats, and 53 seats on federal courts of appeals.<sup>47</sup>

During his four years in office, Trump was able to appoint approximately one-third of the federal appellate bench.<sup>48</sup> That has led many to discuss court-packing remedies<sup>49</sup> and other strategies for reducing Republican partisan control over the Supreme Court and the federal judiciary.<sup>50</sup> In support of such strategies, Professor Klarman has argued that Democrats would actually be “unpacking” the Supreme Court, after McConnell's confirmation strategies succeeded in shrinking the size of the Court to eight for one year and then increasing it back to nine once Trump became President.<sup>51</sup> Klarman stressed that McConnell's partisan use of the Senate confirmation process showed that Republicans would not themselves hesitate to regulate the size of the Supreme Court if they thought it would give them a partisan political advantage.<sup>52</sup>

McConnell's political use of the Senate confirmation process is not technically unconstitutional, but it does violate previously established norms about how the confirmation process is supposed to work.<sup>53</sup> Such a political strategy has come to be known as playing constitutional “hardball.”<sup>54</sup> McConnell could, of course, have secured the Supreme Court appointments he favored by holding customary confirmation hearings and having the Senate Republican majority reject President Obama's Garland nomination and confirm President Trump's Barrett nomination. But by hypocritically refusing to hold hearings on Garland, pursuant to a principle that he would later defy in holding hearings on Barrett, McConnell supplanted even the pretense that Supreme Court selections were about anything other than politics.

Because of McConnell's politically motivated manipulation of the Senate confirmation process for Supreme Court Justices, President Trump was able to appoint three Justices to the Supreme Court, thereby giving the current Court a six-to-three majority of conservative Republican Justices.<sup>55</sup> President Trump

47. See Fandos, *Senate Confirms Barrett*, *supra* note 35.

48. *Id.*

49. See Janelle Bouie, Opinion, *Court Packing Can Be an Instrument of Justice*, N.Y. TIMES (Oct. 9, 2020), <https://www.nytimes.com/2020/10/09/opinion/court-packing-amy-coney-barrett.html?searchResultPosition=5> [<https://perma.cc/GGV3-KBJ6> (dark archive)].

50. See Emily Bazelon, Kent Greenfield, Steven G. Calabresi, Melody Wang, Aaron Tang, Larry Kramer, Leah Litman & Randy Barnett, Opinion, *How To Fix the Supreme Court*, N.Y. TIMES (Oct. 27, 2020), <https://www.nytimes.com/interactive/2020/10/27/opinion/supreme-court-reform.html?searchResultPosition=1> [<https://perma.cc/GC3G-BKE8> (dark archive)].

51. See Klarman, *supra* note 11, at 247–49.

52. See *id.* at 251–52.

53. See *id.* at 248–51.

54. See *id.* at 167 (“Political or constitutional ‘hardball’ refers to political behavior that challenges traditional norms without violating clearly established legal rules.”).

55. See Linda Greenhouse, Opinion, *The Supreme Court Is Now 6-3. What Does That Mean?*, N.Y. TIMES (Nov. 5, 2020), <https://www.nytimes.com/2020/11/05/opinion/supreme-court-amy-coney-barrett.html?searchResultPosition=7> [<https://perma.cc/4MVW-CSJ7> (dark archive)]; Thomas B.

made a strategic campaign decision to announce that he would select his Supreme Court nominees from a list of reliably conservative Republican candidates compiled by conservative organizations such as The Federalist Society.<sup>56</sup>

In all likelihood, if McConnell had adhered to the normal Senate confirmation process for Supreme Court Justices, President Trump would only have been able to appoint one Justice. President Obama would have been able to nominate Merrick Garland to replace Justice Scalia, and a majority of Senators playing by normal rules would have confirmed that nomination. In addition, President Biden would have been able to nominate the successor to Justice Ginsburg and, like Obama, Biden would almost certainly have nominated a candidate who would have been confirmed by a majority of Senators adhering to normal confirmation standards. Absent McConnell's political manipulation of the confirmation process, the current Supreme Court would have had a five-to-four liberal majority, rather than its present six-to-three conservative majority.

If politics matter so much, it must be because politics, rather than doctrine, determines how a divided Supreme Court will rule on close constitutional questions. By acknowledging in an obvious way that such decisions are determined more by the political and ideological leanings of the Justices than by the constitutional doctrines that the Justices purport to interpret, McConnell seems to have haughtily flaunted his political power in a way that undermines even the cosmetic pretense that the Supreme Court is a nonpolitical body. Therefore, when a Supreme Court Justice says, "The Constitution requires . . .," what we should hear is, "My political ideology requires . . .," and we should adjust our level of deference accordingly. If the emperor is indeed wearing no clothes, perhaps we should thank Senator McConnell for making it now permissible to admit what we have always been reluctant to say out loud. But as part of a political branch of government, the Supreme Court, and its racial politics, has historically posed a problem for racial justice that can no longer plausibly be hidden beneath the veneer of neutral constitutional rhetoric.

#### B. *White Privilege*

A Supreme Court that operates as the head of a political branch of government is a threat to racial equality. As I have argued in the past, Supreme Court Justices are likely to share an elite majoritarian acculturation that makes

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Edsall, Opinion, *The Right's Relentless Supreme Court Justice Picking Machine*, N.Y. TIMES (Oct. 1, 2020), <https://www.nytimes.com/2020/10/01/opinion/amy-coney-barrett-supreme-court.html?searchResultPosition=6> [<https://perma.cc/DCP3-F8KP> (dark archive)].

56. See Tyler Olson, *An Inside Look at How Trump's Supreme Court List Is Made: "A Tremendous Investment of Time"*, FOX NEWS (July 10, 2020), <https://www.foxnews.com/politics/behind-the-scenes-of-how-trumps-supreme-court-list-is-made> [<https://perma.cc/5QEV-D5CE>].

them more sympathetic to White interests than to those of nonwhites.<sup>57</sup> As the Legal Realists have taught us, legal doctrine is too indeterminate to constrain judicial discretion in a way that is sufficient to prevent a judge's political values and biases from influencing the judge's decision.<sup>58</sup> Accordingly, when the political Supreme Court knowingly or unknowingly infuses its political policy preferences into its doctrinal decisions, it is likely to do so in a way that reflects majoritarian views on race.<sup>59</sup> Not surprisingly, therefore, the Supreme Court has customarily been one of the social institutions on which majoritarian U.S. culture relies to protect White privilege.<sup>60</sup> Unfortunately, the history of Supreme Court decisions in race cases contains many infamous examples.

The 1842 decision in *Prigg v. Pennsylvania*<sup>61</sup> provides one of the most egregious early cases in which the Supreme Court sacrificed the interests of Blacks to advance the interests of Whites. Pennsylvania passed a statute prohibiting the removal by force from the state of anyone claimed to be a runaway slave without first establishing legal ownership of the claimed slave through the judicial process prescribed by the statute.<sup>62</sup> In *Prigg*, the Supreme Court held that the Pennsylvania statute violated the Rendition Clause of Article IV, Section 2 of the U.S. Constitution and the federal Fugitive Slave Act of 1793 by interfering with the property rights of slave owners.<sup>63</sup> The *Prigg* decision not only permitted the reenslavement of a woman who had escaped slavery in Maryland, but it also permitted the enslavement of her two children, one of whom was born free in Pennsylvania under a Pennsylvania statute providing for the gradual abolition of slavery.<sup>64</sup>

In addition, *Prigg* facilitated continuation of the practice depicted in the autobiographical book and subsequent Academy Award-winning movie *Twelve Years a Slave*, where slave traders responded to the 1808 abolition of the African slave trade by kidnapping free Blacks in northern states and then selling them into slavery in southern states.<sup>65</sup> Regardless of how one feels about the abolitionist sentiments that may have motivated the enactment of the Pennsylvania statute, the *Prigg* decision sacrificed the liberty interest of at least some free Blacks in order to protect the asserted property interests of White

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57. See GIRARDEAU A. SPANN, RACE AGAINST THE COURT: THE SUPREME COURT AND MINORITIES IN CONTEMPORARY AMERICA 1-6 (1993) [hereinafter SPANN, RACE AGAINST THE COURT].

58. See *id.* at 59.

59. See *id.* at 19-23.

60. See *id.* at 130-36.

61. 41 U.S. (16 Pet.) 539.

62. *Id.* at 540.

63. See *id.* at 611, 613.

64. See *id.* at 543, 557.

65. See SOLOMON NORTHUP, TWELVE YEARS A SLAVE (David Wilson ed., 2014); 12 YEARS A SLAVE (Regency Enterprises et al. Nov. 8, 2013).

slave owners. *Prigg* allowed those free Blacks to be kidnapped from their northern homes and sold into southern slavery.

Perhaps the best-known antebellum Supreme Court decision that sacrificed the interests of Blacks for the interests of Whites is *Dred Scott v. Sandford*.<sup>66</sup> In *Dred Scott*, the Supreme Court invalidated the Missouri Compromise Act of 1820, which Congress had passed in an effort to limit the spread of slavery in new territories as the United States expanded westward.<sup>67</sup> In the process of invalidating the federal statute, the Supreme Court tried its hand at resolving the contentious political issue of slavery. The Court held that the statute seeking to limit the spread of slavery unconstitutionally interfered with the property interests of slave owners.<sup>68</sup> In addition—despite having ruled on the merits—the Supreme Court held that it lacked diversity jurisdiction to entertain the case. Thus, even though the plaintiff and the defendant resided in different states, there was no diversity of citizenship because the plaintiff was Black, and Blacks could not be citizens within the meaning of the U.S. Constitution.<sup>69</sup> In so holding, the language that Chief Justice Taney used in characterizing the framers’ intent, on which his holding was based, is notoriously demeaning in its racial depiction of Blacks as subhuman:

The words “people of the United States” and “citizens” are synonymous terms, and mean the same thing. They both describe the political body who, according to our republican institutions, form the sovereignty, and who hold the power and conduct the Government through their representatives. They are what we familiarly call the “sovereign people,” and every citizen is one of this people, and a constituent member of this sovereignty. The question before us is, whether the class of persons described in the plea in abatement compose a portion of this people, and are constituent members of this sovereignty? We think they are not, and that they are not included, and were not intended to be included, under the word “citizens” in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States. On the contrary, they were at that time considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them. . . .

It is difficult at this day to realize the state of public opinion in relation to that unfortunate race, which prevailed in the civilized and enlightened

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66. 60 U.S. (19 How.) 393 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

67. *See id.* at 452.

68. *See id.* at 451–52.

69. *Id.* at 404–06.

portions of the world at the time of the Declaration of Independence, and when the Constitution of the United States was framed and adopted. But the public history of every European nation displays it in a manner too plain to be mistaken.

They had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit. He was bought and sold, and treated as an ordinary article of merchandise and traffic, whenever a profit could be made by it. This opinion was at that time fixed and universal in the civilized portion of the white race. It was regarded as an axiom in morals as well as in politics, which no one thought of disputing, or supposed to be open to dispute; and men in every grade and position in society daily and habitually acted upon it in their private pursuits, as well as in matters of public concern, without doubting for a moment the correctness of this opinion.<sup>70</sup>

The Supreme Court's effort in *Dred Scott* to resolve the political debate over the issue of slavery by constitutionalizing the racial inferiority of Blacks did not work out well. It ultimately led to the Civil War and, after the Northern victory, to the Reconstruction Amendments to the Constitution. The 1865 Thirteenth Amendment abolished slavery.<sup>71</sup> The 1868 Fourteenth Amendment broadly granted privileges and immunities, due process rights, and equal protection rights, which extended to Blacks.<sup>72</sup> The 1870 Fifteenth Amendment prohibited racial discrimination in voting.<sup>73</sup> Section 1 of the Fourteenth Amendment directly overruled *Dred Scott* by granting natural-born citizenship to all persons, including Blacks.<sup>74</sup> However, the Supreme Court's political preference for Whites over Blacks did not end with the adoption of the Reconstruction Amendments.

After Congress exercised its remedial powers under Section 5 of the Fourteenth Amendment to pass the Civil Rights Act of 1875, which prohibited racial discrimination in public accommodations, the Supreme Court invalidated the Act. The 1883 *Civil Rights Cases*<sup>75</sup> established a new state action requirement, holding that the Fourteenth Amendment did not give Congress the power to prohibit private acts of racial discrimination.<sup>76</sup> If there was any lingering doubt about whether the post-Civil War Supreme Court was motivated by a political

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70. *See id.* at 404–05, 407.

71. U.S. CONST. amend. XIII.

72. *Id.* amend. XIV.

73. *Id.* amend. XV.

74. *See id.* amend. XIV, § 1.

75. 109 U.S. 3.

76. *Id.* at 18–19.

preference for Whites over Blacks, it was eliminated by the Court's subsequent decision in *Plessy v. Ferguson*.<sup>77</sup>

The 1896 decision of the Supreme Court in *Plessy* upheld the Jim Crow regime of separate-but-equal racial segregation in the South, finding that such racial discrimination did not violate the Equal Protection Clause of the Fourteenth Amendment.<sup>78</sup> The Court held that if Blacks thought that “the enforced separation of the two races stamps the colored race with a badge of inferiority. . . . [I]t is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.”<sup>79</sup> The Court also rejected the idea that “social prejudices may be overcome by legislation . . . . If the two races are to meet upon terms of social equality, it must be the result of natural affinities.”<sup>80</sup> The majority in *Plessy* had so acquiesced in the Jim Crow racial politics of the South that racial segregation was not even a form of racial discrimination for the Court. Moreover, the racial prejudices and societal attitudes of Black inferiority that prevailed in the South were beyond the law's ability to redress.

Not surprisingly, it turned out that the separate-but-equal doctrine did not really mean equal at all. Rather, the doctrine was constitutional even when it meant separate but unequal. The Supreme Court made that abundantly clear in its 1899 *Cumming v. Board of Education*<sup>81</sup> decision. In *Cumming*, the Court upheld the constitutionality of the Richmond County, Georgia, segregated school system under the Equal Protection Clause of the Fourteenth Amendment, even though the school system had a segregated high school for White students but no high school at all for Black students.<sup>82</sup> Moreover, the Court held it was permissible for Richmond County to tax Black parents for the funds necessary to maintain the White high school, despite the fact that their Black children could not attend it.<sup>83</sup>

The race-based political biases of the Supreme Court have not been limited to favoring the interests of Whites over Blacks. Another of the Court's infamous race cases involved discrimination against Japanese American citizens. In the 1944 case of *Korematsu v. United States*,<sup>84</sup> the Supreme Court upheld a World War II exclusion order that expelled people with Japanese ancestry from certain areas on the West Coast, even though many of the people subject to the

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77. 163 U.S. 537 (1896).

78. *See id.* at 544–52.

79. *Id.* at 551.

80. *Id.*

81. 175 U.S. 528.

82. *See id.* at 544–45.

83. *See id.* at 531, 545.

84. 323 U.S. 214 (1944), *abrogated by* *Trump v. Hawaii*, 138 S. Ct. 2392 (2018).

exclusion order barring them from returning to their own homes were loyal American citizens.<sup>85</sup>

A year earlier, in the 1943 case of *Hirabayashi v. United States*,<sup>86</sup> the Court had similarly upheld a military curfew order that required enemy aliens, including people of Japanese descent, to remain in their homes everyday between the hours of 8 p.m. and 6 a.m.<sup>87</sup> The curfew and exclusion orders upheld in *Hirabayashi* and *Korematsu* ultimately led to the now widely condemned World War II confinement of Japanese American citizens in concentration camps that the government referred to as “relocation centers.”<sup>88</sup> In its 1944 *Ex parte Endo*<sup>89</sup> decision issued the same day as *Korematsu*, a unanimous Court *did* grant a detainee’s habeas corpus petition, holding that concededly loyal American citizens could not be held in the concentration camps.<sup>90</sup> But *Korematsu* and *Hirabayashi* remain troubling, because they were decided after the 1942 Japanese bombing of Pearl Harbor. They illustrate that wartime hysteria can infect even the politics of Supreme Court constitutional decisions.

Japanese residents were not the only Asians whom the Supreme Court subjected to invidious discriminatory treatment. For example, in the *Chinese Exclusion Cases*,<sup>91</sup> the Court upheld the Chinese Exclusion Act, which banned Chinese immigration in order to protect White laborers from competition by Chinese laborers.<sup>92</sup>

And, of course, Indigenous people have always been treated dreadfully by the United States, through the abrogation of treaties and through genocide.<sup>93</sup> The Supreme Court made this all possible by upholding the United States’ seizure of land from Indigenous people through conquest in *Johnson v. McIntosh*.<sup>94</sup> Then, in *Cherokee Nation v. Georgia*,<sup>95</sup> the Court allowed the seizure of those lands by White settlers, holding that it lacked jurisdiction to enforce Indigenous land claims because the Cherokee Nation was not a foreign state,

85. *Id.* at 216–20.

86. 320 U.S. 81.

87. *See id.* at 88, 100–02.

88. *See Korematsu*, 323 U.S. at 223–24.

89. 323 U.S. 283.

90. *Id.* at 297.

91. *See, e.g.*, *Chae Chan Ping v. United States*, 130 U.S. 581 (1889); *Fong Yue Ting v. United States*, 149 U.S. 698 (1893); *United States v. Ju Toy*, 198 U.S. 253 (1905).

92. *See Chae Chan Ping*, 130 U.S. at 609; *Fong Yue Ting*, 149 U.S. at 707; *Ju Toy*, 198 U.S. at 263. *See generally* LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 509–10 (2d ed. 1985) (describing discrimination against Chinese workers).

93. *See* FRIEDMAN, *supra* note 92, at 508–09. *See generally* DEE BROWN, *BURY MY HEART AT WOUNDED KNEE: AN INDIAN HISTORY OF THE AMERICAN WEST* (1970) (describing the treatment of Indigenous people); PETER MATTHIESSEN, *IN THE SPIRIT OF CRAZY HORSE* (1980) (same); MARI SANDOZ, *CRAZY HORSE: THE STRANGE MAN OF THE OGLALAS* (1942) (same).

94. 21 U.S. 543, 587–92 (1823).

95. 30 U.S. 1 (1831).



but rather a “domestic dependent nation[,]” that was “completely under the sovereignty and dominion of the United States.”<sup>96</sup> The Supreme Court did, however, subsequently recognize Indigenous tribal sovereignty in *Worcester v. Georgia*.<sup>97</sup> But President Andrew Jackson declined to enforce the Court’s order, allowing Georgia to expel 15,000 Cherokee tribe members from their land, after which 4,000 died in a forced westward march that has come to be known as the “Trail of Tears.”<sup>98</sup>

The Supreme Court has a long history of tolerating discrimination against nonwhites. But despite this history, the Court’s 1954 decision in *Brown v. Board of Education*<sup>99</sup> overruled *Plessy* and held that racial segregation in public schools was inherently unequal.<sup>100</sup> One might be tempted to argue that, by disregarding massive southern resistance and desegregating southern schools, *Brown* demonstrated the ability of the Supreme Court to marginalize the effect of politics on its constitutional decisions. But that is not what happened. Rather, *Brown* is better understood as illustrating Supreme Court capitulation to the elite northern political desire to end the outdated de jure racial discrimination of the South, which was becoming an embarrassment to the nation during the civil rights movement. Indeed, the Justice Department amicus brief supporting desegregation in *Brown* emphasized how southern segregation was proving to be an impediment to the nation’s competition with communism in exerting influence over developing third-world countries.<sup>101</sup>

Moreover, the 1954 *Brown* decision was not the Supreme Court’s final pronouncement in the desegregation political debate. In 1955, the Supreme Court issued its decision in *Brown II*<sup>102</sup> after reargument addressed to the issue of remedy.<sup>103</sup> Rather than order southern schools to desegregate immediately, the Court ordered the schools to desegregate “with all deliberate speed.”<sup>104</sup> The “all deliberate speed” formulation turned out to mean that segregated southern school districts would end up having the next decade to engage in successful massive resistance techniques designed to evade the *Brown* desegregation decree.<sup>105</sup> Ten years after *Brown*, only 1.2% of Black students in the South

96. *Id.* at 13, 17.

97. 31 U.S. 515, 559–61 (1832).

98. See *Worcester v. Georgia*, ENCYC. BRITANNICA (Feb. 24, 2021), <https://www.britannica.com/topic/Worcester-v-Georgia> [https://perma.cc/KP45-JEFJ].

99. 347 U.S. 483.

100. *Id.* at 494–95.

101. See Brief for the United States as Amicus Curiae at 3–8, 31–32, *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (Nos. 1, 2, 4 & 10), 1952 WL 82045; see also Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61, 65 (1988).

102. *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294.

103. *Id.* at 298.

104. *Id.* at 301.

105. See CHOPER ET AL., *supra* note 13, at 1412–13. See generally SPANN, RACE AGAINST THE COURT, *supra* note 57, at 104–10 (discussing failure to desegregate schools after *Brown*).

attended schools that were actually desegregated.<sup>106</sup> When southern schools finally began moving toward a meaningful level of school desegregation ten years after *Brown*, that progress was produced not by the Supreme Court but rather by the intervention of Congress and federal executive officials who threatened government lawsuits and educational fund cutoffs if the schools did not desegregate.<sup>107</sup> When the Supreme Court finally began to invalidate southern evasion techniques, it responded to politics in the form of a renewed national commitment to end southern school segregation that grew out of the civil rights movement.<sup>108</sup> Far from resisting the nation's racial politics, the Supreme Court was simply reflecting them.

When the school desegregation effort moved North and West, the nation's political commitment to desegregation broke down. Those who had favored desegregation in the South did not favor it in the North and West, where their own children would actually be forced to go to integrated schools. And the Supreme Court responded accordingly, issuing a series of decisions that enabled schools to remain de facto segregated.<sup>109</sup> For example, in *Keyes v. School District No. 1*,<sup>110</sup> the Court emphasized that the Constitution prohibited only de facto, and not de jure, discrimination.<sup>111</sup> In *Milliken v. Bradley*,<sup>112</sup> the Court read the Equal Protection Clause to prohibit interdistrict busing remedies, thereby eliminating the only practical way of desegregating inner-city and suburban schools, which had been segregated by de facto residential patterns rather than by state laws.<sup>113</sup> In *Oklahoma City Board of Education v. Dowell*,<sup>114</sup> the Court held that a period of good-faith compliance with a desegregation plan eliminated a school district's unconstitutional de jure segregation, even if the racial identities of the schools remained unchanged.<sup>115</sup> And in *Parents Involved in Community Schools v. Seattle School District No. 1*,<sup>116</sup> the Court held that the Constitution prohibited even voluntary race-conscious efforts to prevent de facto resegregation.<sup>117</sup>

*Brown* is said to have desegregated public schools, but in fact, it did no such thing. Today, the nation's public schools remain badly segregated. Even

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106. See CHOPER ET AL., *supra* note 13, at 1413.

107. See *id.* at 1413–14; SPANN, RACE AGAINST THE COURT, *supra* note 57, at 98.

108. See CHOPER ET AL., *supra* note 13, at 1414–16; SPANN, RACE AGAINST THE COURT, *supra* note 57, at 104–10; *cf. id.* at 78–82.

109. See CHOPER ET AL., *supra* note 13, at 1416–19; SPANN, RACE AGAINST THE COURT, *supra* note 57, at 75–82.

110. 413 U.S. 189 (1973).

111. *Id.* at 208–09.

112. 418 U.S. 717 (1974).

113. *Id.* at 744–47.

114. 498 U.S. 237 (1991).

115. *Id.* at 249–50.

116. 551 U.S. 701 (2007).

117. *Id.* at 709–11, 720–25.

those schools that eventually became desegregated after *Brown II* are now being resegregated under the Supreme Court's more recent precedents.<sup>118</sup> *Brown* is also said to have eliminated the government's use of racial classifications. But it has not done that either. The government continues to utilize explicit racial classifications in racial profiling by police and airport security officials. It also uses racial classifications in a variety of other settings including the Census, adoption standards, drug profiles, immigration stops, and laws providing for special treatment of Indigenous people.<sup>119</sup> Ironically, *Brown* is perhaps more important today as a precedent that is invoked to invalidate affirmative action programs than as a case that promotes integration.<sup>120</sup> The Equal Protection Clause has now become so stridently insistent on the de facto segregation of public schools—and the beneficial agglomeration of educational inputs and outputs that segregation confers on White students—that Professor Erika Wilson has called for the use of antitrust laws, rather than the Equal Protection Clause, to challenge the White privilege that characterizes our educational system.<sup>121</sup>

It would be unrealistic to expect the Supreme Court, as the head of a branch of government that is inevitably political, to operate free from the influence of politics. The Justices, and lower-court federal judges, are nominated and confirmed largely because of their political and ideological views. Historically, the politics of the Supreme Court has tended to favor the sacrifice of nonwhite minority interests in order to advance the interests of the White majority. But this is not just a historical artifact. The racial jurisprudence of the contemporary Supreme Court has displayed a similar commitment to White privilege.

## II. THE CONTEMPORARY COURT

Consistent with the function of safeguarding White privilege, the contemporary Supreme Court has adopted a racial jurisprudence that continues to facilitate the advancement of White interests at the expense of nonwhites. The law that the Court has developed to govern the Fourteenth Amendment's Equal Protection Clause prohibition on racial discrimination actually legitimates more discrimination than it prohibits. The prohibition now applies only to a narrow form of intentional discrimination and does not apply to actions that have only discriminatory effects. Today, most forms of

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118. See Girardeau A. Spann, *Proposition 209*, 47 DUKE L.J. 187, 280–83 (1997) [hereinafter Spann, *Proposition 209*]; see also *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 803–04 (2007) (Breyer, J., dissenting) (asserting that the majority imposes impediments to remedies for resegregation).

119. See Spann, *Proposition 209*, *supra* note 118, at 280–83.

120. See *id.* at 192–93.

121. See Erika K. Wilson, *Monopolizing Whiteness*, 134 HARV. L. REV. 2382, 2384–88 (2021).

contemporary racial discrimination do not employ the express racial classifications that characterized the Jim Crow era. Rather, they utilize purportedly neutral standards that do not mention race. But implicit biases and structural features of society nevertheless cause those standards to have a racially disparate impact. By placing disparate impact beyond the reach of the Constitution, the Court has allowed the culture to sacrifice nonwhite minority interests in order to advance the interests of Whites. This has created vast, racially correlated discrepancies in the way that societal resources are distributed. But the Supreme Court has viewed those discrepancies as a form of “societal discrimination” that is permissible under the Constitution.<sup>122</sup> In fact, the Court has read the Constitution actually to prohibit use of the most effective remedies that could be invoked to address the problem of societal discrimination.

A. *Intentional Discrimination*

In its 1976 *Washington v. Davis* decision, the Supreme Court held that the equal protection component of the Fifth Amendment—which applied the Fourteenth Amendment equal protection principle to the federal government—prohibited intentional discrimination, but did not prohibit official acts that had only a racially disparate impact.<sup>123</sup> Accordingly, the verbal skills test that the District of Columbia used to select its police officers did not violate the Equal Protection Clause even though it resulted in the hiring of a disproportionately high number of White officers and a disproportionately low number of Black officers. Because the intent of the test was to ensure adequate verbal skills in police officers, and not to discriminate against Black applicants, use of the test was not unconstitutional.<sup>124</sup>

The *Washington v. Davis* concept of intentional discrimination was further narrowed by the Court’s 1979 decision in *Feeney*. In that case, the Court held that to qualify as discriminatory intent for *Washington v. Davis* purposes, the government’s actuating motive had to be “because of” an action’s discriminatory consequences. The government’s mere incidental willingness to take an action “in spite of” its known disparate impact was not sufficient to establish an equal protection violation.<sup>125</sup>

The Equal Protection Clause applies strict scrutiny to racial classifications.<sup>126</sup> But that strict scrutiny is not triggered unless the government’s motive is sufficiently invidious to establish the existence of a

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122. *Parents Involved*, 551 U.S. at 731.

123. 426 U.S. 229, 238–48.

124. *See id.* at 245–46.

125. *See Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 278–81.

126. *See Korematsu v. United States*, 323 U.S. 214, 216 (1944), *abrogated by Trump v. Hawaii*, 138 S. Ct. 2392 (2018).

racial classification under the *Washington v. Davis* and *Feeney* tests. Because government officials are almost always able to articulate some nonracial goal that might be advanced by the actions that they take, “in spite of” the racially disparate impact of their actions,<sup>127</sup> it is often difficult to prove the invidious intent required by *Washington v. Davis* and *Feeney*. As a result, the Supreme Court’s intentional discrimination standard provides constitutional cover for large amounts of racially disparate impact in the allocation of societal resources.

The Supreme Court could easily have avoided its *Washington v. Davis* choice to tolerate disparate impact, by relying instead on the decision it announced five years earlier in 1971 in *Griggs v. Duke Power Co.*<sup>128</sup> The *Griggs* Court held that the existence of racial discrimination in employment, which is prohibited by Title VII of the Civil Rights Act of 1964, was to be assessed under a disparate impact test rather than an intentional discrimination test.<sup>129</sup> If a discriminatory effects test was appropriate for racial discrimination claims brought under a federal civil rights statute in *Griggs*, it is not clear why a discriminatory effects test was not also appropriate for racial discrimination claims brought under the Equal Protection Clause.

The Equal Protection Clause was a core civil rights provision of the Reconstruction Amendments, and was adopted explicitly to guard against foreseeable discrimination against Blacks after the Civil War.<sup>130</sup> Indeed, after *Griggs*, most lower federal courts had applied the discriminatory effects test to equal protection claims as well as to Title VII claims.<sup>131</sup> Prior to *Washington v. Davis*, even the Supreme Court itself had suggested that a disparate impact standard would apply to discrimination claims brought under the Equal Protection Clause.<sup>132</sup>

What is perhaps most telling is the reason that the *Washington v. Davis* Court offered for adopting a discriminatory intent standard in lieu of a discriminatory effects standard. The Court concluded that the use of a disparate impact standard under the Equal Protection Clause would simply encompass too many cases.<sup>133</sup> In other words, it was precisely because racially disparate impact had become so widespread in U.S. culture that it could not be deemed unconstitutional. Invalidating disparate impact would undermine the White privilege to which the culture had become accustomed as a form of racial entitlement.

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127. *Feeney*, 442 U.S. at 279.

128. 401 U.S. 424.

129. *See id.* at 429–32.

130. *See* MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUITY 8–60 (2004).

131. *See* *Washington v. Davis*, 426 U.S. 229, 236–37, 244–45, 245 n.12 (1976).

132. *See id.* at 242–44.

133. *See id.* at 238–48.

The underlying facts of *Washington v. Davis* itself further illustrate how ubiquitous racially disparate impact has become, and how that disparate impact has reinforced baseline assumptions about what constitutes racial neutrality in our contemporary culture.<sup>134</sup> The verbal skills test that the Court upheld in *Washington v. Davis*, despite its racially disparate effect on the makeup of the Washington D.C. police force, had never been validated to show any connection to the job performance of police officers.<sup>135</sup> Even if it had been validated, however, the verbal skills test was almost certainly based on White English verbal skills rather than Ebonics or Black English verbal skills. In the 1970s, the population of Washington, D.C., was seventy percent Black.<sup>136</sup> But the Supreme Court had no difficulty characterizing a White English test as racially neutral, even in a predominantly Black city. White privilege is so firmly infused into the baseline assumptions shared by White culture that it never even occurs to most people to question the racial tilt built into such assumptions.

I am not suggesting that invidious racial discrimination has ceased to exist in the United States. The storming and siege of the U.S. Capitol on January 6, 2021, by Confederate flag wielding White supremacist Trump supporters shows that defiantly explicit racism still exists in this country.<sup>137</sup> Congressional testimony revealed that multiple Trump supporters involved in the siege repeatedly shouted an odious racial epithet at a Black Capitol police officer who was trying to defend the Capitol.<sup>138</sup> But most contemporary racial discrimination is more indirect and subtle. It is produced by structural features of the culture. For example, bank lending criteria can make it more difficult for nonwhites to buy homes or get business loans because a history of racial discrimination has left them with lower quality jobs, lower salaries, and less property, which often has lower market value that can be used as collateral.<sup>139</sup>

134. See *id.* at 245–46.

135. See *id.* at 235–36, 246–48.

136. Campbell Gibson & Kay Jung, *Historical Census Statistics on Population Totals by Race, 1790 to 1990, and by Hispanic Origin, 1970 to 1990, for the United States, Regions, Divisions, and States* 41 tbl.23 (U.S. Census Bureau, Working Paper No. 56, 2002).

137. See Sabrina Tavernise & Matthew Rosenberg, *These Are the Rioters Who Stormed the Nation's Capitol*, N.Y. TIMES (May 12, 2021), <https://www.nytimes.com/2021/01/07/us/names-of-rioters-capitol.html?searchResultPosition=2> [<https://perma.cc/2HNC-MLEK> (dark archive)]; see also Michele L. Norris, Opinion, *Believe What You Saw. With All This Country's White Grievance, It Was Inevitable*, WASH. POST (Jan. 7, 2021, 5:11 PM), [https://www.washingtonpost.com/opinions/believe-what-you-saw-with-all-this-countrys-white-grievance-it-was-inevitable/2021/01/07/87f55c02-5127-11eb-b96e-0e54447b23a1\\_story.html](https://www.washingtonpost.com/opinions/believe-what-you-saw-with-all-this-countrys-white-grievance-it-was-inevitable/2021/01/07/87f55c02-5127-11eb-b96e-0e54447b23a1_story.html) [<https://perma.cc/UP7F-K38W> (dark archive)].

138. See Luke Broadwater & Nicholas Fandos, *"A Hit Man Sent Them." Police at the Capitol Recount the Horrors of Jan. 6 as the Inquiry Begins.*, N.Y. TIMES (Aug. 26, 2021), <https://www.nytimes.com/2021/07/27/us/jan-6-inquiry.html> [<https://perma.cc/QPG4-ADBA> (dark archive)].

139. See Girardeau A. Spann, *Race Ipsa Loquitur*, 2018 MICH. ST. L. REV. 1025, 1046–49 [hereinafter Spann, *Race Ipsa Loquitur*]; cf. *Bank of Am. v. Miami*, 137 S. Ct. 1296, 1300–01 (2017) (discussing injuries suffered by the city itself as result of bank lending practices that discriminated against minorities in violation of the Fair Housing Act).

Typically, the lenders who establish and apply those lending criteria are not consciously engaged in intentional racial discrimination. But they often have implicit biases that unconsciously skew the ways in which they define and apply those loan criteria. The problem of implicit racial bias has now been well documented using the Implicit Association Test.<sup>140</sup> However, this indirect form of subconscious discrimination does not satisfy the high level of formalism that *Feeney* requires to establish intentional discrimination under *Washington v. Davis*. The *Washington v. Davis* intentional discrimination test simply lacks the capacity to recognize implicitly biased forms of discrimination because such forms of discrimination are not the product of conscious intent.

Often, what intuitively seem like obvious forms of invidious racial discrimination are not deemed intentional for Equal Protection purposes. The 1989 case of *Richmond v. J.A. Croson Co.*<sup>141</sup> provides a striking example of this. In *Croson*, the Court was confronted with a record showing that, during the pertinent time period, only 0.67% of construction contracts in Richmond, Virginia, went to nonwhite contractors.<sup>142</sup> Even though the Richmond population was fifty percent Black, and Richmond had been the former capital of the Confederacy, Justice O'Connor's opinion for the Court deemed that evidence insufficient to determine whether there had been past racial discrimination in the Richmond construction trades.<sup>143</sup>

An Indiana voter ID law was upheld by the Supreme Court in the 2008 *Crawford v. Marion County Election Board*<sup>144</sup> decision as a valid means of reducing in-person voter fraud.<sup>145</sup> The problem is that Indiana was not able to identify even a single case of in-person voter fraud to justify the law.<sup>146</sup> Nevertheless, the Indiana voter ID law became one of an array of voter-suppression laws that are used primarily by Republican states to reduce voting by nonwhites, who tend to vote for Democrats.<sup>147</sup> Voter ID laws have such a discriminatory effect because nonwhite voters are significantly less likely than White voters to possess the sorts of IDs that those states have deemed adequate for voting.<sup>148</sup>

140. See *Implicit Association Test: About Us*, PROJECT IMPLICIT, <https://implicit.harvard.edu/implicit/takeatest.html> [<https://perma.cc/7Q4Q-CMLG>]; see also MAHZARIN R. BANAJI & ANTHONY G. GREENWALD, *BLINDSPOT: HIDDEN BIASES OF GOOD PEOPLE* 39–47, 105, 108–10 (2013); Girardeau A. Spann, *Good Faith Discrimination*, 23 WM. & MARY BILL RTS. J. 585, 626–29 (2015) [hereinafter Spann, *Good Faith Discrimination*].

141. 488 U.S. 469.

142. See *id.* at 479–80.

143. See *id.* at 479–80, 509–11.

144. 553 U.S. 181.

145. See *id.* at 191, 202–03; see also Klarman, *supra* note 11, at 184–87.

146. See *Crawford*, 553 U.S. at 194–95; Klarman, *supra* note 11, at 184.

147. See Klarman, *supra* note 11, at 45–66, 178–94.

148. See *id.* at 48–51, 184–87.

The 2013 Supreme Court decision in *Shelby County v. Holder*<sup>149</sup> invalidated a key provision of the 1965 Voting Rights Act—a statute that had produced dramatic increases in nonwhite voting rates.<sup>150</sup> Despite the broad adoption of laws like the *Crawford* ID law, which were motivated by the desire to disenfranchise nonwhite voters in the name of preventing largely nonexistent voter fraud, the *Shelby County* Court could not find adequate evidence of continuing state efforts to suppress nonwhite voting.<sup>151</sup> Although the invidious motive to engage in racial discrimination may at times be obvious to all reasonable observers, its salience can still be insufficient to count as racial discrimination for constitutional purposes.

### B. *Disparate Impact*

The Supreme Court's *Washington v. Davis* intentional discrimination test has provided constitutional protection for massive amounts of racially disparate impact in the allocation of societal resources. This has been made glaringly clear by the COVID-19 pandemic. Racially correlated disparities in the social determinates of health have left nonwhites much more susceptible than Whites to COVID-19 infection and death. Those social determinates include racial disparities in housing, living conditions, nutrition, pollution, general health, access to healthcare, access to health insurance, dangerous working conditions, income, wealth, debt, childcare, and education.<sup>152</sup> COVID-19 death rates are highest for Blacks and Indigenous peoples, followed by Pacific Islanders, Latinx people, Asians, and Whites.<sup>153</sup> In the United States, Blacks are almost three times as likely to die from COVID-19 as Whites, and in Washington, D.C., Blacks die at a rate that is six times higher than the rate for Whites.<sup>154</sup> In 2020, seventy-five percent of the fatal COVID-19 victims in Washington, D.C., were Black, even though Blacks now make up only forty-six percent of the city's population.<sup>155</sup>

I emphasize COVID-19 racial disparities because they have become so stark and relevant during the current pandemic. However, similarly dramatic racial disparities exist in the distribution of nearly all significant societal

149. 570 U.S. 529.

150. *See id.* at 573–76 (Ginsburg, J., dissenting).

151. *See id.* at 550–53, 556–57 (majority opinion); *see also* Klarman, *supra* note 11, at 179–84.

152. *See Covid-19 Racial and Ethnic Health Disparities*, CDC (Dec. 10, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/health-equity/racial-ethnic-disparities/index.html> [<https://perma.cc/5B7Y-6BVB>].

153. *See* Wei Li, *Racial Disparities in Covid-19*, SCI. NEWS HARV. U. (Oct. 24, 2020), <http://sitn.hms.harvard.edu/flash/2020/racial-disparities-in-covid-19/> [<https://perma.cc/64YE-E393>].

154. Michael E. Miller, *In D.C., Black Families Reel from the Pain of Hundreds Lost to Covid-19 and Killings*, WASH. POST (Dec. 30, 2020, 10:20 AM), [https://www.washingtonpost.com/local/black-dc-covid-killings-job-loss/2020/12/29/a06701be-40a6-11eb-8db8-395dedaaa036\\_story.html](https://www.washingtonpost.com/local/black-dc-covid-killings-job-loss/2020/12/29/a06701be-40a6-11eb-8db8-395dedaaa036_story.html) [<https://perma.cc/RR4H-H2YB> (dark archive)].

155. *See id.*



resources. I have previously cited a plethora of racial disparity statistics related to money, education, employment, health, housing, voting, and of course, the criminal justice system.<sup>156</sup>

Among the most disheartening of the disparate impact statistics is the fact that the median household income for Blacks is less than sixty percent of the median household income for Whites, and the typical White household has sixteen times the wealth of the typical Black household.<sup>157</sup> Moreover, the racial wealth gap is increasing rather than decreasing.<sup>158</sup> Ironically, receiving a college education actually exacerbates rather than ameliorates these racial wealth gaps. That is because discriminatory lending practices give Black students higher tuition debt than White students, and the discriminatory job market often fails to transform higher education into higher income for Black workers.<sup>159</sup> Historically, Black unemployment rates have typically been twice the unemployment rates for Whites.<sup>160</sup> These discrepancies are largely attributable to employment discrimination and not educational differences.<sup>161</sup>

Black infants are more than twice as likely to die as White infants, and Black women are three to four times as likely to die from pregnancy-related causes than White women.<sup>162</sup> Although the widely recognized disproportionate mortality rates for Black babies are cut in half if Black babies are cared for by Black doctors, there are too few Black doctors to provide care for all Black babies.<sup>163</sup> Our anti-immigration policies cause even legal immigrants from Latin America to forgo public health services, and Latinx people are more than three times as likely to lack health insurance as Whites.<sup>164</sup> Moreover, Blacks who want to rent an apartment are told about 11.4% fewer units and shown 4.2 fewer units than White renters, and Black homebuyers are informed of 17% fewer homes and shown 17.7 fewer homes than White homebuyers.<sup>165</sup> In some areas, 40% of housing units were owned by Blacks, while White homeownership rates were higher than 70%.<sup>166</sup>

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156. See Spann, *Race Ipsa Loquitur*, *supra* note 139, at 1025–56.

157. See *id.* at 1036–37.

158. See *id.*

159. See Dorothy A. Brown, *College Isn't the Solution for the Racial Wealth Gap. It's Part of the Problem.*, WASH. POST (Apr. 9, 2021), <https://www.washingtonpost.com/outlook/2021/04/09/student-loans-black-wealth-gap/> [<https://perma.cc/V7HF-GLG6> (dark archive)].

160. See Spann, *Race Ipsa Loquitur*, *supra* note 139, at 1043.

161. See *id.*

162. See *id.* at 1044–45.

163. See Tonya Russell, *Mortality Rate for Black Babies Is Cut Dramatically When Black Doctors Care for Them After Birth, Researchers Say*, WASH. POST (Jan. 13, 2021, 3:47 PM), [https://www.washingtonpost.com/health/black-baby-death-rate-cut-by-black-doctors/2021/01/08/e9f0f850-238a-11eb-952e-0c475972cfc0\\_story.html](https://www.washingtonpost.com/health/black-baby-death-rate-cut-by-black-doctors/2021/01/08/e9f0f850-238a-11eb-952e-0c475972cfc0_story.html) [<https://perma.cc/5CS9-SYDX> (dark archive)].

164. See Spann, *Race Ipsa Loquitur*, *supra* note 139, at 1045.

165. See *id.* at 1046–47.

166. See *id.*

The racial disparities that characterize the criminal justice system were called to the nation's attention in the Ferguson Report that the U.S. Department of Justice issued after the 2014 police shooting of a Black man named Michael Brown by White police officer Darren Wilson.<sup>167</sup> It showed that from 2012 to 2014, Blacks constituted 67% of the Ferguson, Missouri, population, but comprised 85% of the vehicles stopped, 90% of the citations issued, and 93% of the arrests.<sup>168</sup> Blacks were twice as likely as Whites to be searched during vehicle stops, even though Blacks were 26% less likely than Whites to possess contraband when stopped.<sup>169</sup>

Nationally, Black men are 6.7 times more likely to be incarcerated than White men.<sup>170</sup> And Blacks are 2.5 times more likely than Whites to be killed by the police.<sup>171</sup> Moreover, young Black men are twenty-one times more likely to be killed by the police than young White men.<sup>172</sup> And, of course, prosecutors rarely charge or obtain convictions of police officers who shoot and kill unarmed Blacks. That could be because, in recent years, fewer than 5% of chief prosecutors in the United States were Black.<sup>173</sup> In *McCleskey v. Kemp*,<sup>174</sup> the Supreme Court itself ignored the racially disparate impact of Georgia's death penalty statute and permitted the execution of a Black man even though statistics showed that Black defendants were four times more likely to receive the death penalty if their victims were White than if their victims were Black.<sup>175</sup>

Those statistics represent just a small sample of the many ways in which our cultural practices have had a racially disparate adverse impact on nonwhites and a racially disparate beneficial impact on Whites.<sup>176</sup> Indeed, the ubiquity of racially disparate impact has recently prompted some state legislatures to propose—and Maine actually to enact—legislation requiring racial impact statements that assess the racial consequences of pending legislation.<sup>177</sup>

167. See generally C.R. DIV., U.S. DEP'T OF JUST., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT (2015), [https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson\\_police\\_department\\_report.pdf](https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf) [<https://perma.cc/82B4-UMWK>] (detailing findings of a pattern or practice of unlawful conduct within the Ferguson Police Department).

168. See Spann, *Race Ipsa Loquitur*, *supra* note 139, at 1053.

169. See *id.*

170. See *id.* at 1054.

171. See *id.*

172. See *Young Black Men Are 21 Times as Likely as Their White Peers To Be Killed by Police*, EQUAL JUST. INITIATIVE (Oct. 20, 2014), <https://eji.org/news/study-shows-young-black-men-21-times-more-likely-to-be-killed-by-police/> [<https://perma.cc/5UJ3-NK8L>].

173. See Spann, *Race Ipsa Loquitur*, *supra* note 139, at 1055.

174. 481 U.S. 279 (1987).

175. See Spann, *Race Ipsa Loquitur*, *supra* note 139, at 1082 (discussing *McCleskey*, 481 U.S. at 286–87).

176. See generally *id.* (citing numerous other racially disparate impact statistics).

177. See Scott Thistle, *Governor Signs Bill Requiring Reviews of All Legislation for Racial Impacts*, PORTLAND PRESS HERALD (Mar. 19, 2021), <https://www.pressherald.com/2021/03/19/mills-signs-into-law-bill-requiring-racial-impact-statements-on-new-legislation/> [<https://perma.cc/Q3BX-QR38>].

Nevertheless, the Supreme Court's decision in *Washington v. Davis* to adopt an intentional discrimination standard rather than a discriminatory effects test for equal protection purposes has permitted the culture's preference for a racially disparate allocation of societal resources to go largely unchecked. In fact, the White privilege that the Supreme Court's intentional discrimination standard invites has even become a constitutionally protected feature of U.S. culture.

### C. *Societal Discrimination*

The racially disparate allocation of societal benefits is so firmly entrenched in U.S. culture that the Supreme Court has given it a name. Justice Powell's controlling opinion in the 1978 *Bakke* decision referred to such pervasive disparate impact as "societal discrimination."<sup>178</sup> Terming it "an amorphous concept of injury that may be ageless in its reach into the past," Justice Powell announced that societal discrimination could not be constitutionally remedied through direct race-conscious efforts.<sup>179</sup> That was because targeting such remedies to "persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations" would be unfair to those who were thereby disadvantaged.<sup>180</sup> Accordingly, *Bakke* invalidated a program adopted by the University of California at Davis reserving up to sixteen seats in its incoming medical school class of 100 for economically and educationally disadvantaged students—some of whom were permitted to self-identify as nonwhite.<sup>181</sup>

To Justice Powell, race-conscious disparate impact remedies for the societal discrimination that harmed nonwhites were unconstitutional because they interfered with White privilege. They threatened the disproportionate resource advantages that were being enjoyed by innocent Whites. And, of course, the reason that the White recipients of this privilege were "innocent" was that, under the Court's recently adopted intentional discrimination standard, the White recipients had done nothing wrong.<sup>182</sup> True, they were the beneficiaries of a cultural system that had been structured to favor Whites over nonwhites in myriad ways. But the racially disparate impacts of that system did not count as unlawfully discriminatory under *Washington v. Davis* and *Feeney*. Justice Powell concluded:

Hence, the purpose of helping certain groups whom the faculty of the Davis Medical School perceived as victims of "societal discrimination" does not justify a classification that imposes disadvantages upon persons

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178. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 307–10 (1978).

179. See *id.* at 307.

180. See *id.* at 307–09.

181. See *id.* at 272–76.

182. See *id.* at 298.

like respondent, who bear no responsibility for whatever harm the beneficiaries of the special admissions program are thought to have suffered. To hold otherwise would be to convert a remedy heretofore reserved for violations of legal rights into a privilege that all institutions throughout the Nation could grant at their pleasure to whatever groups are perceived as victims of societal discrimination. That is a step we have never approved.<sup>183</sup>

Justice Powell's opinion in *Bakke* was the controlling opinion for a badly split Supreme Court, but the opinion was joined only by Justice Powell himself. Nevertheless, Justice Powell's opinion has since acquired a talismanic aura. It has often been endorsed by other Justices and has now been adopted by a majority of the Court.<sup>184</sup> Perhaps most notably, Justice O'Connor endorsed Justice Powell's societal discrimination view in her 2003 majority opinion upholding a University of Michigan Law School racial affirmative action plan in *Grutter v. Bollinger*.<sup>185</sup> And Chief Justice Roberts also invoked Justice Powell's societal discrimination view in his 2007 plurality opinion invalidating a plan to combat racial resegregation in *Parents Involved in Community Schools v. Seattle School District No. 1*.<sup>186</sup>

Apparently, any direct effort to challenge White privilege by reducing its racially disparate impact would itself be an unconstitutional creation of nonwhite privilege. As a result, the existing entitlement of Whites to a disproportionate share of societal resources ends up being protected by the Equal Protection Clause. The resource allocation advantage that Whites have over nonwhites is thereby normalized by the Constitution itself and thus built into our baseline understanding of the way that things should operate in American society.

The reason that the Supreme Court is willing to turn a blind eye to societal discrimination is that the Supreme Court is a racist Court. "Racism" is a term that some critical race theorists have used to describe the view that racial

183. *Id.* at 310.

184. Powell's position was initially articulated in *Bakke*, *id.* at 307–10, and reasserted by Justice Powell in *Wygant v. Jackson Board of Education*, 476 U.S. 267, 274–79 (1986) (plurality opinion). Led by Justice O'Connor, that view has since been adopted by a majority of the full Supreme Court. *See Grutter v. Bollinger*, 539 U.S. 306, 323–25, 330 (2003) (citing *Bakke*, 438 U.S. at 307, as rejecting interest in remedying societal discrimination and rejecting racial balancing as "patently unconstitutional"); *see also* *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 612–14 (1990) (O'Connor, J., dissenting) (rejecting societal discrimination), *overruled by* *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 494–96 (1989) (plurality opinion) (same); *Johnson v. Transp. Agency*, 480 U.S. 616, 647–53 (1987) (O'Connor, J., concurring) (same); *Wygant*, 476 U.S. at 288 (O'Connor, J., concurring) (same). Most recently, Chief Justice Roberts reiterated this view in *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 732–33 (2007) (plurality opinion) (same).

185. *See* 539 U.S. 306, 323–25, 330 (2003).

186. 551 U.S. at 731–32.

discrimination is isolated and atomistic, consisting only of particularized bad acts that deviate from a behavioral norm of colorblind race neutrality. The racist Supreme Court, therefore, rejects the view that racial discrimination is holistic, systemic and structural in nature.<sup>187</sup> As a result, the Court's racial jurisprudence has evolved in a way that does not even recognize as problematic the pervasive societal discrimination embodied in the routine racially disparate impact that the Court insists the Constitution must protect, reinforce, and facilitate.

### III. RANDOM JUSTICE

Racial discrimination, in the form of racially disparate impact, is so deeply embedded in U.S. culture that we have thus far been unable to eradicate it. Logically, it makes sense to use the law of affirmative action to provide compensatory and prospective racial balance remedies for the ongoing discrimination that we have not otherwise been able to prevent. But the Supreme Court has formulated a law of affirmative action that invalidates as unconstitutional efforts to pursue racial balance in the allocation of societal resources. Moreover, racial discrimination is now so pervasive throughout the culture that the Supreme Court's own affirmative action doctrine is itself racially discriminatory in its knowing sacrifice of nonwhite interests in order to advance the interests of Whites. However, the Court's current doctrinal rules do allow for lottery-based affirmative action plans that randomly allocate resources, such as university seats, in a way that approximates the equitable distribution of resources that would exist in a nondiscriminatory society. Such a randomized pursuit of racial equality might threaten the prestige of our elite educational institutions, but the ensuing racial justice benefits would outweigh any concomitant loss of elite educational prestige.

#### A. *Affirmative Action*

So-called racial affirmative action is not the pejorative practice of reverse discrimination that its opponents claim it to be. Rather, as Lyndon Johnson explained when he first coined the term, affirmative action is a technique designed to reduce the myriad forms of continuing racial bias and inequality that have managed to elude our antidiscrimination laws.<sup>188</sup> Support for affirmative action is, therefore, support for racial equality. Opposition to

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187. See CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT, at xxiv–xxvii (Kimberlé Crenshaw, Neil Gotanda, Gary Peller & Kendall Thomas eds., 1995); see also Girardeau A. Spann, *Disparate Impact*, 98 GEO. L.J. 1133, 1137 (2010).

188. See *Middleton v. City of Flint*, 92 F.3d 396, 404 n.6 (6th Cir. 1996) (discussing the evolution of the term “affirmative action”); Nicholas Lemann, *Taking Affirmative Action Apart*, N.Y. TIMES (June 11, 1995), <https://www.nytimes.com/1995/06/11/magazine/taking-affirmative-action-apart.html> [<https://perma.cc/Y8C5-S6LZ> (dark archive)] (providing additional background on the history of the term).

affirmative action is support for maintaining the racially disparate status quo. One's support for either of those two objectives tends to correlate with one's political ideology on the issue of race.

As I argued in Section I.A above, the Supreme Court is part of a political branch of government. Therefore, it is not surprising that the degree of Supreme Court support for affirmative action has varied over time. Outcomes in particular cases have been determined by whether the Court's liberal or conservative voting blocs had political control of the Court when the Court issued its decisions. In the 1970s and 1980s, the liberal bloc succeeded in upholding at least some affirmative action plans.<sup>189</sup> Since the 1990s, however, the Court's conservative bloc has invalidated most of the racial affirmative action programs that it has considered, typically in five-to-four politically correlated decisions.<sup>190</sup> With the recent addition of Justice Barrett to the Court, it seems likely that the Supreme Court's future anti-affirmative action decisions will be issued by a six-to-three Court.

There are doctrinal anomalies in the Supreme Court's affirmative action jurisprudence that I have tried to highlight here<sup>191</sup> and have analyzed in greater detail elsewhere.<sup>192</sup> Perhaps most striking is the fact that the Court applies the same standard of strict scrutiny to benign affirmative action plans that it applies to invidious racial classifications. After years of Supreme Court vacillation concerning the proper level of scrutiny, Justice O'Connor's majority opinion in *Adarand Constructors v. Peña*<sup>193</sup> overruled the Court's earlier decision in *Metro Broadcasting, Inc. v. FCC*.<sup>194</sup> Her *Adarand* opinion held that typically fatal strict

189. See, e.g., *Metro Broad, Inc.*, 497 U.S. at 556–58, 566 (upholding FCC license preference for nonwhite broadcasters); *Loc. 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421, 431–33, 479–81 (1986) (upholding court-ordered union membership preference for nonwhite workers); *Fullilove v. Klutznick*, 448 U.S. 448, 453–54, 492 (1980) (upholding construction contract set aside for nonwhite contractors); *United Jewish Orgs. of Williamsburgh, Inc. v. Carey*, 430 U.S. 144, 151–53, 168 (1977) (upholding redistricting preference for nonwhite voters); see also GIRARDEAU A. SPANN, *THE LAW OF AFFIRMATIVE ACTION: TWENTY-FIVE YEARS OF SUPREME COURT DECISIONS ON RACE AND REMEDIES* 156–64 (2000) [hereinafter SPANN, *AFFIRMATIVE ACTION*] (describing Supreme Court voting blocs, with a chart showing how Justices voted).

190. *Gratz v. Bollinger*, 539 U.S. 244, 255–57, 275–76 (2003) (invalidating University of Michigan undergraduate admissions affirmative action plan); *Parents Involved*, 551 U.S. at 723, 730, 732, 740 (invalidating Seattle elementary and secondary school pupil assignment affirmative action plan); *Fisher v. Univ. of Tex. at Austin (Fisher II)*, 136 S. Ct. 2198, 2206, 2215 (2016) (upholding University of Texas at Austin undergraduate affirmative action program for student admissions); see, e.g., *Miller v. Johnson*, 515 U.S. 900, 916–20, 927–28 (1995) (invalidating majority-minority voter redistricting plan); see also SPANN, *AFFIRMATIVE ACTION*, *supra* note 189, at 156–64; cf. *Grutter*, 539 U.S. at 327–30, 334 (upholding University of Michigan Law School affirmative action program for student admissions).

191. See *supra* Part II.

192. See, e.g., SPANN, *AFFIRMATIVE ACTION*, *supra* note 189, at 156–64; Spann, *Race Ipsa Loquitur*, *supra* note 139, at 1039–40; Girardeau A. Spann, *Good Trouble*, U. CHI. L. REV. ONLINE (Oct. 30, 2020), <https://lawreviewblog.uchicago.edu/2020/10/30/aa-spann/> [<https://perma.cc/U86L-KTFW>].

193. 515 U.S. 200 (1995).

194. 497 U.S. 547 (1990).

scrutiny—rather than more permissive intermediate scrutiny—applied to all racial classifications, whether benign or invidious.<sup>195</sup> Responding to Justice O’Connor’s insistence on applying the same level of scrutiny to both benign and invidious discrimination, Justice Stevens’s *Adarand* dissent accused Justice O’Connor of being unable to tell the difference between a no trespassing sign and a welcome mat.<sup>196</sup>

Justice O’Connor defended her insistence on strict scrutiny by emphasizing that the Equal Protection Clause protected White people as well as nonwhites, thereby making strict scrutiny necessary to ensure that Whites were not being discriminated against in order to benefit nonwhites.<sup>197</sup> That, of course, turned the Fourteenth Amendment on its head by ignoring the fact that the original public meaning of the Equal Protection Clause was to guard against the post-Civil War exploitation of Blacks for the benefit of Whites. The pervasive racial disparities discussed in Section II.B continue to exist today, thereby showing that our society has hardly passed through the looking glass and become one in which Whites now need Supreme Court protection from victimization by nonwhites.

Despite the Fifteenth Amendment prohibition on discrimination in voting, the United States has had a long history of disenfranchising nonwhite voters. Congress took remedial affirmative action to address this voter discrimination by passing the Voting Rights Act of 1965.<sup>198</sup> The Act was successfully able to increase nonwhite voting rates, especially in the South.<sup>199</sup> Nevertheless, in its 2013 *Shelby County v. Holder* decision, the Supreme Court effectively nullified the Section 5 federal preclearance provision of the Act that had made it so successful.<sup>200</sup> It did so by invalidating the Section 4 provision of the Act that determined which jurisdictions were covered, meaning that no jurisdiction was subject to Section 5 preclearance any longer.<sup>201</sup>

Prior to the invalidation of Section 4, the Voting Rights Act had been successful by prompting the creation of majority-minority voting districts. Because a majority of voters in such districts were nonwhite, nonwhite voters had a better chance of electing candidates of their choice.<sup>202</sup> But in 1993, the

195. See *Adarand*, 515 U.S. at 223–27 (overruling *Metro Broad., Inc.*, 497 U.S. at 566).

196. See *id.* at 245 (Stevens, J., dissenting) (“The consistency that the Court espouses would disregard the difference between a ‘No Trespassing’ sign and a welcome mat.”).

197. See *id.* at 223–26, 230 (majority opinion).

198. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 52 U.S.C. §§ 10101, 10301–10314, 10501–10508, 10701–10702).

199. See *Shelby County v. Holder*, 570 U.S. 529, 536–40 (2013) (outlining the history of the Voting Rights Act and congressional reauthorizations); *id.* at 559, 564–66, 593–94 (Ginsburg, J., dissenting) (outlining the same).

200. See *id.* at 550–57 (invalidating Section 4 of the Voting Rights Act of 1965).

201. See *id.* at 557.

202. *Shaw v. Reno*, 509 U.S. 630, 639–52 (1993).

Court's decision in *Shaw v. Reno*<sup>203</sup> held that White voters had standing to challenge such districts as entailing a form of racial discrimination, even though those districts had enabled the first Black representatives to be sent to Congress since Reconstruction.<sup>204</sup> Then, in 1995, *Miller v. Johnson*<sup>205</sup> went on to hold that the Equal Protection Clause invalidated majority-minority districts if race had been the predominate factor in drawing district lines.<sup>206</sup>

The Court's decisions in *Shelby County, Shaw*, and *Miller* made it easier for White voters to preserve and perpetuate the electoral advantages that they have historically had over nonwhite voters. Then, the Supreme Court went on to help Whites also use the voter initiative process to maintain their advantages over nonwhites in the distribution of resources.

In its 2014 *Schuette v. Coalition To Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality by Any Means Necessary (BAMN)*<sup>207</sup> decision, the Court chose to perpetuate existing racial inequalities by upholding a Michigan voter initiative that amended the state constitution to prohibit affirmative action.<sup>208</sup> At first blush, upholding a requirement for prospective colorblindness in the allocation of resources might seem unobjectionable.<sup>209</sup> But since *Adarand*, the Supreme Court now permits the use of racial affirmative action only when it satisfies the exacting demands of strict scrutiny—meaning it has to be narrowly tailored to advance a compelling government interest.<sup>210</sup> As a result, the *Schuette* decision means that Michigan voters were allowed to ban the use of racial affirmative action even when affirmative action was necessary to satisfy the government's compelling interest in remedying past discrimination or providing for prospective diversity.

In *Adarand*, Justice O'Connor stated that strict scrutiny was not necessarily fatal scrutiny.<sup>211</sup> However, many were skeptical because no invidious racial classification had survived strict scrutiny since *Korematsu*, and the Court's *Korematsu* decision to uphold the World War II Japanese-American exclusion order under strict scrutiny had itself become widely condemned.<sup>212</sup>

203. *Id.* at 630.

204. *See id.* at 659 (White, J., dissenting) (noting that majority-minority district resulted in North Carolina sending its first Black representative to Congress since Reconstruction); *id.* at 676 (Blackmun, J., dissenting) (noting the same).

205. 515 U.S. 900.

206. *See id.* at 916–20, 927–28.

207. 572 U.S. 291.

208. *See id.* at 313–14.

209. *See id.* at 331–32 (Scalia, J., concurring).

210. *See Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995).

211. *See id.* at 237 (“Finally, we wish to dispel the notion that strict scrutiny is ‘strict in theory, but fatal in fact.’” (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980) (Marshall, J., concurring))).

212. *See Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018) (“*Korematsu* was gravely wrong the day it was decided, has been overruled in the court of history, and—to be clear—has no place in law under



Nevertheless, in the 2003 case of *Grutter v. Bollinger*, the Supreme Court surprisingly upheld the University of Michigan Law School's affirmative action program.<sup>213</sup> Justice O'Connor's majority opinion held that the program survived strict scrutiny because it was a narrowly tailored effort to advance the school's compelling interest in achieving a racially diverse student body.<sup>214</sup> But the reliability of the *Grutter* decision as a basis for predicting the fate of other affirmative action plans was called into question by the Court's decision invalidating the University of Michigan undergraduate affirmative action program on the same day that *Grutter* was decided.

In *Gratz v. Bollinger*,<sup>215</sup> the Court held that the undergraduate plan was unconstitutional because it was not narrowly tailored.<sup>216</sup> However, the problem is that both the law school and undergraduate plans seem legally indistinguishable with respect to the doctrinal standards governing strict scrutiny. Therefore, it appears as if the *Gratz* Court was merely disagreeing with the judgment of the undergraduate college about how much weight racial diversity should be given in pursuit of a school's educational mission.<sup>217</sup> The Court supplanted the school's judgment even though *Grutter* had emphasized that the Court should show deference to educational institutions on this issue, in light of their greater relative expertise.<sup>218</sup>

Justice O'Connor's *Grutter* decision to uphold a racial affirmative action plan was so distasteful to the other Justices in the Court's conservative voting bloc that, when Justice Alito replaced Justice O'Connor on the Supreme Court in 2006, opponents of affirmative action hoped that the Court would overrule *Grutter* when an appropriate case presented itself.<sup>219</sup> The 2013 case of *Fisher v.*

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the Constitution.” (quoting *Korematsu v. United States*, 323 U.S. 214, 248 (1944) (Jackson, J., dissenting))).

213. *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003).

214. *See id.*

215. 539 U.S. 244 (2003).

216. *Compare Grutter*, 539 U.S. at 327–30, 334 (upholding University of Michigan Law School affirmative action program for student admissions), *with Gratz*, 539 U.S. at 255–57, 275–76 (invalidating an arguably indistinguishable University of Michigan undergraduate affirmative action program on same day that *Grutter* was decided).

217. *See Gratz*, 539 U.S. at 279–80 (O'Connor, J., concurring) (holding that the undergraduate program must have individualized consideration); *see also Spann, Good Faith Discrimination*, *supra* note 140, at 601–02.

218. *See Grutter*, 539 U.S. at 328–29.

219. *Cf. Fisher II*, 136 S. Ct. 2198, 2215 (2016) (Thomas, J., dissenting) (arguing that *Grutter* should be overruled). Justice Thomas stated:

I write separately to reaffirm that “a State’s use of race in higher education admissions decisions is categorically prohibited by the Equal Protection Clause.” “The Constitution abhors classifications based on race because every time the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all.” That constitutional imperative does not change in the face of a “faddish theor[y]” that racial discrimination may produce “educational benefits.” The Court was wrong to hold otherwise

*University of Texas at Austin (Fisher I)*<sup>220</sup> provided the Court with such an opportunity. But Justice Kennedy—who had dissented from the Court’s decision in *Grutter*—instead provided a fifth vote to remand the case for more stringent application of the narrow-tailoring prong of the strict scrutiny test.<sup>221</sup>

After remand, when the Court heard the case again in 2016 (*Fisher II*), Justice Kennedy wrote a five-to-four majority opinion upholding the University of Texas affirmative action plan, which had been modeled on the plan upheld in *Grutter*.<sup>222</sup> However, now that Justice Kavanaugh has replaced Justice Kennedy on the Court, and Justice Barrett has replaced Justice Ginsburg, the current six-to-three conservative majority on the Supreme Court may well overrule *Grutter* or so narrow its applicability that it loses any meaningful precedential value for upholding future racial affirmative action.<sup>223</sup>

Although Justice O’Connor’s opinion in *Grutter* upheld the University of Michigan Law School affirmative action plan, it also forcefully reaffirmed the assertion first articulated by Justice Powell in *Bakke*, that efforts to achieve racial balance in the distribution of resources would be “patently unconstitutional.”<sup>224</sup> That statement has been reasserted in numerous other Supreme Court opinions, including *Fisher I*, *Parents Involved*, and *Fisher II*.<sup>225</sup> If this Article is correct in its conclusion that racial equality cannot be achieved without first securing racial balance in the distribution of societal resources, the Supreme Court’s affirmative action doctrine simply precludes the possibility of achieving racial equality.

Consistent with this view, *Parents Involved* invalidated a race-conscious student assignment program that was adopted to reduce the resegregation occurring in public schools as a result of population shifts that increased de facto residential segregation.<sup>226</sup> Bizarrely, Chief Justice Roberts actually invoked *Brown v. Board of Education* in support of his decision to protect school

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in *Grutter v. Bollinger*, 539 U.S. 306, 343, 123 S. Ct. 2325, 156 L.Ed.2d 304 (2003). I would overrule *Grutter* and reverse the Fifth Circuit’s judgment.

*Id.* (citations omitted).

220. 570 U.S. 297.

221. *See id.* at 303, 311–15.

222. *See Fisher II*, 136 S. Ct. at 2206, 2215.

223. *See* Ellie Gardey, *The Looming End to Affirmative Action*, AM. SPECTATOR (Dec. 12, 2020, 12:05 AM), <https://spectator.org/affirmative-action-scotus/> [<https://perma.cc/Z6UD-PNPK> (dark archive)].

224. *See Grutter v. Bollinger*, 539 U.S. 306, 329–30 (2003).

225. *See, e.g., Fisher I*, 570 U.S. at 311; *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 723 (2007); *Fisher II*, 136 S. Ct. at 2225–26; *see also* Spann, *Race Ipsa Loquitur*, *supra* note 139, at 1083–84 (citing additional cases).

226. *See Parents Involved*, 551 U.S. at 733–35 (plurality opinion) (stating that the resegregation plan did not advance a compelling interest in diversity and was not narrowly tailored).

resegregation.<sup>227</sup> The Court further reinforced its inclination to protect existing racially disparate impact in *Ricci v. DeStefano*,<sup>228</sup> where it threatened to hold unconstitutional Title VII's statutory prohibition on racially disparate impact in employment discrimination.<sup>229</sup> The Court imposed a saving construction on the statute in order to avoid applying its disparate impact standard.<sup>230</sup> But in his concurring opinion, Justice Scalia suggested that he already viewed the statutory disparate impact standard as unconstitutional because it did not survive the *Washington v. Davis* and *Feeney* intentional discrimination test.<sup>231</sup>

The Court's threat to invalidate disparate impact statutes is given increased plausibility by the Court's 2013 *Shelby County* decision, which invalidated the statistically based provision of the Voting Rights Act that was needed to enforce the Act's preclearance requirement for jurisdictions with a racially disparate history of suppressing nonwhite voting.<sup>232</sup> It is true that the Court's 2015 decision in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*<sup>233</sup> rejected a challenge to the disparate impact provision of the Fair Housing Act of 1968—albeit with a *Ricci*-inspired stringent causation requirement that limits the application of the disparate impact standard.<sup>234</sup> However, the five-to-four majority in that case included Justices Kennedy and Ginsburg, both of whom are no longer on the Court.<sup>235</sup> It is questionable whether the Supreme Court's tolerance of disparate impact will survive the Court's present six-to-three conservative majority.

In addition to the many impediments that the Supreme Court's affirmative action rules have erected to prevent a more racially equitable reallocation of societal resources, Professor Dan Farber has emphasized that the Supreme Court's law of affirmative action is itself racially discriminatory.<sup>236</sup> For example, when government action—such as the police officer verbal skills test administered in *Washington v. Davis*—has a known racially disparate impact, the adverse effect on nonwhites does not count as intentional discrimination.<sup>237</sup>

227. *See id.* at 743; *cf. id.* at 798–99 (Stevens, J., dissenting) (noting “cruel irony” in Chief Justice Roberts' invocation of *Brown* to compel resegregation).

228. 557 U.S. 557 (2009).

229. *See id.* at 563, 582–93.

230. *See id.* at 582–93.

231. *See id.* at 594–96 (Scalia, J., concurring).

232. *See Shelby County v. Holder*, 570 U.S. 529, 550–57 (invalidating Section 4 of the Voting Rights Act of 1965).

233. 135 S. Ct. 2507.

234. *See id.* at 2523–25.

235. *Id.* at 2512.

236. *See* DANIEL A. FARBER, WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & JANE S. SCHACTER, *CASES AND MATERIALS ON CONSTITUTIONAL LAW: THEMES FOR THE CONSTITUTION'S THIRD CENTURY* 354–58 (5th ed. 2013) (describing a racially correlated discrepancy in the Supreme Court's treatment of racial discrimination claims).

237. *See Washington v. Davis*, 426 U.S. 229, 232–37 (1976).

That is because the government does not have the “because of” intent to harm nonwhites that is required by *Feeney*. However, when government action—such as the set asides for socially and economically disadvantaged nonwhite construction contractors in *Adarand*—has a known racially disparate impact, the adverse effect on Whites does count as intentional discrimination.<sup>238</sup> That is true even though the government was not motivated by a desire to harm Whites, but only to help disadvantaged nonwhite contractors “in spite of” the adverse impact on Whites that should be permitted by *Feeney*. Accordingly, disparate impact counts as unconstitutional racial discrimination when Whites are disadvantaged, but not when nonwhites are disadvantaged.<sup>239</sup> Stated differently, maintaining or exacerbating current racial disparities in the allocation of societal resources is not unconstitutional. But trying to remedy current racial disparities in the allocation of societal resources is.<sup>240</sup>

I have tried to demonstrate that the Supreme Court, whose Justices are selected and confirmed in large part because of their political and ideological beliefs, has developed a law of affirmative action that is striking in its preference for the interests of Whites over the interests of nonwhites. The Court has held that the Equal Protection Clause of the Reconstruction Fourteenth Amendment protects the interests of the White majority when they conflict with the interests of nonwhite minorities.<sup>241</sup> It has held that the same typically-fatal strict scrutiny standard of review that governs invidious discrimination also applies to benign affirmative action.<sup>242</sup> It has held that the Constitution does not permit race-conscious remedies for general societal discrimination.<sup>243</sup> It has held that *Brown v. Board of Education* protects the de facto resegregation of public schools, even when school districts wish to use race-conscious pupil assignment to prevent that resegregation.<sup>244</sup> It has held that disparate impact does not count as a form of unconstitutional racial discrimination.<sup>245</sup> And it has

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238. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 204 (1995).

239. See FARBER ET AL., *supra* note 236, at 357–58.

240. It is true that racial affirmative action programs tend to use facial race-based classifications, and that such facial use of race is typically absent in other government actions that produce racially disparate impacts. But it is not clear why that should matter when the facial use of race for affirmative action purposes is not evidence of an invidious intent to harm Whites under *Washington v. Davis* and *Feeney*. In addition, as illustrated by the majority-minority voting districts at issue in cases like *Shaw v. Reno* and *Miller v. Johnson*, the Supreme Court sometimes invalidates racial affirmative action plans designed to protect nonwhite voters even when the affirmative action plans are facially neutral. See *supra* text accompanying notes 203–06.

241. See *supra* text accompanying notes 202–04.

242. See *supra* text accompanying notes 191–96.

243. See *supra* Section II.C.

244. See *supra* text accompanying note 227.

245. See *supra* Section II.A.

held that the Constitution prohibits the pursuit of racial balance, which the Court deems to be “patently unconstitutional.”<sup>246</sup>

The Supreme Court’s affirmative action doctrines leave little hope for meaningful progress in the quest for racial equality. Rather, the Court seems firmly committed to the protection, preservation, and perpetuation of the White privilege that has always characterized U.S. culture. Nevertheless, there may be a crack in the Court’s affirmative action jurisprudence that still allows us to promote racial balance in the allocation of societal resources, if only we have the will to do so.

### B. *Equality by Chance*

In a nondiscriminatory culture, the natural distribution of societal resources would be racially proportional.<sup>247</sup> Nevertheless, the Supreme Court has held that the direct pursuit of racial balance in the allocation of resources is prohibited, ironically, by the Equal Protection Clause itself. However, if resources such as university admissions were allocated randomly through a lottery, we would end up with a racially proportional distribution of those resources. Chance would do a better job than the Supreme Court has done in neutralizing disparate impact. And even Justice Thomas believes that such a strategy would be consistent with the Court’s existing affirmative action doctrine.<sup>248</sup> Nondiscriminatory standards could be used to ensure minimum qualifications in a way that was consistent with our current conceptions of merit. Although lottery-based admissions might threaten the prestige of elite

246. See *supra* text accompanying notes 224–25.

247. Some have suggested that racially proportional strategies for allocating educational resources would provide a sensible way to address the current problem of racial discrimination in education. See, e.g., John Charles Boger, *Toward Ending Residential Segregation: A Fair Share Proposal for the Next Generation*, 71 N.C. L. REV. 1573, 1573–74 (1993) (proposing national “Fair Share” tax incentives to eliminate residential segregation, based on statistical compliance with specified desegregation goals); cf. Julius Chambers, John Charles Boger & William Tobin, *How Colleges and Universities Can Promote K-12 Diversity: A Modest Proposal*, POVERTY & RACE, Jan.–Feb. 2008, at 1, 1–2, 11–13, <https://www.prrac.org/pdf/K12DiversityJanMar2008.pdf> [<https://perma.cc/X7FV-6ZSM>] (proposing “diversity capital” admissions plus accorded college and university applicants from racially and economically disadvantaged secondary schools, which would facilitate desired levels of diversity in higher education). In other contexts, I myself have suggested that the pursuit of racial proportionality in the allocation of all significant societal resources offers the best hope of addressing the intractable problem of longstanding and persistent racial discrimination in the United States. See, e.g., Spann, *Race Ipsa Loquitur*, *supra* note 139, at 1086–87; Spann, *Good Faith Discrimination*, *supra* note 140, at 603–05; SPANN, AFFIRMATIVE ACTION, *supra* note 189, at 92–94. In the post-*Brown* school desegregation case of *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), even Chief Justice Burger suggested that the pursuit of racial balance through the use of “mathematical ratios” was “likely to be a useful starting point in shaping a remedy to correct past constitutional violations.” *Id.* at 25. However, as the text following this footnote indicates, the Supreme Court has since become particularly hostile to the pursuit of equality through racial proportionality. The lottery-based strategy advanced in this Article should, therefore, be viewed as only a second-best solution.

248. See *infra* text accompanying notes 273–74.

universities, any loss of prestige would be easily offset by the ensuing benefits of racial justice. Similarly, lottery-based affirmative action could be used to remedy disparate impact in the distribution of other societal resources as well. Because U.S. culture has internalized a baseline assumption of White privilege, we are unlikely to make meaningful strides toward racial equality in the absence of some sort of precommitment that precludes us from succumbing to our ubiquitous structural practices and implicit biases. But the adoption of randomized affirmative action might constitute such a precommitment; it would bind us to an understanding of racial justice that encompasses the resource distribution that would exist in a truly nondiscriminatory culture.

Imagine a university that used lottery-based admissions as an affirmative action plan to promote diversity in its student body.<sup>249</sup> Statistically, the makeup of the ensuing class would reflect the racial composition of the applicant pool. If the university chose to minimize barriers to entry that were racially correlated—such as geographic limitations, religious restrictions, or high application fees—the composition of the applicant pool would reflect the racial composition of the larger pertinent population as well. It is true that individual applicant preferences, such as the desire to attend universities or the ability to pay tuition, might be racially skewed. But those racial differences would likely reflect differences in socialization, acculturation, or social and economic inequalities that themselves reflect structural forms of racial discrimination or implicit bias, rather than reflecting inherent racial differences. Universities could decide how much they wish to correct for those factors in their efforts to get their applicant pools to mirror the diversity that exists in the culture at large. The goal would be to get a natural distribution of students that approximated the racial diversity that would exist in a nondiscriminatory culture.

Educational experts have begun to consider lottery-based admissions as a way of increasing student body diversity, but they note that without a true commitment to diversity, many loopholes can be exploited to undermine the success of lottery programs.<sup>250</sup> Despite vigorous controversy, some high schools have adopted randomized lottery admissions that increase student diversity and reduce the racially disparate impact of traditional racially correlated admissions criteria. For example, prestigious Lowell High School in San Francisco responded to COVID-19 standardized testing difficulties by admitting its entire 2021–2022 class through a lottery.<sup>251</sup> It has now made a version of lottery-based

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249. The details of a lottery admissions system could vary, but for present purposes, I am more interested in the lottery concept than the details of particular systems that might be adopted.

250. See Anya Kamenetz, *What If Elite Colleges Switched to a Lottery for Admissions*, NPR (Mar. 27, 2019, 7:01 AM), <https://www.npr.org/2019/03/27/705477877/what-if-elite-colleges-switched-to-a-lottery-for-admissions> [<https://perma.cc/Y7VL-XY9L> (dark archive)].

251. See David K. Li, *Prominent San Francisco High School Could Drop Academic Achievement for Admissions*, NBC NEWS (Feb. 2, 2021, 9:43 PM), <https://www.nbcnews.com/news/asian-america/prominent-san-francisco-high-school-could-drop-academic-achievement-admission-n1256488>

admissions permanent as a means of increasing student body diversity.<sup>252</sup> Not surprisingly, the school's permanent lottery proposal has been opposed by many of those who benefit from the traditional exam-based admissions process; they argue that the school's prestige will be reduced by lottery admissions.<sup>253</sup> Others argue that deviation from standardized admissions exams discriminates against Asian Americans who perform well on such exams.<sup>254</sup>

In December 2020, New York City Mayor Bill de Blasio announced a compromise plan to increase diversity in the city's selective high schools and middle schools. The plan retains entrance exams for the city's prestigious high schools but uses lottery-based admissions for the city's selective middle schools.<sup>255</sup> Throughout the nation, some private charter schools in the United States also use weighted lotteries to increase student diversity.<sup>256</sup>

The country's most highly ranked public high school is often said to be Thomas Jefferson High School in Fairfax, Virginia.<sup>257</sup> To increase diversity, the school initially proposed lottery-based admissions in 2020, but the school eventually bowed to pressure from parents and students who wished to retain

[<https://perma.cc/748K-XRL3> (dark archive)]; see also Jay Mathews, *Why Not Lottery Admissions for Great High Schools? It's Not Church Bingo*, WASH. POST (Jan. 16, 2022, 6:00 AM), <https://www.washingtonpost.com/education/2022/01/16/selective-high-school-lottery/> [<https://perma.cc/F8PF-US86> (dark archive)] (discussing lottery-based efforts to increase student diversity at Lowell High School in San Francisco, California, and Thomas Jefferson High School in Fairfax County, Virginia).

252. See Laura Meckler, *Discord in San Francisco Schools, on Race and Reopening, Looms Large*, WASH. POST (May 22, 2021, 4:40 PM), <https://www.washingtonpost.com/education/2021/05/22/san-francisco-school-board-race-reopening/> [<https://perma.cc/TJ3J-PJNW> (dark archive)].

253. See *id.*; Jill Tucker, *'Doesn't Feel Fair': Proposed Lottery Admissions for S.F.'s Elite Lowell High School Met with Frustration and Anger*, S.F. CHRON. (Oct. 14, 2020, 9:21 AM), <https://www.sfchronicle.com/education/article/Doesn-t-feel-fair-Proposed-lottery-15641937.php> [<https://perma.cc/8KA4-DFTC> (dark archive)].

254. See Hannah Natanson, *Fairfax County School System Faces Second Lawsuit over Changes to Thomas Jefferson Admissions*, WASH. POST (Mar. 10, 2021, 6:10 PM), [https://www.washingtonpost.com/local/education/thomas-jefferson-high-lawsuit-admissions-changes/2021/03/10/339e7c3c-81c0-11eb-81db-b02f0398f49a\\_story.html](https://www.washingtonpost.com/local/education/thomas-jefferson-high-lawsuit-admissions-changes/2021/03/10/339e7c3c-81c0-11eb-81db-b02f0398f49a_story.html) [<https://perma.cc/JE82-QAT4> (dark archive)] [hereinafter Natanson, *Fairfax County*].

255. See Laura Meckler & Hannah Natanson, *Schools, Caught by Pandemic and Confronting Systemic Racism, Jettison Testing for Admissions*, WASH. POST (Dec. 18, 2020, 7:11 PM), [https://www.washingtonpost.com/education/nyc-schools-admissions-change-segregation/2020/12/18/6dd18590-4163-11eb-8db8-395dedaaa036\\_story.html](https://www.washingtonpost.com/education/nyc-schools-admissions-change-segregation/2020/12/18/6dd18590-4163-11eb-8db8-395dedaaa036_story.html) [<https://perma.cc/6QBJ-NQRM> (dark archive)]; see also Eliza Shapiro, *Lawsuit Challenging N.Y.C. School Segregation Targets Gifted Programs*, N.Y. TIMES (Oct. 15, 2021), <https://www.nytimes.com/2021/03/09/nyregion/nyc-schools-segregation-lawsuit.html> [<https://perma.cc/7TSB-3C3T> (dark archive)].

256. See NAT'L ALL. FOR PUB. CHARTER SCHS., STATE LAWS ON WEIGHTED LOTTERIES AND ENROLLMENT PRACTICES 4 (2015), [http://www.publiccharters.org/sites/default/files/migrated/wp-content/uploads/2015/06/NPC035\\_WeightedLotteries\\_Digital\\_rev.pdf](http://www.publiccharters.org/sites/default/files/migrated/wp-content/uploads/2015/06/NPC035_WeightedLotteries_Digital_rev.pdf) [<https://perma.cc/5JU3-G8JH>].

257. See, e.g., *Best High Schools Rankings*, U.S. NEWS, <https://www.usnews.com/education/best-high-schools/rankings-overview> [<https://perma.cc/U7G2-AXMQ> (staff-uploaded archive)].

the traditional exam-based admissions process from which they benefitted.<sup>258</sup> The school ultimately chose a compromise designed to increase diversity by admitting a certain percentage of students from each middle school in the region rather than admitting students solely based on test scores.<sup>259</sup>

Although lottery-based university admissions are not common in the United States, lotteries are sometimes used to admit university students in European countries. In addition, some knowledgeable people have now advocated for lottery-based university admissions in the United States as well.<sup>260</sup> Relatedly, many schools are now making optional, or entirely eliminating, standardized university admission tests, such as the SAT and the ACT.<sup>261</sup> And the College Board has modified the format of its SAT exam.<sup>262</sup> Lotteries could also be useful in implementing current calls to improve equity and diversity by dramatically increasing the number of students admitted to selective universities.<sup>263</sup> Although lottery-based admissions are likely to remain

258. See Hannah Natanson, *Fairfax School Board Switches to 'Holistic Review' Admissions System for Thomas Jefferson High School*, WASH. POST (Dec. 18, 2020, 12:20 PM), [https://www.washingtonpost.com/local/education/thomas-jefferson-high-admissions-fairfax/2020/12/18/d09a2b3c-40b9-11eb-8bc0-ae155bee4aff\\_story.html](https://www.washingtonpost.com/local/education/thomas-jefferson-high-admissions-fairfax/2020/12/18/d09a2b3c-40b9-11eb-8bc0-ae155bee4aff_story.html) [<https://perma.cc/JE82-QAT4> (dark archive)].

259. See *id.*; see also Natanson, *Fairfax County*, *supra* note 254.

260. See, e.g., Alia Wong, *Lotteries May Be the Fairest Way To Fix Elite-College Admissions*, ATLANTIC (Aug. 1, 2018), <https://www.theatlantic.com/education/archive/2018/08/lottery-college-admissions/566492/> [<https://perma.cc/4WKJ-FGCY> (dark archive)]; Barry Schwartz, *Do College Admissions by Lottery*, N.Y. TIMES (Sept. 25, 2015, 4:42 PM), <https://www.nytimes.com/roomfordebate/2015/03/31/how-to-improve-the-college-admissions-process/do-college-admissions-by-lottery> [<https://perma.cc/R5W-3KKF> (dark archive)]; Paul Fain, *Call for Lottery-Style College Admissions*, INSIDE HIGHER ED (Apr. 7, 2020), <http://www.insidehighered.com/news/2020/04/07/call-lottery-style-college-admissions> [<https://perma.cc/EKF5-7URM>]; NEW AM., SUPPORTING STUDENTS OF COLOR IN HIGHER EDUCATION 6–7 (2019), [https://s3.amazonaws.com/newamericadotorg/documents/Supporting\\_Students\\_of\\_Color\\_in\\_Higher\\_Education\\_New\\_America.pdf](https://s3.amazonaws.com/newamericadotorg/documents/Supporting_Students_of_Color_in_Higher_Education_New_America.pdf) [<https://perma.cc/U5VD-GLDD>].

261. Nick Anderson, *Applications Surge After Big-Name Colleges Halt SAT and ACT Testing Rules*, WASH. POST (Jan. 29, 2021, 4:28 PM), [https://www.washingtonpost.com/local/education/harvard-iva-sat-act-requirement-college-applications/2021/01/29/90566562-6176-11eb-9430-e7c77b5b0297\\_story.html](https://www.washingtonpost.com/local/education/harvard-iva-sat-act-requirement-college-applications/2021/01/29/90566562-6176-11eb-9430-e7c77b5b0297_story.html) [<https://perma.cc/GPT4-SLEN> (dark archive)]; cf. Valerie Strauss, *More States Seek Federal Waivers from Standardized Tests as Biden's Education Department Extends Deadline for Requests*, WASH. POST (Jan. 29, 2021, 6:30 AM), <https://www.washingtonpost.com/education/2021/01/29/standardized-tests-waiver-states-biden/> [<https://perma.cc/F5W3-8G2L> (dark archive)].

262. See Nick Anderson, *College Board Is Scrapping SAT's Optional Essay and Subject Tests*, WASH. POST (Jan. 19, 2021, 2:10 PM), [https://www.washingtonpost.com/local/education/sat-ending-essay-subject-tests/2021/01/19/ac82cdd8-574a-11eb-a817-e5e7f8a406d6\\_story.html](https://www.washingtonpost.com/local/education/sat-ending-essay-subject-tests/2021/01/19/ac82cdd8-574a-11eb-a817-e5e7f8a406d6_story.html) [<https://perma.cc/57QU-KYVU> (dark archive)] (noting how the SAT is changing by eliminating its optional essay and supplementary subject tests in various fields).

263. See Brandon Busted, *Elite Universities Should Enroll a Million Students*, FORBES (Feb. 20, 2021, 6:55 AM), <https://www.forbes.com/sites/brandonbusted/2021/02/20/elite-universities-should-enroll-a-million-students/?sh=48061e764ba7> [<https://perma.cc/VD5Z-T83R>]; Jay Mathews, *Showing Stingy Ivies How To Become Less Selective but Much Better*, WASH. POST (Feb. 13, 2021, 6:00 AM), [https://www.washingtonpost.com/local/education/ivy-league-admissions-low/2021/02/12/872c2622-6bb0-11eb-9ead-673168d5b874\\_story.html](https://www.washingtonpost.com/local/education/ivy-league-admissions-low/2021/02/12/872c2622-6bb0-11eb-9ead-673168d5b874_story.html) [<https://perma.cc/G8NT-4WEN> (dark archive)]; Jeffrey J. Selingo, *Harvard and Its Peers Should Be Embarrassed About How Few Students They Educate*, WASH. POST (Apr. 8, 2021, 1:19 PM), <https://www.washingtonpost.com/outlook/harvard-and-its-peers->



controversial in the immediate future, they do seem to offer an appealing strategy for those who believe in the importance of reducing the racially disparate impact of current admissions standards in a way that satisfies the doctrinal constraints that the present Supreme Court has imposed on valid affirmative action programs.

Because the stated goal of a lottery-based admissions program would be to increase racial diversity, one might well wonder whether such an affirmative action plan would constitute intentional discrimination that was unconstitutional under *Washington v. Davis* and *Feeney*.<sup>264</sup> Under existing law, the plan would almost certainly be valid. It would be facially neutral by not using the express racial classifications that are contained in some other affirmative action plans.<sup>265</sup> In addition, the goal of enhancing the educational experience of both White and nonwhite students through a more diverse student body seems more like a permissible goal under *Feeney* than a prohibited racial classification under *Washington v. Davis*. If the D.C. Police Department can use an exam to enhance the verbal skills of its police force despite the resulting increase in racial disparities, a university should certainly be able to use a randomized lottery to enhance the educational experience of its student body, despite the resulting decrease in racial disparities. The effect of a lottery on racial disparities seems more like permissible “in spite of” intent, rather than invidious “because of” intent, under *Feeney*.<sup>266</sup>

Even if the university’s random lottery-based admissions plan were somehow deemed to be a racial classification that was subject to strict scrutiny, Supreme Court decisions ranging from *Grutter* to *Fisher II* have held that the pursuit of diversity in the context of higher education is a compelling interest sufficient to satisfy the strict scrutiny standard.<sup>267</sup> And it is hard to think of a more narrowly tailored strategy for enhancing diversity than one that relies on race-neutral randomness rather than on any student’s race. It is true that the new six-to-three conservative majority on the Supreme Court could theoretically overrule *Grutter* and *Fisher*, holding that the pursuit of educational diversity was no longer to be deemed a compelling governmental interest under strict scrutiny analysis. But it would be hard to view such a holding as legitimate. The Court would be ruling that White applicants have a constitutional entitlement to the preferential treatment they are accorded under

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should-be-embarrassed-about-how-few-students-they-educate/2021/04/08/3c0be99c-97cb-11eb-b28d-bfa7bb5cb2a5\_story.html [https://perma.cc/VC55-RK2S (dark archive)].

264. See *supra* Section II.A (discussing *Washington v. Davis* and *Feeney*).

265. For example, the undergraduate affirmative action program that the Court invalidated in *Gratz* gave an explicit admissions preference to “underrepresented minorities,” and it considered African Americans, Hispanics and Native Americans to fit within that category. See *Gratz v. Bollinger*, 539 U.S. 244, 253–54 (2003).

266. See *supra* text accompanying notes 123–27.

267. See *supra* text accompanying notes 211–21.

existing racially disparate admissions criteria and that their entitlement is sufficient to defeat the racially neutral treatment they would be accorded by randomized admissions. The Court would, in essence, be requiring affirmative action for White applicants even though the remedial and diversity goals of affirmative action would be defeated rather than advanced.

In its *Fisher* decisions, the Supreme Court considered the constitutionality of an express racial affirmative action plan that was modeled on the plan the Court had previously upheld in *Grutter*.<sup>268</sup> One of the constitutional challenges to the *Fisher* plan was that it had been rendered unnecessary because Texas had already adopted a Top Ten Percent Plan, under which any student graduating in the top ten percent of his or her high school class was automatically granted admission to the state's flagship University of Texas at Austin.<sup>269</sup> In evaluating and ultimately upholding the plan, the Supreme Court assumed that the Top Ten Percent Plan was racially neutral, even though the clear intent of the legislature in adopting the plan was to promote racial diversity in the state's flagship school.<sup>270</sup> Indeed, the constitutionality of the Top Ten Percent Plan was not even challenged by the White plaintiff.<sup>271</sup>

If the *Fisher* Top Ten Percent Plan was not motivated by intentional discrimination within the meaning of *Washington v. Davis* and *Feeney*, it would be hard to conclude that a randomized lottery admissions plan, designed to advance the very same diversity interest, was unconstitutionally motivated. Moreover, if randomized lottery-based admissions were unconstitutional under *Washington v. Davis* and *Feeney*, then it appears that there would be no other way to remedy the problem of racially disparate university admissions. And that, of course, would make lottery-based admissions the least restrictive means of promoting student diversity, thereby bolstering the plan's claim to constitutional validity even under strict scrutiny.<sup>272</sup>

Another reason that the Court is unlikely to invalidate randomized lottery-based admissions programs, despite their admitted goal of promoting racially balanced student body diversity, is that such a strategy flows from ideas suggested by Justice Thomas himself. Thomas is a staunch opponent of racial affirmative action. However, one of the reasons he gave for rejecting affirmative action in his *Grutter* opinion was that less restrictive alternatives were available to achieve diversity without using racial classifications to advance what he

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268. See *supra* text accompanying notes 220–25.

269. See *Fisher II*, 136 S. Ct. 2198, 2206, 2208–09 (2016).

270. See *id.* at 2211–14.

271. See *id.*

272. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 223–27 (1995) (applying strict scrutiny); see also *Grutter v. Bollinger*, 539 U.S. 306, 327–30 (2003) (same).

termed the “aesthetics” of a diverse student body.<sup>273</sup> He suggested replacing racially correlated “selective” admissions standards with other admissions criteria that did not have a racially disparate impact. One race neutral alternative he proposed was open admissions. Another alternative he proposed was abandoning reliance on racially correlated standardized tests. He emphasized that a school’s desire to retain selective admissions advanced only the school’s interest in maintaining its elite status as a prestigious educational institution. But the interest in remaining an elite institution was not a compelling governmental interest.<sup>274</sup> If open admissions and abandoning the SAT are constitutionally permissible strategies for pursuing racial diversity, then certainly using randomized lottery-based admissions, which never mention race at all, would be a constitutionally permissible strategy as well.

One might argue that lottery-based admissions would abandon the concept of merit. But that is not true. Randomizing selection among applicants who satisfy minimum standards for admission would redefine rather than abandon the concept of merit. The suggestion that grades and standardized test scores exhaust the many factors that comprise merit is too restrictive a view to have much normative appeal. Imagine teaching a case like *Brown v. Board of Education* or *Roe v. Wade* in a class consisting of only White male students who had high grades and exam scores.<sup>275</sup> A diversity of perspectives on complex and contested societal issues is at least as important to a quality educational experience as the GPAs and SAT scores of the students in the class. Grades and test scores merely reflect normative judgments about what factors some people deem to be significant. They do not define a neutral or natural baseline about what is educationally important.

It is all too easy to find smart people to fill the seats in a classroom. What is more difficult is finding students who will question and challenge conventional understandings and norms about the ways in which competing societal interests are presented, recognized, and balanced. What is even more difficult is selecting students in a way that is not skewed by the conscious or implicit biases of the people who do the selecting. Because it is difficult to identify with confidence the optimal mixture of diverse perspectives in an educational setting, a sensible default approach would be to rely on the mixture contained in a student body that was racially balanced—the type of student body that would exist in a culture that was truly nondiscriminatory—the type of student body that would be produced by randomized lottery admissions.

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273. *Grutter*, 539 U.S. 306 at 354–61, 367–71 (Thomas, J., concurring in part and dissenting in part).

274. *See id.* at 356; *see also* Spann, *The Dark Side of Grutter*, *supra* note 9, at 236–39 (discussing Justice Thomas’s rejection of racially correlated efforts to maintain school’s elite status).

275. *See generally* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (ordering desegregation of public schools); *Roe v. Wade*, 410 U.S. 113 (1973) (finding constitutional privacy right to abortion).

Even those who continue to believe that grades and test scores should alone determine university admissions must admit that we often allow other factors to override that narrow conception of merit. Factors such as legacy status, athletic prowess, and geographic residence often supersede grades and test scores in university admissions. Moreover, those deviations from grades and test scores themselves have a racially disparate impact, because they benefit Whites significantly more than they benefit nonwhites.<sup>276</sup> In addition, California's famous Proposition 209<sup>277</sup> ban on race and gender affirmative action continues to allow deviations from merit that are based on preferences related to veteran status, athletics, disability, geography, age, artistic ability, low-income status, and legacy status.<sup>278</sup> If deviations from merit are permissible for such a wide range of factors that benefit Whites, it is not clear why a similar deviation should not also be permitted to reduce the racially disparate impact of grades and standardized test scores in university admissions.

I suspect that many of those who oppose randomized lottery admission efforts to increase racial diversity and reduce the racially disparate impact of traditional admissions standards silently believe that Whites simply possess more merit than nonwhites. To the extent that such a view is supported by traditional measures of merit, it suggests that the ways in which merit is typically measured and acquired are themselves products of the structural discrimination and implicit biases that exist in our culture. That further supports the strategy of addressing such discrimination by randomized affirmative action efforts to reduce racially disparate impact. However, if people nevertheless believe that such efforts are doomed to fail because nonwhites inherently possess less capacity than Whites to acquire merit, that is simply a contemporary form of White supremacy.

Although this Article has focused on lottery-based university admissions, the technique of using randomized lotteries to select among qualified applicants can also be used to reduce racially disparate impact in the allocation of other societal goods and services. Accordingly, lotteries could be used to allocate things like jobs and promotions, to award construction contracts, to grant mortgages and other loans, and to decide who gets coronavirus vaccine shots.

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276. See, e.g., David Benjamin Oppenheimer, *Understanding Affirmative Action*, 23 HASTINGS CONST. L.Q. 921, 965 (1996) (noting that more students are admitted to Harvard each year through legacy preferences than through all racial affirmative action preferences combined); see also *Grutter*, 539 U.S. at 367–68 (Thomas, J., dissenting) (noting that legacy preferences undermine meritocracy in higher education admissions).

277. Proposition 209 was adopted in 1996 as a voter initiative to amend the California Constitution. See CAL. CONST. art. 1, § 31(a); see also *Coal. for Econ. Equity v. Wilson*, 122 F.3d 692, 696 (9th Cir. 1997) (discussing voter initiative and constitutional amendment).

278. See *Coal. for Econ. Equity v. Wilson*, 946 F. Supp. 1480, 1498 n.19, 1499, 1505 (N.D. Cal. 1996) (enumerating types of affirmative action preferences that are untouched by Proposition 209), *vacated* by 122 F.3d 692 (9th Cir. 1997).

Those resources, and many others, are currently distributed in ways that are racially correlated. But randomized allocations would enlist the safeguard of statistical chance as a filter to guard against the cultural forces that end up producing that disparate impact.

University admissions based on randomized lotteries could advance the goal of racial justice by reducing the racially disparate impact of our current university admissions criteria. The benefits would be substantial, because the most significant form of racial discrimination that exists in contemporary U.S. culture is the arguably “unintentional” discrimination permitted by *Washington v. Davis* and *Feeney* despite its disparate impact. Notwithstanding the goal of promoting racial balance, randomized lottery admissions would be constitutionally valid under the current Supreme Court’s law of affirmative action. Lottery-based admissions would also help us overcome the tacit White privilege that is built into our existing baseline assumptions about things like merit. The only significant cost of using lottery-based admissions as an affirmative action remedy for racially disparate impact would be a potential reduction in the esteem and prestige presently possessed by our elite universities. But that is a small price to pay for racial justice.<sup>279</sup> The racial history of the United States suggests that we are not likely to achieve racial equality if left to our own devices. However, by invoking the antidiscrimination safeguard of statistical chance, we may be able to precommit ourselves to achieving a degree of equality that we could not otherwise attain.

#### CONCLUSION

The Supreme Court is best viewed as the head of a political branch of government, whose Justices are chosen by a process that makes their ideological views dispositive in their selection. The constitutional and other doctrinal rules that the Court interprets are sufficiently ambiguous that resorting to the political preferences of the Justices is necessary to give the doctrine operative meaning. However, throughout its history, the political and ideological preferences of the Supreme Court have been invoked in ways that favor the interests of Whites over the interests of nonwhites, thereby making the Court an instrumental player in the maintenance of White privilege.

Subtle forms of White privilege are so pervasively present in the structures and institutions of our society that discrimination in favor of Whites is able to elude formal detection by the legal rules that are supposed to prevent it. As a result, the most promising strategy for pursuing racial equality is to

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279. A loss of prestige and esteem might arguably entail some ensuing financial or economic loss as well. But any such loss would not merit legitimate recognition. That is because the loss would be occasioned only by a school’s curtailed ability to continue receiving the financial benefits that previously flowed from engaging in racially discriminatory admissions.

adopt affirmative action programs that are designed to remedy the dramatic racially disparate impact that exists in the allocation of societal resources. But the Supreme Court has held that efforts to promote such racial balance are patently unconstitutional, because only a narrow conception of intentional discrimination is recognized by the Constitution. The Court thereby accords constitutional protection to the myriad forms of structural discrimination and implicit bias that comprise the most common ways to practice contemporary racial discrimination.

Nevertheless, there is a way that affirmative action can address the problem of racially disparate impact within the confines of the Court's existing jurisprudence. In the context of university admissions, for example, diversity could be enhanced by admitting qualified applicants under a randomized lottery system. Statistical chance would, therefore, provide a safeguard against structural discrimination and implicit bias. And the racial makeup of the student body would approximate the racial makeup of the society at large—just as it would in a racially nondiscriminatory culture.

Despite the admitted goal of promoting racial balance, lottery-based admissions would be sufficiently race-neutral to survive scrutiny by even our new six-to-three conservative Supreme Court under any legitimate interpretation of the Equal Protection Clause. Any ensuing loss of prestige for elite universities would be a small price to pay for enhanced racial justice. Lotteries could be used to allocate other societal resources as well. And a lottery-based system for allocating societal resources would constitute the sort of binding precommitment to racial equality that seems necessary in a society whose other efforts at achieving racial equality have been a failure since before the nation's founding. But it is a commitment that we will be willing to make only if we genuinely believe in racial equality.

I do have one reservation in proposing randomized lottery-based strategies for societal resource allocation. My proposal represents an effort to color within the lines established by the Supreme Court's existing doctrinal framework. The danger in complying with, rather than defying, such a framework is that I am actually legitimating the Court's assertion of constitutional power over an important issue of social policy. At least where race is involved, such social policy issues should properly be resolved by other branches of government whose histories of dealing with nonwhite interests are at least marginally less hostile than the Supreme Court's long history of protecting White privilege. Perhaps, rather than trying to circumvent the Court's prohibition on pursuing racial balance to remedy racially disparate impact, it might make more sense to challenge that prohibition head on. But, if so, that is a story for another day.