DESEGREGATING CRIMINAL CODES, ROOT AND BRANCH: THE DUTY NOT TO ENFORCE UNCONSTITUTIONAL LAWS*

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In the school segregation context, the Supreme Court has held that governments have an affirmative duty to eliminate the vestiges of racial discrimination, root and branch. While criminal codes, state and federal, are also afflicted by vestiges of discrimination, the Court has imposed no equivalent affirmative duty on legislatures or Congress. As a result, not only are many people affected by past criminal records based on unconstitutional crimes, people are now charged with offenses under statutes which were unconstitutional when enacted. Nevertheless, when challenged, modern courts are reluctant to rule that facially neutral, discriminatorily motivated laws are void. This Article proposes that governments should—and do—have a duty to scour their laws to determine which statutes were motivated by racial oppression. It also proposes that a dispositive, or at least significant, factor in determining whether an unconstitutionally motivated law is now invalid should be whether the jurisdiction has audited its code for discriminatory provisions and repealed those which were invalid.

INTRODUCTION

This Article offers a new consideration for courts evaluating whether a racially motivated law is nevertheless valid because it is "purged of its taint": whether the jurisdiction has made a good-faith effort to evaluate whether racist laws remain on its books. That a jurisdiction has not sought to identify

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unconstitutional laws is a strong, perhaps dispositive, indication that it does not consider compliance with equal protection principles to be a high priority.

This Article proceeds in two parts. Part I discusses why it is a significant issue that racially discriminatory laws remain on the books, reviewing discrimination caselaw and scholarly critiques of the judiciary's tepid response to historical discrimination. Part II argues that state legislatures have an affirmative duty not to perpetuate discriminatory laws, and that a key feature of that duty is the obligation to scrutinize their statutory codes to find and root out unconstitutional remnants of a racist past. It urges that whether a legislature has complied with this duty, making a good-faith effort to find and repeal discriminatory laws, should influence—if not determine—whether a particular statute has shaken off its racist past.

I. THE PROBLEM OF RACIST, FACIALLY NEUTRAL LAWS

The problem of racist but facially neutral laws is significant for several reasons. First, one of the features of American society that is most burdensome to people of color is the criminal legal system. The death penalty is, of course, a total deprivation. Imprisonment leaves a person alive but involves a nearly complete loss of meaningful freedom. Conviction of a crime, even without imprisonment, can result in economic and social catastrophe. And a conviction, or even an arrest apart from any formal punishment, can give rise to a criminal record equivalent to a virtual ball and chain.[1]

Criminalization and criminal records must be considered in the context of a United States that has been profoundly shaped by race. At a very broad level of generality, most of the land in the United States was once owned by Indigenous tribes; almost all of it has moved out of their possession.[2] Roughly half of the world is Asian, and the United States fancies itself a "Nation of

1. Analytically, the burden of criminal records, particularly the racially disparate burden of criminal records, can be mitigated in one of several ways. First, substantive decriminalization, like marijuana legalization. Second, reasonable enforcement of laws on the books, such as discouraging racially selective enforcement, or not having police in schools. Third, restrictions on dissemination maintenance of records which have been created, such as through sealing or expungement, or destruction of nonconviction records. Fourth, the law may create nondiscrimination rules against people with records. Of these, there is reason to think that substantive decriminalization is the most effective, given the evidence that once a criminal record is created, the cat is out of the bag, and it may have effects notwithstanding laws designed to ameliorate its effects.

2. Justin Farrell, Paul Berne Burow, Kathryn McConnell, Jude Bayham, Kyle Whyte & Gal Koss, *Effects of Land Dispossession and Forced Migration on Indigenous Peoples in North America*, 374 SCIENCE 578, 578 (2021) (summarizing study findings).

Immigrants,"[3] but as late as 1960, thanks to the robust Asian exclusion policy,[4] the Asian population of the United States was reduced to a fraction of one percent.[5] In the United States, persons of African ancestry experienced slavery, and then a Jim Crow regime of remarkable scope and vigor.[6] A United States in which rights had not been allocated primarily by race would be a dramatically different place than the one which now exists, based on these three examples alone.

There are, of course, many more examples. Modern scholarship increasingly reveals how racial policy operated in a wide range of institutional and statutory contexts. Racial discrimination was embedded in federal land and

3. *See generally* John F. Kennedy, *A Nation of Immigrants*, *in* JOHN F. KENNEDY IN HIS OWN WORDS 222 (Eric Freeman & Howard Hoffman eds., 2005) (an essay detailing the history of American immigration policy).

4. Important examples include the Naturalization Act of 1790, limiting citizenship to foreign-born migrants who were "free white persons," the Chinese Exclusion Act of 1882, and the Immigration Act of 1924, which excluded most Asians. Gabriel J. Chin, *The Civil Rights Revolution Comes to Immigration Law: A New Look at the Immigration and Nationality Act of 1965*, 75 N.C. L. REV. 273, 280–82 (1996).

5. U.S. CENSUS BUREAU, SUPPLEMENTARY REPORTS: RACE OF THE POPULATION OF THE UNITED STATES, BY STATES: 1960, at 3 (1961), https://www2.census.gov/library/publications/decennial/1960/pc-s1-supplementary-reports/pc-s1-10.pdf [https://perma.cc/VGF9-SBNH]. People who identify as neither Black nor White were in total less than one percent of the population. *Id.* Latinx people were not separately tabulated. *Id.*

6. *See* PAULI MURRAY, STATES' LAWS ON RACE AND COLOR 5–6 (Univ. Ga. Press ed., 1997) (1951). As one measure of the impact of Jim Crow, given their majority of the population in three states, and having over forty percent of the population in four more, in free and fair elections, there is reason to think that African Americans would have had enormous political influence across the whole United States. *See* Gabriel J. Chin & Randy Wagner, *The Tyranny of the Minority: Jim Crow and the Counter-Majoritarian Difficulty*, 43 HARV. C.R.-C.L. L. REV. 65, 66 (2008) (noting that in 1880 African Americans constituted a majority of the population in Louisiana, Mississippi, and South Carolina, and over forty percent of the population in Alabama, Florida, Georgia, and Virginia).

housing policy,[7] in education,[8] in the G.I. Bill,[9] in the civil service,[10] in Social Security,[11] in federal farm programs,[12] in taxation,[13] in family law,[14] in states and towns[15] as well as at the federal level,[16] and in the North as well as the South. Based on the portions of the system of discrimination that are documented, the appropriate question seems to be whether, before some date in the modern era, there was any place, industry, occupation, or sphere of life where people of color had a reasonably equal shot at education, employment, political participation, or housing.

7. *See generally* RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA (2017) (arguing residential housing segregation is no accident but rather the result of purposeful public policy); Gabriel J. Chin, *Black Equal Citizenship and Residential Segregation in the Supreme Court's Race Jurisprudence*, 75 U.C. L.J. 1581 (2024) [hereinafter Chin, *Black Equal Citizenship*] (analyzing how housing segregation was perpetuated through a variety of racist systems like zoning, restrictive covenants, and federal financing); Joy Milligan, Plessy *Preserved: Agencies and the Effective Constitution*, 129 YALE L.J. 924 (2020) (discussing how "separate but equal" was implemented through federal housing programs).

8. *See, e.g.*, Joy Milligan, *Subsidizing Segregation*, 104 VA. L. REV. 847, 849 (2018) (discussing federal financing of segregated schooling, pre- and post-*Brown*).

9. *See generally* KATHLEEN J. FRYDL, THE GI BILL 234–54 (2009) (discussing how the benefits guaranteed by the G.I. Bill were not given equally to Black veterans); Juan F. Perea, *Doctrines of Delusion: How the History of the G.I. Bill and Other Inconvenient Truths Undermine the Supreme Court's Affirmative Action Jurisprudence*, 75 U. PITT. L. REV. 583 (2014) (arguing the G.I. Bill encouraged segregation by leaving distribution of education and housing benefits to private parties).

10. Daiquiri J. Steele, *Enforcing Equity*, 118 NW. U. L. REV. 577, 593 (2023) (discussing segregation in federal civil service); Gabriel J. Chin & Sam Chew Chin, *The War Against Asian Sailors and Fishers*, 69 UCLA L. REV. 572, 574 (2022) (discussing discrimination in federal maritime employment).

11. Jon C. Dubin, *The Color of Social Security: Race and Unequal Protection in the Crown Jewel of the American Welfare State*, 35 STAN. L. & POL'Y REV. 104, 108–09 (2024); Juan F. Perea, *The Echoes of Slavery: Recognizing the Racist Origins of the Agricultural and Domestic Worker Exclusion from the National Labor Relations Act*, 72 OHIO ST. L.J. 95, 96 (2011).

12. PETE DANIEL, DISPOSSESSION: DISCRIMINATION AGAINST AFRICAN AMERICAN FARMERS IN THE AGE OF CIVIL RIGHTS 20–24 (2013).

13. *See generally* ANDREW W. KAHRL, THE BLACK TAX: 150 YEARS OF THEFT, EXPLOITATION, AND DISPOSSESSION IN AMERICA (2024) (discussing the overtaxation of Black individuals).

14. *See generally* Rose Cuison Villazor, *The Other* Loving: *Uncovering the Federal Government's Racial Regulation of Marriage*, 86 N.Y.U. L. REV. 1361 (2011) (discussing how antimiscegenation laws were enforced by federal officials abroad to prevent marriages between American soldiers and Japanese women and preserve "White racial supremacy").

15. *See, e.g.*, Buchanan v. Warley, 245 U.S. 60, 61, 82 (1917) (invalidating a local housing ordinance that forbid people of color from buying property in neighborhoods where a majority of residents were White); Chin, *Black Equal Citizenship*, *supra* note 7, at 1587–89 (discussing how despite the holding in *Buchanan v. Warley*, racial zoning was largely used to segregate).

16. *See generally* Joy Milligan, *Remembering: The Constitution and Federally Funded Apartheid*, 89 U. CHI. L. REV. 65 (2022) (arguing the judiciary "silenc[ed]" Fifth Amendment claims through procedural means).

Although statutory law shares this history of racism, courts have proved reluctant to strike down criminal laws on constitutional grounds.[17] Some scholars have noted the connections between race and crimes involving disorderly conduct,[18] vagrancy,[19] and drugs.[20] Nevertheless, courts have not been eager to find that the presumption of constitutionality has been overcome. After an early post-Civil War period in which courts invalidated facial racial classifications,[21] discriminators—many of whom, after all, were assisted by able legal counsel—learned their lesson and sought out facially neutral means of discriminating.[22] This, the Supreme Court held, in cases like *Williams v.*

17. *See, e.g.*, Darryl K. Brown, *Strict Liability in the Shadow of Juries*, 67 SMU L. REV. 525, 539–40 (2014) ("In general, especially in the wake of Warren Court era, the dominant narrative of American criminal justice, for most Supreme Court justices and some commentators, is that criminal defendants enjoy strong (perhaps excessively strong) procedural protections. This regime of procedural safeguards is accompanied by the Constitution's notable lack of parameters for substantive criminal law or punishment. Save for limits that follow as corollaries from guarantees of free expression, gun ownership, or personal privacy, the Constitution places almost no constraints on what legislators may criminalize or how they may define offenses."); Donald A. Dripps, *Why* Gideon *Failed: Politics and Feedback Loops in the Reform of Criminal Justice*, 70 WASH. & LEE L. REV. 883, 904 (2013) ("Legislatures may not overrule the Court's constitutional rulings about criminal procedure. Current constitutional law, however, leaves legislatures free to underfund indigent defense and to increase both the scope and the severity of the substantive criminal law."); Paul D. Butler, *Poor People Lose*: Gideon *and the Critique of Rights*, 122 YALE L.J. 2176, 2201 (2013) ("States reacted to Warren Court criminal procedure holdings by making the substantive criminal law more punitive, to compensate for the rights provided to accused persons.").

18. *See, e.g.*, Rachel Moran, *Doing Away with Disorderly Conduct*, 63 B.C. L. REV. 65, 66 (2022); Jamelia N. Morgan, *Rethinking Disorderly Conduct*, 109 CALIF. L. REV. 1637, 1642 (2021).

19. *See, e.g.*, William O. Douglas, *Vagrancy and Arrest on Suspicion*, 70 YALE L.J. 1, 4–5 (1960); Risa L. Goluboff, *Dispatch from the Supreme Court Archives: Vagrancy, Abortion, and What the Links Between Them Reveal About the History of Fundamental Rights*, 62 STAN. L. REV. 1361, 1362 (2010); Ahmed A. White, *A Different Kind of Labor Law: Vagrancy Law and the Regulation of Harvest Labor, 1913–1924*, 75 U. COLO. L. REV. 667, 670 (2004).

20. *See, e.g.*, DAVID F. MUSTO, THE AMERICAN DISEASE: ORIGINS OF NARCOTIC CONTROL 294–96 (3d ed. 1999); Gabriel J. Chin, *Race, the War on Drugs, and the Collateral Consequences of Criminal Conviction*, 6 J. GENDER RACE & JUST. 255, 256 (2002); André Douglas Pond Cummings & Steven A. Ramirez, *The Racist Roots of the War on Drugs & the Myth of Equal Protection for People of Color*, 44 U. ARK. LITTLE ROCK L. REV. 453, 455 (2022); Michael Tonry, *Race and the War on Drugs*, 1994 U. CHI. LEGAL F. 25, 27; Doris Marie Provine, *Race and Inequality in the War on Drugs*, 7 ANN. REV. L. & SOC. SCI. 41, 42 (2011); Erik Grant Luna, *Our Vietnam: The Prohibition Apocalypse*, 46 DEPAUL L. REV. 483, 483 (1997).

21. *See* Strauder v. West Virginia, 100 U.S. 303, 312 (1879) (holding that a statute prohibiting African Americans from serving on juries was invalid).

22. Empirically, the presumption that all persons know the law is particularly likely to in fact be true in the case of government officials who are themselves lawyers, like attorneys general and prosecutors, and those who have access to legal advice in connection with their duties, such as legislators and executive officials.

Mississippi,[23] was not unconstitutional.[24] In *Williams*, the Court declined to invalidate a provision of the Mississippi Constitution designed to disenfranchise African Americans.[25] Thus, no matter how consciously and deliberately calculated to discriminate on the basis of race, facially neutral laws were unassailable in the absence of proof of discriminatory enforcement. As recently as 1971, a majority of the Court wrote: "no case in this Court has held that a legislative act may violate equal protection solely because of the motivations of the men who voted for it."[26]

But in 1977, in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,[27] the Court held, without disagreement, that "[p]roof of racially discriminatory intent or purpose" would invalidate governmental action.[28] Thus, there are three ways a law may be subject to strict scrutiny and therefore invalid unless narrowly tailored to advance a compelling state interest. First, if a law includes a facial racial classification, it will be subject to strict scrutiny.[29] Second, it might be facially neutral but so transparently designed to discriminate that it is deemed intentionally discriminatory.[30] Finally, if there is satisfactory proof of discriminatory motivation for a law—although facially neutral—that targets particular races.[31]

23. 170 U.S. 213 (1898).

24. *See id.* at 225. The Court declined to invalidate a section of the Mississippi Constitution of 1890 designed to disenfranchise African Americans. The Mississippi Supreme Court described the provision thusly:

> Within the field of permissible action under the limitations imposed by the federal constitution, the convention swept the circle of expedients to obstruct the exercise of the franchise by the negro race . . . . Restrained by the federal constitution from discriminating against the negro race, the convention discriminates against its characteristics, and the offenses to which its criminal members are prone.

Ratliff v. Beale, 20 So. 865, 868 (Miss. 1896). The U.S. Supreme Court was untroubled. *See Williams*, 170 U.S. at 225.

25. 170 U.S. at 220–24.

26. Palmer v. Thompson, 403 U.S. 217, 224 (1971).

27. 429 U.S. 252 (1977).

28. *Id.* at 265.

29. This includes classic forms of discrimination, such as segregation. *See* Johnson v. California, 543 U.S. 499, 505 (2005) (applying strict scrutiny to racial segregation in prison); *see also* Palmore v. Sidoti, 466 U.S. 429, 433 (1984) (holding that a mother's interracial marriage was insufficient to warrant termination of parental rights).

30. *See Arlington Heights*, 429 U.S. at 266 (first citing Yick Wo v. Hopkins, 118 U.S. 356 (1886); then citing Guinn v. United States, 238 U.S. 347 (1915); then citing Lane v. Wilson, 307 U.S. 268 (1939); and then citing Gomillion v. Lightfoot, 364 U.S. 339 (1960)) ("Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face.").

31. *Id.* at 265–66 ("But racial discrimination is not just another competing consideration. When there is a proof that a discriminatory purpose has been a motivating factor in the decision, this judicial deference is no longer justified."); *see also id.* at 267 ("The historical background of the decision is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes.").

The Supreme Court has had to address discrimination in a number of contexts, and, on the surface, the Court's application of the law sometimes seems hostile to racial discrimination against African Americans and other forms of invidious discrimination. In *Hunter v. Underwood*,[32] for example, the Court was faced with a state constitutional provision designed to disenfranchise because of race.[33] The Court held that "[the provision's] original enactment was motivated by a desire to discriminate against blacks on account of race and the section continues to this day to have that effect. As such, it violates equal protection under *Arlington Heights*."[34]

Another recent case, *Ramos v. Louisiana*,[35] invalidated nonunanimous criminal jury verdicts of guilty on originalist grounds.[36] However, some members of the Court noted the racist history of the provisions:

> Although Ramos does not bring an equal protection challenge, the history is worthy of this Court's attention. That is not simply because that legacy existed in the first place—unfortunately, many laws and policies in this country have had some history of racial animus—but also because the States' legislatures never truly grappled with the laws' sordid history in reenacting them.[37]

In cases like *Flowers v. Mississippi*,[38] a conservative Court seemed to be taking race discrimination in jury selection seriously;[39] and in *Pena-Rodriguez v. Colorado*,[40] it allowed the traditional secrecy attached to the jury room to be pierced to determine whether bias affected a verdict.[41] In other cases, the Justices have been attentive to various forms of racism and discrimination.[42]

32. 471 U.S. 222 (1985).

33. *Id.* at 224.

34. *Id.* at 233.

35. 140 S. Ct. 1390 (2020).

36. *Id.* at 1402 ("Louisiana . . . overlooks the fact that, at the time of the Sixth Amendment's adoption, the right to trial by jury *included* a right to a unanimous verdict.").

37. *Id.* at 1410 (Sotomayor, J., concurring) (citing United States v. Fordice, 505 U.S. 717, 729 (1992)).

38. 139 S. Ct. 2228 (2019).

39. *Id.* at 2244.

40. 137 S. Ct. 855 (2017).

41. *Id.* at 869.

42. *See* United States v. Vaello Madero, 142 S. Ct. 1539, 1552 (2022) (Gorsuch, J., concurring) ("A century ago in the Insular Cases, this Court held that the federal government could rule Puerto Rico and other Territories largely without regard to the Constitution. It is past time to acknowledge the gravity of this error and admit what we know to be true: The Insular Cases have no foundation in the Constitution and rest instead on racial stereotypes. They deserve no place in our law."); Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2259–60 (2020) (referring to anti-Catholic bigotry); Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2097 n.3 (2019) (Thomas, J., concurring in the judgment) (referring to anti-Catholic hostility on the part of Congress and the Court); Shelby Cnty. v. Holder, 570 U.S. 529, 544 (2013) (noting the "fundamental principle of *equal* sovereignty" among states (quoting Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 203 (2009)).

Despite some high-profile victories, challenges to criminal laws based on race have proved remarkably unsuccessful. Legal scholar Eric Fish recently examined the legislative history of one of the most commonly charged federal criminal statutes, prohibiting reentry of a person after deportation, and found that it, too, was motivated by racism.[43] While the law was challenged in a number of jurisdictions, the courts bent over backwards to hold that it was valid, in large part because it was recodified in 1952 and 1965 as part of comprehensive immigration measures.[44] Recently, the Seventh[45] and Tenth[46] Circuits have likewise rejected challenges to the law. A powerful challenge to the sentencing disparity between crack and powder cocaine under federal law won a victory in a trial court, but was reversed on appeal.[47] Recently, a divided Fifth Circuit en banc rejected a challenge to the law at issue in *Williams v. Mississippi*;[48] although the law would have been invalid as enacted, subsequent amendments, the court found, rendered it constitutional. Justices Jackson and Sotomayor dissented from the Supreme Court's refusal to grant certiorari.[49]

Scholars have criticized the judiciary's tepid response to historical discrimination against people of color, which still reverberates in law today. Professor Arulanantham has objected to the Court's continued reliance on precedent infused with racism.[50] Professor Simard has written about judicial

43. Eric S. Fish, *Race, History, and Immigration Crimes*, 107 IOWA L. REV. 1051, 1106 (2022).

44. *See id.* at 1098.

45. United States v. Viveros-Chavez, 114 F.4th 618, 630 (7th Cir. 2024) ("We recognize that § 1326 and its enforcement have had significant consequences for individuals in the Mexican and Latino communities. But such policy concerns are better directed to the political branches of our government. Here, we conclude that the district court did not clearly err in finding that § 1326 was not motivated by racial animus against Mexican and Latino persons. We therefore affirm.").

46. United States v. Amador-Bonilla, 102 F.4th 1110, 1116–17 (10th Cir. 2024) ("With this in mind, notwithstanding the actions of earlier Congresses, we must begin our analysis with the presumption that the 1952 Congress acted in good faith in reenacting the illegal reentry provision. The burden is on Amador-Bonilla to show otherwise." (first citing Abbott v. Perez, 138 S. Ct. 2305, 2305 (2018); then citing United States v. Carrillo-Lopez, 68 F.4th 1133, 1153 (9th Cir. 2023), *cert. denied*, 144 S. Ct. 703 (2024) (mem.); then citing N.C. State Conf. of the NAACP v. Raymond, 981 F.3d 295, 298 (4th Cir. 2020); then citing Miller v. Johnson, 515 U.S. 900, 915 (1995); and then *Carrillo-Lopez*, 68 F.4th at 1140–41)).

47. United States v. Clary, 846 F. Supp. 768, 797 (E.D. Mo.), *rev'd*, 34 F.3d 709, 714 (8th Cir. 1994).

48. Harness v. Watson, 47 F.4th 296, 311 (5th Cir. 2022) (en banc), *cert. denied*, 143 S. Ct. 2426, 2426 (2023).

49. 143 S. Ct. at 2426 (2023) (Jackson & Sotomayor, JJ., dissenting from denial of certiorari). I criticized an earlier decision upholding this law. *See* Gabriel J. Chin, *Rehabilitating Unconstitutional Statutes: An Analysis of* Cotton v. Fordice, 71 U. CIN. L. REV. 421, 423 (2003).

50. Ahilan T. Arulanantham, *Reversing Racist Precedent*, 112 GEO. L.J. 439, 444 (2024) ("Although courts have applied the Constitution's prohibition on state action motivated by racial animus to various forms of governmental decisionmaking—including court orders and other judicial acts—they have not applied that prohibition to *their own* precedent.").

comfort with using slave cases to resolve modern disputes.[51] Professor Murray[52] and Professor Araiza[53] have proposed frameworks for evaluating whether statutes with racist drafting histories should be invalidated. Contextualized historical analysis has precedent in, for example, the context of the Voting Rights Act.[54] This is one of the most perplexing and stunning ironies of the contemporary era: more and more people insist that the United States is a post-racial country, that the problem is obsessing about race, not racism, even as scholars document in black letter, in chapter and verse, how the system has been structured in favor of White people and, often, against Black people in particular.

II. TOWARDS A DUTY NOT TO PERPETUATE DISCRIMINATORY LAWS

This Article proposes a new factor for judicial consideration when determining whether a law that would have been invalid when enacted but, because of unconstitutional motivation, has been successfully cleansed of its taint and therefore is valid going forward: Has the government complied with its duty to search out unconstitutional laws? What follows is an argument that there is such a duty, that those who make laws have an obligation to repeal laws that are unconstitutional, and that those who enforce laws have a similar duty to evaluate their validity before relying on them. Disregard of this duty is a dispositive, or at least very important, consideration in showing that a statute has not shaken off its racist past. Concretely, if a legislature in a jurisdiction with a history of racial discrimination has so little interest in whether the statutes for which it is responsible are unconstitutional that it has never checked, then there is no basis to presume the legislature has in good faith carried out its duties under the Constitution.

An affirmative duty to stop acting unconstitutionally is familiar from school desegregation cases. As is well known, after *Brown v. Board of Education*,[55] segregators did not leap to comply with the law.[56] Instead, some government officials employed "[d]eliberate resistance" and "dilatory tactics."[57] The Court offered an opinion making clear that the responsibility to ensure compliance with the law was neither with the courts nor with those who had been discriminated against. Instead, government officials operating schools were "clearly charged with the affirmative duty to take whatever steps might be

51. Justin Simard, *Citing Slavery*, 72 STAN. L. REV. 79, 99 (2020).

52. W. Kerrel Murray, *Discriminatory Taint*, 135 HARV. L. REV. 1190, 1194–95, 1236–60 (2022).

53. William D. Araiza, *Cleansing Animus: The Path Through* Arlington Heights, 74 ALA. L. REV. 541, 576–83 (2023).

54. *See, e.g.*, Christopher S. Elmendorf & Douglas M. Spencer, *Administering Section 2 of the Voting Rights Act After* Shelby County, 115 COLUM. L. REV. 2143, 2163 (2015).

55. 347 U.S. 483 (1954).

56. *See* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 13 (1971).

57. *Id.*

necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch."[58]

This argument begins with the idea that it is the duty of the government to obey the law. As the Court said in *Marbury v. Madison*,[59] "[i]t is the duty of the secretary of state to conform to the law, and in this he is an officer of the United States, bound to obey the laws."[60] This idea has been reiterated by the Court over the decades,[61] albeit in modern times more frequently in dissent, as the Court creates exceptions to the exclusionary rule and special restrictions on private rights of action,[62] such as qualified immunity.[63]

Substantial authority supports the proposition that the obligation to comply with the Constitution in particular is a general duty, applicable to all branches and levels of government, and not just, say, to the courts or parties to particular lawsuits.[64] Thus, scholars argue that the legislature must obey the

58. *Id.* at 15 (quoting Green v. Cnty. Sch. Bd. of New Kent Cnty., 391 U.S. 430, 437–38 (1968)).

59. 5 U.S. (1 Cranch) 137 (1803).

60. *Id.* at 158.

61. *See, e.g.*, *Ex parte* Royall, 117 U.S. 241, 249 (1886) ("The grand jurors who found the indictment, the court into which it was returned and by whose order he was arrested, and the officer who holds him in custody, are all, equally with individual citizens, under a duty, from the discharge of which the state could not release them, to respect and obey the supreme law of the land, 'anything in the constitution and laws of any state to the contrary notwithstanding.'"); *Ex parte* Virginia, 100 U.S. 339, 348 (1879) ("We do not perceive how holding an office under a State, and claiming to act for the State, can relieve the holder from obligation to obey the Constitution of the United States, or take away the power of Congress to punish his disobedience.").

62. *See, e.g.*, Michigan v. Harvey, 494 U.S. 344, 369 (1990) (Stevens, J., dissenting) ("[T]hose who are entrusted with the power of government have the same duty to respect and obey the law as the ordinary citizen."); I.N.S. v. Lopez-Mendoza, 468 U.S. 1032, 1052 (1984) (Brennan, J., dissenting) ("The Government of the United States bears an obligation to obey the Fourth Amendment; that obligation is not lifted simply because the law enforcement officers were agents of the Immigration and Naturalization Service, nor because the evidence obtained by those officers was to be used in civil deportation proceedings."); Gertz v. Robert Welch, Inc., 418 U.S. 323, 404 (1974) (White, J., dissenting) ("[O]ur constitutional scheme compels a proper respect for the role of the States in acquitting their duty to obey the Constitution.").

63. *See, e.g.*, Alexander A. Reinert, *Qualified Immunity's Flawed Foundation*, 111 CALIF. L. REV. 201, 203 (2023).

64. *See, e.g.*, Salazar v. Buono, 559 U.S. 700, 717 (2010) (plurality opinion) (citing United States v. Nixon, 418 U.S. 683, 703 (1974)) ("Congress, the Executive, and the Judiciary all have a duty to support and defend the Constitution."); *see also* MICHAEL A. BAMBERGER, RECKLESS LEGISLATION: HOW LAWMAKERS IGNORE THE CONSTITUTION 1 (2000); Edward Rubin, *Judicial Review and the Right to Resist*, 97 GEO. L.J. 61, 107 (2008) ("[J]udicial supremacy does not relieve other government institutions of their obligation to obey the Constitution on their own. Higher law is supposed to operate as a constraint on government in general; thus, we want all the components of the government to comply with it, and to do so voluntarily."); John Yoo, *Peeking Abroad?: The Supreme Court's Use of Foreign Precedents in Constitutional Cases*, 26 U. HAW. L. REV. 385, 395 (2004) ("The Oaths Clause makes clear that all officials of both the federal and state governments have a basic obligation not to violate the Constitution."); Nicholas Quinn Rosenkranz, *Executing the Treaty Power*, 118 HARV. L. REV. 1867, 1909 (2005) ("Moreover, each branch has an independent obligation to make its own assessment of constitutional questions. Thus, the blame for an unconstitutional statute can generally be laid at the

Constitution when enacting law.[65] Professor William Baude's reference to "the increasingly conventional wisdom that the President can or must disregard some or all laws that he independently believes to be unconstitutional"[66] is backed by a wide range of scholarship,[67] and is recognized as routine by a federal

door of the political branches; they have, deliberately or unwittingly, violated their oaths and violated the Constitution by enacting the statute.").

65. A leading example is Paul Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 STAN. L. REV. 585, 587 (1975) ("[L]egislators are obligated to determine, as best they can, the constitutionality of proposed legislation."); *see also, e.g.*, David H. Gans, *Severability as Judicial Lawmaking*, 76 GEO. WASH. L. REV. 639, 677 (2008) ("After all, the legislature is a coordinate branch of government whose members, like the judiciary, swear to uphold the Constitution and have a responsibility to comport with its mandates, and we should not presume that the legislature will not conscientiously discharge its duty to obey the Constitution."); Richard M. Re, *Promising the Constitution*, 110 NW. U. L. REV. 299, 301 (2016) ("The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution." (quoting U.S. CONST. art. VI, cl. 3 (Oath Clause)); Illinois v. Krull, 480 U.S. 340, 355 (1987) ("A statute cannot support objectively reasonable reliance if, in passing the statute, the legislature wholly abandoned its responsibility to enact constitutional laws.").

66. William Baude, *The Judgment Power*, 96 GEO. L.J. 1807, 1810 n.13 (2008).

67. *See, e.g.*, Michael Sant'Ambrogio, *Standing in the Shadow of Popular Sovereignty*, 95 B.U. L. REV. 1869, 1903 (2015) ("Because the executive's highest duty is to the sovereign people, the executive may choose not to enforce or defend a clearly unconstitutional law."); Zachary S. Price, *Reliance on Executive Constitutional Interpretation*, 100 B.U. L. REV. 197, 216 n.77 (2020) (citing Saikrishna Bangalore Prakash, *The Executive's Duty to Disregard Unconstitutional Laws*, 96 GEO. L.J. 1613, 1628–48 (2008)) (characterizing Prakash's article as a "recent defense[] of departmentalism" that argues "based on history and structure of Constitution, Presidents should not enforce unconstitutional statutes"); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 228–82 (1994) (theorizing that executive has coequal constitutional interpretation power with other branches); William H. Pryor Jr., *The Separation of Powers and the Federal and State Executive Duty to Review the Law*, 65 CASE W. RES. L. REV. 279, 283 (2014) ("Executive officers, both federal and state, are duty-bound to interpret and obey the Constitution in the performance of their duties, and in doing so, they owe no deference to other authorities."); Neal Devins & Saikrishna B. Prakash, *The Indefensible Duty to Defend*, 112 COLUM. L. REV. 507, 533 (2012) ("Just as the courts may refrain from enforcing unconstitutional laws despite their implied obligation to execute federal law, so too the executive need not enforce those laws despite his express duty to execute federal laws."); Richard H. Fallon, Jr., *Judicial Supremacy, Departmentalism, and the Rule of Law in a Populist Age*, 96 TEX. L. REV. 487, 500 (2018) ("But no one should deny that presidents have a prerogative and perhaps a responsibility not to enforce laws that they think unconstitutional under at least some circumstances."); Robert J. Delahunty, *The Obama Administration's Decisions to Enforce, but Not Defend, DOMA § 3*, 106 NW. U. L. REV. COLLOQUY 69, 70 (2011) ("The harder question is whether the Executive has a duty not to enforce an unconstitutional statute, or the discretion to decide whether to enforce it or not. Leading constitutional scholars have taken different positions on the matter. Walter Dellinger, whose views the current DOJ appears to be tracking, has maintained that the Executive has discretion not to enforce an unconstitutional law, but not a duty not to do so. Sai Prakash, on the other hand, argues that the Executive is duty-bound not to enforce an unconstitutional law." (citing Memorandum from Walter Dellinger, Assistant Att'y Gen., to Abner J. Mikva, Counsel to the President (Nov. 2, 1994))); Michael Stokes Paulsen, *The President and the Myth of Judicial Supremacy*, 14 U. ST. THOMAS L.J. 602, 604 (2018) ("[T]he president has both the power and duty not to enforce or execute unconstitutional laws, whether or not the judiciary agrees with the president's good faith constitutional judgment." (emphasis omitted)); Philip Heymann, *The On/Off Switch*, 16 WM. & MARY BILL RTS. J. 55, 55 (2007)

statute requiring the executive to notify Congress when it declines to enforce a law on the ground of unconstitutionality.[68]

This argument is not concerned with the question of branch supremacy; it contemplates that, for example, a legislature or executive which has undertaken a good-faith exploration of its laws and their racial motivation might have a more or less capacious view of the principle of equal protection than, say, the Supreme Court in *Hunter v. Underwood*[69] or *Washington v. Davis*.[70] Nor does the argument turn on which officers are entitled to formulate their own constitutional opinions and act on them.[71] But it presumes that in every state, and virtually every municipality, there is some lawmaking body with leaders and an executive branch with leaders. It also presumes that these officers and institutions have legal power to make policy, to make decisions, and to give orders or directions which will be carried out. If there is an unconstitutional statute, ordinance, or regulation, some government official or entity can find that out, and some government official or entity can repeal it or direct that it not be enforced.

Likewise, this argument does not rest on precise categorization of when the government must repeal or refuse to enforce a law that is possibly or probably unconstitutional, other than to propose that they cannot do it in a way that itself violates equal protection principles. For example, it would be impermissible to elect not to enforce laws discriminating against Christians while enforcing laws intended to harm Jewish people unless or until those laws

("I take seriously the argument that the President, under an extension of the principles of *Marbury v. Madison*, has a responsibility to direct subordinates not to enforce at least some statutes on the grounds that they are plainly unconstitutional.").

68. 28 U.S.C. § 530D; Curtis A. Bradley & Jack L. Goldsmith, *Presidential Control over International Law*, 131 HARV. L. REV. 1201, 1293 n.416 (2018) ("[U]nder 28 U.S.C. § 530D (2012), the Justice Department has an obligation to report to Congress any new policy to refrain from enforcing federal law, or a determination to contest or not enforce federal law on the ground that it is unconstitutional."); *see also* Christopher S. Yoo, *Presidential Signing Statements: A New Perspective*, 164 U. PA. L. REV. 1801, 1815–16 & n.81 (2016) (citing *Presidential Authority to Decline to Execute Unconstitutional Statutes*, 18 Op. O.L.C. 199, 199 (1994)) ("Finally, the Justice Department has long regarded as 'uncontroversial' that 'there are circumstances in which the President may appropriately decline to enforce a statute that he views as unconstitutional.' Some commentators assert that Presidents possess a broad obligation not to enforce statutes they believe to be unconstitutional." (quoting *Presidential Authority to Decline to Execute Unconstitutional Statutes*, 18 Op. O.L.C. 199, 199 (1994))).

69. 471 U.S. 222 (1985).

70. 426 U.S. 229 (1976).

71. For example, there is authority that "administrative agencies lack the power to hold statutory provisions unconstitutional . . . . This is true whether one surveys Louisiana jurisprudence, federal jurisprudence, or the jurisprudence of our sister states." Albe v. Louisiana Workers' Comp. Corp., 97-0581 (La. 10/21/97), 700 So. 2d 824, 827, *modified in part on reh'g sub nom.* Clark v. Schwegmann Giant Supermarket, 97-0581 (La. 11/21/97), 701 So. 2d 1324. But if a particular agency or officer is not empowered or capable of evaluating statutory constitutionality, there will be some other officer or court which can make that judgment.

targeting Christians were enjoined. Of course, the opposite would be equally unacceptable.

Notwithstanding cynical critiques of the intelligence and honesty of lawmakers, the Court's jurisprudence presumes that even average people are familiar with the general facts of history and law. As the Court explained in an establishment clause case where it rejected a claim by a local government that particular action might be seen as endorsement of religion:

> But the world is not made brand new every morning, and the Counties are simply asking us to ignore perfectly probative evidence; they want an absentminded objective observer, not one presumed to be familiar with the history of the government's actions and competent to learn what history has to show. The Counties' position just bucks common sense: reasonable observers have reasonable memories, and our precedents sensibly forbid an observer to turn a blind eye to the context in which [the] policy arose.[72]

In many other cases, the Court has assumed familiarity with general facts of history.[73]

Legislatures, boards, and councils frequently order reports and studies of particular issues. Indeed, many states have legislative drafting and research arms

72. McCreary Cnty. v. Am. C.L. Union of Ky., 545 U.S. 844, 866 (2005) (footnote omitted) (quoting Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 308 (2000) (discussing that an objective observer is familiar with "'implementation of'" government action); Edwards v. Aguillard, 482 U.S. 578, 595 (1987) (discussing that enquiry looks to "the historical context of the statute . . . and the specific sequence of events leading to [its] passage"); Capitol Square Rev. & Advisory Bd. v. Pinette, 515 U.S. 753, 780 (1995) (O'Connor, J., concurring in part and concurring in the judgment) ("[T]he reasonable observer in the endorsement inquiry must be deemed aware of the history and context of the community and forum in which the religious display appears.")).

73. *See, e.g.*, Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 475 (1857) (enslaved party) (Daniel, J., concurring) ("In the constructing of pleadings either in abatement or in bar, every fact or position constituting a portion of the public law, or of known or general history, is necessarily implied. Such fact or position need not be specially averred and set forth; it is what the world at large and every individual are presumed to know—nay, are bound to know and to be governed by."), *superseded by const. amend.*, U.S. CONST. amend. XIV; Queen v. Hepburn, 11 U.S. (7 Cranch) 290, 296 (1813) (Marshall, C.J.) ("There are also matters of general and public history which may be received without that full proof which is necessary for the establishment of a private fact."); The Antelope, 23 U.S. (10 Wheat.) 66, 130 (1825) (Marshall, C.J.) (writing of the slave trade: "That Americans, and others, who cannot use the flag of their own nation, carry on this criminal and inhuman traffic under the flags of other countries, is a fact of such general notoriety, that Courts of admiralty may act upon it. It cannot be necessary to take particular depositions, to prove a fact which is matter of general and public history."). Although it arose in a different context, David Ball's idea that decisionmakers should assume the existence of an average amount of racism in official action, rather than zero, may be relevant here. W. David Ball, *The Plausible and the Possible: A Bayesian Approach to the Analysis of Reasonable Suspicion*, 55 AM. CRIM. L. REV. 511, 532 (2018) ("Even absent evidence of the influence of race in a particular case, then, it would be a mistake to assume that there is no racial influence. We must, instead, assume that there is an average racial influence.").

staffed by lawyers.[74] Legislatures also have the power to order and appropriate money for ad hoc research. At the federal level, the United States Commission on Civil Rights,[75] Congressional Research Service,[76] and General Accountability Office[77] have performed and published highly useful, sophisticated research. There is no practical or institutional reason that lawmakers and enforcers cannot, in the words of Professor Murray, carry out "direct engagement with problematic history."[78] Presumably, a controlling consideration in directing the production of research is the importance with which those in control of the legislature regard the issue. The cost of ordering a study of a particular issue is a fraction of the political capital necessary to enact legislation. If a state legislature or Congress does not study a particular issue, it is because that issue is not a priority.[79]

While individuals may object to being treated unconstitutionally, the violation of the Constitution occurs based on the government's action, not on whether those it is inflicted upon have the ability to articulate the correct legal objections or have the means to hire counsel to file suit. If there is a duty not to enact or enforce unconstitutional laws, then there must be a duty to inquire.

74. Jarrod Shobe, *Intertemporal Statutory Interpretation and the Evolution of Legislative Drafting*, 114 COLUM. L. REV. 807, 817 (2014); Jeffrey J. Coonjohn, *A Brief History of the California Legislative Counsel Bureau and the Growing Precedential Value of Its Digest and Opinions*, 25 PAC. L.J. 211, 213 (1994); 84 OHIO JURIS. 3D § 64 (2024); 96 N.Y. JURIS. 2D § 156 (2024).

75. *See* U.S. COMM'N ON C.R., SEX BIAS IN THE U.S. CODE (1977), https://www2.law.umaryland.edu/marshall/usccr/documents/cr12se9.pdf [https://perma.cc/PYM3-5B3C].

76. *See* VALERIE C. BRANNON, CONG. RSCH. SERV., R45153, STATUTORY INTERPRETATION: THEORIES, TOOLS, AND TRENDS (2023), https://crsreports.congress.gov/product/pdf/r/r45153 [https://perma.cc/RES8-M3KZ].

77. *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-24-106386, MILITARY JUSTICE: INCREASED OVERSIGHT, DATA COLLECTION, AND ANALYSIS COULD AID ASSESSMENT OF RACIAL DISPARITIES (2023), https://www.gao.gov/assets/gao-24-106386.pdf [https://perma.cc/AUY2-X8EG]; U.S. GOV'T ACCOUNTABILITY OFF., GGD-00-4, RACIAL PROFILING: LIMITED DATA AVAILABLE ON MOTORIST STOPS (2000), https://www.gao.gov/products/ggd-00-41 [https://perma.cc/5BN2-AJJ2]; U.S. GOV'T ACCOUNTABILITY OFF., HRD-92-56, SOCIAL SECURITY: RACIAL DIFFERENCE IN DISABILITY DECISIONS WARRANTS FURTHER INVESTIGATION (1992), https://www.gao.gov/products/hrd-92-56 [https://perma.cc/2LW5-25W9].

78. Murray, *supra* note 52, at 1243.

79. A number of leading scholars have used the term "equal concern and respect." *See, e.g.*, Ronald Dworkin, *Unenumerated Rights: Whether and How* Roe *Should Be Overruled*, 59 U. CHI. L. REV. 381, 382 (1992) ("[T]he Bill of Rights orders nothing less than that government treat everyone subject to its dominion with equal concern and respect."); John Hart Ely, *Professor Dworkin's External/Personal Preference Distinction*, 1983 DUKE L.J. 959, 959 ("Professor Ronald Dworkin has made several important contributions to contemporary constitutional theory. A phrase that I have quite openly purloined, because it so evocatively summarizes so much of what I have argued for, is the 'right to equal concern and respect in the design and administration of the political institutions that govern' us."). Suffice it to say that that it is unusual for groups with power to willingly subject themselves to hostile, unconstitutional laws. A group subjected to a hostile, unconstitutional law might well assume that the reason for their subjection is the absence of equal concern and respect.

This argument also does not quarrel with the principle that laws on the books are presumptively valid.[80] On the other hand, if a state has a history of unconstitutional *de jure* or *de facto* racial discrimination, it is on notice that it may have discriminatory laws on the books.[81] Legislators and law enforcers are busy, just like everyone, and have a range of priorities. Yet, none are so busy that they do not have time to carry out tasks they regard as important. A state may have a history of racial oppression, and that state may never have scoured the laws on the books to determine whether any facially neutral laws are unconstitutional under contemporary doctrine. If so, then the only reasonable conclusion is that the jurisdiction, in the form of its political actors, did not consider eliminating unconstitutional discrimination to be a significant priority. In such a case, there is no room for a presumption that any amendment or reenactment was done to eliminate racism—rather, this is a jurisdiction where eliminating racism is not a priority.

There are obvious practical reasons a government would not wish to inquire: It might cause problems for itself by discovering, for example, that there are laws on the books designed to discriminate on the basis of race and which continue to have that effect, and therefore may be unconstitutional under *Hunter v. Underwood*.[82] But the law does not encourage deliberate ignorance of facts in order to take advantage of people or violate the Constitution.[83]

80. United States v. Louisiana, 225 F. Supp. 353, 401 (E.D. La. 1963) (three-judge court) (West, J., dissenting) ("[A] statute properly passed by a State Legislature is presumed to be constitutional until such time as it is found to be unconstitutional."), *aff'd*, 380 U.S. 145 (1965); *see also* Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After* Morrison *and* Kimel, 110 YALE L.J. 441, 462 n.112 (2000).

81. The Court has frequently recognized that history is relevant in understanding the constitutionality of governmental action. *See, e.g.*, Thornburg v. Gingles, 478 U.S. 30, 36–37 (1986) (in Voting Rights Act case, noting that the Senate Report indicated that one factor in evaluating voting discrimination was "the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process"); Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 267 (1977) ("The historical background of the decision is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes.").

82. 471 U.S. 222, 232–33 (1985).

83. *See, e.g.*, United States *ex rel.* Schutte v. SuperValu Inc., 143 S. Ct. 1391, 1400 (2023) ("[O]ne widely cited English decision, *Derry v. Peek*, articulated the rule as follows: '[F]raud is proved when it is shewn that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false.' And, capturing the FCA's use of the term 'deliberate ignorance,' that decision noted that an action for fraud would lie if 'a person making a false statement had shut his eyes to the facts, or purposely abstained from inquiring into them.' Those standards have been cited and widely adopted by American courts in the century since." (quoting Derry v. Peek, 14 App. Cas. 337, 376 (1889)) (first citing 3 DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, LAW OF TORTS § 665, p. 645 (2d ed. 2011); then citing RESTATEMENT (SECOND) OF TORTS § 526 (AM. L. INST. 1977))); Hotchkiss v. Nat'l Banks, 88 U.S. (21 Wall.) 354, 359 (1874) ("The law is well settled that a party who takes negotiable paper before due for a valuable consideration, without knowledge of any defect of title, in good faith, can hold it against all the world. A suspicion that there

Another reason to recognize an affirmative duty to inquire is that remedying racial oppression as it exists in statutory law is more difficult than it is with respect to social practices. One hopes that once, say, school segregation ends, restrictive covenants are voided, and employment discrimination is made illegal, market forces will result in changes to the circumstances of people in the United States. As the Supreme Court explained:

> As the *de jure* violation becomes more remote in time and these demographic changes intervene, it becomes less likely that a current racial imbalance in a school district is a vestige of the prior *de jure* system. The causal link between current conditions and the prior violation is even more attenuated if the school district has demonstrated its good faith.[84]

People, regardless of race, can and do apply for jobs, for admission into university, and to hire U-Hauls. By contrast, statutes cannot repeal themselves. Unless affirmatively changed, they will remain in place regardless of market forces, public attitudes, and human values. And changing laws is no simple matter. This is the lesson of the widely accepted theory of "legislative inertia,"[85] that "the forces of the statutory status quo are stronger than the forces of

is a defect of title in the holder, or a knowledge of circumstances that might excite such suspicion in the mind of a cautious person, or even gross negligence at the time, will not defeat the title of the purchaser. That result can be produced only by bad faith, which implies guilty knowledge or wilful ignorance, and the burden of proof lies on the assailant of the title."); Lytle v. Lansing, 147 U.S. 59, 71 (1893) ("While purchasers of negotiable securities are not chargeable with constructive notice of the pendency of a suit affecting the title or validity of the securities, it has never been doubted, as was said in Scotland Co. v. Hill, that those who buy such securities from litigating parties, with actual notice of a suit, do so at their peril, and must abide the result the same as the parties from whom they got their title. Under the circumstances, it was bad faith or willful ignorance, under the rule laid down in Goodman v. Simonds and Murray v. Lardner, to forbear making further inquiries. No rule of law protects a purchaser who willfully closes his ears to information, or refuses to make inquiry when circumstances of grave suspicion imperatively demand it." (first citing Scotland Cnty. v. Hill, 112 U.S. 183, 185 (1884); then citing Goodman v. Simonds, 61 U.S. (20 How.) 343 (1857); and then citing Murray v. Lardner, 69 U.S. (2 Wall.) 110 (1864))); *Murray*, 69 U.S. at 121 ("[G]uilty knowledge and wilful ignorance alike involve the result of bad faith. They are the same in effect."); Talbot v. Janson, 3 U.S. (3 Dall.) 133, 167 (1795) (Iredell, J.) ("But, wilful ignorance, is never excuseable; when there is time to inquire, inquiry ought to be made."); *see also* Ind. Dep't of State Revenue v. Safayan, 654 N.E.2d 270, 274 n.5 (Ind. 1995) ("The Sergeant Schultz defense refers, of course, to the refrain of the character by that name in the television comedy, Hogan's Heroes. Sergeant Schultz was assigned the unenviable task of guarding Colonel Hogan and his men in a German prisoner of war camp during World War II. Each week, despite the best efforts of the camp's commandant, Colonel Klink, the 'prisoners' would successfully conduct espionage operations from inside the prison. And each week, the lovable, if incompetent, sergeant would stumble upon some clue to Hogan's activities. Instead of pursuing these leads, however, Schultz would simply declare, 'I know n-oth-i-n-g, I see n-oth-i-n-g, n-oth-i-n-g.'").

84. Freeman v. Pitts, 503 U.S. 467, 496 (1992).

85. Mirit Eyal-Cohen, *Unintended Legislative Inertia*, 55 GA. L. REV. 1193, 1202 (2021).

statutory change."[86] Thus, as judges and justices recognize,[87] as well as scholars,[88] our codes contain laws which could not be enacted now yet will not be repealed.

Minorities, logically, bear a greater burden from legislative inertia than do majorities; as difficult as it is even for majorities to translate their views into political action, it is harder still for groups with fewer raw votes. This is particularly true given two features of the statutory laws at issue. First, they are facially neutral, thus making them more difficult to identify and challenge.

86. John Copeland Nagle, *CERCLA's Mistakes*, 38 WM. & MARY L. REV. 1405, 1455 (1997).

87. Writing of school segregation, Justice Thomas explained:

> It is safe to assume that a policy adopted during the *de jure* era, if it produces segregative effects, reflects a discriminatory intent. As long as that intent remains, of course, such a policy cannot continue. And given an initially tainted policy, it is eminently reasonable to make the State bear the risk of nonpersuasion with respect to intent at some future time, both because the State has created the dispute through its own prior unlawful conduct, and because discriminatory intent does tend to persist through time.

United States v. Fordice, 505 U.S. 717, 746–47 (1992) (Thomas, J., concurring) (citing Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 309–10, n.15 (1977)); *see also, e.g.*, Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 826 (2014) (Thomas, J., dissenting) (citing Johnson v. Transp. Agency, 480 U.S. 616, 672 (1987) (Scalia, J., dissenting)) ("There are many reasons Congress might not act on a decision . . . and most of them have nothing at all to do with Congress' desire to preserve the decision."); Indus. Union Dep't, AFL-CIO v. Am. Petrol. Inst., 448 U.S. 607, 717 (1980) (Marshall, J., dissenting) ("Today's decision is objectionable not because it is final, but because it places the burden of legislative inertia on the beneficiaries of the safety and health legislation in question in these cases. By allocating the burden in this fashion, the Court requires the American worker to return to the political arena and to win a victory that he won once before in 1970. I am unable to discern any justification for that result."); United States v. Then, 56 F.3d 464, 469 (2d Cir. 1995) (Calabresi, J., concurring) ("Rather than jumping in and striking the laws down, or leaving them undisturbed and thereby allowing legislative inertia to dominate, these [European] Courts have found a middle ground. They have, in a few cases, announced that laws, because of changed circumstances, were heading toward unconstitutionality."); Oddi v. Ayco Corp., 947 F.2d 257, 262 (7th Cir. 1991) ("Ordinary legislative inertia ensures that any statutory status quo will continue for at least a few years.").

88. *See, e.g.*, Elizabeth K. Hinson, *Mainstreaming Equality in Federal Budgeting: Addressing Educational Inequities with Regard to the States*, 20 MICH. J. RACE & L. 377, 386–87 (2015) (quoting Note, *Unfulfilled Promises: School Finance Remedies and State Courts*, 104 HARV. L. REV. 1072, 1072 (1991)) ("That is, 'legislative inertia and unwarranted judicial deference to the political branches in the remedial phase hinder the school finance plaintiff's prospects for securing a constitutional remedy.' . . . The public's views on race are consequently real obstacles to challenging school funding schemes."); Aneil Kovvali, *Stark Choices for Corporate Reform*, 123 COLUM. L. REV. 693, 737–38 (2023) ("Federal and state regulators have demonstrated limited willingness and capacity to advance external reforms addressing racial justice issues. As of this writing, much of the national political conversation regarding race is consumed with a debate about the teaching of 'critical race theory' that has led numerous state governments to enact prohibitions on teaching a broad range of perspectives on the role of race in American history. Recent years have also seen a shocking rise in racist sentiments in some quarters. Given the need for a broad consensus to overcome legislative inertia, these attitudes are likely enough to prevent meaningful external reform."); Louis Michael Seidman, *The Ratchet Wreck: Equality's Leveling Down Problem*, 110 KY. L.J. 59, 67 (2022) ("Congressional inertia makes default rules sticky."); Daniel Patrick Tokaji, *The Persistence of Prejudice: Process-Based Theory and the Retroactivity of the Civil Rights Act of 1991*, 103 YALE L.J. 567, 576 (1993) ("[T]he burden of inertia would be greater when the court's decision disadvantages a minority group than when it disadvantages the white majority.").

Second, as is the universal character of United States race law, affirmative action policies not necessarily excluded,[89] they benefit White people.[90] Policies covertly benefitting the majority, or not burdening them, are, to say the least, not likely to be unpopular. Thus, there is no strong reason to imagine they will disappear as part of the ordinary political process.

An advantage of the approach is that it is neatly calibrated to the harm. If a state did not have a vigorous race policy, there is likely to be little evidence in the historical record and little disruption to the state code. On the other hand, if the state did insert hostile racial considerations into many pieces of facially neutral law, and if they still have discriminatory effects, the cost of the accounting effort will be higher but at the same time the unconstitutional harm will be concomitantly greater, as will be the reward for complying with the Constitution.

Another consideration will be the nature of the government's response. When a legislature discovers that a facially neutral law is unconstitutional because it was motivated by race, what do they do? It seems that the right thing to do is to repeal or invalidate the law first and decide what else to do later. After all, "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[91] It has also been said "the very meaning of an enforceable constitution is that an unconstitutional law may not be enforced."[92] Any response other than repealing the statute and then, if it is desirable, debating its merits over time and forcing it to run the gauntlet of the legislative process would give the unconstitutional statute the benefit of the status quo. This is particularly true in the case of unconstitutional electoral statutes, which affect the very composition of the elected bodies which will determine whether to retain or discard the laws.

89. Professor Delgado plausibly argues that affirmative action was compatible with White interests. Richard Delgado, *Affirmative Action as a Majoritarian Device: Or, Do You Really Want to Be a Role Model?*, 89 MICH. L. REV. 1222, 1230 (1991). In any event, whatever their merits or constitutionality, affirmative action plans seem not designed to exclude Whites from desirable positions or opportunities, but to promote inclusion of people of color in integrated institutions. Put simply, there would be little point in African Americans "taking over" Princeton or Dartmouth, and no chance of people of color excluding White people from employment as, say, police officers or plumbers.

90. This is an empirical assertion. Just as there are no examples, to the author's knowledge, of minority Americans successfully expelling White people from desirable territory, in the way that, say, Chinese Americans were evicted from many Western towns, *see generally* BETH LEW-WILLIAMS, THE CHINESE MUST GO: VIOLENCE, EXCLUSION, AND THE MAKING OF THE ALIEN IN AMERICA (2018) (describing the history of Chinese exclusion), or in the way that Black Americans were driven out of (for example) the Greenwood neighborhood in Tulsa, Oklahoma, *Randle v. Tulsa*, 556 P.3d 612, 615 (Okla. 2024), the author is aware of no instances where a non-White racial group obtained control of a state legislature and passed laws depriving White people as a class of economic or political opportunities.

91. Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 748 (2007).

92. Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235, 247 (1994).

A government entity's failure to execute its duty to inquire whether its laws are unconstitutional would not relieve a challenger of its obligation to prove that the law was invalid when enacted. But once it is shown that a law was unconstitutionally motivated, and also that the enacting jurisdiction did not confront its discriminatory history, a reviewing court should be reluctant to uphold it. A reviewing court should not, for example, take a recodification or a technical repeal and reenactment as purging the taint, but instead treat it as a continuation of prior law.[93] In this context, it is worth noting the nature of the political coalitions enacting racist laws. In many instances, the support of people who do not support racism, but are willing to tolerate it, provide the margin of victory. For example, the United States Constitution protected slavery in a number of ways.[94] These provisions became law based on the support of people who affirmatively supported slavery, and those who opposed slavery but were willing to support the Constitution to obtain the other benefits it provided. By the same token, racist laws may survive not because legislators are racist, but because they have other, higher, priorities for their political capital, and therefore problematic enactments are tolerated. In sum, unless a government has shown that it does not tolerate racist laws, there is no reason to conclude that it does not tolerate racist laws.

CONCLUSION

Segregation existed in many, perhaps all, parts of the United States in many forms. In the visible and central context of school segregation, the law has imposed an affirmative duty to eliminate every vestige of unlawful discrimination. But in the context of the law itself, the Court has not required states or Congress itself to ensure the validity of the laws it has passed and commands the executive to enforce. The law has placed the burden on individuals to challenge the validity of laws when they are charged with violating them, and even in the face of strong evidence of bias, courts tend to find the laws valid. Drawing on the general duty to obey the Constitution, and not to enact or enforce unconstitutional laws, states and Congress should scour

93. Posadas v. Nat'l City Bank of N.Y., 296 U.S. 497, 505 (1936) (citing Bear Lake Irrigation Co. v. Garland, 164 U.S. 1, 11–13 (1936)) ("[E]ven in the face of a repealing clause, circumstances may justify the conclusion that a later act repeating provisions of an earlier one is a continuation, rather than an abrogation and reenactment, of the earlier act."); M.L. Cross, Annotation, *Effect of Simultaneous Repeal and Re-enactment of All, or Part, of Legislative Act*, 77 A.L.R.2d 336, § 2 (1961) ("Simultaneous repeal and re-enactment are to be construed, not as a true repeal, but as an affirmation and continuation of the original provisions."); *Effect of Reenactment on Intermediate Acts*, 1A SUTHERLAND STATUTORY CONSTR. § 23:30 (Norman Singer & Shambie Singer eds., 7th ed.) ("The reenactment of a statute is a continuation of the law as it existed prior to the reenactment as far as the original provisions are repeated without change in the reenactment.").

94. *See* Paul Finkelman & Gabriel J. Chin, *How We Know the U.S. Constitution Was Proslavery*, 9 CONST. STUD. 1, 2 (2024).

the codes, looking for facially neutral statutes which are unconstitutional under *Hunter v. Underwood*. In the absence of a jurisdiction's good-faith effort to comply with the Constitution, there is no room for a presumption that subsequent legislative acts have purged the taint.