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The New Jim Crow Is the Old Jim Crow

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THE YALE LAW JOURNAL

KATIE R. EYER

The New Jim Crow Is the Old Jim Crow

Mothers of Massive Resistance: White Women and the Politics of White Supremacy

BY ELIZABETH GILLESPIE MCRAE
OXFORD UNIVERSITY PRESS, 2018

A More Beautiful and Terrible History: The Uses and Misuses of Civil Rights History

BY JEANNE THEOHARIS
BEACON PRESS, 2018

ABSTRACT. A vast divide exists in the national imagination between the racial struggles of the civil rights era and the racial inequality of the present. The attitudes and legal strategies of segregationists in the civil rights era are conceptualized as explicit, gross, and founded exclusively in raw racial animus. In contrast, racial inequality in the present is conceptualized as subtle, subconscious, and structural. The causes of modern racial inequality—and the obstacles to its remediation—are thus characterized as fundamentally distinct from those undergirding historical racial inequality.

Drawing on the recent work of Elizabeth Gillespie McRae and Jeanne Theoharis, as well as other historians of the South and the civil rights movement, this Book Review argues that this oversimplified account obscures key continuities between our racial past and present. As the work of McRae, Theoharis, and others has shown, facially race-neutral opposition to racial equality and integration did not originate in the modern era but rather long predated *Brown v. Board of Education* in both the North and the South. Moreover, many of the justifications that segregationists offered for their actions—such as a desire for good schools and safe neighborhoods—do not look so very different from the justifications that we continue to rely on to legitimize racial inequality today.

Thus, an accurate accounting of our national history of racial discrimination—rather than substantiating a sharp break between past and present—reveals many uncomfortable continuities. This Book Review suggests that recognizing and coming to terms with this more complex history is critical to contemporary racial-equality work, both in and outside the courts.



AUTHOR. Professor of Law, Rutgers Law School. Many thanks to Elise Boddie, Vinay Harpalani, Stacy Hawkins, Earl Maltz, Kim Mutcherson, Christopher Schmidt, Rick Swedloff, Anders Walker, Mary Ziegler, and participants in the Rutgers Legal History and Law and Society affinity group for helpful feedback and conversations regarding this project. This piece benefitted greatly from the editorial suggestions of the editors of the *Yale Law Journal*, including especially Dylan Shea Cowit. Finally, my sincerest thanks also to the generations of critical race scholars whose work helped shape my understanding of the history recounted herein. Note that although the title of this piece is an obvious allusion to the title of Michelle Alexander’s excellent book, *The New Jim Crow*, it is not primarily intended to be responsive to that book—and indeed, to the extent one major project of Alexander’s is to point out continuities between the past and the present, her work is consonant with the observations made herein. However, to the extent that *The New Jim Crow*, like many other sources, casts our racial history as focused on explicit Jim Crow laws and bigoted white Southerners, I view it as important to complicate those accounts for the reasons described herein.



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INTRODUCTION

Our nation's canonical racial histories tell a story of dramatic change.¹ Resistance to racial equality in the civil rights era ("old racism") is conceptualized, as Jeanne Theoharis puts it, as "personal hatefulness . . . the governor snarling at the University of Alabama entrance, the Mississippi voter registrar continually slamming the door on would-be Black voters, the white mother spitting at Black children."² "New racism," to the extent it is acknowledged to exist, is generally perceived as subtle and perhaps even subconscious—different in quality and form from the racism of the past.³ In this telling, the civil rights movement—always respected (and respectable)—succeeded in its aims: dismantling the open segregation of the Jim Crow South.⁴ The causes of modern racial inequality—and the obstacles to its remediation—are characterized as fundamentally distinct from those undergirding historical racial inequality.⁵

A growing body of work by historians of the South and of the civil rights movement challenges this overly simplistic account and demonstrates that there

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1. As I discuss more fully below, I do not mean to suggest that everyone subscribes to this view of the differences between contemporary and historical racial discrimination, nor that it is the only extant narrative of the civil rights era. Rather, the perspective I describe as the "canonical," "dominant," or "popular" account of the civil rights era is simply the stock story that frames many contemporary discussions of race and informs the perspective of, in particular, many everyday white Americans. Notably, the power of these stock stories is demonstrated by the fact that they have at times framed the statements and work of even those who are surely aware of the stories' oversimplified and potentially misleading nature. See *infra* note 33 and accompanying text.
 2. JEANNE THEOHARIS, *A MORE BEAUTIFUL AND TERRIBLE HISTORY: THE USES AND MISUSES OF CIVIL RIGHTS HISTORY* 84 (2018).
 3. See EDUARDO BONILLA-SILVA, *RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN AMERICA* 2-4 (2014) (drawing sharp distinctions between the racism of the present and the racism of the past); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 460 (2001) (arguing that "[c]ognitive bias, structures of decisionmaking, and patterns of interaction have replaced deliberate racism and sexism as the frontier of much continued inequality"). *But cf.* Jessica A. Clarke, *Explicit Bias*, 113 NW. U. L. REV. 505 (2018) (arguing for renewed scholarly attention to continued forms of "old" explicit bias in the present). Note that this Review does not contend that there has not been any evolution in the forms that racism takes, but simply that the break between those forms in our past and present is far less sharp than it is often characterized as being.
 4. See THEOHARIS, *supra* note 2, at 3-27.
 5. See *id.*; see also Sturm, *supra* note 3.

is far less discontinuity between the past and the present than we⁶ might like to believe.⁷ As these historians have shown, resistance to racial equality during the civil rights era took many forms – of which explicit Jim Crow-style statutes and

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6. A word on my use of pronouns is in order. As described later in the Introduction, this Review is directed predominantly at the self-perception and racial understandings of white Americans. Thus, when I use the terms “us” and “we,” I am directing my commentary at that subgroup, of which I am a member. Many of the simplistic histories – and accounts of the present – that the work of the historians described herein challenges are not ones that most people of color would endorse. Cf. Russell K. Robinson, *Perceptual Segregation*, 108 COLUM. L. REV. 1093 (2008) (extensively describing divides between how whites and racial minorities perceive racial discrimination).
 7. For additional recent historical literature complicating this oversimplified account, see also, for example, R. SCOTT BAKER, *PARADOXES OF DESEGREGATION: AFRICAN AMERICAN STRUGGLES FOR EDUCATIONAL EQUITY IN CHARLESTON, SOUTH CAROLINA, 1926-1972* (2006); JOSEPH CRESPINO, *IN SEARCH OF ANOTHER COUNTRY: MISSISSIPPI AND THE CONSERVATIVE COUNTERREVOLUTION* (2007); *ESSAYS IN TWENTIETH-CENTURY SOUTHERN EDUCATION: EXCEPTIONALISM AND ITS LIMITS* (Wayne J. Urban ed., 1999); KEVIN M. KRUSE, *WHITE FLIGHT: ATLANTA AND THE MAKING OF MODERN CONSERVATISM* (2005); MATTHEW D. LASSITER, *THE SILENT MAJORITY: SUBURBAN POLITICS IN THE SUNBELT SOUTH* (2006); JAMES W. LOEWEN, *SUNDOWN TOWNS: A HIDDEN DIMENSION OF AMERICAN RACISM* (2005); NANCY MACLEAN, *FREEDOM IS NOT ENOUGH: THE OPENING OF THE AMERICAN WORKPLACE* (2006); *THE MODERATES' DILEMMA: MASSIVE RESISTANCE TO SCHOOL DESEGREGATION IN VIRGINIA* (Matthew D. Lassiter & Andrew B. Lewis eds., 1998) [hereinafter *THE MODERATES' DILEMMA*]; *THE MYTH OF SOUTHERN EXCEPTIONALISM* (Matthew D. Lassiter & Joseph Crespino eds., 2010); CHRISTOPHER W. SCHMIDT, *THE SIT-INS: PROTEST AND LEGAL CHANGE IN THE CIVIL RIGHTS ERA* (2018); THOMAS J. SUGRUE, *SWEET LAND OF LIBERTY: THE FORGOTTEN STRUGGLE FOR CIVIL RIGHTS IN THE NORTH* (2008); ANDERS WALKER, *THE BURNING HOUSE: JIM CROW AND THE MAKING OF MODERN AMERICA* (2018) [hereinafter *WALKER, THE BURNING HOUSE*]; and ANDERS WALKER, *THE GHOST OF JIM CROW: HOW SOUTHERN MODERATES USED BROWN V. BOARD OF EDUCATION TO STALL CIVIL RIGHTS* (2009) [hereinafter *WALKER, THE GHOST OF JIM CROW*]. Articles also contributing to a richer understanding are too numerous to list, but are cited where relevant. Note of course that many critical race scholars have also long made similar arguments about continuity between our racial past and present, which, as I discuss later in the Review, are deeply consonant with the recent work of historians (and especially the conclusions that can be drawn from them). See, e.g., DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* 3, 98 (1992) [hereinafter *BELL, FACES AT THE BOTTOM OF THE WELL*]; Derrick Bell, *Foreword: The Final Civil Rights Act*, 79 CALIF. L. REV. 597, 597 (1991) [hereinafter *Bell, Final Civil Rights Act*]. There is also a recent burgeoning literature offering more complicated accounts of the civil rights movement itself, which, apart from Theoharis's book, I do not address here.

practices were but one.⁸ Even before *Brown v. Board of Education*,⁹ opponents of desegregation and racial equality – both Southern and Northern – had embraced ostensibly “race neutral” measures and rhetoric to entrench racial inequality where open racial discrimination was no longer sanctioned.¹⁰ As “massive resistance”¹¹ collapsed, race-neutral¹² approaches became the dominant frame for resistance to racial equality in the South – just as they had long been in the North.¹³

Historians have also, by offering a much richer account of opponents of desegregation and other racial-equality measures, complicated perceptions of such opponents as uniformly the product of raw racial animus. While, to be sure, racial animus played a substantial role in opposition to the civil rights movement, many opponents – in both the North and the South – perceived themselves to be acting for “good” reasons – reasons they did not see as reflecting racial hatred.¹⁴ Rather, many of the tropes invoked by segregationists and other opponents of

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8. See *infra* Part III. Scholarship addressing the phenomenon of nonfacial forms of racial discrimination – during both the Jim Crow and civil rights eras – of course existed even prior to the recent historical scholarship described herein. But recent scholarship, such as Anders Walker’s excellent book *The Ghost of Jim Crow*, has given special attention to the importance of attending to the continuity that such forms of nonfacial racial discrimination create between our present and our past. See generally WALKER, *THE GHOST OF JIM CROW*, *supra* note 7 (extensively discussing this issue).
 9. 347 U.S. 483 (1954).
 10. See *infra* Part III.
 11. The “absolute defiance” response to *Brown* – openly refusing to admit African American children to “white” schools – is typically referred to as “massive resistance.” See Judith A. Hagley, *Massive Resistance – The Rhetoric and the Reality*, 27 N.M. L. REV. 167, 170 (1997). As discussed in Part II, although massive resistance is often conceptualized as being the general response of the Southern states during the earliest years following *Brown*, see *id.*, several Southern states, from the start, took a covert obstructionist approach. As massive resistance collapsed in the late 1950s and early 1960s, this became the dominant approach to resisting *Brown*. See *infra* Part II.
 12. I use the term “race neutral” throughout this piece to describe laws, rhetoric, or beliefs that are characterized as, or are perceived to be, unrelated to racial disparate treatment. As described at greater length herein, such characterizations and self-perceptions may be sincere or insincere – but in either instance may be false, insofar as many “race-neutral” laws, rhetoric, and beliefs, historically and today, are in fact racially discriminatory.
 13. See *infra* Part II.
 14. See *id.* Of course, this was true even regarding slavery, which many contemporaneous whites viewed as beneficial to both blacks and whites. See John W. Wertheimer, 36 LAW & HIST. REV. 186 (2018) (reviewing ALFRED L. BROPHY, *UNIVERSITY, COURT, AND SLAVE: PRO-SLAVERY THOUGHT IN SOUTHERN COLLEGES AND COURTS AND THE COMING OF THE CIVIL WAR* (2016)).

racial equality—of black criminality and dangerousness, of black students’ academic unpreparedness, of property rights, and of safe neighborhoods—were perceived by opponents as reflecting real concerns.¹⁵ Thus, many opponents of desegregation would have perceived little resemblance between themselves and the animus-driven archetype of segregationist resistance—just as many white Americans today perceive themselves as fundamentally dissimilar from segregationists of the civil rights era.

Elizabeth Gillespie McRae’s *Mothers of Massive Resistance* and Theoharis’s *A More Beautiful and Terrible History* are both welcome additions to the burgeoning historical literature complicating the distance we seek to place between our racial past and present. McRae’s *Mothers of Massive Resistance* places white women at the center of efforts to maintain white supremacy in the Jim Crow South, tracing the complex and evolving ways that white women and mothers sought to preserve racial privilege.¹⁶ By following a core group of white women activists in the era leading up to and after *Brown*, McRae shows the evolving rhetoric and strategies of opposition to desegregation and its increasing representation in “colorblind”¹⁷ frames.¹⁸ By demonstrating how these women integrated themselves into a national conservative movement—and undertook the work of reproducing

15. See *infra* Part II. In this Review, I repeatedly identify the specific racial stereotypes held by white Americans historically and today—something that may seem jarring in today’s era of “colorblind” discourse. To be clear, I do so neither to suggest that such stereotypes are true (though as I point out, it is important to understanding racism that segregationists then and now have believed them to be), nor to suggest that their embrace is not racist. Rather, the purpose of my discussion of racial stereotypes is intended to highlight a point that other scholars have also previously observed: their capacity to obscure, for those who hold them, a self-awareness of their own racism. See generally Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987) (seminal article making this point).

Some might question the need to repeatedly name these stereotypes, and might believe that doing so in some way gives them credence. That is a reasonable perspective, though certainly not my intent. My own perspective is that we cannot effectively counteract racism without being willing to explicitly say its name and identify its manifestations. Indeed, if the purpose of revisiting our histories is to encourage white Americans to interrogate their own racial biases by helping them see continuity with the past, we cannot hope to do that without naming with specificity which racial stereotypes—past and present—continue to undergird contemporary racism.

16. ELIZABETH GILLESPIE MCRAE, *MOTHERS OF MASSIVE RESISTANCE: WHITE WOMEN AND THE POLITICS OF WHITE SUPREMACY* 4 (2018).

17. “Colorblind,” as used herein, refers to measures, rhetoric, or beliefs that are facially race neutral. As described at greater length in this Review, such measures need not be truly race neutral and indeed often are not. See also *supra* note 12 (describing the use of the term “race neutral” in this Review).

18. See MCRAE, *supra* note 16, at 4-19.

racial hierarchy in innumerable localized and private ways not touched by the law – McRae’s work suggests why it would be facile to assume that formal legal equality has undone the structures of racial hierarchy.¹⁹

Theoharis’s *A More Beautiful and Terrible History* similarly complicates our triumphalist perception of the civil rights era, taking on both sides of our oversimplified account. As Theoharis persuasively demonstrates, the civil rights movement itself was neither so beloved in its own time nor so domesticated as contemporary accounts would suggest. Martin Luther King, Jr., opposed discrimination, segregation, and police brutality in both the North and the South – and for this reason, among others, was widely unpopular with white Americans at the time of his death.²⁰ Robust grassroots civil rights movements existed in both the North and the South, and challenged forms of segregation and discrimination that are, in many regards, strikingly similar to those we live with today.²¹ Just as the Black Lives Matter movement is today subjected to criticism by multiple constituencies, the civil rights movement was criticized by both whites and some blacks as pushing too hard, using unlawful and disruptive methods, and seeking to introduce dangerous and damaging reforms.²²

On the other side, Theoharis demonstrates how our triumphalist narrative of the civil rights movement dovetails with our flattened, animus-focused account of the actions of segregationists. Theoharis shows how our caricatured account of opponents of desegregation – what she refers to as “the redneckification of racism” – melds with our accounts of the civil rights movement to allow us to imagine ourselves as much further removed than we actually are from the racial

19. *See id.*

20. *See* THEOHARIS, *supra* note 2, at 3-4, 9-10, 63-64; *Black Lives Matter*, INFLUENCE WATCH, <https://www.influencewatch.org/movement/black-lives-matter> [https://perma.cc/9YZP-37DM] (collecting sources describing criticisms of the Black Lives Matter movement).

21. *See* THEOHARIS, *supra* note 2, at 31-98.

22. *See id.* at 22-26. For example, as Theoharis and others have pointed out, the pervasive critiques that have been leveled against the forms of protest employed by the Black Lives Matter movement are hardly novel. Though the civil disobedience of the civil rights movement is today remembered with reverence, in its own time, it was often criticized as dangerous, disruptive, un-American, and illegal. *See id.* at 23-26, 173-86; Anders Walker, *A Lawyer Looks at Civil Disobedience: Why Lewis F. Powell Jr. Divorced Diversity from Affirmative Action*, 86 U. COLO. L. REV. 1229, 1230-31 (2015); *see also* Steve Chapman, Opinion, *Why Do Whites Oppose the NFL Protests?*, CHI. TRIB. (Sept. 26, 2017, 3:40 PM), <https://www.chicagotribune.com/news/opinion/chapman/ct-perspec-whites-nfl-anthem-protests-20170927-story.html> [https://perma.cc/K5EM-D8SR] (observing that, then and now, white Americans view unfavorably even peaceful, lawful protests by African Americans). *But cf.* SCHMIDT, *supra* note 7, at 91-113 (describing the heterogeneity of the responses to sit-in protests, even among opponents).

inequality of the past.²³ Rather, many opponents of desegregation during the civil rights era deployed familiar and often ostensibly race-neutral frames to resist meaningful desegregation.²⁴ As Theoharis suggests, it is only through our mythologization and flattening of both the civil rights movement and its opponents that we can perceive our racial present as fundamentally disconnected from our racial past.

Drawing on the work of Theoharis and McRae—as well as that of other historians—this Book Review makes the case that recapturing these more complicated accounts of our racial past is critical to the racial-equality work of the present.²⁵ As the work of Theoharis, McRae, and others demonstrates, it is only through highly selective memorialization that we can claim a clear break from the structures and ideologies of racial subordination that existed in the civil rights era. And yet this distance is what allows us to exculpate ourselves from the racial inequality of the present.²⁶ Fully embracing our complicated racial history thus has important implications for contemporary race equality work both inside and outside of the courts.

In law, in particular, embracing these more complicated histories calls upon us to reimagine the doctrine at the heart of contemporary antidiscrimination law: disparate treatment. With a fuller understanding of the motives and self-perception of racial-justice opponents, it is readily apparent why the “intent” proxy that the Supreme Court often uses for disparate treatment is inadequate. Rather, disparate treatment doctrine must, in fact, focus on *disparate treatment*: the ways in which racial minorities continue to be treated differently across a host of domains. So too history suggests an important role in disparate treatment doctrine for stereotypes, which have long undergirded the justifications for racial inequality, and for skeptical consideration of facially race-neutral measures, which have served as a form of “colorblind” Jim Crow for 150 years.

23. THEOHARIS, *supra* note 2, at 83-99.

24. *Id.* at 62-99.

25. Note that this Book Review, because it is centered on our national histories of the civil rights movement and responses to *Brown* in the South, focuses on African Americans. However, much of the discussion could also pertain to other complicated histories—and important implications of those histories—that we ought to consider regarding other racial and ethnic minority groups in our country. Certainly, the recommendations of Part V, although framed in terms of African Americans, should extend to adjudication of discrimination against all racial and ethnic minority groups, and indeed arguably to all protected groups generally.

26. Cf. Elise C. Boddie, *The Contested Role of Time in Equal Protection*, 117 COLUM. L. REV. 1825, 1826 (2017) (making a similar observation in relation to the Supreme Court’s jurisprudence and its propensity to “obscure the relationship between present-day racial inequality and past discrimination,” and calling for greater historical inquiry as an aid to adjudicating discrimination in equal protection jurisprudence).

This Review proceeds in five Parts. Part I introduces *A More Beautiful and Terrible History* and *Mothers of Massive Resistance* more fully. It then situates them within the broader body of historical work calling into question our standard accounts of the civil rights era. As this Part lays out, Theoharis's and McRae's books are important new additions to an outpouring of contemporary historical scholarship that challenges virtually every aspect of our standard accounts of the civil rights era, and in so doing should complicate our understandings of our racial past and present.

Part II turns to an in-depth discussion of one of the most substantial contributions of the historical literature in this area, complicating our unidimensional accounts of opponents of desegregation and other civil rights measures. As historians such as Theoharis, McRae, and others have shown, our caricature of segregationists as exclusively motivated by raw racial animus and exclusively located within the South has caused us largely to overlook the wide array of actors that opposed desegregation and the many reasons they put forward. Moreover, many of those reasons—such as worries about school quality, stereotypes about the morals and academic unpreparedness of African American students, and concerns regarding state erosion of parental control—look not so very different from those widely embraced today. Thus, the work of historians—by affording greater nuance and complexity to our understandings of who opposed desegregation and why—fundamentally problematizes the distance we place between ourselves and historical opponents of racial equality.

Part III turns to the historical work that demonstrates that not only the perspectives, but also the forms, of legal discrimination in the Jim Crow era are not so very distant from our present. Drawing on the work of Theoharis and McRae—as well as others, such as Anders Walker²⁷—this Part shows that while Jim Crow laws were one piece of the framework of racial subordination in the years before *Brown*, they were far from the only piece. In both the North and the South, ostensibly race-neutral devices were used to maintain segregation and other forms of racial subordination both before and after *Brown*. This Part explores how our story of a triumphant civil rights movement that defeated legalized racism becomes far more complicated if one acknowledges the diversity of forms legal opposition to racial equality took, even during the civil rights era itself.

Part IV takes up the constitutional doctrines that grew out of *Brown*—“color-blindness” and intent doctrine—and describes why both, while well intentioned,

27. For relevant works by Walker, see, for example, WALKER, THE GHOST OF JIM CROW, *supra* note 7, as well as the articles cited *infra* note 121.

ultimately proved inadequate to the task of eradicating racial inequality.²⁸ As this Part explores, the close work of historians gives us an up-front view of the process that Reva Siegel has referred to as “preservation-through-transformation” – the preservation of status regimes in the face of legal reform.²⁹ As the work of contemporary historians has shown, there are striking similarities between the forms of and justifications for opposition to civil rights after *Brown* and the forms of and justifications for opposition to civil rights today. Thus, the work of historians shows just how little “transformation” was required for important aspects of the pre-*Brown* racial regime to endure.

Finally, Part V explores the implications of the foregoing discussion for contemporary society and equality law. As this Part explores, the work of historians ought to profoundly shape how we view our modern structures of racial inequality – as well as our own comfortable understanding of such structures as race neutral and justified. In the case of equality law, the work of historians calls upon us to take seriously the ways that contemporary antidiscrimination doctrine predictably fails to achieve even its core anti-disparate-treatment mission and to recommit ourselves to that disparate treatment mission through historically informed doctrinal reform. Most fundamentally, adopting a more accurate, historically informed understanding of how racial disparate treatment occurs makes clear why disparate treatment itself – rather than its traditional proxy, discriminatory intent – must form the fundamental inquiry in equality law.³⁰ The work of historians provides the tools for such a refocused disparate treatment

28. I interrogate in this Book Review the tendency to characterize ourselves as far removed from the structures and ideologies of racial subordination that existed in the civil rights era. In particular, I suggest that continuities with the past should cause us to reassess whether we can assure ourselves with confidence that the anti-disparate-treatment mission of contemporary equality law is being met. Of course, even if disparate treatment were entirely eradicated today, racial inequality would remain, as other scholars have persuasively shown. See generally DARIA ROITHMAYR, *REPRODUCING RACISM: HOW EVERYDAY CHOICES LOCK IN WHITE ADVANTAGE* (2014) (extensively documenting how racial inequality reproduces itself even in the absence of disparate treatment). Thus, my arguments should not be taken to suggest that the work of historians that complicates our understandings of racial bias – or the prescriptive suggestions regarding disparate treatment that I derive therefrom – entirely explains or addresses contemporary racial inequality.

29. See Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1119 (1997); see also Elise C. Boddie, *Adaptive Discrimination*, 94 N.C. L. REV. 1235 (2016) (articulating a similar theory and describing the ways that racial discrimination has evolved to survive in the face of legal and social change).

30. I do not mean to suggest here that disparate treatment should be the only actionable paradigm in equality law, but rather that as to our core disparate treatment commitment, disparate treatment itself – rather than discriminatory intent – ought to be at the heart of the inquiry. For statutory antidiscrimination law, it remains the case that disparate impact is, and ought to be, another available paradigm.

inquiry, reminding us that the faces of contemporary racism are often not so very different from those of our past.

* * *

A few final observations are important before proceeding to the substance of this Review. First, while the work of historians that I describe herein may be valuable to a variety of audiences, its most vital audience—and that to which I address myself most directly here—is white Americans. Although, as other excellent work has shown, not all causes of racial subordination derive from the actions of the white community,³¹ the central call of the history described herein is for those of us who are its racial descendants to understand how it may implicate us. Thus, when I use the terms “we” and “us,” I am referring primarily to people (like myself) who share the (white) racial heritage of the historical actors described herein.

Relatedly, the turn to greater historical complexity I urge in this Review is likely to strike some as neither surprising nor new. Many critical race theory (CRT) scholars, historians, people of color, and other antiracist actors have long been aware that racial discrimination was not historically limited to explicit Jim Crow—and have also been fully aware that not all racial discrimination, even during the civil rights era, was motivated by raw racial animus.³² While the recent work of historians adds new and rich detail to our understanding of these aspects of our racial history, the basic insights described herein—that there was always covert racial discrimination in our country, and that racial discrimination was never exclusively undergirded by raw racial animus—are in some sense hardly novel. Thus, one might question the very project of highlighting the work of historians described herein or urging its importance in understanding our racial past and present.

But in my view, this overlooks the powerful hold that canonical stories of our relationship to the civil rights era continue to have on our national discourse and on the views of many white Americans. To be sure, there are individuals, espe-

31. On the issue of the complexity of the modern system of mass incarceration and the role of black prosecutors and politicians in its rise, see, for example, JAMES FORMAN, JR., *LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA* (2017).

32. See, e.g., Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1052 (1978); Lawrence, *supra* note 15, at 318; cf. Martin Luther King, Jr., *Letter from Birmingham Jail*, CARSON-NEWMAN (1963), https://web.cn.edu/kwheeler/documents/Letter_Birmingham_Jail.pdf [<https://perma.cc/JLC8-WUDZ>] (“I have been gravely disappointed with the white moderate. I have almost reached the regrettable conclusion that the Negro’s great stumbling block in the stride toward freedom is not the White Citizens Councillor or the Ku Klux Klanner but the white moderate . . .”).

cially abundant in the academy and in communities of color, that do not view our racial history primarily through the lens of the oversimplified popular histories I describe as the “canonical” or “stock” or “popular” accounts. But the stock stories I describe continue to powerfully affect how our racial history is framed in our country—in politics, in judicial opinions, in public discourse, and most importantly, in many individuals’ beliefs.³³ Indeed, the power of these stories is so strong that they have even provided the framing at times for discussions of race by some (like prominent CRT scholars or President Obama) who surely know them to be woefully oversimplified.³⁴

Thus, in drawing attention to the recent work of historians, I do not mean to suggest that the basic insights their work affords were previously unknown or unknowable—although their work has surely added rich historical detail and new perspective to what we knew. Rather, this Review is intended to emphasize the importance of using these histories to dismantle the stock stories that our country continues to tell about its racial past—and to emphasize the implications that such a dismantling would have. Replacing our canonical stories about the civil rights era with a new canon—one closer to the more-complicated portrait that modern historians (and others) have painted of our racial past—has yet to occur.³⁵ And such a move would, as laid out herein, have important implications for how we approach contemporary racial inequality, both in the law and outside it.

As elaborated in the later sections of this Review, those implications are in many regards strikingly similar to those that CRT scholars have urged for

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33. See THEOHARIS, *supra* note 2, at x-xiv, 4-13, 31-32, 83-84; Boddie, *supra* note 26, at 1854-56 (describing the variety of ways that the Supreme Court has in the modern era situated racial discrimination as being in the past and disconnected from modern equality, based on the passage of time); Michelle Diggles & Lanae Erickson Hatalsky, *The State of the Center*, THIRD WAY (May 15, 2014), <http://thirdway.imgix.net/pdfs/the-state-of-the-center.pdf> [<https://perma.cc/7Y6C-RNDX>] (reporting that forty-three percent of conservatives believe racial discrimination against minorities is a thing of the past); Tyler Kingkade, *College Student Survey Suggests We've Made Little Progress Eliminating Racism*, HUFFPOST (Dec. 6, 2017), https://www.huffingtonpost.com/2015/02/07/college-student-survey-race_n_6632854.html [<https://perma.cc/6PAU-P5HZ>] (noting that “[o]ne-fourth of college students say racism is no longer a problem in the U.S.”); see also *infra* notes 38-42, 101-103, 144-145, 193-198 and accompanying text.
34. See, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 35-38 (2010) (offering a fairly standard historical account of the end of Jim Crow); BONILLA-SILVA, *supra* note 3, at 2-4 (drawing sharp distinctions between the racism of the present and the racism of the past); THEOHARIS, *supra* note 2, at 8-9, 13 (discussing President Obama’s remarks).
35. See sources cited *supra* notes 33-34.

years—based on history, but also on psychology, storytelling, and critical readings of the law.³⁶ To the extent that the work of historians I describe herein—and the conclusions that can be drawn from it—is deeply consonant with the existing insights of CRT scholars, it provides additional powerful reasons to credit that existing body of work. Most notably, while our stock stories of the civil rights era might facilitate dismissive views of important modern racial phenomena described by CRT scholars (like stereotype-based discrimination) as less morally reprehensible, and fundamentally different in kind, than the “bad” racism of the past, the history discussed in this Review eviscerates the foundation for this perspective. It thus ought to compel those whose initial reaction is to resist the conclusions of CRT scholars to interrogate more closely the reasons why they do so—and to question whether our now-reviled segregationist forerunners might have similarly justified their own racial beliefs.

In short, the work of Theoharis, McRae, and other modern historians builds on the longstanding project of understanding our racial past and present; it surely does not begin it. But to the extent that the histories they describe continue to be peripheral to our canonical understandings, it remains, for the reasons set out herein, vitally important that those histories continue to be heard. This Review seeks to contribute to that goal and, in so doing, to the broader project of dismantling contemporary racial inequality.

I. THEOHARIS, MCRAE, AND THE RISE OF “THE HISTORIES WE NEED”³⁷

The story of the civil rights era is a familiar and reassuring one for many white Americans. Centered around the aftermath of *Brown* and the ultimate collapse of Jim Crow, the story takes on a redemptive cast.³⁸ Racism, represented exclusively by the explicit racial structures of the Jim Crow South, was vicious and ugly, but it was defeated.³⁹ Its proponents (Southern “rednecks”) were violent and motivated by raw racial animus, but bear little resemblance to most well-intentioned “colorblind” people today.⁴⁰ The majority of Americans were moved by the injustice of segregation and ultimately joined forces with the civil

36. See *infra* Parts IV, V.

37. THEOHARIS, *supra* note 2, at xvii.

38. See Mark Golub, *Remembering Massive Resistance to School Desegregation*, 31 LAW & HIST. REV. 491, 491-92 (2013).

39. See THEOHARIS, *supra* note 2, at 31-33.

40. See *id.* at 84-85.

rights movement to bring down the Jim Crow regime.⁴¹ The civil rights movement, always respected and respectable, prevailed.⁴²

Like most popular histories, our dominant recounting of the civil rights era has important elements of truth. But as recent work has shown, it is also fundamentally misleading in what it omits. Indeed, virtually every feature that renders our stock histories of the civil rights era reassuring, rather than unsettling, rests on what historians have shown to be essentially incomplete understandings. Racism flourished in both the South *and* the North.⁴³ In both places, it took forms that were at times explicit *and* at others “colorblind.”⁴⁴ Its proponents relied on both explicitly race-based justifications *and* justifications that were ostensibly race neutral.⁴⁵ The nation’s response to the civil rights movement’s efforts to address racism was both embracing *and* hostile.⁴⁶ And ultimately, the civil rights movement’s goals (the toppling of Jim Crow *and* the defeat of Northern-style racism) were only partially achieved.⁴⁷ Taking the work of historians seriously, the causes and forms of racial inequality look far less distinct – and the victories far less complete – in ways that should unsettle our comfortable sense of distance from our racial past.

And indeed, this is precisely what Jeanne Theoharis sets out to do in an excellent addition to the historical literature in this area, *A More Beautiful and Terrible History: The Uses and Misuses of Civil Rights History*. Theoharis begins by examining the rise – and consequences – of what she refers to as the “national fable” of the civil rights movement.⁴⁸ Politicians, on both the left and right, have for a generation embraced the civil rights movement, celebrating and honoring it publicly.⁴⁹ But as Theoharis persuasively argues, in so doing, they have built an oversimplified and self-congratulatory account that serves, at best, to distract from contemporary racial injustice – and at worst, to facilitate it.⁵⁰ As Theoharis puts it:

41. *See id.* at 21.

42. *See id.* at 7-8, 13-15.

43. *See infra* text accompanying notes 54-59, 92-96, 135-138, 184-185.

44. *See infra* Part III.

45. *See infra* Part II.

46. *See supra* note 22; *infra* text accompanying notes 68, 71.

47. *See supra* notes 20-21; *infra* text accompanying notes 56-59.

48. *See* THEOHARIS, *supra* note 2, at xiv.

49. *See id.* at ix-xiv, 3-15.

50. *See infra* text accompanying notes 51-53, 73-76.

A narrative of dreamy heroes and accidental heroines, the story was narrowed to buses and lunch counters and Southern redneck violence. It became a key way that Americans publicly acknowledged the country's legacy of racial injustice – in the past – where the death-defying courage and sacrifices of these heroes and heroines vanquished it, as opposed to in the present, where our own resolve might be needed as well. And it became a way the nation celebrated its own identity⁵¹

The remainder of Theoharis's book is dedicated to providing, as she puts it, "the histories we need": histories of the civil rights era that make clear just how partial the victories of the civil rights movement were – and just how many commonalities there are between our racial present and past.⁵² Theoharis's purpose here is not to discount the courage of civil rights leaders or the significance of their achievements – far from it – but rather to make clear that our triumphalist account of the civil rights movement's victory over racism is possible only if we ignore the reality of what – and who – the civil rights movement was struggling against.⁵³

As Theoharis lays out, one of the cornerstones of our triumphalist narrative is our forgetting of the long struggle for civil rights in the North and in the West (hereinafter collectively referred to as the "North").⁵⁴ Other historians, like Thomas Sugrue and Davison Douglas, have previously done important work in this area, demonstrating that although Southern and Northern racial inequality took different forms, racism (and even segregation) flourished in the North and was long the subject of grassroots civil rights activism.⁵⁵ Theoharis builds on this in a series of chapters about civil rights struggles in the North, examining in rich detail struggles against school and housing segregation, police brutality, and the criminalization of minority youth in cities like New York, Boston, and Los Angeles.⁵⁶ As Theoharis persuasively argues, the erasure of these Northern civil

51. THEOHARIS, *supra* note 2, at xiii.

52. *Id.* at xvii; *see also infra* text accompanying notes 54–66.

53. *See* THEOHARIS, *supra* note 2, at xvii–xxv, 207–11.

54. I use the term "North" as shorthand for not only the northern part of the country, but also western states like California, which have likewise been omitted from our canonical understandings of the civil rights movement and what it was fighting against.

55. *See generally* DAVISON M. DOUGLAS, *JIM CROW MOVES NORTH: THE BATTLE OVER NORTHERN SCHOOL SEGREGATION, 1865–1954* (2005) (detailing school segregation and struggles to address it in the North before *Brown*); SUGRUE, *supra* note 7 (extensively detailing the long history of civil rights struggles against racial inequality in the North).

56. *See* THEOHARIS, *supra* note 2, at chs. 1–3, 6.

rights movements allows us to forget that just as white Southerners actively opposed desegregation, so too white Northerners actively fought back when confronted with the possibility of desegregation.⁵⁷ While dissembling was often the first-line defense against desegregation advocacy in the North (forcing Northern activists to “*prove* that there was segregation . . . time and again”), when that failed, Northerners fought just as hard to keep “their” white schools.⁵⁸ Just as in the South, in the North racist tropes of African Americans’ lack of morals, criminality, and academic unpreparedness often undergirded this resistance.⁵⁹

And yet, as Theoharis points out, we remember the North differently, having bought into its own obfuscatory account of Northern segregation as *de facto* rather than *de jure*.⁶⁰ As Theoharis suggests, this is no doubt in part the result of the unfortunate decision of some civil rights activists to embrace the term “*de facto* segregation” to describe their cause in the North.⁶¹ But in one of Theoharis’s most novel and persuasive chapters, she also lays out the key role that the national media has played in absolving the North – to this day – of its discriminatory acts.⁶² Even as members of the national media were engaging in acts of bravery to report truthfully on the civil rights struggle in the South, they simultaneously embraced wholesale the self-interested framings of public officials and opponents of desegregation in the North.⁶³ Thus, even cases of adjudicated, purposeful segregation like that in Boston were cast by the media in terms that served to differentiate and mitigate the racism of Northern actors.⁶⁴ Boston had a “busing crisis”; the South had “segregationists.”⁶⁵ But as Theoharis demonstrates, these terms served to obscure the commonalities between North and South in both the causes of segregation and the levels of vitriol that accompanied its ordered demise.⁶⁶

The second half of Theoharis’s book turns to our accounts of the civil rights movement itself and the ways that our flattened and limited canonical recountings serve to distort our understanding of contemporary racial-justice

57. *See id.* at 32-33, 45-46, 55-56, 70-71, 86, 91.

58. *See id.* at 32, 37-38, 40-43, 49-50, 65-66, 89-90.

59. *See id.* at 32-33, 38, 40-44, 50-51, 61, 68, 71, 90, 94-98.

60. *See id.* at 32-34; *see also id.* at 38-39 (describing the origins of the “*de facto*” term).

61. *See id.* at 39.

62. *See id.* at 100-22.

63. *See id.* at 102-05.

64. *See id.* at 105-08.

65. *See id.* at 48-57, 105-08.

66. *See id.*

struggles.⁶⁷ As she details, the broad goals of the civil rights movement (including economic justice, welfare rights, an end to international imperialism, and criminal-justice reform), the diversity of actors (including youth, women, and many other now-forgotten individuals), the fear and demonization that the movement inspired (and accompanying government surveillance), and the long, hard organizing that preceded breakthrough moments are all marginalized within many of our popular accounts today.⁶⁸ What we are left with too often is an oversimplified morality tale: as caricatured by Student Nonviolent Coordinating Committee organizer Julian Bond, “Rosa sat down, Martin stood up, then the white folks saw the light and saved the day.”⁶⁹

As Theoharis persuasively argues, this narrowed account robs contemporary racial-justice actors—such as the activists leading the Black Lives Matter movement—of the history that should unconditionally be seen to support their work.⁷⁰ And it allows the rest of us to forget that the very same responses that have proliferated today in reaction to full-throated claims to racial equality—demonization, fear, and criticism—were equally present in responses to the now-revered civil rights movement of the 1960s.⁷¹ Just as our flattening of the forms of racism that existed during the civil rights era allows us erroneously to view the racism of our present as disconnected from our past, so too the flattening of the civil rights movement allows us to view it as distinct from the racial-justice movements of today.⁷²

Ultimately, Theoharis’s core claim, and one she makes persuasively, is that our national histories of the civil rights era often serve to shore up—rather than break down—contemporary racial inequality.⁷³ By ignoring and distorting key parts of the history, we are left with a narrative that silences the voices and diminishes the concerns of those who would call attention to racial injustice today.⁷⁴ We can absolve ourselves, secure in the knowledge that historical forms of racial injustice were narrow and confined—and were defeated with the collapse

67. See *id.* at chs. 5-9.

68. See *id.* at 207-10.

69. *Id.* at 21.

70. See *id.* at 22-26.

71. See *id.* at 173-86.

72. See *id.* at 22-26, 207-11.

73. See *infra* notes 74-76 and accompanying text.

74. See THEOHARIS, *supra* note 2, at 22-26, 207-11.

of Jim Crow.⁷⁵ Racial injustice is placed comfortably in the past, rather than being situated as a problem that we are required to grapple with today.⁷⁶

Elizabeth Gillespie McRae's *Mothers of Massive Resistance: White Women and the Politics of White Supremacy* also takes aim at our oversimplified accounts of the civil rights era, but with a very different focus. McRae's subjects are a series of Southern white women who worked from the 1920s through the decades following *Brown* to shore up the South's racial hierarchy.⁷⁷ Through close, detailed research tracing the work of her subjects – its breadth and dimensions outside the law, and how it evolved in response to new challenges – McRae seeks to illuminate the reasons why it would be facile to believe that racism ended with the eradication of Jim Crow laws.⁷⁸

And indeed, one of McRae's principal contributions is to show how malleable the strategies of segregationist women were in response to new or developing threats to Jim Crow.⁷⁹ In many ways a granular historical portrait of what Siegel has referred to as “preservation-through-transformation,” McRae traces the gradual evolution of the racial work that her subjects sought to do.⁸⁰ As new challenges to Jim Crow arose, the women she profiles developed new strategies to meet them.⁸¹ In the years leading up to *Brown* – and even more so in the years following – this meant an increasing turn towards “colorblind” frameworks and rhetoric in defending segregation and racial inequality.⁸²

As McRae explores, many of these “colorblind” frameworks – such as anti-communism, anti-internationalism, and critiques of excessive government intervention in parental and property rights – dovetailed to a significant extent with the emerging agenda of conservatives nationwide.⁸³ McRae traces how this afforded segregationist women in the South opportunities to develop national po-

75. See *id.* at x-xii.

76. See *id.* at xiii.

77. See MCRAE, *supra* note 16, at 4-6.

78. See *id.* at 9-10, 17-18.

79. See sources cited *infra* notes 81-86.

80. Siegel, *supra* note 29, at 1119; see *infra* notes 81-86 and accompanying text.

81. See MCRAE, *supra* note 16, at 23-40 (describing the ways that white women policed the boundaries of racial identity during the Jim Crow era in response to threats posed by multiracial communities); *id.* at 41-60 (describing the education- and curriculum-based work that white women did to shore up support for Jim Crow); *id.* at 109-37 (describing the partisan rhetorical realignments taking place among segregationist women in the post-World War II era).

82. See *id.* at 63-65, 148-64, 167-68, 174-75, 178, 184, 188-90, 197-98, 201, 204-05, 207-16.

83. See *id.*

litical networks and deploy those networks in service of racial goals.⁸⁴ But McRae’s work also makes clear that a simple account of these framings – and the incorporation of segregationist women in national conservative networks – as merely strategic racial pretexts also does not accurately convey their complexity.⁸⁵ With the rise of a national discourse that encouraged segregationists to avoid explicit references to race (as one organizer put it, “except in our own localities”), it became increasingly difficult to disentangle broader conservative objectives from their partially racial origins.⁸⁶

McRae’s other major contribution is to point out that the work of reproducing racism – even under Jim Crow – has always been iterative, multisited, and often nonlegal.⁸⁷ As McRae puts it, “legislation was never enough to sustain a Jim Crow South or nation, nor was it enough to destroy it.”⁸⁸ The women that she profiles strategized around preserving Jim Crow laws, but so too did they seek to reproduce racial hierarchies through political organizing, control of school-curriculum content, social work, government service, and control of the public framing of racially charged issues.⁸⁹ Ultimately, as McRae demonstrates, the defeat of Jim Crow laws could address only a small (albeit certainly significant) subset of the ways that racial hierarchies were maintained and perpetuated in the South.⁹⁰

Finally, like Theoharis, McRae, too, is dedicated to discrediting the distinctions our dominant accounts of the civil rights era draw between the South and the North.⁹¹ Drawing on the Boston “busing crisis,”⁹² she argues that the responses, framings, and self-perceptions of segregationist women in the North

84. *See id.*

85. *See id.*

86. *Id.* at 209 (quoting from a Women for Constitutional Government telephone script, in which organizers encouraged their members to “try to stay off the racial problem except in [their] own localities”).

87. *See id.* at 23-40 (describing how white women policed the color line through low-level bureaucratic action); *id.* at 41-60 (describing how segregationists shored up Jim Crow through school curricula); *id.* at 174-75, 189, 191-92, 195-96 (discussing various extralegal ways of resisting *Brown*, such as through curricula, inculcation of youth values, and racial storytelling).

88. *Id.* at 240.

89. *See* sources cited *supra* notes 81-86.

90. *See* MCRAE, *supra* note 16, at 240. McRae is, of course, not the first to make this observation, but her book offers new and rich historical detail to the reasons why this is so.

91. *See id.* at 217-40 (noting that white women facilitated de facto segregation in both the North and the South).

92. As noted above, there is a good argument that the characterization of what happened in Boston as a “busing crisis” is a misnomer that serves to exonerate white segregationists in the

were virtually indistinguishable from those of their counterparts in the South.⁹³ As McRae demonstrates, such women—Northern and Southern alike—embraced similar stereotypical beliefs about African Americans, casting them as academically unprepared, violent, and lacking in values.⁹⁴ So too in both the North and the South, such women drew on “colorblind” framings to oppose desegregation, emphasizing parental control, homeowners’ rights, and freedom of choice.⁹⁵ And in both the North and the South, women also drew on explicitly racist rhetoric—and targeted the African American children selected to desegregate white schools with violence and vitriol—even as they claimed themselves to be nonracist.⁹⁶

Ultimately, McRae, like Theoharis, seeks to complicate our sense of security that the collapse of Jim Crow laws marked the end of, or even a dramatic turn in, racial inequality in the United States. As she persuasively demonstrates, even in the South, efforts to preserve racial hierarchy were never exclusively situated in law, nor were they static in response to threats.⁹⁷ As explicit appeals to racial rhetoric became unacceptable in the aftermath of *Brown*, segregationist women developed “colorblind” frames for their concerns—frames that tied them to a growing national conservative network.⁹⁸ Eventually, the arguments of the South became the arguments of the nation as desegregation moved North and the reach of conservative politics expanded.⁹⁹

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Both McRae’s and Theoharis’s books include extensive original historical research and, as set forth above, are engaging and important in their own right. But perhaps of greatest importance is the broader cumulative picture that their work reveals, together with the work of many other recent historians. As set out in the following two Parts, what this history collectively uncovers is a portrait of those who resisted *Brown* and the legal methods by which they did so, which

North from their own “massive resistance” to a judicially ordered decree to desegregate de jure segregated schools. See *supra* notes 60–66 and accompanying text.

93. See *infra* notes 94–96 and accompanying text.

94. See McRAE, *supra* note 16, at 1, 168, 170–71, 173, 175, 203, 211, 228–29.

95. See *id.* at 10, 14–15, 161–63, 168, 174–75, 178, 184, 189–90, 196–98, 202, 208, 214–16, 221–22, 225–40; see also sources cited *supra* note 82 (detailing the use of “colorblind” rhetoric by segregationists in the South).

96. See McRAE, *supra* note 16, at 15, 168, 170–71, 173, 196, 222–24, 230–40.

97. See *supra* notes 78–90 and accompanying text.

98. See McRAE, *supra* note 16, at 63–65, 148–64, 167–68, 174–75, 178, 184, 188–90, 197–98, 201, 204–05, 207–16.

99. See *id.* at 215–40. See generally CRESPIANO, *supra* note 7 (detailing the history of segregationist politics in the rise of conservatism nationwide).

includes many elements that are strikingly similar to the ways that racial inequality is rationalized and justified today. As such, the work of these historians challenges us to take seriously the ways that an accurate historical account implicates us and the ways in which we sustain racial injustice in the present.

II. QUESTIONING THE “REDNECKIFICATION OF RACISM”¹⁰⁰

Like the story of the civil rights era, the popular iconography of the era is familiar to most Americans: Police Chief Bull Connor using police dogs to attack children, Emmett Till’s distorted and brutalized body, white mothers swearing and spitting at young African American schoolchildren.¹⁰¹ Through this iconography, we have come to understand segregationists through a particular paradigm: the brutal, Southern white redneck, motivated by raw racial animus.¹⁰² The result, as Theoharis puts it, has been the “redneckification of racism,” a portrait of racism as “violent, aggressively personalized, and continually located in the ‘barbaric South.’”¹⁰³

Like all aspects of our national stories of the civil rights era, this accounting has vital elements of truth.¹⁰⁴ The images that have become the centerpiece of

100. THEOHARIS, *supra* note 2, at 85 (coining the term “redneckification of racism”).

101. See *The Civil Rights Movement in Photos*, CNN (Apr. 8, 2014), <https://www.cnn.com/2014/04/07/us/gallery/iconic-civil-rights/index.html> [<https://perma.cc/VST3-RYS8>]; see also MCRAE, *supra* note 16, at 18 (discussing the limited iconography of the civil rights era); THEOHARIS, *supra* note 2, at 84 (same).

102. See THEOHARIS, *supra* note 2, at 83-85; see also Golub, *supra* note 38, at 498 (arguing that the popular memorialization of the movement cabins the site of white supremacy and trivializes the movement); cf. Matthew D. Lassiter & Andrew B. Lewis, *Massive Resistance Revisited: Virginia’s White Moderates and the Byrd Organization*, in *THE MODERATES’ DILEMMA*, *supra* note 7, at 1, 2-3 (arguing that the “majority of white southerners inhabited a broad middle ground”).

103. THEOHARIS, *supra* note 2, at 84 (quoting Heather Ann Thompson, *Blinded by a “Barbaric” South: Prison Horrors, Inmate Abuse, and the Ironic History of American Penal Reform*, in *THE MYTH OF SOUTHERN EXCEPTIONALISM*, *supra* note 7, at 74).

104. See *infra* notes 105-106 and accompanying text. As I explain several other places herein, it is important to note that many aspects of our contemporary history – including this one – are at least partially the product of the civil rights movement’s strategic decision-making during the civil rights era. Emphasizing the especially brutal nature of white racism in the South – and indeed, graphically provoking it – was part of how the civil rights movement sought to persuade white Americans to embrace civil rights objectives. See Michael J. Klarman, Brown, *Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7, 141-49 (1994). As multiple scholars have observed, this strategy was, in the near term, quite effective, leading to the enactment of landmark civil rights legislation. See DERRICK BELL, *SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM* 7-8 (2004); Klarman, *supra*, at 141-49. This highlights a pervasive problem in both social-movement advocacy and the law: that such strategic choices can often be co-opted by forces pushing in the opposite direction,

our national portrait of opponents of *Brown* became so precisely because they represent a very real and ugly component of how segregationists responded to challenges to Jim Crow. There were many agents of resistance to desegregation who *were* motivated by racial animus and responded with violence when white supremacy was challenged.¹⁰⁵ The South—and especially the Deep South—was in fact the center of violent and aggressive efforts to subjugate African Americans.¹⁰⁶

But as numerous historians have recently explored, this focus, while depicting a real part of the story, also obscures the breadth and diversity of the opposition to *Brown*.¹⁰⁷ Even in the South—the very center of our imagined understandings of resistance to *Brown*—there was always a great diversity of actors engaged in resistance to desegregation, many of whom bear little resemblance to our unidimensional accounts of segregationists.¹⁰⁸ Many segregationists, for example, were willing to accept tokenism and believed themselves to be acting for good reasons—not out of raw racial animus.¹⁰⁹ And yet few of these actors feature significantly in our popular understandings of resistance to *Brown*.

with unpredictable results. See generally Katie R. Eyer, *Ideological Drift and the Forgotten History of Intent*, 51 HARV. C.R.-C.L. L. REV. 1, 70-72 (2016) (discussing the problem of “ideological drift” and noting that, “[w]here the law’s content has been defined by a social movement’s own successes, it is on the contours of those successes that battles over meaning will be fought”).

105. See Michael J. Klarman, *Brown at 50*, 90 VA. L. REV. 1613, 1623-33 (2004); Michael J. Klarman, *Brown v. Board of Education: Facts and Political Correctness*, 80 VA. L. REV. 185, 195-96 (1994).

106. See sources cited *supra* note 105.

107. In addition to the two books reviewed herein, a number of other historians have undertaken to provide more complicated portraits of the motives and tactics of segregationists. For several significant accounts, see, for example, BAKER, *supra* note 7; CRESPIANO, *supra* note 7; KRUSE, *supra* note 7; THE MODERATES’ DILEMMA, *supra* note 7; THE MYTH OF SOUTHERN EXCEPTIONALISM, *supra* note 7; SCHMIDT, *supra* note 7, at 91-113; WALKER, THE BURNING HOUSE, *supra* note 7; WALKER, THE GHOST OF JIM CROW, *supra* note 7; Golub, *supra* note 38; Christopher W. Schmidt, *Beyond Backlash: Conservatism and the Civil Rights Movement*, 56 AM. J. LEGAL HIST. 179 (2016); and Christopher W. Schmidt, *Litigating Against the Civil Rights Movement*, 86 U. COLO. L. REV. 1173 (2015) [hereinafter Schmidt, *Litigating Against the Civil Rights Movement*].

108. See sources cited *supra* note 107.

109. See sources cited *infra* notes 111-131 and accompanying text; see also CRESPIANO, *supra* note 7, at 69 (quoting a segregationist contending “[w]e are not racists” and contending that segregation was a response to real, religiously ordained differences in the races); WALKER, THE GHOST OF JIM CROW, *supra* note 7, at 60-61 (describing moderates’ acceptance of token integration).

Among the most notable of these omissions is the virtual erasure from our popular historical memory of “moderate” segregationists¹¹⁰—those who opposed massive resistance and instead proposed “colorblind” measures, coupled with tokenism, as a means of obstructing *Brown*.¹¹¹ As numerous modern historians have explored, “moderate” segregationists were the eventual political winners in much of the South.¹¹² In some states, moderate segregationists maintained control from the outset, and in others, the collapse of massive resistance led to their political rise.¹¹³ And although we often think of massive resistance’s

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110. The term “moderate segregationists” is the term used at times by modern historians to describe those who opposed desegregation through “colorblind” and tokenistic strategies—and thus is the term I use to describe this group. See WALKER, *THE GHOST OF JIM CROW*, *supra* note 7, at 142 (using this term); Golub, *supra* note 38, at 529 (same); Schmidt, *Litigating Against the Civil Rights Movement*, *supra* note 107, at 1189–90 (same). Note, however, that there are certainly critiques one might raise of the term as inapt. Most notably, one might resist the conclusion that *any* segregationists should be characterized as “moderate.” Importantly, however, this terminology in fact represents *increased* transparency in describing the views of those who possessed such viewpoints, as the common convention has generally been to characterize such individuals simply as “moderates” or “Southern moderates”—both terms that entirely fail to acknowledge the segregationist perspectives of those they describe. See WALKER, *THE GHOST OF JIM CROW*, *supra* note 7 (using the term “Southern moderates” rather than “moderate segregationists” in the book subtitle, and the term “moderates” elsewhere in the book—though also using the term “moderate segregationist”); Golub, *supra* note 38 (regularly using the term “moderates” or “Southern moderates”). On balance, it is my view that the term can be a useful, while perhaps not ideal, way of distinguishing between segregationists who deployed massive-resistance approaches and those who instead favored “colorblind” and tokenistic obstruction.
111. See Golub, *supra* note 38, at 503–04.
112. See *id.* at 508; see also *infra* note 113 and accompanying text. Note that even before the recent scholarship I describe herein, there was a recognition among historians and others that there were moderates in the South who endorsed tokenistic strategies that led to little genuine integration. See NUMAN V. BARTLEY, *THE RISE OF MASSIVE RESISTANCE: RACE AND POLITICS IN THE SOUTH DURING THE 1950’S* 342–43 (1969). But in this scholarship, moderates were often portrayed only as opponents of massive resistance (albeit ineffective ones in achieving meaningful desegregation), as opposed to active agents of segregation themselves. See *id.*
113. See LASSITER, *supra* note 7, at 29–30 (noting that four states rejected massive resistance from the start, accepting token desegregation limited by pupil placement and residential segregation); *id.* at 88–89 (describing how moderate policies were adopted in Georgia when massive resistance collapsed in 1961, including “colorblind” obstructionist measures); WALKER, *THE GHOST OF JIM CROW*, *supra* note 7, at chs. 1–3 (describing the work of “moderate” segregationist governors immediately after *Brown* in Mississippi, North Carolina, and Florida); Davison M. Douglas, *The Rhetoric of Moderation: Desegregating the South During the Decade After Brown*, 89 NW. L. REV. 92, 94 (1994) (arguing that moderation prevailed from the start in states like North Carolina, Tennessee, and Texas); Golub, *supra* note 38, at 508 (arguing that moderates were the ultimate victors over massive resistance); James H. Hershman, Jr., *Massive Resistance Meets Its Match: The Emergence of a Pro-Public School Majority*, in *THE MODERATES’ DILEMMA*, *supra* note 7, at 104, 106 (arguing that moderates were ultimately the primary architects of

collapse as the key turning point in the struggles to implement *Brown*, these “moderates” were themselves remarkably successful at obstructing *Brown*.¹¹⁴ Indeed, such “moderates” were so successfully obstructionist that even years after they assumed power, only tiny numbers of African American students were attending schools with whites in many Southern states.¹¹⁵

And yet our image of who a segregationist is – and what their motives were – looks very different if we refocus our attention on moderate segregationists instead of the agents of massive resistance. As Walker and others have shown, many moderate segregationists did not understand themselves to be acting out of raw racial animus.¹¹⁶ Rather, many appear to have understood themselves to be genuinely seeking to protect and improve all races, even taking steps that we might characterize as truly progressive, such as efforts to limit racial violence and the actions of the Ku Klux Klan.¹¹⁷

And yet moderate segregationists were, as historians have pointed out, still “segregationists,” who believed that it would harm students – black and white – to have significant levels of integration.¹¹⁸ Their reasons – often grounded in racial stereotyping – bear a striking resemblance to the racial stereotypes of to-

responses to *Brown* in Virginia and took tokenistic approaches); Lassiter & Lewis, *supra* note 102, at 2 (observing that massive resistance was repealed and replaced by moderate “colorblind” laws in Virginia in 1959).

114. See sources cited *infra* note 115.

115. During the first decade-plus after *Brown*, only a tiny number of African American students were enrolled in white schools in many states under the political governance of moderate segregationists. See Douglas, *supra* note 113, at 95. For example, in North Carolina, where moderates were in power from the outset, only 0.5% of African American students attended schools with white students in 1964, a full decade after *Brown*. *Id.* at 95 n.11; see also LASSITER, *supra* note 7, at 43 (noting that almost 98% of African Americans in the South were still in segregated schools in 1964, after the collapse of massive resistance); Lassiter & Lewis, *supra* note 102, at 19 (arguing that massive resistance was less effective than moderates’ “colorblind” tokenism approaches).

116. See *infra* notes 117-118 and accompanying text.

117. See WALKER, *THE GHOST OF JIM CROW*, *supra* note 7, at 4-6, 76-77, 92; see also Anders Walker, *The New Jim Crow? Recovering the Progressive Origins of Mass Incarceration*, 41 HASTINGS CONST. L.Q. 845, 850-55 (2014) (describing various segregationists who viewed their goals as “progressive”). See generally WALKER, *THE BURNING HOUSE*, *supra* note 7 (surveying critiques of integration in the 1950s and 1960s to demonstrate how some beliefs about the value of diversity for intellectual pluralism dovetailed with intellectual defenses of segregation).

118. See MCRAE, *supra* note 16, at 188; Golub, *supra* note 38, at 505-07, 515; Joseph Mello, *Reluctant Radicals: How Moderates Shape Movements for Social Change*, 41 LAW & SOC. INQUIRY 720, 724-25 (2016); see also CRESPIANO, *supra* note 7, at 11-12, 18-19, 72 (describing moderate segregationists’ arguments that segregation benefitted both African Americans and whites); KRUSE, *supra* note 7, at 41 (noting that even in the City of Atlanta – portrayed as “the city too busy to hate” – white members of its ostensibly progressive coalition “were just as segregationist in

day.¹¹⁹ Many moderate segregationists thought that African Americans were academically unprepared and would be unable to compete with their white peers.¹²⁰ The African American community, in which recorded rates of marriage were lower and recorded rates of nonmarital births were higher, was perceived as possessing different moral beliefs than those possessed by middle-class whites.¹²¹ Violence and criminality were believed to be more common among African Americans—ills that moderate segregationists worried would be imported to white schools.¹²²

Moderate segregationists attempted to deploy these arguments strategically, even attempting to use family-law reform to make the number of illegitimate births in the African American community appear more stark.¹²³ However, it would be a mistake to conclude from this that such views were not sincerely held.¹²⁴ Rather, moderate segregationists believed that these arguments would succeed in bringing the public opinion of the nation on board, precisely because

their thinking as other whites of the city”); Paul M. Gaston, *Foreword by Way of Memoir to THE MODERATES’ DILEMMA*, *supra* note 7, at ix, xii (noting how moderates’ “program of tokenism . . . became the conservative strategy of containment, holding the line against integration”); *infra* notes 119-128 and accompanying text (discussing white moderate segregationists’ beliefs that black culture was different and a threat to white cultural values).

119. See *infra* notes 127-128 and accompanying text; see also Hershman, *supra* note 113, at 104-07 (distinguishing the older caste view that underlay massive resistance from moderates’ “class” view, not by a lack of prejudice but rather by the totality with which it was believed that racial lines must be maintained).
120. See CRESPINO, *supra* note 7, at 99; WALKER, *THE GHOST OF JIM CROW*, *supra* note 7, at 15, 107-08; Mello, *supra* note 118, at 724.
121. See CRESPINO, *supra* note 7, at 31, 72; WALKER, *THE GHOST OF JIM CROW*, *supra* note 7, at 49-51, 66-84, 87, 104-05, 107-13; Hershman, *supra* note 113, at 116; Mello, *supra* note 118, at 724; J. Douglas Smith, “When Reason Collides with Prejudice”: Armistead Lloyd Boothe and the Politics of Moderation, in *THE MODERATES’ DILEMMA*, *supra* note 7, at 22, 38-39; Anders Walker, “A Horrible Fascination”: Segregation, Obscenity & the Cultural Contingency of Rights, 89 WASH. U. L. REV. 1017, 1023-34 (2012) [hereinafter Walker, “A Horrible Fascination”]; Anders Walker, *Blackboard Jungle: Delinquency, Desegregation, and the Cultural Politics of Brown*, 110 COLUM. L. REV. 1911, 1927-45 (2010) [hereinafter Walker, *Blackboard Jungle*]; Anders Walker, *Legislating Virtue: How Segregationists Disguised Racial Discrimination as Moral Reform Following Brown v. Board of Education*, 47 DUKE L.J. 399, 410-17 (1998) [hereinafter Walker, *Legislating Virtue*].
122. See WALKER, *THE GHOST OF JIM CROW*, *supra* note 7, at 107-12; Mello, *supra* note 118, at 724; see also Walker, *Blackboard Jungle*, *supra* note 121, at 1912, 1935 (describing segregationists’ arguments that desegregated schools, in particular, were likely to cause increased violence and crime).
123. See WALKER, *THE GHOST OF JIM CROW*, *supra* note 7, at 66-84; Walker, *Legislating Virtue*, *supra* note 121, at 410-17.
124. See *infra* notes 131-133 and accompanying text.

they believed them to be true.¹²⁵ Because moderate segregationists genuinely believed stereotypical tropes about the African American community, they thought that if such “facts” were brought to public awareness, support for desegregation efforts would wane.¹²⁶

So too at the grassroots level, in the South, the work of historians has shown a far more complex picture than the iconographic images of white women spewing vitriol at African American schoolchildren. Although raw racial animus certainly pervaded many individual efforts to forestall desegregation, many individual homeowners and parents also fought desegregation because they believed in the same racial stereotypes as their leadership—that most African Americans were less academically capable, more prone to violence, and possessed different (and worse) community values.¹²⁷ Thus, many genuinely believed that desegregation would lead to a decrease in key “goods” for themselves and their families, such as the safety of their neighborhoods and the quality of their children’s education.¹²⁸

These views often dovetailed with perceptions of middle- and working-class homeowners that they were being stripped of their “rights” as homeowners and parents.¹²⁹ For many homeowners, their house was their single biggest investment and the gateway to the benefits of a middle-class life: good schools, government amenities, and safe and clean neighborhoods.¹³⁰ The entry of African Americans was often perceived by whites as unfairly divesting them of their earned right to a good, middle-class life, since it was assumed such entry would

125. See CRESPIANO, *supra* note 7, at 187-90, 202; WALKER, THE GHOST OF JIM CROW, *supra* note 7, at 4-7, 15, 87-88; Walker, *Blackboard Jungle*, *supra* note 121, at 1918-19; Walker, “A Horrible Fascination,” *supra* note 121, at 1023-27.

126. See *infra* notes 135-137 and accompanying text.

127. See CRESPIANO, *supra* note 7, at 99; KRUSE, *supra* note 7, at 158; LASSITER, *supra* note 7, at 78; MCRAE, *supra* note 16, at 1, 168-71, 211; THEOHARIS, *supra* note 2, at 88; see also Andrew B. Lewis, *Emergency Mothers: Basement Schools and the Preservation of Public Education in Charlottesville*, in THE MODERATES’ DILEMMA, *supra* note 7, at 72, 73, 76, 98 (noting that even those organizing in opposition to school closures did not support substantive integration, because they feared large numbers of African Americans in white classrooms would threaten to diminish educational quality).

128. See sources cited *infra* note 136; see also, e.g., KRUSE, *supra* note 7, at 15 (noting that “virtually all whites reacted to the course of civil rights change with some degree of opposition and distancing” — and observing that the timing of their doing so depended only on when desegregation began to affect them personally); MCRAE, *supra* note 16, at 15, 168 (describing white mothers’ opposition to school desegregation out of fear that integration would harm white schools and change the lessons and social norms taught there).

129. See *infra* notes 130-132 and accompanying text. See generally KRUSE, *supra* note 7 (discussing this extensively); LASSITER, *supra* note 7 (same); MCRAE, *supra* note 16 (same).

130. See KRUSE, *supra* note 7, at 61, 89, 106-07, 123-25; LASSITER, *supra* note 7, at 1-2.

lead to a decline in school and neighborhood quality and home values.¹³¹ Despite years of neglect of African American communities by government services, whites consistently assumed that African Americans were not significant contributors to the tax system and had not “earned” the services that they themselves had through their tax contributions.¹³²

Thus, at both the leadership and the grassroots levels, raw racial animus serves as only a partial explanation for the opposition to residential and school desegregation in the aftermath of *Brown*. While racial animus certainly played a role, it was far from the only dimension of segregationist actors’ self-perception. Rather, such actors often understood themselves to be acting for what they believed to be “good” reasons: because of what they perceived as the real differences between black and white communities (and the consequences they thus expected to flow from desegregation) and because of what they perceived to be their entitlements as homeowners and parents.¹³³

This expanded view of the identities and motives of opponents of desegregation brings the South and the North much closer together, and so too the present and the past.¹³⁴ Moderate segregationist politicians in the South were right to believe that many in the North, at bottom, shared their perspective on desegregation.¹³⁵ Many in the North, like those in the South, stereotyped African American children as academically incapable and unprepared and stereotyped the broader African American community as permeated with violence, criminal-

131. See KRUSE, *supra* note 7, at 61-62, 76-77, 89, 123-25; LASSITER, *supra* note 7, at 1-2; MCRAE, *supra* note 16, at 170, 221-22.

132. See KRUSE, *supra* note 7, at 125-27; MCRAE, *supra* note 16, at 175.

133. See sources cited *supra* notes 129-132 and accompanying text.

134. This is not, of course, to suggest that there were no differences in attitudes between the South and the North or between the past and the present. With regard to the South and the North, the biggest difference in attitudes resided in the continued embrace by a significant portion of the white South of a “caste” mentality, rather than the “class” mentality that Southern moderates and most Northerners endorsed. See Hershman, *supra* note 113, at 104-06 (describing the distinctions between the older “caste” view that underlay massive resistance and moderates’ “class” view). The geography of the North, in which the largest concentrations of African Americans tended to be in racially segregated cities (rather than in physically integrated rural communities, as some – but certainly not all – Southern locales were), also made the preservation of racial segregation in the North easier through “colorblind” means such as gerrymandered school-attendance lines. See generally DOUGLAS, *supra* note 55, at 265-73 (describing the reasons why the NAACP’s largely successful campaign in the twentieth century against facially segregated schools in the North nonetheless faced difficulties in actually desegregating schools).

135. See *infra* notes 136-138 and accompanying text; see also MCRAE, *supra* note 16, at 216-18.

ity, and questionable values.¹³⁶ So too many in the North viewed their own “entitlements” as homeowners and parents as being unfairly challenged by efforts to address segregation and discrimination.¹³⁷ And just as in the South, many, if not most, opposed efforts to bring about desegregation—even where those efforts were very limited.¹³⁸

So too in the present, there are many indications that we have not moved so very far from the stereotypical views that animated many of those who opposed *Brown*.¹³⁹ Studies have shown, for example, that many white parents today continue to use race as a proxy for school quality, perceiving declines in school quality when the racial composition of their neighborhood schools shifts towards a greater predominance of minorities.¹⁴⁰ A majority of whites still prefer white neighborhoods, perceiving heavily African American neighborhoods as less desirable and more dangerous than identical white neighborhoods.¹⁴¹ Numerous studies have shown that African Americans (especially African American men and boys) are perceived without reason by whites as dangerous, sometimes with

136. See MCRAE, *supra* note 16, at 1, 168, 170-71, 173, 203, 211; THEOHARIS, *supra* note 2, at 32-33, 37-38, 40-44, 50-51, 61, 68, 71, 94-98; Jeanne Theoharis, *Hidden in Plain Sight: The Civil Rights Movement Outside the South*, in THE MYTH OF SOUTHERN EXCEPTIONALISM, *supra* note 7, at 49, 53, 55, 58, 63, 65, 69.

137. See MCRAE, *supra* note 16, at 10, 15, 168, 174-75; THEOHARIS, *supra* note 2, at 51.

138. See MCRAE, *supra* note 16, at 15, 168, 173, 222, 230-40; THEOHARIS, *supra* note 2, at 33, 45-46, 55-56, 70-71, 86, 91; Matthew D. Lassiter, *De Jure/De Facto Segregation: The Long Shadow of a National Myth*, in THE MYTH OF SOUTHERN EXCEPTIONALISM, *supra* note 7, at 1, 36-37.

139. See *infra* notes 140-143 and accompanying text; see also KRUSE, *supra* note 7, at 245-58 (drawing parallels between modern suburban rhetoric and segregationist perspectives).

140. See Kimberly A. Goyette et al., *This School's Gone Downhill: Racial Change and Perceived School Quality Among Whites*, 59 SOC. PROBS. 155 (2012). Although it is much less common today for integration orders to be handed down, and thus for white parents to face the prospect of significant numbers of African American students entering largely white schools, when this does transpire, many of the reactions are strikingly similar to those during the civil rights era. See *The Problem We All Live with—Part One*, THIS AM. LIFE (July 31, 2015), <https://www.thisamericanlife.org/562/transcript> [<https://perma.cc/7NVH-3QYL>] (reporting on the concerns articulated by parents in Frances Howell District after finding out that a significant number of students from a predominantly African American district were to be transferred in, which included stereotype-based concerns regarding “violent behavior,” lack of academic preparedness, and poor values).

141. See Maria Krysan et al., *Does Race Matter in Neighborhood Preferences? Results from a Video Experiment*, 115 AM. J. SOC. 527, 548-49 (2009); Lincoln Quillian & Devah Pager, *Black Neighbors, Higher Crime? The Role of Racial Stereotypes in Evaluations of Neighborhood Crime*, 107 AM. J. SOC. 717, 740 (2001); see also Angela Onwuachi-Willig, *Policing the Boundaries of Whiteness: The Tragedy of Being Out of Place from Emmett Till to Trayvon Martin*, 102 IOWA L. REV. 1113, 1155 (2017).

deadly consequences for those so perceived.¹⁴² White parents, scholars, and sometimes even Supreme Court Justices continue to suggest that African American students are ill equipped to compete with their white peers and might be better off in “less-advanced” schools where their skills would (according to such whites) be more in line with those of their peers.¹⁴³

In short, complicating our accounts of the motivations of segregationists offers us far less comfortable distance from our racial past. Unlike the vicious, animus-motivated “redneck,” who is easy to dismiss as possessing motivations fundamentally unlike our own, moderate segregationists both had beliefs and framed their views in terms that still very much undergird many white Americans’ actions today. Offering a more nuanced account thus demands far more of us in the way of questioning our contemporary racial biases and dismantling the structures of racial oppression that they support.

142. See, e.g., Yara Mekawi & Konrad Bresin, *Is the Evidence from Racial Bias Shooting Task Studies a Smoking Gun? Results from a Meta-Analysis*, 61 J. EXPERIMENTAL SOC. PSYCH. 120 (2015); John Paul Wilson et al., *Racial Bias in Judgments of Physical Size and Formidability: From Size to Threat*, 113 J. PERSONALITY & SOC. PSYCH. 59 (2017).

143. See, e.g., Transcript of Oral Argument, *Fisher v. Univ. of Tex. at Austin*, 136 S. Ct. 2198 (2016) (No. 14-981), <https://www.oyez.org/cases/2015/14-981> [<https://perma.cc/UT29-YU9V>] (Justice Scalia noting, and seemingly endorsing, the argument that African American students might be better off in “less-advanced” schools). Many of these are cast as well intentioned efforts to ensure that black students succeed—something that proponents of mismatch theory have claimed is jeopardized by affirmative action. See Richard H. Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367, 371-72 (2004). However, it is also clear that even today, false racial stereotypes about African American students’ inability to compete in elite institutions drives parts of this discourse. See Bloggingheads.tv, *The Downside to Social Uplift | Glenn Loury & Amy Wax [The Glenn Show]*, YOUTUBE, at 49:05-50:30 (Sept. 11, 2017), <https://www.youtube.com/watch?v=cb9Ey-SsNsg> (scholar Amy Wax making unsupported, and later refuted, claims about the academic performance of African American students at the University of Pennsylvania Law School); cf. Joe Patrice, *Amy Wax Relieved of Her 1L Teaching Duties After Bald-Faced Lying About Black Students*, ABOVE L. (Mar. 13, 2018, 6:52 PM), <https://abovethelaw.com/2018/03/amy-wax-relieved-of-her-1l-teaching-duties-after-bald-faced-lying-about-black-students/2> [<https://perma.cc/P2K8-93TC>] (reporting the full text of an email from the University of Pennsylvania Law School Dean in which he refutes Wax’s statements). See generally William C. Kidder & Angela Onwuachi-Willig, *Still Hazy After All These Years: The Data and Theory Behind “Mismatch,”* 92 TEX. L. REV. 895 (2014) (extensively critiquing the empirical basis for mismatch theory and pointing out that the theory’s leading proponents focus their critique exclusively on minorities and affirmative action, while their theory would apply equally to whites with lower numeric indicators, such as legacy preferences, and even some white anti-affirmative-action plaintiffs). Moreover, segregationists, too, argued—self-servingly, but apparently sincerely—that it was better for African American students’ academic development to be in their own institutions, since they would not be able to compete in white schools. See WALKER, *THE GHOST OF JIM CROW*, *supra* note 7, at 15; Mello, *supra* note 118, at 723.

III. REMEMBERING “COLORBLIND” JIM CROW

Just as the identity of those who opposed desegregation has been reduced to a singular image in our national memory, so too the forms that legalized racial repression took before and after *Brown* have been remembered only in very partial form. Explicit Jim Crow laws and policies take center stage in our remembered battles of the civil rights era, represented in their most dramatic form by the school segregation laws that were struck down by *Brown* and the explicitly racial defense of segregation offered by Southern officials in *Brown*'s wake.¹⁴⁴ So narrowed, the eradication of explicitly racial Jim Crow laws—the landmark achievement of the civil rights movement—can be seen as marking an unambiguous victory over the racial regime of the past.¹⁴⁵

But so too here, our canonical representations are a dramatic oversimplification, causing us to miss much of what is important for our present era. Explicitly racial Jim Crow laws represented only a small fraction of the ways that racial segregation and discrimination were enforced, even in the South in the years preceding *Brown*.¹⁴⁶ Even during the *Plessy* era, political rights (like jury service and voting) were protected by the Court against explicit race-based infringement, and yet African Americans were widely prevented from exercising these rights.¹⁴⁷ Explicitly racial residential-segregation ordinances were struck down by the Supreme Court in 1917, and yet residential segregation remained pervasive.¹⁴⁸ NAACP victories in the Supreme Court and lower courts had chipped away at the ability of higher-education programs to exclude African Americans

144. See Jack E. Davis, *Civil Rights Movement: An Overview*, SCHOLASTIC (July 1, 2014), <https://www.scholastic.com/teachers/articles/teaching-content/civil-rights-movement-overview> [<https://perma.cc/XZH8-77YF>] (focusing only on Jim Crow laws and explicit segregation and resistance to *Brown* in describing the civil rights movement in a summary for middle and high school students).

145. Cf. MCRAE, *supra* note 16, at 240 (questioning this view and observing that “legislation was never enough to sustain a Jim Crow South or nation, nor was it enough to destroy it”); THEOHARIS, *supra* note 2, at xx-xxv, 207-11 (arguing that we can only view the triumph of the civil rights movement as complete if we ignore the full scope of what the movement was struggling against).

146. See, e.g., CRESPIANO, *supra* note 7, at 8-9; see also *infra* notes 147-162 and accompanying text.

147. See Eyer, *supra* note 104, at 8-12.

148. See *Buchanan v. Warley*, 245 U.S. 60, 80-82 (1917). Regarding the ways residential racial segregation continued to be enforced, in both facially race-based and nominally “colorblind” forms, see, for example, LOEWEN, *supra* note 7, at 1-14; and RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* (2017).

and the ability of states to pay black teachers lower salaries, yet equality in those domains was far from a reality.¹⁴⁹

Part of this is explained by forces outside the law, such as strong but informal customs and extralegal forms of coercion like economic retaliation and violence.¹⁵⁰ But “colorblind” Jim Crow laws and administrative action (in other words, legal action intended to reach racial results through means that were not facially discriminatory) were also an important piece of how inequality was sustained.¹⁵¹ For example, in the voting domain, most of the infamous efforts to disenfranchise African Americans – such as the grandfather clause, the poll tax, literacy tests, and felon disenfranchisement laws – were “race neutral” in design, precisely in order to evade prohibitions on facially race-based voting restrictions.¹⁵² Because, at the time, racial intent was not understood to be a basis for invalidating a law, Southern politicians were often not even covert in their aims, openly acknowledging that the purpose of adopting such “colorblind” measures was to disenfranchise the black community.¹⁵³ And, indeed, such “colorblind” measures were enormously successful in abrogating the voting and jury service rights of African Americans, in spite of the fact that such rights were nominally guaranteed.¹⁵⁴

Racially targeted (but facially “colorblind”) policing and imprisonment practices had also long been relied upon by Southern whites to maintain racial

149. See BAKER, *supra* note 7, at 44-86 (describing ways that the state of South Carolina continued to instantiate racial inequality after initial victories in the graduate-education and teacher-pay domains); Scott Baker, *An American Dilemma: Teacher Testing and School Desegregation in the South*, in *ESSAYS IN TWENTIETH-CENTURY SOUTHERN EDUCATION: EXCEPTIONALISM AND ITS LIMITS*, *supra* note 7, at 163, 167-82 (discussing the use of the National Teacher Examination to reinstantiate race-based salary differentials after facial discrimination was struck down).

150. See Eyer, *supra* note 104, at 9.

151. See *id.* at 9-11.

152. See MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* 30-36, 54-55 (2004); Nat'l Historic Landmarks Program, *Civil Rights Voting in America: Racial Voting Rights*, NAT'L PARK SERV. 10-16 (2009), <http://www.nps.history.com/publications/nhl/theme-studies/civil-rights-voting-rights.pdf> [<https://perma.cc/NN6J-UPRU>].

153. See Eyer, *supra* note 104, at 9-10; see also *Hunter v. Underwood*, 471 U.S. 222, 229 (1985) (quoting the president of the Alabama constitutional convention that adopted felon disenfranchisement as stating that the convention's goal was “within the limits imposed by the Federal Constitution, to establish white supremacy in this State”).

154. See KLARMAN, *supra* note 152, at 30-43, 52-57, 62, 85-86, 96-97, 141, 154, 250-53, 267-69, 283, 456-57; Sanjay K. Chhablani, *Re-Framing the ‘Fair Cross-Section’ Requirement*, 13 U. PA. J. CONST. L. 931, 937-38 (2011).

inequality.¹⁵⁵ In the aftermath of slavery, many locations in the South criminalized morally unobjectionable “offenses,” such as unemployment, with the purpose and effect of forcing freedmen back into servitude¹⁵⁶ (through the practice of convict leasing or by requiring freedmen to accept extremely exploitative contracts to avoid criminalization). Purportedly “colorblind” policing and legal process was regularly used as the method of effectuation of racism and racial control.¹⁵⁷ Foreshadowing the modern phenomenon of mass incarceration, many Southern jurisdictions saw enormous jumps in their African American prison populations in the aftermath of emancipation, as policing and criminalization became a preferred “colorblind” means of reinstating racial control.¹⁵⁸

So too the emerging standardized-testing industry became in the pre-*Brown* era a common “colorblind” way of limiting African Americans’ access to equality in pay and jobs. For example, after the NAACP prevailed in a pair of legal challenges in 1939 and 1940 to unequal pay scales for African American teachers, many jurisdictions in the South turned to a standardized test—the National Teacher Examination—as a “colorblind” way of ensuring that most African American teachers continued to be paid less.¹⁵⁹ After legal challenges to segregated higher education resulted in public law-school opportunities for African Americans, many state legislatures revoked diploma privilege—under which all graduates of the state law school were entitled to admission to the bar—in favor of a mandatory bar exam.¹⁶⁰ The SAT and ACT were adopted for the first time

155. As Taja-Nia Henderson has shown, the history of using the machinery of criminal justice to maintain systems of racial control and subordination has very long roots, stretching into the pre-Civil War South. See Taja-Nia Y. Henderson, *Property, Penalty and (Racial) Profiling*, 12 STAN. J. C.R. & C.L. 177 (2016).

156. See, e.g., Ian F. Haney López, *Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, 98 CALIF. L. REV. 1023, 1041-45 (2010).

157. See William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2073-77 (2002) (describing the NAACP’s efforts to address facially race-neutral but unquestionably racist policing and conviction practices prior to *Brown*).

158. See Haney López, *supra* note 156, at 1041-42.

159. See BAKER, *supra* note 7, at 44-62; Baker, *supra* note 149, at 165-78. When some members of the South Carolina legislature balked at adopting the test—worried it would permit some African Americans to be paid more than whites—they were assured that the average score of blacks was “at the lower fifth percentile of whites” and that the fact that a few blacks would score higher and qualify for salary increases could “be publicized to show the absence of discrimination.” BAKER, *supra* note 7, at 52.

160. See, e.g., BAKER, *supra* note 7, at 84 (quoting the sponsor of such a bill in South Carolina as saying it was introduced to “bar Negroes and some undesirable whites”).

by many public Southern universities as a “means of keeping out Negro applicants.”¹⁶¹ Regularly across the South, officials turned to standardized tests and other facially neutral measures as a way to “legally” exclude African Americans after facially discriminatory measures had been struck down.¹⁶²

It is then perhaps unsurprising that, in the aftermath of *Brown*, many Southern politicians turned to facially race-neutral measures as the most effective means of evading *Brown*.¹⁶³ Indeed, most moderate segregationists differed from those promoting massive resistance not in their support of segregation but in their belief that—*Brown* having been decided—“colorblind” measures would be the only effective approach to resisting compliance.¹⁶⁴ Such moderates argued that explicit massive-resistance measures would, contrary to public perceptions, lead to greater integration, as they made proving discrimination easy and would attract federal-court intervention.¹⁶⁵ In contrast, many moderate segregationists believed that desegregation could be limited to a bare minimum through the use of “colorblind” measures like pupil placement laws (requiring those wanting to change schools to undergo a battery of tests and vesting decision makers with vast discretion) and “freedom of choice plans” (nominally guaranteeing students the right to choose their schools but practically ensuring continued segregation

161. *Id.* at 132; *see also* United States v. Fordice, 505 U.S. 717, 734 (1992) (“The present admissions standards are . . . traceable to the *de jure* system and were originally adopted for a discriminatory purpose.”); *id.* at 130-32, 134-35 (describing the efforts of University of South Carolina administrators to adopt new admissions requirements and similar initiatives in other Southern states).

162. *See supra* notes 159-161 and accompanying text. This trend toward embracing standardized testing as a means of “legally” excluding African Americans continued after *Brown*. *See* Katie R. Eyer, *Protected Class Rational Basis Review*, 95 N.C. L. REV. 975, 1002-08 (2017).

163. *See infra* notes 164-166 and accompanying text. Some moderates explicitly drew on post-Reconstruction history in making the argument that such facially neutral measures were likely to form the most effective means of evading *Brown*. *See* WALKER, *THE GHOST OF JIM CROW*, *supra* note 7, at 17-18. So too grassroots advocacy increasingly turned to “colorblind” frames as open appeals to racism became politically unpalatable. *See* CRESPIANO, *supra* note 7, at 9; KRUSE, *supra* note 7, at 44; *supra* notes 82-86 and accompanying text.

164. *See infra* notes 165-166 and accompanying text; *see also* Lassiter & Lewis, *supra* note 102, at 19 (arguing that massive resistance was less effective than moderates’ “colorblind” tokenism approaches). Even leading proponents of massive resistance and interposition, such as James J. Kilpatrick, ultimately acceded to this view after massive resistance collapsed. *See, e.g.,* Joseph J. Thronthike, “The Sometimes Sordid Level of Race and Segregation”: James J. Kilpatrick and the Virginia Campaign Against *Brown*, in *THE MODERATES’ DILEMMA*, *supra* note 7, at 51, 70-71. Indeed, as described *infra* note 167, many packages of legislation passed under massive resistance incorporated “colorblind” measures to obstruct *Brown* together with explicitly racial measures.

165. *See* CRESPIANO, *supra* note 7, at 18-24, 26-35, 48; LASSITER, *supra* note 7, at 85; WALKER, *THE GHOST OF JIM CROW*, *supra* note 7, at 12-13, 15-16, 21-22, 113-14.

through biased initial assignments and informal intimidation of African Americans).¹⁶⁶

Of course, moderates did not initially dominate the political landscape in most states in the South following *Brown* (although they did in some).¹⁶⁷ But with the collapse of massive resistance in the late 1950s and early 1960s, the approach of moderate segregationists became the dominant approach of the South.¹⁶⁸ And by applying “colorblind” measures such as pupil placement and freedom-of-choice plans, moderates were remarkably successful in continuing

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166. See CRESPIANO, *supra* note 7, at 18-24, 26-35, 48, 173-80; BRUCE H. KALK, THE ORIGINS OF THE SOUTHERN STRATEGY: TWO-PARTY COMPETITION IN SOUTH CAROLINA, 1950-1972, at 83 (2001); KRUSE, *supra* note 7, at 143-44, 150-51, 161-62; LASSITER, *supra* note 7, at 13-14, 31-36, 40-43, 72-76, 83-85; MCRAE, *supra* note 16, at 177-78, 184-86, 191; WALKER, THE GHOST OF JIM CROW, *supra* note 7, at 4-7, 12-14, 16, 20-21, 38-44, 49-51, 53-56, 107-12; Eyer, *supra* note 104, at 12-15; Hershman, *supra* note 113, at 128-30; Lewis, *supra* note 127, at 98; Smith, *supra* note 121, at 35-41, 44-45; Diane Ravitch, *Resegregation*, NEW REPUBLIC (Sept. 29, 2010) (book review), <https://newrepublic.com/article/77872/resegregation-martha-minow> [<https://perma.cc/Y8P3-7ZS8>]. Southern politicians also attempted to rely on “colorblind” strategies and subterfuge outside of the primary- and secondary-school context. See CRESPIANO, *supra* note 7, at 16, 109; KRUSE, *supra* note 7, at 122, 145; SCHMIDT, *supra* note 7, at 102-07.
167. The primary Southern states where moderates were in power even before the collapse of massive resistance include at least North Carolina, Tennessee, and Texas. See Douglas, *supra* note 113, at 94. Some governors in other states during the immediate post-*Brown* era, including Florida and Mississippi, were also moderate segregationists. See WALKER, THE GHOST OF JIM CROW, *supra* note 7, at 11-48, 85-116. Even in those states in which moderate segregationists did not carry the day initially, “colorblind” measures like pupil placement were often a part of the package of reforms under massive resistance as well. See KRUSE, *supra* note 7, at 143-44; Lassiter & Lewis, *supra* note 102, at 6-7. Illustrating that moderate segregationists’ legal prediction on this issue was correct, the Supreme Court initially upheld such pupil placement plans in *Shuttlesworth v. Birmingham Board of Education*, 358 U.S. 101 (1958), even as it was opining on the unconstitutionality of interposition and massive resistance in *Cooper v. Aaron*, 358 U.S. 1 (1958). See Eyer, *supra* note 104, at 14-15.
168. See CRESPIANO, *supra* note 7, at 108; KRUSE, *supra* note 7, at 146-51; WALKER, THE GHOST OF JIM CROW, *supra* note 7 at 117-22. Indeed, as scholars such as Walker and Earl Maltz have shown, the appointment of several moderate segregationists to important federal government positions helped to diffuse many of the approaches and perspectives of such individuals nationally. See WALKER, THE GHOST OF JIM CROW, *supra* note 7, at 123-24, 142-43; Earl M. Maltz, The Triumph of the Southern Man: *Dowell, Shelby County*, and the Jurisprudence of Justice Lewis F. Powell, Jr. (unpublished manuscript) (on file with author) (not using the term “moderate segregationist” to describe Justice Powell, but offering an account that supports that designation); see also Lassiter & Lewis, *supra* note 102, at 18 (offering a historical account of Justice Powell as a moderate segregationist who promised to help hold desegregation to a legal minimum, a path he helped maintain through the 1960s).

to forestall enforcement of *Brown*.¹⁶⁹ Indeed, in 1964, years after massive resistance collapsed in most of the South, still only 1.2% of black students in the South attended school with whites.¹⁷⁰ It was not until the late 1960s, as the political branches became involved in desegregation battles and the Supreme Court permitted inquiry into government officials' racial intent, that such "colorblind" measures finally were deemed inadequate to meet Southern jurisdictions' obligations under *Brown*.¹⁷¹

In the North, of course, such "colorblind" approaches had long been the dominant mechanism through which segregation was maintained.¹⁷² While some Northern segregation was truly "de facto" – in other words, without purposefully racial state intervention¹⁷³ – much Northern segregation was the result

169. See CRESPIANO, *supra* note 7, at 176–80; KRUSE, *supra* note 7, at 133, 150–51; WALKER, THE GHOST OF JIM CROW, *supra* note 7, at 40, 56–62. See generally *infra* notes 170–171 and accompanying text.

170. ROBERT J. COTTRILL ET AL., *BROWN V. BOARD OF EDUCATION: CASTE, CULTURE, AND THE CONSTITUTION* 204 (2003).

171. See 3 BRUCE ACKERMAN, *WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION* 234–36 (2014) (describing the role of Title VI enforcement); Eyer, *supra* note 104, at 16–22 (describing the Supreme Court's turn in the 1960s and 1970s to invalidating intentionally discriminatory, but facially "colorblind," ways of obstructing *Brown* after initially refusing to do so); Richard I. Slippen, *The Title VI Enforcement Process*, 21 WAYNE L. REV. 931, 946–47 (1975) (describing the significant role that the Department of Health, Education, and Welfare's enforcement of Title VI played in bringing about meaningful desegregation in the late 1960s). As noted later in this Review, even during this "desegregation" era, many of the most important cases the Supreme Court decided were based on a remedial rationale, which situated the constitutional violation in historic Jim Crow practices rather than current evasive laws. See *infra* notes 250–253 and accompanying text.

172. See *infra* notes 174–177 and accompanying text. As described in Douglas's excellent book, *Jim Crow Moves North*, some segregation in the North, even after the Civil War, was not even nominally "colorblind" but rather quite explicit. See DOUGLAS, *supra* note 55, at 3–4. But by the time of *Brown*, most Northern jurisdictions had moved to nominally "colorblind" means of maintaining racial segregation. See *id.* at 275; see also *infra* notes 174–177 and accompanying text.

173. Confusingly, the term "de facto" segregation, both in the aftermath of *Brown* and today, has been used to refer to an array of arguably distinctive school segregation practices, including, at times: (1) educational segregation that was purposeful but not instantiated through facially racial policies; (2) educational segregation that was instantiated with no purposeful segregative intent (but that might perpetuate purposeful segregation in other realms like housing unintentionally); and (3) segregation that there was no intentional government involvement in producing, direct or indirect. As used herein, I refer to "de facto" school segregation to mean segregation created without purposefully racial state intervention. Most courts define de facto segregation in this way, and most would include both (2) and (3) – but not (1) – within the definition of "de facto" segregation. See, e.g., *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 208 (1973) (emphasizing that school officials' intent or purpose to segregate is what distinguishes "de jure" from "de facto" segregation).

of only nominally “colorblind” Jim Crow policies, which were intended to (and did) instantiate segregation and discrimination, even while denying that it existed.¹⁷⁴ Thus, for example, school officials in many Northern jurisdictions undertook myriad administrative actions to create and maintain segregated schools—drawing district and catchment lines, strategically siting new school buildings, busing children, and assigning teachers—while simultaneously denying publicly that the schools were segregated.¹⁷⁵ So too government-mandated redlining practices served to ensure that minority residential communities remained distinct and separate.¹⁷⁶ Such “colorblind” administrative practices served in many areas as highly effective means of ensuring racially separate neighborhoods and schools without the instantiation of explicit Jim Crow laws.¹⁷⁷

Indeed, there were Southern officials who understood that the North had been effective in its “colorblind” approach to segregation and viewed emulation of such Northern approaches as the most promising pathway to de minimis desegregation.¹⁷⁸ Although, ultimately, such efforts to insulate the South from desegregation would temporarily fail—as courts took Southern jurisdictions to task for never properly remediating the unquestionable constitutional violation of Jim Crow—Southern officials were not wrong to think that such measures could be highly effective in obstructing integration.¹⁷⁹ Indeed, to the frustration of many Southern leaders, much of the North escaped legal censure for its own

174. See DOUGLAS, *supra* note 55; SUGRUE, *supra* note 7; THEOHARIS, *supra* note 2, at 31-82; Theoharis, *supra* note 136, at 58, 61; see also LASSITER, *supra* note 7, at 16; sources cited *supra* note 58 (detailing the obfuscating approach often taken by Northern school districts when confronted with desegregation claims).

175. See *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 452-53 (1979); *Keyes*, 413 U.S. at 191; see also sources cited *supra* note 174.

176. See generally ROTHSTEIN, *supra* note 148. Underneath the nominally “colorblind” practice of redlining were explicit racial instructions—thus, it may be questionable to refer to this practice as “colorblind.” But the ways that school segregation was maintained around the segregated neighborhoods that redlining produced was a facially “colorblind” practice.

177. See *supra* notes 174-176 and accompanying text.

178. See CRESPINO, *supra* note 7, at 180-81; WALKER, *THE GHOST OF JIM CROW*, *supra* note 7, at 15.

179. Regarding the imposition of remedial measures in the South, see *infra* notes 248-255 and accompanying text. Regarding the successfulness of the North’s strategies, see, for example, THEOHARIS, *supra* note 2, at 31-61, which notes that our perspective on the successfulness of the civil rights movement changes dramatically if we include efforts to dismantle segregation in the North.

brand of segregation, even as the South was required to implement increasingly far-reaching remedial measures to address its history of explicit Jim Crow.¹⁸⁰

Segregationists thus recognized the value, both before and after *Brown*, of “colorblind” measures as a shield to maintain segregation and inequality.¹⁸¹ All of the Southern states had a long history before *Brown* of using such measures to enforce legal inequality where explicit racial measures were no longer permitted.¹⁸² And such measures played a substantial role in the South’s resistance to

180. See CRESPINO, *supra* note 7, at 271. Indeed, during the height of desegregation in the South, Southern leaders actively sought the application of desegregation measures to Northern locales, since they correctly perceived that Northerners would object just as much to the dismantling of their own brand of segregation and hoped this would cause support for desegregation efforts to wane generally. *See id.* at 174-75, 179-80, 186-94, 199-204.

181. *See supra* notes 151-180 and accompanying text. By the mid-1960s, moreover, segregationists increasingly recognized the value of using “colorblindness” as a sword against civil rights measures. In early speeches and writings in the 1960s, prominent segregationists sketched out a theory founded in “colorblindness” for opposing the broad remedial measures that were finally beginning to effectively desegregate Southern school districts. *See* Whiteford S. Blakeney, *Segregation-Integration and the U.S. Constitution*, CHARLOTTE OBSERVER, Oct. 14, 1969, at A9, reprinted in John C. Satterfield/American Bar Association Collection (on file with the University of Mississippi Libraries) (copy in the files of, and with markings by, prominent segregationist lawyer John C. Satterfield) (articulating an early version of the conservative “colorblindness” theory in the school desegregation context); *see also* IAN HANEY LÓPEZ, *DOG WHISTLE POLITICS: HOW CODED RACIAL APPEALS HAVE REINVENTED RACISM AND WRECKED THE MIDDLE CLASS* 83 (2014) (describing 1960s-era conservative “colorblindness” reasoning emerging in the courts). Arguing that the same principles that prohibited assignment of children by race under explicit Jim Crow laws also prohibited assignment of children by race for remedial purposes, they suggested that such orders (and other race-conscious civil rights measures) were unconstitutional. *See sources cited supra.* By the mid-1970s, this theory would receive the full-throated endorsement of the segregationist rearguard, as numerous former defenders of segregation (and other opponents of civil rights reform) would—remarkably—embrace the language of “colorblindness” and civil rights, in service of anti-civil rights goals. *See* MACLEAN, *supra* note 7, at 225-61; *see also* Katie R. Eyer, *The Declaration of Independence as Bellwether*, 89 S. CAL. L. REV. 427, 446-47 (2016). Note, however, that any number of liberals during this timeframe also opposed some forms of race-conscious measures, including some forms of affirmative action, based on a genuine commitment to “colorblind” ideals. *See* Eyer, *supra* at 444-45 nn.65-73 and accompanying text (citing and describing work showing that “colorblind” opposition to affirmative action did not arise exclusively from strategic segregationists, but rather also encompassed some progressives, including some who had traditionally been strongly allied with civil rights); *see also* Christopher W. Schmidt, *Brown and the Colorblind Constitution*, 94 CORNELL L. REV. 203, 225-29 (2008) (detailing the principled commitment of the NAACP to “colorblind” constitutionalism during the era leading up to *Brown* but also suggesting this commitment was far more complicated than contemporary conservatives seeking to co-opt it would suggest).

182. *See* Eyer, *supra* note 104, at 8-12.

Brown, becoming the dominant mode of obstructing desegregation after the collapse of massive resistance.¹⁸³ In the North, such “colorblind” measures had long been the dominant – and in some places, the exclusive – approach to instantiating segregation and racial inequality.¹⁸⁴ Thus, the major victory of the civil rights era – the eradication of explicit Jim Crow laws – furthered the convergence of Southern and Northern approaches to instantiating racial inequality but did not mark their end.¹⁸⁵

Indeed, even today, some of the very same “colorblind” Jim Crow measures initially adopted to resist racial equality remain.¹⁸⁶ Felon disenfranchisement laws are still on the books in many states and continue to disproportionately disenfranchise African Americans.¹⁸⁷ Standardized tests remain a pervasive gatekeeper to a middle-class life and continue to disproportionately exclude racial minorities from pathways to a multitude of careers.¹⁸⁸ Communities originally built around redlined housing and gerrymandered school-attendance boundaries continue to produce racially segregated neighborhoods and schools.¹⁸⁹ And new “colorblind” forms of racial subordination continue to appear, excluding

183. See *supra* notes 163-171 and accompanying text. As some historians have observed, some true race progressives – i.e., those who genuinely desired meaningful integration – turned to token desegregation measures, and even emphasized their ability to limit true integration, as a result of the political constraints of the time. See Matthew D. Lassiter, *A “Fighting Moderate”*: Benjamin Muse’s Search for the Submerged South, in *THE MODERATES’ DILEMMA*, *supra* note 7, at 168, 201. However, such progressives were quite rare and ultimately did not succeed in using tokenistic approaches to open up deeper moral and practical changes. See *id.* As noted later in this Review, court-ordered desegregation on a remedial rationale did occur eventually in many Southern localities, but typically without grappling with the states’ post-*Brown* obstructive conduct as an independent constitutional wrong. See *infra* notes 248-255 and accompanying text.

184. See *supra* notes 172-177 and accompanying text.

185. See Golub, *supra* note 38, at 509; see also THEOHARIS, *supra* note 2, at 92-99 (discussing the convergence of Northern and Southern approaches to discrimination after the collapse of Jim Crow).

186. See *infra* notes 187-189 and accompanying text; see also Andrew Wiese, *African-American Suburbanization and Regionalism in the Modern South*, in *THE MYTH OF SOUTHERN EXCEPTIONALISM*, *supra* note 7, at 210, 221-22 (describing redlining and mortgage discrimination continuing into the 1990s).

187. See, e.g., *Democracy Imprisoned: A Review of the Prevalence and Impact of Felony Disenfranchisement Laws in the United States*, ACLU 2-3 (Sept. 30, 2013), <https://www.sentencingproject.org/publications/democracy-imprisoned-a-review-of-the-prevalence-and-impact-of-felony-disenfranchisement-laws-in-the-united-states> [<https://perma.cc/GH68-26Z3>].

188. See Richard Delgado, *Official Elitism or Institutional Self-Interest? 10 Reasons Why UC Davis Should Abandon the LSAT (and Why Other Good Law Schools Should Follow Suit)*, 34 U.C. DAVIS L. REV. 593, 597-600, 604-05 (2001).

189. See ROTHSTEIN, *supra* note 148.

African Americans and other minorities from schools, communities, and political participation rights.¹⁹⁰

History thus starkly calls into question our ability to claim victory over our nation's regime of legalized discrimination. For while we can confidently assure ourselves that the nation's explicit Jim Crow laws were eradicated, it is far more difficult to have similar confidence that the other longstanding pillar of legalized racial inequality – “colorblind” Jim Crow – has truly disappeared.¹⁹¹ Recognizing the true diversity of forms that legalized racial inequality has always taken thus calls on us to be much more skeptical of claims of “victory” over racial inequality – and to interrogate much more carefully those systems of racial inequality that purport to be “colorblind” today.¹⁹²

IV. PRESERVATION THROUGH TRANSFORMATION

But what about the Constitution? While the story of the civil rights era is a social-movement story, it is also, in our national historical memory, a quintessentially constitutional one.¹⁹³ *Plessy v. Ferguson* – the constitutional decision that

190. See, e.g., *N.C. State Conference of the NAACP v. McCrory*, 831 F.3d 204, 223–24 (4th Cir. 2016) (detailing the evidentiary basis for concluding that North Carolina's facially race-neutral omnibus legislation imposing a voter ID requirement and limiting other voting practices disproportionately used by African Americans was intentionally discriminatory); Naomi Nix, *A Year After Ferguson, St. Louis Parents Fight to Escape Michael Brown's Terrible High School*, SEVENTY-FOUR (Aug. 5, 2015), <https://www.the74million.org/article/a-year-after-ferguson-st-louis-parents-fight-to-escape-michael-browns-terrible-high-school> [<https://perma.cc/R9XB-MVBQ>] (describing the fallout from the deaccreditation of the predominantly African American Normandy school district, including facially “colorblind” efforts of a predominantly white district to avoid an influx of students from Normandy); see also BELL, *FACES AT THE BOTTOM OF THE WELL*, *supra* note 7, at 17–19 (describing ability tracking as the new segregation).

191. The work of scholars such as Walker and Maltz, showing the ways that the perspectives of moderate segregationists have been incorporated into modern equality doctrine, ought to make us especially wary of reaching such a conclusion. See WALKER, *THE GHOST OF JIM CROW*, *supra* note 7, at 117–54; Maltz, *supra* note 168.

192. See Boddie, *supra* note 26, at 1854 (arguing that highlighting the breadth of historical resistance to *Brown* and efforts to evade the decision would “provide[] a context for interpreting later, segregative decisions by school officials as a vestige of discriminatory intent”).

193. Many scholars attribute most of the legal progress of the civil rights era to the enactment of civil rights legislation (as a result of civil rights protest) and the undertaking of meaningful enforcement efforts by the federal executive branch. See, e.g., 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 234–36 (1998) (describing the role of Title VI enforcement in moving civil rights forward); Olatunde C.A. Johnson, *Lawyering that Has No Name: Title VI and the Meaning of Private Enforcement*, 66 STAN. L. REV. 1293, 1311 (2014) (noting that “com-

permitted Jim Crow segregation—is today understood as a terrible constitutional mistake, “wrong the day it was decided.”¹⁹⁴ *Brown* is cast as the redemptive decision that returned us to the “true” Constitution, in alignment with our national values, by repudiating racial inequality.¹⁹⁵ Lawyers and judges are the courageous heroes of the story, as they struggled first to achieve—and then to enforce—*Brown* in the face of a recalcitrant South.¹⁹⁶ Ultimately, at the urging of the civil rights movement, the Constitution prevailed against racial injustice.¹⁹⁷ For a nation that reveres its Constitution with almost religious fervor, the story of *Brown* provides a powerfully redemptive chapter in our national history.¹⁹⁸

Like our other stock stories of the civil rights era, this too has important elements of truth. *Brown* did mark a vitally important turning point in the interpretation of the Fourteenth Amendment and in our nation’s relationship to racial equality.¹⁹⁹ The eradication of formal legal sanction for racial segregation was a critical step towards real racial equality—a step that fundamentally, albeit incompletely, changed the opportunities available to many African Americans.²⁰⁰ In

mentators have long credited Title VI with an important role in helping advance school desegregation after *Brown v. Board of Education*”). But in the popular imagination (and even to a large extent among legal audiences), *Brown* continues to loom large. Herein I address such popular imaginings on their own terms, and thus focus on the constitutional doctrines that emerged from *Brown*.

194. See Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 386-87, 404, 434 (2011).

195. See Golub, *supra* note 38, at 491.

196. See JACK BASS, UNLIKELY HEROES: A VIVID ACCOUNT OF THE IMPLEMENTATION OF THE *BROWN* DECISION IN THE SOUTH BY SOUTHERN FEDERAL JUDGES COMMITTED TO THE RULE OF LAW (1981); RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA’S STRUGGLE FOR EQUALITY (1975). *But cf.* Derrick A. Bell, Jr., *Civil Rights Lawyers on the Bench*, 91 YALE L.J. 814 (1982) (reviewing BASS, *supra*) (critiquing *Unlikely Heroes* for neglecting to account for the failings of desegregation and *Brown*, as well as for obscuring the agency and work of African Americans).

197. See THEOHARIS, *supra* note 2, at 7-8; Golub, *supra* note 38, at 491-92.

198. See Tom Donnelly, *Popular Constitutionalism, Civic Education and the Stories We Tell Our Children*, 118 YALE L.J. 948, 978-82 (2009); *see also* Sumi K. Cho, *Redeeming Whiteness in the Shadow of Internment: Earl Warren, Brown and a Theory of Racial Redemption*, 40 B.C. L. REV. 73, 153-69 (1998) (offering a more nuanced theory of racial redemption and *Brown*’s role within it).

199. See Mark Tushnet, *The Significance of Brown v. Board of Education*, 80 VA. L. REV. 173, 174-79 (1994).

200. See Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1378 (1988). Of course, as described *supra* note 193, statutes like the Civil Rights Act of 1964 have played a very significant role in this turn, as well, and probably a greater role. But as even scholars skeptical of *Brown*’s significance have pointed out, *Brown* appears to have played an important role in the complicated

addition to activists, many lawyers and judges made courageous decisions in their push to end segregation.²⁰¹ Thus, it is not wrong to view *Brown* as an important and redemptive turning point in our national history.

But here, too, the work of historians should cause us to see our central stories of the civil rights era through new eyes.²⁰² Scholars have long critiqued triumphalist accounts of *Brown* for failing to account for the persistence of racial inequality.²⁰³ The work of historians buttresses that critical work by affording us a history that explains *why* the two key doctrines of the civil rights era—“colorblindness” and intent—failed to do the work of fundamentally uprooting racial inequality.²⁰⁴ Indeed, the work of historians provides a granular, up-close perspective on what Reva Siegel has referred to as “preservation-through-transformation”—how status regimes evolve to reproduce themselves even as the law seeks to root them out.²⁰⁵

What the work of historians suggests is that by the start of the 1960s, comparatively little “transformation” was required for much of the edifice of civil-rights-era racial inequality to endure.²⁰⁶ While the failings of the civil-rights-era constitutional doctrines—“colorblindness” and intent—may seem opaque when cast against a historical account focused on explicit discrimination and animus-

political history that led to the enactment of such statutes themselves. See Klarman, *supra* note 104, at 85-149.

201. See sources cited *supra* note 196; see also JOHN LEWIS, *ACROSS THAT BRIDGE: LIFE LESSONS AND A VISION FOR CHANGE* (2012) (discussing the courage of activists); THEOHARIS, *supra* note 2, at 187-206 (same).
202. The insights that can be drawn from the work of historians in many regards echo those of critical race theorists. Cf. BONILLA-SILVA, *supra* note 3, at 18 (articulating a similar set of elements and factors in describing the emergence of “the new racism” in the 1960s but, contrary to my account herein, describing this as a sharp break from the past).
203. See BELL, *supra* note 104, at 6-7, 10, 186, 198; Derrick Bell, *The Supreme Court, 1984 Term—Foreword: The Civil Rights Chronicles*, 99 HARV. L. REV. 4, 11-12, 16, 22-23, 60, 67, 76-77 (1985) [hereinafter Bell, *Civil Rights Chronicles*]; Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1049-50 (1978); Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1750-54 (1993); Louis Michael Seidman, *Brown and Miranda*, 80 CALIF. L. REV. 673, 708-18, 750-53 (1992).
204. See *infra* notes 209-240 and accompanying text.
205. Siegel, *supra* note 29, at 1120; see also BELL, *FACES AT THE BOTTOM OF THE WELL*, *supra* note 7, at 104 (describing the phenomenon of evolving and adaptive forms of racial discrimination); HANEY LÓPEZ, *supra* note 181, at xii (same); Boddie, *supra* note 26 (same).
206. As explained *supra* notes 112-115 and accompanying text, there were some Southern states in which moderate segregationists were in power (and stayed in power) even in the immediate aftermath of *Brown*—regardless, in most Southern states such moderates had taken power by the early 1960s.

driven Southern “rednecks,” they are (as set out below) far more obvious when situated in relation to an account focused on Southern moderates.²⁰⁷ To the extent that such moderates came to represent the dominant political perspective in the South—and bear close resemblance to the long-existing regimes of racial inequality in the North—only small shifts were required for the dominant regimes of racial oppression to endure.²⁰⁸ With the collapse of massive resistance—itsself arguably a key aspect of the South’s “transformation”—the most common forms of racial repression were no longer ones that “colorblindness” and intent were well suited to address.

This is most evident in the case of “colorblindness,” the central rule that has come to be understood as *Brown*’s core mandate.²⁰⁹ Viewed through the lens of a fuller history, it is not at all hard to see why “colorblindness”—understood as bans on explicit racial classifications like Jim Crow—was only ever a partial and flimsy tool.²¹⁰ Operating under a “colorblind” regime, the South had virtually entirely eliminated the political rights (like voting and jury service) to which African Americans were entitled long before *Brown*.²¹¹ So too they had continued to obstruct professional and educational equality effectively through mechanisms like standardized testing in those circumstances in which formal equality had been mandated.²¹² In the North, “colorblind” measures had long formed the

207. See *infra* notes 209-240 and accompanying text.

208. *Id.*; see also *supra* notes 112-115, 135-138, 167-177 and accompanying text.

209. As scholars such as Klarman and Siegel have shown, the “colorblindness” framing of *Brown* was not the only possible understanding of its reasoning. See, e.g., Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 235-39 (1991); Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470, 1478-89 (2004); see also Schmidt, *supra* note 181, at 231-33 (describing understandings of *Brown* in its immediate aftermath that sounded both in “colorblindness” and in antisubordination principles). However, subsequent decisions of the Court made clear, at a minimum, that *Brown* prohibited facial racial discrimination against African Americans in all but the most compelling circumstances. See, e.g., *Loving v. Virginia*, 388 U.S. 1 (1967).

210. Cf. BONILLA-SILVA, *supra* note 3, at 3 (noting the limitations of “colorblindness” given the prevalence of facially race-neutral forms of racial subordination). My focus herein is on the problems with “colorblindness” as a tool for dismantling structures of racial inequality—even operating from within the limits of a disparate treatment regime. As described *supra* note 181, by the late 1960s, segregationists began to recognize the potential of using “colorblindness” as a sword against civil rights measures, a turn that today is firmly instantiated in civil rights law. Many other scholars have rightly critiqued this manifestation of “colorblindness” doctrine in law—as well as its cultural-discourse counterpart. See, e.g., HANEY LÓPEZ, *supra* note 181, at 77-103, 127-45; Crenshaw, *supra* note 200, at 1346.

211. See sources cited *supra* notes 152-154.

212. See sources cited *supra* notes 159-162.

cornerstone of segregation and racial inequality.²¹³ Thus, “preservation” of the racial regime after *Brown* required only turning to a known method of “transformation”: “colorblind” legal measures targeted at the same aims. For more than a decade after *Brown*, nearly ninety-nine percent of African Americans in the South were kept from desegregated schools by “colorblind” means.²¹⁴

Why did intent doctrine not prevent this? Although today often critiqued for its role in obstructing racial justice, intent doctrine was originally advocated by racial-justice litigators – and their progressive counterparts on the Court – precisely to address the problem of “colorblind” Jim Crow.²¹⁵ Recognizing that *Brown* could become a dead letter if Southern jurisdictions were permitted to adopt evasive “colorblind” measures, racial-justice advocates worked hard in the aftermath of *Brown* to change doctrinal rules that had historically barred the consideration of racial intent.²¹⁶ And although the full institutionalization of intent doctrine took time – much longer than is remembered today – intent did ultimately play an important role in eradicating parts of the legal edifice of “colorblind” Jim Crow.²¹⁷

But as scholars have shown, intent doctrine – like “colorblindness” – failed to complete the work it was intended to do.²¹⁸ Although some “colorblind” measures were struck down under intent doctrine, findings of racial intent have always been very rare.²¹⁹ Today, such findings have effectively disappeared at the Supreme Court level and are unusual even in the lower courts.²²⁰ Even in cases

213. See *supra* notes 172-177 and accompanying text.

214. COTTROLET AL., *supra* note 170, at 204.

215. See Eyer, *supra* note 104, at 4-5.

216. See *id.* at 4-5, 12-22.

217. See *id.* at 12-22, 31-54, 65-67.

218. For prominent critiques of the failings of modern intent doctrine, see, for example, Barbara J. Flagg, “Was Blind, but Now I See”: *White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953 (1997); Ian Haney-López, *Intentional Blindness*, 87 N.Y.U. L. REV. 1779 (2012); Lawrence, *supra* note 15; and Reva B. Siegel, *The Supreme Court, 2012 Term – Foreword: Equality Divided*, 127 HARV. L. REV. 1 (2013) [hereinafter Siegel, *Equality Divided*]; and Siegel, *supra* note 24. See also *infra* notes 219-222 and accompanying text.

219. See, e.g., *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189 (1973) (finding that Denver had intentionally segregated its schools); HANEY LÓPEZ, *supra* note 181, at 86-87; Bell, *supra* note 203, at 28, 64-65. *But cf.* *Hunter v. Underwood*, 471 U.S. 222 (1985) (a rare case striking down a law as purposefully discriminatory – but a law from an era in which intent was not understood to be a valid basis for striking a law, and thus lawmakers did not hide their racial intent).

220. See HANEY LÓPEZ, *supra* note 181, at 86-87; Bell, *Civil Rights Chronicles*, *supra* note 203, at 28, 64-65; cf. Theodore Eisenberg & Sheri Lynn Johnson, *The Effects of Intent: Do We Know how Legal Standards Work?*, 76 CORNELL L. REV. 1151, 1193-95 (1991) (noting, in the context of an

involving strong evidence of racialized decision-making—like the crack/cocaine disparity or the death penalty—courts are disinclined to tar government decision makers with the accusation of intentional racial discrimination.²²¹ As such, many “colorblind” measures with extreme racial impacts continue to be deemed race neutral under the contemporary constitutional regime.²²²

As prior scholars have explored, there are many reasons why this may be. The standards the Court has set for proving intent are extremely high, and thus unlikely to be met in most circumstances.²²³ In the modern era, engaging in intentional racial discrimination is ordinarily viewed as especially bad, and thus it may be particularly fraught for judges to accuse government officials of intentional discrimination.²²⁴ It could be that our energy for fighting battles over racial justice ran out just when we, as a nation, needed to pick up the new tools of intent doctrine to root out “colorblind” Jim Crow laws.²²⁵ Alternatively, it may

empirical study, that victories in intent cases are rare, but that the success rates are not substantially lower than those of other civil rights claimants).

221. See, e.g., *McCleskey v. Kemp*, 481 U.S. 279 (1987); Eyer, *supra* note 162, at 1055.

222. See *supra* notes 219–221 and accompanying text; cf. Eyer, *supra* note 162, at 977–81 (observing that there is a long tradition of using rational basis review to achieve racial-justice ends and that such claims do not require a finding of racially discriminatory intent).

223. See HANEY LÓPEZ, *supra* note 181, at 86–87; Bell, *Civil Rights Chronicles*, *supra* note 203, at 64–65; HANEY LÓPEZ, *supra* note 218, at 1828–33; Siegel, *Equality Divided*, *supra* note 218, at 17–20. Both HANEY LÓPEZ and Siegel place the development of this extremely stringent version of intent doctrine later than *Washington v. Davis*, 426 U.S. 229 (1976), starting in the late 1970s with *Personnel Administrator v. Feeney*, 442 U.S. 256 (1979). See HANEY LÓPEZ, *supra* note 218, at 1828–33; Siegel, *Equality Divided*, *supra* note 218, at 17–20. As Siegel and HANEY LÓPEZ explore, *Feeney* can be understood (and has sometimes been understood by the lower courts) as requiring essentially a showing of racial (or gender-based) animus in order for a litigant to prove intent. See HANEY LÓPEZ, *supra* note 218, at 1828–33; Siegel, *Equality Divided*, *supra* note 218, at 17–20. *But cf.* Eyer, *supra* note 104 at 64 & n.385 (arguing that there is little evidence that the Justices themselves understood their holding in *Feeney* as requiring an elevated showing of animus or malice and surveying the history suggesting that their concern was with ensuring the continued integrity of an intent-based standard, in view of the findings below that suggested that the Massachusetts legislature had no sex-based intent in enacting its veterans’ preference law).

224. See Flagg, *supra* note 218, at 990.

225. See Samuel R. Bagenstos, *Implicit Bias’s Failure*, BERKELEY J. EMP. & LAB. L. (forthcoming) (manuscript at 5), <https://papers.ssrn.com/sol3/abstract=3015031>. See generally Darren Leonard Hutchinson, *Racial Exhaustion*, 86 WASH. U. L. REV. 917, 950–62 (2009) (describing rhetoric of racial fatigue during the retrenchment of the 1970s and 1980s, but also making the case that such rhetoric has been a persistent historical form of opposition to racial-justice advocacy). As described in my prior work, the institutionalization of permissive intent-based invalidation was a much longer process than is commonly acknowledged, becoming fully settled only in the mid-1970s. See Eyer, *supra* note 104, at 31–54. It thus coincided with the timeframe that many scholars identify as the point of the Court’s turn away from robust racial-justice

well be that white society never possessed the full-throated commitment to equality that real racial-justice work requires.²²⁶

All of these explanations are plausible and no doubt contribute to intent doctrine's failures. But the work of modern historians also helps us to understand intent doctrine's failings.²²⁷ As described above, many moderate opponents of desegregation during the civil rights era viewed their perspective as justified by "good" reasons—reasons that ultimately proved capable of being recast as race neutral.²²⁸ Because such opponents genuinely believed the stereotypical tropes they endorsed—and perceived themselves to be fighting for goods to which they were entitled—many did not understand themselves as racist.²²⁹ So too black

enforcement, and indeed robust antidiscrimination remedies generally. See Eyer, *supra* note 104, at 3; see also Bagenstos, *supra*.

226. See BELL, *FACES AT THE BOTTOM OF THE WELL*, *supra* note 7, at 9-10; BELL, *supra* note 104, at 9; Bell, *Civil Rights Chronicles*, *supra* note 203, at 10, 60, 64-65, 76-77, 80.

227. The critique that flows from this modern historical work in many ways mirrors—and thus further buttresses—prior excellent work on unconscious bias, including Charles Lawrence III's seminal article regarding unconscious bias and the abundant scholarship that has built on his insights. See Lawrence, *supra* note 15. I would, however, frame the central focus of my critique slightly differently—not as a contention that racism is unconscious per se (although it no doubt is, in some circumstances), but rather an argument that honestly believed racial stereotypes provide an easy means of deception—including self-deception—regarding the racial nature of discriminatory actions. See *infra* notes 230-240 and accompanying text; cf. Lawrence, *supra* note 15, at 349 (recognizing the role that self-deception may play in disguising racism). In this sense, it might be more properly characterized as a critique of the law's conception of racism as "self-aware." As set out more fully *infra* note 283, for a number of reasons, I see this historically focused conception as a more doctrinally and politically promising project than what has become the contemporary focus of much of the unconscious-bias literature: the related phenomenon of "implicit bias."

228. See *supra* Part II. A word here is in order as to what I mean by "race neutral" in this context. Obviously, racial stereotypes—even those that are honestly believed—are not actually race neutral. The point I am making here is that they can appear race neutral to those who genuinely believe them and act based upon them, permitting a form of non-self-aware bias that can be difficult to capture in an intent-based regime. See *infra* notes 233-235 and accompanying text. This turn towards non-self-aware stereotype-based bias was no doubt facilitated by the rise of the new geography of race in the 1970s, in which "inner cities" were conflated with communities of color. See *infra* notes 236-240 and accompanying text.

229. See *supra* Part II; see also CRESPIANO, *supra* note 7, at 69; MCRAE, *supra* note 16, at 196, 222, 226-29; THEOHARIS, *supra* note 2, at 88, 90. Regarding modern whites' disclaimers of racism, see generally BONILLA-SILVA, *supra* note 3, at 1, which notes that today "few whites . . . claim to be 'racist'"; PATRICIA WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS: DIARY OF A LAW PROFESSOR* 59 (1991), which describes white residents' simultaneous explicit racial stereotyping of African Americans as criminal and dangerous, while denying racial motives in the aftermath of a brutal racial assault on black motorists whose car broke down in Queens; and Bell, *Final Civil Rights Act*, *supra* note 7, at 609, in which Derrick Bell's fictional interrogator Geneva observes that "[t]oday, even the worst racist denies he is a 'racist.'"

inequality was perceived by many—even during the civil rights era—to be not the result of discrimination but rather as a reflection of real disparities that existed between white and African American values, efforts, and capabilities.²³⁰

Against such a backdrop, it is easy to see why intent doctrine—like “colorblindness”—could never do more than a small fraction of its work. Even in fulfilling the limited role it has traditionally been understood to accomplish—preventing so-called disparate treatment—intent doctrine requires an understanding of discrimination in which actors’ self-perception of their motives is racial.²³¹ But as the work of historians suggests, even during the civil rights era itself, it is overly simplistic to believe that all segregationists would have cast their motives in those terms.²³² As the racial caste system collapsed, supplanted by moderate segregationists’ “class” approach (recognizing that individual African Americans could defy the standards of their group, and relying on “colorblind” measures), the dominant mode of opposition to desegregation was no longer inextricably tied to a self-consciously race-based regime.²³³ So decoupled, it is unsurprising that disparate treatment based on honestly believed racial stereotypes could come to appear race neutral—even to those engaging in it.²³⁴ The ability of racial stereotypes and other “colorblind” frames to stand in for race means that even in self-perception, relatively little “transformation” was required for the preexisting racial regime to be preserved.²³⁵

Trends in demographics and politics conspired to make it easy for many of the very same racial tropes of the civil rights era to be reconfigured in terms that

230. See *supra* Part II; see also CRESPIANO, *supra* note 7, at 99; MACLEAN, *supra* note 7, at 43-44, 50, 54-55, 62-64; 73-74, 83-85, 252-54; THEOHARIS, *supra* note 2, at 178.

231. As noted above, this insight is not a new one, although prior accounts have tended to frame it in terms of “unconscious bias.” The phenomenon I describe herein I would characterize somewhat differently, as “non-self-aware bias” or “stereotype bias.” See *supra* note 227; cf. Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995) (seminal work on the role of cognitively based biases in discrimination); Lawrence, *supra* note 218 (seminal work on unconscious bias). Regardless, the observations made herein are for the most part entirely consistent with the pathbreaking work of prior scholars in this area, and simply are directed to a somewhat different issue: the ability of even those we might consider to be “segregationists” or “old-fashioned racists” to perceive themselves as nonracist given the proxy role of racial stereotypes. See *infra* notes 232-240 and accompanying text.

232. See generally *supra* Part II.

233. See Hershman, *supra* note 113, at 105-07 (describing the distinctions between the older caste view that underlay massive resistance and moderates’ “class” view). See generally THEOHARIS, *supra* note 2, at 92-93 (describing the transition in the South to “colorblind” frames).

234. See *supra* notes 232-233; *infra* notes 236-240 and accompanying text.

235. Cf. Maltz, *supra* note 168 (describing the evolution in the racial views of Justice Powell, whom I would describe as a moderate segregationist, although Maltz does not use that term).

appeared race neutral to many white Americans.²³⁶ As the 1960s progressed, white flight and the general trend towards white suburbanization created a geographic division that allowed racist stereotypes of criminality, academic unpreparedness, and questionable community values to be cast as those of “inner city” communities – communities that were assumed to be comprised of racial minorities.²³⁷ So cast, white parents could oppose integration based on virtually identical concerns as their Jim Crow counterparts, while simultaneously understanding themselves to be “colorblind.”²³⁸ Politicians could laud the accomplishments of the civil rights movement – and rhetorically align themselves with its noble goals – while simultaneously enacting harsh, racially targeted criminal-justice measures.²³⁹ White America could continue on, with its racial tropes essentially intact but with a renewed sense of confidence in its own racial innocence.²⁴⁰

This is not to suggest that every white American – then or now – has understood their racism as race neutral, nor that every account of self-perceived race neutrality has been sincere.²⁴¹ But understanding the story of the civil rights era

236. See KRUSE, *supra* note 7, at 8, 106-07, 234-58, 259-66; LASSITER, *supra* note 7, at 3-5, 9-10; Golub, *supra* note 38, at 508-09; Hershman, *supra* note 113, at 128, 133.

237. On trends towards racial segregation through suburbanization, see *supra* note 236. On the use of “inner city” or “ghetto” constructs as a proxy for race, see, for example, Onwuachi-Willig, *supra* note 141, at 1156. See generally HANEY LÓPEZ, *supra* note 181 (extensively describing other ways that modern politicians have introduced racially coded language to substitute for explicit racial appeals).

238. See *The Problem We All Live with – Part One*, *supra* note 140 (reporting on the concerns articulated by parents at Francis Howell District after finding out that a significant number of students from a predominantly African American district were to be transferred in, which included purported risks of dangerousness, lack of academic preparedness, and poor values); see also Hershman, *supra* note 113, at 133 (making a similar observation with respect to the shift from a caste-based to a class-based understanding of African Americans in Virginia after the collapse of massive resistance).

239. See THEOHARIS, *supra* note 2, at 6-7.

240. See *supra* notes 236-239 and accompanying text. See generally HANEY LÓPEZ, *supra* note 181 (extensively describing the way that coded racism founded in this new framing has played a pervasive role in modern politics, and how it assures white America of its own innocence).

241. As noted above, I use the term “race neutral” in this piece to refer to the self-perception of the individual perpetrating racial disparate treatment, not to refer to the actual race neutrality of that individual’s views or actions. See *supra* note 228 and accompanying text. As I note below, it is often impossible to disaggregate sincere from insincere beliefs in race neutrality, which raises the possibility that the bulk of – or even all – white protestations of race neutrality are not sincere (in the sense of not being genuinely believed by those making them). See *infra* notes 244-245 and accompanying text. This is possible. But as someone who is a member of the white community, it is certainly my perception that there are many white Americans who sincerely, but mistakenly, perceive their actions as race neutral. Indeed, such individuals are

through the lens of moderate segregationists renders it far more explicable how easily we arrived at the present moment, in which many white Americans genuinely see their perspectives as fundamentally nonracial even as they continue to recreate the racial regimes of the past.²⁴² For those in both the North and the South who genuinely believed in the truth of the stereotypes that undergirded their perspectives, it was a short leap to perceiving their own views as non-racial.²⁴³ And the very possibility of this self-deception has since provided a comfortable cover for those whose transformation may have been less than genuine.²⁴⁴ In a world where there are rarely ways to disaggregate the sincere from the strategic—and in which challenging strategically reformulated views would be self-implicating—whites have long had a stake in not pushing too hard on where and how protestations of racial innocence are insincere.²⁴⁵

The work of historians thus offers new insights into the story of why our racial-equality doctrines—“colorblindness” and intent—failed. Given the long history of “colorblind” Jim Crow, “colorblindness” could never have been expected to eradicate racially unequal laws on its own.²⁴⁶ And intent doctrine relied on a paradigm of self-reflective racism that ignores the reality that, even during the civil rights era, many opponents of racial equality understood themselves to be acting for reasons that they did not perceive as residing in racial animus, but rather in what they perceived as reality.²⁴⁷ Thus, small shifts in justificatory regimes could permit white America’s racial ideology to fall outside the framework of intent, preventing intent doctrine from serving its essential role in blocking the reinstatement of racial regimes in “colorblind” forms. Taking the work of historians seriously, it is not hard to see where and how constitutional equality law failed.

the central “we” and “us” to whom the remarks in this Book Review are most directly addressed.

242. Cf. Margaret Renkl, *How to Talk to a Racist: White Liberals, You’re Doing It All Wrong*, N.Y. TIMES (July 30, 2018), <https://www.nytimes.com/2018/07/30/opinion/how-to-talk-to-a-racist.html> [<https://perma.cc/G36J-2KPY>] (noting that few white people—even those that white liberals would identify as racist—self-identify in that way).

243. See *supra* notes 227-240 and accompanying text.

244. This is not intended to suggest that the sincerity of self-deception makes it nonculpable or unnecessary to change, but rather to suggest that it presents different difficulties than insincere protestations of racial innocence.

245. See Ralph Richard Banks & Richard Thompson Ford, (*How*) *Does Unconscious Bias Matter?: Law, Politics, and Racial Inequality*, 58 EMORY L.J. 1053, 1064-65 (2009) (noting the difficulty of disentangling explicit racial attitudes from implicit ones in the related context of “implicit bias”).

246. See *supra* Part III.

247. See *supra* Part II.

Of course, some might contend that constitutional equality law did not fail, pointing out that ultimately, the “colorblind” mechanisms that Southern jurisdictions adopted to obstruct *Brown* – such as pupil placement laws and freedom of choice plans – were deemed inadequate, and real desegregation did occur. It is true that many Southern jurisdictions – and even a few Northern ones – were eventually held to task.²⁴⁸ Thus, even under “colorblindness” and intent doctrine, there was a true “desegregation era” – an era during which there was genuine constitutionally mandated desegregation, resulting in appreciable racial integration in at least some of our nation’s schools.²⁴⁹

But, of course, the rationale on which the lion’s share of desegregation was justified was never one that implicated the nation’s present racial conduct. Rather, the majority of court-ordered desegregation – and the only subset of desegregation that is remembered as being obviously correct today – was that imposed on the South on a remedial rationale.²⁵⁰ Looking to the South’s history of explicit

248. See Michelle Adams, *Shifting Sands: The Jurisprudence of Integration Past, Present, and Future*, 47 HOW. L.J. 795, 803-13 (2004). As noted above, the enactment of Title VI and enforcement efforts by the political branches played a major role in this turn as well. See *supra* Part III. But to the extent the Supreme Court did rely on the Constitution (as it very often did) to order meaningful desegregation, it did so, as noted below, on a remedial rationale. See *infra* notes 250-255 and accompanying text.

249. See generally Adams, *supra* note 248 (describing the history of school desegregation).

250. See *infra* notes 251-253 and accompanying text (regarding the remedial rationale). During this era, there were of course several major desegregation cases in the North, which were not justified on a remedial rationale. See, e.g., *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449 (1979); *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189 (1973). But our relationship to this part of our desegregation history has always been more fraught than our perspective on desegregation in the South. No doubt aided by the false narrative of Northern desegregation as being about “busing” and “neighborhood schools” rather than the dismantling of purposeful dual school systems, even today, Northern desegregation campaigns continue to be cast as far less sympathetic – and the resistance of Northern opponents of desegregation as far more justified – than the desegregation battles of the South. See THEOHARIS, *supra* note 2, at 105, 120.

Note also that litigation of desegregation cases in the lower courts – even in the South – has always involved a more diverse array of arguments than the remedial rationale, including arguments regarding present constitutional violations. See, e.g., *United States v. Halifax Cty. Bd. of Educ.*, 314 F. Supp. 65, 77-78 (E.D.N.C. 1970) (relying in significant part on the school board’s current racial intent in finding a constitutional violation where the school board was carving out a majority-white portion of a majority-black school district and making it its own district). But because these more-complicated arguments did not ultimately form the basis for the Supreme Court’s decision-making (outside of cases involving the North), they have had little impact on most everyday Americans’ (or even most law students’ or legal professionals’) understanding of the history of desegregation. See, e.g., *United States v. Scot. Neck City Bd. of Educ.*, 407 U.S. 484, 489-91 (1972) (relying, in the appeal of the *Halifax County* case, not on present segregative intent but rather finding a violation based on the remedial rationale).

Jim Crow laws as the basis for the constitutional violation—and situating the current wrong as the failure to remediate that history—the Supreme Court never required the nation to grapple fully with the illegality of the evasive “colorblind” measures that replaced explicit Jim Crow.²⁵¹ Although Southern jurisdictions’ purposeful efforts to maintain segregation following the collapse of massive resistance were well known and even described in many of the Court’s opinions, the Court situated these deliberately segregative actions as peripheral, rather than central, to its accounts of Southern states’ constitutional wrongs.²⁵² Thus, even in the very era that Southern states continued to obstruct *Brown* through “colorblind” means, their wrong was often cast as a failure to remediate a history long past, not as constitutionally impermissible racial discrimination here in the present.²⁵³

251. See, e.g., *Green v. Cty. Sch. Bd.*, 391 U.S. 430 (1968) (declining to constitutionally invalidate evasive “freedom of choice” plans, and instead holding against the school district on remedial grounds); see also *Scotland Neck*, 407 U.S. at 489 (sidestepping arguments regarding continued intentional discrimination, and instead ruling on remedial grounds); *Wright v. Council of Emporia*, 407 U.S. 451 (1972) (same); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971) (ruling on remedial grounds); *United States v. Montgomery Cty. Bd. of Educ.*, 395 U.S. 225 (1969) (same). There were a few notable exceptions, mostly relating to segregation in the North. See, e.g., *Keyes*, 413 U.S. at 189 (holding Denver responsible for intentional discrimination); see also *infra* note 253 (describing *Griffin v. County School Board*, 377 U.S. 218 (1964)). As explained *supra* note 250, opposition to desegregation in the North—the primary situs of decisions situating covert segregative measures as the constitutional harm—has generally been cast as far more sympathetic than resistance in the South, and even today is often not cast as wrongful in the same way that we revile the South’s explicit history of Jim Crow laws.

252. See, e.g., *Green*, 391 U.S. at 438-41 (choosing instead, in a case where the adoption of an ineffective “freedom of choice” plan was almost certainly done with segregative intent, to situate the harm as residing in the failure to adequately dismantle the de jure dual system); *Council of Emporia*, 407 U.S. at 456, 459-62 (emphatically rejecting the idea that segregative intent was the benchmark in a case in which a white enclave sought to establish its own school district two weeks after the issuance of a desegregation decree, and finding a violation based on the remedial rationale).

Ironically, this focus on remedies likely arose from a desire to *benefit* racial-justice plaintiffs. At the time, continued questions existed on the Court regarding the extent to which the segregative intent behind a facially neutral law could be the basis for a finding of a constitutional violation. See Eyer, *supra* note 104, at 22-33. In addition, as described *infra* note 253, racial-justice plaintiffs often argued for the remedial rationale—and against any focus on present segregative intent—because of the difficulties of proving intent.

253. See *supra* note 251. Before the rise of the remedial rationale in the late 1960s, the Court did employ a nonremedial rationale in the 1964 case of *Griffin v. County School Board*, directly resting its holding on the state’s intent to avoid desegregation. 377 U.S. at 231; see also Eyer, *supra* note 104, at 20-22. But within a few short years, the Court would turn to the remedial rationale instead, an approach that it continued to deploy throughout much of the timeframe that followed. See sources cited *supra* note 251.

Indeed, the remedial rationale arguably fit comfortably into the nation's emerging story of its racial present, situating the wrong of racial inequality as residing not in contemporaneous racial discrimination but in the South's (now long-since invalidated) Jim Crow laws.²⁵⁴ The nation could feel satisfied that the courts had finally done something about the South's now-reviled history of explicitly racial laws. Even Southern jurisdictions, after enduring the burdens of court-ordered desegregation, could eventually be absolved, having atoned for their constitutional wrongs.²⁵⁵ Constitutionally actionable racial inequality could be comfortably situated in the past, in forms that no longer existed.

Thus, the remedial rationale—even more so than “colorblindness” and intent—was never a doctrine that could have been expected to complete the work of uprooting racial inequality. With explicit Jim Crow laws cast as the constitutional wrong—and massive resistance long since past—the remedial rationale was necessarily limited by time and place. Providing the buffer between our racial past and present, it offered a comfortable focus on the racial sins of the past, even as it deflected attention from efforts to instantiate racial inequality in the present.

V. TAKING DISPARATE TREATMENT SERIOUSLY

The important question remains: how ought the work of historians affect us in the present? If our history is far more complex—and our break from the past far less complete—than we like to imagine, how should that affect us today?

It must be acknowledged that part—and perhaps the larger part—of the answer to this question resides beyond the law. As scholars including McRae and

254. This, of course, was surely not the intent of the racial-justice plaintiffs who undoubtedly deployed the remedial rationale for strategic reasons in order to win desegregation cases. At the time of the remedial rationale's rise, there continued to be some uncertainty about the viability of intent as a theory for invalidating facially “colorblind” government action, *see Eyer, supra* note 104, at 22-33, and it also was then (as it is now) difficult to persuade a court to find intentional covert discrimination, *see id.* at 25 n.133 (reviewing sources that reveal disputes regarding the factual existence of intent in the cases of *Council of Emporia* and *Scotland Neck City Board of Education*). The remedial rationale sidestepped these questions and thus was a straightforward way of securing liability. *See id.* at 22-33. As is so often the case, this strategic move had unintended consequences. *See id.* at 71-72.

255. *See Missouri v. Jenkins*, 515 U.S. 70 (1995); *Freeman v. Pitts*, 503 U.S. 467 (1992); *Bd. of Educ. v. Dowell*, 498 U.S. 237 (1991). Despite *Dowell*, *Freeman*, and *Jenkins*, there remain any number of continuing (and occasionally new) desegregation cases. *See Wendy Parker, The Future of School Desegregation*, 94 Nw. U. L. REV. 1157, 1207 (2000) (demonstrating that, as of 2000, much school desegregation litigation remained); Civil Rights Div., *Case Summaries*, U.S. DEP'T JUST., <https://www.justice.gov/crt/case-summaries> [<https://perma.cc/B79G-JPZN>].

Theoharis have pointed out, law alone has never been adequate to the task of disestablishing racial inequality, and it undoubtedly remains inadequate to the task today.²⁵⁶ Much of the work that needs to be done to bring our more complicated racial history to bear on contemporary racial inequality involves efforts to transform our national racial ideologies, through changing the stories we tell ourselves about our racial past.²⁵⁷ Those transformations – which ultimately rely on the ability of individuals to question their own racial perspectives – will begin, if at all, through the process of retelling the story of our racial past: in K-12 classrooms, in the news and popular media, in political speeches, and in our homes and neighborhoods.²⁵⁸

But while much of this work will necessarily reach beyond the law, reclaiming this history also ought to be a legal project. It was law that formally made the promise of racial equality, while ultimately failing to deliver.²⁵⁹ In so doing, law provided the fundamental cornerstone of our modern narrative of postracial equality by suggesting that racial equality was already constitutionally secured.²⁶⁰ As critical race scholars have long argued, law thus contributes to our ability to ignore modern racial inequality by facilitating a popular narrative in which racial equality was won long ago.²⁶¹ Thus, this history demands that we

256. See MCRÆ, *supra* note 16, at 240; THEOHARIS, *supra* note 2, at 3-27; *see also* sources cited *infra* note 258.

257. See THEOHARIS, *supra* note 2, at 3-27 (discussing extensively the popular misuses of the civil rights movement and distinguishing the “histories we need” from the “histories we get”).

258. As Reva Siegel and others have observed, this process of extralegal transformation is often critical to transformation within the law itself, and thus may be necessary to any legal transformation. *See generally* Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191 (2008) (describing how changes in constitutional culture outside the courts – fought in the political- and social-movement realm – led to the decision in *District of Columbia v. Heller*, 554 U.S. 570 (2008)). But it is also the case that law no doubt will only ever be a very partial tool in the task of dismantling racial oppression, and thus that most of the work of reconfiguring Americans’ racial practices and attitudes must take place outside the courts. *See generally* ALEXANDER, *supra* note 34, at 225 (describing the inadequacy of litigation as an exclusive tool of racial justice); HANEY LÓPEZ, *supra* note 181, at 181-89 (describing the ways that racial “common sense” is constructed through environment); Reva B. Siegel, *Blind Justice: Why the Court Refused to Accept Statistical Evidence of Discriminatory Purpose in McCleskey v. Kemp – and Some Pathways for Change*, 112 NW. U. L. REV. 1269, 1289-91 (2018) (calling for “securing equal treatment, with or without courts”).

259. *See* sources cited *infra* note 261.

260. *Id.*

261. *See* BELL, *FACES AT THE BOTTOM OF THE WELL*, *supra* note 7, at 13-14, 101, 104; BELL, *supra* note 104, at 6-7, 186-87; Bell, *supra* note 203, at 16, 30, 34-35; *see also* Freeman, *supra* note 203, at 1050 (“[A]s surely as the law has outlawed racial discrimination, it has affirmed that Black Americans can be without jobs, have their children in all-black, poorly funded schools, have no opportunities for decent housing, and have very little political power, without any violation

take seriously the failings of modern equality law and the contributions of those failings to the persistence of racial inequality.

Of course, critical race theorists and others have argued for years for a similar project, for many closely related reasons.²⁶² And yet, half a century in, we remain largely mired in the same doctrinal regime. This history of inaction is sobering and should cause us to be skeptical of the prospects for change in equality law. It may be true that—as scholars such as Derrick Bell have observed—the law is, and always will be, bent towards the preservation of racial inequality, except where it suits white interests to have it be otherwise.²⁶³ And yet, as Bell also wrote, “we must maintain the struggle against racism else the erosion of black rights will become even worse than it is now.”²⁶⁴ In that project, the work of contemporary historians offers yet another foundation from which to raise arguments about the nature of racial inequality—arguments that echo those that have long been made from other vantage points.²⁶⁵

Most strikingly, the work of historians—like the work of critical race scholars—seriously calls into question the ability of equality law to do even the limited work it purports to do.²⁶⁶ The promise that individuals will not be treated differently based on their race resides at the core of almost any conception of our

of antidiscrimination law.”); Seidman, *supra* note 203, at 750-53 (describing how the end of legal segregation “produced a new system of legitimation” for current racial inequalities).

262. For just a few examples, see Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107 (1976); Haney-López, *supra* note 218; Lawrence, *supra* note 15; Siegel, *Equality Divided*, *supra* note 218; Siegel, *supra* note 29. Of course, many critical race scholars have also expressed ambivalence about any rights-focused project of reform, although many have also simultaneously recognized the necessity of such a project. See, e.g., Derrick Bell, *Racial Realism*, 24 CONN. L. REV. 363, 378-79 (1992); Linda S. Greene, *Race in the 21st Century: Equality Through Law?*, 64 TUL. L. REV. 1515, 1540-41 (1990).

263. See Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980) (“The interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites.”).

264. Bell, *supra* note 262, at 378.

265. To be clear, I am not especially optimistic about the possibility of this type of transformative legal change, especially in the absence of the existence of social change of the kind described *supra* notes 257-258 and accompanying text. Much of this lack of optimism arises from the long history of cogent critiques by critical race theory (CRT) scholars and others—arriving at similar conclusions to those I describe herein—that have largely gone unheeded in the doctrine. See sources cited *supra* notes 203, 218, 227, 262; *infra* note 284. Nevertheless, the work of historians offers an additional opportunity for reframing our understandings of contemporary racism—in my view, the key to facilitating real change, legal or otherwise. And I share the view of many prior skeptics that pursuing change, even if unlikely, remains important.

266. Although much of this Review has focused on constitutional law, today the legal landscape of racial-equality law is equally defined by statutory equality guarantees. My recommendations for reform of equality law should thus be understood as extending to both contexts. Note that

contemporary racial-equality project.²⁶⁷ And yet the ways that historians have complicated our understandings of the past casts significant doubt on the ability

in the context of the arena that is the central focus of my recommendations for reform—disparate treatment law—courts have generally treated claims in the constitutional and statutory context as coextensive. See Richard Primus, *The Future of Disparate Impact*, 108 MICH. L. REV. 1341, 1354-55 (2010) (observing that the “conceptual content” of the statutory and constitutional prohibitions on disparate treatment “is the same”).

Of course, unlike the Constitution, many antidiscrimination statutes also provide a disparate-impact cause of action, and thus one could contend that statutory reform efforts ought to focus on that context instead. But while scholars and other progressives have for many years focused considerable energies on sustaining and expanding the disparate impact cause of action, the actual impact of those efforts is at least debatable. See Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701, 704-06 (2006). Moreover, the vast majority of antidiscrimination claims in the courts today are brought on a disparate treatment theory. See ELLEN BERREY ET AL., RIGHTS ON TRIAL: HOW WORKPLACE DISCRIMINATION LAW PERPETUATES INEQUALITY 57 (2017) (providing Title VII data).

At a minimum, it seems clear that we should not abandon disparate treatment as the subject of theorizing and proposals for reform. Indeed, as scholars like Michael Selmi have suggested, such progressive theorizing around disparate treatment—and the building out of broader social-movement efforts to persuade the public of its correctness—arguably is a vital component of equality law’s future. See Selmi, *supra*, at 782 (making a related point).

267. See Lea Brilmayer, *Lonely Libertarian: One Man’s View of Antidiscrimination Law*, 31 SAN DIEGO L. REV. 105, 106 (1994) (characterizing disparate treatment as the “core antidiscrimination principle”—the one with which the vast majority of the public agrees). Of course, there are some cases in which the Court has expressed the view that not all racial disparate treatment may be actionable, most notably the majority opinion in *McCleskey v. Kemp*. See 481 U.S. 279, 315 (1987) (expressly noting the concern that accepting claims of racial bias in sentencing might “throw[] into serious question the principles that underlie our entire criminal justice system” and citing this as a reason to reject McCleskey’s Eighth Amendment claim). And there are innumerable other ways in which the Court has in fact made it difficult or impossible to address racial disparate treatment, relying on technical grounds. See ALEXANDER, *supra* note 34, at 109-39; *supra* notes 203, 218-222 and accompanying text. However, as of this date, a majority of the Court remains at least rhetorically committed to the notion that racial disparate treatment resides at the core of our antidiscrimination law project. See, e.g., *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2419 (2013) (stating that “judicial review must begin from the position that ‘any official action that treats a person differently on account of his race . . . is inherently suspect’” (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 523 (1980))); *Ricci v. DeStefano*, 557 U.S. 557, 577 (2009) (characterizing Title VII’s prohibition on “disparate treatment” as its “principal nondiscrimination provision” and describing disparate treatment as “the most easily understood type of discrimination” (quoting *Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977))). Even in *McCleskey* itself, the majority’s primary equal protection argument was a technical one (that the defendant could not prove racial bias in his individual case) rather than one that explicitly abandoned equal protection’s racial disparate treatment project. See *McCleskey*, 481 U.S. at 293-95. Thus, while the Court has clearly shown itself willing to limit the practical ability of claimants to bring racial disparate treatment claims—and some Justices might be willing to go further—the Court’s doctrine continues to situate racial disparate treatment as the core of its antidiscrimination project. See *Fisher*, 570 U.S. at 310;

of our current equality law regime to accomplish even this core shared goal.²⁶⁸ As laid out earlier in this Review, if explicit Jim Crow laws are not the exclusive, or even predominant, way that racial subordination is enforced, “colorblindness” – now, as then – offers few tools for dismantling differential treatment based on race.²⁶⁹ And if many, if not most, people understand themselves to be acting in service of well-justified, race-neutral goals – even as race affects their decision-making – intent doctrine too will be but a limited tool.²⁷⁰

The work of historians thus suggests a vital need to rethink our doctrinal approach to the anti-disparate-treatment mission that lies at the heart of contemporary antidiscrimination law.²⁷¹ Today’s historically impoverished disparate treatment doctrine provides a veneer of fairness but fails to grapple meaningfully with the lessons of our racial past.²⁷² What those lessons teach is that disparate treatment is perpetrated not only by the animus-driven bigot, but also by the well-intentioned moderate.²⁷³ Perpetually reincarnated racial stereotypes have long allowed moderate whites to disclaim their racism, even as they engage in racially determined action.²⁷⁴ And facially race-neutral forms of racially disparate treatment are far from the rare, modern innovation that they are often cast

Ricci, 133 S. Ct. at 2419; cf. Memorandum of Justice Scalia to the Conference, *McCleskey*, 481 U.S. 279 (Jan. 6, 1987) (No. 84-6811), <http://law2.wlu.edu/powellarchives/page.asp?pageid=1350> [<https://perma.cc/WTW3-KVUS>] (at page 147 of the online PDF) (internally expressing the view that, because “the unconscious operation of irrational . . . antipathies, including racial, upon jury decisions and (hence) prosecutorial decisions is real . . . and ineradicable, I cannot honestly say that what I need is more proof” to validate an equal protection claim predicated on racial disparate treatment in sentencing – and thus implying that the Constitution simply did not reach these forms of race-based disparate treatment in criminal law).

268. See *supra* notes 231–240 and accompanying text. As explained *supra* note 265, prior work by CRT scholars and scholars of cognition and bias should have acted as a clarion call to the legal community that we were in trouble on the disparate treatment project long before now, including for reasons very similar to the ones described herein. Thus, I certainly do not make the claim that the insights that can be drawn from the recent work of historians are entirely novel ones. Insofar as they may offer renewed opportunities, it is because they offer a new set of arguments from which to seek to persuade.

269. See *supra* Part IV.

270. *Id.*

271. See *infra* notes 272–275 and accompanying text.

272. Cf. *Boddie*, *supra* note 26 (making a similar observation and demonstrating how the Court has increasingly used the passage of time to refuse to see connections between the racial past and present).

273. See *supra* Part II.

274. See *supra* Parts II, IV.

as. Rather they have—for more than a century—been a mainstay of racial disparate treatment where facial discrimination is formally disallowed.²⁷⁵

Thus, our commitment to equality law's anti-disparate-treatment mission demands that we shift our focus away from an approach that is far too common today—a historically uncontextualized search for racial intent—and instead recommit ourselves to a meaningful disparate treatment inquiry. If the outcome would have been different “but for” the race of those affected, it ought not matter whether we can identify a self-aware racist actor—an inquiry that history suggests would often have been complicated, or even impossible, even during the civil rights era itself.²⁷⁶ Moreover, historical context can provide important guideposts to where disparate treatment has occurred, helping us identify the myriad continuities—in justifications, stereotypes, and forms—between the racial actions of today and of the past.²⁷⁷ A historically informed disparate treatment doctrine—trained on the central question of disparate treatment, not intent—could thus constitute an important first step towards recommitting ourselves to the fundamental anti-disparate-treatment mission that resides at the heart of equality law today.

Such a recommitment to the anti-disparate-treatment mission of equality law is wholly consistent with many of the core premises of contemporary anti-discrimination doctrine. But as informed by the work of historians, it does suggest the need for several important doctrinal reforms.²⁷⁸ Most notably, the work

275. See *supra* Part III.

276. For further discussion of this point, see *infra* notes 279–304 and accompanying text; see also *supra* notes 232–235 and accompanying text (regarding the potential futility of this inquiry even in the civil rights era).

277. See *infra* notes 301–341 and accompanying text.

278. Importantly, each of the reforms described herein could be argued for from *within* the current structure of antidiscrimination law, without the need to abandon the core commitments of the current Court (something that the Court seems exceedingly unlikely to do in the near future). For example, the Court has simply never resolved the issue of whether disparate treatment law may reach more broadly than intentional discrimination, assuming that the two are coextensive (although, to be sure, there is language from which one could argue that intentional discrimination is the required showing). See sources cited *infra* note 279; see also Evan Tsen Lee & Ashutosh Bhagwat, *The McCleskey Puzzle: Remediating Prosecutorial Discrimination Against Black Victims in Capital Sentencing*, 1998 SUP. CT. REV. 145, 154 (noting in the constitutional context that the Court has never considered the issue of whether a purely causation-based standard—as opposed to a conscious-intent one—is correct); Rebecca Hanner White & Linda Hamilton Krieger, *Whose Motive Matters?: Discrimination in Multi-Actor Employment Decisionmaking*, 61 LA. L. REV. 495, 498 (2001) (noting in the Title VII context that, “[s]urprisingly, the Supreme Court has yet to confront this issue head on”); see also Banks & Ford, *supra* note 245, at 1072–1100 (extensively making the case, in the context of debates on unconscious or implicit bias, that the Court’s current disparate treatment jurisprudence does not

of historians reinforces the vital need to clarify a longstanding ambiguity in anti-discrimination doctrine regarding the ultimate focus of disparate treatment law: whether it is, as the name suggests, “disparate treatment” – or whether it is instead the narrower construct of discriminatory intent.

This important ambiguity has arisen from the Supreme Court’s longstanding conflation of disparate treatment and intentional discrimination, in both the statutory and the constitutional context.²⁷⁹ As described at greater length below, the Court has generally treated intentional discrimination and disparate treatment as interchangeable, referring to both without differentiation in its disparate

preclude liability based on unconscious bias). So too there are cases from which one could argue for a meaningful role for racial stereotyping and for the history of “colorblind” Jim Crow in the Supreme Court’s anti-disparate-treatment doctrine. See sources cited *infra* notes 301-318, 324-326.

To be clear, I am not naïve as to the low probability that any reform of antidiscrimination law will succeed in the current environment. Insofar as the reform I propose derives from similar concerns noted previously by many other scholars, there are significant reasons to be pessimistic – reasons that existed even prior to the replacement of Justice Kennedy with Justice Kavanaugh on the Supreme Court. On the other hand, the proposals contained herein – especially the proposal to simplify and generalize disparate treatment doctrine by focusing on the ultimate issue of causation – are consistent with current trends in the Supreme Court’s equality law jurisprudence, which have generally been formalistic in nature and increasingly focused on “but for” causation. See, e.g., *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2419 (2013); *Gross v. FBL Fin. Servs.*, 557 U.S. 167 (2009).

279. In the constitutional context, compare *Fisher*, 133 S. Ct. at 2419, which states that “judicial review must begin from the position that ‘any official action that treats a person differently on account of his race . . . is inherently suspect’” (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 523 (1980)), with *Washington v. Davis*, 426 U.S. 229 (1976), which states that impact alone is not sufficient to state a constitutional violation and requires a showing of purpose but does not acknowledge that differential treatment might occur even in the absence of intent. In the statutory context, see, for example, *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 715 (1983), which states, in a single passage, both that “[t]he ‘factual inquiry’ in a Title VII case is ‘[whether] the defendant intentionally discriminated against the plaintiff’” and that the question is whether “the employer . . . [is] treating some people less favorably than others because of their race, color, religion, sex, or national origin” (quoting *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978)); and *Gross*, 557 U.S. at 176 (treating the causal language “because of” as synonymous with “but for” causation, not motivation). *But cf.* *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007) (suggesting, in a statute of limitations case, that intent, rather than mere disparate treatment, has to be shown within the limitations period), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5. See generally Tristin K. Green, *The Future of Systemic Disparate Treatment Law*, 32 BERKELEY J. EMP. & LAB. L. 395, 417 & n.91 (2011) (making a similar observation in the statutory context); Lawrence, *supra* note 15, at 321-22 (making a similar observation in the constitutional context). This conflation, of course, takes on particular bite in the constitutional context, where the Court has held that disparate impact claims – which might take up some of the slack of non-intent-based disparate treatment – are not actionable. See *Davis*, 426 U.S. 229.

treatment case law.²⁸⁰ As such, the Court has assumed that the question of whether the defendant “intentionally discriminated” (i.e., acted with a discriminatory motive or intent) is the same as the question of whether the defendant engaged in disparate treatment (i.e., “treat[ed] some people less favorably than others because of their race”).²⁸¹ As a result of this conflation, it remains unclear which of these constructs in fact ultimately controls: whether it is, indeed, the question of whether “disparate treatment” has occurred that is dispositive (whether the outcome would be different “but for” the race of the victim) or instead the question of whether the defendant acted with discriminatory motive or intent (and thus subjected the plaintiff to “intentional discrimination”).²⁸²

But as the work of historians reminds us—and as critical race scholars and others have long observed—discriminatory intent is just one subset of a much broader set of cases in which disparate treatment has occurred.²⁸³ Though the

280. See sources cited *supra* note 279.

281. *Aikens*, 460 U.S. at 715 (quoting *Furnco*, 438 U.S. at 577). Note that this oversight does not appear to have been intentional. Rather, the Court appears to have so completely perceived these two things to be synonymous that it has not endeavored to define which should be dispositive, instead using the two interchangeably.

282. See generally sources cited *supra* note 278 (noting that the Court has never resolved this issue directly in either the statutory or the constitutional context). Reflecting this ambiguity, the model jury instructions in different circuits are inconsistent on this front, with some calling for an intent-based paradigm and others simply asking the question of disparate treatment. Compare *Instructions for Race Discrimination Claims Under 42 U.S.C. § 1981*, U.S. CT. APPEALS FOR THIRD CIR. 12 (Mar. 2018), http://www.ca3.uscourts.gov/sites/ca3/files/6_Chap_6_2018_March.pdf [<https://perma.cc/9NQA-XQBD>] (stating, in model jury instructions for a § 1981 claim, the plaintiff’s burden as: “In order for [plaintiff] to recover on this discrimination claim against [defendant], [plaintiff] must prove that [defendant] intentionally discriminated against [plaintiff]”), with Comm. on Pattern Civil Jury Instructions of the Seventh Circuit, *Federal Civil Jury Instructions of the Seventh Circuit*, U.S. CT. APPEALS FOR SEVENTH CIR. § 3.01, at 59 (2017), http://www.ca7.uscourts.gov/pattern-jury-instructions/7th_cir_civil_instructions.pdf [<https://perma.cc/CUS5-L9YF>] (stating, for § 1981 claims, the general instruction as follows: “To succeed on this claim, Plaintiff must prove by a preponderance of the evidence that he was [subject to adverse employment action] by Defendant because of his [protected class]. To determine that Plaintiff was [subject to adverse employment action] because of his [protected class], you must decide that Defendant would not have [engaged in adverse employment action against] Plaintiff had he been [outside protected class] but everything else had been the same” (emphases omitted)).

283. See *infra* notes 284-286 and accompanying text. As explained *supra* note 231, I am far from the first to make this observation. For just a few of the many relevant articles, see, for example, Krieger, *supra* note 231; Lawrence, *supra* note 15; and Lee & Bhagwat, *supra* note 278, at 154-55. Although this is not a new argument, the history described herein may serve as a new and compelling platform for its articulation because it highlights that even conduct we think of as undisputedly wrongful—resistance to desegregation in the South—might not have been captured by a discriminatory-intent model, as opposed to a true disparate treatment model.

Supreme Court has assumed that the two are synonymous—and they certainly *may* overlap—there are myriad circumstances in which disparate treatment can take place without the existence of discriminatory intent. Most notably, where racial stereotypes are genuinely believed, disparate treatment may occur precisely because the sincerity of those beliefs makes those who hold them genuinely perceive individual African Americans (or the communities they are a part of) as more dangerous, lazier, or less committed to academic or workplace achievement.²⁸⁴ But whether or not those committing disparate treatment understand their actions as being racially motivated—or believe in racist stereotypes so deeply that they would fail to identify such motivations—disparate treatment has still occurred.²⁸⁵ Thus, while intentional discrimination certainly should be sufficient to show disparate treatment, to the extent we care about disparate treatment, it ought not be the ultimate question we ask. Rather, as the Court has already suggested in other contexts, that question should focus on causation: whether the outcome would be different “but for” the race of the individual or group affected.²⁸⁶

Moreover, to the extent that much of the focus in making such arguments has been on psychological evidence derived from the implicit-association test (IAT) and psychologists’ studies of implicit bias, I share many of the concerns articulated by progressive commentators regarding the limits of that project’s political and legal possibilities. See Bagenstos, *supra* note 225, at 1-9; Banks & Ford, *supra* note 245, at 1063-72, 1113-21; Michael Selmi, *The Evolution of Employment Discrimination Law: Changed Doctrine for Changed Social Conditions*, 2014 WIS. L. REV. 937, 978-81, 990. In particular, the modern focus on the IAT as the central basis for claims regarding the salience of implicit bias to antidiscrimination law seems to me unlikely to provide the type of basis for wide moral suasion that more robust antidiscrimination law reform would require. Finally, some prior scholars have seemed to concede that this issue is resolved in favor of an intent-based approach, something that, as noted above, is not actually compelled by the precedents. See David Benjamin Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899, 919-20, 932-34 (1993) (treating the disparate treatment cause of action as coextensive with discriminatory intent and arguing for the recognition of a “negligence” cause of action, separate and apart from disparate treatment).

284. See generally *supra* notes 231-240 and accompanying text. Lawrence, Linda Hamilton Krieger, and other scholars have made similar observations relying on modern social psychology. See Krieger, *supra* note 231; Lawrence, *supra* note 15; see also sources cited *infra* note 303 (citing other scholarly work in the area of racial stereotyping).

285. See sources cited *supra* note 283; cf. Lawrence, *supra* note 15, at 344 (“I believe the law should be equally concerned when the mind’s censor successfully disguises a socially repugnant wish like racism if that motive produces behavior that has a discriminatory result as injurious as if it flowed from a consciously held motive.”).

286. As noted above, preventing race-based disparate treatment is commonly conceptualized as at the very core of our constitutional and statutory antidiscrimination project. See *supra* note 267. Thus, there are strong arguments that our jurisprudence should fully capture such discrimination. For cases where the Court has suggested that the ultimate question in an anti-disparate-treatment case is the causation one—albeit not directly so held—see, for example, *Gross v.*

There are reasons to believe that this move alone could have a meaningful impact on equality law.²⁸⁷ As many scholars have long argued, the focus on intent in equality law misdirects our inquiry to a highly personalized concept of racism—one that derives from the stereotypical conception of racism as individual animus.²⁸⁸ Scholars have long argued for a variety of legal reforms to rectify this error—including, most prominently, an impact-focused constitutional standard.²⁸⁹ But a true disparate treatment framework—focused on how outcomes would differ were the race of those affected different—also takes us a considerable distance towards more capacious conceptions of racism.²⁹⁰ Thus, for example, it is a very different question to ask not whether Congress intended to discriminate against blacks in enacting harsh criminal-justice measures like the hundred-to-one sentencing disparity for crack cocaine, but whether Congress would have responded comparably if the race of those predominantly affected by the drug crisis were white.²⁹¹ So too the inquiry looks different if we ask not

FBL Financial Services, 557 U.S. 167 (2009), which held that the ADEA’s proscription on discrimination “because of” age connoted “but-for causation,” not an inquiry into whether age was a “motivating” factor.

287. Many equality scholars might take issue with this, seeing little difference between an intent and a disparate treatment regime and seeing a disparate impact regime as more promising. But insofar as this claim is used to argue against disparate treatment reform, I disagree. We have yet to reclaim the real meaning of “disparate treatment” and, in so doing, disaggregate it from intent (a problematically narrow and individualized standard, *see supra* note 279 and accompanying text). It is not certain that such a true disparate treatment standard would be more effective, but there are reasons (described in the text) why it is certainly possible. For many reasons, political and doctrinal, it is more realistic that a more robust disparate treatment regime will be plausible in the near future than that a constitutional disparate impact standard will be adopted. And while many antidiscrimination statutes do include disparate impact causes of action—and such claims have sometimes led to important victories—the overwhelming majority of statutory claims are today brought under a disparate treatment standard. *See BERREY ET AL.*, *supra* note 266, at 57 (providing Title VII data). Thus, even if one also advocates for broader availability of disparate impact, it is important to do what we can to revitalize disparate treatment law as well.
288. *See sources cited supra* note 218.
289. *See, e.g.*, Fiss, *supra* note 262 (arguing for an impact-focused standard); Flagg, *supra* note 218 (doing the same). *But cf.* Lawrence, *supra* note 15, at 322-24 (sidestepping disparate impact debates and arguing instead for a modification of disparate treatment law to look to the “cultural meaning” of allegedly racial practices).
290. Of course, intent remains an important subset of the ways in which one can prove disparate treatment. Where an actor has intentionally taken an action because of race, they have engaged in disparate treatment because of race. But a pure disparate treatment paradigm also makes room for other ways in which disparate treatment can occur.
291. As some have observed, the divergent responses to the crack epidemic (the public face of which was overwhelmingly black) and the current opioid crisis (largely white) are telling in this regard. *See* Petula Dvorak, *We Scorned Addicts when They Were Black. It Is Different Now*

whether voter ID laws were intentionally discriminatory (which they may also be), but instead whether Republican legislatures would have enacted such a regime if the race of those disproportionately excluded from voting were white.²⁹² And there are a host of other contexts – such as criminal justice and youth discipline – where we know, through statistical analysis, that disparate treatment is occurring, and yet the vain search for an actor with intent has stymied the courts’ ability to find discrimination.²⁹³

So too, outside the context of government action, there are reasons to believe that a turn to a true disparate treatment standard could produce meaningful changes. In employment discrimination cases – the field that produces the lion’s

that They Are White, WASH. POST (Apr. 12, 2018), https://www.washingtonpost.com/local/we-hated-addicts-when-they-were-black-it-is-different-now-that-they-are-white/2018/04/12/cd845f20-3e5b-11e8-974f-aacd97698cef_story.html [<https://perma.cc/TB8W-9GMZ>]. *But cf.* FORMAN, *supra* note 31 (complicating the standard racial account by demonstrating the role that African American officials and leaders played in generating the modern punitive and racially targeted response to drugs). Note that although the formulation of this question (asking the question from the vantage point of whether blacks are being treated as well as whites would have been) may sound unfamiliar, it in fact mirrors the linguistic formulation used in key provisions of the Civil Rights Act of 1866, the precursor to the Fourteenth Amendment. *See* 42 U.S.C. §§ 1981, 1982 (2018) (defining the benchmark for equality rights in relation to the treatment of “white citizens”).

292. Given the political identification of minority voters with the Democratic Party, it seems exceedingly unlikely that Republican majorities would have enacted stringent voter ID laws if they had a comparable racially disparate impact on whites (thus lessening white voting strength compared to minority voting strength). *Cf.* *Cooper v. Harris*, 137 S. Ct. 1455, 1473 n.7 (2017) (noting that gerrymandering to disadvantage African Americans triggers strict scrutiny under the Equal Protection Clause, even where it was done for partisan reasons). *See generally* N.C. State Conference of the NAACP v. McCrory, 831 F.3d 204 (4th Cir. 2016) (finding purposeful racial discrimination in the enactment of North Carolina’s voter ID law); BONILLA-SILVA, *supra* note 3, at 39 (describing racial bias in voter ID laws, despite their “color-blind” facade).
293. *See, e.g.*, *McCleskey v. Kemp*, 481 U.S. 279 (1987); Nora Gordon, *Disproportionality in Student Discipline: Connecting Policy to Research*, BROOKINGS INSTITUTION (Jan. 18, 2018), <https://www.brookings.edu/research/disproportionality-in-student-discipline-connecting-policy-to-research> [<https://perma.cc/WVW9-FWJC>] (describing new studies supporting the claim that discrimination contributes to racial disparities in school discipline). *See generally* Green, *supra* note 279 (making a similar argument about the search for an actor with intent in the context of Title VII systemic disparate treatment); Destiny Peery & Osagie K. Obasogie, *Equal Protection and the Social Sciences Thirty Years After McCleskey v. Kemp*, 112 NW. U. L. REV. 1261, 1263–64 (2018) (making a similar observation in the constitutional law context). Of course, this may be a matter of a more fundamental inability or unwillingness to “see” discrimination, a more sobering possibility. *See* Katie Eyer, *That’s Not Discrimination: American Beliefs and the Limits of Anti-Discrimination Law*, 96 MINN. L. REV. 1275 (2012) (describing psychological research showing that people are generally reluctant – even in the face of strong evidence – to make attributions to discrimination).

share of discrimination claims—courts routinely dismiss plaintiffs’ claims for a failure to show “pretext”—i.e., a failure to show that the employer’s given reasons for the employment decision were false.²⁹⁴ As an adjunct to that inquiry, many lower courts have developed a doctrine known as the “honest belief rule,” reasoning that if the decision maker honestly believed their reason, the reason cannot be pretextual (and thus discrimination cannot have occurred).²⁹⁵ But as scholars such as Linda Krieger and Susan Fiske have explored, such a construct assumes a self-aware conception of discrimination that—while consistent with an intent-based regime—would allow much disparate treatment to go unaddressed.²⁹⁶ Similarly, the way that some courts frame the ultimate question in employment discrimination cases—as whether an employee was subjected to “intentional discrimination[.]”—asks fact finders (and judges) a question that utterly ignores the possibility of non-self-aware biases.²⁹⁷ A turn to a true disparate treatment inquiry—focused simply on the question of whether an equivalently strong (or weak) white employee would have been retained (or hired, promoted, etc.)—offers in the employment discrimination context too the possibility of a more meaningfully protective equality law regime.

Shifting the inquiry away from intent to a broader disparate treatment focus thus subtly, but importantly, shifts our attention to the ways that African Americans continue to be treated differently, rather than (exclusively) the intent of the individuals allegedly responsible. In undertaking such an inquiry, evidence of racial stereotyping—where it is present—ought to play a central role. As the work of historians has shown, many of the same racial stereotypes that persist today also undergirded racial disparate treatment during the civil rights era.²⁹⁸ Because, as described above, such racial stereotypes can stand in for race, the presence of such longstanding stereotypes should serve as a key warning that racial

294. See Natasha T. Martin, *Pretext in Peril*, 75 MO. L. REV. 313, 335-36 (2010) (characterizing the pretext stage as a “nearly insurmountable hurdle for plaintiffs to prove discrimination”).

295. See Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CALIF. L. REV. 997, 1034-38 (2006).

296. *Id.*

297. See, e.g., *Instructions for Employment Discrimination Claims Under Title VII*, U.S. CT. APP. FOR THIRD CIR. 20 (Mar. 2018), http://www.ca3.uscourts.gov/sites/ca3/files/5_Chap_5_2018_March.pdf [<https://perma.cc/TE9F-UACE>] (stating, in model jury instructions for a Title VII claim, the plaintiff’s burden as follows: “In order for [plaintiff] to recover on this discrimination claim against [defendant], [plaintiff] must prove that [defendant] intentionally discriminated against [plaintiff].”). As noted above, see *supra* note 282, not all circuits characterize the inquiry in this way; some instead rely on a true disparate treatment formulation.

298. See *supra* Part II.

disparate treatment may be at play.²⁹⁹ Indeed, the existence of racial stereotypes may often provide the most compelling evidence that racially disparate treatment has occurred. Thus, a robust jurisprudence of racial stereotyping should be an important component of a revitalized anti-disparate-treatment jurisprudence.

Such a turn would, of course, require renewed efforts to create a meaningful jurisprudence of racial stereotyping.³⁰⁰ In both the statutory and the constitutional context, equality law has long had a developed jurisprudence of gender stereotyping.³⁰¹ But efforts to instantiate a comparable jurisprudence of racial stereotyping have not been nearly as successful.³⁰² Courts have generally—in

299. See *supra* notes 227-240 and accompanying text.

300. As described below, a robust racial-stereotyping jurisprudence could potentially contribute substantially to the ability to meaningfully pursue racial-justice objectives under antidiscrimination law. But as with virtually any doctrine, there is certainly a possibility of such a jurisprudence being deployed for ideologically opposing aims. Most obviously, some conservatives, including Justices Thomas and Alito, have contended that measures such as affirmative action both rest on and foment racial stereotypes. See, e.g., *Fisher v. Univ. of Tex. at Austin*, 136 S. Ct. 2198, 2232 (2016) (Alito, J., dissenting) (arguing that the university's affirmative-action rationale relies on precisely the kind of "pernicious stereotype[s]" that are forbidden by the Equal Protection Clause); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 241 (1995) (Thomas, J., dissenting) ("[T]here can be no doubt that racial paternalism and its unintended consequences can be as poisonous and pernicious as any other form of discrimination."). As I have written elsewhere, it is my view that this possibility—of ideological co-optation—is a pervasive possibility in doctrinal reform efforts. See Eyer, *supra* note 104, at 71-72, 74. Thus, it is my view that the real work of social movements must reside not in avoiding co-optable doctrine, but rather in winning the fight for the normative soul of the doctrinal regimes they persuade the courts to adopt.

301. In the statutory context, see, for example, *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); and Stephanie Bornstein, *Unifying Antidiscrimination Law Through Stereotype Theory*, 20 LEWIS & CLARK L. REV. 919 (2016). In the constitutional context, see Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. REV. 83 (2010).

302. See, e.g., *EEOC v. Catastrophe Mgmt. Sols.*, 852 F.3d 1018 (11th Cir. 2016); *Simmons v. Poe*, 47 F.3d 1370 (4th Cir. 1995); see also Bornstein, *supra* note 301, at 964-68 (contrasting stereotyping in sex-discrimination cases and racial-discrimination cases). Note that, at least in the constitutional law context, there are certainly cases that do express concerns regarding racial stereotyping that could potentially buttress the development of a true racial-stereotyping jurisprudence (ironically, many were authored in the affirmative-action or race-based redistricting contexts). See, e.g., *Bush v. Vera*, 517 U.S. 952, 968 (1996) (plurality opinion); *Georgia v. McCollum*, 505 U.S. 42, 59 (1992) (Rehnquist, C.J., concurring); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 630-31 (1991); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493-94, 511 (1989) (plurality opinion); see also *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 869-70 (2017); *Batson v. Kentucky*, 476 U.S. 79, 104-05 (1986) (Marshall, J., concurring). In the statutory context, see, for example, *Thomas v. Eastman Kodak Co.*, 183 F.3d 38, 58-61 (1st Cir. 1999), which embraces a jurisprudence of racial stereotyping in the Title VII context. So too the tradition of the courts treating discrimination adjudication methodologies consistently

both the constitutional and statutory context—resisted a racial-equality paradigm that gives significant meaning to the presence of racial stereotypes.

The work of historians may, however, offer additional tools in our efforts to build a robust racial-stereotyping jurisprudence. As this work reminds us (and as many critical race and social-psychology scholars have known all along), a durable and identifiable set of racial stereotypes has long undergirded racial inequality in this country.³⁰³ Whether defined as it initially was as a matter of biology,³⁰⁴ as it was in the post-*Brown* era as a matter of African American culture, or as it is today as the pathologies of the “inner city,” the core set of racist stereotypes of African Americans as dangerous, lazy, less competent, less refined, and lacking in moral values has a very long and deep history.³⁰⁵ While such stereotypes have undergone changes in the causes to which they are attributed, much of their core substance has remained the same.

Acknowledging this—and drawing on the work of historians as experts to substantiate it—provides an important foundation for developing a jurisprudence of racial stereotyping. The reality that so many of the racial stereotypes of the present have an exceedingly long history in our country should allow us

across categories (race, sex, etc.) should counsel in favor of the transferability of sex-stereotyping precedents. See, e.g., *Hively v. Ivy Tech Cmty. Coll.*, 853 F.3d 339, 347-49 (7th Cir. 2017) (extensively relying on race precedents in the sex-discrimination context); cf. *McCleskey v. Kemp*, 481 U.S. 279, 298 (1987) (relying on *Personnel Administrator v. Feeney*, 442 U.S. 256 (1979), a sex-discrimination precedent, in the race context).

303. See generally *supra* Part II. Numerous scholars—across multiple disciplines—have examined the content, durability, and consequences of racial stereotypes, as well as offered suggestions for how they should be accounted for in the law. See, e.g., BONILLA-SILVA, *supra* note 3, at 73-99; HANEY LÓPEZ, *supra* note 181, at 94-102; Lawrence D. Bobo, *Racial Attitudes and Relations at the Close of the Twentieth Century*, in 1 AMERICA BECOMING: RACIAL TRENDS AND THEIR CONSEQUENCES 264 (Neil J. Smelser et al. eds., 2001); Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259 (2000); Devon W. Carbado & Patrick Rock, *What Exposes African Americans to Police Violence*, 51 HARV. C.R.-C.L. L. REV. 159 (2016); Angela Onwuachi-Willig & Mario Barnes, *By Any Other Name?: On Being “Regarded as” Black, and Why Title VII Should Apply Even if Lakisha and Jamal Are White*, 2005 WIS. L. REV. 1283, 1325-28; Devah Pager & Diana Karafin, *Bayesian Bigot? Statistical Discrimination, Stereotypes and Employer Decision Making*, 621 ANNALS AM. ACAD. POL. & SOC. SCI. 70 (2009); S. Plous & Tyrone Williams, *Racial Stereotypes from the Days of American Slavery: A Continuing Legacy*, 25 J. APPLIED SOC. PSYCHOL. 795 (1995); Nicole Yadon & Spencer Piston, *Examining Whites’ Anti-Black Attitudes After Obama’s Presidency*, POL. GROUPS & IDENTITIES, Mar. 5, 2018.
304. Obviously, all of these characterizations are not strictly temporally limited—there were people who situated racial stereotypes in culture even before *Brown* and those who situate racial stereotypes in biology today. See Plous & Williams, *supra* note 303. The point is simply that the stereotypes have remained the same, even as the precise characterization of their causation has shifted. See BONILLA-SILVA, *supra* note 3, at 1-7.
305. See sources cited *supra* note 303.

(with the aid of historical expertise) to identify them with some specificity.³⁰⁶ History also—by demonstrating that historical agents of racial inequality embraced and were motivated by stereotypes that persist today—points out how naïve it would be to argue that such stereotypes are entirely divorced from racial inequality today. Thus, history offers both the tools to identify such stereotypes as well as arguments for why it is important to understand their significance.

How, specifically, racial stereotypes ought to be considered in the disparate treatment inquiry is a more complicated question, but one to which existing gender-stereotyping law offers some initial answers. Sometimes, and most basically, gender-stereotyping law suggests that stereotypes may simply serve as evidence of disparate treatment—a component of our multifaceted inquiry into whether the outcome would have been different “but for” protected class status.³⁰⁷ This is often the role that stereotypes play in family-responsibilities discrimination cases, in which an understanding of stereotypes and their relationship to sex and gender helps buttress claims of sex discrimination by providing the background context that allows us to see how concerns about caregiving and parents may be gendered—concerns that, without social context, could appear sex neutral.³⁰⁸ So too, in the area of race, the context provided by racial stereotypes might help us understand as raced evidence that courts currently too often dismiss as race neutral—such as an employer’s unsubstantiated beliefs that an African American employee was “lazy” or “unprofessional,” or a legislator’s unsubstantiated belief that the “dangerousness” of a predominantly African American community justifies harsh criminal penalties.³⁰⁹

306. There are, of course, other disciplines that courts could look to as well in developing this inquiry. See sources cited *supra* note 303.

307. See *infra* notes 308-309 and accompanying text.

308. See, e.g., *Chadwick v. Wellpoint*, 561 F.3d 38 (1st Cir. 2009) (relying on knowledge of gender stereotypes to recognize that sex discrimination could be at play where comments were made about parental responsibilities, even where comments were all gender neutral and a woman got the job). See generally Joan C. Williams & Stephanie Bornstein, *Caregivers in the Courtroom: The Growing Trend of Family Responsibilities Discrimination*, 41 U.S.F. L. REV. 171 (2006) (describing the important role of gender stereotyping in family-responsibilities discrimination).

309. Cf. BONILLA-SILVA, *supra* note 3, at 36, 50 (describing employers’ stereotypes about African Americans as employees and research on law enforcement stereotypes of African Americans as criminals). Note that this inference ought to be especially strong where the stereotypical beliefs at issue are without genuine foundation in that particular case. As I have written previously, laying bare the lack of justification for racially impactful laws (or private action) can often provide a key way of buttressing the conclusion that such action was in fact racial discrimination. See Eyer, *supra* note 162, at 1057-58.

Sex-discrimination law also suggests that it is a violation of antidiscrimination law's proscription on disparate treatment for gender stereotypes to be descriptively assumed—or prescriptively applied.³¹⁰ In the context of race, there is already some case law that suggests that descriptive stereotyping leading to disparate treatment is legally impermissible, and certainly theoretically, such stereotyping should be as problematic as any other form of racial disparate treatment.³¹¹ The most prominent example of this, of course, is racial profiling by law enforcement officers—but disparate treatment founded in descriptive racial stereotypes remains a pervasive problem across a host of arenas, including criminal justice, education, and juvenile justice.³¹² So too prescriptive stereotyping—assumptions that African Americans should (or must) have certain interests or desires, or a particular kind of racial appearance—should be found problematic by analogy to existing gender-stereotyping jurisprudence.³¹³ Though courts have, to date, generally rejected such arguments,³¹⁴ prescriptive racial stereotypes—for example, requiring a particular racialized appearance—unquestiona-

310. Prescriptive stereotypes are stereotypes about what characteristics and roles *should* be associated with a particular race (or sex), whereas descriptive stereotypes are assumptions about the reality of the differing characteristics associated with a particular race (or sex) that are attributed (often erroneously) to individuals. See William N. Eskridge, Jr., *Title VII's Statutory History and the Sex Discrimination Argument for LGBT Workplace Protections*, 127 YALE L.J. 322, 363-64 (2017) (describing the distinction between prescriptive and descriptive stereotypes).

311. See JODY FEDER, CONG. RESEARCH SERV., RL 31130, RACIAL PROFILING: LEGAL AND CONSTITUTIONAL ISSUES (2012), <https://fas.org/sgp/crs/misc/RL31130.pdf> [<https://perma.cc/9M8X-2Q8T>]; see also *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 868-70 (2017) (treating eradication of discrimination on the basis of race as a constitutional principle in the criminal-justice context, and finding that principle to be implicated where a juror had acted based on racial stereotypes); *Hassan v. City of New York*, 804 F.3d 277, 297-98 (3d Cir. 2015) (making clear that where individuals would not have been surveilled had they not been Muslim, intentional discrimination within the meaning of the Constitution has occurred). Although *Peña-Rodriguez* was a Sixth Amendment case, its reasoning strongly supports the conclusion that stereotype-based disparate treatment would be constitutionally problematic. For an argument that stereotype-based disparate treatment is already unlawful under Title VII, see Onwuachi-Willig & Barnes, *supra* note 303, at 1326-27.

312. See sources cited *supra* notes 293, 311.

313. See *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

314. See, e.g., *EEOC v. Catastrophe Mgmt. Sol.*, 852 F.3d 1018 (11th Cir. 2016) (rejecting a racial-stereotyping argument and finding the employer's requirement that the prospective employee cut off her dreadlocks to be nondiscriminatory); *Eatman v. United Parcel Serv.*, 194 F. Supp. 2d 256, 262-263 (S.D.N.Y. 2002) (rejecting a *Price Waterhouse*-based argument and finding that an employer's policy deeming dreadlocked hair "unbusinesslike" was not discriminatory).

bly should be deemed impermissible by a court taking racial stereotyping seriously.³¹⁵ Relying on history to renew our efforts to build a jurisprudence of racial stereotyping could thus provide an opportunity to inject vitality into our nascent jurisprudence of race-based descriptive stereotyping, while offering a new foundation from which to argue for the reversal of lower courts' rejection of prescriptive racial-stereotyping arguments.

Finally, in some contexts – such as mixed-motive burden shifting – the presence of gender stereotypes has formed the basis for shifting the burden to the defendant to demonstrate an absence of disparate treatment.³¹⁶ So too, in the context of race, a more developed jurisprudence of racial stereotyping should afford opportunities to require *defendants*, based on the presence of stereotypes, to undertake the task of showing that their actions would have been the same “but for” the race of those affected.³¹⁷ While deployment of the mixed-motive burden shifting paradigm is to some extent complicated by its current focus on “motives” – as noted earlier, an erroneously limited paradigm – it offers another potential space in which existing doctrine suggests that stereotypes may be rele-

315. See D. Wendy Greene, *Title VII: What's Hair (and Other Race-Based Characteristics) Got to Do with It?*, 79 U. COLO. L. REV. 1355 (2008) (extensively discussing the relevance of stereotyping jurisprudence to addressing prescriptive racial stereotypes in the context of employment policies regarding appearances).

Note, however, that the existence of lower-court case law ignoring the Supreme Court's anti-gender-stereotyping jurisprudence in the context of uniform and appearance policies does offer a potential basis for suggesting that protected-class-prescriptive stereotypes – insofar as they are codified as uniform and appearance policies – are consistent with Title VII law. See, e.g., *Jespersion v. Harrah's Operating Co.*, 444 F.3d 1104 (9th Cir. 2006) (en banc) (holding that a requirement that female employees wear makeup did not violate Title VII). This lower-court case law is clearly inconsistent with *Price Waterhouse* and yet has mostly persisted during the three decades since *Price Waterhouse* was decided. *Id.* But cf. *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 573-574 (6th Cir. 2018) (noting that *Jespersion* and cases like it are arguably inconsistent with *Price Waterhouse*). The proposal described herein to develop a broader, historically grounded racial-stereotyping jurisprudence would not necessarily alleviate the problem of poorly reasoned stereotyping-jurisprudence carve outs, like the carve out that the lower courts have created for appearance and grooming policies.

316. See *Price Waterhouse*, 490 U.S. 228.

317. Mixed-motive burden shifting already exists in the context of race claims in both the constitutional and statutory context, but unlike in the context of sex, it is rarely triggered today by evidence of racial stereotyping. For some of the cases and statutory provisions recognizing burden shifting in the race context, see, for example, 42 U.S.C. § 2000e-2(k) (2018); *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 270 n.21 (1977); and *Keyes v. School District No. 1*, 413 U.S. 189, 208-10 (1973).

vant.³¹⁸ Moreover, in the constitutional context, the Court itself could move its burden shifting paradigm towards a true disparate treatment approach.³¹⁹

There are reasons to believe that shifting the burden of proof in this way—based on the presence of racial stereotypes in government or employer decision-making—could have real effects on the outcomes in some cases.³²⁰ Racial stereotypes have pervaded many of the most notoriously racially harmful forms of modern government decision-making, including, for example, the crack/cocaine disparity, debates over voter fraud (often used to justify voter ID laws and other restrictive voting measures), and many of the Trump Administration’s anti-immigrant initiatives.³²¹ So too racial stereotypes often undergird employers’ actions disadvantaging racial-minority employees.³²² And yet many of those cases

318. See *Price Waterhouse*, 490 U.S. 228.

319. See *supra* notes 279-292 and accompanying text. In the statutory context, the situation is much more complicated, given that Congress amended the relevant statute in 1991 to include language specifically referring to motives. See 42 U.S.C. § 2000e-2(m) (proscribing employer actions where race was a “motivating factor . . . even though other factors also motivated the practice”). While intended to benefit plaintiffs, the motivating factor language added by the Civil Rights Act of 1991 codifies a motive-focused inquiry for some types of employment discrimination cases (those brought under the “mixed motives” rubric).

320. As explained *supra* note 317, mixed-motive burden shifting is already available under both the Constitution and Title VII, and in theory could provide the basis for this type of burden shifting, but in practice is almost never found to be triggered today based on racial stereotypes. For example, a search in the Allfeds Database of Westlaw for [adv: (race! racial!) /5 stereotyp! /50 (“mixed motive!” “motivat! factor!” “burden shift!” “shift the burden”)] produced no cases in which the court at issue shifted the burden to the defendant based on the existence of racial stereotypes.

321. See, e.g., Richard Dvorak, *Cracking the Code: “De-Coding” Colorblind Slurs During the Congressional Crack Cocaine Debates*, 5 MICH. J. RACE & L. 611, 654-61 (2000) (describing racial stereotypes in the congressional debates over the crack/cocaine disparity); Tim Pugmire, *Racism Alleged in Voter ID Campaign*, CAP. VIEW (Feb. 20, 2012), https://blogs.mprnews.org/capitol-view/2012/02/racism_alleged [<https://perma.cc/V57B-4UET>] (reporting on an image used in the Minnesota campaign for voter ID laws which included both an African American in a striped prison uniform and a mariachi-clad individual—described by proponents of the image as an “illegal immigrant”—lining up to vote); Dylan Scott, “Shithole” Countries, *Donald Trump’s Latest Racist Tirade, Explained*, VOX (Jan. 12, 2018), <https://www.vox.com/policy-and-politics/2018/1/12/16882840/donald-trump-shithole-daca> [<https://perma.cc/9M72-KZ29>] (extensively documenting President Trump’s racist remarks regarding racial-minority immigrants).

322. See, e.g., *Titus-Morris v. Banc of Am. Card Servicing Corp.*, 512 F. App’x 213, 218 (3d Cir. 2013) (characterizing remarks stereotyping an African American woman as too aggressive and unprofessional in appearance due to racially associated clothing as mere “stray remarks” and dismissing the discrimination claim); *Reid v. Evergreen Aviation Ground Logistics Enters.*, No. 07-1641-AC, 2009 WL 136019 (D. Or. Jan. 20, 2009) (characterizing managerial state-

lose today, under both constitutional and statutory law, with racial stereotypes being afforded little, if any, significance.³²³ Were defendants required—once the presence of racial stereotypes in the decision-making process was demonstrated—to show that race did *not* play a “but for” role in the outcome, some of these claims might plausibly fare better.

Finally, the work of historians suggests that renewing our commitment to a true anti-disparate-treatment mission must include a more searching examination of where “colorblind” Jim Crow may be at play. Under our current historical narrative, it has been easy for courts to dismiss racial inequality as in the past, and thus to exculpate contemporary “colorblind” forms of action disadvantaging African Americans as nondiscriminatory.³²⁴ But the work of historians—by showing the long history of “colorblind” Jim Crow, both before and after *Brown*—suggests that such forms of action merit a much closer look.³²⁵ It is incredible, in the literal sense of the term, to believe that a form of racial subordination that existed for a century in both the South and the North simply stopped in the 1970s.³²⁶ And indeed, some of the very same measures initially adopted for racial purposes—such as felon disenfranchisement laws and standardized tests with a racial impact—remain today.³²⁷

ments drawing on stereotypes of racial minorities as lazy and on welfare as mere “stray remarks” and dismissing the racial-discrimination claim). Numerous other examples of such decisions exist, often justified through the “stray remarks” doctrine.

323. See sources cited *supra* notes 308, 321-322; see also Eyer, *supra* note 162, at 1055-63 (describing the low success rates in persuading courts to hold, inter alia, voter ID laws and the crack/cocaine disparity unconstitutional as a form of racial discrimination—although noting that rational-basis-review arguments have sometimes gained traction).
324. The most striking example of this may be lower courts’ treatment of felon disenfranchisement statutes. Despite the fact that many such statutes were enacted at least in part to exclude minorities from voting—and that the Supreme Court, in a rare application of its intent doctrine, has struck down such a law, see *Hunter v. Underwood*, 471 U.S. 222 (1985)—the lower courts have sustained many (albeit not all) modern felon disenfranchisement laws, often by reasoning that there is no evidence that their contemporary manifestation is motivated by racial animus. See, e.g., *Hayden v. Paterson*, 594 F.3d 150, 164-66 (2d Cir. 2010); *Johnson v. Governor of Fla.*, 405 F.3d 1214, 1224 (11th Cir. 2005); *Cotton v. Fordice*, 157 F.3d 388, 391 (5th Cir. 1998).
325. See *supra* Part III.
326. Cf. *United States v. Fordice*, 505 U.S. 717, 733-38 (1992) (finding ACT test-score standards originally adopted with discriminatory intent to be constitutionally problematic and noting that a later change in justification for the standards to a racially neutral one “[o]bviously . . . does not make the present admissions standards any less constitutionally suspect”).
327. See *supra* notes 187-188 and accompanying text; see also *supra* text accompanying notes 152-162 (describing the racially discriminatory roots of many contemporary racially burdensome practices).

In the case of those historic “colorblind” Jim Crow laws or practices that have survived into the present, the simple shift to a true disparate treatment model should counsel their invalidation in most circumstances.³²⁸ Rather than the courts’ current misdirected search for contemporary racial intent – which focuses on whether the plaintiff can prove racial intent in, say, a contemporary reenactment or application of the same provision – the shift to causation asks a fundamentally different question.³²⁹ Where a law initially was enacted for the purposes of racial subordination, in most circumstances the race of those initially burdened by the law is still a cause (and typically a “but for” cause) of the contemporary statute’s existence.³³⁰ Shifting to a true disparate treatment regime thus puts far greater pressure on defendants to demonstrate that some intervening event justifies believing that the law would exist today if the race of those burdened had not been (and was not today) African American.³³¹

The case of felon disenfranchisement laws is instructive on this front. In many jurisdictions – both North and South – there is ample historical evidence that felon disenfranchisement laws were originally the product of explicit racial and ethnic bias.³³² Indeed, the evidence of racial bias in the provenance of felon disenfranchisement laws is so strong that the invalidation of such a law provides

328. See *infra* notes 329–331 and accompanying text.

329. The Supreme Court has not been entirely consistent in how it has approached this issue. Compare *McCleskey v. Kemp*, 481 U.S. 279, 298 n.20 (1987) (treating the racially discriminatory history of Georgia’s death penalty as irrelevant because it was historically remote, and requiring a showing of contemporary intent), with *Fordice*, 505 U.S. at 734 (expressing substantial skepticism that a change in rationale for ACT score minimums could render those minimums race neutral, where minimum ACT scores were originally adopted for discriminatory reasons, despite the passage of thirty years from their original discriminatory adoption, but in a remedial case), and *Hunter*, 471 U.S. at 233 (striking down a law that was enacted with discriminatory intent eighty years ago).

330. See *Johnson v. Governor of Fla.*, 353 F.3d 1287, 1299 (11th Cir. 2003) (holding that in order to break the chain of causation from a statute originally enacted for discriminatory purposes, there must be a sufficiently independent intervening event), *rev’d en banc*, 405 F.3d 1214 (11th Cir. 2005). *But cf.* *Abbott v. Perez*, 138 S. Ct. 2305, 2324–25 (2018) (rejecting this type of argument in a redistricting case, but in a situation where the Court appeared to view there as having been an intervening event in the form of a prior court-ordered revised districting map).

331. Some courts have suggested it may also be appropriate to shift the formal burden of proof to defendants in this context. For a persuasive, albeit ultimately overruled, articulation of the reasons why such an approach is defensible, see *Johnson*, 353 F.3d at 1296–1301. *But cf.* *Abbott*, 138 S. Ct. at 2325 (finding, in a complicated voting rights case involving the vestiges of allegedly intentionally discriminatory redistricting, that it was error for the district court to shift the burden of proof to the defendants).

332. See Erin Kelley, *Racism & Felon Disenfranchisement: An Intertwined History*, BRENNAN CTR. FOR JUST., https://www.brennancenter.org/sites/default/files/publications/Disenfranchisement_History.pdf [<https://perma.cc/2SLK-9W3W>].

one of the rare modern examples of the Supreme Court invalidating a law based on discriminatory intent.³³³ And yet many of the other challenges in the lower courts have foundered, as courts engage in a misdirected search for discriminatory intent in the contemporary versions of such laws.³³⁴ But while such proof of modern intent may be difficult, the chain of causation is far less so.³³⁵ In many instances, such laws would not exist “but for” the racial makeup of those they originally affected³³⁶—and even today, it is questionable whether a legislature would adopt measures having a comparable disparate effect on the white electorate.³³⁷ Thus, a shift to a true disparate treatment model should counsel their invalidation.

For other “colorblind” measures whose provenance does not trace directly to our Jim Crow past, the shift in equality law counseled by the work of historians is more subtle and resides in the type of general change in perspective that more-complicated histories ought to bring about. As noted above, the more-complicated historical narratives offered by modern historians—in which “colorblind” Jim Crow plays a central and longstanding role—eviscerate our common account

333. See *Hunter*, 471 U.S. 222.

334. See sources cited *supra* note 324.

335. See sources cited *infra* note 337.

336. See *Johnson*, 353 F.3d at 1299 (holding in a felon disenfranchisement case that to break the chain of causation from a statute originally enacted for discriminatory purposes, there must be a sufficiently independent intervening event, and that a fact issue existed as to whether such an intervening event had occurred).

337. Consider in this respect that some states with felon disenfranchisement laws, such as Mississippi, are also states with highly racially polarized voting patterns, large numbers of African American voters, and relatively slim margins by which white voters are in the majority. See, e.g., *Electorate Profile: Mississippi*, U.S. CENSUS BUREAU, https://www.census.gov/content/dam/Census/library/visualizations/2016/comm/cb16-tps38_graphic_voting_mississippi.jpg [<https://perma.cc/EHW7-NH8>] (demographics of Mississippi voters); Toni Monkovic, *Why Donald Trump Has Done Worse in Mostly White States*, N.Y. TIMES (Mar. 8, 2016), <https://www.nytimes.com/2016/03/09/upshot/why-donald-trump-has-done-worse-in-mostly-white-states.html> [<https://perma.cc/V8EB-4EUU>] (describing extreme racial polarization in Mississippi presidential elections). From 1994 to 2017, sixty-one percent of those disenfranchised under Mississippi’s felon disenfranchisement law were African Americans. See Alex Rozier, *Racial Disparity Conspicuous Among Mississippians Banned from Voting*, MISS. TODAY (Feb. 22, 2018), <https://mississippitoday.org/2018/02/22/racial-disparity-conspicuous-among-mississippians-banned-voting> [<https://perma.cc/NF5E-EN4X>]. Under the circumstances, it seems highly unlikely that Mississippi’s predominantly white Republican legislature would adopt a voting measure having a comparable effect on the white electorate. See *Legislators’ Race and Ethnicity 2015*, NAT’L CONF. ST. LEGISLATURES, http://www.ncsl.org/Portals/1/Documents/About_State_Legislatures/Raceethnicity_Rev2.pdf [<https://perma.cc/F9RW-FPYE>]; *Partisan Composition of State Houses*, BALLOTPEdia, https://ballotpedia.org/Partisan_composition_of_state_houses [<https://perma.cc/F9RW-FPYE>].

of the collapse of explicit Jim Crow measures as marking the end of racial inequality.³³⁸ Taking that history seriously entails a much more careful search—in the present—for the ways that “colorblind” Jim Crow may persist and result in racially disparate treatment today. While this search for disparate treatment in contemporary “colorblind” measures need not entail a formal shift in the doctrine, it does call for a much more skeptical attitude on the part of adjudicators. Especially where adjudicators are confronted with practices like school district secession (historically used to preserve racial segregation) or voter ID laws (closely resembling historical “colorblind” voting restrictions targeting African Americans), poorly supported or racially stereotyped government justifications ought to be viewed with extreme skepticism.³³⁹

Of course, judicial “attitude” is an amorphous concept, and not something that one can hope to systematically revise through law or otherwise. But recent historical work provides tools for offering judges a different historical narrative—not of postracialism, but of the long and unbroken history of “colorblind” Jim Crow as an agent of racial oppression.³⁴⁰ It may also, in some instances, allow judges to see the striking similarities between current “colorblind” forms of racial oppression and those of the past.³⁴¹ While this no doubt will not persuade all judges—either in or outside the courtroom—for those it persuades, it may mark an important step in moving away from a legal regime that views racial inequality as largely a thing of the past. In that way, it may open the door to a legal regime that—at least partially and incompletely—recognizes the persistence of racial inequality in the present.

338. See *supra* Part III.

339. See generally Boddie, *supra* note 29, at 1254–55 (describing the evolution of voter ID laws following the invalidation of other nominally race-neutral ways of suppressing the black vote); Erika K. Wilson, *The New School Segregation*, 102 CORNELL L. REV. 139 (2016) (describing the history of the practice of school district secession as a means of avoiding desegregation, as well as contemporary instances of the practice). Courts ought to be especially skeptical of practices that bear a strong resemblance to those that have a long history of being used for racial purposes.

340. See *supra* Part III.

341. For a recent example of the success of this type of approach, see *Lewis v. Governor of Ala.*, 896 F.3d 1282, 1295–96 (11th Cir. 2018), which relies on Alabama’s long history of efforts to impede black social and economic equality—including race-neutral efforts—in allowing a case challenging a facially neutral state law to go forward. See also Sara Mayeux, *Debating the Past’s Authority in Alabama*, 70 STAN. L. REV. 1645, 1649 (2018) (describing the role of a historians’ amicus brief in understanding the meaning of the law challenged in *Lewis*).

And indeed, this—a start at a regime of antidiscrimination law that tells a different story about contemporary racial inequality—is arguably the most substantial benefit we can hope to derive from bringing a more accurate historical account to bear in the law. Working alone, there are few reasons to believe that legal reform—of any kind—will lead to a radical transformation in our modern structures of racial inequality. But whether or not legal reform can on its own effectuate fundamental change, it may—by opening up the possibility of different narratives—be generative of the broader, more important project of reconfiguring how Americans think about contemporary racial discrimination. Currently, our body of equality law buttresses popular historical accounts by teaching that racial discrimination is explicit, animus driven, and largely a thing of the past. It is time for equality law—by recognizing our complicated connections to our past—to embrace a different account.³⁴²

CONCLUSION

The recent work of historians complicates, in vital ways, how we understand our national history with respect to race. Rather than a story of long-vanquished Jim Crow laws defended exclusively by animus-driven Southern bigots, the story modern historians tell is much more complex. Opposition to *Brown* was not limited to those who acted out of racial animus, but rather included those whose reasons for opposing desegregation do not look so very different from the reasons used to justify racial inequality today. The forms that discrimination took—even in the Jim Crow era—were always complex, often “colorblind,” and never resided exclusively in explicit Jim Crow. The civil rights movement sought far more—and its victories were far less complete—than many modern accounts acknowledge. In short, there are far more continuities between our racial past and present than our popular national histories suggest.

These continuities should have profound implications for how we view our modern structures of racial inequality. If we know that opponents of racial equality—both before and after *Brown*—used “colorblind” measures to obstruct racial equality, how can that not fail to problematize our triumphalist account of the collapse of Jim Crow? If we know that many modern racially impactful measures—such as standardized tests and felon disenfranchisement laws—were originally adopted for racially exclusionary reasons, how can that not call into question our understanding of such measures as fair and race neutral today?

342. Cf. Siegel, *Equality Divided*, *supra* note 218, at 93 (“When the Roberts Court teaches about the harms of racial classification—when it selects cases to demonstrate that government should respect people’s dignity and treat them fairly, as individuals, to avoid racially divisive messages—the Court takes equal protection cases about affirmative action, not racial profiling.”).

Most fundamentally, if we know that the reasons why segregationists thought they were justified are not so very dissimilar from the ways in which we justify racial inequality today, how can that fail to cause us to question our own self-exculpation from contemporary racial injustice?

It must be acknowledged that this project of revisiting and complicating our racial histories – although replete with opportunities for a renewed commitment to racial equality – also comes with risks in a time of rising racism and xenophobia.³⁴³ Part of the reason we have the histories we do of the civil rights era is because those are the stories that were needed to bring white Americans on board.³⁴⁴ The risk of complicating our histories is that some may view such complications – and the ways they draw our present closer to our past – as reason to reassess the invidiousness of our past, rather than the perceived noninvidiousness of our present. Indeed, reimagining the racial past as less deplorable – arguably one possible narrative that could be derived from historians' work – has long been a strategy of segregationists and other white supremacists.³⁴⁵

This is a real risk. But the alternative is to live with a set of histories that currently pose enormous barriers to contemporary racial-justice work.³⁴⁶ Many white Americans want to believe that racial inequality is in the past – and our dominant histories assure them that, for the most part, it is.³⁴⁷ They want to

343. See *infra* notes 344–345 and accompanying text. On rising racism and xenophobia, see, for example, BONILLA-SILVA, *supra* note 3, at 227; Bagenstos, *supra* note 225, at 9; and Clarke, *supra* note 3, at 2–4.

344. See *supra* note 104 (describing the strategic efforts by the civil rights movement to publicize the brutality and irrationality of Southern racism in order to persuade white Americans to oppose discrimination).

345. See MCRAE, *supra* note 16, at ch. 2 (extensively describing textbook campaigns seeking to characterize slavery as a relatively benign institution during the era of segregation in the South); THEOHARIS, *supra* note 2, at xx (describing the way that accounts of slavery as less pernicious than it actually was were used to help establish Jim Crow); see also *Key Concepts to Understand Violent White Supremacy*, NAT'L CONSORTIUM FOR STUDY TERRORISM & RESPONSES TERRORISM 3 (Apr. 2017), https://www.start.umd.edu/pubs/START_KeyConceptsToUnderstandViolentWhiteSupremacy_ResearchBrief_April2017.pdf [<https://perma.cc/V3W4-369U>] (discussing Holocaust denial among white supremacists).

346. Of course, not all white Americans share the perspectives described in this paragraph – the author being among those who would not identify in that way. But it is important to acknowledge that for many white Americans, preserving their self-perception of racial innocence is very important psychologically, and that our current histories facilitate that in deeply problematic ways. See generally ROBIN DIANGELO, *WHITE FRAGILITY: WHY IT'S SO HARD FOR WHITE PEOPLE TO TALK ABOUT RACISM* (2018).

347. See BONILLA-SILVA, *supra* note 3, at 25 (noting that most whites believe discrimination against racial minorities is in the past); Boddie, *supra* note 26, at 1832–34 (arguing that most people want to distance themselves from the racial inequality of the past); Michael I. Norton & Samuel R. Sommers, *Whites See Racism as a Zero-Sum Game that They Are Now Losing*, 6 *PERSP.*

believe that they are unlike those who propped up segregation – and our histories tell them that they are.³⁴⁸ They want to believe that what is theirs they have earned (and by implication, that African Americans struggle because they have not earned better) – and our histories reify this delusion by proclaiming that equality was secured fifty years ago.³⁴⁹

We cannot hope to do meaningful racial-equality work in the shadow of such histories. And the work of modern historians gives us the tools needed to break them down. One can only hope that – for the vast majority of white Americans – this will not shift the fundamental moral valence attached to our history of racial inequality: that we will continue to revile segregation, even if we understand that its proponents had more complex motivations than empty animus; that we will be able to see that efforts to evade *Brown* were wrong, even if those efforts resemble our own.

ON PSYCHOL. SCI. 215, 216 fig.1 (2011) (observing that, starting in the 2000s, whites “perceived more anti-White bias than anti-Black bias”).

348. See THEOHARIS, *supra* note 2, at 84-85.

349. See BELL, *FACES AT THE BOTTOM OF THE WELL*, *supra* note 7, at 5-6; BELL, *supra* note 104, at 6-7, 186-87; Bell, *supra* note 203, at 30; Crenshaw, *supra* note 200, at 1347-48, 1379-81.