THE AGE OF COVERT RACISM IN THE ERA OF THE ROBERTS COURT DURING THE WANING OF AFFIRMATIVE ACTION

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Abstract

Change and permanence can coexist. Witness the arc of racism in America as it evolves from overt to covert manifestations even as it remains a permanent feature of the American landscape. America is now in the age of covert racism. Such surreptitious racism is difficult, but not impossible, to discern. Its ubiety can be apprehended at the individual, institutional, and systemic levels in society. The pervasiveness of covert racism requires affirmative action to continue. The Roberts Court, though, is an obstacle because of its insouciance toward enduring racism and hostility to affirmative action. The Roberts Court should move beyond its obstructionist role by seeing clearly the reality of enduring racism and allowing affirmative action to counter enduring racism.

I. Introduction

This is the age of covert racism. America has not extirpated racism, but has instead allowed it to mutate into a different form. Prior overt racism has transformed into current covert racism. The era of overt racism began with slavery and continued during post-slavery de jure segregation when belief in white superiority and minority inferiority was explicit.[1] The era of covert racism began during the Civil Rights movement of the 1960s when explicit views of racial superiority were viewed with opprobrium.[2] Decades later, covert racism persists along with the struggles against such racism.[3]

To recognize current covert racism, imagine racism as the similitude of an iceberg.[4] The part of the iceberg above the water is

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1 Girardeau A. Spann, *Disintegration*, 46 U. LOUISVILLE L. REV. 565, 607 (2008).

2 *See* LESLIE HOUTS PICCA & JOE R. FEAGIN, TWO-FACED RACISM: WHITES IN THE BACKSTAGE AND FRONTSTAGE xi (2007).

3 *See* GRETA DE JONG, INVISIBLE ENEMY: THE AFRICAN AMERICAN FREEDOM STRUGGLE AFTER 1965 75 (2010).

4 *See* Matthew Desmond & Mustafa Emirbayer, *What is Racial Domination?*, *in* RACE, GENDER, SEXUALITY, AND SOCIAL CLASS 20, 26 (Susan J. Ferguson ed., 2013).

overt racism and the part below is covert racism. During the overt era, the iceberg was mostly above the water and blatantly visible. Now, in the covert era, most of the iceberg has submerged below the water rendering the iceberg mostly invisible. Covert racism is more perilous because it is less visible, just as a low-floating iceberg is more perilous because it is less visible.[5]

The less-visible racism of today is pervasive. It ranges extensively to taint all aspects of society. This societal scourge requires a societal response—affirmative action—to remove the taint. But the Roberts Court's anathema toward affirmative action effectively extends racism's reach in society. Instead of being part of the problem, the Roberts Court should be part of the solution by heeding Justice Sotomayor's admonition that the Court "ought not sit back and wish away, rather than confront, the racial inequality that exists in our society."[6]

Confronting racial inequality requires recognizing the reality of enduring racism. Part II of this article explains that recognition comes about by reconceiving racism to extend beyond the blatantly hateful acts of individuals to encompass the less visible procedures of institutions and norms of a system. Using this broad re-conception of racism, Part III illuminates the pervasive reach of covert racism at the individual, institutional, and systemic levels of society. Given covert racism's pervasive reach, affirmative action is needed to counter its prevalence. Part IV explicates the Roberts Court's obstructionist role in thwarting affirmative action efforts when, instead, it should promote affirmative action because of its duty to confront racial inequality.

II. Recognizing Covert Racism

Recognizing the reality of covert racism in the modern era requires, first, reconceiving racism to incorporate its covert character, and second, acknowledging rather than denying the existence of continuing racism.

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[5] *See* JOSEPH BARNDT, DISMANTLING RACISM 80 (1991).

[6] Schuette v. Coal. to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality By Any Means Necessary, 134 S. Ct. 1623, 1676 (2014) (Sotomayor, J., dissenting).

A. Reconceiving Racism

In this age of covert racism, the conception of racism must change to capture its clandestine nature. The majority of society, which the Supreme Court reflects, misperceives racism as merely hateful individuals engaging in overtly racist acts.[7] Such overt racism has been termed old-fashioned racism, classical racism, redneck racism, and blatant racism.[8] But racism extends beyond blatant acts by individuals.[9] Racism encompasses covert individual behavior, institutional processes, and systemic dynamics.[10] Individuals, institutions, and systems can practice covert racism.[11] Other terms describing covert racism include symbolic racism, subtle racism, ambivalent racism, laissez faire racism, aversive racism, and modern racism.[12] Their commonality is recognizing the opaqueness of racism in the modern era. By being subtly imperceptible rather than blatantly visible, covert racism is a more insidious form of racial bias.[13]

B. Acknowledging Racism

Reconceiving racism to understand its covert nature is needed because many fail to acknowledge the reality of persistent racism.[14] Whites are less likely to believe that racial discrimination often exists in America.[15] They disregard racism as a historical artifact rather than acknowledging racism as an enduring phenomenon.[16] One

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[7] *See* BARBARA TREPAGNIER, SILENT RACISM: HOW WELL-MEANING WHITE PEOPLE PERPETUATE THE RACIAL DIVIDE 3 (2006).

[8] Imani Perry, *Post-Intent Racism: A New Framework for an Old Problem*, NAT'L BLACK L. J. 113, 136 (2006-07).

[9] *See* TREPAGNIER, *supra* note 7, at 3.

[10] *See* Vernellia R. Randall, *The Misuse of the LSAT: Discrimination Against Blacks and Other Minorities in Law School Admissions*, 80 ST. JOHN'S L. REV. 107, 109-10 (2006).

[11] *See Id.*

[12] Perry, *supra* note 8, at 136-37.

[13] *See* John Tyler Clemons, *Blind Injustice: The Supreme Court, Implicit Racial Bias, and the Racial Disparity in the Criminal Justice System*, 51 AM. CRIM. L. REV. 689 (2014).

[14] *See* DANIEL BYRD & BRUCE MIRKEN, THE GREENLINING INSTITUTE, POST-RACIAL?: AMERICANS AND RACE IN THE AGE OF OBAMA 9 (2011), *available at* http://greenlining.org/wpcontent/uploads/2013/02/AmericansandRaceinAgeof Obama.pdf.

[15] *Id.* at 18.

[16] *See* MICHAEL J. KLARMAN, UNFINISHED BUSINESS: RACIAL EQUALITY IN AMERICAN HISTORY 201 (2007).

study revealed that "[o]nly 16% of Whites believe that there is a lot of discrimination in America today, while 56% of Blacks and 26% of Latinos believe that there is a lot of discrimination in America today . . . ."[17] Another study by the Pew Research Center reported that "about a third of all blacks (35%) say they had been discriminated against or treated unfairly because of their race in the past year, as do 20% of Hispanics and 10% of whites."[18] Regarding treatment by the police, "seven-in-ten blacks and about a third of whites (37%) say blacks are treated less fairly in their dealings with the police."[19] Regarding treatment by the courts, "about two-thirds of black respondents (68%) and a quarter of whites (27%) say blacks are not treated as fairly as whites in the courts."[20] Not surprisingly, blacks are "much more downbeat"[21] than whites about the pace of progress toward racial equality. Pessimism about racial progress is understandable given the reality of covert racism in current society.

III. Covert Racism is Pervasive

Covert racism is pervasive and arises at the individual, institutional, and systemic levels.[22] Individual racism involves acts by individuals.[23] Institutional racism involves the policies and practices of institutions.[24] Systemic racism involves the rules and norms of a social system.[25]

These three categories of racism can be intentional or otherwise. For example, *institutions* may have intentionally racist policies or actual practices that discriminate even absent intentionally racist policies.[26] Also, these categories of racism can overlap. For example, *individual* bias and *institutional* bias can accentuate each

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[17] BYRD & MIRKEN, *supra* note 14, at 9.

[18] PEW RESEARCH CTR, KING'S DREAM REMAINS AN ELUSIVE GOAL 2 (2013), *available at* http://www.pewsocialtrends.org/files/2013/08/final_full_report_racial_disparities.pdf.

[19] *Id.* at 1.

[20] *Id.*

[21] *Id.*

[22] VERNELLIA RANDALL, DYING WHILE BLACK 22 (2006).

[23] *Id.*

[24] *Id.*

[25] CLAYTON JAMES MOSHER, DISCRIMINATION AND DENIAL 29 (1998).

[26] Helen Paillé, *Black Female Inmates' Reproductive Rights: Cutting the Chains of Colorblind Constitutionalism*, 3 WM. MITCHELL L. RAZA. J. 1, 17 (2012).

other.[27] The norms of organizations interact with the implicit biases of individuals. Research suggests that individuals are more likely to act on their implicit biases when supervisors or leaders in organizations condone discrimination.[28]

Below are non-exhaustive examples of covert racial bias at all three levels of U.S. society. It is beyond the scope of this paper to discuss every type of covert racial bias. Nonetheless, the examples below sufficiently show the ubiquity of covert racial bias in America today.

A. Individual Racism

An individual's racist thoughts and assumptions will produce concordant racist behavior.[29] Much racist behavior that was previously overt is now covert.[30]

i. Backstage Racism

Today's racism is less visible because "whites often conceal their overtly racist views in certain settings."[31] Despite recent surveys suggesting whites' racial attitude have become more liberal, the reality is that much overt racial bias has become covert racial bias.[32] "Frontstage" racism in public settings has shifted to "backstage" racism in private settings.[33] Civil rights advances in the 1960s made blatant racism in the frontstage less acceptable.[34] Whites then, intentionally or unconsciously, steered their racial bias to the backstage.[35] The backstage is where racial events occur typically with other whites.[36] Backstage intimacy and protection allow whites to safely engage in racist performances.[37] In one study involving white

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[27] *See* Pat K. Chew, *Seeing Subtle Racism*, 6 STAN J. CIV. RTS. & CIV. LIBERTIES 183, 204 (2010).
[28] *Id.*
[29] TREPAGNIER, *supra* note 7, at 1.
[30] PICCA & FEAGIN, *supra* note 2, at ix-x.
[31] *Id.* at 27.
[32] *Id.* at ix-x.
[33] *Id.* at x.
[34] *See id.* at xi.
[35] *Id.* at xi-xii.
[36] *See* PICCA & FEAGIN, *supra* note 2, at 91.
[37] *See id.* at 21.

college students keeping regular journals of racial events, a white student noted:

> "A lot of whites still, the majority I'd say, will say the right, politically correct things at the right times, but behind closed doors, or with their friends, their small circle of friends, will be extremely bigoted in their comments."[38] For example, one white student recounted a backstage incident after returning home for spring break: "At dinner, my father . . . kept making remarks about black people, saying things like, 'I love ribs, maybe I have a little brotha in me! What do you think about that?'"[39] Another white student recalled the father of a white friend taking several white students out to dinner and praising the northern city he lived in: "[h]er dad said that one of the reasons it was such a great city was because, unlike all the other big cities he could think of, there weren't a lot of black people running around."[40] One white student wrote about her conversation with her white cousin in which the cousin mentioned that another white cousin had a Spanish boyfriend: "[My cousin] then proceeded to say that she hates Mexicans and her friend and I chimed in. . . . I am shocked at the words that came out of our mouths. It's just that where we live, the Mexicans are seen as a nuisance who cut our lawns and can barely talk to us in English."[41]

Whites of all classes and backgrounds participate in these racial performances.[42] They include whites in positions of power such as police officers. In one account, a white student noted the preferential treatment he received from a white police officer who stopped his vehicle: "It seemed like his whole demeanor changed when he saw that I was also Caucasian. . . . He claimed there was

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[38] *Id.* at xi.
[39] *Id.* at 99.
[40] *Id.* at 20.
[41] *Id.* at 129.
[42] PICCA & FEAGIN, *supra* note 2, at 4-5.

complaints about African American youngsters that were listening to their music too loud and he was instructed to ticket them."[43]

Whites recognize the different front stage and backstage settings and act accordingly. For example, one white student recalled a white co-worker's surreptitious telling of a racial joke: "Robby was there telling a [racist] joke. He just finished and I asked him to start over. He glanced to see if anyone was around." The white student further recalled: "I thought it was pretty funny and I wasn't the only one. But, I'm glad he waited till no one was around to tell it."[44] These racial performances are performed countless times each year across the United States.[45] They form a racial masque that envelops America society.

ii. Informally Learning Covert Racism

Racism is perpetuated through "informal" learning. Formal learning involves a teacher and a student in a formal setting; informal learning involves the learner modeling others without the parties being aware of it.[46] An example of informal teaching of covert racism is from the account below from a white participant in a racism study involving white women who did not regard themselves as racist:

> I was explicitly told that racism is wrong, that [her parents] are not racist, and that I shouldn't be racist, and that anyone decent wouldn't be. Yet at the same time I got the distinct feeling that they were uncomfortable about [the black neighbors]. If I just tried to picture them meeting a black person on the street, even though I can't really remember that, I'd know the look on their faces and the way their bodies would tense up . . . and no real explanation as to why. So I got, I think, a very deep message of underlying fear; that they intensely feared blacks.[47]

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[43] *Id.* at 225.
[44] *Id.* at 102.
[45] *Id.* at 27.
[46] TREPAGNIER, *supra* note 7, at 23.
[47] *Id.* at 23-24.

The white participant received two lessons—one formal and the other informal. The formal lesson was *don't be racist*; the informal lesson was that *blacks are to be feared*. For the white participant, the deeper message was the informal lesson that "*blacks are to be feared*."[48]

B. Institutional Racism

Racism is institutionalized across all sectors of society.[49] It suffuses the social order including the political, legal, economic, and educational arenas.[50] Institutional racism is covert because it does not involve blatantly racist acts by aberrant individuals,[51] but rather the imperceptible processes and procedures of organizations.[52] From schools to corporations to government, institutionalized racism colors all aspects of U.S. society.[53]

i. Voting

Covert racism was present at the advent of modern civil rights legislation when the Mississippi legislature sought to surreptitiously undermine the Voting Rights Act passed by Congress in 1965.[54] The Voting Rights Act suspended discriminatory voter registration tests such as literacy tests and declared the poll tax unconstitutional.[55] Mississippi responded by passing laws gerrymandering congressional districts to dilute black voting power.[56] A covert strategy was employed.[57] Mississippi legislators avoided open defiance and blatant white supremacist rhetoric.[58] They had learned from their openly racist attacks against the earlier federal school desegregation effort that overt bigotry could be used against them in

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[48] *Id.* at 24 (emphasis added).
[49] JOE R. FEAGIN, RACIST AMERICA 16 (2001).
[50] TREPAGNIER, *supra* note 7, at 2.
[51] *See* Mona Lynch & Craig Haney, *Looking Across the Empathic Divide: Racialized Decision Making on the Capital Jury*, 2011 MICH. ST. L. REV. 573, 594.
[52] *Id.*
[53] *See* BARNDT, *supra* note 5, at 144-45.
[54] Jason Watkins, *Mississippi's 2002 Congressional Reapportionment: Legislators Beware—Eliminating a Minority Influence District May Violate the Nonretrogression Principle of the Voting Rights Act*, 69 MISS. L.J. 885, 903 (1999).
[55] FRANK P. PARKER, BLACK VOTES COUNT: POLITICAL EMPOWERMENT IN MISSISSIPPI AFTER 1965 29 (1990).
[56] *Id.* at 39.
[57] Watkins, *supra* note 54, at 903.
[58] PARKER, *supra* note 55, at 36.

court to strike down their racist statutes. [59] Accordingly, Mississippi lawmakers cloaked their discriminatory purpose.[60] They sought to maintain a conspiracy of silence by using coded language during debates.[61]

For example, in 1964, the Mississippi House of Representatives approved a congressional redistricting bill to split black voters, but Representative Thompson McClellan opposed the redistricting proposal because his district would receive more black voters.[62] Representative McClellan used coded language to explain how the redistricting proposal moved certain areas so that "there shall not be a majority of *certain groups* in a district."[63] He further revealed that, "[t]his [redistricting proposal] patently was drawn in a manner to devalue the vote of a *certain group* of people."[64] "Certain groups" referred to blacks. "Legislators frequently refrain from using the word 'Negro,' and refer to Negroes as a 'certain group,'" explained one newspaper account.[65] Despite the subterfuge, "we all know the Negro situation was the main factor," confirmed Representative Odie Trenor, who also opposed the redistricting proposal because he did not want his district to include more blacks.[66] Mississippi's covert strategy succeeded in "diluting minority voting strength"[67] for decades.

ii. Politics

Politicians can engage in "dog whistle politics" to garner white votes. *Dog whistle politics* is a metaphor for racial pandering using coded language.[68] Politicians employing a dog whistle are speaking in code to a select audience.[69] They are engaging in clandestine racial

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[59] *Id.*

[60] *See* Watkins, *supra* note 54, at 903.

[61] PARKER, *supra* note 55, at 39.

[62] *House Gives Lopsided Vote For Redistricting*, LAUREL LEADER-CALL, Jan. 14, 1966, at 1 (emphasis added), *available at* http://newspaperarchive.com/us/mississippi/laurel/laurel-leader-call/1966/01-14/.

[63] *Id.*

[64] *Id.* at 1-2.

[65] PARKER, *supra* note 55, at 37.

[66] *House Gives Lopsided Vote*, *supra* note 62, at 1.

[67] Watkins, *supra* note 54, at 903-04.

[68] *See* IAN HANEY LÓPEZ, DOG WHISTLE POLITICS: HOW CODED RACIAL APPEALS HAVE REINVENTED RACISM AND WRECKED THE MIDDLE CLASS 3 (2014).

[69] *Id.* at 4.

appeals.[70] For example, "Nixon used coded appeals as the centerpiece of his Southern Strategy. 'States' rights' and 'law and order' were the code phrases of his campaigns."[71]

South Carolinian Lee Atwater explained the use of covert racial appeals during an interview when he was a member of President Ronald Reagan's White House political staff.[72] His interview remarks below expose the use of coded racial in political campaigns:

> You start in 1954 by saying "Ni[ ][ ]er, ni[ ][ ]er, ni[ ][ ]er." By 1968 you can't say "Ni[ ][ ]er." That hurts you. It backfires. So you say stuff like *forced busing*, *states rights* and all that stuff and you get so abstract. Now you talk about *cutting taxes* and these things you're talking about are totally economic things and a byproduct of them is, blacks get hurt worse than whites. And subconsciously maybe that's part of it. I'm not saying that. But I'm saying that if it is getting that abstract and that coded, we are doing away with the racial problem one way or the other. Obviously sitting around saying we want to cut taxes and we want this, is a lot more abstract than even the busing thing and a hell of a lot more abstract than ni[ ][ ]er ni[ ][ ]er. So anyway you look at it, race is coming on the back burner.[73]

Atwater's comments underscore the reality of covert racial appeals that can be part of an election strategy. Dog whistle politicians realize they would be broadly condemned if they openly appealed for white solidarity.[74] Thus, they use covert racial appeals to attain their electoral objectives. In this way, covert race-based machinations wind their way into American politics.

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[70] *Id.*

[71] Leland Ware & David C. Wilson, *Jim Crow on the "Down Low": Subtle Racial Appeals in Presidential Campaigns*, 24 J. OF CIV. RTS. AND ECON. DEV. 299, 341 (2009).

[72] ALEXANDER P. LAMIS, *The Two-Party South: From the 1960s to the 1990s*, *in* SOUTHERN POLITICS IN THE 1990S 1, 7 (Alexander P. Lamis ed., 1990).

[73] Andrew Rosenthal, Opinion, *Lee Atwater's 'Southern Strategy' Interview*, N.Y. TIMES (Nov. 14, 2012), http://takingnote.blogs.nytimes.com/2012/11/14/lee-atwaters-southern-strategy-interview/?_php=true&_type=blogs&_r=0 (emphasis added).

[74] LÓPEZ, *supra* note 68, at 4.

iii. Economics

Although mortgage deregulation and banks played a role in the 2008-09 economic meltdown, racial predatory lending practices also helped cause the economic crisis.[75] Prior to the economic meltdown, these inequitable financial practices were not noticed because they were mainly affecting people of color.[76]

Predatory lending is a subcategory of subprime lending. Subprime lenders extend credit to borrowers with poor credit ratings and charge them higher interest rates to offset their higher risk.[77] Predatory lenders go further and charge high interest rates well beyond the risk posed by the borrower's credit history, impose much more punitive loan terms, and undermine rather than augment the borrower's equity position.[78] Examples of predatory practices include charging exorbitantly high annual interest rates or closing costs.[79] Predatory lenders may "fail to disclose loan terms, provide a Good Faith Estimate, inform the borrower that they have a specific number of days to change their mind, or itemize all charges on the loan before or during the closing."[80]

Predatory lenders targeted communities of color.[81] Subprime loans were dispensed to minority borrowers even though they qualified for prime loans.[82] In 2006, 55% of loans to blacks were subprime, 40% to Latinos were subprime, 35% to Native Americans were subprime, while only 23% to whites were subprime.[83]

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[75] Davita Silfen Glasberg, Angie Beeman & Colleen Casey, *Predatory Lending and the Twenty-First Century Recession, in* THE END OF THE WORLD AS WE KNOW IT?: CRISIS, RESISTANCE, AND THE AGE OF AUSTERITY 55, 63 (Deric Shannon ed., 2014).
[76] *See Id.* at 56.
[77] *Id.* at 59.
[78] *Id.*
[79] *Id.* at 60.
[80] *Id.* at 61.
[81] *See* Lisa T. Alexander, *Cyberfinancing for Economic Justice*, 4 WM. & MARY BUS. L. REV. 309, 333 (2013).
[82] André Douglas Pond Cummings, *Families of Color in Crisis*, 55 HOW. L.J. 303, 312 (2012).
[83] *Id.*

iv. Education

Racial bias exists in both *pathways* and *gateways* to college.[84] *Pathways* refer to the paths leading up to the gates of college.[85] *Gateways* refer to the gates that guard entry to college.[86]

1. Bias at the Pathway to College

An example of a pathway to college is professor mentoring of prospective students. A recent study revealed racial bias in professor mentoring.[87] Researchers sent emails to thousands of college professors in Ph.D. programs. Each email was from a fictional prospective student inquiring about the professor's Ph.D. program and seeking guidance.[88] The emails had racially diverse names such as Meredith Roberts, Lamar Washington, Juanita Martinez, Raj Singh, and Chang Huang.[89]

The response of professors differed depending on the students' race (and gender).[90] The study found that "[p]rofessors were more responsive to white male students than to female, black, Hispanic, Indian or Chinese students in almost every discipline and across all types of universities."[91] Professors with higher salaries and at private universities exhibited the most severe bias.[92] Of the various academic fields, the business field exhibited the most bias with "87 percent of white males receiving a response compared with just 62 percent of all females and minorities combined."[93] Among the various ethnicities, Chinese students were the most discriminated-against

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[84] *See* Katherine L. Milkman et. al., *What Happens Before? A Field Experiment Exploring How Pay and Representation Differentially Shape Bias on the Pathway into Organizations*, SOC. SCI. RES. NETWORK, 4 (Apr. 23, 2014), *available at* http://blogs.uoregon.edu/diversityinhiring/files/2011/05/ssrn-id2063742-1pop41q.pdf.

[85] *See id.* at 3.

[86] *See id.*

[87] *Id* at 4-5.

[88] Katherine L. Milkman et. al., *Professors are Prejudiced, Too*, N.Y. TIMES, May 9, 2014, http://www.nytimes.com/2014/05/11/opinion/sunday/professors-are-prejudiced-too.html?_r=0.

[89] *Id.*

[90] *Id.*

[91] *Id.*

[92] *Id.*

[93] *Id.*

group.[94] In sum, pathway racial discrimination can hinder the educational advancement of minorities.[95]

2. Bias at the Gateway to College

Colleges set a higher bar for Asian-American applicants attempting to pass through their gateways.[96] For example, in 1982, Asian Americans admitted to Harvard had an average verbal Scholastic Aptitude Test ("SAT") score of 742 versus 666 for Caucasians, and an average math SAT score of 725 versus 689 for Caucasians.[97] A 1990 report by the U.S. Department of Education's Office for Civil Rights revealed that Asian-Americans applying to Harvard were admitted "at a significantly lower rate than white applicants" despite the "slightly stronger" SAT scores and grades of the Asian American applicants.[98] A 2004 Princeton study found that Asian American students needed to score 50 points or higher on the SAT to have the same chance as others to enter an elite university.[99]

Racial stereotyping is also a gateway obstacle. Admissions offices stereotype Asian applicants as automatons excelling only in math and science.[100] The dean of admissions at Massachusetts Institute of Technology ("MIT"), speculating on why a university might deny admission to an academically successful Asian American student, opined that it was understandable a university would admit a celebrity child or legacy admit over "yet another textureless math grind."[101] John Moores, former chair of University of California Berkeley's board of regents, studied Berkeley's 2002 admissions records and concluded that the university discriminated against Asian Americans.[102] Berkeley officials denied discriminating against Asian Americans, but its own 2004 report found that "somewhat fewer

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[94] Milkman et. al., *Professors are Prejudiced, Too, supra* note 88.

[95] *See* Milkman et. al., *supra* note 84, at 4-5.

[96] DANIEL GOLDEN, THE PRICE OF ADMISSION 203 (2006).

[97] William Bradford Reynolds, Asst. Attorney Gen., U.S. Dep't of Justice, Remarks at the Symposium on Asian American University Admissions: Discrimination Against Asian Americans in Higher Education 5 (Nov. 30, 1988), *available at* http://files.eric.ed.gov/fulltext/ED308730.pdf.

[98] GOLDEN, *supra* note 96, at 202.

[99] *Id.* at 203.

[100] *Id.* at 201.

[101] *Id.*

[102] *Id.* at 211.

Asian students"[103] were admitted than expected. The reported also conceded that a possible explanation was "small but real racial or ethnic effects on admission decisions."[104] Racial stereotypes, along with the higher test score requirement, narrow the gateways for Asian American students seeking entry to higher education.

v. Law

Abiding racism in the legal arena undermines racial equality. Two areas of continuing bias are (1) inequality in securing legal representation and (2) inequality in the courtroom.

1. Legal representation

Access to justice is problematic for people of color because they have more difficulty securing legal representation. Plaintiffs of color, especially African-American, are much less likely than white plaintiffs to have legal representation.[105] Research shows that whites are much more likely to have lawyers when filing lawsuits. African Americans are 2.5 times more likely to file *pro se* than whites. Other plaintiffs of color are 1.9 times more likely to file *pro se* than whites.[106]

The search for a lawyer is affected by the potential client's education, wealth, income, and professional networks, but inequitable social structures lead to less education, wealth, income and professional networks for people of color. Thus, people of color are disadvantaged relative to whites when it comes to legal representation.[107]

2. Courts

Even when people of color have access to attorneys, the judges they encounter can present additional obstacles. Judges are

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[103] *Id.*

[104] GOLDEN, *supra* note 96, at 211.

[105] Amy Myrick, Robert L. Nelson & Laura Beth Nielsen, Article, *Race and Representation: Racial Disparities in Legal Representation for Employment Civil Rights Plaintiffs*, 15 N.Y.U. J. LEGIS. & PUB. POL'Y 705, 757 (2012), *available at* http://www.nyujlpp.org/wp-content/uploads/2013/01/MyrickNelsonNielsen-Race-and-Representation.pdf.

[106] *Id.* at 720.

[107] *Id.* at 739.

imperfect beings subject to human foibles.[108] Federal district court judge Mark Bennett explains:

> [We] have a plethora of fears, feelings, perceptions, and stereotypes that lie deep within our subconscious. They reside there without our permission. Even though we may, and often do, abhor these buried biases, we act on them in both little ways . . . and in larger ways, like *decisions about who we employ or don't, who we leave on juries or don't, and who we believe or don't.*[109]

Many judges, though, do not recognize the reality of hidden biases. Research suggests that many judges recognize only blatant, obvious racial bias and regard racism as mostly a problem of a bygone era.[110] In actuality, judges themselves are subject to stereotypes and biases that affect their judgment.[111] Their reliance on their own intuitions may mislead them.[112] Thus, judges must recognize their own part in perpetuating racism and how racial bias has "evolved from overt to more subtle forms."[113]

In addition to failing to recognize hidden bias within themselves, judges may also fail to recognize hidden bias in others, such as employers, who racially discriminate. Judges are more likely to recognize obvious, blatant racial bias than less-obvious, subtle bias.[114] This is a problem when plaintiffs of color seek to persuade judges they are victims of less-obvious racial bias. One study revealed that judges evaluating workplace racial harassment claims tend to deem relevant only overtly racist behavior such as uttering racial slurs, but tend to disregard covert racist behavior such as exclusion from professional or work-related activities, social isolation, or other subtle

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[108] Joan B. Gottschall, *Response to Judge Wendell Griffen*, 81 MARQ. L. REV. 533, 534 (1998).

[109] Chew, *supra* note 27, at 209 (emphasis added).

[110] Victor D. Quintanilla, *Beyond Common Sense: A Social Psychological Study of Iqbal's Effect on Claims of Race Discrimination*, 17 MICH. J. RACE & L. 1, 3 (2011).

[111] *Id.*

[112] *Id.*

[113] *Id.*

[114] Michael A. Olivas, *Reflections on Academic Merit Badges and Becoming an Eagle Scout*, 43 HOUS. L. REV. 81, 88 (2006).

stratagems.[115] Courts have increasingly dismissed claims of racial discrimination, especially when the racial bias was covert rather than overt.[116] Also, white judges dismiss racial discrimination claims more often than black judges.[117] Judicial blindness to subtle, covert racism impairs the ability of plaintiffs of color to have their racial discrimination claims impartially evaluated in the courtroom.[118]

vi. Local Government and Immigration

Local governments engage in covert racial discrimination. In 2006, Escondido, a city with a burgeoning Latino population, passed an ordinance punishing landlords who rented to "illegal aliens."[119] The ordinance language expressly targeted "illegal aliens" by stating: "The harboring of illegal aliens in dwelling units in the City, and crime committed by illegal aliens harm the health, safety and welfare of legal residents in the City."[120] But the city rescinded the rental ordinance when legal bills accrued after lawsuits were filed against the city.[121]

This taught the city council to adopt a covert anti-immigrant approach. "We learned from the rental ordinance,"[122] explained council member Sam Abed. "We changed our focus to *quality of life* issues,"[123] using this covert strategy, Escondido in 2007 crafted a resolution to cite residents for public nuisances (e.g., garage conversions) instead of using language expressly targeting immigrants.[124] To avoid explicit anti-immigrant references, the city removed the following section prior to passage of the resolution: "Illegal immigration leads to higher crime rates, contributes to overcrowded classrooms and failing schools, subjects our hospitals to fiscal hardship and legal residents to substandard quality of care, and destroys our neighborhoods and diminishes our overall quality of

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115 *Id.*

116 Quintanilla, *supra* note 110, at 55.

117 *Id.*

118 Olivas, *supra* note 114, at 88.

119 Anna Gorman, *Undocumented? Unwelcome*, L.A. TIMES, July 13, 2008, http://articles.latimes.com/2008/jul/13/local/me-escondido13.

120 Escondido, Cal., Ordinance 2006-38 R, § 1(3), *available at* http://www.cooley.com/files/tbl_s5SiteRepository/FileUpload21/925/Escondido%20Ordinance.pdf.

121 Gorman, *supra* note 119.

122 *Id.*

123 *Id.*

124 *Id.* (emphasis added).

life."[125] Despite sanitizing the language, critics contended the resolution's intended target was the Latino community.[126] The message was, "[l]atinos, you're not welcome here," according to Bill Flores, an Escondido resident and former sheriff's deputy. [127]

vii. Housing

President Johnson proposed fair housing legislation in the late 1960s to prohibit racial discrimination in "advertising properties, renting or selling homes, and offering loan terms to prospective home buyers."[128] But opponents engaged in covert resistance both before and after passage of fair housing legislation. Prior to passage, Southern Democrats and their Republican allies in Congress avoided direct attacks and instead "deployed the rhetoric of individual freedom and private property rights to block fair housing legislation . . . ."[129] After passage, opponents implemented "[s]ubtle methods of denying housing options to black people such as withholding information or steering home seekers toward particular neighborhoods . . . ."[130]

More recently, paired testing by the Department of Housing and Urban Development ("HUD") shows that although blatant housing discrimination (e.g., refusing to meet with a minority homeseeker) has declined, subtle discrimination (e.g., providing information about fewer units) persists.[131] In these paired tests, "two people, one white and the other minority, pose as equally qualified home-seekers and inquire about available homes or apartments."[132] Over 8,000 tests were conducted in twenty-eight metropolitan areas.[133]

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[125] *Id.*

[126] *Id.*

[127] Ruxandra Guidi, *Latinos Are Majority In Escondido, But Feel Targeted By Police*, KPBS (Oct. 8, 2010), http://www.kpbs.org/news/2010/oct/08/latinos-are-majority-escondido-feel-targeted-polic/.

[128] DE JONG, *supra* note 3, at 57.

[129] *Id.*

[130] *Id.*

[131] Margery Austin Turner et al., *Housing Discrimination Against Racial and Ethnic Minorities,* OFFICE OF POLICY DEV. & RESEARCH, U.S. DEP'T OF HOUSING & URBAN DEV. at xi, xi (2012), *available at* http://www.huduser.org/portal/Publications/pdf/HUD-514_HDS2012.pdf.

[132] *Id.* at xii.

[133] *Id.*

The paired tests reveal covert racial bias in *renting*. Minority renters are shown significantly fewer housing units than whites. According to the HUD study, "Blacks are shown about one fewer unit for every 25 visits; Hispanics are shown one fewer unit for every 14 visits; and Asians are shown one fewer unit for every 13 visits."[134] In one rental test where a white tester asked to see a two-bedroom apartment, the agent showed him the available two-bedroom unit as well as a one-bedroom apartment and provided application information for both units. But the Latino tester who arrived two hours later at the same office was told that nothing was available.[135]

The paired tests also reveal covert racial bias in *home buying*. Black and Asian homebuyers are told about and shown fewer homes than whites.[136] In one test, a white tester who called and spoke with an agent was not asked about prequalification and was able to make an appointment to meet with the agent. By contrast, the black tester who called was told by the agent that she had to be prequalified to see homes. The agent would not meet the black tester until she first talked to a lender.[137]

The covert nature of present-day housing discrimination requires replacing the image of the *slammed door* with the image of a *revolving door* where people of color are courteously escorted in and then out.[138] Biased housing practices are concealed by common courtesies.[139] Renters and sellers engage in "stealth" behavior.[140] They mask their unlawful conduct to escape detection.[141] But in the presence of whites, the mask is sometimes removed. As one agent told a white tester: "I'm not prejudiced but I wouldn't recommend living in South Albuquerque . . . too many Hispanics. The further south you go the more you run into."[142]

Despite the effectiveness of HUD's paired testing program to reveal hidden racial bias, the program probably understates the total amount of discrimination in housing, according to a 2012 HUD report.[143] Underreporting occurs due to faulty HUD testing

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[134] *Id.* at xiv.
[135] *Id.*
[136] *Id.* at xvii.
[137] Turner et al., *supra* note 131, at xvii.
[138] Fred Freiberg, *A Test of Our Fairness*, 41 URB. LAW. 239, 243 (2009).
[139] *Id.*
[140] *Id.* at 242.
[141] *Id.* at 243.
[142] Turner et al., *supra* note 131, at xxii.
[143] *Id.* at 3.

methodology, according to Fred Freiberg who directed a national testing program he helped establish in the Civil Rights Department of the U.S. Department of Justice.[144] HUD testing is flawed in three ways. First, HUD samples only publicly-available Internet advertisements for their paired tests.[145] HUD does not sample real estate company websites, pay-for-listing websites, word-of-mouth, tenant referrals, bulletin board notices, and religious or "ethnic" publications targeting specific audiences.[146] HUD's use of only publicly-available Internet advertisements allows biased housing providers to use less public advertising methods to avoid contact with "unwanted" minority buyers and renters.[147] Thus, people of color cannot inquire about available units when they are denied information about such units.[148]

Second, HUD's paired testing understates the amount of housing discrimination because it tests for bias only during the initial inquiry and fails to test for bias after the initial inquiry when "home seekers submit applications, seek mortgage financing, or negotiate lease terms."[149] The focus on only the "initial inquiry" stage is especially problematic because housing providers engage in "flight attendant" behavior to skirt housing laws. Housing providers act like flight attendants by providing a standard, scripted presentation to all prospective homebuyers during the initial inquiry. Only later during subsequent contacts will housing providers engage in racially biased behavior that HUD will fail to detect.[150]

Third, HUD testing understates the amount of housing discrimination because its simplistic "number count" methodology fails to capture the full range of racial discrimination that occurs. Merely counting the number of units shown fails to capture other discriminatory behavior such as steering whites to white neighborhoods. An example is provided by a former HUD test supervisor who recalled one test where an agent told a black tester

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144 Fred Freiberg, *Racial Discrimination in Housing: Underestimated and Overlooked,* FAIR HOUSING JUSTICE CTR., at 1, *available at* http://www.fairhousingjustice.org/wp-content/uploads/2013/07/FHJC-PolicyPaper-HDS2012-web.pdf (accessed May 19, 2014).

145 TURNER ET AL., *supra* note 131, at 22.

146 Freiberg, *supra* note 144, at 1.

147 *Id.* at 2.

148 TURNER ET AL., *supra* note 131, at xii.

149 *Id.*

150 Freiberg, *supra* note 144, at 2.

about two apartments in a black neighborhood and the same agent told a white tester about one apartment in an area away from the black neighborhood. The agent told the white tester he had other apartments, but that they were in a "bad" (i.e., predominantly black) neighborhood. As the former HUD supervisor explained[151]:

> At the time, I was puzzled that the study characterized this test as a "minority-favored" outcome simply because the black tester was told about and shown two apartments and the white tester was only told about one apartment. I do not quarrel that the test showed differential treatment and discrimination, but I think a reasonable person would agree that the discrimination was adversely impacting both testers by *steering the white tester away from a black neighborhood* and *steering the black tester to a black neighborhood* for the purpose of maintaining racial segregation.[152]

The racially biased *steering* practice mentioned above is just the tip of the iceberg. Covert racism is endemic in the housing sector as shown by HUD testing that, although revealing, in fact understates the amount of discrimination.

viii. Employment

Modern forms of employment discrimination are "largely subtle and covert," according to one study.[153] This study involved sending comparable white, Latino, and black testers to apply for identical entry-level positions throughout New York City.[154] The study found discrimination in three types of employer action: (1) categorical exclusion, (2) shifting standards, and (3) race-coded job channeling.[155]

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[151] *Id.* at 3-4.

[152] *Id.* (emphases added).

[153] Devah Pager, Bart Bonikowski & Bruce Western, *Discrimination in a Low-Wage Labor Market: A Field Experiment*, 74 AM. SOC. REV., 777, 786 (Oct. 2009), *available at* http://scholar.harvard.edu/files/bonikowski/files/pager-western-bonikowski-discrimination-in-a-low-wage-labor-market.pdf.

[154] *Id.* at 781-82.

[155] *Id.* at 787.

Categorical exclusion occurs in the hiring stage where an employer immediately or automatically rejects a minority applicant early in the application process. The second action, *shifting standards* also occurs in the hiring decision stage where an employer's evaluation of an applicant's qualifications shifts based on the applicant's race. The third employer action, *job channeling*, moves beyond the hiring stage and refers to an employer steering applicants of color toward select positions such as those involving greater physical demands or limited customer contact.[156] Employers use all three actions to discriminate against applicants of color.[157]

For example, the following incident in a study reveals how an employer categorically excluded a black applicant.[158] Three testers (who were white, Latino, and black) applied for a warehouse worker position. The employer who collected their applications told them they could leave saying, "there's no interview today, guys!" After walking across the street, they were motioned back by the employer, so they returned. The employer told the black tester he could leave because she needed to speak to the other two. After the black tester departed, the white and Latino testers were instructed to return at 5:00 p.m. that day to begin work. As the white tester later revealed, "[s]he said she told the other people [who were not hired] that we needed to sign something—that that's why she called us over—so as not to let them know she was hiring us. She seemed pretty concerned with not letting anyone else know."[159] The employer's charade highlights the reality of covert discrimination in the employment sector and reveals the extent to which employers will veil their racially biased practices.

ix. Corporations

Many companies veil the racial composition of their workforce.[160] All U.S. companies with more than one hundred employees must provide annual race and gender workforce data to the

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[156] *Id.*

[157] *Id.* at 792.

[158] *Id.* at 787.

[159] Pager, Bonikowski & Western, *supra* note 153, at 787 (alteration in original).

[160] Julianne Pepitone, *Silicon Valley fights to keep its diversity data secret*, CNNMONEY (Nov. 9, 2011, 1:13 pm), http://money.cnn.com/2011/11/09/technology/diversity_silicon_valley/.

Equal Employment Opportunity Commission ("EEOC").[161] In 2011, CNNMoney investigated the racial workforce composition of large technology corporations and filed a Freedom of Information request with the EEOC.[162] When the EEOC denied the request, CNNMoney asked the companies to voluntarily release their workforce data. Dell, Ingram, Micro, and Intel released their data, but not Microsoft, Apple, Amazon, Cisco, eBay, Facebook, Google, Groupon, Hewlett-Packard, Hulu, IBM, LinkedIn, Living Social, Netflix, Twitter, Yelp, or Zynga.[163]

Intel was among those companies that, to its credit, revealed its workforce data. Intel's workforce data reflect the skewed racial demographics in the technology industry. Black workers were 3.5% of Intel's workforce and 1.3% of its management (but approximately 11% of the U.S. workforce), and Latinos were 8% of Intel's workforce and 3% of its management (but approximately 15% of the U.S. workforce).[164]

Recently, other companies including Google disclosed their racial composition numbers. Google's numbers, similar to Intel's in minority underrepresentation especially for blacks and Latinos, revealed that the company is 61% white, 3% Latino, and 2% black. Google's leadership is 72% white, 2% black, and 1% Latino.[165] Like Google, other companies should disclose rather than suppress their workforce data so that transparency motivates greater efforts at achieving racial equality in corporate America.

x. Sentencing

Covert racial bias exists in sentencing.[166] In non-capital cases, harsher sentences are meted out to young black and Latino males in

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[161] *EEO-1 Frequently Asked Questions and Answer*s, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, http://www.eeoc.gov/employers/eeo1survey/faq.cfm (last visited Jan. 6, 2015).

[162] Pepitone, *supra* note 160.

[163] *Id.*

[164] *Id.*

[165] Elizabeth Weise, *Google Discloses Its (Lack Of) Diversity*, USA TODAY (Aug. 15, 2014), *available at* http://www.usatoday.com/story/tech/2014/05/28/google-releases-employee-diversity-figures/9697049/.

[166] Tushar Kansal, *Racial Disparity in Sentencing: A Review of the Literature*, THE SENTENCING PROJECT 5 (Jan. 2005), *available at* http://www.sentencingproject.org/doc/publications/rd_sentencing_review.pdf.

the criminal justice system.[167] They are sentenced more severely than similarly situated white defendants for less serious crimes, especially drug and property crimes.[168] In capital cases, minority defendants (especially blacks) are more likely to receive a death sentence in the federal system and other jurisdictions.[169]

One reason for racial sentencing disparities is the implicit bias in prosecutors when they request downward departures from mandatory minimum sentences.[170] Prosecutors tend to request downward departures for "sympathetic" defendants who tend to be white.[171] A study of federal criminal cases from 1991 to 1994 found that prosecutors were less likely to request downward departures (based on substantial assistance in helping to investigate and prosecute other offenders) for black and Latino male defendants than for white male defendants.[172] Even when prosecutors requested downward departures for defendants of color, the departures were, on average, six months less than those received by white defendants.[173]

In addition to prosecutorial bias, judicial bias can be another reason for racial sentencing disparities. One study examining judicial sentencing in felony cases adjudicated between 1995-2001 in Cook County, Illinois, found that some judges treat defendants differently based on their race.[174] "[R]ace appears to play a role in judicial decision making," according to the study.[175] The study concluded that judicial bias might help explain the substantial overrepresentation of blacks in the prison system.[176]

xi. The Military

A study by the Military Leadership Diversity Commission ("MLDC") revealed racial disparity in the military. The MLDC study stated that *officer* promotion rates "for several racial/ethnic minority

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[167] *Id.* at 2.
[168] *Id.*
[169] *Id.*
[170] Clemons, *supra* note 13, at 696.
[171] *Id.* at 696-97.
[172] *Id.* at 697.
[173] *Id.*
[174] David S. Abrams, Marianne Bertrand & Sendhil Mullainathan, *Do Judges Vary in Their Treatment of Race?*, 41 J. LEGAL STUD. 347, 350 (2012).
[175] *Id.* at 377.
[176] *Id.*

groups were lower than the average."[177] For Latino officers, the officer promotion rates were lower than the average (except in the Army).[178] For black officers, the officer promotion rates were "substantially lower."[179] The officer promotion rates were also "substantially lower" for Asians, Pacific Islanders, American Indians, Alaska natives, and individuals reporting more than one race.[180] The MLDC study also found racial disparity in *enlisted* promotion rates.[181] For example, black marines had "substantially lower-than-average promotion rates" to the higher enlisted ranks.[182]

A study by Burk and Espinoza found evidence of racial bias in the military.[183] This study found that officer promotions were "racially biased by language used in officer fitness reports . . . ."[184] Second, the administration of military justice was biased in part because of inadequate systems for filing equal opportunity complaints and longer sentences for minority military defendants. Third, the care of minority veterans was biased because of barriers blocking their entry into the VA health care system.[185]

xii. National Security

Covert bias occurs in the national security realm. The pressing drive to protect the homeland motivates national security officials to uncover enemy threats through covert means including racial profiling and email monitoring.[186]

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[177] MILITARY LEADERSHIP DIVERSITY COMM'N, FROM REPRESENTATION TO INCLUSION: DIVERSITY LEADERSHIP FOR THE 21ST CENTURY MILITARY 75 (2011), *available at* http://diversity.defense.gov/Portals/51/Documents/Special%20Feature/MLDC_Final_Report.pdf

[178] *Id.* at 76.

[179] *Id.*

[180] *Id.*

[181] *Id.*

[182] *Id.*

[183] James Burk & Evelyn Espinoza, *Race Relations Within the US Military*, ANN. REV. OF SOC. 401, 414 (2012), *available at* http://www.annualreviews.org/doi/pdf/10.1146/annurev-soc-071811-145501.

[184] *Id.*

[185] *Id.*

[186] *See* Tom Risen, *Racial Profiling Reported in NSA, FBI Surveillance*, U.S. NEWS (July 9, 2014, 3:40 PM), http://www.usnews.com/news/articles/2014/07/09/racial-profiling-reported-in-nsa-fbi-surveillance.

1. Racial Profiling

A covert 2004 anti-terrorism operation by the Department of Homeland Security named Operation Front Line sought out over 2,500 foreigners in the United States. The secret program was revealed by a Freedom of Information Act lawsuit by the American-Arab Anti-Discrimination Committee and Yale Law School's National Litigation Project.[187] According to Immigration and Customs Enforcement, it was investigating leads to disrupt terrorist attacks and that the investigations were conducted "without regard to race, ethnicity or religion."[188] But 79% of the suspects were from Muslim-majority countries. Consequently, those from Muslim-majority countries were 1,280 times more likely to be targeted.[189] The government was ethnically profiling, according to the National Litigation Project at Yale Law School and the American-Arab Anti-Discrimination Committee.[190] "This was profiling," explained Michael Wishnie, a Yale Law School professor who helped disclose the government program.[191]

Questioning individuals was part of the program. One person in the United States on a student visa was asked his "opinion of America."[192] He responded that he was "living the American dream and cared greatly for the equal opportunities, rights and values that are afforded in America."[193]A person from South Asia was asked about the mosque he attended. He replied that his mosque "did not espouse any radical or fundamental form of Islam or denounce the United States in any way."[194] Ultimately, Project Front Line did not produce any terrorism-related conviction.[195]

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[187] Chandra Bhatnagar, *The Persistence of Racial and Ethnic Profiling in the United States*, AMERICAN CIVIL LIBERTIES UNION & RIGHTS WORKING GROUP 31 (June 30, 2009), *available at* https://www.aclu.org/files/pdfs/humanrights/cerd_finalreport.pdf.

[188] Eric Lichtblau, *Inquiry Targeted 2,000 Foreign Muslims in 2004*, N.Y. TIMES, Oct. 30, 2008, http://www.nytimes.com/2008/10/31/us/31inquire.html?_r=0.

[189] Bhatnagar, *supra* note 187, at 31.

[190] Lichtblau, *supra* note 188.

[191] *Id.*

[192] *Id.*

[193] *Id.*

[194] *Id.*

[195] Bhatnagar, *supra* note 187, at 31.

2. Email Monitoring

The National Security Agency ("NSA") and the Federal Bureau of Investigation ("FBI") secretly monitored the emails of prominent Muslim-Americans, according to The Intercept, an online news site that reviewed documents leaked by former NSA employee Edward Snowden.[196] The program was intended to root out terrorists and foreign spies.[197] Those monitored include Faisal Gill, who served in the Department of Homeland Security under President George W. Bush; Asim Ghafoor, an attorney; Hooshang Amirahmadi, a professor of international relations; Agha Saeed, a former political science professor; and Nihad Awad, executive director of the Council on American-Islamic Relations.[198] The government denied targeting them based on their race, ethnicity, or religion.[199] But according to Asim Ghafoor, an attorney who represented clients in terrorism-related cases, "I believe that they tapped me because my name is Asim Abdur Rahman Ghafoor, my parents are from India, I travelled to Saudi Arabia as a young man, and I do the pilgrimage."[200]

xiii. White Supremacists

White supremacists employ a covert strategy termed "ghost skins" to maintain white dominance. The strategy involves avoiding overt expressions of racial animus to blend into society.[201] One white supremacist website describes the strategy as the "fascist path of stealth."[202] The website explains how covert white supremacists do

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196 Glenn Greenwald & Murtaza Hussain, *Meet the Muslim-American Leaders the FBI and NSA Have Been Spying On*, THE INTERCEPT (July 9, 2014), https://firstlook.org/theintercept/article/2014/07/09/under-surveillance/.

197 *Id.*

198 *Id.*

199 Ellen Nakashima, *Report: U.S. Monitored E-mails Of Prominent Muslim Americans, Including Attorneys*, THE WASHINGTON POST, July 9, 2014, http://www.washingtonpost.com/world/national-security/report-us-monitored-e-mails-of-prominent-muslim-americans-including-attorneys/2014/07/09/03f51682-0781-11e4-a0dd-f2b22a257353_story.html.

200 Greenwald & Hussain, *supra* note 195.

201 COUNTERTERRORISM DIV., FED. BUREAU OF INVESTIGATION, INTELLIGENCE ASSESSMENT, WHITE SUPREMACIST INFILTRATION OF LAW ENFORCEMENT 5 (Oct. 17, 2006), *available at* https://www.documentcloud.org/documents/402521-doc-26-white-supremacist-infiltration.html.

202 COUNTERTERRORISM DIV., FED. BUREAU OF INVESTIGATION, INTELLIGENCE BULLETIN, GHOST SKINS: THE FASCIST PATH OF STEALTH 1 (Oct. 17, 2006), *available*

not shave their heads or do anything else that can visually identify them as Nazis. They view themselves as "undercover white power warriors" engaged in a form of roleplaying.[203] A 1996 FBI terrorism report stated, "[e]fforts have been made by these [white supremacist] groups to reduce openly racist views in order to appeal to a broader segment of the population . . . ."[204] Thom Robb, the Grand Wizard of the Knights of the Klu Klux Klan, instructed Klan followers to avoid overt use of racial slurs in order to construct a new Klan image.[205]

Their covert strategy includes infiltrating law enforcement. A 2006 FBI intelligence assessment explained, "[p]rospective Ghost Skins will reportedly be encouraged to seek positions in law enforcement in order to alert white supremacists of pending investigative action against them."[206] A Klan police officer in 2005 wrote the following in a members-only white supremacist online discussion forum: "I know everyone [sic] must be discreet. I especially need to be discreet because of my job i.e.: law enforcement."[207]

They also infiltrate the military. White supremacist websites and FBI sources reveal that white supremacist leaders encourage followers without criminal histories or visible racist tattoos to infiltrate the U.S. military as "ghost skins."[208] White supremacists covet veterans' military skills and their access to weapons and intelligence.[209] Even as military attempts to weed out extremists, white supremacist groups adapt by instructing their followers to camouflage

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at https://www.documentcloud.org/documents/402522-doc-27-ghost-skins.html. [hereinafter FBI Ghostskins].

[203] *Id.*

[204] COUNTERTERRORISM THREAT ASSESSMENT AND WARNING UNIT, NAT'L SEC. DIV., FED. BUREAU OF INVESTIGATION, TERRORISM IN THE UNITED STATES 17 (1996), *available at* http://www.fbi.gov/stats-services/publications/terror_96.pdf.

[205] JON RONSON, THEM: ADVENTURES WITH EXTREMISTS 79 (Simon & Schuster 2002) (2001).

[206] FBI GHOSTSKINS, *supra* note 201, at 2.

[207] State v. Henderson, 762 N.W.2d 1, 11 (Neb. 2009).

[208] COUNTERTERRORISM DIV., FED. BUREAU OF INVESTIGATION, WHITE SUPREMACIST RECRUITMENT OF MILITARY PERSONNEL SINCE 9/11 (July 7, 2008), *available at* http://documents.law.yale.edu/sites/default/files/White%20Supremacist%20Recruitment%20of%20Military%20Personnel%20Since%209-11-ocr.pdf.

[209] *Id.* at 3.

their white supremacist affinity by letting their hair grow, concealing racist tattoos, and suppressing racist views.[210]

C. Systemic Racism

Systemic racism involves societal norms that produce inequality.[211] These societal norms are expressed through implicit racial bias and the presumption of incompetence discussed below.

i. Implicit Bias

A commonly held view is that racism is no longer a problem because overt, explicit bias has lessened.[212] In reality, racism persists in the form of covert, implicit bias (also termed unconscious bias).[213] Implicit bias is the "unconscious process of sorting information based on implicit attitudes and stereotypes."[214] A common form of implicit bias is the bias of the socially dominant group against subordinate groups (e.g., whites over non-whites).[215] Such implicit bias is pervasive.[216] Research reveals that a majority of Americans, despite professing egalitarian values, retain negative implicit attitudes toward blacks and other minority groups.[217] For example, many individuals automatically associate black men with violence.[218] Pervasive implicit bias affects not only individuals, but also society, resulting in systemic

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[210] Daniel Trotta, *U.S. Army battling racists within its own ranks*, REUTERS (Aug. 21, 2012), http://www.reuters.com/article/2012/08/21/us-usa-wisconsin-shooting-army-idUSBRE87K04Y20120821.

[211] MOSHER, *supra* note 25, at 29.

[212] Cheryl Staats, Kirwan Inst. for the Study of Race and Ethnicity, *A Conversation with an Implicit Bias Skeptic*, STATE OF THE SCIENCE: IMPLICIT BIAS REV., 2014, app. at 71, *available at* http://kirwaninstitute.osu.edu/wp-content/uploads/2014/03/2014-implicit-bias.pdf.

[213] *Id.*

[214] Michael B. Hyman, *Implicit Bias in the Courts*, 102 ILL. B.J. 40, 41 (Jan. 2014).

[215] Dale Larson, *A Fair and Implicitly Impartial Jury: An Argument for Administering the Implicit Association Test During Voir Dire*, 3 DEPAUL J. FOR SOC. JUST. 139, 146-148 (2010).

[216] Staats, *supra* note 211.

[217] Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 SEATTLE U. L. REV. 795, 797-98 (2012).

[218] Jennifer K. Brooke & Tom R. Tyler, *Board Diversity and Corporate Performance: Filling in the Gaps: Diversity and Corporate Performance: A Review of the Psychological Literature*, 89 N.C. L. REV. 715, 737 (2011).

discrimination against minority groups.[219] The expansive reach of implicit bias in society includes private markets, government, law enforcement, juvenile justice, employment, and education.[220]

ii. Presumption of Incompetence

A racially biased societal norm is the presumption that whites are competent and people of color are incompetent.[221] People of color must constantly battle to overcome this presumption of incompetence.[222]

1. Education

Students carry into the classroom a presumption of incompetence that falls primarily on teachers of color (and white women).[223] Minority professors are challenged because of their race. The challenge is subtle and does not expressly refer to race even though the race of the teacher is the reason.[224] For example, one Latina college professor recounted how she was challenged by a white male student at the beginning of class:

> White male student: Can we cancel class today?
> Latina professor: Why should we cancel class?
> White male student: I don't feel like being in the classroom today, and since my parents pay for your salary, I think it is only fair you do what I say.[225]

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[219] Eva Paterson, Kimberly Thomas Rapp & Sara Jackson, *The Id, the Ego, and Equal Protection in the 21st Century: Building Upon Charles Lawrence's Vision to Mount a Contemporary Challenge to the Intent Doctrine*, 40 CONN. L. REV. 1175, 1181 (2008).

[220] *See* Olatunde C.A. Johnson, *Disparity Rules*, 107 COLUM. L. REV. 374, 382-83 (2007).

[221] RODNEY D. COATES, COVERT RACISM: THEORIES, INSTITUTIONS, AND EXPERIENCES 12 (Rodney D. Coates ed., Brill 2011).

[222] *Id.*

[223] Pamela J. Smith, *Teaching the Retrenchment Generation: When Sapphire Meets Socrates at the Intersection of Race, Gender, and Authority*, 6 WM. & MARY J. WOMEN & L. 53, 102 (1999).

[224] *Id.* at 69.

[225] Carmen R. Lugo-Lugo, *A Prostitute, a Servant, and a Customer-Service Representative: A Latina in Academia*, *in* PRESUMED INCOMPETENT 40, 40 (Gabriella Gutiérrez y Muhs et al. eds., 2012).

The professor explained the state legislature actually paid her salary. Classroom tension dissipated somewhat after the professor declared, "regardless of who pays for my services, I am your professor, not your personal prostitute." [226] The white student later admitted that he would not have considered asking his math professor, who was a white male, to dismiss class.[227]

In addition to resistance from students, minority professors may encounter resistance from white administrators and other professors who subtly actualize their presumption of incompetence in various ways, including not responding to racialized attacks against professors of color or uncritically relying on racially biased student evaluations to assess professors of color.[228]

The presumption of incompetence operates against not only teachers of color, but also students of color. In one study, Latina and African female students reported that faculty treated them as exceptions while viewing white students as the norm.[229] One black female student recounted professors walking into the classroom and asking if she was there to replace the light bulb in the projector.[230] A Latina student shared her strategy to overcome the presumption of incompetence: "When I am at school, I act white. . . . I avoid speaking Spanish. I study harder than them. . . . I can't change that I am a female, but I can make them stop assuming I am a dumb Mexican. . . . At least I know the game I have to play."[231] This presumption of incompetence operates in all levels of academia including law schools.[232]

2. Employment

The presumption of incompetence also operates in the workplace. First, customers view minority workers more negatively.

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[226] *Id.* at 41.

[227] *Id.* at 43.

[228] Smith, *supra* note 222, at 104-05.

[229] Deirdre M. Bowen, *Visibly Invisible: The Burden of Race and Gender for Female Students of Color Striving for an Academic Career in the Sciences*, *in* PRESUMED INCOMPETENT 116, 128 (Gabriella Gutiérrez y Muhs et al. eds., 2012).

[230] Cerise L. Glenn, *Stepping in and Stepping out: Examining the Way Anticipatory Career Socialization Impacts Identity Negotiation of African American Women in Academia, in* PRESUMED INCOMPETENT 133, 137 (Gabriella Gutiérrez y Muhs et al. eds., 2012).

[231] Bowen, *supra* note 228, at 131-32.

[232] Smith, *supra* note 222, at 102.

In one study, three groups of participants watched a video clip of an interaction between a sales clerk and a customer. Each group watched one of three video clips where the setting was the same but the sales clerk was a white woman, black man, or white man. The participants rated the white man's performance highest.[233]

Second, supervisors evaluate minority workers more harshly. In the workplace, research shows that equally qualified minority workers are discriminated against when their record is less than perfect. Employers use a double standard in evaluations by focusing on the strongest credentials of white men while focusing on the weakest aspects of racial minorities.[234] The double standard is often the product of unconscious bias, even among those who do not view themselves as biased.[235]

Third, employers create promotion ceilings such as the "bamboo" ceiling that limits Asian Americans from advancing to leadership positions.[236] Asian Americans are viewed as lacking warmth, social skills, and leadership abilities.[237] Recent data shows that although Asian Americans made up 4.8% of the U.S. population, they held only 2.1% of corporate board of director seats in Fortune 500 companies whereas whites, which made up 72% of the population, held over 90 %of the seats.[238]

IV. Continuing Affirmative Action

A remedy to the problem of covert racism is to retain affirmative action. Affirmative efforts are needed to counter enduring

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[233] Nicholas Bakalar, *Perceptions: A Customer Bias in Favor of White Men*, N.Y. TIMES, June 22, 2009, http://www.nytimes.com/2009/06/23/health/research/23perc.html?_r=0.

[234] John F. Dovidio, *Introduction: Part II: Faculty/Student Relationships*, *in* PRESUMED INCOMPETENT 113, 114 (Gabriella Gutiérrez y Muhs et al. eds., 2012).

[235] *Id.*

[236] U.S. EQUAL EMP'T OPPORTUNITY COMM'N, ASIAN AMERICAN AND PACIFIC ISLANDER WORK GROUP REPORT TO THE CHAIR OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *available at* http://www.eeoc.gov/federal/reports/aapi.html (last modified Dec. 21, 2008).

[237] Peggy Li, *Hitting the Ceiling: An Examination of Barriers to Success for Asian American Women*, 29 BERKELEY J. GENDER L. & JUST. 140, 146 (2014).

[238] *Id.* at 145.

racism.[239] This requires the Supreme Court to acknowledge persistent racism and cease opposing affirmative action efforts. [240]

A. The Roberts Court is Willfully Blind to Covert Racism

The judiciary fails to understand the modern nature of racism. It has burrowed underground where courts fail to detect its hidden presence.[241] Judges regard persistent racial discrimination with "deep skepticism" and adopt an anti-affirmative action mindset when analyzing race cases.[242] This is true of the Roberts Court; it is blind to recurring racism.[243] Chief Justice Roberts indicated his blindness to covert racism when, in *Northwest Austin Municipality Utility v. Holder*, he asserted that "we are now a very different Nation" with much less discrimination than when the Voting Rights Act was passed in 1965.[244] In his estimation, "[b]latantly discriminatory evasions of federal decrees are rare."[245] But his focus on *blatant* discrimination reveals his blindness to less blatant racism that is subtle and covert.

In *Shelby County v. Holder*, Chief Justice Roberts again declared that "[o]ur country has changed" and racial discrimination has significantly lessened to the point where states that historically discriminated against minorities no longer need to seek permission from the federal government before altering their voting procedures.[246] According to Chief Justice Roberts, "things have changed dramatically" in recent decades.[247] This contention underscores his blindness to enduring racism that continues to harm people of color. To counter this blindness, judges must "apply the

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[239] Robert C. Power, *Affirmative Action and Judicial Incoherence*, 55 OHIO ST. L.J. 79, 92 n.33 (1994).

[240] *See* Richard Lempert, *The Schuette Decision: The Supreme Court Rules on Affirmative Action*, BROOKINGS INST. (Apr. 25, 2014, 11:17 AM), http://www.brookings.edu/blogs/fixgov/posts/2014/04/25-schuette-affirmative-action-supreme-court-comment-lempert.

[241] Damon Ritenhouse, *Where Title VII Stops: Exploring Subtle Race Discrimination in the Workplace*, 7 DEPAUL J. SOC. JUST. 87, 92 (2013).

[242] Michael Selmi, *Why Are Employment Discrimination Cases So Hard to Win?*, 61 LA. L. REV. 555, 562 (2001).

[243] Lempert, *supra* note 239.

[244] 557 U.S. 193, 211 (2009).

[245] *Id.* at 202.

[246] 133 S. Ct. 2612, 2631 (2013).

[247] *Id.* at 2625.

Constitution *with eyes open* to the unfortunate effects of centuries of racial discrimination," admonished Justice Sotomayor in *Schuette*.[248]

B. The Roberts Court Opposes Affirmative Action

Those who fail to see enduring covert racism will also fail to see the need for affirmative action. [249] The Roberts Court fails to see covert racism and also fails to see the need for affirmative action.[250] Indeed, the Roberts Court is engaging in a covert effort to end affirmative action by slowly chipping away at it.[251] The Roberts Court is slowly removing, chunk by chunk, the legal foundation for race-conscious policies aiding racial minorities.[252] "Affirmative action is dying the death of a thousand cuts," says law professor Victor Goode.[253] As noted by law professor James E. Ryan, "[i]f you keep putting the pieces together, it does seem that . . . we're on the slow path to eliminating race-based affirmative action."[254]

The following Supreme Court decisions reveal the slow dismantling of chunks of the affirmative action foundation. Chief Justice Roberts, in the 2006 case of *League of United Latin American Citizens v. Perry*, expressed his distaste for government efforts to remedy racial discrimination by referring to such efforts as a "sordid business."[255] In *League*, the Texas state legislature had enacted a

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[248] Schuette v. Coal. to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equal. By Any Means Necessary (BAMN), 134 S. Ct. 1623, 1676 (2014) (Sotomayor, J., dissenting) (emphasis added).

[249] MICHAEL K. BROWN, ET AL., WHITE-WASHING RACE: THE MYTH OF A COLOR-BLIND SOCIETY 1-2 (2003).

[250] *See* Lempert, *supra* note 239.

[251] Paul M. Barrett, *The Supreme Court Takes a Further Swipe at Affirmative Action: 4 Blunt Points*, BUSINESSWEEK (Apr. 22, 2014), http://www.businessweek.com/articles/2014-04-22/supreme-court-takes-another-swipe-at-affirmative-action-4-blunt-points.

[252] *Id.*

[253] Julianne Hing, *Is Affirmative Action At Risk Again?*, COLORLINES (Oct. 15, 2013, 7:00 AM), http://colorlines.com/archives/2013/10/is_affirmative_action_at_risk_again.html.

[254] Mark Walsh, *SCOTUS Ruling May Enliven The Debate Over Affirmative Action*, ABA JOURNAL (June 1, 2014, 8:50 AM), http://www.abajournal.com/mobile/mag_article/scotus_ruling_may_enliven_the_debate_over_affirmative_action.

[255] League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 511 (2006) (Roberts, J., dissenting in part).

congressional redistricting plan benefitting Republican candidates.[256] The Court upheld the redistricting plan, but struck down one congressional district that diluted the voting power of Latinos.[257] Chief Justice Robert dissented from this part of opinion, stating that it is a "sordid business, this divvying us up by race."[258]

In the 2007 case of *Parents Involved in Community Schools v. Seattle Sch. Dist. No. 1*,, the Court invalidated local school district efforts in Seattle and Louisville to promote racial integration through school plans that considered race when assigning students to public schools.[259] Prior to the Court's decision in *Parents Involved*, Judge Kozinski of the Ninth Circuit seemingly anticipated Supreme Court hostility to the Seattle integration plan when he counseled, "[n]ot only does a plan that promotes the mixing of races deserve support rather than suspicion and hostility from the judiciary, but there is much to be said for returning primacy on matters of educational policy to local officials."[260]

In the 2013 case of *Fisher v. University of Texas*, the Court vacated the Fifth Circuit's ruling upholding the University of Texas' admissions process that considered race as a factor.[261] Although acknowledging that promoting diversity can be a compelling state interest in higher education, the Court also reinforced the high bar set for affirmative action efforts in universities. The Court averred that the burden was on the university to show each applicant was evaluated as an individual rather than focusing on the individual's race.[262] The Court also declared that the strict scrutiny standard required courts to scrutinize a school's admission process instead of deferring to the school's expertise and accepting the school's assertion that it was using race in a permissible manner.[263]

In the 2014 case of *Schuette,* the Court upheld the right of Michigan voters to change their constitution to prohibit Michigan's

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[256] *Id.* at 412-13.

[257] *Id.* at 441-42.

[258] *Id.* at 511.

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

[260] Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 426 F.3d 1162, 1195 (9th Cir. 2005) (Kozinski, J., concurring).

[261] 133 S. Ct. 2411, 2415 (2013). On remand, a panel of the Fifth Circuit again upheld the University of Texas' admissions process that considered race as a factor. Fisher v. Univ. of Tex., 758 F.3d 633, 660 (5th Cir. 2014).

[262] Fisher v. University of Texas at Austin, 133 S. Ct. 2411, 2420 (2013).

[263] *Id.* at 2421.

public universities from considering race during the college admissions process.[264] The *Schuette* ruling permits other states to copy Michigan and restrict affirmative action in higher education.[265]

Even as it dismantles affirmative action,[266] the Roberts Court proclaims equality by promoting a colorblind doctrine that declares, as stated by Chief Justice Roberts, "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[267] But the Court's colorblind approach impedes racial equality by being blind to white advantage accrued through generations of racial exploitation.[268] The Court's colorblind doctrine "constitutionalizes" racial inequality in the United States[269] and solidifies white privilege by striking down affirmative efforts to remedy past and present racial inequality.[270]

C. The Roberts Court Should Allow Affirmative Action

The Court should allow states and other actors experiment with affirmative action policies instead of invalidating them. The Court has established the practice of allowing states experiment with solutions for intractable problems.[271] Justice Brandeis declared, "[t]here must be power in the states and the nation to remold, through experimentation, our economic practices and institutions to meet changing social and economic needs."[272] The Court in *Gerstein v. Pugh* recognized the "desirability of . . . experimentation by the States."[273] Ironically, the Roberts Court in *Schuette* relied in part on the idea of experimentation by states to uphold Michigan's ban on race-conscious college admissions policies.[274] Justice Kennedy, author of the *Schuette* opinion, quoted his earlier concurring opinion in *United*

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[264] 134 S. Ct. 1623, 1638 (2014).
[265] Adam Liptak, *Court Backs Michigan on Affirmative Action*, N.Y. TIMES, Apr. 22, 2014, http://www.nytimes.com/2014/04/23/us/supreme-court-michigan-affirmative-action-ban.html?_r=0.
[266] Barrett, *supra* note 250.
[267] *Parents Involved*, 551 U.S. at 748.
[268] Spann, *supra* note 1, at 608.
[269] *Id.*
[270] *Id.*
[271] Smith v. Robbins, 528 U.S. 259, 272 (2000).
[272] New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).
[273] 420 U.S. 103, 123 (1975).
[274] 134 S. Ct. 1623, 1630 (2014) (citation omitted).

States v. Lopez: "the States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear."[275] But the *Schuette* decision permitting Michigan to ban consideration of race in college admissions, instead of promoting experimentation, is actually impairing experimentation. Michigan's ban is a closed door rule that effectively precludes states from experimenting with race-conscious solutions to intractable problems such as persistent racial discrimination.[276] Real experimentation requires states and other actors to try a variety of policies to remedy generations of racial injustice.[277] The covert nature of today's racism makes it even more imperative for affirmative action experiments to occur.[278] The ability of racism to evolve from overt to covert bias means states and other actors must be allowed to experiment with new policies that can counter new forms of racism.[279]

D. The Roberts Court has a Duty to Remedy Racial Inequality

The Court has a duty to affirmatively remedy racial discrimination. As the Court declaimed in its 1965 *Louisiana v. United States* opinion, "the court has not merely the power but the *duty* to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future."[280] Likewise, Justice Sotomayor declared that the Court was "*tasked with intervening* to carry out the guarantee of equal protection . . . ."[281] Justice Breyer in *Parents Involved* recognized that true racial equality was not merely a matter of "fine words on paper," but a matter of "everyday life of the Nation's citizens . . . ."[282] The Roberts Court should heed Justice Frankfurter's prescient admonition in *Brown v. Board of Education*, when Thurgood Marshall was an attorney arguing before the Court, that "[n]othing could be worse

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[275] 514 U.S. 549, 581 (1995) (citation omitted).

[276] *See* Smith, 528 U.S. at 272.

[277] *See* Richard A. Hicks, *California Suggests De Facto School Segregation Must End*, 16 STAN. L. REV. 434, 442 (1964).

[278] *See* William Bradford, "*With a Very Great Blame on Our Hearts": Reparations, Reconciliation, and an American Indian Plea for Peace with Justice*, 27 AM. INDIAN L. REV. 1, 92-94 (2002-2003).

[279] *See* Richard Delgado, *Si Se Puede, But Who Gets the Gravy?*, 11 MICH. J. RACE & L. 9, 11 (2005).

[280] 380 U.S. 145, 154 (1965) (emphasis added).

[281] 134 S. Ct. 1623, 1676 (2014) (Sotomayor, J., dissenting) (emphasis added).

[282] 551 U.S. 701, 867 (2007) (Breyer, J., dissenting).

from my point of view than for this Court to make an abstract declaration that segregation is bad and then have it evaded by tricks."[283]

The Court's duty to affirmatively remedy racial discrimination is made more urgent by the fact that the Court, for most of its history, has been considered as a "malign force" through rulings that subjugated people of color.[284] The Supreme Court has a history of favoring white interests over minority interests.[285] Racism was overt in the days of slavery and de jure segregation, and when express exploitation of minorities was disfavored, more subtle methods evolved.[286] The Supreme Court devised doctrinal devices such as "the limitation of constitutional protections to cases of intentional discrimination" that continued favoring white majority interests.[287] The Court's tilt toward majority rather than minority interests continues through the use of the principled-sounding doctrine of *colorblind* jurisprudence to emphasize the *principle* of equality over the *practical means* to achieve it.[288] The Roberts Court mirrors majority society by supporting racial equality in principle while objecting in practice to policies that would make equality a reality.[289] But it is equality as a reality that is essential because of "persistent racial inequality in society" that the Court should no longer ignore.[290]

Conclusion

The racism phenomenon is an abiding one. Discrimination remains even as overt racism gives way to covert racism. Its diminished discernibility does not impair its ubiquitous existence. Covert racism ranges far and wide, from individuals to institutions, from the workplace to the marketplace, and from the public to the private sectors. Its continuing prevalence in society necessitates affirmative action to oppose it. This requires the Supreme Court to

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[283] ALEXANDER M. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 6 (1978).

[284] JEFFREY TOOBIN, THE OATH 86 (2012).

[285] *See* Spann, *supra* note 1, at 606.

[286] *Id.* at 607.

[287] *See id.*

[288] EDUARDO BONILLA-SILVA, RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN THE UNITED STATES 131 (2013).

[289] *See Id.*

[290] 134 S. Ct. 1623, 1676 (2014) (Sotomayor, J., dissenting).

sanction rather than subvert affirmative action efforts. This further requires open eyes to see and the will to confront racial inequality that continues to exist in U.S. society.