For Health's Sake Be Not Colorblind

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FOR HEALTH’S SAKE BE NOT COLORBLIND:

CONTEMPORARY COLORBLIND RACISM & MINORITY HEALTH DISPARITIES

ABSTRACT

The United States’ past ideology of overt state-sanctioned racism has been replaced by a covert, seemingly race-neutral ideology. This Article looks at the history of racism in the United States and traces the recent shift in ideology and discourse about race, positing that the discourse of “colorblindness” powerfully maintains the racial status quo while purporting to advance race neutrality. Then, using affirmative action as the lens from which to view these shifts in ideology and discourse, this Article analyzes racial disparities in health and healthcare. It highlights some of the health consequences people of color face because they live a racialized existence amid this discourse of colorblindness. The Article concludes with a call to revitalize a proposal, once called a “faddish theory,” to acknowledge racism in institutional policies and practices even when laws carefully avoid making facial racial classifications.
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INTRODUCTION:

The Civil Rights Movement produced landmark court decisions and legislation that have resulted in significant progress in the dismantling of overt racism in the United States. Numerous federal and state laws including the landmark 1964 Civil Rights Act have made illegal most forms of racial discrimination including discrimination in public accommodations and in education. The equalizing impact of this legislation is readily apparent in some segments of U.S. society, such as in the overt behavior of lenders and real estate agents as seen in the systematic dismantling of overt redlining of neighborhoods.¹

Debate, however, continues regarding the extent to which racial discrimination continues to persist today.² Some conservative scholars argue that discrimination is a thing of the past and that the United States is poised to enter a post racial society.³ Others argue that racism has shifted and the ideology of racism has become less overt while simultaneously remaining pervasive.⁴ Pervasive racial health disparities offer compelling evidence that racism has not

¹ INSTITUTE OF MEDICINE, UNEQUAL TREATMENT: CONFRONTING RACIAL AND ETHNIC DISPARITIES IN HEALTHCARE 96–100 (2003) (noting, however, that even with the fair housing act and anti-discrimination laws, minority applicants are rejected for mortgage loans at twice the rate of white applicants and disparities continue even when controlled for minorities’ generally lower credit scores and income).
² Id. at 95.
⁴ See generally EDUARDO BONILLA-SILVA, WHITE SUPREMACY & RACISM IN THE POST-CIVIL RIGHTS ERA, 137 (2001) (arguing that the ideology of overt state-sanctioned racism has been subverted by a covert seemingly race-neutral ideology).
yet race presents differently in modern form. This new racism is more difficult to identify than racism of our past and is often the result of societal and institutional policies rather than explicit individual biases. This paper looks at racial health disparities in the United States and situates those disparities within the ideology of racial colorblindness. Additionally, this paper interrogates the current Fourteenth Amendment Equal Protection doctrine and reviews recent court cases that advocate for colorblindness as additional factors that contribute negatively to minority health in the United States.

Specifically, Part I briefly analyzes the history of racism in the United States and the recent shift in ideology and discourse about race that powerfully maintains the racial status quo while purporting to advance race neutrality. It further argues that this shifting ideology is actually a form of colorblind racism that is just as invidious and harmful as the overt racism of the United States’ past. Part II reviews recent Supreme Court contributions that espouse a constitutional requirement of “colorblindness” that underscore this new colorblind racism. Part III analyzes racial disparities in health and healthcare and focuses on the health consequences for people of color, who live a racialized existence amid the discourse of a colorblind society. Part IV takes up the limitations of current equal protection jurisprudence and calls for acknowledgement of racism in institutional policies and practices even when laws do not make facial racial classifications.

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5 See Supra Part III.
6 See Supra Note 39–48 and accompanying text.
7 INSTITUTE OF MEDICINE, supra note 1 at 95 (“[W]hile individual discrimination is often easier to identify, institutional discrimination—the uneven access by group membership to resources, status, and power that stems from facially neutral policies and practices of organizations and institutions—is harder to identify.”).
8 While studies have been conducted that further break down health data by race and ethnicity, this author does not choose to delve into the differences in health among minority races/ethnicities. This is because the author espouses a perspective that racism privileges white people and marginalizes all people of color. Where feasible, the author uses data that supports her assertion across races, but some studies focus exclusively on a sub-set of minority experiences. In those cases, the author notes which race/ethnic group to whom the data applies. Where appropriate, the author uses the terms “people of color” and “minorities” interchangeably.
I: The Myth of the Post-Racial Society

“As racism has become less visibly obvious since the 1960s, it has become easier for those not directly victimized by it to ignore it.”

Clarence Page

Many Americans believe the notion that prosperity is available to everyone who works hard enough to achieve it. This so-called “American Dream” treats success as the product of individual hard work and failure as the product of individual shortcomings. This belief is tied closely to the ideology of meritocracy, the belief that people achieve success because of individual merit. The ideology of meritocracy is considered by many scholars to be the “myth of meritocracy” because it does not take into account unequal opportunities and unequal access to resources that are the result of racism and other forms of institutionalized discrimination.

The ethos of the American Dream and the ideology of meritocracy draw on one another to rationalize social inequality. Social justifications for inequality are imperative in order for the masses to allow such a system of inequality to continue. Societies with huge disparities in education and services must therefore have convincing justifications in order for systems of inequality to remain. Meritocracy, therefore, “provides a socially acceptable explanation for

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11 Id. at 1–2.
12 Id. at 2.
13 Id.
14 See Id. (“In a general way, people understand the idea of the American Dream as the fulfillment of the promise of meritocracy.”).
15 Id. at 3.
16 Id.
the kind and extent of inequality within society.”

Within this ideology, the onus of unlived dreams falls on each individual, therefore inequalities in society are assumed to be “fair” and “deserved” because the most intelligent, the hardest working, and the most righteous should, simply put, get more.

Although studies and statistics show the United States does not operate as a meritocracy, Americans largely believe the United States is a society where success is available to those willing to work for it. In fact, very few people will actually be born to “rags” and make it to “riches.” Each year Forbes Magazine releases a list of the 400 wealthiest individuals in the United States. Forbes often celebrates the “bootstrappers” those the magazine considers to have self-made their fortunes. “The reality is that the key to great wealth for the majority of the richest Americans is to choose wealthy parents.”

A 1997 survey by United for a Fair Economy illustrates that over half of the individuals on the Forbes list are there because they either inherited their spot on the list or they inherited considerable start-up capital from a relative. In fact forty-two percent of those on the Forbes 400 list inherited sufficient wealth to rank on the list. However, many of these individuals are listed as “self made” by Forbes because Forbes considers people “self-made” even if they inherit substantial sums of money if they later built that inheritance into an even larger fortune. One example is the 39th richest person in 2011, Philip Anschutz who is listed as “self-made” although

17 *Id.* at 2.
18 *Id.* at 4. It is interesting, however, that many people who purport to believe in meritocracy also often defend the right of individuals to bequeath their property when they die to whomever they choose. Of course, receiving an inheritance continues intergenerational inequality yet has nothing to do with individual merit. *See Id.* at 1.
19 CHUCK COLLINS & FELICE YESKEL, ECONOMIC APARTHEID IN AMERICA, 67 (2000).
20 *Id.* at 64.
21 *Id.*
22 *Id.* at 65.
23 *Id.*
24 *Id.*
he inherited a 500 million dollar oil and gas business. In terms of minorities on the list, the first African American on the list was Black Entertainment Television founder Robert Johnson who is currently listed as 374; Oprah Winfrey tops the list of the Wealthiest Black Americans and ranks 139 on the current Forbes 400 list. Though the poor and middle class vastly outnumber the rich in the United States, the fantasy of being rich is “so compelling that we are willing to accept large-scale poverty in exchange for the prospect of a few lucky folks hitting the big time.” Tax policy is one area in which it is easy to see how the rules benefit the wealthiest Americans and hurt the majority of wage earning working families but again, the fantasy of becoming rich, keeps many from demanding more just tax policies.

\[ a. \text{ Remnants of Plessy v. Ferguson} \]

Throughout history, people in power have utilized such ideologies, including the ideology of meritocracy, to rationalize inequality. These ideologies and strategies shift over time as societies change and progress. Scholars tend to agree that the Post-Civil Rights Era has marked a new racial ideology. Historically, overt racism was culturally, institutionally, and legally sanctioned. The overt racial practices of the Plessy v. Ferguson era continued Jim Crow segregation. Jim Crow laws mandated racial segregation under the legal pretense that

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27 Id. at 67.
28 See COLLINS & YESKE, supra note 19 at 100.
29 BONILLA-SILVA, supra note 4 at 137.
30 See id.
31 Id. at 89–136.
32 163 U.S. 537 (1896).
resources were “separate but equal.” The Supreme Court in *Plessy* legally sanctioned segregation and put the imprimatur of the highest court in the land on such discrimination.

Between the 1950s and the 1970s, several cultural and legal events transpired that challenged the overt racial structure operating in the United States. Civil Rights protests, race riots, and the landmark Supreme Court case of *Brown v. Board of Education* produced an emerging consciousness around race that exposed the “contradiction between the democratic rhetoric of the U.S. government . . . and its treatment of minorities.” *Brown* formed the legal basis to end school segregation finding the *Plessy* doctrine in the context of school segregation “inherently unequal.” In response, states opposed to integration began to focus on delaying desegregation and significant gains were not made in desegregation until the passage of the 1964 Civil Rights Act, which finally made *de jure* racial segregation against the law.

*b. Race Today*

The impact of race in American society between 1964 and the present is largely debatable. Many Americans and some scholars believe that racism is a thing of the past and that it has entirely, or will soon, disappear all together. Recent research indicates that white people support racial integration and equal opportunity and white people are more likely now than at

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33 Segregated facilities were anything but equal. As one high school racial history textbook explains facilities, services, and resources were “separate and subordinate.” S. DALE MCLEMORE & HARRIETT D. ROMO, RACIAL AND ETHNIC RELATIONS IN AMERICA 7th ed. 162 (2005)
34 *Id.* at 552.
36 BONILLA-SILVA, supra note 4 at 138.
any time in United States history to approve of interracial relationships. Still, white people often oppose programs designed to fulfill this goal of racial equality, and continue to perpetuate stereotypes based on race. “[I]n the postmodern world few claim to be ‘racist’ except for Nazis and Neonazis and members of white supremacist groups.” Most white people, “proclaim to be colorblind and express their wish to live in a society where race does not matter at all.” Interestingly, some psychologists argue that colorblindness is not only undesirable but is unrealistic considering that people use social categorization that includes race in order to simplify the complexities of the social world in which we live. Though purporting to be colorblind, whites tend to live largely segregated lives: usually living in white neighborhoods, socializing more intimately with people who are white, going predominantly to exclusively white schools, worshiping at white churches and marrying other white people. Though the segregation is no longer state mandated, the reality is that predominantly minority schools and neighborhoods tend to have struggling infrastructures marked by lower literacy rates, higher incarceration rates, poorer placement in college, and lower property taxes to support that infrastructure.

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40 Bonilla Silva, supra note 4 at 139.
41 Id.
42 Id. at 140.
43 Id. at 140–41.
44 See e.g., Destiny Peery, The Colorblind Ideal in a Race-Conscious Reality: The Case for a New Legal Ideal for Race Relations, 6 NW J. L. & Soc. Pol’y 473, 480–81 (challenging colorblindness as a legal or social ideal and challenging whether, given the cognitive categorization humans do in order to simplify life’s complexities).
45 Id. at 141.
46 See Joe R. Feagin & Karyn D. McKinney, The Many Costs of Racism, 20-38 (2003) (identifying the history and contemporary situation of white people as being unjustly enriched for their race while minorities have been unjustly impoverished). They note the costs as being “far more than just economic.” Id. at 21. See also Gary Orfield & Chungmei Lee, Why Segregation Matters, in Race Class & Gender An Anthology 416-25 (Anderson & Collins eds, 7th Ed. 2010). Interestingly, neighborhoods can be plagued by the other side of the same coin when racially diverse neighborhoods are plagued with rising property taxes and gentrification that forces them out. See Doug A. Timmer, D. Stanley Eitzen, & Kathryn D. Talley, The Root Causes of Homelessness in American Cities, in Experiencing Race, Class, and Gender in the United States 391 (Roberta Fiske-Rusciano ed, 5th ed. 2009).
This new ideology of race tends to be more covert, focuses on institutional practices (as opposed to individual acts of discrimination) and is often couched in race-neutral language. “[I]ndividual discrimination is easier to identify [than] institutional discrimination—the uneven access by group membership to resources, status, and power that stems from facially neutral policies and practices of organizations and institutions is harder to identify.”\(^\text{47}\) This post civil rights racial structure is replete with covert racialized attitudes and behaviors that are often expressed as race-neutral. Take for example, the seemingly race-neutral stereotype of the “welfare queen.” Though facially race-neutral, this stereotype has long been a racial stereotype linking black women with laziness and poverty.\(^\text{48}\) Identifying when attitudes and behaviors are connected to race is often difficult and makes identifying—indeed “proving” race discrimination in court—a difficulty in litigation.\(^\text{49}\) This often comes up in the context of employment discrimination cases alleging either disparate treatment or disparate impact.

c. The New Ideology of Race at Work

Disparate impact claims are a method of challenging discriminatory employment practices that are facially neutral with regard to race but the impact falls more harshly on one group (usually minorities).\(^\text{50}\) While intent to discriminate is not an element in this claim, the claim is lost if the employer can justify the employment practices on the basis of a “business necessity.”\(^\text{51}\) The Supreme Court has loosely interpreted a “business necessity” as anything that

\(^{47}\) INSTITUTE OF MEDICINE, supra note 1 at 95.

\(^{48}\) PATRICIA HILL COLLINS, BLACK FEMINIST THOUGHT, 80 (2000).

\(^{49}\) Joan C. Williams, Correct Diagnosis; Wrong Cure: A Response to Professor Suk, 110 COLUM. L. REV. 24, 29 (May 2010).


\(^{51}\) Id.
“serves a valid business purpose.” Additionally, this type of claim is extremely expensive to litigate, leaving scholars to consider such a claim relevant primarily in the context of class action litigation.53

Disparate treatment, in the employment context, involves a complicated burden-shifting regime.54 Disparate treatment claims require the plaintiff establish a prima facie case of discrimination, which triggers an inference of discrimination.55 This inference can be rebutted if the defendant can show a legitimate non-discriminatory reason for the adverse employment action.56 Once the defendant shows a non-discriminatory reason for its action, the burden shifts back to the plaintiff to prove that the reason the defendant gives for the adverse action is merely pretext and that discrimination was the actual reason for the adverse employment action.57 This type of case is also difficult for plaintiffs to prevail in litigation because of common so called “mixed-motives” cases where the employer has both discriminatory and non-discriminatory reasons for taking an adverse employment action. In these mixed-motives cases, employers can easily prevail unless the plaintiff has direct evidence of retaliatory animus in the actual decision-making process and even when the plaintiff has such direct evidence, the employer only has to show that it would have taken the adverse employment action had it not acted on the animus.58

These legal tools are inefficient in making systemic racial progress; meanwhile many white Americans do not see a systemic race problem at all. White people often overestimate the

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53 Williams, supra note 49; See e.g., Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011) (alleging disparate impact and disparate treatment under Title VII of the Civil Rights Act).
54 Ward supra note 50.
55 Id. at 632.
56 Id. at 633.
57 Id. at 633–34.
58 See e.g., Price Waterhouse v. Hopkins, 490 U.S. 228, 280 (showing direct evidence of discriminatory animus in decision necessary to shift burden to defendant in the context of a sex discrimination case).
social and political gains that people of color have made since the Civil Rights era. Many white people “believe that the United States has de facto extended equal opportunities to all of its citizens and is, for the most part, a race-neutral society. Therefore, they exhibit little sympathy if not outright resentment for affirmative action, race-targeted government programs, or minorities’ demands for their fair shares.” People of color are often the scapegoat for systemic factors beyond individual control. For example, many victims of Hurricane Katrina were blamed for not evacuating quickly enough even though victims were often unable to leave because they were constrained by factors such as age, poverty, or lack of transportation.

White people and people of color tend to disagree on the prevalence of the problem of race discrimination. In one study about views from the judiciary, 83% of white judges surveyed believed that African Americans are treated fairly in the judicial system while only 18% of black judges held this view. Another study of mostly white physicians found that 60% believe the health care system rarely or never treats people unfairly because of their race or ethnicity while only 23% of black physicians agreed. Consistently, minorities perceive discrimination in their lives and note discrimination that is both institutional and individual, whereas whites tend to see discrimination as being historical in nature, or as the individual

59 INSTITUTE OF MEDICINE, supra note 1 at 94 (citing a Henry J. Kaiser Family Foundation and Harvard University study conducted by the Washington Post that revealed “large numbers of white Americans incorrectly believe that blacks are as well off as whites in terms of their jobs, incomes, schooling, and healthcare.”)
60 BONILLA-SILVA supra note 4 at 161.
62 INSTITUTE OF MEDICINE, supra note 1 at 94.
attitudes and behaviors of a small number of bigoted people.  In one study over 70% of white Americans felt that African Americans “enjoy the same or greater opportunities than whites.”

Another study found that almost 90% of African Americans felt that police treat minorities unfairly while less than 50% of white Americans purport to believe this.

Across the board, white people consistently underestimate the impact racism has on the lives of people of color. In fact, the average black family has only about one tenth of the wealth of the average white family. Minorities are “disproportionately represented in the lower socioeconomic ranks, in lower quality schools, and in poorer-paying jobs. These disparities can be traced to many factors, including historic patterns of legalized segregation and discrimination.”

Colorblindness, in this sense, can be considered erasure, as it disguises and discounts the racialized history (and present) of the United States. It ignores that some people were paid for their labor and were thus able to pass wealth on to their next generation while other people were enslaved. It ignores that racism was codified in the constitution, justified by “science” of the day, and enforced by the United States Supreme Court.

**d. Colorblindness Perpetuates Racial “Deficit” Thinking**

Colorblindness is the current dominant approach espoused in the United States, yet other perspectives, those of multiculturalism and critical race theory, deserve mention. Whereas

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65 INSTITUTE OF MEDICINE, supra note 1 at 94. (citing Bobo 2001).
66 Id. (citing Schuman et al. 1997).
67 FEAGIN, supra note 46 at 43 (2003).
68 INSTITUTE OF MEDICINE, supra note 1 at 6.
69 Id. at 33–34.
colorblindness downplays the importance of race and pretends it does not exist, multiculturalism and critical race theory respect racial differences and draw on the cultural capital that minorities possess. Colorblind messages actually have a negative impact on both white people and people of color. “[T]he more White employees endorse a multicultural ideology, the more ethnic minority co-workers demonstrate engagement in the workplace; in contrast, ethnic minority co-workers are less engaged the more Whites endorse a colorblind ideology.” Further, in one study, ethnic minorities actually performed less well on cognitive tasks when interacting with Whites primed for the study to espouse colorblindness. Often, minorities have capital such as familial capital, aspirational capital, linguistic capital, and navigational capital that are cultural and social assets to people of color. Not only are these assets completely ignored in a colorblind ideology, but colorblindness may actually diminish such strengths.

This colorblind racism holds many central components. Eduardo Bonilla-Silva lists four dominant themes of this racism.

(1) abstract liberalism (‘I am all for equal opportunity and that’s why I oppose affirmative action’), (2) “biologization of culture” (Blacks are poor because they do not have the proper values”), (3) naturalization of matters that reflect the effects of white supremacy (‘Neighborhood segregation is a sad but natural thing since people want to live with people who are like them’), and (4) minimization of racism and discrimination (‘There are racists out there but they are few and hard to find.’).

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73 *Id.* (finding that “[e]xposure to colorblind (vs. multicultural) messages predicts negative outcomes among Whites, such as greater implicit and explicit racial bias”).

74 *Id.*

75 *Id.* at 563-64.

76 Yosso, *supra* note 72 at 77-80.

77 *See* Holoin & Shelton, *supra* note 69.

78 BONILLA-SILVA *supra* note 4 at 141.
The themes of these features of covert racism all converge to advance the belief that America is colorblind, that very few individuals are racist, and that any problems that persist in this society with regard to race are the fault of the racial minorities themselves, and/or the culture from which they were raised. This “deficit” model frames racial minorities’ culture, practices, beliefs, and intelligences as being deficient to white culture, practices, beliefs, and intelligences. Many white people desire to be viewed as nonracist, which puts white people in the position of having to rationalize around contradictions between what they purport to think about race, and what their actions show.

Haney-Lopez gives an excellent example of this disparity between what white people purport to think and how they behave. He cites a study by Andrew Hacker, in which white college students were asked what amount of compensation was reasonable for them to have to spend the remainder of their lives as “black” people but their lives would not otherwise change. The majority of students felt it would be reasonable to ask for $50 million; $1 million for each year they’d be expected to live as a racial minority. Indeed, while many white people rationalize around these contradictions, these contradictions—mainly the experience of living a racialized life within a purportedly colorblind society—actually have a negative impact on the physical and mental health of people of color.

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79 Beth Harry & Janette Klinger, *Discarding the Deficit Model*, EDUCATIONAL LEADERSHIP, Vol. 64, Number 5, at 16, 19 (“When a habit of looking for intrinsic deficit intertwines with a habit of interpreting cultural and racial difference as a deficit, the deck is powerfully loaded against poor [people] of color.”)
82 Id.
83 See infra part III.
II: THE SUPREME COURT AND COLORBLIND RACISM

“[T]here is a moral and constitutional equivalence between laws designed to subjugate a race and those that distribute benefits on the basis of race in order to foster some current notion of equality . . . . In my mind, government-sponsored racial discrimination based on benign prejudice is just as noxious as discrimination inspired by malicious prejudice. In each instance, it is racial discrimination pure and simple.”

CLARENCE THOMAS

Colorblindness as a constitutional mandate is often traced back to Justice Harlan’s dissent in *Plessy v. Ferguson* where he pronounced “our constitution is colorblind, and neither knows nor tolerates classes among citizens.” But Justice Harlan’s belief in colorblindness was undermined by his own color-conscious racism in the very same decision, declaring that Chinese people belong to “a race so different from ours that we do not permit those belonging to it to become citizens of the United States.” Justice Harlan’s commitment to “colorblindness” might be further questioned as he authored the opinion (for a unanimous court), which upheld racial segregation in public schools just a few years after his dissent in *Plessy*. Colorblindness was once the purported goal of the National Association for the Advancement of Colored People (NAACP) but colorblindness as a strategy to dismantle racism never materialized. As a society that has depended on racism since its inception, it was not surprising that “neither society nor the courts embraced colorblindness when doing so might have sped the demise of White supremacy.”

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85 *Plessy*, 163 U.S. at 569 (1896).
86 *Id.* at 542.
87 *Cumming v. Board of Education*, 175 U.S. 528 (1899); *IАН HANEY LOPEZ*, supra note 81 at 157.
88 HANEY LOPEZ, supra note 81 at 157.
89 *Id.*
Colorblindness became the rallying cry, however, to oppose remedies for discrimination and, as an ideology, colorblindness has been much more successful as a tool for maintaining the racial status quo.\textsuperscript{90} “Whereas colorblindness in the context of Jim Crow was heavy with emancipatory promise, in the civil rights era and since, its greatest potency instead lies in preserving the racial status quo.”\textsuperscript{91} Colorblindness has now been recognized as a “rhetorical weapon in the battle against race conscious remedies.”\textsuperscript{92}

\textit{a. Foundational Race Cases}

The Supreme Court has repeatedly espoused colorblindness as a social and constitutional ideal. In 1971 in the case of \textit{Palmer v. Thompson}\textsuperscript{93} the Supreme Court upheld a municipal decision in Jackson, Mississippi to close down all city swimming pools rather than having to become racially integrated.\textsuperscript{94} The Court noted that a swimming pool is not “an essential public function” and there is no Constitutional right to swim in a municipal swimming pool. Justice Douglas, in his dissent recognizes that the impact on poor African Americans is much more substantial than on the white population.\textsuperscript{95} He alone recognized:

\begin{quote}
[t]he closing of the City’s pools has done more than deprive a few thousand Negroes of the pleasures of swimming. It has taught Jackson’s Negroes a lesson: In Jackson the price of protest is high. Negroes there now know that they risk losing even segregated public facilities if they dare to protest segregation. Negroes will now think twice before protesting segregated public parks, segregated public libraries, or other segregated facilities. They must first decide whether they wish to risk living without the
\end{quote}

\textsuperscript{90} See \textit{id.}
\textsuperscript{91} \textit{Id.} at 158.
\textsuperscript{92} \textit{Id.}
\textsuperscript{93} 403 U.S. 217 (1971).
\textsuperscript{94} \textit{Id.} at 227.
\textsuperscript{95} \textit{Id.} at 267 (“Here, too, the reality is that the impact of the city’s act falls on the minority.”).
facility altogether, and at the same time engendering further animosity from a white community which has lost its public facilities also through the Negroes’ attempts to desegregate these facilities.  

In 1976, in the landmark case of *Washington v. Davis*, the Supreme Court held that a qualifying test administered to police officer applicants was constitutional despite minority applicants consistently scoring lower on the test. The court noted the law, or in this case the qualifying test, will be upheld even if there is a disproportionate effect on a racial minority as long as the intent of the law is not to discriminate against racial minorities. “Disproportionate impact is not irrelevant, but is not the sole touchtone of an invidious racial discrimination forbidden by the Constitution.” According to this view, when there is not a facial classification based on race, a constitutional problem arises only when there is intent to racially discriminate. The problem with this approach is that those whose goal it is to maintain the racial status quo can easily mask a law’s intent.

One scholar has labeled the dynamic process of racial change as being “preservation-through-transformation” and notes that “doctrines of heightened scrutiny have disestablished overtly classificatory forms of race. . . yet the doctrine of discriminatory purpose currently sanctions facially neutral state action that perpetuates race. . . stratification, so long as such regulation is not justified in discredited forms of status-based reasoning.” Because they would not be upheld under the doctrine of heightened scrutiny, overt racial classifications are currently

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96 Id. at 235 (Douglas, J., dissenting).
98 Id. at 252.
99 Id. at 242.
101 Id. at 21-22. Or there may not actually be a conscious “intent” to a law that perpetuates racism but the outcome may continue to perpetuate racial stratification. Consider the racial implications of federal sentencing guidelines that distinguish between powder and base (crack) cocaine. Id. at 33–39.
almost non-existent. However, there continues to be an abundance of laws upon which minority populations feel the brunt of the impact.\(^\text{103}\) The Federal Sentencing Guidelines regarding powder cocaine as compared to base (crack) cocaine provide a prototypical example of a facially neutral law whose impact falls largely on racial minorities.\(^\text{104}\)

Meanwhile, racism, as a dynamic system, continues to evolve around the legal rules of society, allowing “a shift in the rule structure and justificatory rhetoric of racial status law.”\(^\text{105}\) A disparate impact claim must overcome the “formidable barrier” of the intent requirement, thus making such claims practically useless as a tool to remedy today’s racism.\(^\text{106}\) Thus, what currently remains is an equal protection framework that is incapable of “addressing and invalidating covert discrimination.”\(^\text{107}\)

\textit{b. The Legacy of Gratz and Grutter}

In companion affirmative action cases, the Supreme Court struck down a higher education admissions scheme at University of Michigan’s undergraduate level but upheld a similar race-conscious scheme at its law school.\(^\text{108}\) In \textit{Gratz v. Bollinger}, the undergraduate case, the Court held that though achieving racial diversity is a compelling state interest, its admissions scheme was not narrowly tailored.\(^\text{109}\) The court was troubled that the admissions scheme

\(^{103}\) Driessen \textit{supra} note 100 at 34 (“[T]he crack cocaine offenders were overwhelmingly black and the powder cocaine defendants were overwhelmingly white.”).

\(^{104}\) \textit{Id.} (noting that to trigger a five-year mandatory minimum for powder cocaine the amount of powder possessed translates into 5,000 doses of cocaine whereas the same penalty was triggered at 50 doses of crack cocaine).

\(^{105}\) \textit{Id.} at 1130.

\(^{106}\) \textit{Id.} at 1134.

\(^{107}\) Driessen \textit{supra} note 100 at 40.


\(^{109}\) \textit{Gratz}, 539 U.S. at 267–68.
provided an automatic 20-point boost for race, which it stated, was not a “meaningful individualized review of applicants.”\textsuperscript{110}

In \textit{Grutter v. Bollinger}, the court upheld the law school’s race conscious admissions scheme, noting that although it used race as a factor, it provided a “highly individualized, holistic review of each applicant’s file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment.”\textsuperscript{111} However, even in upholding the race-conscious admission scheme, the court gave racial colorblindness a nod, noting “[t]he court expects that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.”\textsuperscript{112}

Additionally, the Supreme Court recently narrowed \textit{Grutter}, touting the constitutional expectation of colorblindness in the case of \textit{Parents Involved in Community Schools v. Seattle School District Number 1}.\textsuperscript{113} In this case, the majority struck down a school desegregation plan that used race as a factor to ensure racial diversity in the district’s schools as a violation of equal protection.\textsuperscript{114} This case involved a school district in Seattle, Washington that voluntarily adopted a school assignment plan that took into account race as a factor in determining which schools certain children would attend.\textsuperscript{115} The school district’s reliance on race as a factor was to achieve racial balance at the district’s schools.\textsuperscript{116}

The Supreme Court struck down the school assignment plan as a violation of equal protection noting that even if the school district had a compelling interest in using racial classifications, “the costs are undeniable. Distinctions between citizens solely because of their

\begin{footnotes}
\item[110] \textit{Id.} at 276.
\item[111] \textit{Grutter}, 539 U.S. at 322.
\item[112] \textit{Id.} at 322–23.
\item[114] \textit{Id.} at 747–48.
\item[115] \textit{Id.} at 710.
\item[116] \textit{Id.}
\end{footnotes}
ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.” Justices Thomas and Kennedy, in their concurrence discuss the colorblind ideal:

[disfavoring a color blind interpretation of the Constitution, the dissent would give school boards a free hand to make decisions on the basis of race—an approach reminiscent of that advocated by the segregationists in Brown v. Board of Education. This approach is just as wrong today as it was a half-century ago. The Constitution and our cases require us to be much more demanding before permitting local school boards to make decisions based on race.]

Colorblindness, therefore, protects against racial classifications that are designed to discriminate negatively against people of color, yet it may also require the court to strike down classifications that are designed to remedy not just past, but also current, racial discrimination. Indeed, framing the need for racial remedies such as affirmative action as a measure that levels the playing field because of past discrimination might actually perpetuate the problem because it situates the problem as one that existed only in the past, and is currently remedied. Indeed, many scholars argue, and research supports, the colorblind constitutionalism as espoused by the Supreme Court continues the system of white racial domination. As explored infra, regarding our nation’s health, health disparities because of race are not a thing of the past.

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117 Id. at 745–46 (internal quotations omitted).
118 Id. at 748 (internal citation omitted).
III: Our Nation’s Health is not Colorblind

“There’s one view of us as biological creatures, we are determined by our genes, that what we see in our biology is innately us, who we were born to be. What this misses is that we grow up and develop . . . We interact constantly in the world in which we are engaged. That’s the way in which the biology actually happens. We carry our history in our bodies. How could we not?”

Unnatural Causes: Is Inequality Making us Sick

A 2002 report by the well-respected National Academy of Science’s Institute of Medicine found that racial health disparities are “remarkably consistent” across a whole range of services and illnesses even when adjusted for socioeconomic status and issues of health access. Health disparity among the races has always been a problem in the United States. “In 1900, the life expectancy at birth in the United States was 47.6 years for whites and 33.0 years for nonwhites . . . by 1990, the comparable numbers were 76.1 years for whites and 69.1 years for blacks.” So while the twentieth century showed substantial health progress for all races, minorities “continue to bear a higher burden of death, disease, and disability.” As the Institute of Medicine explained, “these findings suggest that minorities’ experiences in the world outside of the healthcare practitioner’s office are likely to affect their perceptions and responses in care settings.”

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121 This long awaited report was conducted by the office of Minority Health, the U.S. Department of Health and Human Services and the National Academy of Science’s Institute of Medicine, which is an organization that assists and advises Congress on matters of health. See Feagin, supra note 64 at 184–87 (2003).
122 INSTITUTE OF MEDICINE, supra note 1 at 5.
124 Id. at 26
125 Id.
126 INSTITUTE OF MEDICINE, supra note 1 at 6.
Historically, research on health and race has largely been focused on genetic and biological racial differences.\textsuperscript{127} Much of this research is based on assumptions that genes differ by race and that it is these genetic differences that are responsible for differences in the racial disparities in health statistics.\textsuperscript{128} Just as eugenic science has now been exposed as racist dogma, “the belief that races are human populations that differ from each other primarily in terms of genetics is without scientific basis.”\textsuperscript{129} Race is a social construct much more than a genetic or biological one.\textsuperscript{130} The biological construction of race is a scientific invention, the creation of which was intended to justify the exploitation of others, because “in order for racism to happen, humans had to be raced.”\textsuperscript{131} Although socially constructed, race is central to social identity and is a key factor in accessing desirable resources.\textsuperscript{132}

Only recently have theorists and practitioners looked at racism and racial discrimination as affecting health of minorities rather than trying to explain health disparities as being inherently genetic and biological.\textsuperscript{133} Scientists now know that “[t]he genetic constituents of all human races are exceedingly similar, and racial diversity only accounts for less than 5% of the overall genetic variations within our entire species.”\textsuperscript{134} Indeed, racism, more so than the genetics of race, appear to be central to health disparities that minorities face.\textsuperscript{135}

\begin{flushright}
\textsuperscript{127} Williams et al., supra note 123 at 27. \\
\textsuperscript{128} Id. \\
\textsuperscript{129} Id. \\
\textsuperscript{130} Id. (noting “[t]he fact that we know what race we belong to tells us more about our society than about our genetic makeup.”). \\
\textsuperscript{131} Justin Desautels-Stein, Race as a Legal Concept, COLUM. J. OF RACE AND L. at 1, 4 & 73 (April 2012). \\
\textsuperscript{132} Williams et al., supra note 123 at 28. \\
\textsuperscript{133} See Id. Interestingly, some researchers have pointed to sickle cell anemia and Tay Sachs disease as examples of disorders where race plays a large role. Even this assumption may be scientifically flawed. Scientists now know that “the sickle cell trait, although more common in blacks, appear not to result from race but from geographic origin . . . The disease is more prevalent in the regions of the world where malaria was common . . . and appears to be a protective adaptation to malaria.” Id. \\
\textsuperscript{134} Windsor Mak, Raymond T. F. Cheung & Shu Leong Ho, Biological Basis of the Racial Disparities in Health and Diseases: An Evolutionary Perspective in RACIAL AND ETHNIC DISPARITIES IN HEALTH AND HEALTH CARE 73, 73 (Elena V. Metrosa ed., 2006). \\
\textsuperscript{135} Williams et al., supra note 123 at 29.
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a. **Racism as Uncontrollable and Unpredictable**

The easiest way to understand a person’s mental and physical health as it responds to racial discrimination is to view discrimination as a stressor that is both uncontrollable and unpredictable.\(^{136}\) These types of stressors are particularly harmful to one’s health.\(^{137}\) Living with the effects of perceived discrimination has harmful health effects that are both mental and physical.\(^{138}\) These effects include depression, psychological distress, anxiety, hypertension, and even breast cancer.\(^{139}\) Perceived discrimination has also been linked to risk factors for disease including substance use, obesity, high blood pressure and certain cardiovascular factors that have been linked to coronary heart disease.\(^{140}\) Some minorities even underuse palliative end of life care even when they have access to it, in part because of concerns over being discriminated against and because of a fear of being forced into majoritarian cultural values.\(^{141}\)

Studies of mental health outcomes by race consistently show that the experience of discrimination is significantly related to high levels of psychological distress.\(^{142}\) This is true for both cross sectional and longitudinal studies.\(^{143}\) Interestingly, although perceived “racial discrimination lead[s] to adverse mental health outcomes, . . . poor mental health does not lead to increased reports of racial discrimination.”\(^{144}\) Perceived racial discrimination, although
consistently related to psychological distress, is not always correlated to depression. Some scholars believe minority health would be much worse except that many minorities are taught by their parents and cultures how to effectively cope with racial discrimination and that many minorities are quite successful in creating coping strategies to reduce the stress related to inequality.

Actual and perceived discrimination takes its toll on both the physical and mental health of minorities. “Ambulatory blood pressure studies indicate that perceived racism may influence cardiovascular recovery and [result in] higher systolic and diastolic blood pressure throughout the day.” Other studies indicate that repeated exposure to discrimination changes the ways our bodies react to stressful situations.

Repeated discrimination becomes so routine that it “become[s] a chronic stressor that may erode an individual’s protective resources and increase vulnerability to physical illness” leaving a “wear and tear” on the body. With regard to health, this wear and tear leaves the victim of discrimination with less energy to make good health choices. Some theorists believe that the modern trend toward “colorblindness” is responsible for psychological consequences even more than past overt forms of discrimination. This is because people of color face racial microaggressions, “a modern form of racism comprised of subtle daily racial slights and insults,”

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145 Id. at 126.
146 Id. at 128.
147 Pascoe & Richman, supra note 138 at 531–32.
148 Id. (internal citations omitted).
149 Id.
150 Id. at 532.
151 Id. For example, the wear and tear on the body from dealing with discrimination may lead one to take up smoking or to use alcohol or illegal drugs, which ultimately further affects their health. Additionally, it may leave one without energy to sustain a healthy diet, manage other underlying health problems, or seek preventative care. See id.
152 See e.g., BONILLA-SILVA supra note 4 at 137–66; HANEY-LOPEZ supra note 81 at 143–62.
masked to be race-neutral. Microaggressions are often described as manifesting in many forms, and downplaying the impact of race is one of them.

The subtlety, and the common couching of the episode in race neutral terms, leaves the target of the racial microaggression as having to interrogate the motivations of the perpetrator and interrogate whether race actually played a role in the interaction. Essentially, the victim must put additional energy into ascertaining whether the other person actually perpetuated a racially discriminatory act. Put another way, purporting to live in a colorblind society when we actually live in a racialized society is, at least in part, responsible for the vast health disparities racial minorities face in this country.

IV: MOVING FORWARD BY MOVING AWAY FROM THE POST-RACIAL SOCIETY AS AN IDEAL

“THAT AMERICANS OF AFRICAN ORIGIN ONCE WORE THE CHAINS OF CHATTELS REMAINS ALIVE IN THE MEMORY OF [ALL] RACES AND CONTINUES TO SEPARATE THEM.”

ANDREW HACKER

The Supreme Court’s disparate impact doctrine requires proof of both disparate intent and disparate outcome, making this doctrine practically useless as a litigation strategy. This is because in order to show a disparate impact, a plaintiff must not only show a disparity in


154 The belief that we live in a post-racial, colorblind society itself is a distinct form of microaggressions for whenever a target expresses their experiences with racial discrimination, their reality is questioned. Society’s response is often that the target is oversensitive or makes everything about race.

155 Any interaction can be a racial microaggression, even a compliment such as noting that one is “so articulate and well spoken.” The target may be left wondering if he or she is deemed to be articulate only because the perpetrator sees the target’s race as being inferior. Meanwhile there is plausible deniability on the part of the perpetrator, for it is likely that they did not consciously intend to take race into account.

outcome but must also show intent to discriminate on the basis of race.\textsuperscript{157} Under modern American racism, such overt racial classifications are almost obsolete and state actors can easily come up with a pretext that does not sound in race. These policies have been replaced with less overt racial policies—often policies that are based on white ignorance and inaccurate assumptions of minorities’ current status with regard to wealth, health, and success.

Unfortunately, in contemporary American courts, the idealistic language of the Fourteenth Amendment’s equal protection clause might actually be used more to impede efforts to address and remedy racism than to stop impermissible discriminatory racial classifications. This is because when the Supreme Court ignores the social perception/reality of race and instead analyzes racial classifications formalistically, in a manner than is entirely divorced from this perception/reality, the Court takes the classification at issue out of the societal and historical context of discrimination. By ignoring such historical context, the Court creates precedent that leaves the United States in a racial vacuum, unable to devise effective solutions to very real inequality.

Because the move toward a post-racial society is failing to account for racial disparities, some scholars have advocated for a complete overhaul of equal protection jurisprudence.\textsuperscript{158} One such recommendation is for equal protection to move away from a formula that analyzes classifications, and instead be concerned with laws whose effect is subjugation.\textsuperscript{159} Such proposals take the systemic nature of oppression into account, and thus protect minorities from racially disparate impact – even without proof of discriminatory intent. Similar protection for

\textsuperscript{157} See e.g., Washington v. Davis, 426 U.S. 229 (1976).


\textsuperscript{159} Powell supra note 158 at 511–12.
white people is deemed unnecessary because white people are not combating hundreds of years of racial subjugation. In this regard, the Fourteenth Amendment would serve as a barrier to racial subordination.” In effect, the Supreme Court would “recognize the systemic nature of subordination in American society.” This overhaul of equal protection would protect the historically marginalized “class” rather than protecting all people from impermissible “classifications.” Such proposal is also arguably consistent with the language of the Equal Protection Clause itself, though obviously not consistent with the judicial invention of strict scrutiny.

Such a race-conscious approach to the Fourteenth Amendment was called a “faddish social theor[y]” in the Parents Involved in Community Schools v. Seattle School District case. However, the entire reason racial classifications are suspect is because of the United States’ history of state-sanctioned racism. If the United States did not have hundreds of years of racist history then classifications based on race would be given the same scrutiny as classifications given to advertisement on busses. The reason such classifications are suspect to begin with is because of the systematic disadvantage these classifications were designed, and continue, to give. In the context of hundreds of years of American racism, marked by slavery and

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160 Gotanda, supra note 70 at 63 (“Constitutional jurisprudence on race must accommodate legitimate governmental efforts to address white racial privilege . . . Further, any constitutional program must recognize cultural genocide implicit in the development of a color-blind society, and acknowledge the importance of [minority] culture[s], communit[ies], and consciousness.”).
161 Id.
162 Id.
163 U.S. Cons. Amend XIV. (interpreting language “nor deny to any person within its jurisdiction the equal protection of the laws” by situating it within the historical context of white American enslavement of African Americans).
164 551 U.S. 701, 780 (Kennedy, J. & Thomas, J. concurring).
segregation, it does not seem so faddish to “permit measures to keep the races together and proscribe measures to keep the races apart.”\textsuperscript{166}

A race-conscious approach to the Fourteenth Amendment might look much like that espoused by Justice Blackmun in his dissent to the 1978 affirmative action case, \textit{Regents of University of California v. Bakke}.\textsuperscript{167} Blackmun noted:

\begin{quote}
I suspect that it would be impossible to arrange an affirmative-action program in a racially neutral way and have it successful. To ask that this be so is to demand the impossible. In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently. We cannot—we dare not—let the Equal Protection Clause perpetuate racial supremacy.\textsuperscript{168}
\end{quote}

Such an approach would allow the courts to get a step ahead of the ever changing dynamic of colorblind racism and recognize the true problem is that of white privilege and minority subjugation, and there are many effective ways to perpetuate such systems without making overt racial classifications.\textsuperscript{169}

African Americans began immigrating as slaves to North America in about 1619.\textsuperscript{170} “For nearly two thirds of their total time in North America, African Americans were enslaved as the chattel property of white Americans.\textsuperscript{171} From slavery’s end in 1865 until the 1960s, there was overt racism and blatant segregation, which many have considered an era of near slavery.\textsuperscript{172}

\textsuperscript{166} Seattle School District, 551 U.S. at 780.
\textsuperscript{167} 438 U.S. 265 (1978).
\textsuperscript{168} Id. at 408.
\textsuperscript{169} HANEY LOPEZ supra note 81 at 158 (referring to the holding of McCleskey v. Kemp as an example of how powerful this colorblindness ideology is). In \textit{McCleskey}, the Supreme Court held that the racially disproportionate impact of Georgia’s death penalty scheme was not unconstitutional because there was no discriminatory intent to the scheme even accepting as true results of a sophisticated statistical study that showed “blacks who kill whites are sentenced to death at nearly 22 times the rate of blacks who kill blacks, and more than 7 times the rate of whites who kill blacks.” McCleskey v. Kemp, 481 U.S. 279, 327 (1987).
\textsuperscript{170} FEAGIN & MCKINNEY supra note 46 at 21.
\textsuperscript{171} Id.
\textsuperscript{172} Id.
Other racial groups also faced legally sanctioned systemic challenges.\textsuperscript{173} Blatant, legally sanctioned racial oppression was abolished less than fifty years ago. Yet some purport that American society has already moved beyond even seeing racial differences.

The lofty language of the Fourteenth Amendment—Congress’ response to the lesson of slavery—meant little for its first 80 years. Equal Protection’s legacy has been debatable in the last 80 years. What will it mean in the next 80 years? Minorities’ health will tell the tale.

\textsuperscript{173} See generally, HOWARD ZINN, A PEOPLE’S HISTORY OF THE UNITED STATES: 1492 TO PRESENT (5th ed. 2003) (documenting the shift from annihilation to reservations for Native Americans, near-slavery labor of Chinese-Americans, WWII internment of Japanese Americans, and the systemic racism faced throughout history by non-white groups, women, and poor laborers).