Caught in a Web of Ignorances: How Black Americans are Denied Equal Protection of the Laws

Michael Boucai
University at Buffalo School of Law

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NOTES

CAUGHT IN A WEB OF IGNORANCES: HOW BLACK AMERICANS ARE DENIED EQUAL PROTECTION OF THE LAWS

Michael Boucai*

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What characterizes these trials . . . is that in them the law – traditionally calling for consciousness and cognition to arbitrate between opposing views, both of which are in principle available to consciousness – finds itself either responding to or unwittingly involved with processes that are unavailable to consciousness or to which consciousness is purposely blind.

Shoshana Felman, The Juridical Unconscious

If ignorance is not – as it is evidently not – a single Manichean, aboriginal maw of darkness from which the heroics of human cognition can occasionally wrestle facts, insights, freedoms, progress, perhaps there exists instead a plethora of ignorances, and we may begin to ask questions about the labor . . . and economics of their human production and distribution.

Eve Kosofsky Sedgwick, Epistemology of the Closet

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* Public Interest Law Scholar, Georgetown University Law Center, J.D., expected May 2005, B.A., History, Yale University, 2002.


INTRODUCTION

A. The Defective Doctrines of Equal Protection Law

The Fourteenth Amendment guarantees that "no state shall . . . deny to any person within its jurisdiction equal protection of the laws." The special relevance of the Equal Protection Clause to black Americans, most of whom were recently emancipated slaves when the provision was adopted in 1868, is beyond serious question. In 1872, the Supreme Court suggested that white supremacist discrimination was "the evil [the Civil War Amendments] were designed to remedy," and eight years later it noted that it was "the colored race for whose protection the [Fourteenth] Amendment was primarily designed." Even this fundamental premise, however, did not suggest to the Court in the 1896 case of Plessy v. Ferguson that legally imposed racial segregation violates the Equal Protection Clause. It took nearly a century after the Civil War ended for equal protection doctrine to begin to embrace even a modest notion of substantive equality. The Warren Court's decision in Brown v. Board of Education was widely received as the harbinger of a new judicial commitment to make good on the Fourteenth Amendment's long-obsured promise. The Burger Court, however, wounded Brown's potential and the Rehnquist Court has very nearly eviscerated it. Today, innovative theories of equal protection - namely, the doctrines of intent and colorblindness - comprise "a more sophisticated approach" to toleration of racial discrimination and inequity.

In this article, I join those who have asked how and "why equal protection no longer protects." and I offer, in the context of race law, a unified explanation of that failure's causes and mechanisms. My theory is that each of the major doctrinal problems is both a function and a deployment of willful ignorance. The vocabulary of my critique consists of words like amnesia and myopia, forgetting and ignoring, consciousness and unconsciousness, for by ignorance I do not mean a simple lack of knowledge. Ignorance is not always - indeed, usually never is - a blank slate waiting to be filled with facts or wisdom. What I mean here by ignorance is a psycho-

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4. Slaughter-House Cases, 83 U.S. 36, 72 (1872) ("We do not say that no one else but the negro can share in [their] protection, but . . . in any fair and just construction of any section or phrase of these [Civil War] amendments, it is necessary to look to the purpose which we have said was the pervading spirit of them all, the evil which they were designed to remedy.").
8. Judge Earl Pollack, who was Chief Justice Earl Warren's law clerk when Brown was decided, remembers that "the day [the opinion] was announced . . . it was glorious news . . . Many of us . . . naively thought the world would be transformed." Robert Carter, who worked on the case while an attorney at the NAACP Legal Defense Fund, remembers, "Everyone thought the [civil rights battle] was over," Wendell LeGrand, Brown at 50, A.B.A. J., Apr. 2004, at 39.
10. See, e.g., Reva Siegel, Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action, 49 Stan. L. Rev. 1111 (1997). Siegel insightfully reasons that outward changes in the rules and rhetoric of personal status have served to preserve, in almost everything but name, an unequal status regime.
logical state akin to what the law calls "willful blindness," an ignorance whose authenticity is questionable in light of one's actual or perceived stake in its perpetuation.

The ignorance theory presented in this article draws heavily on the work of constitutional scholars and critical race theorists who have convincingly explained why contemporary equal protection law is internally incoherent, radically conservative, and morally reprehensible. Ignorance is not explicitly central to any of these critiques, but as a trope it has been useful to practically all of them. My goal in this piece is to raise ignorance from a valuable motif in academic analysis of equal protection law to an essential tool in explaining what's gone wrong.

B. Willful Ignorance

Michel Foucault famously observed that "there is no binary division to be made between what one says and what one does not say." The same can be said of knowledge; i.e., there is no binary division between what one knows and what one does not know. Insofar as knowledge provides our means for understanding the world and negotiating our places in it, ignorance and knowledge are analytically equivalent: both equally impact what we think and what we do. A concrete illustration of the equivalence is the use to which ignorance is put in the political philosophy of John Rawls. Although the kind of ignorance he employs - the blank-slate variety - is not the kind I will emphasize in the present study of equal protection law, it amply demonstrates how ignorance functions as knowledge. Observe how Rawls describes the theoretical standpoint from which a just social contract may be formed:

[In t]he original position, with the feature I have called the "veil of ignorance," . . . the parties are not allowed to know the social positions or the particular comprehensive doctrines of the persons they represent, [nor their] race and ethic group, sex, or various native endowments such as strength and intelligence . . . We express these limits on information figuratively by saying the parties are behind a veil of ignorance.

For Rawls, the knowledge best suited to our reaching agreement about basic entitlements in an ideal society is, so far as certain matters are concerned, no knowledge whatsoever. Rawls correctly perceives that the essential distinction between ignorance and knowledge (in the traditional sense of "knowledge") has to do with how each impacts human choice, not whether each impacts it - the difference is qualitative, not practical.

The functional equivalence of ignorance and knowledge forces us to rethink the complicated relationship between politics and epistemology.

13. Professor Peter Rubin noted in response to this characterization that the colorblindness doctrine, which essentially asks state actors to act "as if they didn't know" is an unlikely sibling of Rawls' "veil of ignorance" concept. Like the veil of ignorance, colorblindness is premised upon the belief that we'll arrive at the right answers so long as we remember to forget certain things. Of course, the major difference between the veil of ignorance and colorblindness is that the former seeks to "preempt" discrimination from a hypothetical, antediluvian point called the original position, while the latter seeks to fix damage that's already been done. Conversation with Peter Rubin, Professor, Georgetown University Law Center, in Washington, D.C. (Mar. 2004).
Thus one can understand Foucault’s assertion that “[k]nowledge is never anything more than a weapon in a war, or a tactical deployment within that war”\(^{14}\) as an improvement on the oft-heard but overly simplistic maxim, “knowledge is power.” Following Foucault, Eve Kosofsky Sedgwick describes in her tellingly-titled *Epistemology of the Closet* how “ignorance and opacity collude or compete with knowledge in mobilizing the flows of energy, desire, goods, meanings, and persons,” and she concludes that both “can be harnessed, licensed, and regulated on small and large scales for striking enforcements.”\(^{15}\) Sedgwick’s first illustration is innocuous (and now dated), but its implications are broad: “If M. Mitterrand knows English but Mr. Reagan lacks – as he did lack – French, it is the urbane M. Mitterrand who must negotiate in an acquired tongue, the ignorant Mr. Reagan who may dilate in his native one.”\(^{16}\) Thus it was the American President’s ignorance as much as the French President’s *connaissance* that allowed the former to “define the terms of [their] exchange.”\(^{17}\) Still, like ignorance in Rawls’ original position, Reagan’s inability to speak French is ignorance as we usually understand it\(^{18}\) – whatever else may be said of his political motives, the Great Communicator did not pretend to be monoglot during visits to the Elysées Palace.

But ignorance isn’t always so innocent. “Willful ignorance” is the designation I’ve chosen to describe those more questionable, sometimes even sinister, forms of what Sedgwick calls “unknowing.”\(^{19}\) The defining feature of willful ignorance, as the term is used here, is the investment its bearer has in it. But for the benefits that accrue from this ignorance, it would be readily abandoned in favor of some other, presumably more useful, knowledge. As we’ll see, a willful ignorance can be a knowledge that is “merely” unexamined; it can also be consciously or unconsciously willed, or even patently phony. This last kind – the patently phony – corresponds to the rather ridiculous notion that Reagan feigned ignorance of French when he negotiated with Mitterrand. Though the idea sounds silly in that context, such pretense is actually quite common.\(^{20}\) Nonetheless, I will assume (perhaps generously) that the Justices of the Supreme Court are not so duplici-

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15. *SEDGWICK, supra* note 2, at 3-4. Sedgwick treats Foucault’s theories of knowledge and power as “axiomatic.”

16. *Id.* at 4.


18. The first definition of “ignorant” (as an adjective) in the Oxford English Dictionary is “destitute of knowledge, either in general or with respect to a particular fact of subject; unknowing, uninformed, unlearned ...” *Oxford English Dictionary* 640 (2d ed. 1989).

19. *SEDGWICK, supra* note 2, at 77.

20. It can be exciting to pretend you don’t know something. It can also be useful, like when a Parisian panhandler asks me for money in French (which I speak) and I respond (in English), “I don’t speak French.” Such pretense can also be empowering; Sedgwick notes that the glass closet – the phenomenon where a homosexual isn’t “out” even though her homosexuality is somehow evident to everyone – “can license insult (‘I’d never have said those things if I’d known you were gay!’ – yeah, sure); it can also license far warmer relations, but [ones] whose potential for exploitativeness is built into the optics of the asymmetrical, the specularized, and the inexplicit.” *Id.* at 80.
tous, and that they instead suffer from the two other kinds of willful ignorance just mentioned: the "merely" unexamined and the willed, both of which closely resemble Jean-Paul Sartre's description of bad faith, where "the one to whom the lie is told and the one who lies are one and the same person."

To repeat the essential point: inherent in all these ways of describing the phenomenon of willful ignorance is an emphasis on stakes. With Sedgwick, I insist that when benefits attach to a lack of self-awareness, to misperceptions of the world around us, or to ignorance of our past, we had best be skeptical.

Identifying willful ignorance at work is not always easy, especially at the level of constitutional doctrine. As Sedgwick writes, "although the simple, stubborn fact or pretense of ignorance... can be enough to enforce discursive power, a far more complex drama of ignorance and knowledge is the more usual carrier of political struggle." She cites the majority opinion in Bowers v. Hardwick, a dazzling demonstration of what Justice Blackmun's dissent called, in the spirit of this article, "the most willful blindness."

In [Justice] White's opinion, "to claim that a right to engage in sodomy is 'deeply rooted in this nation's history and tradition' or 'implicit in the concept of ordered liberty' is, at best, facetious."

What lends the word "facetious" in this sentence such an unusual power to offend... has to be the economical way it functions here as a switch point for the cyclonic epistemological undertows that encompass power in general.... One considers: (1) *prima facie*, nobody could, of course, actually for an instant mistake the intent of the gay advocates as facetious. (2) *Secunda facie*, it is thus the court itself that is pleased to be facetious. ... (3) [The] assertion's... transparent stupidity [is] not just [a] contemptuous demonstration that powerful people don't have to be acute or right, but even more, [a] contemptuous demonstration... of how obtuseness itself arms the powerful against their enemies.

Thus Sedgwick identifies for her readers "the degree to which the power of our enemies over us is implicated, not in their command of

21. For example, when I argue later that Justice O'Connor's opinion in Croson v. Richmond manifests an egregiously willful ignorance of history, I take for granted that, in some important sense, she "believes" what she writes -- that she is not just performing ignorance in order to achieve what she knows to be racist ends. As Duncan Kennedy writes of judges' denial of the political nature of their decisions, "[i]t is not a conscious, deliberate, strategic misrepresentation, not a lie designed to deceive an audience without the speaker having any belief at all in its truth." DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION 193 (1997). Girardeau Spann might question the application of Kennedy's description of judicial denial to the Supreme Court's decisions on race: "Although it is always possible to articulate nonracial motives for the Court's civil rights decisions, the popular perception is that a politically conservative majority wishing to cut back on the protection of minority interests at majority expense now dominates the Court." GIRARDEAU SPANN, RACE AGAINST THE COURT: THE SUPREME COURT AND MINORITIES IN CONTEMPORARY AMERICA 1 (1993). In some sense, this article attempts to mediate between the visions articulated by Kennedy and Spann, using the concept of "willful ignorance" to explain how the Court is able to cover racial motives, consciously or unconsciously, in nonracial terms.


23. SEDGWICK, supra note 2, at 6.


25. SEDGWICK, supra note 2, at 6-7 (emphasis added).
knowledge, but precisely in their ignorance.” That Justice Blackmun should have described this very phenomenon as “the most willful blindness” points to a conflation of sorts that this article not only adopts, but self-consciously embraces – namely, the rhetorical equivalence of ignorance with sightlessness. The relative interchangeability of these concepts probably relates to our culture’s intuitive trust in a correlation between seeing and knowing. The sentiment “I’ll believe it when I see it” embodies a popular, if philosophically embattled, tenet of Western epistemology, one that has explicit incarnations in law. Not only does the common criminal law use “willful blindness” and “willful ignorance” to describe the same culpable mental state, the most persuasive evidence admitted in a trial is “proof corroborated by the eye: the most authoritative testimony is that of an eyewitness.”

As noted earlier, the law incorporates a notion of guilty ignorance. In the criminal law – though not, interestingly, in the field of legal ethics – the doctrine of “willful ignorance” states that when a person contrives her own ignorance, when she intentionally avoids learning a fact whose knowledge would make her subsequent conduct knowingly illegal, that ignorance is legally equivalent to knowledge. Under one interpretation, the willful ignorance/blindness doctrine would apply in situations where “the wrongdoer didn’t know, [but] should have known.” But this rendering doesn’t convey the necessary connotation of guilty intuition; as David Luban explains, it sounds an awful lot like negligence. The Model Penal Code has suggested that willful blindness isn’t really the equivalent of knowledge, but is rather “awareness of the high probability of a fact” whose confirmation the wrongdoer has somehow arranged to avoid. Distinct though they are, these legal conceptions of willful ignorance share at least one necessary implication: the wrongdoer’s “ignorance” is motivated by self-interest, and in this sense both definitions resonate with my use of the expression here. I have addressed the law’s understanding of “willful ignorance” not to indicate an intent to analyze equal protection doctrine according to standards derived from criminal law, but to emphasize that this concept of willful ignorance is familiar to members of a legal community who are generally

26. Id. at 7.
27. In an English Christian text from the fourteenth century, we read “Be blynd in Ignorance.” Richard Rolle de Hampole, Psalter, c. xlv. 6. (1340) (Clarendon Press, 1884). Hundreds of years later, when the American poet Wallace Stevens wrote of “seeing the sun again with an ignorant eye” in order to see the sun more truly, he was self-consciously and ironically overturning what was by 1947 a deeply ingrained trope. Wallace Stevens, Notes Toward a Supreme Fiction (1947), in Wallace Stevens, The Palm at the End of the Mind: Selected Poems and A Play 207 (Holly Stevens ed., Vintage Books 1971).
30. Felman, supra note 1, at 81.
31. Luban, supra note 29, at 967.
32. Id. at 959-60.
33. Id. at 959-62.
34. Id.
unfamiliar with Eve Sedgwick's literary criticism and who are about as interested in Foucault as Foucault was in them.  

C. Thesis: Willful Ignorance, Racism, and Unequal Protection

Having explained what I mean by willful ignorance, I can now offer a more concrete description of my use of the concept here. In the mode of critical race scholarship, which seeks "to understand how a regime of white supremacy . . . [has] been created and maintained in America and, in particular, to examine the relationship between that social structure and professed ideals such as . . . equal protection," I propose that willful ignorance provides a way of accounting for equal protection's failure to protect black Americans. Willful ignorance functions on two levels in current equal protection law. The first level is doctrinal; the second is practical, and has to do with ignorance's political utility. On the level of doctrine, this article focuses on the two defects identified earlier, intent and colorblindness, and it explains how ignorance is indulged, employed, or imposed in each context.

In Part One, "Blissful Ignorance and the Unintentional Discriminator," I use Charles Lawrence's concept of "unconscious racism" to describe how the Supreme Court's requirement of discriminatory intent privileges and perpetuates discriminators' ignorance of their own racism. I characterize the choice of an intent requirement as a judicial deployment of what Sedgwick calls "ignorance effects," one that immunizes from constitutional sanction the most widespread (and perhaps the most devastating) forms of discrimination. I further argue that the requirement of discriminatory purpose is premised upon a willful ignorance of history, in that the conceptions of fault and causation implicit in any understanding of intent are, in light of the history of black Americans, entirely out of place in the determination of equal protection violations.

Part Two, "Judicial Ignorance and the Intentional Discriminator," describes how the Court's assertion of its own ignorance, its own inability to know an actor's motive, has served as the basis upon which to erect such a high bar for a showing of discriminatory intent that many instances of consciously racist discrimination can withstand constitutional challenge.

In Part Three, "The Most Willful Blindness," I elaborate upon Derrick Bell's contention that colorblindness has allowed the Court "to ignore historical patterns, to ignore contemporary statistics, and to ignore flexible reasoning." I argue that the doctrine is premised upon a tragic historical amnesia and a profound blindness to modern reality – even when, as in the recent case of Grutter v. Bollinger, an exception is made for limited race-conscious decision-making. I emphasize that there is a reciprocal relation-

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35. The threat of violence inherent in law was perhaps too obvious to greatly interest Foucault, who was more concerned with subtler forms of coercion, the "humble modalities, [the] minor procedures" of power. Michel Foucault, Discipline and Punish: The Birth of the Prison 170 (Alan Sheridan trans., Vintage Books 1977). As for the lawyers, I've been chided that it's "the irrelevant part" of the academic legal community that bothers with Foucault.


37. Sedgwick, supra note 2, at 5.

ship between the Court's amnesiac understanding of history and the American people's; on one hand, the Justices reflect this national failing and, on the other, they who are in a position to at least partially correct our error perpetuate it instead.

In my conclusion, "A Web of Ignorances," I describe how willful ignorance may be characterized as the proverbial "tie that binds" the doctrines of intent and colorblindness. I argue that the ignorance embodied in unconscious racism and constitutionalized by the intent doctrine—essentially whites' ignorance of their own racial specificity—functions to bolster the problematic notions of merit and neutrality that in turn reinforce colorblindness and dominate the discourse of affirmative action. I then posit that by creating an impossibly numerous class of innocent whites (innocent by law, either because they had no intent to discriminate or because that intent could not reach the court's cognition), the intent doctrine bolsters the ignorance of history and reality that together rationalize colorblindness.

Running parallel to my description of the centrality of ignorance to each of the "doctrinal mystifications" outlined above is the hypothesis that ignorance, aside from being a mere trend, is the very thing that permits these doctrines to mystify. The harnessing and deployment of ignorance effects functions today in much the same way that legal formalism allowed the Lochner Court to mask from its readers and from the public—and even to hide from itself—the deeply political character of its decisions. Ignorance, both ours and the Court's, camouflages a drastically retrograde race-politics, allowing our constitutional doctrines to appear more moderate than they are. Or to put it as Richard Delgado might, the "primary instrument" of racial subordination in this country is the prevailing mindset "by means of which members of the dominant group justify the world as it is." My argument about the practical utility of willful ignorance is that it is a prominent feature of the dominant and dominating mindset.

Why is ignorance so convenient, so compelling to the discriminator's mindset? I think the explanation has something to do with its "forgivability," a phenomenon that Sedgwick derides as "the . . . palpably sentimental privileging of ignorance as an originary, passive innocence." Even if criminal law occasionally accommodates a notion of guilty ignorance, society on the whole resists the idea. The equation of ignorance with

39. Introduction, supra note 36, at xxviii.
40. As Professor Anthony Cook suggested to me, ignorance may be what allows "compassionate conservatism" to call itself (and maybe even see itself) as compassionate. Conversation with Anthony Cook, Professor, Georgetown University Law Center, in Washington, D.C. (Feb. 2004).
42. Sedgwick, supra note 2, at 7. Sedgwick's characterization of rape law is a remarkably accurate description of the state of affairs in Great Britain. See Director of Pub. Prosecutions v. Morgan, 1976 A.C. 182, 2 All E.R. 347, [1975] 2 W.L.R. 913 (H.L.) (where the House of Lords ruled that an alleged rapist may not be convicted even when he unreasonably believes that his alleged victim consented). In the United States, however, "most . . . courts have omitted mens rea altogether," and have instead—but to equally pernicious effects—turned the inquiry involved in a rape trial almost totally toward the intent of the alleged victim. Susan Estrich, Rape, 95 YALE L.J. 1087, 1097-1101 (1986).
innocence has deep roots in our culture. In the Gospel of Luke, Jesus speaks heavenward of those who have crucified him, “Father, forgive them, for they know not what they do.” This biblical conflation of ignorance and innocence was thoroughly secularized by 1548, when the English chronicler Edward Hall wrote of “a man of no great wit, suche as men comonly call an Innocent man.” Today, “ignorant” and “innocent” are still understood as synonyms in certain contexts; one definition of “ignorant” in the Oxford English Dictionary is “[h]aving no knowledge of, hence . . . innocent of,” and one definition of “innocent” is “simplicity, hence, want of knowledge, ignorance.” Both terms may denote a naiveté most closely associated with children, who are often protected from aspersions of punishable guilt, but their legal metonymy can apply to even the most adult offenses – note the “epistemological asymmetry” of rape law, which, as Sedgwick provocatively charges, “privileges at the same time men and ignorance, inasmuch as it matters not at all what the woman perceives or wants so long as the man raping her can claim not to have noticed.” By marrying our ignorance to innocence, we bargain our way out of facing problems and treating them.

You may be wondering why a theory purporting to explain a body of constitutional law that’s deeply harmful to black Americans should be based on anything other than flat-out racism. Part One’s discussion of unconscious racism will suggest a partial answer to that necessary question, but for the time being it should be conceded that, far from rejecting racism as the reason for our judicially-enforced regime of unequal protection, I am characterizing how racism functions at the Supreme Court and, reciprocally, in the general culture. Girardeau Spann’s assessment that “when the Court is called upon to protect minority interests, it . . . [operates] as little more than a covert agent of the majority” is reflected in the fact that the ignorances deployed in constitutional equal protection doctrine correspond to broader, cultural ignorances, whose main objects are black Americans and American racism itself. These ignorances, I believe, replace a “positive” knowledge of racial superiority that has been partly purged from the white mindset in the past half-century; they’re like mental “gaps” that continue, in Sedgwick’s words, to serve as “weighty and . . . consequential epistemological place[s]” from which racist impulses continue to emanate.

44. *Edward Hall, The Union of the Noble and Illustre Famelies of Lancastre and York* (1548).
46. As an adjective, “innocent” is defined as “having or showing the simplicity [or] ignorance . . . of a child or one ignorant of the world.” As a noun, “innocent” can itself mean “a young child.” *Id.*, at 996.
47. *Sedgwick*, *supra* note 2, at 5.
49. *Sedgwick*, *supra* note 2, at 77.
50. To put the point more plainly, what racial knowledge was (and is) to targeted racism, racial ignorance is to systemic or institutional racism. One example, to which we will return, comes from the context of higher education. Generally speaking, universities no longer discriminate against racial minorities in a formal sense; in fact, they often use affirmative action to increase minority enrollment. Affirmative action, however, is perceived as an exception to neutral standards of merit, standards to which the universities will vigorously and proudly return once affirmative action is “no longer necessary.” But such a conception of merit, and thus of affirma-
In light of the ignorance/racism double-whammy, I address this article primarily to race-liberals and the legal community. First, by "race-liberals," I mean people who are nonracist in their rhetoric, self-perception, and conscious intention. (I imagine that if you've read this far, you're probably such a person.) However many pernicious equal protection opinions the Justices might write, I think that - at least by the definition offered here - they would all have to be identified as race-liberals. In this sense, I know very few figures in the legal community whom I would not so identify, and I say this fully aware of the wide range of particular opinions on race that issue from this profession's mainstream. Few liberals in the legal community, even self-designated liberals, would embrace the kinds of sweeping doctrinal and social overhaul that many Critical Race Theorists have called necessary for healing this country's racial wounds, an antagonism veiled by ostensibly good intentions. As Stephen Steinberg observes, "[l]iberals are not the enemy, [but] the 'enemy' depends on the so-called liberal to put a kinder and gentler face on racism; to subdue the rage of the oppressed; to raise false hopes that change is imminent; to modulate the demands for complete liberation." This description of the role of liberals in the perpetuation of racial hierarchy corresponds precisely with my conception of how ignorance functions in equal protection law - namely, as a cover.

I write, then, for those of us who have been, in the words of Anthony Cook, "duped by the rhetoric of liberalism." While this article does not answer Cook's call for work focusing on "constructive goals of social struggle and practical strategies of mobilization," I hope that my theory of willful ignorance will show liberals and the legal community how they have managed to ignore those tasks thus far and convince them why they must do so no longer. Liberals abhor ignorance. Ignorance rebels against a post-Enlightenment attitude, fundamental to liberal discourse, which understands truth-seeking as an ethical imperative. The legal community - and not merely as a subset of liberals - also abhors ignorance. Shoshana Felman perceptively calls law "a discipline of consciousness." True, justice should be blind, but only in the metaphorical sense of being unbiased; in actuality, the study and practice of law are committed to insight. The very vocabulary of a trial - "discovery," "voir dire," "eyewitness" - demonstrates the extent to which law, like liberalism, is committed to truth-seeking and truth-seeing. And it should be remembered that law, seemingly alone in our culture, recognizes and punishes the phenomenon of willful action, is largely contingent upon white's ignorance of their own race. (If you are incredulous about whites' ignorance of their whiteness, see infra pp. 214-216) This ignorance allows whiteness to masquerade as normal (in the normative sense) and white standards to pose as neutral and nonracial.

51. This is a representation of "what has often been termed 'political correctness' inside and outside the academy - a high level of righteousness, defensiveness, and concomitant refusal of the very intellectual and political agonism that one expects to find celebrated in... liberal thinking." WENDY BROWN, POLITICS OUT OF HISTORY 37 (2001).


54. Id.

55. FELMAN, supra note 1, at 107.
ignorance. In law, and certainly in constitutional law, *ignoranti non excusat* – ignorance is no excuse. The Supreme Court should know better and, in some sense, it does.

I. Blissful Ignorance and the Unintentional Discriminator

[A] court . . . is often inflicted with a particular judicial blindness that unwittingly reflects and duplicates the constitutional blindness of culture. . . . A pattern emerges in which the trial, while it tries to put an end to [a] trauma, inadvertently performs an acting out of it.

Shoshana Felman, *The Juridical Unconscious* 

*Washington v. Davis* was the decision that made intent to discriminate an explicit requirement of equal protection violations. Decided in 1976, more than twenty years after *Brown*, the situation at issue in *Davis* was typical of the post-*Brown* era, in which many institutions remained segregated, all-white, or nearly all-white even in the absence of formal racial policies. The *Davis* plaintiffs were black applicants to the District of Columbia Metropolitan Police Department who were rejected because they had not achieved a certain minimum score on a written test of verbal skills “used generally throughout the federal service.” They argued that because blacks consistently performed worse than whites on “Test 21,” as it was called, and because the exam had not been shown to correlate with subsequent job performance, the burden was on the state to justify its hiring practices. Their argument for what’s known as an “effects test” makes intuitive sense; stated simply, “your test disproportionately flunks black applicants, so prove its relevance to the job.”

Justice White, writing for the majority, rejected the plaintiffs’ proposed equal protection analysis. The Court conceded that in *Griggs v. Duke Power Co.*, it had adopted an effects test for interpreting Title VII, but the Constitution? – now that was a different story. Ignoring the actual argument before it (again, that a showing of discriminatory effect should merely shift the burden of proof), the Court refused to embrace “the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact.” Whether or not it was accurate to characterize precedent on this point as determinative – the opinion’s treatment of “some indications to the contrary in our cases” is rather ingenious – the Court insisted that “the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose.” Test 21 was not designed with an intent to keep blacks off the police force, and therefore the plaintiffs, “as Negroes, could no more successfully claim that the test denied them equal protection than could

56. Felman, supra note 1, at 5.
58. Id. at 234.
61. Id. at 239 (emphasis in original).
62. Id. at 242-47.
63. Id. at 240.
white applicants who also failed.”64 A contrary holding would open the floodgates, for if the Constitution protected blacks from disparate treatment resulting from neutral-but-unjustified standards, there would arise “serious questions about . . . a whole range of tax, welfare, public service, regulatory, and licensing statutes.”65 Imagine that.

Though there is much to criticize in Washington v. Davis,66 this section is limited to a discussion of two willful ignorances at play in the Court’s choice of an intent standard. The first is the doctrine’s implicit grounding in formalistic notions of fault and causation, which make sense only if history should be ignored or forgotten in the adjudication of race-discrimination claims. Because this phenomenon is discussed at greater length in Part Three, I focus more extensively here on the second ignorance-related problem – namely, how the intent requirement incites us to ignorance of our own racist impulses and discriminatory behaviors.

A. Intent Doctrine and Willful Ignorance of History

Justice White’s opinion in Davis manifests an astounding cultural amnesia that we will encounter again in the Court’s colorblindness doctrine. Willful blindness may be a more accurate description than amnesia, because it’s difficult to believe that the Justices, like so many Americans, have really forgotten this country’s shameful racial history. Call it what you will, this forgetfulness operates in the intent requirement via an implicit insistence upon legal notions of fault and causation, in which every violation must have its perpetrator. As Alan Freeman writes, “the causation principle makes it clear that some objective instances of discrimination are to be regarded as mere accidents, or ‘caused,’ if at all, by the behavior of ancestral demons whose responsibility cannot follow their successors in interest over time.”67

Freeman’s reference to “ancestral demons” and “successors in interest” suggests the naive ahistoricism of the intent requirement. In Davis, for example, the Court never asks why, in the absence of intent, blacks nonetheless scored less well than whites on Test 21. A full answer to this question would be complicated, but it takes an utter disregard of 500 years of racial subordination on this continent not to perceive that the discrepancies in exam performance are, in large part, but one consequence of a disgraceful racial history. Asking the rejected applicants to name a specific person or group who harbored the necessary intent to discriminate erases history from the picture, as if both the black applicant and the white police chief,

64. Id. at 246.
65. Id. at 248. I can’t resist highlighting the fact that this consequentialist policy argument (which essentially decides by fiat that serious questions may not be raised about this wide range of statutes) reflects an important part of the liberal sensibility discussed earlier – namely, a commitment to order and to progress that’s no faster than slow-and-steady. As Martin Luther King wrote in 1963, “I have almost reached the regrettable conclusion that the Negro’s great stumbling block in the stride toward freedom is not the White Citizens Counciler or the Ku Klux Klanner, but the white moderate who is more devoted to ‘order’ than to justice.” MARTIN LUTHER KING, JR., Letter from a Birmingham Jail, in I HAVE A DREAM: WRITINGS AND SPEECHES THAT CHANGED THE WORLD 83, 91, (James Melvin Washington, ed. 1986).
67. Freeman, supra note 9, at 30.
the applicant’s father and the chief’s father, and so on, had been equally well-prepared to take this verbal exam (which, remember, may not have had anything to do with actual job performance). The excuse that no one in particular meant for things to turn out as they did is premised upon the inarguable fact that no one in particular caused the discrepancies. And so, paradoxically, it is the very history that is unaccounted for in the Court’s equal protection doctrine that will have to take the blame for the plaintiffs’ failure to perform better. The intent standard reflects what historian Wendy Brown identifies as the contemporary tendency to “personify oppression in the figure of individuals and . . . reify it in particular acts and utterances.” The doctrine manifests “a peculiar relationship to history, one that holds history responsible, at the same time as it evinces a disbelief in history as a teleological force [and] . . . disavow[s] history as . . . productive.”68 History is conjured momentarily and no more than implicitly, so that we can blame and perhaps even regret it, only to be forgotten – or, better, ignored – at the critical moment of decision.

B. Intent Doctrine and the Privileging of Ignorance

Saint Jerome spoke of the double sin of being “ignorant of your ignorance.”69 Sadly, through its intent doctrine, the Court commits precisely this offense when it fails to take into account, and thereby privileges, unconscious racism – or the fact that most people, most discriminators, are ignorant of their own biases, or are ignorant of the extent and depth (and, thus, the fertility) of those biases. Unconscious racism works subtly on a decision; there’s certainly no intent to discriminate, even if invidious racial discrimination is, in fact, what drives the ultimate course of action. Charles Lawrence, who did much to acquaint the legal community with the concept and prevalence of unconscious racism, illustrates the phenomenon by way of a hypothetical scenario where an employer selects a white applicant rather than a black one, sincerely believing that his decision is “based on observed intangibles unrelated to race; [he] perceives the white candidate as ‘more articulate,’ ‘more collegial,’ ‘more thoughtful,’ or ‘more charismatic,’ [and he] is unaware of the learned stereotype that influenced his decision.”70 Adrian Piper offers a more stunning example, one whose implications for Lawrence’s employment scenario run deep:

No reflective and well-intentioned white person . . . wants to admit to instinctively recoiling at the thought of being identified as black herself. But if you want to see such a white person do this, just peer at the person’s facial features and tell her, in a complimentary tone of voice, that she looks as though she might have some black ancestry, and watch her reaction. It’s not a test I or any black person finds . . . pleasant to apply . . . and having once done so inadvertently, I will never do it again.71

68. Brown, supra note 51, at 21, 30.
The evidence for unconscious racism isn’t merely anecdotal. From the theoretical standpoint of psychology, the field that gave us the concept of the unconscious, this form of ignorance makes perfect sense. Lawrence notes cognitive psychology’s demonstration that transmission of our most deeply entrenched cultural beliefs and preferences are, most of the time, exactly those beliefs and preferences that “are not experienced as explicit lessons.” On this view, then, some of our racism must be unconscious, given that so much of it is unconsciously transmitted. But this is only the beginning.

Since the civil rights movement, Americans are decreasingly tolerant of open expressions of bigotry. This change is more than just a dictate of political correctness; it reflects an understanding among most whites that racism, at least in the abstract, is wrong. Thus whites experience great social pressure (the threat of shame) and varying degrees of internal pressure (the threat of guilt) to repress their racism, to ignore it as if that will make it go away. The project isn’t entirely fruitless; as Freud said of the repressed, “it is true that they have driven [repression of the idea to which the intolerable wish is attached] out of consciousness and out of memory, [they] have apparently saved themselves a large amount of unpleasure [sic].” So far so good. “But” – and this is the important part for our consideration of ignorance and intent – “the repressed wishful impulse continues to exist in the unconscious,” and there it sits, quasi-dormant, “on the look-out for an opportunity of being activated.”

Surely this is all quite familiar. We’re well aware in this post-Freudian age that the unconscious manifests itself constantly in our lives, although naturally and necessarily we’re not aware of giving it expression, especially as we’re acting on its urgings. So it shouldn’t come as a surprise that racism, like any other taboo, doesn’t evaporate altogether once we’ve cleansed it from our conscious thoughts, and that we continue to act on racist impulses submerged in the unconscious.

Nor does the evidence of unconscious racism stop at the level of theory. The hypothesis that we are ignorant of our own racism has been borne out in many empirical studies, too numerous to summarize here. The same studies which attest to white Americans’ embrace of principles of racial equality also document important discrepancies between that nominal commitment and persisting forms of racial bias. If most whites say they aren’t racist, there are only two ways of squaring their self-description with their well-documented racist behaviors, discussed below and throughout this article: either they’re lying or they’re unconsciously discriminating. There’s no need to choose between the two possibilities; one is true for some people, the second is true for others, and both are true for most of us.

72. Lawrence, supra note 70, at 323.
74. Id. (emphasis in original).
A good example of unconscious racism exposed by sociological research is the study measuring the impact of racial stereotyping on perception by asking white college students to view a scene in which one person shoved another. When the aggressor was black, white students called the shove "violent"; when the aggressor was white, they described it as "playing around." Or take Faye Crosby's revealing "helping studies." In one, someone posing as a supermarket shopper would drop a bag of groceries and white shoppers were observed for differences in behavior depending on whether the person was white or black. Another study measured whether whites were less likely to help blacks than whites when called by someone posing as a motorist in distress. Having conducted thirty experiments of this sort, Crosby found that white subjects showed discriminatory behavior against blacks in 40% of the scenarios. This figure, however, is conservative if one factors in the nature and extent of the help that whites offered blacks compared to whites.77

Given whites' purported self-conceptions,78 most of these studies' subjects would not have predicted their discriminatory responses. Again, this discrepancy between what people say and what they do means they're either lying or are "just" unaware of their racist tendencies. To the extent the latter is true, an intent standard under the Equal Protection Clause is manifestly underinclusive. Unfortunately, as one commentator dryly observes, the Court "did not consult sociological or psychological studies of racial bias" when deciding the cases that established and then elaborated the requirement of purposeful discrimination.79 Today, Justice Stevens comes close in his occasional reference to "blind habit" and "automatic reflex,"80 but of the Justices sitting on the current Court, it is Justice Ginsburg who most consistently voices an awareness of this definitionally undetected form of racism. Dissenting from Adarand Constructors, Inc. v. Pena, Justice Ginsburg wrote that "bias, both conscious and unconscious, reflecting traditional and unexamined habits of thought, keeps up barriers that must come down if equal opportunity and nondiscrimination are ever genuinely to become this country's law and practice."81 In Grutter v. Bollinger she emphasized that "[i]t is well documented that conscious and unconscious race bias, even rank discrimination based on race, remain alive in our land."82

In light of her consciousness of unconscious racism, does Justice Ginsburg, like Lawrence, fear that "[e]ven the most thorough investigation of conscious motive will not uncover the race-based stereotype that has influ-

77. Id at 549. For example, in the grocery bag experiment, the help offered to white women was usually thorough and time-consuming (subjects would help pick up all the groceries), while the help offered to black women was more likely to be gestural (subjects would pick up, say, a few vegetables).
78. Oppenheimer, supra note 75, at 904-911.
79. Siegel, supra note 10, at 1136.
enced [a] decision?"83 The intent standard’s inadequacy in this regard was
dramatic in the case of Village of Arlington Heights v. Metropolitan Hos-
ing Corp., where the Supreme Court ruled that a mostly white suburb’s
refusal to grant a rezoning request to develop multifamily, low-income
housing did not violate equal protection.84 The Court conceded that the
town’s decision had racially discriminatory effects, but it did not find the
purposeful discrimination necessary to establish a winning claim. As Law-
rence speculates, however, unconscious racism might have informed the
permit’s denial in any number of scenarios.85 Perhaps “[a] constituency
within Arlington Heights – [say the] elderly . . . did not actively campaign
for the rezoning,” despite its interest in low-income housing, because of a
[partly] unconscious aversion to blacks prevented coalition?86 Or maybe
the interests of black people were completely ignored; “i.e., it was a fight
between environmentalists and developer[s], but an inadvertent devaluing
of black interests caused inattention to the costs blacks would have to bear
. . . [Such] selective indiffererence or misapprehension of costs . . . occurs
entirely outside of consciousness.”87

The other side of the unconscious racism coin is the phenomenon that
Barbara Flagg’s powerful book, Was Blind But Now I See, calls “white
transparency,” or “the tendency of whites not to think about whiteness,” to
rarely understand or describe themselves in racial terms.88 This ignorance
is one of “the most striking characteristic[s]” of white racism, because
whites’ relegation of their own racial specificity “to the realm of the sub-
conscious” is contingent upon a dominant place in the American racial
hierarchy:89

Do you attribute your successes or failures in life to your whiteness?
What about the life courses of others? . . . [H]ow much attention did
[Justice Souter’s] race receive in conversations among whites about his
abilities and prospects for confirmation? Did you or your white acquaint-
ances speculate on the ways his whiteness might have contributed to his
success, how his race may have affected his character and personality, or
how his whiteness might predispose him to a racially skewed perspective
on legal issues?90

To put it mildly, the phenomenon of white transparency calls into
question even the most innocent-looking decisions, because requirements
that whites perceive as neutral will very likely reflect distinctly white stan-
dards, and procedures that whites perceive as neutral will very likely be
infused with – let’s call it white obliviousness. In a defense of affirmative
action policies as checks on institutional forms of racism, Robin Barnes

83. Lawrence, supra note 70, at 343.
85. Of course, the key word here is speculated. The problem with shifting the burden of proof
ton the defendant only after intent has been established is that, although we can’t know in advance
if unconscious racism was the force driving a decision, an effects test would presumably force the
defendant to show that the contested decision was the result of other, legitimate motives. As
things operate currently, our speculations of unconscious racism remain as potent before a case
has been brought as after it’s been dismissed for want of purposeful discrimination.
86. Lawrence, supra note 70, at 348-9.
87. Id. at 349.
89. Id. at 2.
90. Id. at 3.
describes how white transparency can figure into the work of, say, the hiring committee at a high-ranking law school:

Three white male members of the . . . committee, all good liberals, had a white male friend [whom] they honestly believed would have filled [a vacant] position well. No doubt he would have. But . . . the women [who sat on the committee] insisted [upon holding] the position open for a while to consider women and persons of color. . . . While these white male faculty members were guilty of no malice, what almost occurred would have been totally exclusionary, regardless of motive or intent.91

The problem here, constitutionally speaking, isn’t the hiring committee’s lack of concern for faculty diversity; the averted exclusion is questionable because, by looking only to their own cronies, the white male professors immediately and arbitrarily narrowed the pool of contenders to one that’s even more white and male than the applicant pool generally.

Washington v. Davis, which established the requirement of purposeful discrimination, may have been – indeed, looks very much like – an instance of white transparency at work. Remember that the purportedly neutral Test 21 (1) was not shown to have anything to do with actual job performance and (2) black applicants flunked at a much higher rate than white applicants. Assuming, as the record seemed to suggest, that the test did not correlate with success on the job, isn’t “neutral” a strange word to describe the standards set by Test 21? Mightn’t “white” be a better word to describe them?92

From its very origins, then, the intent doctrine has failed “to provide any foothold for attacking the transparency phenomenon,”93 which is, again, one manifestation of whites’ ignorance of their own racism. Acknowledgement of this ignorance by the Supreme Court would mandate a necessary skepticism of all facially neutral criteria of decision making, one that would regard all such criteria as presumptively white-specific.94 Instead, by ignoring the reality of unconscious racism, the intent requirement mandates the exact opposite – namely, an unwarranted presumption of race-neutrality.

Arlington Heights and Davis illustrate how unconscious racism may be at play in decisions which, using an intent standard, will not be deemed unconstitutional under the Equal Protection Clause. As such, these cases show that the Court was wrong to insist that a showing of discriminatory effects should not shift the burden of proof. For if we are ignorant of our motives, and if those motives can be guilty ones – a possibility recognized from ancient Greek tragedy to twentieth-century psychoanalysis95 – then

92. There is, of course, no contradiction between, on one hand, the proposition that past and present discrimination partly explain why blacks have not learned a certain set of skills as well as whites, and, on the other hand, the proposition that those skills reflect a specifically racial knowledge. Both explanations tell a different part of the same story. To tell it again briefly: a dominant group establishes a particular regime of truth, internalizes it as the natural order of things, and in manifold ways keeps a subordinated group from even participating in that already inhospitable regime.
93. FLAEG, supra note 88, at 10.
94. Id. at 4, 53-65.
95. Albert Ehrenzweig writes:
the intent doctrine established in *Davis*, requiring (at least) that the defendant be conscious of her unfair treatment of black people, calculated or not, "severely limits the number of individual cases in which the courts will acknowledge and remedy racial discrimination." As Lawrence writes, if equal protection jurisprudence necessitates "the elimination of governmental decisions that take race into account without good and important reasons," then the law of equal protection must deal with the profundity of Americans' ignorance of their own racism.

Here we reach the most egregious aspect of the intent doctrine: the Court's outright validation, perpetuation, and imposition of American ignorance. The judge-made rule that only conscious discriminatory purpose violates equal protection gives us, all of us, an *incentive* not to confront or counteract our unconscious racism. Willful ignorance is defined, in part, by the investment its bearer has in it; clearly, avoiding judicial sanction for racial discrimination makes one's investment in ignorance even stronger than it already is (i.e., as a means of evading others' disdain and one's own feeling of guilt). By keeping us ignorant – by insisting, in Lawrence's words, "that we participate in [a] fantasy" – the Court appears to be doing us the favor of keeping us innocent. As we'll soon see, this favor comes at great cost. Not only is our innocence a fiction; it's a fiction that rears its head again in the colorblindness doctrine, where, bolstered by its affirmation in the intent doctrine, it wreaks still more damage to the constitutional mandate of equal protection of the laws.

II. JUDICIAL IGNORANCE AND THE INTENTIONAL DISCRIMINATOR

Blind and naked Ignorance
Delivers brawling judgments, unashamed . . .

Alfred Lord Tennyson, *Idylls of the King* 99

It has been argued that a discriminatory purpose standard *per se* need not pose any problem for minority interests. Girardeau Spann notes that "the concept of intent can mean [conscious] purpose, or it can mean toleration of known effects, or it can mean knowing toleration of ignorance about likely effects." As this definitional spectrum indicates, sometimes there's but a fine line separating an intent test from an effects test. Interestingly, it was with this knowledge that Justice Stevens joined the majority in *Washington v. Davis*. "Frequently," he wrote, "the most probative evi-
vidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor. For normally the actor is presumed to have intended the natural consequences of his deeds.\footnote{101}

Thinking along with Justice Stevens, David Strauss suggested a “reversing the groups” test to implement the intent requirement, where a court would ask whether a governmental decision would have been different had the adverse effects fallen on whites rather than blacks.\footnote{102} This test articulates a standard that remains true to the spirit of the Equal Protection Clause and, as Strauss pointed out, resonates with our common understandings of discrimination (i.e., “You wouldn’t have rejected that applicant if he had been white.”).\footnote{103} Moreover, and most importantly in light of the critique of ignorance elaborated in Part One, a “reversing the groups test” would reach both conscious and unconscious discrimination.\footnote{104}

The Court has not embraced a “reversing the groups” test and has actually gone far in the opposite direction, making the standards for establishing discriminatory purpose more stringent than might have been predicted from the standpoint of Davis. In Arlington Heights, the Court set forth high evidentiary requirements focusing on factors like the particular sequence of events leading up to the challenged practice or decision, deviations from standard decision-making procedures, and departures from substantive factors normally taken into account. “Without purporting to be exhaustive,” these were, said Justice Powell, the “subjects of proper inquiry in determining whether racially discriminatory intent existed.”\footnote{105} As Kathleen Sullivan writes, the Arlington Heights decision “made clear that proving [an unconstitutional motivation] would not be easy.”\footnote{106}

In Personnel Administrator of Massachusetts v. Feeney, a 1980 gender-discrimination case upholding a Massachusetts law that granted a state-employment preference to the overwhelmingly male population of military veterans, the Court maintained, and on some readings raised, the high bar for discriminatory intent articulated in Arlington Heights. Although Massachusetts legislators must have been aware that this law would seriously hinder female participation in the upper levels of civil service employment, the Court held that this fact alone was inadequate to establish unconstitu-

\footnote{101. Washington v. Davis, 426 U.S. 229, 253 (1976). Here Justice Stevens cited to Gomillion v. Lightfoot, where the Court held that a local act altering the shape of a city from a square to a 28-sided figure, with the effect of removing from the city of all but four or five of its 400 black voters while not removing a single white voter, could be the basis of a valid equal protection claim. “The conclusion would be irresistible, tantamount for all practical purposes to a mathematical demonstration, that the legislation is solely concerned with segregating white and colored voters by fencing Negro citizens out of town so as to deprive them of their pre-existing municipal vote.” 364 U.S. 339, 341 (1960).

102. Strauss, supra note 66, at 956; see also Spann, supra note 21, at 62 (“a properly administered intent principle would require strict scrutiny of all legislation having a racially disparate impact, because mere legislative toleration of disparate impact can amount to . . . intentional discrimination.”).

103. Strauss, supra note 66, at 958.

104. Id at 960. The test recommended by Strauss “asks what the decision maker would have done in different circumstances. It does not matter whether the decision maker was aware that he would have acted differently had he been dealing with people of a different race or sex.”


106. Kathleen Sullivan & Gerald Gunther, Constitutional Law 772 (14th ed. 2001).}
tional intent: "discriminatory purpose . . . implies more than intent as volition or . . . awareness of consequences. It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." With more easily identifiable states of mind like volition explicitly rejected as adequate measures of intent, the current Court asks plaintiffs in equal protection suits to prove that governmental decision makers acted with the express purpose of injuring them based on their minority status - essentially "a legislative state of mind akin to malice."

What's interesting about all this, so far as this article is concerned, is how the Court arrives at such high intent standards. Palmer v. Thompson, which actually pre-dated Davis, is telling in this regard. Palmer involved an equal protection challenge to the decision of Jackson, Mississippi to close its swimming pools shortly after they had been ordered desegregated. The city justified the pool closings on the ground that they "could not be operated safely and economically on an integrated basis." The Court accepted the city's reason and found no violation, despite significant evidence to the contrary and despite the general, massive resistance throughout the South to judicially mandated integration. It may seem amazing that the Court took the city at its word in this case, but it did so, explained Justice Black, because "it is extremely difficult for a court to ascertain the motivation, or collection of different motivations, that lie behind a legislative enactment." Thus the Court can justify its high standards for a finding of invidious intent through a profession of its own ignorance, its own inability to know individuals' subjective intentions.

Justice Thomas wrote in Hunt v. Cromartie that "the task of assessing . . . motivation . . . is not a simple matter; on the contrary, it is an inherently complex endeavor." But even in the face of such difficulties, the Court is unwilling to sanction the sort of probing inquiry that might, in some cases, actually discover an actor's motivations. "Administrative and legislative history may be highly relevant," noted Justice Powell in Arlington Heights, but "judicial inquiries into legislative or executive motivation represent a substantial intrusion into the workings of other branches of government. Placing a decisionmaker on the stand is therefore . . . to be avoided."

We're left with an intent standard that is, as Lawrence writes, "a motive-centered doctrine of racial discrimination [that] places a very heavy, and often impossible, burden of persuasion on the wrong side of the dispute." Why is the burden "heavy and often impossible"? The answer, says Lawrence, is remarkably straightforward: "Improper motives are easy to hide." Where the original choice of an intent requirement privileges

108. Siegel, supra note 10, at 1135.
110. Id. at 225.
111. Id. at 224.
114. Lawrence, supra note 70, at 319.
115. Id.
the unintentional discriminator, who is unconsciously racist, the extremely high intent standards privilege the intentional discriminator, who is quite consciously racist. Just as the choice of an intent standard creates an incentive for some discriminators to remain ignorant of their racism, the Court's profession of its own ignorance creates an incentive for other discriminators to hide the consciously racist grounds for their decision-making. When an alternative standard like volition exists as a legitimate measure of the judicially mandated intent requirement, the Court's admission of its ignorance and the standards that result from that admission must be understood for what they are: a license to lie.\footnote{116}

First it should be noted that discriminators do lie—and, more specifically, that white Americans lie quite frequently about their attitudes about and behaviors toward black Americans. In interracial contexts, many whites "avoid acting in [ways] they feel to be blatantly racist,"\footnote{117} and many would probably agree (even sympathize with) the statement that "a lot of whites still . . . say the right [things] at the right times, but behind closed doors or with their friends . . . they will be extremely bigoted."\footnote{118} This distinction between "frontstage and backstage" actions was drawn decades ago in sociologist Erving Goffman's classic research into prejudice and stigma,\footnote{119} and it has been subsequently confirmed by numerous researchers. While most surveys show significant, but also significantly declining, racist attitudes among whites,\footnote{120} these results are dubious because respondents very often lie in order to spare themselves the embarrassment of being considered racist, even in otherwise confidential testing situations. This dishonest tendency has been documented, for example, by a series of experiments in which white subjects were asked for their views on black Americans, with 50% of the participants hooked up to what they believed was a lie-detector device. Not surprisingly, the whites who thought they were being monitored for truthfulness admitted to far more racist attitudes than those who did not.\footnote{121} A similar study showed that white subjects who had taken a written test measuring their perceptions of blacks gave much harsher answers (meaning they told the truth more often) when answering the same questions orally, hooked up to the phony lie-detector.\footnote{122}

To what extent are findings of whites' propensity to lie about racist impulses, beliefs, and motivations transposable to the contexts of legislation and other state decision-making? I think there's good reason to suspect that conscious but well-hidden racism remains a basis for some
contemporary policy choices. Why should we imagine that lawmakers and law enforcers – think here of, say, the Los Angeles Police Department – are significantly more enlightened on racial issues than the populations they serve? Spann effectively argues that the Supreme Court has proven itself a highly majoritarian institution, reflecting the logic and prejudices of the American mainstream. This correlation is likely to be even stronger for elected representatives and low-level state actors. Political actors are simply more likely than most Americans to keep their racism hidden, given that they are public figures who must pay particular attention to what passes their lips.

Sometimes, though, politicians and officials slip and say something that betrays profoundly racist sentiment. My guess – and I don’t think it’s a stretch – is that such blunders normally reflect consciously and deeply held beliefs, ones that are probably shared by any number of other state actors and are sometimes central to those actors’ decision-making. As Michael Brown and colleagues write, “putative nonracists” often sound and act like racists. They cite Trent Lott – the former Senate majority leader – as one politician who lets his conscious racism out of the closet with audacious frequency:

Until recently, [Lott was] closely associated with the Council of Conservative Citizens, a right-wing, prowhite political group. Before the Washington Post exposed this group’s racist views, Lott told its members, “The people in this room stand for the right principles and the right philosophy.” This was not the first nor the last time Lott . . . blurred the distinction between conservatism and not-so-subtle racist appeals . . . [A] later statement cost him his position as Senate majority leader. “I want to say this about my state,” Lott said, at a celebration of Senator Strom Thurmond’s one hundredth birthday . . . “[When Thurmond] ran for president we voted for him. We’re proud of it. And if the rest of the country had followed our lead, we wouldn’t have had all these problems over all these years, either.”123

Now, Thurmond “left little to the imagination” in his 1948 campaign against Truman: “On the question of social intermingling of the races,” he declared, “we draw the line. And all the laws of Washington and all the bayonets of the Army cannot force the Negro into our homes, into our schools, our churches and our places of recreation and amusement.”124

Or take John Ashcroft, former United States Attorney General, who defended the Confederacy in the pages of the Southern Partisan, which is touted as “the oldest and the leading neo-Confederate publication.”125 House Majority Leader Dick Armey and Senators Thad Cochran, Phil Gramm, Jesse Helms, and, of course, Trent Lott, have also contributed to the Southern Partisan. Or take Montana Senator Conrad Burns, who responded to the question, “How can you live back there [in Washington, D.C.] with all those niggers?” with “[It’s] a hell of a challenge.”126 So when Senator Burns votes with Senators Cochran, Gramm, Helms, and Lott to

124. Id.
126. BROWN ET AL., supra note 123, at 54.
abolish a program that helps businesses owned by minorities to compete for federally funded transportation, or when he votes against a minority set-aside program for federal construction contracts, or when he votes against a law that would enable prisoners appealing death penalty sentences to argue racial discrimination on the basis of often-gastly sentencing statistics, isn't the conclusion irresistible, in light of his statement on the difficulty of living in a city populated by "niggers," that some conscious racism is at play in those decisions?

I would tell anyone who’s incredulous about an active desire among state actors to harm black people and other racial minorities (and I have spoken to a number of such individuals) that he’s giving our elected and non-elected officials more credit than they deserve. I do think malice – of precisely the kind the Court has said constitutes intent for equal protection purposes – is alive and well in American government. The problem, again, is that it’s hard to see. Our understandable ignorance of what happens behind closed doors and in closed minds allows consciously racist motives to go undetected when laws, actions, and policies are given reasonable-sounding justifications that have nothing to do with race.\(^{127}\)

Words like “fair play” provide a useful and often credible cover for consciously racist ends. The problematic reality that “governmental officials will always be able to argue that racially neutral considerations prompted” an action is exacerbated by the fact that most state decisions are reached by multiple participants and are the result of “the interaction of a multitude of motives.”\(^{128}\) The Court’s malice-like definition of intent allows legislatures to enact racist laws and policies so long as their racist motivations are masked just enough to take advantage of the Court’s blindness to subjective states of mind. Unless a malicious intent to discriminate is evident in the law itself (which is extremely rare) or is explicit in the legislative history (also extremely rare), purposeful discriminators will profit from the Court’s ignorance. And in the extraordinary situation where a governmental decision can be traced to such motives and is therefore struck down, there remains under the Court’s current intent doctrine the possibility of making the same decision again while pointing to new, constitutionally legitimate aims.\(^{129}\)

I have already cited Palmer, the Mississippi swimming-pool case, as an example of how judicial ignorance functions as a boon to what look like very purposeful discriminators. Lawrence posits that Arlington Heights – which unlike Palmer was decided after Davis’s explicit enunciation of an intent requirement – might also be seen in this light. In Lawrence’s account, the defendants might have claimed that they refused the zoning permit for low-income housing in order to keep property values up, but their

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\(^{127}\) Id at 55. “... One cannot assume, as all too many... do, that opposition to affirmative action is based entirely on the principles of fair play and individual merit. Much of the opposition is based on resentment toward blacks.”

\(^{128}\) Lawrence, supra note 70, at 319.

\(^{129}\) Justice Black predicted this very possibility in Palmer v. Thompson: “[t]here is an element of futility in a judicial attempt to invalidate a law because of the bad motives of its supporters, [because] if the law is struck down for this reason... it would presumably be valid as soon as the legislature or relevant governing body repassed it for different reasons.” 403 U.S. 217, 225 (1971).
fear about property values was not based merely on the introduction of poor people into their neighborhoods, but on the introduction of poor *black* people into their neighborhoods. Lawrence argues that such a scenario, where a city seeks to achieve an otherwise legitimate economic purpose by excluding black people, as such, is the analytical equivalent of a different scenario where there is “a classification by race on the face of the statute for which a legitimate goal is claimed.” However, the high evidentiary requirements for intent practically ensure that even a decision whose justification is only once-removed from racist motivation will meet the required standard.

The Court’s profession of ignorance of subjective mental states is, I suppose, a generally accurate assessment of its own real limitations. It’s not the confession of blindness that is troubling, but the malice-as-intent standard – or, still more fundamentally, the intent standard itself – that forces the Court to make the confession in the first place. Nonetheless, it seems that in certain particularly egregious decisions, the Court’s blindness is powerfully willful, assiduously self-imposed. *McCleskey v. Kemp* may be the paradigmatic case where the Court’s purported inability to know reaches nearly unbelievable proportions. *McCleskey* involved a statistical study, undisputed so far as the Supreme Court was concerned, indicating that murder convicts in Georgia were 4.3 times more likely to receive the death penalty if their victims were white than if their victims were black, and that black convicts were 1.1 times more likely to be sentenced to death than white convicts. The inevitable conclusion to be drawn from these data was, as Spann writes, that the Georgia jury, “like the population at large,... undervalues the lives of blacks to such an extent that it makes the deterrent and retributive protection of the criminal law four times more available to white citizens than it does to black citizens.”

Justice Powell’s majority opinion in *McCleskey* is paean to the jury system and the wide latitude for discretion that juries are traditionally allowed. (To be fair, it’s likely that juries’ racially disproportionate application of the death penalty resulted more from unconscious than conscious racism, which would automatically disqualify it under *Davis* from consideration as an equal protection violation.) The Powell opinion in *McCleskey* also inquires into the motives of the Georgia legislature, asking whether the state’s death penalty statute was adopted in order to kill black people specifically. Not surprisingly, the Court found no such intention.

Given the difficulties of pinning the equal protection violation on either juries or lawmakers, Justice Marshall’s dissent focuses on the role of state prosecutors, who decide whether or not to seek the death penalty. The study at issue found that prosecutors sought the death penalty in 70% of the cases involving black defendants and white victims; 32% of the cases involving white defendants and white victims; 15% of the cases involving black defendants and black victims; and 19% of the cases involving white

130. Lawrence, *supra* note 70, at 348.
132. Spann, *supra* note 21, at 30. The Court characterized the findings differently: “At most, the ... Baldus study indicates a discrepancy that appears to correlate with race.” *Id.* at 312.
defendants and black victims. Justice Marshall emphasized that the plaintiff handily "established that the race of the victim is an especially significant factor at the point where the defendant has been convicted of murder and the prosecutor must choose whether to proceed to the penalty phase of the trial and create the possibility that a death sentence may be imposed or to accept the imposition of a sentence of life imprisonment." Marshall also alluded to the testimony of a representative from the Georgia prosecutor’s office, who listed "the likelihood that a jury would impose the death sentence" among the factors taken into account in deciding whether to seek that severest penalty. These authoritative pieces of evidence are, says Marshall, "ignored by the Court." Justice Brennan’s dissent lamented, in a similar vein, that "the considerations . . . the majority invokes to discount [the] evidence cannot justify ignoring its force," and Justice Blackmun protested that "McCleskey’s evidence confronts us with the subtle and persistent influence of the past, . . . [and] we ignore him at our peril." Justice Powell and the four who joined his opinion claimed that the answer to whether purposeful discrimination entered the deliberations leading to McCleskey’s death sentence was “unknown and perhaps unknowable.” The dissenters respond that if the Court can’t know in this case, the Court mustn’t be able to know anything.

III. THE MOST WILLFUL BLINDNESS

History in [Walter] Benjamin’s reflections is related not just to the structure of a trial but, more radically, to “Judgment Day”: the day on which historical injustice will be canceled out precisely through the act of judgment; the day on which justice and memory will coincide (perhaps the day on which the court will be redeemed from its inherent political forgetfulness).

Shoshana Felman, The Juridical Unconscious

A colorblind Constitution is understood by the current Court to mandate the strictest scrutiny of all racial classifications, regardless of whether they are intended to benefit or disadvantage minorities. Controversy over this interpretation is most audible in the affirmative action debate, where proponents of the practice insist that the guarantee of equal protection should not render presumptively invalid color-conscious measures that the majority imposes upon itself. Under one common interpretation of the Fourteenth Amendment, classifications based upon criteria like race are presumptively unconstitutional because minorities require special protection against otherwise unbridled legislative majorities with whom coalition

133. It is remarkable, and notable for our discussion of willful blindness, that these statistics were recited in the majority opinion, as well as the dissenting opinion of Justice Marshall. McCleskey v. Kemp, 481 U.S. 279, 287 (1987).
134. Id. at 355.
135. Id. at 358.
136. Id. at 351 (emphasis added).
137. Id. at 322 (emphasis added).
138. Id. at 344 (emphasis added).
140. Felman, supra note 1, at 14.
is unduly hindered by irrational prejudice.\textsuperscript{141} Strict scrutiny in such cases is intended to correct a process defect that simply does not exist when, for example, a predominantly white State Board of Regents, acting as the representatives of a predominantly white population, imposes an affirmative action program in the universities it runs.

As we saw earlier, the play of ignorances in intent doctrine is stunning and complex, and always to the disadvantage of blacks. The presence and function of ignorance in colorblindness doctrine is more straightforward. Nonetheless, some readers might find counterintuitive the notion that colorblindness constitutes (or, more accurately, is constituted by) ignorance. As Gary Peller has shown, the dominant liberal vision of American race politics equates color-consciousness with racism, and both color-consciousness and racism are equated with ignorance.\textsuperscript{142} Peller writes that the "integrationist ideology" implicit in \textit{Brown} and subsequently championed by race-liberals fighting the segregationist ideology of conservatives "identifies progress with the transcendence of . . . racial consciousness."\textsuperscript{143} The progress narrative of liberal race ideology moves "from an ignorant time when racial status was taken to signify real and meaningful differences between people, to the present, enlightened time, when race properly is understood . . . not to make a difference except as [a vestige] of unfortunate historical oppression."\textsuperscript{144} Peller identifies liberal notions of prejudice, discrimination, and segregation as embodiments of "the central aspect of racism – the distortion of reason through the prism of myth and ignorance."\textsuperscript{145} Naturally, then, "knowledge" derived from interracial interactions is understood within this paradigm as the opposite of "the ignorance that appears as racism."\textsuperscript{146}

Our everyday understanding of colorblindness as racism's opposite is reflected in statements like "I don't think of you as black" and, still more obviously, "whether they were black, pink, or purple . . . I don't think there's much difference . . ."\textsuperscript{147} Certainly such proclamations are well-intentioned, but there is reason to doubt both their honesty and their efficacy in dealing with racism. As for their honesty, Joe Feagin's studies show that the same people who profess colorblindness are actually not so colorblind at all and know that society isn't either.\textsuperscript{148} Colorblindness, thus exposed, is one of what Feagin calls "sincere fictions of the white self."\textsuperscript{149} As for its

\textsuperscript{141} \textsc{John Hart Ely, Democracy and Distrust: A Theory of Judicial Review} (1980).
\textsuperscript{143} \textit{Id.} at 760.
\textsuperscript{144} \textit{Id.} at 764 (emphasis added).
\textsuperscript{145} \textit{Id.} at 768.
\textsuperscript{146} \textit{Id.} at 768-69.
\textsuperscript{147} Excerpts from a white business executive's articulation of his personal views on the relevance of race, quoted in \textsc{Joe R. Feagin & Eileen O'Brien, White Men on Race: Power, Privilege, and the Shaping of Cultural Consciousness} 73 (2003). As Feagin and O'Brien write, "The phrase 'whether they were black, pink, or purple' is a common indicator of colorblind discourse, which interestingly mixes a category of real racial significance in society (black) in the same list with meaningless categories that do not signal real racial realities (pink and purple)."
\textsuperscript{149} The naming of nonracial categories (green and purple seem to be favorites in such lists) is common among many whites who comment on how they see racial matters in
efficacy, I would compare colorblindness rhetoric to our nearly universal opposition to slavery or lynching, as interpreted by Reva Siegel. Oft-repeated condemnations of these practices are "presumably intended to bind Americans ever more closely to principles of equality, [but they] may have just the opposite effect. We have demonized subordinating practices of the past to such a degree that [such condemnations] may instead function to exonerate practices contested in the present." 150 Correspondingly, color-consciousness is so associated with the past practice of segregation, rightly demonized, that we have adopted a rule of colorblindness so strict that its effects are akin to those of segregation.

There is a sense in which colorblindness, especially on the level of actual, personal relations, is patently racist. A profession of colorblindness, as Peller demonstrates, does not simply mean that the speaker thinks a person's worth or dignity has no relation to the color of her skin; the imperative of colorblindness often connotes a denial that race matters in any sense at all, that there's no point in talking about race-related issues or, as the colorblind person might put it, talking about "general" (perhaps class-based?) issues "in terms of" race. This is a new phenomenon. Howard Winant notes that in the past half-century we have developed "two ways of looking at race," whereas in the past there was just one. Before World War II, there was universal agreement around the existence of racial subordination, and the burning issue was whether that subordination was justified; today, the debate is about whether there's subordination in the first place: 151 "the very idea that 'race matters' is something which today must be argued, something which is not self-evident." 152

Patricia Williams has offered a more specific description of how a culture of colorblindness very directly supports racial subordination. In a society where racial difference is not something you're supposed to acknowledge, you find, for example, that residents of a middle-class black neighborhood will oppose a proposal to name a street in their town "Martin Luther King Boulevard" - not just from the stigma that will result from the presumption that the neighborhood residents are black, but from their own anxiety over the unconcealed color-consciousness of pride in the most celebrated hero of black American history: 153

It seems to me that the "stigmatum" of "Dr. Martin Luther King Boulevard" . . . is reflective of a deep personal discomfort among blacks, a wordless and tabooed sense of self that is identical to the discomfort shared by both blacks and whites in even mentioning words like "black" and "race" in mixed company. Neutrality is from this perspective a suppression, an institutionalization of psychic taboos as much as segregation.

the United States. Such artificial categories are a clear indicator of the sincere fiction of color-blindness. Yet the respondent himself then points out the contrast between his color-blind . . . ideals and the harsher societal reality, when the interviewer asks him about how society really works. Even some who employ color-blind imagery realize that it often does not reflect everyday reality.

Feagin & O'Brien, supra note 147, at 73; see also Feagin et al., supra note 117, at 186.

150. Siegel, supra note 10, at 1113.


152. Id. at 88.

was the institutionalization of physical boundaries. What the middle-class, propertied, upwardly mobile black striver must do, to accommodate a race-neutral world view, is to become an invisible black, a phantom-black.\textsuperscript{154}

Having established that colorblindness is not necessarily the opposite of racism, we can better appreciate how colorblindness is, empirically, today, a manifestation of ignorance rather than a rejection of it. As an initial matter, let’s briefly examine the concept of colorblindness at face value. At the risk of being guilty of the same literal-mindedness that besets those who profess not to notice whether a person’s “black, white, green, or purple,” I will resort to another story narrated by Williams, one that exposes the willful and ultimately cruel ignorance that colorblindness can be. Williams describes the hiring troubles of Radio City Music Hall’s famous Rockettes who, after years of resisting integration out of concern for their hallmark symmetry, finally hired one black woman.\textsuperscript{155}

At the time of Williams’ writing, this woman still had not performed and was waiting in the wings, “on call for vacancies,” but Williams was troubled by the thought of the day this dancer would be introduced to the audiences of Radio City: “There are infinite ways to get a racially mixed lineup to look like a mirror image of itself. Hiring one black, however, is not the way to do it. Hiring one and sticking her third to the left is a sure way to make her stick out... and the imprecision of the whole line will devolve upon her. \textit{Hiring one black dancer and pretending that her color is invisible is “... an absurd type of twisted thinking, ... racism-in-drag.”}\textsuperscript{156}

It’s our fantasy of colorblindness – the flight of the imagination that we really could put race out of our minds – that puts an unreasonable burden on the sole black Rockette and on her audience. Evidently, this fantasy is selective; the tokenism at play in Williams’s story is plainly color-conscious, but it’s premised on the assumption, which the Rockette managers have long known to be false, that color-consciousness will end there.

With her biting account of race and the Rockettes, Williams demonstrates that we are not, in an important sense, colorblind. But is our constitution? Is it always colorblind, or only sometimes? Despite the Supreme Court’s introduction in \textit{Grutter v. Bollinger} of the importance of “context” in equal protection review of race-based governmental action, it states in the same breath that “all governmental uses of race are subject to strict scrutiny.”\textsuperscript{157} This idea of the “colorblind Constitution” dates to the first Justice Harlan’s dissent in \textit{Plessy v. Ferguson},\textsuperscript{158} but a full majority of the Court did not settle on the principle until 1989 in \textit{Richmond v. J.A. Croson Co.}\textsuperscript{159} The doctrine is a purely judicial invention; not only did more than a century pass before it became constitutional law, the framers of the Fourteenth Amendment don’t appear to have intended such a reading.\textsuperscript{160}

\textsuperscript{154} Id. at 2140.
\textsuperscript{155} Id. at 2138.
\textsuperscript{156} Id. at 2137-38.
\textsuperscript{158} Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).
Somewhat astonishingly, given their ostensible preference for so-called originalist constitutional interpretation, Justices Scalia and Thomas have been the most absolutist proponents of colorblindness, although at least four other members of the current Court subscribe to a version of the principle that renders unconstitutional a considerable range of affirmative action policies.\textsuperscript{161} Perhaps the most uncompromising articulation of the colorblindness principle is found in Justice Scalia’s concurring opinion in \textit{Croson}:

\begin{quote}
I agree . . . that strict scrutiny must be applied to all governmental classification by race, whether or not its asserted purpose is “remedial” or “benign.” . . . I do not agree . . . [that] state and local governments may in some circumstances discriminate on the basis of race in order . . . “to ameliorate the effects of past discrimination.” . . . The difficulty of overcoming the effects of past discrimination is as nothing compared with the difficulty of eradicating from our society the source of those effects, which is the tendency . . . to classify and judge . . . on the basis of . . . country of origin or [skin color]. . . . Only a social emergency rising to the level of imminent danger to life and limb – for example, a prison race riot, requiring temporary segregation of inmates . . . – can justify an exception to the principle embodied in the Fourteenth Amendment that “[o]ur Constitution is color-blind.”\textsuperscript{162}
\end{quote}

In this section, I will show how Williams’ story of a perversely integrated Rockettes kick line is the physical embodiment of Justice Scalia’s meticulously colorblind interpretation of the Equal Protection Clause. The literally willful blindness exposed by Williams in the context of Radio City Music Hall has its doctrinal and theoretical equivalents in the similarly pernicious, but much more indelible, willful ignorances of the Supreme Court’s colorblindness jurisprudence.

The myth of colorblindness derives from deeper forms of cultural blindness or, as Shoshana Felman would call them, “culture’s blind spots.”\textsuperscript{163} My analysis of the Court’s affirmative action jurisprudence owes much to Felman’s brilliant take on the O.J. Simpson and Rodney King trials, which she considers counterparts in their respective expositions of things that still go willfully unseen in contemporary America. Both events, she writes, were “about a beating – and about an unseen beating, about an inexplicable, recalcitrant relation between beating and blindness, beating and invisibility, and invisibility that cannot be dispelled in spite of the most probatory visual evidence.”\textsuperscript{164} The evidence to which Felman refers, of course, is the image of Nicole Brown Simpson’s horrifically bruised face

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\footnote{161. See Gratz v. Bollinger, 123 S.Ct. 2411 (2003) (striking down the affirmative action policy of the College at the University of Michigan); Justices Kennedy, O’Connor, Scalia, and Thomas all joined the Chief Justice’s majority opinion, while Justice Breyer wrote his own concurring opinion and joined that of Justice O’Connor.}

\footnote{162. Richmond v. Croson, 488 U.S. 469, at 735-36 (Scalia, J. concurring) (citations omitted) (emphases added).}

\footnote{163. \textit{Felman}, supra note 1, at 79.}

\footnote{164. \textit{Id.} at 82}
\end{footnotes}
and the shocking videotape of Rodney King's ghastly beating by police. These judicial failures to see the obvious, to acknowledge "the very blows that inflict trauma," in turn produce verdicts that are themselves "traumatic in that they deny, in fact, the very trauma that the trial was supposed to remedy." Felman understands these failures of sight as willful, purposeful, selective, and racialized. And she concludes, ultimately, that what the juries fail to see in both cases is not just violence in the literal sense, but "hate (hate for women [Brown Simpson], hate for blacks [King])."

The affirmative action trials that have come before the Court (even those that uphold the contested program) are uncanny parallels of the trials analyzed by Felman. Their shared insistence upon colorblindness contains within it judicial manifestations and validations of blindesses—hate-based blindesses—that are deep and catastrophic limitations on the American psyche. This section examines, first, the Court's willful blindness to present reality and, second, its willfully amnesiac ignorance of history, both of which are reflected in the constitutional doctrine of colorblindness, and both of which reproduce the very traumas that affirmative action programs (if we were honest about them) are meant to remedy. In Bakke, Croson, Adarand, Grutter, and Gratz, if we read them right, we can see America's blind spots.

A. (Color)Blindness to Reality

T. Alexander Aleinikoff and John Garvey point out that, even if we understand the Equal Protection Clause to mean that "[t]he laws shall treat all people alike," no one would seriously contend, for instance, that there's any "constitutional harm in denying drivers' licenses to persons under 16." Therefore the provision might be more accurately read as requiring that "[p]eople who are alike (in whatever way matters) shall be treated alike by the laws." The constitutional doctrine of colorblindness is premised upon the idea that blacks and whites are alike in all the ways that constitutionally matter. This notion of sameness is a serious case of willful ignorance—here one is reminded of Anatole France's observation that "the law in its majestic equality forbids the rich and the poor alike from sleeping under bridges"—and this ignorance has resulted in a begrudging and disabled Fourteenth Amendment with regard to black Americans.

There is another ignorance, this one quite literal, that allows the sameness notion to thrive among whites—namely, their ignorance of blacks. This phenomenon is nicely illustrated in the recollections of a successful white businessman interviewed by sociologists Joe Feagin and Eileen O'Brien. Asked about his first contact with a black person, the subject answered with a story that will be familiar to many white readers:
I got to be almost in college . . . where I really started to come across black people for the first time. It was almost as if, you know, we were totally segregated from them. . . . I think the first black person I remember was when I worked in [names store] and he was a salesman inside, just an everyday type of person, but I was never, even to this day, confronted with face-to-face living conditions, working conditions, with people from cultures other than white. I have basically been immune from that, so it's, so it's almost like ignorance.  

*Almost* like ignorance? Compared to other racial groups in the United States, whites live in striking isolation from people who are different from them. By some accounts, residential segregation in this country is worse than when formal segregation was still in place. When researchers from the *New York Times* did field research in and around Chicago, a city whose neighborhoods and suburbs know intense racial segregation, many whites were found to be living their entire lives “without ever getting to know a black person.” The reverse, however, was very rarely true; the vast majority of blacks necessarily interacted with whites a great deal. Hence an important difference between whites’ fears and suspicions of blacks and blacks’ fears and suspicions of whites – the apprehensions of blacks were based on actual interaction, while the apprehensions of whites were based on a lack of interaction.

It should be remembered that white ignorance of black people, this simple lack of experience, not only fuels racism but is fueled by it. Segregation “is a basic part of the social process whereby systemic racism is reproduced from one generation to the next, [breeding] significant social and mental isolation.” A 1992 study of Detroit and its suburbs found that 40% of whites said they would be unwilling to move to an area where blacks constituted 20% of the population; 30% said they would feel uncomfortable living there; and 15% said they would try to move from the area if they lived there already. Were a neighborhood to be majority-black – 53% was the figure used – 71% of whites would not wish to move there, 65% would be uncomfortable, and 53% would try to leave. These astounding figures, remember, are based on what white respondents actually report; as we noted earlier, “stark disparities emerge” when sociologists compare what whites actually do with their professed self-expectations.

Whites’ very real ignorance of black Americans means that they generally lack a knowledge of “the objective conditions of life” for blacks and the “consciousness associated with those conditions” – elements of a “victim perspective” that Alan Freeman understands as vital to fair adjudica-

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170. Feagin & O'Brien, supra note 147, at 32 (emphasis added).
173. Most black Americans work, shop, or travel with large numbers of whites, whereas relatively few white Americans have such extensive interactions with large numbers of blacks. Feagin, supra note 171, at 132.
174. See Wilkerson, supra note 172.
175. Feagin, supra note 171, at 132.
177. Brown, supra note 75, at 526.
tion of minorities’ constitutional claims. To put it another way, whites’ ignorance of black people contributes to their ignorance of the realities of being black in the United States, a condition that allows for the myth of colorblindness to pervade whites’ understanding of race as well as the Supreme Court’s interpretations of the Equal Protection Clause.

The Plessy Court’s statement that racial segregation was a badge of inferiority only insofar as “the colored race chooses to put that construction upon it” is a stark example of the effect of reality-blindness on doctrinal interpretation. So, too, is Herbert Wechsler’s legendary argument, in much the same vein, that he could find no “neutral principle” to justify the Court’s decision in Brown. Wechsler, good liberal that he was, disdained racial segregation, but he was so ensconced in the formalist fantasy of “neutral principles” (colorblindness sounds like just such a fantasy, doesn’t it?) that he simply couldn’t see how the Equal Protection Clause mandated an end to the purely hypothetical regime of separate-but-equal. One way to explain Wechsler’s lack of imagination was his willful ignorance of both the “objective conditions” of segregation and the “consciousness associated with those conditions.” Charles Black argued in his famous reply to Wechsler’s article that the Warren Court, thank goodness, did not suffer from these deficiencies. He thought the answer to Wechsler’s conundrum was “awkwardly simple”: “The Equal Protection Clause of the Fourteenth Amendment should be read as saying that the Negro race, as such, is not to be significantly disadvantaged by the laws of the states . . . Segregation is a massive intentional disadvantaging of the Negro race, as such, by state law.” I think it goes without saying that if Wechsler were black (not just Charles Black) he probably would have come to the same conclusion.

Ignorance of blacks’ experiences contributes powerfully to the idea, central to colorblindness doctrine, that “we’re all alike” in the ways that are, or should be, legally relevant. Critical race theorists, however, have amply shown how this idea turns a defiant blind eye to the painful facts of real life. As Kimberlé Crenshaw says, a “belief in colorblindness . . . [makes] no sense at all in a society in which identifiable groups had actually been treated differently historically and in which the effects of this difference in treatment continued into the present.” One of the most insightful explanations of how blacks and whites are not “all alike” in ways that are constitutionally relevant is the theory, suggested by Derrick Bell and elaborated by Cheryl Harris, of a property right in whiteness. Their

178. Freeman, supra note 9, at 29.
179. Asked whether blacks’ quality of life had improved in the preceding decade, almost 60% of white Pennsylvanians said “yes” and less than 30% of blacks said “no.” Matthew P. Smith, Bridging the Gulf Between Blacks and Whites, Pittsburgh Post-Gazette, April 7, 1996, at A1.
central idea is that being white is a privilege of significant worth, whose benefits “whites have come to expect and rely on” and whose legitimacy has been “affirmed . . . and protected by the law.” While this property right was nearly explicitly recognized in Plessy v. Ferguson, Bell writes that today “the passwords for gaining judicial recognition of the still viable property right in being white include ‘higher entrance scores,’ ‘seniority,’ and ‘neighborhood schools’.” Ultimately, concludes Harris, “[w]hiteness – the right to white identity as embraced by law – is property if by property one means all of a person’s legal rights.” Thus affirmative action is, in light of the property right identified by Harris and Bell, a mechanism that “levels . . . racial privilege.”

Vada Berger, a white woman, recognizes the extent of her advantage over black women and men: “[E]very day of our lives,” she writes, “we whites benefit from [our] white privilege. This means we are enjoying benefits . . . not fairly ours, that we have not worked for and often do not need, at another’s expense.” Most whites, unfortunately, would not make the same confession. A 1997 ABC/Washington Post poll found that, while 44% of black Americans believe there is a lot of racial discrimination, only 17% of whites agree. A recent survey of Massachusetts residents found that a majority of white respondents think that racial minorities have the same life chances as whites, an opinion that is incontestably refuted by official government statistics.

To some extent, whites’ ignorance of their privilege is understandable; it’s said that the fish is the last to know it’s in water and, similarly, “those privileged by color . . . are often ignorant of the ways their liberty and choices are enhanced while those of people of color are diminished.” But there’s more to the denial than that. For a white person to acknowledge her skin color as a kind of property right means “recognizing significant racial disparities in the societal fabric,” an acknowledgement that, as Feagin and O’Brien write, undermines the very colorblindness regime that prevents the law from redistributing the “unearned advantages one receives solely by virtue” of whiteness. Thus an element of willfulness is inherent in whites’ ignorance of their privilege. Comedian Chris Rock put it best:

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185. Harris, supra note 184, at 1713. “Whiteness defined the legal status of a person as slave or free. White identity conferred tangible and economically valuable benefits and was jealously guarded as a valued possession, allowed only to those who met a strict standard of proof.” Id. at 1726.


187. Bell, Property Rights in Whiteness, supra note 184, at 77.

188. Harris, supra note 184, at 1726.

189. Id. at 1786.


194. Feagin & O’Brien, supra note 147, at 72.
"There ain't no white man in this room that will change places with me—and I'm rich... There's a one-legged busboy in here right now that's going 'I don't want to change. I'm gonna ride this white thing out and see where it takes me.'\footnote{See Brown et al., supra note 123, at 34.} \footnote{Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 327 (1978) (Blackmun, Brennan, Marshall, & White, JJ., dissenting).} \footnote{Measured by any benchmark of comfort or achievement, meaningful equality remains a distant dream for the Negro. A Negro child today has a life expectancy which is shorter by more than five years than that of a white child. The Negro child's mother is over three times more likely to die of complications in childbirth, and the infant mortality rate for Negroes is nearly twice that for whites. The median income of the Negro family is only 60% that of the median of a white family, and the percentage of Negroes who live in families with incomes below the poverty line is nearly four times greater than that of whites. When the Negro child reaches working age, he finds that America offers him significantly less than it offers his white counterpart. For Negro adults, the unemployment rate is twice that of whites, and the unemployment rate for Negro teenagers is nearly three times that of white teenagers. A Negro male who completes four years of college can expect a median annual income of merely $110 more than a white male who has only a high school diploma. Although Negroes represent 11.5% of the population, they are only 1.2% of the lawyers, and judges, 2% of the physicians, 2.3% of the dentists, 1.1% of the engineers and 2.6% of the college and university professors. Id. at 395-96, (Marshall, J., dissenting, citations omitted).} \footnote{Trying to salvage what she could from a majority opinion that adopted a highly formalistic understanding of colorblindness, Justice Ginsburg wrote that she applauded: the Court's recognition of the persistence of racial inequality and a majority's acknowledgment of Congress' authority to act affirmatively, not only to end discrimination, but also to counteract discrimination's lingering effects. Those effects, reflective of a system of racial caste only recently ended, are evident in our workplaces, markets, and neigh-

So whites and blacks are not "all alike." But the doctrine of colorblindness would suggest that they are, as the dissenters in the Supreme Court's first affirmative action decision protested. In Regents of University of California v. Bakke, the Court struck down a state school's use of racial quotas in its affirmative action admissions plan. While the majority of a very split court determined that no affirmative action program could withstand strict scrutiny with reparations as its justification, five Justices agreed that classroom and campus diversity were compelling enough interests to satisfy exacting equal protection review. Four members of the Court, however, thought "claims that law must be 'color-blind' or that the datum of race is no longer relevant to public policy must be seen as aspiration rather than as description of reality. . . . [W]e cannot . . . let colorblindness become myopia which masks the reality that many 'created equal' have been treated within our lifetimes as inferior both by the law and by their fellow citizens." \footnote{Where Charles Black argued, in defense of}
Brown, that the "purpose and impact of segregation . . . [were] matters not so much for judicial notice as for the background knowledge of educated men who live in the world," 199 Justices Marshall and Ginsburg have argued, in defense of affirmative action, that the realities which the Court ignores are or should be part of the background knowledge of any conscious American.

Alan Freeman has effectively argued that the Court’s blindness-through-colorblindness is racist – not just in effect, but in its very content and implications. Freeman asks us to imagine a nation that has achieved what all the Justices seem to agree is the American ideal: “the future society of racial irrelevance.” 200 In Freeman’s hypothetical, we discover in the future society conditions that might, in other contexts, be understood as a pattern of racial discrimination; one race tends to occupy the worst housing and the worst jobs, and it has the least control over society’s resources. “For such conditions to be fair and accepted as legitimate,” argues Freeman, “they would have to be perceived as produced by accidental, impartial, and neutral phenomena utterly dissociated from any racist practice.” 201 This perception is dangerously close to Lochner-era free-marketplace ideology, which Crenshaw acutely notes “constitutionalized [in Plessy] the massive inequality of separate-but-equal” and “is reincarnated in colorblind jurisprudence,” where it has the effect of representing “contemporary race hierarchy . . . as a natural outgrowth of cultural disability.” 202 In other words, if discrimination doesn’t explain current disparities, then there must be something about those blacks – they’re lazy, they’re stupid, they’re spoiled, or some such nonsense. It’s one or the other; we’re faced with a choice between a racist interpretation and an interpretation that accounts for racism.

Thus Freeman and Crenshaw expose how the doctrine of colorblindness, which makes colorblindness both an empirical approach and a normative goal, functions as a means of preserving racist perceptions of blacks. And here we see the link between the colorblindness doctrine adopted by the Supreme Court and, for example, the impression of a majority of whites that racial inequality in jobs, housing, and income stems not from discrimination, but from blacks’ lack of motivation. 203 When the Court ignores . . .

199. Black, supra note 182, at 426.
200. Freeman, supra note 9, at 35.
201. Id.
203. See Smith, supra note 179.
reality through colorblindness, it must take some responsibility for exacerbating the patently racist reality-ignorance of the American people.

B. Color(Blindness) to History

Justice Holmes believed that "history must be a part of the study [of law], . . . because it is a first step toward an enlightened skepticism, that is, toward a deliberate reconsideration of the worth of [the legal] rules." Film critic Joel Siegel believed that "some movies, like some farts, are so rank that you're left with only two options: pretending that they never happened or assaulting the perpetrators." I posit here that the constitutional rule of colorblindness warrants "deliberate reconsideration" in light of history, and that the historical amnesia evident in equal protection doctrine manifests a judicial tendency to pretend that the rankest of farts didn't happen. Like Kimberlé Crenshaw, I argue that it is largely through colorblindness -- "this ahistoricism, this willful inattention to the historical operations of white supremacy" -- that the Supreme Court and the American people wrongly presume "a discontinuity between past and present."206

The contemporary realities discussed in the previous section are, of course, intimately connected to historical realities. Justice Marshall's recitation in his Bakke dissent of then-current statistics on racial disparity was followed by the observation that "the relationship between those figures and the history of unequal treatment afforded to the Negro cannot be denied. At every point from birth to death the impact of the past is reflected in the still disfavored position of the Negro."207 Here Justice Marshall articulates the position of those who favor at least selective color-consciousness -- those who, as Peller explains, view race in the context of American history, "where racial identity was seen as a central basis for comprehending the significance of various social relations as they are actually lived and experienced, and within which the meaning of race was anything but symmetrical."208 Proponents of color-consciousness acknowledge what Neil Gotanda has called "historical-race," which gives substance to racial categories insofar as they embody historical racial subordination.209 This perspective is fundamentally at odds with the project of strict integrationists, mainly good white liberals who understand "race through the prism of universalism -- from within which race consciousness appeared arbitrary, irrational, and symmetrically evil whether practiced by whites or blacks."210

204. Oliver Wendell Holmes, The Path of the Law, 10 HARV. L. REV. 457, 469 (1897).
206. Crenshaw, supra note 202, at 281 (emphasis added). Elsewhere Crenshaw writes, "This belief in color-blindness and equal process, however, would make no sense at all in a society in which identifiable groups had actually been treated differently historically and in which the effects of this difference in treatment continued into the present." Crenshaw, supra note 183, at 1345.
208. Peller, supra note 142, at 791.
210. Peller, supra note 142, at 791. The color-conscious mechanism of affirmative action is, for most white liberals, an integrationist project. But this fact alone doesn't mean that these same proponents of affirmative action question the ultimate ideal of colorblindness. Affirmative ac-
Ignorance of America’s racial history and the reach of that history into the present is, it seems, a national epidemic.\textsuperscript{211} White school children may be taught to be ashamed of slavery, but very rarely are they taught that there is a connection between centuries of black bondage and the tremendous social and economic disadvantage of being black today. Instead Americans are being told precisely the opposite: “We all agree that slavery was evil, but the blood of slavery does not stain modern mainstream America.”\textsuperscript{212} Lamenting this amnesia as a major obstacle in the national dialogue on race, Patricia Williams writes that “[i]f we could press on to a conversation that takes into account the devastating legacy of slavery that lives on as a social crisis that needs generations more of us working to repair – if we could just get to the enormity of that unhappy acknowledgement, then that alone might be the source of a genuinely revivifying, rather than a false, optimism.”\textsuperscript{213} Unfortunately this acknowledgement becomes harder, not easier, to manage as Americans grow increasingly unfamiliar with the era of lynching and segregation and the intervention of the civil rights movement, firsthand and obvious lessons in slavery’s legacy. Indeed, one recent survey found that nearly two-thirds of white Americans don’t think that whites as a group have benefited from past or present discrimination against black Americans.\textsuperscript{214} If that’s not willful ignorance, I don’t know what is.

The Supreme Court has not always blindly reflected and indulged the nation’s historical amnesia with regard to race. Warren Court decisions like \textit{Brown} and \textit{Loving v. Virginia}, both of which invalidated laws that applied “equally” to both races, demonstrated a judicial refusal to ignore the obvious, present relevance of history. \textit{Brown} effectively overturned \textit{Plessy}, the case where the Court chose to define equality as no more than formally symmetrical treatment by “render[ing] the social, material context of segregation as well as its effects . . . private or unknowable.”\textsuperscript{215} But context is everything in \textit{Brown}, whose approach “begins and ends with historical fact.” The Court starts with a review of “the [Fourteenth] Amendment’s history with respect to segregated schools,” and proceeds to discuss the state of “Negro education” in both the North and the South in the aftermath of the Civil War, noting that in some areas “any education of Negroes was forbidden by law.”\textsuperscript{216} To properly determine whether “segregation . . . deprives [the] plaintiffs of equal protection of the laws,” the \textit{Brown} Court insisted that text could not be divorced from historical and present context, that “we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when \textit{Plessy v. Ferguson} was written. We must

\textsuperscript{211} James Baldwin wrote that this country’s “failure to face [its] genocidal history . . . has placed everyone now living into the hands of the most ignorant . . . people the world has ever seen.” James Baldwin, \textit{On Being ‘White’ . . . and Other Lies, in BLACK ON WHITE: BLACK WRITERS ON WHAT IT MEANS TO BE WHITE} 177 (David R. Roediger ed., Schocken Books 1998) (1984).
\textsuperscript{213} Patricia Williams, \textit{The Rooster’s Egg} 78 (Harvard University Press 1995).
\textsuperscript{214} Blendon et al., \textit{supra} note 191, at 67.
\textsuperscript{215} Crenshaw, \textit{supra} note 202, at 282 (emphasis added).
\textsuperscript{216} Brown v. Bd. of Educ. 347 U.S. 483, at 489-90 (emphasis added).
consider public education in the light of its full development and its present place in American life throughout the Nation." \(^{217}\) Brown is historical not only in its impact, but in its approach, which is why Shoshana Felman understands it to be one of the events that continued a novel and laudable twentieth-century trend, begun at Nuremberg, of putting history itself on trial. \(^{218}\) And in Loving, the Court was even more candid in its attentiveness to the historical contingency of Virginia’s purportedly race-neutral miscegenation law, which, “passed during [a] period of extreme nativism,” \(^{219}\) was “designed to maintain White Supremacy.” \(^{220}\)

The historical consciousness of the Warren Court was a short-lived moment in constitutional jurisprudence on race. The Burger Court’s ruling in Bakke (there was no majority decision, but Justice Powell’s opinion, which spoke only for himself, soon gained precedent-like stature) \(^{221}\) exemplified the amnesia that afflicts the contemporary Court. Though Powell’s Bakke opinion has been elaborated by a majority of the Court in the recent cases Grutter and Gratz, \(^{222}\) I focus here on Bakke because it set the tone and established the terms for constitutional evaluation of affirmative action programs in general and academic ones in particular.

The first matter of business in Bakke was deciding which level of scrutiny to apply to the admissions system used by the Medical School at the University of California at Davis. Those Justices who reached the constitutional question – four would have struck down the affirmative action program under Title VI \(^{223}\) – agreed that all race-based classifications, even if “benign” in intent, warrant the strictest scrutiny. But at the level of rhetoric, there were clear distinctions between Justice Powell and Justices Blackmun, Brennan, Marshall, and White. Powell justified the choice of strict scrutiny with the contention that there are “dozens of minority groups” that could “lay claim to a history of prior discrimination at the hands of the State and prior individuals.” \(^{224}\) He could find “no principled basis for deciding which groups would merit ‘heightened judicial solicitude’ and which would not.” \(^{225}\)

\(^{217}\) Id. at 492-93.

\(^{218}\) Until the middle of the twentieth century, a radical division between history and justice was in principle maintained. The law perceived itself either as ahistorical or as expressing a specific stage in society’s historical development. But law and history were separate. The courts sometimes acknowledged that they were part of history, but they did not judge history as such. This state of affairs has changed since the constitution of the Nuremberg tribunal, which . . . for the first time called history itself into a court of justice. . . . Not only has it become thinkable to put history on trial, it has become judicially necessary to do so.

Felman, supra note 1, at 11.

\(^{219}\) Loving v. Virginia, 388 U.S. 1, 6 (1967).

\(^{220}\) Id. at 11.

\(^{221}\) Justice O’Connor noted, “Since this Court’s splintered decision in Bakke, Justice Powell’s opinion announcing the judgment of the Court has served as the touchstone for constitutional analysis of race-conscious admissions policies. Public and private universities across the Nation have modeled their own admissions programs on Justice Powell’s views on permissible race-conscious policies.” Grutter v. Bollinger, 123 S.Ct. 2325, 2336 (2003).


\(^{224}\) Id. at 297 n. 36, 296 (Powell, J.).

\(^{225}\) Id. at 294-6 (Powell, J.).
The concurring-dissenting Justices, on the other hand, thought it “necessary to define with precision the meaning of that inexact term, ‘strict scrutiny’.”\textsuperscript{226} They reasoned that strict scrutiny in race cases entails “a number of considerations,” resembling, but more forceful than, those identified in gender-discrimination cases.\textsuperscript{227} Such considerations, they said, would more than sufficiently deal with claims to “heightened judicial solicitude” by various ethnic groups. With an eye on history, these Justices predicted that a demand by German-Americans for preferential treatment “would create [a] relatively simple problem for the Court.”\textsuperscript{228}

It was Justice Marshall’s solo opinion in \textit{Bakke} that most aggressively challenged the willful ahistoricism of Justice Powell’s floodgates justification for applying strict scrutiny: “The experience of Negroes in America has been different in kind, not just in degree, from that of other ethnic groups. It is not merely the history of slavery alone but also that a whole people were marked as inferior by law. And that mark has endured. The dream of America as the great melting pot has not been realized for the Negro; because of his skin color he never even made it into the pot.”\textsuperscript{229}

The next constitutional question in \textit{Bakke} was whether the Medical School’s admissions program could withstand strict scrutiny. The most intuitively compelling justification for affirmative action – remediying the effects of past societal discrimination – was not, in the view of Justice Powell, constitutionally satisfactory: Couldn’t almost any group make a claim to reparations?\textsuperscript{230} He determined that a school could use affirmative action either to compensate for its own well-documented past discrimination or to foster diversity within the student body.\textsuperscript{231} And so it is the diversity rationale – the justification most divorced from history, most divorced from any desire to improve the present condition of blacks, and most related to the quality of education afforded predominantly white student bodies – that saved affirmative action at the University of California and the rest of America’s universities. Last year a majority of the Court affirmed this justification as constitutionally acceptable, and by that time no one even dared to whisper the word “reparations” or its less provocative euphemisms.\textsuperscript{232}

Remediying the effects of past societal discrimination was clearly, in the eyes of the four concurring-dissenting Justices in \textit{Bakke}, a constitutionally legitimate justification for the affirmative action plan at issue. In light of American history – legal and political, social and economic – they could not see how the University of California could not “conclude that the serious and persistent underrepresentation of minorities in medicine . . . is the result of handicaps under which minority applicants labor as a consequence of deliberate, purposeful discrimination against minorities in education and

\textsuperscript{226} \textit{Id.} at 357 (Brennan, White, Marshall, Blackmun, JJ., dissenting).
\textsuperscript{227} \textit{Id.} at 359.
\textsuperscript{228} \textit{Id.} at 358 n.35.
\textsuperscript{229} \textit{Id.} at 400-01 (Marshall, J., dissenting).
\textsuperscript{230} \textit{Id.} at 295, n. 34.
\textsuperscript{231} \textit{Id.} at 307-09. 311-20.
\textsuperscript{232} \textit{See} \textit{Grutter v. Bollinger}, 123 S.Ct. 2325, 2348 (2003). Diversity was the only rationale offered by the University of Michigan Law School to justify its use of affirmative action in admissions.
in society generally,” discrimination to which blacks, in particular, have been subjected “from the inception of our national life.”

To Justice Marshall, affirmative action as a constitutionally valid remedy for past societal discrimination was practically self-evident if one did not forget history and the Court’s role in history, but instead “remembered that, during most of the past 200 years, the Constitution as interpreted by this Court did not prohibit the most ingenious and pervasive forms of discrimination against the Negro.” Marshall’s opinion recounted a “history . . . perhaps too well-known to require documentation,” but his first footnote acknowledged the great historians upon whose work he relied: John Hope Franklin, Richard Kluger, and C. Vann Woodward. He went on to summarize 350 years of American racism: the middle passage (“the Negro was dragged to this country in chains”); slavery (“thrust into bondage for forced labor . . . [the slave] could be sold away from his family and friends at the whim of his master; and killing or maiming him was not a crime”); the beginning of the Jim Crow era (“first steps to re-enslave the Negroes”); the flowering of segregation (quoting Woodward, even “a Jim Crow Bible for colored witnesses to kiss”); and the contemporary plight of the black American (“the tragic but inevitable consequence of centuries of unequal treatment”). This is the history to which Justice Powell is willfully blind: “I do not believe,” wrote Marshall, “that anyone can truly look into America’s past and still find that a remedy for the effects of that past is impermissible.”

The strict rule of colorblindness has not only obscured the Court’s obstinate ignorance of history in its choice of “the most searching scrutiny” for benign racial classifications and its rejection of a reparations-based justification for affirmative action. Historical amnesia manifests once more in the standards set by the Court for a finding of past discrimination with regard to a particular actor, institution, or industry, which is, aside from diversity, the only constitutionally acceptable rationale for an affirmative action program. These standards were rigidly enunciated in Richmond v. J.A. Croson Co., where the Court struck down the Virginia capital’s requirement that at least 30% of its construction contracts be granted to minority business enterprises. The Court’s neglect of historical reality in Croson is blindness at its most willful, as many commentators have skillfully and scathingly demonstrated. The Croson opinion is the judicial equivalent of the opinion among white Americans, cited earlier, that whites have not benefited from past or present discrimination against blacks.

Writing for a plurality of the Court, Justice O’Connor succinctly reviewed and rejected the evidence set forth by the City of Richmond to justify its use of a racial quota for construction contracts:

234. Id. at 387 (Marshall, J., dissenting).
235. Id. at 388 n.1.
236. Id. at 387-95.
237. Id. at 402 (emphasis added).
240. See Blendon et al., supra note 191, at 178.
The District Court relied upon five predicate ‘facts’ in reaching its conclusion that there was an adequate basis for the 30% quota: (1) the ordinance declares itself to be remedial; (2) several proponents of the measure stated their views that there had been past discrimination in the construction industry; (3) minority businesses received 0.67% of prime contracts from the city while minorities constituted 50% of the city’s population; (4) there were very few minority contractors in local and state contractors’ associations; and (5) in 1977, Congress made a determination that the effects of past discrimination had stifled minority participation in the construction industry nationally.

None of these ‘findings,’ singly or together, provide the city of Richmond with a strong basis . . . for its conclusion that remedial action was necessary.241

It is interesting to note how Justice O’Connor’s placement of quotation marks around the words “facts” and “findings” functions much in the same way, so wonderfully articulated by Eve Sedgwick, as Justice White’s use of the word “facetious” in his Bowers v. Hardwick opinion – namely, “as a switch point for the cyclonic epistemological undertows” that permit five powerful (white) people to determine what constitutes fact and what, in Justice O’Connor’s implication, constitutes fiction or is, at best, irrelevant.242 Her choice of punctuation impugns not only the facts, but also the integrity of the advocates presenting them. In order for the Court to not believe its eyes, it evidently must go out of its way to disbelieve those who can see.

In Bowers, Justice Blackmun responded to Justice White’s contemptuous opinion by calling it an example of “the most willful blindness.”243 Justice Marshall performs a similar role in Croson. “The majority,” he wrote, “takes an exceedingly myopic view of the factual predicate on which the Richmond City Council relied” when it passed the set-aside plan; “[t]o suggest that the facts . . . do not provide a sound basis for its finding of past racial discrimination simply blinks credibility.”244 At one point in the opinion, O’Connor seriously (seriously?) suggests that the reason less than 1% of Richmond’s construction contracts were given to black-owned enterprises, though blacks constituted a majority of the city’s population, might be that construction just isn’t a business blacks are interested in pursuing.245 The difference between the races here is one of temperament only, not status, not wealth, not access, not experience of the world. Like the Lochner Court’s insistence that bakers “freely” chose to work shifts of more than ten hours, the court here “feigns ignorance,” as Crenshaw puts it, of centuries of coercion that have kept blacks out of this highly profitable line of work.246

As Thomas Ross contends, the Justices in Croson “dispute whether . . . history is legally relevant.” Justice O’Connor’s opinion explicitly rejects

242. SEDGWICK, supra note 2, at 6.
245. “The 30% quota cannot be said to be narrowly tailored to any goal, except perhaps outright racial balancing. It rests upon the ‘completely unrealistic’ assumption that minorities will choose a particular trade in lockstep proportion to their representation in the local population.” Id. at 507 (emphasis added).
reference to deep and general patterns of historical discrimination to
demonstrate or implicate discrimination in a particular industry. Resorting
again to belittling punctuation, O'Connor writes that "the 'evidence' relied
upon by Justice Marshall's dissent – the city's history of school desegrega-
tion and numerous congressional reports – does little to define the scope of
any injury . . . [to] justify a preference of any size or duration." But
Marshall's evidence – which was not, to say the least, "evidence" – is much
more extensive, more revealing, and more damning than the majority opin-
ion can stand to see. Like his opinion in Bakke, Marshall's Croson dissent
is from start to finish a substantial account of a "disgraceful history," his
first sentence setting the tone: "It is a welcome symbol of racial progress
when the former capital of the Confederacy acts forthrightly to confront
the effects of racial discrimination in its midst." Unlike the Court major-
ity, says Marshall, the people of Richmond "know what racial discrimina-
tion is." He notes that the city had come before the Justices and before
other courts in numerous race-discrimination cases: "the members of the
Richmond City Council have spent long years witnessing multifarious acts
of discrimination, including, but not limited to, the deliberate diminution of
black residents' voting rights, resistance to school desegregation, and pub-
licly sanctioned housing discrimination." And Marshall berates the ma-
jority for ignoring, for "refusing to recognize," for literally brushing aside
as having no probative value, the "rich trove of evidence," confirmed by
numerous federal reports, "that discrimination in the Nation's construction
industry . . . seriously impaired the competitive position of businesses
owned or controlled by minority groups." For Justices Marshall, Black-
mun, and Brennan, "history is irrefutable." For O'Connor and the rest
of the majority, history is out of their sight and out of their minds.

CONCLUSION: A WEB OF IGNORANCES

I have tried in this article to show how ignorance – sometimes genuine,
usually willful – infects contemporary interpretation of the Equal Protec-
tion Clause and renders it inadequate to the great task for which that provi-
sion was originally intended. By requiring intent, the Court ignores the
prevalence of unconscious racism and thereby privileges our ignorance of
how we discriminate despite our best intentions. Having established the
intent requirement, the Court's ignorance of subjective mental states allows
it to recognize only the most blatant forms of discriminatory motivation,
thereby protecting those whose conscious discrimination is covered with
reasonable-sounding justifications. In its strict doctrine of constitutional
colorblindness, the Court willfully blinds itself to the realities of racial dis-

248. Id. at 528.
249. Id. at 529 (emphasis added).
250. Id. at 544.
251. Id. at 530.
252. Id. at 561 (Blackmun, J., dissenting).
253. The Fourteenth Amendment was a "broad statement of principle, giving constitutional
form to the resolution of a national crisis." ERIC FONER, RECONSTRUCTION: AMERICA'S UNFIN-
parity in the United States and the dishonorable history that lies behind those realities.

These ignorances have spun a constitutional web in which black Americans have long found themselves caught – the ignorances that run through each of the doctrinal strands examined here support each other in highly specific ways. It seems clear that the form of unconscious racism called white transparency – an ignorance that blinds white Americans to the racial contingency of their culture, rules, methods, and values, and is allowed to flourish under the intent doctrine – is an important feature of what’s usually understood as colorblindness doctrine. For even when affirmative action is sanctioned by the Court as an exception to the general rule of colorblindness, it is simultaneously understood as an exception to some generally meritocratic practice. If intent doctrine did not foreclose judicial examination of the extent to which purportedly neutral standards of merit are actually deeply entrenched, not-so-easily reformed, and usually unconscious manifestations of white transparency, affirmative action would have a less embattled career. The ignorance protected by intent, then, reinforces the ignorance mandated by colorblindness.

We have seen how the intent requirement is premised upon a willful ignorance of history insofar as it asks a victim of discrimination to identify with specificity the perpetrator of the alleged violation. This amnesia is obviously the same as the one we examined in the context of colorblindness, but the manner in which it functions in the intent doctrine produces particular consequences in the application of the colorblindness principle. The ahistorical conditions of fault and causation that are implicit in intent doctrine reinforce a pervasive notion of white innocence, whereby only a few particularly malicious discriminators are “guilty” or unfairly benefited, while most whites bear no responsibility whatsoever for remedying theundeniably disadvantageous position of blacks. As Thomas Ross asks, however, “[w]hat white person is ‘innocent’, if innocence is defined as the absence of advantage at the expense of others?” Sadly, this notion of a universal white innocence that has a few (but egregious) exceptions is central to the colorblindness-premised affirmative action debate. Justice Powell’s Bakke opinion lamented the unfairness of asking “innocent persons . . . to endure . . . [deprivation as] the price of membership in the dominant majority,” a premise that has gone uncontested in every subsequent majority opinion on affirmative action.

The flip side of white innocence is a denial of black subordination, which we see, for example, in Justice White’s concurring opinion in the affirmative action case Wygant v. Jackson Board of Education, which stated that “none of [the black plaintiffs] has been shown to be a victim of any racial discrimination.” Such denial of the universality of black Americans’ experience of discrimination reinforces the willful ignorance of history and reality that enables the regime of colorblindness. Denial of black victimhood contaminates the Court’s affirmative action jurisprudence, as

254. See supra notes 88-94 and accompanying text.
Justice Marshall protested in *Bakke*: “It is unnecessary in 20th-century America to have individual Negroes demonstrate that they have been victims of racial discrimination; the racism of our society has been so pervasive that none, regardless of wealth or position, has managed to escape its impact.”

These are just three examples of how the ignorances discussed throughout this paper are interconnected in a web that traps black Americans and offers up their viable equal protection claims to the arachnid doctrines of the contemporary Supreme Court. But such predation cannot continue indefinitely. As Thomas Jefferson wrote in 1816, “If a nation expects to be ignorant and free, in a state of civilization, it expects what never was and never will be.” And as Frederick Douglass said sixty years later: “Where justice is denied,... where ignorance prevails, and where any one class is made to feel that society is in an organized conspiracy to oppress, rob, and degrade them, neither persons nor property will be safe.”

By exposing ignorance at its most willful and damaging, I have at least offered a useful lens through which to understand the contemporary failure of equal protection jurisprudence. But my project is more ambitious than that. I hope to have fulfilled on some level the rhetorical and moral transformation contemplated by Shoshana Felman, who, reflecting on the O.J. Simpson trial, asks whether, “the trial of the century,... the cultural story of our blindness, could ... turn into the story of a revolutionary seeing?” I hope that this revelation of juridical ignorance and blindness is itself a compulsion to know, an incitement to sight.

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258. Letter to Charles Yancey, 1/6/1816.