DISMANTLING THE PILLARS OF WHITE SUPREMACY: OBSTACLES IN ELIMINATING DISPARITIES AND ACHIEVING RACIAL JUSTICE

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INTRODUCTION

Despite the pervasive pronouncements of unity and indivisibility in American culture, this nation has always had a palpable separation that—depending on whom was asked—existed under the surface, out in the open, or solely in the minds of detractors. This dichotomy in American reality, where ostensibly universal benefits have been meted out unequally or wholly denied to some, has been a galvanizing, rallying cry for both activists on the margins and politicians in the mainstream. In 2013, then-mayoral candidate Bill de Blasio used a "Tale of Two Cities" as his campaign slogan and central guiding principle for policy proposals in New York City.[1] On the national stage, John Edwards received significant praise for his "Two Americas" address during the 2004 Democratic National Convention.[2] Both of these political messages focused on persistent

[1] James Cersonsky, *Bill de Blasio: New York's 'Tale of Two Cities*,*'* NATION (May 9, 2013), https://perma.cc/TGV6-5RS7; Hunter Walker, *Bill de Blasio Tells 'A Tale of Two Cities' at His Mayoral Campaign Kickoff*, OBSERVER (Jan. 27, 2013, 4:34 PM), https://perma.cc/258H-X7BB.

[2] Senator John Edwards, Address to the 2004 Democratic National Convention (July 28, 2004) (transcript available at https://perma.cc/9BFW-HXEJ).

inequality through a socioeconomic framework,[3] with only passing allusions to racial injustice.[4]

Of course, race has always played a central role in the American dichotomy, dating back to the nation's inception. In 1968, such a dichotomy was recognized by a federal panel investigating civil uprisings in major cities. Tapped by President Lyndon B. Johnson to determine the cause of this disorder, the National Advisory Commission on Civil Disorders, colloquially known as the "Kerner Commission," concluded: "Our Nation is moving toward two societies, one black, one white—separate and unequal."[5] Though the Kerner Commission spoke of this schism as a future possible reality, people of color have long acknowledged its presence. An early attack on America's hypocritical posturing on matters of equality was Frederick Douglass' 1852 address, "What to the Slave is the Fourth of July?"[6] This speech provided an unforgiving examination of race in America and made plain what was obvious to Black people throughout the country: that the bedrock principles of "political freedom and of natural justice, embodied in that Declaration of Independence" cannot be universal in a country where slavery is legal.[7] Douglass spoke frankly about the immeasurable disparity between Black and white Americans and noted: "The blessings in which you, this day, rejoice, are not enjoyed

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[3] *See Cersonsky, supra* note 1 ("So, let's be honest about where we are today. This is a place that in too many ways has become a tale of two cities, a place where City Hall has too often catered to the interests of the elite rather than the needs of everyday New Yorkers."); Edwards, *supra* note 2 ("We shouldn't have two public school systems in this country: one for the most affluent communities, and one for everybody else. None of us believe that the quality of a child's education should be controlled by where they live or the affluence of the community they live in.").

[4] While campaigning, de Blasio focused mostly on economic inequality but also discussed the disparate effect of stop-and-frisk policing policies on people of color in his ads. *See* NYForDeBlasio *New Yorkers for de Blasio TV Ad: "Dante*," YOUTUBE (Aug. 8, 2013), https://perma.cc/4W6G-R8FJ; *see also* Edwards, *supra* note 2. In describing what role race played in his vision of two Americas, Senator Edwards focused on socioeconomic conditions and noted, "[t]his is not an African-American issue. This is not a Latino issue. This is not an Asian-American issue. This is an American issue . . . The truth is, the truth is that what John [Kerry] and I want, what all of us want [is] for our children and our grandchildren to be the first generations that grow[] up in an America that's no longer divided by race. We must build one America. We must be one America, strong and united for another very important reason: because we are at war."

[5] NAT'L CRIMINAL JUSTICE REFERENCE SERV., REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 1 (1968), https://perma.cc/99RL-TXWW.

[6] Frederick Douglass, What to the Slave is the Fourth of July?, Address at the Rochester Ladies' Anti-Slavery Society (July 5, 1852) (transcript available at https://perma.cc/RYS7-S3U5).

[7] *Id.*

in common. — The rich inheritance of justice, liberty, prosperity and independence, bequeathed by your fathers, is shared by you, not by me."[8]

Today, social justice campaigns like the Movement for Black Lives ("M4BL") have maintained this framing and have asked Americans to recognize how race still creates two essentially different sets of experiences in society, but in doing so they are in the minority. Many Americans disagree that such a double standard exists.[9] Even when such divergences are acknowledged, there is often a great degree of disagreement about why these different experiences exist. This skepticism has led to destructive narratives and incorrect conclusions that have perpetuated racist beliefs and maintained a racial hierarchy. Perhaps worse, this collective amnesia regarding our nation's past has led to a fundamental mismatch where American institutions exert significantly less effort towards remedying racist policies than these institutions exerted towards creating and maintaining a racial hierarchy.

Part I of this article will describe the racial inequality that persists in the twenty-first century and will explain why these disparities matter. Part II introduces four pillars of white supremacy used to create and maintain racial injustice and briefly illustrates their interweaving usage in the realm of housing policy. Part III explores strategies for how each pillar might be best attacked, and discusses the benefits and limitations of litigation and of colorblind solutions in closing the race gap. Finally, Part IV will discuss recent integration efforts in New York City, explaining how these efforts are a case study and possible model for creating equitable outcomes utilizing many of the strategies raised in Part III.

I. A TALE OF TWO AMERICAS STILL PERSISTS TODAY BETWEEN PEOPLE OF COLOR AND WHITES

American dialogue on the subject of race is older than even the country itself. So too is the ongoing debate about unfair treatment on the basis of race—both regarding its pervasiveness and even its existence. Today, the question is one of fairness, examining the ways in which people of color are disparately exposed to negative treatment while white people disparately benefit within American society due to the privileges they possess. Some flashpoints include the string of police killings of unarmed

[8] *Id.*

[9] A majority of Americans—but a minority of Black respondents—believe Black people in their community are treated as fairly as white people in a variety of settings. *See Race Relations*, GALLUP, https://perma.cc/E7XX-YY98 (last visited Feb. 18, 2020).

men and women of color,[10] the unfounded suspicion and harassment experienced by people of color while they engage in mundane activities,[11] and the lack of representation of people of color in various contexts from government to entertainment.[12]

Ironically, the mere identification of racism is often criticized for fomenting divisiveness and sometimes even scrutinized more than racism

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[10] Police violence against unarmed men and women of color is naturally traumatic and has always damaged so-called race relations in America. The availability of camera footage and the quick dissemination of information through social media and other internet channels provided fertile ground for a new wave of social awareness and activism regarding police violence. *See* Sarah Almukhtar et al., *Black Lives Upended by Policing: The Raw Videos Sparking Outrage,* N.Y. TIMES (Apr. 19, 2018), https://perma.cc/822P-3KRG. A string of high-profile deaths at the hands of police triggered extensive discussion about whether people of color are unfairly targeted by law enforcement and whether officers, many of whom were white, were not being held accountable or were receiving lenient treatment. *See* German Lopez, *Cops Are Almost Never Prosecuted and Convicted for Use of Force*, VOX (Nov. 14, 2018, 4:12 PM), https://perma.cc/W44X-D69F.

[11] In early 2018, a string of police and security incidents gained national coverage. In each incident, one or more Black individuals had been engaging in nondescript behavior when a white individual reported their activity to the police or private security on the assumption that the Black individual was suspicious or had been violating a rule or law. *See* e.g., Dakin Andone, *Woman Says She Called Police When Black Airbnb Guests Didn't Wave at Her*, CNN (May 11, 2018, 2:32 AM), https://perma.cc/8PAP-GH48 (renting an Airbnb); Jessica Campisi et al., *After Internet Mockery, 'Permit Patty' Resigns As CEO of Cannabis-Products Company*, CNN (June 26, 2018, 10:47 PM), https://perma.cc/TVX2-EWJM (selling water); Christina Caron, *A Black Yale Student Was Napping, and a White Student Called the Police*, N.Y. TIMES (May 9, 2018), https://perma.cc/TFA2-BPVM (napping in a dormitory lounge); *Existing While Black: What Does It Feel Like When Every Move You Make Is Policed?*, HUFFPOST, https://perma.cc/DS57-RTAL (last visited Nov. 10, 2019) (various scenarios); Erik Ortiz & Gabe Gutierrez, *Man Who Called Police on Black Woman at North Carolina Pool No Longer Has Job*, NBC NEWS (July 6, 2018, 10:37 PM) (swimming); Otis R. Taylor Jr., *Even in Oakland, Calling the Cops on Black People Just Living Their Lives*, S. F. CHRON. (May 17, 2018, 6:00 AM), https://perma.cc/J5AV-TM5N (barbequing). Notably, there wasn't any discernible reason to believe that this wave represented an uptick in these types of incidents. Rather, it is more likely that 911 calls accusing Black individuals of suspicious behavior because of latent biases have always been commonplace. *See, e.g.*, Rachael Herron, *I Used To Be a 911 Dispatcher. I Had to Respond to Racist Calls Every Day.*, VOX (Oct. 31, 2018, 12:08 PM), https://perma.cc/H7J2-37MJ (describing how emergency calls based on racial profiling have long been routine).

[12] KAREN SHANTON, DEMOS, THE PROBLEM OF AFRICAN AMERICAN UNDERREPRESENTATION ON LOCAL COUNCILS (2014), https://perma.cc/XB4C-N5A8; Anna Brown & Sara Atske, *Blacks Have Made Gains in U.S. Political Leadership, but Gaps Remain*, PEW RES. CENTER (Jan. 18, 2019), https://perma.cc/G7EG-57EJ; Kimberly Lawson, *Why Seeing Yourself Represented on Screen Is So Important*, VICE (Feb. 20, 2018, 10:37 PM), https://perma.cc/E4UQ-3LRC; Marissa G. Muller, *Women and People of Color Still Vastly Underrepresented in Hollywood According to UCLA Study*, W MAG. (Feb. 27, 2018, 1:16 PM), https://perma.cc/VE8Q-WUS9; Mazin Sidahmed, *Paul Ryan's 'White' Selfie with Interns Shows Lack of Diversity in Washington*, GUARDIAN (July 18, 2016, 3:51 PM), https://perma.cc/N8U3-MHN4.

itself.[13] For example, calls for unity exploded from conservative commentators following the street demonstrations organized by Black Lives Matter ("BLM") and other activists in response to police violence.[14] When Colin Kaepernick and other athletes protested the national anthem to raise awareness of police violence and systemic oppression in 2016, they were criticized as being not only divisive, but unpatriotic.[15] Lost in these calls for unity was an acknowledgement that the American experience is inextricably correlated with one's race and that recent incidents merely highlight a persistent feature of American society: the predetermination of opportunity and treatment on the basis of race.

This difference in experience and opportunity is borne out in various contexts, most of which are familiar to activists and public interest practitioners. For example, in schools, students of color continue to be suspended and referred to police officers at higher rates.[16] Students of color are underrepresented in postsecondary schools, are less likely to graduate, and perform worse on standardized tests.[17] Additionally, people of color

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[13] Amy Chua, *How America's Identity Politics Went from Inclusion to Division*, GUARDIAN (Mar. 1, 2018, 6:00 AM), https://perma.cc/PD3T-KWP5; Igor Ogorodnev, *Stop Calling Identity Politics 'Divisive' When It Is Actually 'Destructive*,*'* RT (May 27, 2019, 4:44 PM), https://perma.cc/8SAR-5LRT; *White House: Trump's Critics Are Trying to Divide Americans*, FOX NEWS (Oct. 29, 2018), https://perma.cc/SEK4-YPSN. Using unity as a cudgel against anti-racist efforts is nothing new. As Nikole Hannah-Jones noted in the 1619 Project, "Anti-black racism runs in the very DNA of this country, as does the belief, so well articulated by [President Abraham] Lincoln, that black people are the obstacle to national unity." Nikole Hannah-Jones, *Our Democracy's Founding Ideals Were False When They Were Written. Black Americans Have Fought to Make Them True.*, N.Y. TIMES MAG.: THE 1619 PROJECT (Aug. 14, 2019), https://perma.cc/FD5K-9Y8V.

[14] *See* David French, *Black Lives Matter: Radicals Using Moderates to Help Tear America Apart*, NAT'L REV. (July 11, 2016, 7:23 PM), https://perma.cc/8536-RG5L; Paul Rosenberg, *Think Black Lives Matter Is "Divisive"? The Civil Rights Movement Split the U.S. Far More*, SALON (July 20, 2016, 1:57 PM), https://perma.cc/5NDB-R5UW; *Trump Calls Black Lives Matter 'Divisive,' Criticizes Police Shootings*, FOX NEWS (July 12, 2016), https://perma.cc/Y5PA-RVZK.

[15] *See* Kathy Barnette, *Kneeling NFL Players Should Stand Up and Work with President Trump to Achieve Their Goals*, FOX NEWS (Aug. 12, 2018), https://perma.cc/9YFF-5SVQ; Frank Miniter, Opinion, *NFL Protesters Won't See Change by Kneeling During Anthem--Here's What They Should Do*, FOX NEWS (Aug. 10, 2018), https://perma.cc/C866-6T86.

[16] *See* Moriah Balingit, *Racial Disparities in School Discipline Are Growing, Federal Data Show*, WASH. POST (Apr. 24, 2018, 11:41 PM), https://perma.cc/KEF7-FHE6; *see also* Anya Kamenetz, *Suspensions Are Down in U.S. Schools but Large Racial Gaps Remain*, NPR (Dec. 17, 2018, 3:52 PM), https://perma.cc/S9R5-8PK4.

[17] *See* Allie Bidwell, *Racial Gaps in High School Graduation Rates Are Closing*, U.S. NEWS & WORLD REP. (Mar. 16, 2015, 12:47 PM), https://perma.cc/Y2D6-4QGP (high school graduation rates); Ben Casselman, *Race Gap Narrows in College Enrollment, but Not in Graduation*, FIVETHIRTYEIGHT (Apr. 30, 2014, 6:00 AM), https://perma.cc/3PE4-CBJQ (college enrollment and graduation); Christopher Jencks & Meredith Philips, *The Black-White Test Score Gap: Why It Persists and What Can Be Done*, BROOKINGS INSTITUTION (Mar. 1, 1998),

are more likely to be denied job interviews, home loans, and other financial opportunities.[18] They own homes at lower rates than their white counterparts and are more likely to encounter housing instability.[19] There are disproportionately low numbers of people of color serving as elected officials[20] and also an underrepresentation of individuals that represent the interests of communities of color in government.[21] In short, when American institutions and markets run their course, people of color disproportionately fare worse.

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https://perma.cc/DZV4-QHZA (testing); Emily Tate, *Graduation Rates and Race*, INSIDE HIGHER ED (Apr. 26, 2017), https://perma.cc/J3A4-7REG (college graduation rates); Kate Taylor, Opinion, *Race and the Standardized Testing Wars*, N.Y. TIMES (Apr. 23, 2016), https://perma.cc/7XM7-EAH2 (testing); Mitchell Wellman, *Report: The Race Gap in Higher Education Is Very Real*, USA TODAY (Mar. 7, 2017, 4:15 PM), https://perma.cc/2ZCU-DT8T (enrollment in higher education).

[18] *See* DEVAH PAGER & BRUCE WESTERN, PRINCETON UNIV., RACE AT WORK: REALITIES OF RACE AND CRIMINAL RECORD IN THE NYC JOB MARKET (2005), https://perma.cc/A3C7-T8T2 (job market); Kenneth R. Harney, *Racial Disparities Significant in Mortgage Rejections, Study Shows*, CHI. TRIB. (May 22, 2018, 12:00 PM), https://perma.cc/P32B-Z67Z (mortgages); Sarah Ludwig, *Credit Scores in America Perpetuate Racial Injustice. Here's How*, GUARDIAN (Oct. 13, 2015, 10:14 AM), https://perma.cc/S2G8-QN62 (credit); *New Data Shows Continued Constricted Credit, Racial Disparities in Lending*, NCRC (Sept. 18, 2012), https://perma.cc/XW48-PEB2 (credit inequality); Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. OF SOC. 937 (2003) (job interview); Jennifer Streaks, *Black Families Have 10 Times Less Wealth Than Whites and the Gap Is Widening--Here's Why*, CNBC (May 18, 2018, 1:04 PM), https://perma.cc/RM67-TDVV (credit inequality).

[19] *See* JEFFREY OLIVET ET AL., CTR. FOR SOC. INNOVATION, SUPPORTING PARTNERSHIPS FOR ANTI-RACIST COMMUNITIES (2018), https://perma.cc/7ZUH-5J8X (homelessness); Laurie Goodman et al., *A Closer Look at the Fifteen-Year Drop in Black Homeownership*, URB. INST.: URB. WIRE (Feb. 13, 2018), https://perma.cc/76DM-B9EE.

[20] *See* REFLECTIVE DEMOCRACY CAMPAIGN, THE ELECTABILITY MYTH: THE SHIFTING DEMOGRAPHICS OF POLITICAL POWER IN AMERICA (2019), https://perma.cc/YY95-64FE; Reid Wilson, *Racial Imbalance Exists All Across Local Governments, Not Just in Police Departments*, WASH. POST (Aug. 14, 2014, 2:24 PM), https://perma.cc/A442-P2ZX.

[21] People of color have had their interests undermined through gerrymandering schemes such as "cracking" and "packing." Cracking involves drawing district lines in an area with a dense concentration of minority voters such that the communities of color are divided and do not carry a majority in any one district. Packing is the practice of concentrating communities of minority voters in fewer districts to deny them as many districts as they would have with less deliberate design. Both schemes qualify as voter discrimination. *See 'Cracking and Packing:' Tame the Gerrymander*, BALT. SUN (Oct. 3, 2017, 12:45 PM), https://perma.cc/WV5T-L2UM. Recently, evidence emerged suggesting that Republican operatives wanted the citizenship question on the census to give white people a political advantage when new voting districts are drawn after the 2020 census. *See* Tara Bahrampour, *GOP Strategist and Census Official Discussed Citizenship Question, New Documents Filed by Lawyers Suggest*, WASH. POST (June 16, 2019, 8:33 AM), https://perma.cc/DZU5-YJVV. All of these schemes represent the hoarding of voting power among whites.

Skeptics of white privilege and systemic racism often chalk these disparities up to poor decision-making among individuals and cultural defects that are perceived to exist within communities of color.[22] Such skeptics may also subscribe to notions of rugged individualism and lifting oneself by their bootstrap—theories that assume robust social mobility and equality of opportunity are available to all in America.[23] In this view, financial and educational failures are consequences of poor work ethic or lesser intellect. To these critics, entanglement with the criminal justice system and detachment from civic society result from moral failings. In essence, meritocracy and accountability carry the day. But this is incorrect. Equal effort does not necessarily create equal opportunity. Race matters tremendously. However, even when it is conceded that discrimination on the basis of race exists, there is an overemphasis on overt types of racism. There is often little to no consideration that historical wrongs continue to reverberate today in less apparent, colorblind ways.

Indeed, when one examines disparate outcomes without examining racial history and attributes racial disparities to merit and accountability, the reasoning can trend toward the tautological. If one accepts the basic premise that different circumstances can motivate different individual decisions, then individual decisions cannot solely explain different circumstances. Viewing circumstances as immaterial would require believing that people of color, and Black people in particular, historically had less potential or possessed other individual defects which explain why they perform worse than whites across various statistics. This belief would not account for the fact that strong work ethic and high moral character are not enough to create equal opportunity between racial groups in today's America. The surrounding racial structure has been reinforced in a way to promote wildly different results despite similar effort from individuals of different backgrounds. The same amount of effort from an individual

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[22] *See* Wesley Lowery, *Paul Ryan, Poverty, Dog Whistles, and Electoral Politics*, WASH. POST (Mar. 18, 2014, 11:36 AM), https://perma.cc/2R2E-UYBL (describing former-Representative Paul Ryan's comments on the work ethic deficit among Black men in "inner cities"). Ta-Nehisi Coates has referred to cultural arguments describing the racial disparities in America as a "tangle of pathologies," and he criticizes the liberal argument that racial oppression forms a cultural residue that is itself an impediment to success. He notes that these expectations are saturated with white supremacist notions of Blackness. *See* Ta-Nehisi Coates, *Black Pathology and the Closing of the Progressive Mind*, ATLANTIC (Mar. 21, 2014), https://perma.cc/8EV5-VK96.

[23] *See* Ron Haskins, Opinion, *To Tackle Poverty, We Need to Focus on Personal Responsibility*, N.Y. TIMES (Jan. 5, 2014, 6:30 PM), https://perma.cc/7DWY-2Z8Y. For a discussion of how upward social mobility for those "born at the bottom" of American society is nearly impossible, *see* Noliwe M. Rooks, *The Myth of Bootstrapping*, TIME (Sept. 7, 2012), https://perma.cc/4NCX-JGYQ.

in a wealthier environment will see greater dividends than the same individual in a more impoverished scenario. Similarly, the same amount of malfeasance in a wealthier environment results in far more leniency. Ignoring this phenomenon and failing to confront America's discriminatory past entrenches the status quo and denies communities of color, particularly Black Americans, the power and opportunities held by the average white American.

This conclusion is perhaps most clearly demonstrated through economic inequality and racial-wealth gap statistics. Overall, Americans of different races have drastically different levels of net worth.[24] According to data compiled by the Federal Reserve and analyzed by the Institute for Policy Studies in 2018, there has been a decline in wealth for the median Black family in America from 1983 to 2016.[25] Whereas the median Black family owned $7,323 in wealth in 1983, the median Black family now owns much less wealth, with only $3,557 in 2016.[26] The median Latinx family has fared slightly better with a modest increase of wealth over time. The median Latinx family owned less wealth than the median Black family in 1983, with $4,289; by 2016, the median Latinx family surpassed the median Black family and owned $6,591.[27]

Notably, median white family wealth did not decline, nor did it increase only modestly in these years. Instead, what was already an enormous gap in wealth between racial groups in 1983 has managed to grow disproportionately. The median white family had a net worth of $110,160 in 1983 and $146,984 in 2016.[28] Put differently, the median white family went from having fifteen times more wealth than the median Black family in 1983 to having forty-one times more wealth in 2016.

Interestingly, there are still inequitable outcomes when considering the median Latinx family, whose wealth grew at a significantly higher rate over this period than the median white family's wealth (54% compared to 33%).[29] In comparing the median white and Latinx families, the significant rate of increase in wealth for the Latinx cohort over time is overshadowed by initial differences in wealth—i.e., despite the higher growth rate for the median Latinx family, the wealth gap between these two demographics managed to expand in this period (from $105,871 in

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[24] Net worth and net wealth are used as identical concepts here. Either one refers to the measure of total assets minus total debts and liabilities. *See* CHUCK COLLINS ET AL., INST. FOR POLICY STUDIES, TEN SOLUTIONS TO BRIDGE THE RACIAL WEALTH DIVIDE 6 (2019), https://perma.cc/DW4L-GPEY.

[25] *Id.* at 8.

[26] *Id.* at 7. All dollar figures are adjusted to 2018 levels.

[27] *Id.*

[28] *Id.*

[29] COLLINS ET AL., s*upra* note 24, at 7.

1983 to $140,393 in 2016).[30] This means that increased inequality is not merely explained by the loss of wealth by disadvantaged groups (e.g., Black families in the past thirty years). Instead, early advantages and privileges compound success such that the racial wealth gap grows even if later generations of minorities outperform later generations of whites.

II. THE FOUR PILLARS OF WHITE SUPREMACY: A PROPOSED FRAMEWORK AND ILLUSTRATION THROUGH HOUSING POLICIES

A. Recognizing the Four Pillars of White Supremacy

Racism has existed throughout our government's history, both in explicit government policies and in actions that, although private, were government-sanctioned. In order to understand the development of these racial disparities described above, one must maintain a holistic view of racial injustice and acknowledge that this injustice is implemented in various ways. Policies perpetuating racism vary in who they target, in whether they are harmful or amiable, and whether they are explicitly race motivated. To assist in better understanding these drivers of disparities, I propose sorting government involvement in the creation of the racial gap into four categories of policies, each one a pillar supporting white supremacy.

The first category, called "race-motivated impairments," involves harmful actions that are explicitly based on race and are designed to subjugate people of color. The second category, called "race-motivated benefits," include government policies—most of which were enacted in the past—that were tinged with racial animus and white supremacy, such that benefits and opportunities were conferred to white people and denied to Black people under white supremacist tenets. The third category, called "colorblind impairments," is comprised of harmful actions and policies that reflect an intrusion on an individual's life for a broader societal purpose, but are almost exclusively experienced by communities of color. The final category, called "colorblind benefits," is comprised of policies that confer benefits to all people but, due to existing gaps in wealth and opportunity, create a disparate impact leaving people of color behind.

The clearest example of a race-motivated impairment, the first and most impactful pillar of white supremacy, is the American institution of slavery. Slavery's persistence over 400 years has reverberated in indescribably vast ways, including numerous policies that survived the end of slavery and continued through the twenty-first century. Transforming into

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[30] *Id.*

Black Codes and Jim Crow laws, these particular policies were transparent tools of antiblackness.[31] Following the civil rights era, policies of this sort and tolerance of overt racism[32] has become socially unacceptable in mainstream American society. Though there are some notable exceptions like President Donald J. Trump's Muslim Ban, these policies are less common now. The damage continues since these policies stifled progress and growth in target communities in truly meaningful ways.

Practices and policies represented by the second pillar—race-motivated benefits—created racial injustice in two related ways. First and foremost, government officials devised these policies to confer resources to white Americans or create barriers for those who were not white. By any good-faith analysis, that outcome was indefensible. Second, these policies were enacted in a specific moment in time. The moment was shaped by the Supreme Court's tolerance of discriminatory policies and practices,[33] and massive political will for ambitious domestic programs in

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[31] Black people experienced discrimination in various contexts under Jim Crow, including restaurants, lunch counters, soda fountains, and buses. *See generally* Harry T. Quick, *Public Accommodations: A Justification of Title II of the Civil Rights Act of 1964*, 16 W. RES. L. REV. 660 (1965). Jim Crow ultimately contributed to the current wage gap through the deprivation of resources and public funding. *See* Gillian B. White, *Searching for the Origins of the Racial Wage Disparity in Jim Crow America*, ATLANTIC (Feb. 9, 2016), https://perma.cc/K6R9-6AZF.

[32] Equal Justice Initiative has recorded more than 4,384 lynchings of people of color who were the victims of white terror between 1877 and 1950. *See* Ed Pilkington, *The Sadism of White Men: Why America Must Atone for Its Lynchings*, GUARDIAN (Apr. 26, 2018), https://perma.cc/TZN4-QYAV. Individuals were lynched for organizing voters or raising objections to the lynching of another. *Id.* The Greenwood District in Tulsa, known as Black Wall Street, and Rosewood, Florida, are perhaps the two most famous incidents where an entire Black community was destroyed in acts of racial violence. *See* DeNeen L. Brown, *'They Was Killing Black People*,*'* WASH. POST (Sept. 28, 2018), https://perma.cc/4UA9-JCKT; *Jessica* Glenza, *Rosewood Massacre a Harrowing Tale of Racism and the Road Toward Reparations*, GUARDIAN (Jan. 3, 2016, 8:00 AM), https://perma.cc/EUT2-RSCD.

[33] The Supreme Court's denouncement of "separate but equal" did not occur until 1954. Brown v. Bd. of Educ., 347 U.S. 483 (1954). Before this, and in the housing context, the Court endorsed racially restrictive covenants. *See* Corrigan v. Buckley, 271 U.S. 323 (1926). The court reversed their position twenty-two years later, holding that judicial enforcement of racially restrictive covenants violated the Fourteenth Amendment. Shelley v. Kraemer, 334 U.S. 1, 20 (1948). But much like the subsequent *Brown* decision, massive resistance followed the Court's holding, and meaningful reform was delayed. The Court's initial endorsement of racially restrictive covenants and the subsequent intransigence in upholding the law had major effects. *See* Terry Gross, *A 'Forgotten History' of How the U.S. Government Segregated America*, NPR (May 3, 2017, 12:47 PM), https://perma.cc/6GZQ-XCVR (noting that eighty-five percent of the large subdivisions built in the New York City metropolitan area in the 1930s and 1940s had FHA-required restrictive covenants on them). *Shelley* was circumvented for years afterward, and while the decision forbade courts from ordering injunctive relief in the form of evictions, individuals continued to use racially restrictive covenants to seek damages. Not until 1953 did the Supreme Court rule that the Fourteenth Amendment precluded these damage awards. A federal appeals court did not find that the covenants themselves were

the employment,[34] housing,[35] and education[36] contexts. Since then, the Supreme Court has rightfully concluded that policies on the basis of race are inherently suspect and in tension with constitutional tenets,[37] but has also undermined the remedial principles of the Fourteenth Amendment.[38] Further, the political success of American fiscal and social conservatism means there is significantly less willingness in the government to subsidize individuals, encourage mobility, and pursue progressive policies.[39]

As to the third pillar, colorblind impairments are policies that exist as intrusions or harms on an individual. These are the policies that—when one is caught in the crosshairs—limit freedom, hinder opportunity, or physically injure an individual. The policies are proposed as necessary to society, under lofty principles like national security and public safety.[40] The policies are facially race neutral and do not require any racist individual to promote racially unequal outcomes. As one component of systemic racism, these policies can run their course without any racial animus

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a violation of the Fair Housing Act until 1972. RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA 89-90 (2017) (discussing Mayers v. Ridley, 465 F.2d 630 (D.C. Cir. 1972)).

[34] *See, e.g.*, *National Labor Relations Act*, NAT'L LABOR RELATIONS BD., https://perma.cc/ZJ6V-QBSL (last visited Nov. 8, 2019); *Works Progress Administration,* UNIV. OF KY. LIBRARIES*,* https://perma.cc/BU6M-W3TL (last visited Nov. 8, 2019).

[35] *See, e.g.*, *About GI Bill*: *History and Timeline*, U.S. DEP'T OF VETERANS AFFAIRS, https://perma.cc/438U-EFM5 (last updated Nov. 21, 2013); *The Federal Housing Administration (FHA)*, U.S. DEP'T OF HOUS. AND URBAN DEV., https://perma.cc/BS9F-RJUL (last visited Oct. 18, 2019).

[36] *See About GI Bill: History and Timeline*, supra note 35.

[37] *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985) (explaining that classifications based on race are "seldom relevant to the achievement of any legitimate state interest"); Loving v. Virginia, 388 U.S. 1, 11 (1967) (requiring that racial classifications be subject to the most rigid scrutiny); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964); *Brown*, 347 U.S. 483; *Shelley*, 334 U.S. 1.

[38] *See infra* Section III.B.I.

[39] Fiscal conservatism has called for repeated attacks on government welfare programs. *See, e.g.*, Jonathan Weisman, *House Republicans Propose Budget with Deep Cuts*, N.Y. TIMES (Mar. 17, 2015), https://perma.cc/J7WP-QA82 (describing how the first budget issued by the House after the GOP gained control over the Senate proposed more than $1 trillion in unspecified cuts to programs like food stamps and welfare); Nathaniel Weixel, *Ryan Eyes Push for 'Entitlement Reform' in 2018*, HILL (Dec. 6, 2017, 5:24 PM), https://perma.cc/E72R-STTW. Social conservatism and racial prejudices have also played a significant role in this regard. *See* Dylan Matthews, *Study: Telling White People They'll Be Outnumbered Makes Them Hate Welfare More*, VOX (June 7, 2018, 9:00 AM), https://perma.cc/CW47-3GFU.

[40] *See, e.g.*, George L. Kelling & William J. Bratton, *Why We Need Broken Windows Policing*, CITY J. (2015), https://perma.cc/U3XF-LRJU (arguing that Broken Windows policing is necessary for public safety); *see also* Patrick Dunleavy, *Ditch Political Correctness and Wise Up. Empower Cops to Fight Radical Islamic Terrorists Here at Home*, FOX NEWS (Nov. 7, 2017), https://perma.cc/RDD8-JJHJ (arguing that monitoring mosques is necessary for public safety and national security).

within any of the individual decisions therein and still manage to target communities of color disproportionately. Having said that, government actors executing these policies often possess implicit and/or explicit biases and such bias may factor in how the policy is implemented. Examples of colorblind impairments include mass surveillance and monitoring of Muslims,[41] invasive and over-expansive intrusions of parental rights,[42] and of course, nearly every facet of the criminal justice system.[43] Though the goals of colorblind impairments are generally uncontroversial, there is rarely any accounting of the fact that the privileged segments of society are largely inoculated from these policies and that communities of color are almost exclusively bearing the burdens of these societal goals.

The final pillar, colorblind benefits, is the counterpart to colorblind impairments above. Generally, communities of color do not receive enough resources or benefits and should receive more assistance. However, giving these communities more resources does not always work to close racial disparities. Colorblind benefits include solutions that involve the sometimes equal, but always inequitable, allocation of resources and opportunities. They include policies and rules that ostensibly benefit all races, but maintain the gap between nonwhites and whites or even benefit white recipients more than recipients of color. Examples include regressive tax policies and funding schemes that manage to confer additional gains to already privileged individuals.[44] Colorblind benefits largely work along financial and economic lines—one's starting position is critical to determining how one will fare. Whites will generally benefit more because they have more wealth. Notably, this category of policies does not

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[41] *See* Colin Moynihan, *Last Suit Accusing N.Y.P.D. of Spying on Muslims Is Settled*, N.Y. TIMES (Apr. 5, 2018), https://perma.cc/69DV-7NQZ.

[42] *See generally* Michelle Burrell, *What Can the Child Welfare System Learn in the Wake of the Floyd Decision?: A Comparison of Stop-And-Frisk Policing and Child Welfare Investigations*, 22 CUNY L. REV. 124 (2019); *see also* Anna Arons, *Jenny Mollen, Jason Biggs, and How Race and Class Shape the Aftermath of Childhood Accidents*, PASTE MAG. (May 3, 2019, 1:32 PM), https://perma.cc/5QWG-8WUS.

[43] Andrew Khan & Chris Kirk, *What It's Like to be Black in the Criminal Justice System*, SLATE (Aug. 9, 2015, 12:11 PM), https://perma.cc/UD6D-MC9L.

[44] MEG WIEHE ET AL., ITEP & PROSPERITY NOW, RACE, WEALTH AND TAXES: HOW THE TAX CUTS AND JOBS ACT SUPERCHARGES THE RACIAL WEALTH DIVIDE (2018), https://perma.cc/AS2U-SNBW. This group includes any tax scheme or device that does not ensure that benefits are allocated based on financial need such that the wealthiest benefit the least and the poor benefit the most. For example, the 2017 tax law included tax cuts across all income levels. However, it was not designed to make the poorest individuals benefit the most. Instead, the majority of the tax benefits went to the wealthiest Americans and a recent report found that nearly eighty percent of the $275 billion in tax cuts to individual households will go to white families—even though whites make up just two-thirds of taxpayers. *Id.* at 5. *See also* Alexis Gravely, *How Trump's Tax Cuts Favor Whites over Minorities*, CTR. FOR PUB. INTEGRITY (Nov. 17, 2018, 8:08 AM), https://perma.cc/3WLW-V9NJ.

include all race neutral benefits. Existing separately are race neutral policies that improve racial performance gaps by incorporating socioeconomic factors or other correlates to race. Rather, colorblind benefits are policies that do not improve communities of color in relative terms, instead only improving their lot through quantity increases.

B. The Four Pillars at Work in Government-Led and Government-Sanctioned Housing Policies

Though policies represented by the four pillars have created racial inequity from the nation's inception, recent history, and the mid-twentieth century in particular, is rich with specific examples. Perhaps most illustrative of these is the federal government's involvement in homeownership—a goal lauded for decades as the "American Dream." [45] The government not only planted the seed for home ownership as the "American Dream,"[46] but it also launched a decades-long campaign ensuring that only white Americans had the resources necessary to reap the benefits of its policies. Housing in America is a story of overwhelming and pervasive intrusions on the prosperity of Black communities, which, in turn, created opportunities for whites to develop greater advantages in other areas of life.

In fact, mid-twentieth century housing policies explain much of the wealth disparities present today, as home equity is often a major component of household wealth or serves as a springboard for additional wealth for future generations.[47] Black homeownership has always lagged behind

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[45] *See, e.g.*, Anthony Depalma, *Why Owning a Home Is the American Dream*, N.Y. TIMES: IN THE NATION (Sept. 11, 1988), https://perma.cc/4U2W-8KHN ("More than just a symbol of having arrived in the middle class, living in your own home has become part of the American psyche."); *Homeownership: The American Dream*, PD&R EDGE, https://perma.cc/J2PK-QXCJ (last visited Oct. 26, 2019) (noting that the government and society have a goal of increasing homeownership so that Americans can seize this part of the American Dream); Frederick Peters, *The American Dream of Homeownership Is Still Very Much Alive*, FORBES (Apr. 8, 2019, 2:18 PM), https://perma.cc/75ZB-K5Z7 ("The idea of a place of one's own drives the American story."); Jenny Schuetz, *Renting the American Dream: Why Homeownership Shouldn't Be a Prerequisite for Middle-Class Financial Security*, BROOKINGS INSTITUTION (Feb. 13, 2019), https://perma.cc/BH8S-B2G5 (discussing the perception that homeownership is a cornerstone of middle class life in America).

[46] ROTHSTEIN, *supra* note 33, at 60–61 (noting that 1917 also marked the year of the Bolshevik revolution, and that government officials believed that white Americans would become more invested in the capitalist system through owning property); *Urges Saving for Homes. Founder of Thrift Week Says Economy Is Chief Factor for Ownership*, N.Y. TIMES (Jan. 20, 1927), https://perma.cc/7YD5-UDCV (encouraging Americans to save money for their "dream home" and discussing the "important place [home ownership] has always held in the minds of the American people").

[47] *See* Tanvi Misra, *Why America's Racial Wealth Gap Is Really a Homeownership Gap*, CITYLAB (Mar. 12, 2015), https://perma.cc/8U58-4CQZ (noting that homeownership is the

white homeownership. In 2004, Black homeownership reached a peak when the ownership rate was nearly fifty percent, but even then, this rate was one-third less than ownership rates for white homeowners.[48] Since then, the Black homeownership rate has steadily declined,[49] hovering around 42% for the last four years.[50] Notably, white Americans have consistently maintained a 30-point gap in homeownership rate over the same period of time.[51] The homes of white Americans are also considered more valuable. In 2016, the median value of the home for a white family was $200,000, whereas the median value of the home for a Black family was $124,000.[52] These differences in values flow from a web of racist policies, guiding the homeownership surge of the early to mid-twentieth century.

1. How Early Housing Policies Utilized Both Race-Motivated Impairments and Race-Motivated Benefits to Create Wealth in White Communities

In 1933, the Roosevelt administration created the Home Owners' Loan Corporation ("HOLC") to handle a number of obstacles that impeded the progress of the homeownership campaign.[53] Prior to this point, most plans required full repayment of home loans in five to seven years, included interest-only payments, and required a down-payment totaling fifty percent of the home's purchase price.[54] To alleviate the burdens of these plans, the HOLC was authorized to purchase existing mortgages that were subject to imminent foreclosure and then issue new repayment schedules of up to fifteen years at lower rates.[55] The HOLC provided amortized mortgages, allowing borrowers to pay parts of the principal with interest and, for the first time, allowing working- and middle-class

primary way Americans accumulate wealth); *see also* Tanvi Mirsa, *Instead of the Income Gap We Should Be Talking About the Wealth Gap*, CITYLAB (Feb. 19, 2015), https://perma.cc/F32K-CDBF (finding that wealth is an overlooked indicator of economic opportunity).

[48] Troy McMullen, *The 'Heartbreaking' Decrease in Black Homeownership*, WASH. POST (Feb. 28, 2019), https://perma.cc/X3BB-SRXY.

[49] *Id.*

[50] Press Release, U.S. Census Bureau, Quarterly Residential Vacancies and Homeownership, Fourth Quarter 2019 (Jan. 30, 2020), https://perma.cc/W92D-V4ME.

[51] *Id.*

[52] *See* Eshe Nelson, *Greater Homeownership Isn't the Answer to Ending Wealth Inequality*, QUARTZ (Apr. 19, 2018), https://perma.cc/CQQ7-9N8E.

[53] *See* ROTHSTEIN, *supra* note 33, at 63; *see also* Alan S. Blinder, *From the New Deal, a Way Out of a Mess*, N.Y. TIMES (Feb. 24, 2008), https://perma.cc/WRJ6-4ZSK ("The HOLC was established in June 1933 to help distressed families avert foreclosures by replacing mortgages that were in or near default with new ones that homeowners could afford.").

[54] ROTHSTEIN, *supra* note 33, at 63.

[55] *Id*.

homeowners to gain equity while their properties were still mortgaged.[56] Within its first two years, the HOLC had granted just over a million new mortgages,[57] and within three years had refinanced roughly ten percent of non-farm mortgages.[58]

In assessing these loans, the HOLC also undertook another major enterprise—the redlining of neighborhoods. The HOLC enacted race-motivated impairments by drawing color-coded maps documenting the so-called riskiness of lending across neighborhoods in over 200 cities.[59] Risk factors included housing age, quality, occupancy, and prices, and also included non-housing attributes like race, ethnicity, and immigration status.[60] Red symbolized riskiness on these maps, and neighborhoods with Black residents were denoted as risky even if they were solid middle-class neighborhoods with single-family homes.[61]

This policy did not only deny insurance to Black neighborhoods, it also siphoned wealth from these areas. This practice explicitly treated Black residents as less valuable than white homeowners and imposed a harm on these communities. Given that redlining caused property values to plummet[62] and lowered homeownership rates for communities of color,[63] it is not a stretch to say that the government's involvement in housing impeded the progress of Black families.[64]

In 1934, Congress and the President created the Federal Housing Administration ("FHA") to insure bank mortgages and to assist middle-class renters in purchasing single-family homes.[65] Similar to the HOLC, the

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[56] *Id*. at 63-64.

[57] *See* Blinder, *supra* note 53.

[58] *See* Daniel Aaronson et al., The Effects of the 1930s HOLC "Redlining" Maps 6 (Fed. Reserve Bank of Chi., Working Paper No. 2017-12, 2019), https://perma.cc/CY8N-PCGP.

[59] *Id*. at 1.

[60] *Id*.

[61] ROTHSTEIN, *supra* note 33, at 64.

[62] Tracy Jan, *Redlining Was Banned 50 Years Ago. It's Still Hurting Minorities Today.*, WASH. POST (Mar. 28, 2018, 6:00 AM), https://perma.cc/ZG2Z-W76E.

[63] *See* Aaronson et al., *supra* note 58, at 29; U.S. CONFERENCE OF MAYORS, AMERICA'S HOMEOWNERSHIP GAP: HOW URBAN REDLINING AND MORTGAGE LENDING DISCRIMINATION PENALIZE CITY RESIDENTS (1998) (suggesting that redlining has had lingering effects and decreased the availability of mortgage credit to Blacks and Latinx individuals); Aaron Glantz & Emmanuel Martinez, *For People of Color, Banks Are Shutting The Door to Homeownership*, REVEAL NEWS (Feb. 15, 2018), https://perma.cc/8K27-SP4A (finding that even today, people of color are denied mortgages more often than whites with similar credit and income).

[64] Even tax schemes were tools of racial oppression. In determining property tax levels, local governments have surreptitiously overassessed properties in Black neighborhoods and under assessed those in white neighborhoods, effectively shifting the financial burden of homeownership away from whites. *See* ROTHSTEIN, *supra* note 33, at 169–71 (explaining that areas with higher tax burdens for Blacks include Albany, Boston, Buffalo, Chicago, Fort Worth, and Norfolk).

[65] *Id.*

FHA created a map system based on demographic data; however, this time it conferred race-motivated benefits with policies that incorporated white supremacist notions.[66] The FHA manuals explicitly emphasized "undesirable racial or nationality groups" as one of the underwriting standards,[67] and found intolerable risk where a property existed in racially mixed neighborhoods or even in neighborhoods with the potential to integrate.[68] The program was ultimately very effective for spurring purchases, and FHA insurance practically became a requirement for most home transactions at the time.[69] The FHA, in turn, wielded influence on the market. It discouraged bank loans in urban neighborhoods and favored mortgages in newly built suburbs and areas where boulevards or highways separated Black families from white families.[70] All in all, racial segregation became an official requirement of the federal mortgage insurance program, and a whites-only requirement was foundational.[71]

While HOLC and FHA policies were major examples of race-motivated benefits, they were not the only ones that provided white Americans additional benefits on the basis of their skin color. Another major federal

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[66] *Id.* at 65–66 ("The FHA was particularly concerned with preventing school desegregation. Its manual warned that if children 'are compelled to attend school where the majority or a considerable number of the pupils represent a far lower level of society or an incompatible racial element, the neighborhood under consideration will prove far less stable and desirable than if this condition did not exist,' and mortgage lending in such neighborhoods would be risky."). *See also* Ta-Nehisi Coates, *The Case for Reparations*, ATLANTIC (June 2014), https://perma.cc/2NGH-46XT (quoting Charles Abrams, a co-creator of the New York City Housing Authority who noted in 1955 that "[a] government offering such bounty to builders and lenders could have required compliance with a nondiscrimination policy," and "[i]nstead, the FHA adopted a racial policy that could well have been culled from the Nuremberg laws.").

[67] Aaronson et al., *supra* note 58, at 9.

[68] *See* ROTHSTEIN, *supra* note 33, at 65 ("If a neighborhood is to retain stability it is necessary that properties shall continue to be occupied by the same social and racial classes. A change in social or racial occupancy generally leads to instability and a reduction in values") (quoting the FHA Underwriting Manual).

[69] *See* ROTHSTEIN, *supra* note 33, at 70 (noting that by 1950, the federal government was insuring and imposing segregative policies on half of all new mortgages nationwide).

[70] ROTHSTEIN, *supra* note 33, at 65.

[71] Even when developing public housing for Black citizens in the 1930s, the federal government incorporated segregationist principles to ensure white supremacy. Federal agencies reinforced, or even created, segregation in various localities, and Black families living in integrated communities were displaced to make room for segregated sites. *Id.* at 20–24. Within these cities, housing projects for Black families were concentrated in low-income and less desirable neighborhoods. *Id.* at 23. The white-occupied projects almost always had superior facilities, amenities, services, and maintenance. *Id*. at 30. As white families began to leave for the suburbs and Black families faced housing shortages, segregationist policies maintained vacancies in white facilities. *Id*. at 27. Eventually, local and federal officials responded to the housing shortage with increased public housing, but again, only on a segregated basis. *Id*. at 27, 32–34.

intervention that almost exclusively benefited whites was the Servicemen's Readjustment Act of 1944, commonly known as the GI Bill.[72] This bill represented "the most wide-ranging set of social benefits ever offered by the federal government in a single, comprehensive initiative."[73] Fifteen percent of the total federal budget was devoted to the bill by 1948, and in its first twenty-seven years, the system constructed under the bill allocated $95 billion in federal spending to former soldiers.[74] From 1944 to 1952, the Veterans Administration ("VA") backed nearly 2.4 million home loans for World War II veterans.[75] Adding on to the perks of the HOLC, GI Bill-related loans were capped at modest interest rates, and down payments were waived for loans up to thirty years.[76] In order to specifically accommodate white supremacists in Congress, the VA was only authorized to guarantee these loans; actual distribution of these federal loans was intentionally placed in the hands of local officials.[77] This model of administrative decentralization was a tool for advancing racist policies since local government officials were more reliable than federal officials in their support for the agenda of the Jim Crow South.[78] Due to racist officials and the redlining described above, Black veterans received little to no benefit from this expansive program. In 1947, only two of the more than 3,200 VA-guaranteed home loans in thirteen Mississippi cities went to Black borrowers.[79] In the North, of the 67,000 mortgages insured by

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[72] Servicemen's Readjustment Act of 1944, Pub. L. No. 78-346, 58 Stat. 284 (codified as amended in scattered sections of 38 U.S.C.). For information on how the GI Bill almost exclusively benefited white veterans, see IRA KATZNELSON, WHEN AFFIRMATIVE ACTION WAS WHITE: AN UNTOLD HISTORY OF RACIAL INEQUALITY IN TWENTIETH-CENTURY AMERICA 114 (2005) ("[T]he GI Bill did create a more middle-class society, but almost exclusively for whites.").

[73] KATZNELSON, *supra* note 72, at 113.

[74] *Id.*

[75] *See About GI Bill: History and Timeline*, supra note 35; *see also* KATZNELSON, *supra* note 72, at 115 (noting that VA mortgages have paid for nearly five million new homes since the GI Bill was enacted).

[76] *See* KATZNELSON, *supra* note 72, at 115.

[77] Representative John Rankin of Mississippi drafted the bill as chair of the Committee on World War Legislation in the House of Representatives. He required that the VA have sole authority over the bulk of the GI Bill budget and required that locally appointed VA officials control the dispensation of benefits. *See* KATZNELSON, *supra* note 72, at 139; Edward Humes, *How the GI Bill Shunted Blacks into Vocational Training*, J. BLACKS HIGHER EDUC., Autumn 2006, 92, 96.

[78] Decentralization supported the white supremacist agenda because it provided an official means to deny benefits to legally qualified Blacks. *See* KATZNELSON, *supra* note 72, at 38–39, 123. The VA further supported segregation by providing virtually no administrative control over how local GI Bill counselors treated Black servicemen, and by hiring very few Black counselors. *See* Humes, *supra* note 77, at 96.

[79] *See* Ira Katznelson & Suzanne Mettler, *On Race and Policy History: A Dialogue about the G.I. Bill*, 6 PERSP. ON POL. 519, 523 (2008).

the GI Bill in New York and in northern New Jersey suburbs, fewer than one hundred supported non-white homeowners.[80] Overall, the GI Bill has been described as the "great[est] instrument for widening an already huge racial gap in postwar America."[81]

2. How Colorblind Impairments and Colorblind Benefits Continued to Widen the Housing Gap Between Whites and Blacks

The policies and practices above were ultimately outlawed by the Fair Housing Act of 1968[82] and the Community Reinvestment Act of 1977,[83] but their effects in the intervening period were significant. By 1949, the FHA had insured one-third of all newly constructed homes.[84] In an analysis of housing patterns from the 1910 census to the 2010 census, economists calculated significant differences in home valuations between races and noted increased segregation in the years that federal maps played a role.[85] Interestingly, these studies also show significant disinvestment from Black neighborhoods, which was damaging to Black homeowners during this period.[86] Overall, the study estimates that forty percent of the gap in home values between Blacks and whites are attributable to HOLC maps alone.[87]

Though the legislation in 1968 and 1977 curbed federally backed housing discrimination, the results were longstanding and irreversible. For example, in Levittown, New York, Blacks were denied access to the neighborhood through redlining and other color-coded maps (as described above), in addition to other methods such as racial covenants and outright discrimination.[88] In 1948, the homes in this suburb, located outside of

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[80] KATZNELSON, *supra* note 72, at 140.

[81] *Id.* at 121.

[82] Fair Housing Act of 1968, Pub. L. No. 90-284, 82 Stat. 73 (codified as amended at 42 U.S.C. §§ 3601-3631 (1988)).

[83] Community Reinvestment Act of 1977, Pub. L. No. 95-128, 91 Stat. 1111 (codified as amended at 12 U.S.C. §§ 2901-2908 (2018)).

[84] Aaronson et al., *supra* note 58, at 10.

[85] *Id*. at 21-22.

[86] Specifically, there was HOLC-related decline in homeownership, housing values, and rents in Black neighborhoods and other low graded sects. *Id*. at 28-29. In addition to being denied FHA mortgage insurance, Blacks predictably received fewer private lending options too. *Id*. at 34.

[87] *Id*. at 33.

[88] ROTHSTEIN, *supra* note 33, at 70-71. *See also* Bruce Lambert, *At 50, Levittown Contends with Its Legacy of Bias*, N.Y. TIMES (Dec. 28, 1997), https://perma.cc/9KNN-7HE8 ("The whites-only policy was not some unspoken gentlemen's agreement. It was cast in bold capital letters in clause 25 of the standard lease for the first Levitt houses . . . . It stated that the home could not 'be used or occupied by any person other than members of the Caucasian race.'").

New York City, sold for about $75,000 in today's currency.[89] Properties in Levittown now sell for upwards of $350,000.[90] This means that white working-class families who bought those homes in 1948 with significant government assistance have gained over $200,000 in wealth over three generations.[91] Houses that were similarly valued in 1948—but existed in redlined areas nearby—currently sell for $90,000 to $120,000.[92]

Concentration of poverty was a natural result of redlining and the ensuing residential segregation. With concentrated poverty came especially potent colorblind impairments. Low land value, on account of discriminatory housing policies, has made communities of color targets for demolition in the name of "urban renewal" and various major infrastructure projects.[93] With "blight" as a justification, officials did not need to articulate any race-specific reasons for selecting these sights for major infrastructure projects like highways, boulevards, and even parks.[94] Low land value has also justified the siting of industrial and polluting hazards such as landfills, incinerators, and power plants in proximity to nonwhite residents.[95] All in all, these colorblind impairments have been the costs for a thriving infrastructure, a societal benefit. However, communities of color have nearly always borne the burdens required.

Simultaneously, communities of color have received relatively fewer gains from colorblind benefits that favor homeownership. Due to disparities in homeownership,[96] white households are most eligible for home-

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[89] ROTHSTEIN, *supra* note 33, at 182.

[90] *Id*.

[91] *Id.* And there is no question that the properties in Levittown were practically reserved for whites even after the Supreme Court deemed racial covenants unconstitutional in 1948. In the 1990 census, Levittown was 97% White, 4% Hispanic and 0.26% Black. *See* Lambert, *supra* note 88. In the 2010 census, Levittown was 84% White, 14.6% Hispanic, and 1.4% Black. *QuickFacts: Levittown CDP, New York*, U.S. CENSUS BUREAU, https://perma.cc/35KG-H2AU (last visited Oct. 25, 2019).

[92] ROTHSTEIN, *supra* note 33, at 182.

[93] ROTHSTEIN, *supra* note 33, at 127.

[94] *See* Alan Pyke, *Top Infrastructure Official Explains How America Used Highways to Destroy Black Neighborhoods*, THINKPROGRESS (Mar. 31, 2016, 12:47 PM), https://perma.cc/WNM5-NEHQ (explaining that in the first twenty years of highway construction for the federal interstate system, governments displaced over 475,000 families, most of whom were low-income people of color in urban cores); *Seneca Village*, CENTRALPARK.COM (last visited Feb. 1, 2020), https://perma.cc/SEY2-AR8V (noting that in New York City in the mid-nineteenth Century, Seneca Village, a predominantly African American community, was razed to create Central Park).

[95] NEW SCHOOL, TISHMAN ENV'T AND DESIGN CTR., LOCAL POLICIES FOR ENVIRONMENTAL JUSTICE: A NATIONAL SCAN 8–9 (2019), https://perma.cc/Q8RA-HUH3.

[96] *See Racial Disparities and the Income Tax System*, TAX POLICY CENTER (Jan. 30, 2020), https://perma.cc/4MKJ-U88Z (showing average homeownership rates to be 73% for white households, 41% for Black households, 47% for "Hispanic" households, and 57.6% for Asian households).

related tax policies. These colorblind benefits widen the racial wealth gap even though they are facially race neutral. The mortgage interest deduction is one example. This deduction rose in popularity with the rise in homeownership during the Roosevelt administration.[97] Stemming from the racially discriminatory housing policies described above, the mortgage interest deduction is generally less available to Black households.[98] Further, among deduction recipients, Black homeowners receive a disproportionately smaller benefit from the deduction than whites.[99] Another example is the tax code's treatment of home-related capital gains. White households are the primary beneficiaries of deductions for capital gains from the sale of a principal residence.[100] Both tax benefits lack any racially animated factor. Nonetheless, both benefits exacerbate racial disparities and perpetuate racial injustice.

III. PROPOSALS FOR AND OBSTACLES TO DISMANTLING THE PILLARS OF WHITE SUPREMACY

Nearly every aspect of society has been affected by government-imposed or sanctioned racism in the antebellum period, the Jim Crow era, and the last eighty years. The four pillars provide a structure for understanding and categorizing these different manifestations of racial injustice. In fact, when white supremacy is viewed in this manner, it is also apparent that some pillars have received significantly more attention than others. The government's primary response to racism was the enactment of laws prohibiting explicit racial discrimination—laws that only focused on race-motivated impairments and race-motivated benefits. Prospective in nature, these laws are not only insufficient for addressing the harms created by the race-motivated pillars, but they basically leave the colorblind pillars untouched. In order to close the racial disparities in negative and positive socioeconomic situations—a useful measure for analyzing the lingering effects of racial oppression—more needs to be done. Unfortunately, courts, and the Supreme Court specifically, have erected significant barriers to the necessary solutions.

In this Part, I first discuss how each pillar invites a tailored solution and detail the type of solution necessary. I then describe how the current

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[97] Emma Fernandez et al., *Mortgage Interest Deduction and the Racial Wealth Gap*, BERKELEY PUB. POL'Y J. (Aug. 23, 2018), https://perma.cc/S59P-M8TM.

[98] *Id.*

[99] *Id.* (noting that "even though black households comprise about 13 percent of the population, they are able to access just 6 percent of the total benefits from the [mortgage interest deduction].").

[100] Michelle Singletary, *Tax Code Isn't Neutral on Race, Researchers Find*, WASH. POST (Feb. 1, 2020), https://perma.cc/YF47-LSU7.

legal landscape accommodates or does not accommodate that type of solution through litigation. In examining solutions for the first two pillars, race-motivated impairments and benefits, I discuss the consideration of race in the affirmative action and integration contexts. I then shift to the colorblind pillars, beginning with colorblind impairments and stop-and-frisk litigation in New York City and ending with colorblind benefits and school funding litigation in New York State. Each point illustrates the legal difficulties of undoing the effects of white supremacist policies through litigation.

A. Remedying Racial Injustice Pillar by Pillar: A Practical and Philosophical Endeavor

The varied nature of racial injustice has created disparities in opportunities, wealth, property, and privileges. Reforms targeted at addressing racial gaps should also vary to reflect the means by which such gaps were perpetuated.

Policies within the race-motivated pillars directed benefits to white Americans and imposed inferior positions and institutions on Black communities. Ultimately, these policies allowed opportunities in America to be allocated on an unfair basis. This matters significantly because modern-day American society is more competitive than ever. Outlawing explicit discrimination means that desirable institutions attract more individuals than ever before, creating unprecedented competition for each seat.[101] Educational programs, even in the K-12 setting and in taxpayer supported institutions, rely on increasingly competitive admissions to select students.[102] This intense competition starts early and with lasting effects: it is not uncommon for numerous families to vie for a select number of middle school seats so that their children may be well-placed to attend

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[101] *See* Delano R. Franklin et al., *Admissions Rates at Record Low Across Ivy League, Stanford, MIT,* HARVARD CRIMSON (Apr. 24, 2018, 6:45 PM), https://perma.cc/9FYA-WZY9 (showing downward trend for acceptance rates among top-ranked universities as more applicants apply).

[102] For example, New York City's Department of Education administers an admissions test for gifted and talented programs for students as young as four. *See Gifted and Talented Testing*, NYC DEP'T OF EDUC., https://perma.cc/MAU6-SEYG (last visited Oct. 29, 2019). Further, eight out of nine of the city's "specialized high schools" admit students solely on the basis of an admissions exam, the Specialized High School Admissions Test ("SHSAT"). *See About the SHSAT*, PRINCETON REVIEW, https://perma.cc/2H9N-HTTK (last visited Oct. 29, 2019). These selective schools each require a minimum score that a student must get on the SHSAT to be offered a seat and will then admit as many eligible students as there are available seats. *See* Tyler Blint-Welsh, *What Is the SHSAT Exam? And Why Does it Matter?*, N.Y. TIMES (June 21, 2018), https://perma.cc/4JJ4-LYYU. Even though it applies to public high school with barely teen-aged applicants, this process is essentially competitive admissions boiled down to its essence.

a selective high school program and then prestigious college, all so that they may achieve the ultimate goal of securing a selective job.[103] In order to justify the concentration of opportunity in this competitive environment with limited resources, schools label students as gifted or construct test-based barriers of entry for specialized programs.[104] Recognizing the stakes involved with obtaining a good education, white parents in high-performing districts or school zones feel entitled to their specific local public school, even if it means a less fortunate student is afforded a lower quality education.[105]

Reversing the disparities created by race-motivated benefits would require reexamining how our institutions function and revisiting underlying American principles in order to make these institutions more democratic. In particular, the concept of merit and the role it serves in allocating opportunity should be challenged. Racial disparities in admission and hiring decisions are accepted because there is a general notion that the outcomes reflect truly meritocratic principles. However, while individual merit can exist within grades and performance, research has shown that grades and performance also capture other socioeconomic factors, such as wealth and race.[106] These other factors tend to drive outcomes more than an individual's potential or ability.[107] Addressing the racial injustice borne from these pillars would also mean examining how systemic drivers of inequality influence behavior and performance—i.e., how do the lingering effects of oppression encumber an individual and mask their potential. Finally, undoing the effects of race-motivated pillars would naturally require race-based solutions that take into account the historical

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[103] This example begins with middle school, but it is also not uncommon for New Yorkers to vie for preschool spots. *See* Anna Bahr, *When the College Admissions Battle Starts at Age 3*, N.Y. TIMES: THE UPSHOT (July 29, 2014), https://perma.cc/QMT5-HFSE; Elana Lyn Gross, *Inside the Insanely Competitive World of Elite New York City Preschools,* BUS. INSIDER (June 14, 2018, 5:17 PM), https://perma.cc/M4EH-3N9F.

[104] New York City's K-12 programs are a prime example. *See* Letter from Philip Desgranges & Laura D. Barbieri, Chairs, N.Y.C. Bar Comm. on Civil Rights & Comm. on Educ. and the Law, to The Hon. Richard A. Carranza, Chancellor, N.Y.C. Dep't of Educ., and Members of the Sch. Diversity Advisory Grp. (May 1, 2019), https://perma.cc/865T-NNEK.

[105] This sense of entitlement has been recognized as a justification for slow-rolling integration efforts in New York City by Mayor Bill de Blasio. *See infra* note 249 and accompanying text.

[106] *See, e.g.*, Zachary A. Goldfarb, *These Four Charts Show How the SAT Favors Rich, Educated Families*, WASH. POST (Mar. 5, 2014, 4:28 PM), https://perma.cc/2KBD-KERE (explaining that wealthier students from more educated families tend to do better on the SAT); Christopher Tienken, *Students' Test Scores Tell Us More About the Community They Live in Than What They Know*, CONVERSATION (July 5, 2017, 6:54 PM), https://perma.cc/N3ZU-RQFY ("It's already well-established that out-of-school, community demographic and family-level variables strongly influence student achievement on large-scale standardized tests.").

[107] *Id.*

monopolization of wealth and opportunity among whites. Otherwise, access will continue to be unequal.

Colorblind impairments are defined by the disproportionate burden borne by communities of color, and Black communities in particular. Today, these wrongs largely take the form of state-backed punishment or policing to counteract an undesired action by an individual. In my experience, I have typically seen advocates identify the racial disparities associated with a particular colorblind impairment and then call for the practice's elimination. What is less common, however, is an attempt to address the discriminatory elements of the practice, should it still exist after reform. In other words, efforts should be made to ensure that race cannot predict who is subject to these policies and practices.

Responses to colorblind impairments should also try to shift the paradigm surrounding the practice since the practice is often justified with populist notions. These justifications appeal to influential pockets of society—mostly white, wealthy, and unlikely to bear the costs of the practice. For instance, nearly every criminal justice practice disproportionately affects people of color, but elimination is made difficult because of public safety concerns. Therefore, reform efforts should also challenge the underlying justifications and reject the premise that the practice is needed. A prime example is how the prison abolitionist movement reconceptualizes the criminal law system. These reformers are not aspiring to stem carceral sentences nor make their lengths fairer, rather they seek to challenge prevailing notions of public safety by replacing harmful interventions with affirming and productive programs.[108]

For colorblind benefits, the issue is that pre-existing gaps in wealth, opportunity, and privilege mean that equal allocations widen the gap. Therefore, when addressing the dearth of resources available to historically oppressed communities, the solutions ought to be targeted at these communities specifically since universal proposals may expend precious political capital without creating equitable outcomes. Blanket allocations or universal subsidies do not account for competitive characteristics of our society and cannot close the gaps created by unjust practices.

Fiscal principles may be helpful to illustrate this point. In economics, the notion of "progressivism" requires acknowledging the different economic states of individuals in a capitalist market and creating policies that encourage more equitable outcomes.[109] A progressive characteristic of

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[108] *See* Patrisse Cullors, *Abolition and Reparations: Histories of Resistance, Transformative Justice, and Accountability*, 132 HARV. L. REV. 1684 (2019) (discussing through personal narrative how relationship-building and individual intervention can overcome reliance on punitive and carceral systems).

[109] *See* Francisca Alba, *Estimating the Economic Impact of a Wealth Tax*, BROOKINGS INSTITUTION (Sept. 5, 2019), https://perma.cc/7CNG-K7CP.

America's tax code is that the wealthy pay more in federal personal income taxes than the poor.[110] The flip side of a progressive scheme, however, is a regressive scheme. Regressive policies do not necessarily burden the poor in the same manner that progressive policies target the more-resourced. Rather, regressive taxes can take the shape of a flat fee—i.e. one applied uniformly without accounting for context. In taxes, a flat fee is considered regressive because it will always take a larger percentage of income from low-income individuals than from high-income individuals.[111] Such policies do not close wealth gaps, and may actually widen them.[112] By failing to account for the different historical circumstances of white people and people of color, colorblind benefits are a type of "regressive policy." These types of benefits must be recognized for their limitations and their role in exacerbating racial injustice. Thus, solutions to resource inadequacies in communities of color must have fiscally progressive principles attached to reflect how opportunity has been historically allocated in this country. It cannot simply be a case of providing under-resourced individuals with more to utilize; there must also be a consideration of overlooked individuals' capacity to compete against those already possessing resources. Solutions related to this pillar must also overcome abstract obstacles, namely beliefs that institutions ought to be fragmented to maintain tight control of resources and resentments of redistributive policies.

B. Litigation Efforts and the Obstacles to Undoing Racial Injustice

The solutions above describe responses to the four pillars in liberal conditions with few restraints. However, racial justice advocates do not

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[110] *See* CITIZENS FOR TAX JUSTICE, WHO PAYS TAXES IN AMERICA IN 2013? (2013), https://perma.cc/8H6J-YWRP; *For Richer, for Poorer: American Taxes Are Unusually Progressive. Government Spending Is Not*, ECONOMIST (Nov. 23, 2017), https://perma.cc/U2HL-PXMS.

[111] For example, consider excise taxes. "An excise tax increases the price of the taxed good or service relative to the prices of other goods and services. So households that consume more of the taxed good or service as a share of their total consumption face more of the tax burden from this change in relative prices. The regressivity of excise taxes is primarily the result of this relative price effect, because, on average, alcohol and tobacco represent a declining share of consumption as household income rises." TAX POLICY CTR., BRIEFING BOOK (2016), https://perma.cc/K9J6-B4RQ.

[112] Most recently, the Tax Cuts and Jobs Act of 2017 has been singled out as a scheme that is particularly inequitable. Even when comparing wealthy households with similar incomes, it is apparent that white households have benefited more from the bill and that the racial wealth gap is worsened because the law "rewards wealth over work." Among the top one percent of all households, white households have received an average tax cut of over $52,000. In comparison, Black and Latinx households in this same group received an average tax cut of $19,290 and $19,850 respectively. *See* WIEHE ET AL., *supra* note 44, at 8.

have this type of luxury. In practice, there are several obstacles to dismantling the four pillars, especially when reform is pursued through the courts.

1. Difficulties in Undoing Race-Motivated Impairments and Race-Motivated Benefits Through Affirmative Action and Voluntary Integration Policies

The first two pillars discussed above, those focusing on race-motivated impairments and benefits, demonstrate how white Americans received substantial assistance in a time when Black individuals and other people of color were actively hindered on the basis of their skin. Remedying these injustices presents unique challenges. Repayment for the injuries imposed on Black communities during slavery and the subsequent years of discrimination is an important matter that has undeniable complications. Given the renewed focus on cash reparations and the number of excellent resources available, this Article does not focus on that type of solution. Rather, I focus on what I believe to be the less-discussed consequence of these two pillars: inequity in opportunity and access. Unlike cash compensation which, while complicated, can theoretically be done through redistributive policies, opportunity and access are more difficult spoils to reclaim.

Specifically, race-motivated policies gave white Americans greater access to safer, more stable neighborhoods, highly desirable public schools, public and private institutions of higher learning and employment, and networks of individuals with social capital and access to power. A monopoly on government assistance greatly influenced this outcome. In addition to the mortgage-related provisions discussed in Part II, the GI Bill, which "was deliberately designed to accommodate Jim Crow,"[113] also facilitated business loans and funded college educations for millions of white veterans.[114] Early twentieth century labor laws that created labor protections, higher wages, and bargaining rights were also designed to accommodate Jim Crow.[115] These statutes included specific exemptions

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[113] KATZNELSON, *supra* note 72, at 114.

[114] By 1947, student veterans made up more than fifty percent of the college student population in America. *See* Eliza Berman, *How the G.I. Bill Changed the Face of Higher Education in America*, TIME: LIFE (July 13, 2015, 9:43 AM), https://perma.cc/7JFW-WF5K. Black veterans, however, were more often denied opportunities to attend four-year schools and were instead diverted to training programs for low-level positions, and only twelve percent of Black veterans went to college on the GI Bill as opposed to twenty-eight percent of white veterans. *See* Humes, *supra* note 77, at 97.

[115] *See generally* KATZNELSON, *supra* note 72, at 67–79.

for predominantly Black positions like farmworkers and domestic servants.[116] Within federal agencies and the military, the federal government maintained segregationist policies that gave greater opportunities to white individuals and relegated Black individuals to undesirable stations.[117] These policies within the race-motivated pillars gave white communities a massive advantage and prohibited Black individuals from reaching their potential.

Given the significant role of race-motivated benefits and impairments in developing this nation's race gap, race-conscious solutions are a natural starting point for closing this gap. Affirmative action policies, for example, serve to remedy the imbalance of opportunity and access created from these two pillars. Historically, affirmative action has been implemented through the consideration of race as a factor in admissions or hiring decisions—where membership in an underrepresented or oppressed group weighs in favor of admission. In earlier versions, affirmative action has also taken the form of a "set-aside" where a specific number of slots are reserved for members of an underrepresented or oppressed group.[118] In addition to affirmative action, integration plans have also been identified as a race-specific solution with the purpose of undoing the effects of white supremacy. Integration policies consider the race of individuals in the assembly of schools or neighborhoods for the purpose of achieving desegregation.[119]

Indeed, both affirmative action and integration are potent tools for addressing the effects of racial injustice. School integration has been shown to cut the achievement gap between Black and white students by

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[116] *Id.* at 54-61.

[117] *Id.* at 111–12 (describing segregationist policies in the military); ROTHSTEIN, *supra* note 33, at 43 (describing segregationist policies within federal government offices).

[118] *See generally* Steven K. DiLiberto, *Setting Aside Set Asides: The New Standard for Affirmative Action Programs in the Construction Industry*, 42 VILL. L. REV. 2039 (1997); Anemona Hartocollis, *50 Years of Affirmative Action: What Went Right, and What It Got Wrong*, N.Y. TIMES (Mar. 30, 2019), https://perma.cc/R6M9-FKYE.

[119] For this Part, I use the terms integration and desegregation interchangeably because they are used interchangeably by the judges and academics in the case law and literature that is discussed below. Nonetheless, there is an important and growing discussion about the ways in which integration differs from desegregation. *See Critical Definitions*, NYC'S INAUGURAL ALLIANCE FOR SCH. INTEGRATION & DESEGREGATION, https://perma.cc/V8D9-L52L (last visited Nov. 3, 2019). According to the New York City Alliance for School Integration and Desegregation ("NYCASID"), desegregation is "[t]he dismantling of the beliefs, policies, and practices that physically separate students into racially and economically isolated schools, tracks, classes, and/or programs," and integration pertains to "pedagogical, curricular, and cultural mechanism(s) inside of schools that support racially integrated student bodies" and is therefore defined as "decentering whiteness–creating educational opportunities and spaces that are affirming and empowering to all students." *Id.* Integration, as defined by NYCASID, is consistent with the solutions proposed in this Article.

half.[120] In fact, the racial achievement gap was at its narrowest at the height of school integration and increased when integration efforts were stifled.[121] In particular, reading scores among Black and white seventeen-year-olds narrowed to a 20-point gap in 1988 after existing as a 53-point gap in the early 1970s.[122] In 2012, this gap increased to 26 points, perhaps reflecting the increased segregation that has occurred in this time. Studies have shown racially diverse education settings to be a critical factor for improving performance across the curriculum, increasing test scores and school grades, increasing graduation rates, and increasing the likelihood of college attendance and completion.[123] Remarkably, there is evidence that integration policies have progressive qualities—students benefit across racial and socioeconomic backgrounds, but disadvantaged minority youth benefit the most. Thus, the performance gap closes without any harm to already high-performing students.[124]

Notwithstanding these benefits, the Supreme Court has expressed considerable skepticism about the merits of affirmative action or integration programs. On the one hand, the Court has frequently argued that any race-based policy, even remedial ones, create a new form of state-sponsored discrimination that echoes racist practices predating the civil rights movement.[125] Of course, affirmative action and integration programs are neither white supremacist nor anti-Black and are therefore distinguishable from such Jim Crow practices. Nonetheless, to the conservative branch of the Court, this remedial process relies on discriminating against whites and creating a new victim.[126]

On the other hand, the Court has questioned whether people of color truly benefit from these programs. To this, the justices point to the possible second-guessing that comes from benefiting from an affirmative action program, and they challenge whether such racial considerations

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[120] *This American Life: The Problem We All Live With - Part One*, CHI. PUB. MEDIA (July 31, 2015), https://perma.cc/JC8X-TU59.

[121] *See* George Theoharis, *'Forced Busing' Didn't Fail. Desegregation is the Best Way to Improve Our Schools*, WASH. POST (Oct. 23, 2015, 11:03 AM), https://perma.cc/QJ4N-22VC.

[122] *Id*. (citing NAT'L CTR FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., NCES 2013-456, TRENDS IN ACADEMIC PROGRESS: THE NATION'S REPORT CARD 18 fig.11 (2012), https://perma.cc/WBA7-KKX3).

[123] *See* ROSLYN ARLIN MICKELSON, THE NAT'L COAL. ON SCH. DIVERSITY, SCHOOL INTEGRATION AND K-12 OUTCOMES: AN UPDATED QUICK SYNTHESIS OF THE SOCIAL SCIENCE EVIDENCE 1-4 (2016), https://perma.cc/GU39-M66Z.

[124] *See id.; see also* AMY STUART WELLS ET AL., THE CENTURY FOUND., HOW RACIALLY DIVERSE SCHOOLS AND CLASSROOMS CAN BENEFIT ALL STUDENTS 12-15 (2016), https://perma.cc/J2WG-PTAY.

[125] *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 729-33 (2007) (plurality opinion); Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 240 (1995).

[126] *See Adarand*, 515 U.S. at 240.

simply trap society at a point of divisiveness.[127] Wrapped within this criticism is an inherent distrust of any race-based policy and a belief that race is solely a social construct.[128] This second type of skepticism calls for America to end its preoccupation with race and move on.

Acting on these misgivings, the Court severely limited the ability to address nebulous consequences of race-motivated impairments and race-motivated benefits in 1978. In *Regents of the University of California v. Bakke*, the Court ruled against a racial quota program for medical school. In focusing on the merits of diversity, the *Bakke* Court unnecessarily rejected systemic racism, or what it called "societal discrimination," as a compelling interest for the consideration of race in admission decisions.[129] In the controlling opinion, Justice Powell noted, "[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal."[130] Justice Powell also characterized racial remedies under the Fourteenth Amendment as a two-class theory where Black beneficiaries are recognized as "special wards entitled to a greater degree of protection greater than that accorded others."[131]

Importantly, this viewpoint failed to properly grapple with the sequence of historical events that brought America to affirmative action—namely the government's interference in Black communities' efforts to prosper and the government's race-based assistance to white Americans. In a dissenting opinion, Justice Marshall rebutted Justice Powell's criticisms of racial remedies, noting that given the "sorry history of discrimination and its devasting impact on the lives of Negroes, bringing the Negro into the mainstream of American life should be a state interest of the highest order. To fail to do so is to ensure that America will forever remain a divided society."[132]

Later, the Court continued to impede racial justice efforts and signaled the Court's reluctance in sanctioning the types of policies necessary to squarely address the aftershocks of the two race-motivated pillars. For

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[127] *See* Richmond v. J.A. Croson Co., 488 U.S. 469, 493-94 (1989); *see also* Corey Robin, *Clarence Thomas's Radical Vision of Race*, NEW YORKER (Sept. 10, 2019), https://perma.cc/ZA64-Z2QJ.

[128] *See Parents Involved*, 551 U.S. at 730; Grutter v. Bollinger, 539 U.S. 306, 371 (2003) (Thomas, J., concurring in part).

[129] Regents of Univ. of California v. Bakke, 438 U.S. 265, 310 (1978).

[130] *Id.* at 289-90.

[131] *Id.* at 295.

[132] *Id.* at 396 (Marshall, J., concurring in judgment).

example, in 1989, Justice O'Connor opined that there was no way to distinguish between "benign" and "remedial" classifications[133] and found that the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification.[134] She was eager to cabin any use of racial classification and found the government's interest uncompelling where it sought to remedy "the effects of societal discrimination, an amorphous concept of injury that may be ageless in its reach into the past."[135] Similarly, in a 2003 opinion regarding affirmative action in law school admissions, Justice O'Connor minimized the scope and damage of American racism by suggesting unrealistic time limits for remedial efforts. In affirming that the consideration of race for diversity—and not remedial purposes—was a compelling state interest in higher education,[136] Justice O'Connor noted, without sufficient evidence for her unbridled optimism, that she "expect[ed] that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."[137]

In *Parents Involved in Community Schools v. Seattle School District No. 1* ("*Parents Involved*"), the Court doubled down on these principles, holding that *de facto* segregation is not a compelling interest for the consideration of race on an individualized basis for *voluntary* integration plans.[138] While Justice Kennedy's concurrence recognized the value of race-conscious plans and suggested that such policies may not require heightened scrutiny in order to accomplish diversity,[139] Chief Justice Roberts' plurality opinion expressed hostility to the most obvious solutions to the race-motivated policies represented by the first two pillars. Chief Justice Roberts reduced voluntary integration efforts on the individual level to "racial balancing."[140] He then wrote of such solutions as a looming threat that would "effectively assur[e] that race will always be relevant in American life" and will stand in the way of a colorblind constitution.[141] In what has become a perfect summary of the Court's growing unwillingness to remedy or even comprehend America's history of

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[133] Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989).

[134] *Id.* at 494.

[135] *Id.* at 497 (quoting Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 307 (1978)).

[136] Grutter v. Bollinger, 539 U.S. 306, 333 (2003); *see Bakke* discussion *supra* Section III.B.1.

[137] *Grutter*, 539 U.S. at 343.

[138] Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 720-21 (2007).

[139] *Id.* at 798 (Kennedy, J., concurring in part).

[140] *Id.* at 726-732. Serving as an alternative to voluntary integration at the individual level are integration policies that take the racial characteristics of a group or community into account. *See, e.g.*, *id.* at 798 (Kennedy, J., concurring in part).

[141] *Id.* at 730.

racism, the Court noted that "the way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[142]

Although the cases discussed above do not cover every type of policy that incorporates race for the purpose of creating a more just society, it is worth noting how the Court subtly shifted its view of the Fourteenth Amendment. Specifically, the Fourteenth Amendment, enacted to combat white supremacy and defang antiblackness—has been repurposed to primarily prohibit race-based considerations, even if such prohibitions reinforce the pillars of white supremacy.[143] In doing so, the Court has blunted a useful tool for remedying the most complicated and intertwined effects of racism. It has also made equality the primary consideration without any thought to how such equality can be achieved. This is most noticeable in Justice O'Connor's stated belief that race would no longer be a necessary consideration in admissions for achieving diversity in a top-tier law school in 2028. Trends in educational performances make obvious that such an outcome was never realistic.

For those hoping to expand the use of affirmative action and integration plans beyond institutions of higher learning and scenarios where there has been a finding of intentional discrimination, the Supreme Court's jurisprudence has proven to be a major obstacle. Recent cases regarding the consideration of race reveal an ahistorical, if not obtuse, perspective from the Court. By trying to cabin race-conscious solutions to intentionally discriminatory policies enacted by identifiable parties imposing discrete harms,[144] the conservative wing of the court signals that race-conscious policies will not be available to address the amorphous, but still significant, consequences of race-motivated policies represented by the first two pillars. Given Justice Kennedy's retirement and the likelihood that Chief Justice Roberts will continue to serve as the swing vote

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[142] *Id.* at 748. For an interesting discussion of this quote and Justice Sotomayor's retort years later, see Ronald Turner, *"The Way to Stop Discrimination on the Basis of Race . . . ,"* 11 STAN. J. C.R. & C.L. 45 (2015).

[143] For further discussion of the Court's shifting view of the Fourteenth Amendment, see generally Turner, *supra* note 142.

[144] *See Adarand*, 515 U.S. at 223-24; *see also Parents Involved* at 756 (Thomas, J, concurring in part) ("Remediation of past *de jure* segregation is a one-time process involving the redress of a discrete legal injury inflicted by an identified entity. At some point, the discrete injury will be remedied, and the school district will be declared unitary. Unlike *de jure segregation*, there is no ultimate remedy for racial imbalance.").

on cases touching on social justice issues,[145] there is understandable pessimism regarding the viability of the next race-conscious policy examined by the Court.[146]

The Court's approach also makes clear that the Court has little interest in closing the race gap, or at the very least, does not see it as a primary goal. This is seen in Justice Roberts' reduction of integration as racial balancing and in his ungrounded views of how racial progress may occur. In a perfect world, the courts would not need to make complicated determinations regarding race, because race would be as determinative in outcomes as an individual's height or hair color. Of course, we do not live in such a world—the four pillars above make that clear. Such a world would necessarily be without centuries of enslavement and a subsequent century of discrimination, benefits denial, and government intrusion along racial lines. Under Chief Justice Roberts' formulation, where the government only incorporates race into its remedies in the handful of instances where plaintiffs can prove allegations of current, discrete, and obvious forms of discrimination, Black and Latinx individuals will forever lag behind white Americans as a demographic.[147]

2. Stop and Frisk in New York City: An Attempt to Remedy Colorblind Impairments Through Litigation

Due to recent advocacy by countless community members, activists, and scholars, mass incarceration—and the inherent racism of the criminal

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[145] *See* Adam Liptak, *After 14 Years, Chief Justice Roberts Takes Charge*, N.Y. TIMES (June 27, 2019), https://perma.cc/U6SM-JXR3. In providing the decisive votes and writing the majority opinions in cases on the census and partisan gerrymandering, he demonstrated that he has unquestionably become the court's ideological fulcrum after the departure last year of Justice Anthony M. Kennedy.").

[146] *See* Emily Badger, *Can the Racial Wealth Gap Be Closed Without Speaking of Race?*, N.Y. TIMES (May 10, 2019), https://perma.cc/9CY2-V5BE (discussing possible legal obstacles to progressive solutions for addressing the Black-white wealth gap). Indeed, it is much more likely that jurisdictions feel disempowered to attempt ways of diversifying schools because of possible litigation. I have encountered this type of obstacle where the NYC DOE has been sued for introducing a diversity initiative based on socioeconomic factors and not race. In this litigation, I represent a number of students and organizations interested in racial integration in New York City schools. *See* Press Release, N.Y. Civil Liberties Union, Multi-Racial Student and Community Organizations Ask to Join Suit to Defend Expanded Access to Elite New York City Public Schools (Mar. 28, 2019), https://perma.cc/4WFL-ZSSA.

[147] *See* WIEHE ET AL., *supra* note 44, at 3 (noting that under current trends it will take Latinx families over 2,000 years to match white households and that Black families will *never* catch up, rather reaching a point of zero wealth at some point during the second half of this century); *see also Parents Involved*, 551 U.S. at 787–88 (Kennedy, J. concurring in part) ("The plurality opinion is too dismissive of the legitimate interest government has in ensuring all people have equal opportunity regardless of race.").

justice system—has finally been recognized as a civil rights crisis.[148] Michelle Alexander's *The New Jim Crow* and organizers for the Movement for Black Lives have given individuals a framework and vocabulary for articulating how our criminal justice system damages communities of color in America even when policies are facially race neutral.[149]

Mere contact with the criminal justice system risks severe consequences, but not everyone in America is equally exposed to this risk.[150] In the various jurisdictions throughout the United States, the criminal code has expanded to the point where it would be impossible to enforce every law, intervene for every crime committed, or even prosecute every arrest through to a jury verdict.[151] This gives law enforcement actors significant discretion at nearly every step of the process from arrest to conviction.[152] In the abstract, discretion can be a powerful mechanism for

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[148] *See* JULIANA MENASCE HOROWITZ ET AL., PEW RESEARCH CTR., RACE IN AMERICA 2019, at 33–35, https://perma.cc/86K2-9C3H (noting that the majority of Americans believe that Black individuals are treated less fairly than whites by the police and the criminal justice system).

[149] *See* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010); Frank Leon Roberts, *How Black Lives Matter Changed the Way Americans Fight for Freedom*, ACLU (July 13, 2018, 3:45 PM), https://perma.cc/VEX4-TB9D.

[150] *See* discussion of disparities *infra* notes 153-59. When surveyed, New Yorkers reported significant differences in how they experience the police; New Yorkers who live in heavily policed neighborhoods reported feeling surveilled and unsafe around police. JOHANNA MILLER & SIMON MCCORMACK, N.Y. CIVIL LIBERTIES UNION, SHATTERED: THE CONTINUING, DAMAGING, AND DISPARATE LEGACY OF BROKEN WINDOWS POLICING IN NEW YORK CITY 10, 15 (2018), https://perma.cc/E2KU-WJ3K. New York City neighborhoods that are predominantly inhabited by people of color often feature giant police watchtowers, floodlights, and other surveillance equipment. *Id* at 14-15. Notably, the police stop more Black and Latinx New Yorkers regardless of the neighborhood. *See* CHRISTOPHER DUNN & MICHELLE SHAMES, N.Y. CIVIL LIBERTIES UNION, STOP AND FRISK IN THE DE BLASIO ERA 11 (2019), https://perma.cc/ZL8M-A5RQ (discussing NYPD data that reveal large percentages of Black and Latinx people being stopped in precincts that have substantial percentages of white residents). Racially biased intrusions will continue into the future as more decisions become automated. Police are increasingly relying on predictive algorithms that analyze existing crime data. Since this data reflects racial disparities created from years of racist law enforcement practices, the algorithms replicate racially biased outcomes in tools that are designed to be "objective." *See* Rashida Richardson et al., *Dirty Data, Bad Predictions: How Civil Rights Violations Impact Police Data Predictive Policing Systems, and Justice*, 94 N.Y.U. L. REV. 192, 198 (2019).

[151] *See generally* A Crime a Day (@ACrimeaDay), TWITTER, https://perma.cc/BXG6-WFA3 (last visited Oct. 25, 2019). This humorous Twitter account highlights the sheer expansiveness of criminal law and regulations by posting a different provision of the United States Code and the Code of Federal Regulations daily since July 2014.

[152] Less humorously, the Supreme Court has recognized the exceedingly broad discretion possessed by police officers and prosecutors. *See* Whren v. U.S., 517 U.S. 806, 810 (1996) (affirming that officers may stop a vehicle as long as they have a reasonable cause to believe that a traffic violation occurred); Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978) ("[S]o

achieving justice. After all, mercy is perhaps the system's most powerful value.[153] Fairness, however, is another foundational value, and this value is undermined by discretion in the current implementation of criminal law.

When the criminal justice system runs its course, law enforcement actors exercise their discretion against people of color at alarming rates.[154] As the front line of law enforcement, police officers have extraordinary power to shape the individual makeup of the criminal justice system. Within this system, racial disparities exist for charges,[155] pretrial detention,[156] convictions,[157] lengths of confinement,[158] and parole decisions.[159] These racial disparities also reverberate throughout the areas of citizenry

long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.").

[153] When exercised robustly, discretion also ensures efficiency. Though efficiency is obviously a less lofty concept than mercy, efficiency is critical for preserving resources in the system for complex cases.

[154] *See* Radley Balko, *21 More Studies Showing Racial Disparities in the Criminal Justice System*, WASH. POST (Apr. 9, 2019, 7:00 AM), https://perma.cc/3A4P-6HQD (compiling dozens of studies demonstrating racial disparities in the criminal justice system, even after accounting for differences in crime rates).

[155] *See* Carlos Berdejo, *Criminalizing Race: Racial Disparities in Plea-Bargaining*, 59 B.C. L. REV. 1187, 1191, 1215 (2018) (explaining that white defendants are more than twenty-five percent more likely than Black defendants to have their most serious charge dismissed in a plea bargain); Matthew S. Crow & Kathrine A. Johnson, *Race, Ethnicity, and Habitual-Offender Sentencing: A Multilevel Analysis of Individual and Contextual Threat*, 19 CRIM. JUST. POL'Y. REV. 63, 72-73 (2008) (noting that Black defendants with multiple prior convictions are twenty-eight percent more likely to be charged as "habitual offenders" than white defendants with similar criminal records).

[156] *See* NICK PETERSEN ET AL., ACLU, UNEQUAL TREATMENT: RACIAL AND ETHNIC DISPARITIES IN MIAMI-DADE CRIMINAL JUSTICE 20–25 (2018), https://perma.cc/WN7R-7NLE (noting that Black defendants in Miami-Dade County are more likely to be detained pretrial and will spend more time in pretrial detention than white defendants); Besiki Luka Kutateladze & Nancy R. Andiloro, *Prosecution and Racial Justice in New York County* 85 (Vera Inst. of Justice, Technical Report No. 247227, 2014), https://perma.cc/D8ND-TRMY (describing how Black and Latinx defendants in Manhattan are more likely than white defendants to be detained before trial for comparable crimes).

[157] *See* SAMUEL R. GROSS ET AL., NAT'L REGISTRY OF EXONERATIONS, RACE AND WRONGFUL CONVICTIONS IN THE UNITED STATES 1 (2017), https://perma.cc/2MEE-5VRP (explaining that the majority of exonerated criminal defendants in the United States are Black); PETERSEN ET AL., *supra* note 156, at 5.

[158] *See* Christopher Ingraham, *Black Men Sentenced to More Time for Committing the Exact Same Crime as a White Person, Study Finds*, WASH. POST (Nov. 16, 2017 1:33 PM) https://perma.cc/HYN4-SU4B; *see generally* Traci Burch, *Skin Color and the Criminal Justice System: Beyond Black-White Disparities in Sentencing*, 12 J. EMPIRICAL LEGAL STUD. 395 (2015).

[159] Michael Winerip et al., *For Blacks Facing Parole in New York State, Signs of a Broken System*, N.Y. TIMES (Dec. 4, 2016), https://perma.cc/GW3R-3TS4.

affected as collateral consequences of arrests or convictions: employment,[160] housing,[161] access to government resources,[162] and one's ability to vote.[163] Given the life-altering consequences that may follow from interaction with the criminal justice system, many advocates properly focus on challenging racially unjust practices at the front end of the criminal justice system: street encounters with police.

Stop-and-frisk is a colorblind impairment that became a commonly understood term because of the advocacy and litigation efforts of civil rights groups and community members. Sometimes called "Terry stops,"[164] this police tactic involves stopping a person and patting them down to determine if they have a weapon.[165] The Supreme Court articulated specific conditions for the use of this tactic.[166] Despite these constitutional limitations, NYPD officers applied this tactic inappropriately and at unjustifiable rates to Black and Latinx New Yorkers for over a decade.[167] In 2011, the NYPD conducted 685,724 stops and 381,704 frisks.[168] Young Black and Latinx males were the primary targets. Though they accounted for only 4.7% of the city's population, individuals with these specific characteristics accounted for 41.6% of stops.[169] In 2011, the number of stops of young Black and Latinx males surpassed the number of

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[160] *See* Pager, *supra* note 18.

[161] *See* Camila Domonoske, *Denying Housing Over Criminal Record May Be Discrimination, Feds Say*, NPR (Apr. 4, 2016, 1:14 AM), https://perma.cc/238M-JSV8.

[162] *See* Eli Hager, *Six States Where Felons Can't Get Food Stamps*, MARSHALL PROJECT (Feb. 4, 2016, 7:15 AM), https://perma.cc/3UB8-4RX5 (discussing prohibitions on government aid based on prior convictions); *Students with Criminal Convictions Have Limited Eligibility for Federal Student Aid*, FED. STUDENT AID, https://perma.cc/99UG-PNA5 (last visited Feb. 1, 2020) (explaining that a drug conviction can make someone ineligible for federal student aid for college tuition).

[163] *See* ERIN KELLEY, BRENNAN CTR. FOR JUSTICE, RACISM & FELONY DISENFRANCHISEMENT: AN INTERTWINED HISTORY (2017), https://perma.cc/43D2-GRQM (last visited Dec. 12, 2019).

[164] Terry v. Ohio, 392 U.S. 1 (1968).

[165] *Id.* at 29-30.

[166] *Id.* at 29 ("The sole justification of the search . . . is the protection of the police officer and others nearby, and it must therefore be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer.").

[167] *See* Joseph Goldstein, *Judge Rejects New York's Stop-and-Frisk Policy*, N.Y. TIMES (Aug. 12, 2013), https://perma.cc/KQ2V-MZWP; *see generally* Floyd v. City of New York, 959 F. Supp. 2d 540 (S.D.N.Y. 2013) (holding that the city of New York was liable for violations of the predominantly Black and Latinx plaintiffs' Fourth and Fourteenth Amendment rights through its deliberate indifference toward the NYPD's practice of conducting unconstitutional stop-and-frisks).

[168] N.Y. CIVIL LIBERTIES UNION, STOP-AND-FRISK 2011, at 8 (2012), https://perma.cc/223Z-UK3H.

[169] *Id.* at 7.

individuals with these characteristics in New York.[170] Ninety percent of these men were innocent and a gun was found only 1.9% of the time.[171] In contrast, guns were recovered at a higher rate among white individuals who were frisked.[172]

By 2012, civil rights attorneys had brought three separate class actions challenging the use of stop-and-frisk by the NYPD.[173] Overall, the legal challenges to this practice accounted for both the overuse of stop-and-frisk *and* the tactic's discriminatory nature.[174] In tackling these two aspects of the practice, the ideal outcome would involve significantly reducing the number of stops by cabining them to situations where a stop was constitutionally permissible and eliminating the racial disparities within the remaining stops. Both components of this outcome would greatly benefit New Yorkers of color.

In 2013, Judge Shira A. Sheindlin oversaw a nine-week trial and ultimately found that the city systematically violated the Fourth and Fourteenth Amendments with its stop-and-frisk policy.[175] Importantly, she found that there was a sufficient basis to infer discriminatory intent by the city, and that city officials were deliberately indifferent to equal protection violations.[176] This finding was atypical in that courts rarely acknowledge such systemic bias. As a remedy, the Court appointed an independent monitor and ordered a string of reforms including non-discriminatory policies, improved training protocols on racial profiling, mandatory body-worn cameras, and increased supervision and discipline.[177] These changes have been underway for over five years now.

The stop-and-frisk litigation represents a landmark victory, but the outcome also reflects the challenges in addressing colorblind impairments

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[170] *Id.* at 2.

[171] *Id.*

[172] *Id.*

[173] *See* Floyd v. City of New York, 959 F. Supp. 2d 540 (S.D.N.Y. 2013); Ligon v. City of New York, 925 F. Supp. 2d 478 (S.D.N.Y. 2013); Davis v. City of New York, 959 F. Supp. 2d 324 (S.D.N.Y. 2013). I have served as counsel on *Ligon v. City of New York*, and I am currently counsel on *Davis v. City of New York*.

[174] The Fourth Amendment claims of the three lawsuits addressed the NYPD's overuse of the practice. *Davis* 959 F. Supp. 2d at 339-40; *Floyd*, 959 F. Supp. 2d at 658-60; *Ligon*, 925 F. Supp. 2d at 542-43. The Fourteenth Amendment claims in *Floyd* and *Davis* addressed the discriminatory nature of the practice and its impact on Black and Latinx New Yorkers. *Davis* 959 F. Supp. 2d at 359; *Floyd*, 959 F. Supp. 2d at 660. There were also statutory claims in each case that addressed these components. 959 F. Supp. 2d at 366-73; Complaint at 48-50, *Floyd*, 959 F. Supp. 2d 540 (No. 08 Civ. 1034 (SAS)); Complaint at 48-50, *Ligon*, 925 F. Supp. 2d 478 (No. 12 Civ. 2274 (SAS)).

[175] *Floyd*, 959 F. Supp. 2d 540; *see generally* Goldstein, s*upra* note 167.

[176] *Floyd*, 959 F. Supp. 2d at 662–67.

[177] *See generally* Floyd v. City of New York, 959 F. Supp. 2d 668 (S.D.N.Y. 2013) (determining appropriate remedies for NYPD's constitutional violations).

through litigation. In the period immediately following changes in NYPD policy and practices, stops drastically plummeted. From 2014 to 2017, the NYPD reported 92,383 stops for the entire four-year period—a fraction of the nearly 700,000 stops reported in 2011 alone, and less than half the number of stops reported in 2013 when the practice of stop-and-frisk was waning.[178] While the recent numbers likely reflect significant underreporting by the NYPD,[179] it is still true that litigation decreased an unacceptable practice experienced by New Yorkers of color.[180]

Unfortunately, despite the efforts of the plaintiffs and plaintiffs' counsel, litigation and subsequent institutional reforms have had no effect on the racial disparities of the stops. Recent statistics show that Black and Latinx New Yorkers are still overrepresented among those stopped-and-frisked.[181] Though residential patterns play a key role in where police choose to target their resources, recent NYPD data also show that NYPD officers disproportionately stop Black and Latinx individuals in neighborhoods with substantial percentages of white residents.[182] In other words, this disparity is unlikely to be explained by "high-crime areas"—a common excuse for exercising undue scrutiny of communities of color.[183]

These disparities do not reflect an omission by the parties involved in the litigation. Pursuant to the court's order, the NYPD has had, since 2015, special policies and procedures for complaints related to racial profiling and bias-based policing.[184] Specialized training on racial bias was also envisioned within the package of reforms overseen by the monitor. Yet, what should have been a forceful moment for addressing racial disparities and the institutional forces that create racist outcomes has, so far,

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[178] *See* DUNN & SHAMES, *supra* note 150, at 4 fig.1. Undermining the justification for stop and frisk, crime reached a record low in New York City even as the number of stops plummeted. *See id*. at 1; Blake Zeff, *America's Over-Policing Bombshell: How New Data Proves "Stop & Frisk" Critics Were Right All Along,* SALON (Jan. 10, 2015, 4:30 PM), https://perma.cc/QAC7-MEZP (showing crime fell by 4.6% in 2014 and reached a record low in modern New York City history).

[179] *See* Ninth Report of the Independent Monitor at 5, Floyd v. City of New York, No. 08-CV-1034 (AT) (S.D.N.Y. Jan. 11, 2019), https://perma.cc/48S5-FDC9.

[180] *See* DUNN & SHAMES, *supra* note 150, at 1 (explaining that even if stops are underreported, it is unlikely that underreporting fully explains the difference in stops between the height of stop-and-frisk and now).

[181] *Id.* at 9 fig.5 (showing that 81% of reported stops in the four years following Judge Scheindlin's order involved Black and Latinx individuals).

[182] *Id.* at 11.

[183] *Id.* at 8, 11.

[184] *See Floyd*, 959 F. Supp. 2d at 684 ("Finally, the Office of the Chief of Department must begin tracking and investigating complaints it receives related to racial profiling."); *see also* Recommendation Regarding IAB Guide and Training on Profiling Investigations at 1, *Floyd*, No. 08-CV-1034 (AT) (S.D.N.Y. Dec. 20, 2018) (noting that the policies have been in place since 2015), https://perma.cc/D69L-68P3.

fallen short. For example, from November 2014 to December 2018, the NYPD received, investigated, and closed nearly 2,000 complaints of biased policing.[185] Shockingly, the NYPD failed to substantiate a single one of these citizen complaints and has not found racial profiling in any one of them.[186] The NYPD's failure to acknowledge racial profiling in these complaints is particularly unexplainable given the increasingly available evidence that selective enforcement remains a massive problem within New York City. In the last two years alone, there have been numerous reports revealing striking racial disparities regarding the policing of extremely mundane violations. Even though New Yorkers of every race violate these laws, reports reveal that overwhelming majorities of those ticketed or arrested for jaywalking,[187] transit fare evasion,[188] and marijuana possession[189] are Black or Latinx.

A major obstacle here is that equal protection jurisprudence does not encourage holistic examinations of the criminal justice system. The sole focus is on whether individuals were subjected to a particular practice because of intentional discrimination.[190] This approach is incapable of addressing the root causes of racially disparate experiences and the pervasive nature of white supremacist policies. In other words, the jurisprudence leaves no room for demanding that a Black or Latinx individual fundamentally receives the same opportunities and likelihood of outcomes within the criminal justice system as a white individual. Admittedly, it would be difficult to disentangle unconscious bias or the lingering effects of systemic racism from the criminal legal system. But, given the

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[185] N.Y.C. DEP'T OF INVESTIGATION, COMPLAINTS OF BIASED POLICING IN NEW YORK CITY: AN ASSESSMENT OF NYPD'S INVESTIGATIONS, POLICIES, AND TRAINING 17 (2019), https://perma.cc/GU8Q-H5Q7.

[186] *Id.* at 18.

[187] Martin Samoylov & Gersh Kuntzman, *NYPD Targets Blacks and Latinos for 'Jaywalking' Tickets*, STREETSBLOG NYC (Jan. 8, 2020), https://perma.cc/739X-LHBP (analyzing city data revealing that 89.5% of jaywalking tickets in 2019 were given to Black and Latinx residents, despite these demographics comprising only 55% of the city population).

[188] Ashley Southall, *Subway Arrests Investigated Over Claims People of Color Are Targeted*, N.Y. TIMES (Jan. 13, 2020), https://perma.cc/5FCH-UNT8 (explaining that in New York City "[f]rom October 2017 to June 2019, during stops when race was recorded, 73 percent of the people who received a ticket for fare evasion and 90 percent of those who were arrested on that charge were black and Hispanic").

[189] Benjamin Mueller et al., *Surest Way to Face Marijuana Charges in New York: Be Black or Hispanic*, N.Y. TIMES (May 13, 2018), https://perma.cc/FU7Z-8JPC (noting that approximately 87 percent of those arrested for marijuana possession in New York City are Black or Latinx, and that Black and Latinx New Yorkers "are the main targets of arrests even in mostly white neighborhoods.").

[190] Floyd v. City of New York, 959 F. Supp. 2d 540, 571 (S.D.N.Y. 2013) ("[P]laintiffs must show that those who carried out the challenged action '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.'") (quoting Hayden v. Paterson, 594 F.3d 150, 163 (2d Cir. 2010)).

long history of racial injustice, mere difficulty is no excuse. Unfortunately, the Supreme Court has not shown an ability to rise to the challenge. By failing to exercise vigilance over the lingering effects of racism where racial disparities are apparent but intent is not, the Court has revealed a tolerance for systemic racism.

In 1987, the Supreme Court made this tolerance clear in *McCleskey v. Kemp*.[191] Warren McCleskey, who was on death row in Georgia, used statistical analysis to mount a constitutional challenge to his death sentence. The analysis showed disparate patterns indicating that a defendant was more likely to receive a death sentence if the victim of the crime was white.[192] Despite the overwhelming statistical evidence demonstrating this victim-centered version of white supremacy, the Court's majority failed to find that race had unconstitutionally influenced the imposition of the death sentence.[193] The Court rejected McCleskey's claim under the Fourteenth and Eighth Amendments. In finding an insufficient claim under the former, the Court noted that the central role of discretion in criminal justice required exceptionally clear proof that the state of Georgia had abused its discretion in adopting and maintaining the death penalty as it had.[194] The Court essentially rejected a pathway for demonstrating that implicit (or well-concealed explicit) racism creates a constitutional harm, finding that statistical evidence of disparate treatment will not, by itself, demonstrate a constitutional injury.[195]

Following *McCleskey*, it has been incredibly difficult to create equitable outcomes to redress colorblind impairments. Without evidence of racial animus, advocates must rely on challenging the harmful practice outright. Given that these colorblind impairments are framed as unavoidable byproducts of socially acceptable efforts,[196] these harmful practices are rarely eliminated completely. Instead, they continue to exist in a more limited form; racial disparities remain even after victory. Unless the necessity of the practice is completely reimagined or unless the unconscious bias existing in its implementation is excised, communities of color will continue to bear the burden of colorblind impairments.

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[191] 481 U.S. 279 (1987).

[192] *Id.* at 286 ("The raw numbers . . . indicate that defendants charged with killing white persons received the death penalty in 11% of the cases, but defendants charged with killing blacks received the death penalty in only 1% of the cases.").

[193] *Id.* at 298-99.

[194] *Id.*

[195] *See id.* at 293-94.

[196] For example, practices like stop-and-frisk and pretrial detention are not considered irredeemable practices and are largely challenged for how they are meted out. Both are recognized as legitimate strategies that can work toward ensuring safety and order. Despite the racial disparities, post-conviction incarceration and the principles of incapacitation and retribution therein are often considered absolutely essential to most Americans.

3. Colorblind Benefits and School Funding Litigation: How Winning the Fight for Resources Can Leave Communities of Color Lagging Behind

School funding litigation has emerged as a popular tool for securing more resources for underserved students, many of whom are Black and Latinx. Current efforts in this type of litigation typically involve members of all races seeking additional support from the state or federal government. However, increasing assistance without the fulsome incorporation of economically progressive principles ensures that the race gap will endure.

In American public education, neighborhood schooling and local governance have combined with government-influenced residential segregation to produce wildly different student experiences by race, largely on account of funding.[197] The current schemes for funding in most school districts seemingly ignore the role of housing policies and how they create wealth and then funnel it and its surrounding privilege into racialized residential pockets.[198] These funding schemes create a situation where wealth that has been created and fostered through government assistance is now hoarded and made exclusive to specific beneficiaries—wealthy, mostly white families, who feel entitled to cabin the bounty.[199] Put differently, though the government plays a crucial role in centralizing society's winners and keeping out those who can most benefit, it has apparently seen very little need to balance the scales of school funding and create equity—or even equality—within educational opportunity.[200] Funding is

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[197] *See* Janie Boschma & Ronald Brownstein, *The Concentration of Poverty in American Schools*, ATLANTIC (Feb. 29, 2016), https://perma.cc/T9Z6-9QA6; Tanvi Misra, *The Stark Inequality of U.S. Public Schools, Mapped*, CITYLAB (May 14, 2015), https://perma.cc/HZ2F-SQAM.

[198] *See generally* Aniruma Bhargava, *The Interdependence of Housing and School Segregation*, *in* A SHARED FUTURE: FOSTERING COMMUNITIES OF INCLUSION IN AN ERA OF INEQUALITY 388 (Christopher Herbert et al. eds, 2018), https://perma.cc/6KDQ-HT6D (describing the various links between housing and school segregation, including school financing and housing).

[199] *See* EDBUILD, FRACTURED: THE ACCELERATING BREAKDOWN OF AMERICA'S SCHOOL DISTRICTS 3 (2019), https://perma.cc/S2CR-8Y86.

[200] Here, the difference between equality and equity in educational opportunity is significant. Equality would require creating equal educational experiences in public school for every student regardless of wealth or race. Equity in educational opportunity may require even greater educational experiences for those who are poor or nonwhite at the K-12 level. Due to a number of historical advantages, including benefits from some of the explicitly racist policies described above, whites are still statistically more likely to outperform their nonwhite peers when they receive an identical education experience. Students of color are overrepresented in a number of scenarios that pose additional barriers to learning and require greater educational resources. *See* Kristin Turney, *Understanding the Needs of Children with Incarcerated Parents*, AM. EDUCATOR (Summer 2019), https://perma.cc/C9SW-L5R7 (discussing

unnecessarily determined at the district level for the majority of school districts in the country. As such, these school districts have boundaries and those boundaries, often jagged and unnaturally shaped, are primarily pegged to income and race.[201] With significant funding at stake and controversial decisions to be made, there are numerous instances of school districts experiencing gerrymandering and even secessions.[202]

In New York State, students are spread out across over 700 school districts.[203] In these districts, geographic boundaries and attendance zones align with residential patterns, creating segregated schools.[204] Public schools are primarily funded by local and state resources; on average, the federal government pays for less than ten percent of K-12 education.[205] Having many school districts in New York means smaller school districts, and this, in turn, creates increased inequality.[206] Specifically, smaller districts mean that districts can be more homogenous and wealthy; there are

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parental incarceration's increased impact on children of color relative to white children); INST. FOR CHILDREN, POVERTY & HOMELESSNESS, INTERGENERATIONAL DISPARITIES EXPERIENCED BY HOMELESS BLACK FAMILIES (2012), https://perma.cc/AXZ8-LVL2 (discussing Black Americans' disproportionate homelessness compared to whites). Racial minorities also have less access to the social networks and infrastructure (like credit access) that maintain inertia and momentum among society's "winners" even after major shocks. *See* Philipp Ager et al., *Do the Sons of Rich Families Recover After a Large Wealth Shock? Evidence From the US Civil War*, CHI. BOOTH SCH. BUS.: PROMARKET (May 23, 2019), https://perma.cc/XK25-GF3M (discussing how slave-owning families in the South emerged from the Civil War wealthy despite the emancipation of slaves and the loss of land largely on the basis of having been previously wealthy); Brentin Mock, *White Americans' Hold on Wealth Is Old, Deep, and Nearly Unshakeable*, CITYLAB (Sep. 3, 2019), https://perma.cc/9JMM-K3U2 (discussing white families' quick financial recuperation after the Civil War and the subsequent creation of a Jim Crow credit system).

[201] *See* Alvin Chang, *We Can Draw Schools Zones to Make Classrooms Less Segregated. This Is How Well Your District Does*, VOX (Aug. 27, 2018, 8:46 AM), https://perma.cc/BKJ4-MEUB.

[202] *Id*.; P.R. Lockhart, *Smaller Communities Are "Seceding" from Larger School Districts. It's Accelerating School Segregation*, VOX (Sep. 6, 2019, 5:30 PM), https://perma.cc/XQ2F-XA7V.

[203] *See New York State Education at a Glance*, N.Y. STATE EDUC. DEP'T, https://perma.cc/LK7L-TDY5 (last visited Nov. 24, 2019).

[204] *See* JOHN KUSCERA & GARY ORFIELD, THE CIVIL RIGHTS PROJECT AT UCLA, NEW YORK STATE'S EXTREME SCHOOL SEGREGATION, at vii-x (2014), https://perma.cc/K3ZP-UH48.

[205] *See* STEPHEN Q. CORNMAN ET AL., NAT'L CTR FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., NCES 2018-301, REVENUES AND EXPENDITURES FOR PUBLIC ELEMENTARY AND SECONDARY EDUCATION: SCHOOL YEAR 2014-15, at 2 (2018), https://perma.cc/7MFV-YFFA.

[206] As a point of comparison, Florida, which has a similar statewide population to New York, has about one-tenth as many school districts, with only seventy-five. *See Florida School Districts*, GREATSCHOOLS, https://perma.cc/G2D7-LU85 (last visited Feb. 18, 2020). Aside from a few specialty districts (e.g., ones catering to students with special needs), Florida's districts have boundaries contiguous with their respective counties. *See Florida School Districts*, STUDENT SUPPORT SERVS. PROJECT, https://perma.cc/96HH-8ZC2 (last visited Feb. 18,

fewer opportunities to pool resources to ensure less-resourced communities of color benefit from proximity to wealthy white communities.[207] In comparing revenue receipts, it is apparent that without massive reform or intervention, the race gap in funding will continue. On average, predominantly nonwhite districts in New York receive $2,222 less per pupil than predominantly white districts.[208] Though wealth inequality is a big factor here, correlations between race and poverty do not explain this difference entirely. Indeed, poor nonwhite districts in New York receive over $4,000 less per pupil than predominantly poor white districts.[209]

One notable, and perhaps surprising, detail is that in New York, this disappointing status quo follows major litigation efforts beginning in the 1970s and a major legal and legislative victory for school funding in 2006. As such, school funding reform exemplifies a scenario where a rising tide lifts all boats, but still perpetuates the racial gap.

Doctrinally, the limitations in achieving racial justice through school funding litigation flow from a handful of decisions from the state and federal high courts. In 1982, the New York Court of Appeals issued a decision in *Board of Education, Levittown Union Free School District v. Nyquist*.[210] Initiated in 1974, this case alleged violations of the equal protection clauses of both the New York and federal Constitutions, and of the Education Article of the New York State Constitution.[211] In particular, the plaintiffs alleged that the state had unconstitutionally perpetuated a funding system that created grossly disparate financial support—and, thus, grossly disparate educational opportunities—in New York's school districts.[212] Interestingly, the case was not framed along racial lines. Rather, the plaintiffs contrasted districts with low real property wealth with districts with high property wealth, and intervenor-plaintiffs raised the

2020). This allows for more diverse student bodies and a more equitable allocation of tax dollars therein.

[207] An extreme version of this phenomenon occurs in states where wealthy communities have voted to remove themselves and their tax dollars from major metropolitan school systems. *See, e.g.*, EDBUILD, *supra* note 199, at 9-10 (discussing how the Shelby County School Board created new, smaller school districts through secession to undo a countywide financial scheme that saw suburban tax revenue shared with the City of Memphis).

[208] *See* EDBUILD, $23 BILLION, at app. A (2019), https://perma.cc/2KTA-HPP5.

[209] *Id.* at app. B.

[210] Bd. of Educ., Levittown Union Free Sch. Dist. v. Nyquist, 57 N.Y.2d 27 (1982).

[211] N.Y. CONST. art. XI, § 1 ("The legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated").

[212] *Nyquist*, 57 N.Y. 2d at 35-36.

unique issues facing urban school systems.[213] Though the trial and intermediate courts found violations of the equal protection clause of the state constitution, the court modified the judgment and held that the state constitution does not require equitable outcomes in school funding.[214] Working under the assumption that educational expenditures were correlated with the "quantity of educational opportunity provided" and recognizing wealth disparities between districts,[215] the court was unbothered by significant inequalities in the availability of financial support among New York school districts.[216] The court then found that any judicial remedy working to provide substantially equivalent education among school districts would "inevitably work the demise of the local control of education available to students in individual districts."[217] In concluding the opinion, the Court interpreted the Education Article of the state constitution and held that the provision was intended to address the adequacy of education—it did not recognize a constitutional mandate for ensuring an equitable system.[218]

Following *Nyquist*, school funding activists prepared an action principally relying on the court's interpretation of the state constitution's Education Article.[219] Specifically, this meant abandoning an allegation of

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[213] *See* Brian J. Nickerson & Gernard M. Deenihan, *From Equity to Adequacy: The Legal Battle for Increased State Funding of Poor School Districts in New York*, 30 FORDHAM URB. L.J. 1341, 1356 (2003). The demographics of low wealth and urban districts give this case a racial dimension even if there had not been an explicit racial challenge brought.

[214] *Id.* at 1364; *see Nyquist*, 57 N.Y.2d 27, 48-49, 49 n.9. In rejecting the federal equal protection claim, New York's intermediate and highest courts relied on a seminal 1973 Supreme Court decision, *San Antonio Independent School District v. Rodriguez. Nyquist*, 57 N.Y.2d at 41, 45 (citing San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973)). *Rodriguez* principally held that education is not a fundamental right entitled to heightened scrutiny, but also held that a financing system based on local property taxes was not an unconstitutional violation of the Equal Protection Clause. *Rodriguez*, 411 U.S. at 37, 55.

[215] *Nyquist*, 57 N.Y.2d at 38 n.3.

[216] *Id.* at 38-39, 39 n.4.

[217] *Id.* at 46. Whether or not "local control" warrants ignoring inequality has been a source of debate. *See* Meaghan E. Brennan, *Whiter and Wealthier: "Local Control" Hinders Desegregation by Permitting School District Secessions*, 52 COLUM. J.L. & SOC. PROBS. 39, 67-75 (2018); *see also* Milliken v. Bradley, 418 U.S. 717, 741-43 (1974) (discussing local control as a "deeply rooted" tradition in public education and spurring the use of local control as a legal barrier to school integration efforts); Erika K. Wilson, *The New School Segregation*, 102 CORNELL L. REV. 139, 161-63 (2016).

[218] *See Nyquist*, 57 N.Y.2d at 48-49.

[219] *See* Campaign for Fiscal Equity, Inc. v. State, 100 N.Y.2d 893, 906-07, 918-19 (2003) (holding that the inadequate levels of funding for NYC schools were in violation of the state constitution). Advocates also pursued a theory under Title VI of the 1964 Civil Rights Act, which prohibits recipients of federal funds from engaging in practices that have a racially disparate impact. *See* 42 U.S.C. §§ 2000d to 2000d-7 (2018); *see also* Paynter v. State, 100 N.Y.2d 434 (2003) (demonstrating that advocates explicitly challenged the racial aspects of residential districting by which plaintiffs argued that racial isolation denied students a "sound

unfair funding between districts. Instead, the challenge alleged that inadequate funding precluded schools from providing an "opportunity to a sound basic education." In 2003, in the landmark decision *Campaign for Fiscal Equity v. State* ("*CFE*"), the Court of Appeals ruled in these plaintiffs' favor.[220] *CFE* served as the first major victory in a New York adequacy-of-funding case and it defined "sound basic education" as the capacity to serve as a juror and a voter.[221] Functionally, the Court found this to be a "meaningful high school education" at the time of its ruling—a thoroughly unambitious bar for our increasingly competitive world where college readiness has increased significance.[222] Through a subsequent ruling and legislation, in 2007, the state implemented an expansive funding scheme called Foundation Aid.[223] Though this scheme reflected a significant boost in funding for districts serving under-resourced students of color, the legal theory behind the victory and the politics on the ground guaranteed that this change would not balance the playing field among New York school districts.

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basic education" and argued that the disadvantages concentrated among Black and Latinx students violated Title VI); *id*. at 439 (explaining that the trial court had rejected the arguments under the state constitution but refused to dismiss the Title VI claim). Unfortunately, the Supreme Court decided *Alexander v. Sandoval* while *Paynter* was pending appeal, issuing a brutal holding that individuals do not possess a private right of action under Title VI to bring disparate impact claims. *See* 532 U.S. 275, 285-86 (2001); s*ee also* Ceaser v. Pataki, No. 98 CIV.8532(LMM), 2002 WL 472271, at *1-3 (S.D.N.Y. Mar. 26, 2002) (dismissing Title VI action after *Sandoval* where state deviated from regulatory requirements creating racially disparate impact on class of students in 150 high minority schools in New York).

[220] *See Campaign for Fiscal Equity*, 100 N.Y.2d at 931-32.

[221] *Id.* at 906-07.

[222] *Id*. Though the Court of Appeals highlighted a "meaningful high school education," it was careful to note that this was the level advanced by the plaintiffs' expert at trial, and also noted that the Education Article should not be pegged to any particular grade level. *Id.* at 906. In stating this, and in discussing the role of competitiveness in an "urban society," the Court may have left the door open for a higher minimum level of instruction under the "sound basic education" formulation. After all, Georgetown's Center for Education and the Workplace found that more than fifty percent of "good jobs" require a four-year college degree. *See* ANTHONY P. CARNEVALE ET AL., GEORGETOWN UNIV. CTR. ON EDUC. AND THE WORKFORCE, THREE EDUCATIONAL PATHWAYS TO GOOD JOBS: HIGH SCHOOL, MIDDLE SKILLS, AND BACHELOR'S DEGREE 11 (2018), https://perma.cc/RX2J-4GAN. A "good job" is defined in the report as one paying a minimum of $35,000 for workers between the ages of 25 and 44, and at least $45,000 for workers between the ages of 45 and 64. *Id.* at 1. This means that "a meaningful high school education" is no longer competitive. Though the door is theoretically open for an updated standard, the Court of Appeals has not made such a determination. New York State has thus not been working under the assumption that the Education Article requires enough funding to provide an education sufficient for a "good job."

[223] Campaign for Fiscal Equity, Inc. v. State, 8 N.Y.3d 14 (2006); OFFICE OF THE N.Y. STATE COMPTROLLER, NEW YORK STATE SCHOOL AID: TWO PERSPECTIVES 4 (2016), https://perma.cc/LR96-EHBT.

As a legal matter, *CFE* is not a panacea because New York school funding jurisprudence still remains largely unsuited for delivering systemic reform, and because the remedy has inherent limits for promoting fairness. First, through the several school funding cases to reach the high court, the Court of Appeals has interpreted the Education Article to require allegations of district-wide failures[224] and facts specific to each and every district where a deficiency is alleged.[225] Next, and for the reasons described above, the New York Court of Appeals has cabined the legal remedy to adequate funding—which again, does not necessarily require college readiness. Significantly, this interpretation of the Education Article and the equal protection clauses means that courts will not order a remedy specifically targeted at addressing disparate allocations of resources or inequitable outcomes in schools.

The funding scheme that emerged from *CFE*, Foundation Aid, lacked meaningful tools for equity and effectively failed to treat statewide reform as an opportunity to close performance gaps.[226] As a technical matter, although Foundation Aid has progressive elements, it has failed to create an equitable scheme that meaningfully closes the gaps between rich and poor districts. This failure can be largely traced to three problems with the funding overhaul. First, Foundation Aid was never designed to disturb the role of local taxes in funding education—rather, it was only supposed to account for the availability of local resources in its distribution of state aid.[227] This is significant because more than half of public education funding in New York comes from revenues raised locally.[228]

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[224] *See, e.g.*, N.Y. Civil Liberties Union v. State, 4 N.Y.3d 175, 182 (2005) ("Thus, because school districts, not individual schools, are the local units responsible for receiving and using state funding, and the State is responsible for providing sufficient funding to school districts, a claim under the Education Article requires that a district-wide failure be pleaded.").

[225] *See, e.g.*, Aristy-Farer v. State, 29 N.Y.3d 501, 511-12 (2017) (rejecting the call for a declaration of a statewide failure where plaintiffs failed to allege facts for each of the nearly 700 school districts in the state).

[226] *See* DAVID FRIEDFEL, CITIZENS BUDGET COMM'N, A BETTER FOUNDATION AID FORMULA: FUNDING SOUND BASIC EDUCATION WITH ONLY MODEST ADDED COST 9 (2016), https://perma.cc/GD6Q-VLWY.

[227] *See* OFFICE OF THE N.Y. STATE COMPTROLLER, *supra* note 223, at 4; *2007-08 State Aid Handbook: State Formula Aids and Entitlements for Schools in New York State* § I.A.2, N.Y. STATE EDUC. DEP'T, https://perma.cc/4ULQ-7JJV (last updated Oct. 4, 2017). According to the New York State Education Department, reliance on local funding has created massive disparities in fiscal resources. *See* N.Y. STATE EDUC. DEP'T, STATE AID TO SCHOOLS: A PRIMER 3-4 (2018) [hereinafter N.Y. STATE EDUC. DEP'T, STATE AID TO SCHOOLS], https://perma.cc/LS35-TY4L ("In 2015-16, the average actual value of property per pupil among the lowest spending ten percent of districts was $331,646, while the average actual value per pupil among the highest spending ten percent of districts was $1,989,800, a difference of 500 percent.").

[228] N.Y. STATE EDUC. DEP'T, STATE AID TO SCHOOLS, *supra* note 227, at 2 ("In New York State, estimated 2016-17 public education funding comes from three sources: approximately

Second, the formula was modified with several features that distort the gaps between richer and poorer districts—making the execution of progressive features much more difficult.[229] Finally, provisions were included to ensure that virtually all districts, regardless of need, would share in any increases in aggregate Foundation Aid funding.[230] Given the massive differences in local funding available to districts, a truly equitable and progressive system would require withholding additional state aid from wealthy districts. Instead, it would reserve state aid for poorer districts in an attempt to offset property tax revenue disparities.[231] In total, these three issues have combined to maintain the gaps between rich and poor districts, and they even ensure wealthy districts benefit despite preexisting advantages over competing districts. This all creates a regressive quality for what is intended to be a progressive policy.

All in all, school funding represents another area where communities of color have benefitted from the work of advocates. However, like stop and frisk and other colorblind impairments, the litigation remedies con-

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four percent from federal sources, 42 percent from State formula aids and grants, and 54 percent from revenues raised locally. Local property taxes constitute about 91 percent of local revenues.").

[229] FRIEDFEL, *supra* note 226, at 3-4 (noting that, in calculating the local contribution—the amount deducted from aid on account of local resources—there are arbitrary floors and ceilings on the Income Wealth Index (IWI), meaning that the neediest districts seem less needy and the wealthiest districts seem less wealthy); *see id.* at 4 (noting that school districts are also afforded significant discretion in calculating their local contribution such that they can choose to benefit more than how they would under IWI calculations); STATEWIDE SCH. FIN. CONSORTIUM, PROBLEMS WITH THE FOUNDATION AID FORMULA – CHANGES MUST BE MADE TO CREATE GREATER EQUITY 1 (2012), https://perma.cc/KA2J-AFUB (finding that in 2012–13, 304 districts had an IWI below the floor, meaning that these extremely needy districts were seen as less deserving of aid according to the formula). In 2016–17, all but 30 of the nearly 700 districts used an alternative local contribution method. FRIEDFEL, *supra* note 226, at 4. Finally, Foundation Aid included a hold-harmless provision that guaranteed that no district would receive less school aid as a result of the reforms. Districts with increasing wealth or decreasing enrollment continue to receive the same level of Foundation Aid or even receive increases in years where minimum increases are specified. *Id.* The notion of hold harmless was reportedly first introduced in the 1970s by politicians with suburban constituents. Without these provisions, the formula at the time would have guaranteed decreases in state funding for schools within these politicians' jurisdictions. *See* Susan Arbetter, *How the School Aid Formula Became Unrecognizable*, CITY & STATE N.Y. (Apr. 15, 2018), https://perma.cc/5JJ4-E6Y3.

[230] *See* Michael Cooper, *Albany Divided on Calculation of School Aid*, N.Y. TIMES (Mar. 18, 2007), https://perma.cc/J88L-37Y7.

[231] Ironically, through the School Tax Relief ("STAR") program, the State has involved itself in local property taxes but has likely exacerbated wealth disparity. N.Y. STATE EDUC. DEP'T, STATE AID TO SCHOOLS, *supra* note 227, at 4 ("[T]he STAR program that was intended to reduce the property tax burden on local taxpayers, particularly the elderly, has provided significantly more revenue per pupil to wealthier districts.").

nected to colorblind benefits are currently incapable of addressing the inequitable features of the system and, in their design, these judicial remedies ignore the historical legacies of systemic racism.

IV. THE NEW YORK CITY STUDENT INTEGRATION MOVEMENT AND A POSSIBLE PATH FORWARD

The pillars supporting white supremacy will remain in place so long as the history of white supremacy remains overlooked and so long as ambitious, holistic solutions are denied or unexplored. The remedies discussed in Section III.A appear nearly quixotic, especially when advanced through the courts. Given the unavailability of impact litigation, a strategy that has historically been relied upon to drive institutional reform, what remains as a solution? Remarkably, one answer may lie in a youth-led movement that is trying to tackle entrenched racial disparities and *de facto* segregation in New York City, the largest school district in the country.

This campaign is worth examining for several reasons. First, the students leading the efforts have proposed holistic solutions, drafting platforms that correspond to each of the four pillars discussed in this Article. Second, it is a community-based grassroots effort that is not limited to the remedies created through litigation. Finally, and perhaps most significantly, this movement's leaders explicitly call out the racism underlying the status quo, and they substantiate their proposed reforms to the public by identifying past discriminatory practices. As one of the student leaders, Julisa Perez, poignantly noted:

> This country has such a history with racism . . . . People don't like to name it and that's how things go under the radar and [remain] unsaid and then they still linger. Those practices, even if they're not explicit are still there . . . so it's really important to name it what it is, to say "this is what's happening, but these are the solutions that can actually help us."[232]

The following section will examine school segregation in New York City and see how solutions corresponding to the four pillars can apply to a contemporary issue outside of litigation.

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[232] Interview with Julisa Perez, IntegrateNYC Executive College Director and Founding Member (Feb. 15, 2020) (on file with author). Perez has been involved in the student activism regarding segregation since 2016, when she was a high school student. She and the other students that participated in these early discussions and efforts eventually adopted the name IntegrateNYC. She is now in her junior year of college and is still very active in the movement.

A. School Segregation in New York City: An Overview of the Battleground

In 2014, UCLA researchers identified New York State as possessing the most segregated schools in the country and labeled New York City as one of the most segregated districts in the nation.[233] Despite having 1.1 million students,[234] New York City represents a single district among the more than 700 districts in the state.[235] The entire district is run through a centralized Department of Education ("DOE") rather than a school board.[236] DOE employees, including the Chancellor, report to the Mayor.[237] The entire district is divided into thirty-two Community School Districts ("CSDs"), each with a local advisory body called a Community Education Council.[238] Despite the unique features that could facilitate ambitious administrative changes that other districts in the state or nation cannot achieve, the DOE and Mayor's office have consistently been reluctant to address the issue of school segregation.

Under the administration of Michael Bloomberg, the DOE held an overly restrictive and incorrect interpretation of *Parents Involved* and decided that voluntary integration plans were completely unviable.[239] Further, Bloomberg exacerbated segregation under the auspices of "school choice,"[240] a dubious principle that gained popularity following desegregation orders in the South.[241] In this administration, schools employed more "screens"—colorblind admissions tools that weeded out applicants and are known to have racially disparate effects.[242] Bloomberg-era poli-

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[233] KUSCERA & ORFIELD, *supra* note 204, at vi.

[234] *DOE Data at a Glance*, NYC DEP'T OF EDUC., https://perma.cc/3H6G-TQV6 (last visited Feb. 18, 2020).

[235] *See generally* N.Y. EDUC. LAW § 2590 (McKinney 2019); *see also New York State Education at a Glance*, N.Y. ST. EDUC. DEP'T, https://perma.cc/EL3A-GK85 (last visited Feb. 18, 2020).

[236] N.Y. EDUC. LAW § 2590-b (McKinney 2019); *see also* Leslie Brody, *Albany Extends Mayor's Control of New York City Schools by Three Years*, WALL STREET J. (Apr. 1, 2019), https://perma.cc/X62Y-JWGS.

[237] *See* Brody, *supra* note 236.

[238] N.Y. EDUC. LAW § 2590-e (McKinney 2019); *Community Education Councils (CEC)*, RAISE YOUR HAND FOR OUR KIDS, https://perma.cc/HT3B-GMS8 (last visited Oct. 31, 2019).

[239] *See, e.g.*, N.Y. APPLESEED, SEGREGATION IN NYC DISTRICT ELEMENTARY SCHOOLS AND WHAT WE CAN DO ABOUT IT: SCHOOL-TO-SCHOOL DIVERSITY 14 (2013), https://perma.cc/PV6T-PPJ6 (highlighting that the DOE represented in a footnote to the Chancellor's Regulations that race can only be considered pursuant to a court order).

[240] *See* Winnie Hu & Elizabeth A. Harris, *A Shadow System Feeds Segregation in New York City Schools*, N.Y. TIMES (June 17, 2018), https://perma.cc/BY6Y-ZHLP.

[241] Steve Suitts, *Segregationists, Libertarians, and the Modern "School Choice" Movement*, SOUTHERN SPACES (June 4, 2019), https://perma.cc/57JT-8FAH.

[242] *See* Hu & Harris, *supra* note 240.

cies were also responsible for making Gifted and Talented ("G&T") programs more segregated and generally less available to Black and Latinx students.[243]

After the UCLA report[244] and several stories highlighting New York City's ignominious status of having highly segregated public schools,[245] certain CSDs tried to develop integration solutions, including restructuring attendance zones for certain schools to create racially mixed student bodies.[246] These plans faced incredibly vocal resistance.[247] Notably, many of the loudest critics were white, wealthy individuals who espoused concerns of public safety and unfairness.[248] There was little pressure from de Blasio to shift the narrative. Rather, in explaining the obstacles to school integration, he reinforced the protestors' talking points; he emphasized the connection between the residency decisions of those with the resources to choose a specific New York City neighborhood to live in and their expectations regarding public education. Specifically, he noted that he must "respect families who have made a decision to live in a certain area oftentimes because of a specific school" and that such families "made massive life decisions and investments because of which school their kid

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[243] *See* Allison Roda & Judith Kafka, *Gifted and Talented Programs Are Not the Path to Equity*, CENTURY FOUND. (June 19, 2019), https://perma.cc/AX35-D4ED (noting how Black and Latinx enrollment in G&T programs declined by over fifty percent following changes during the Bloomberg administration); s*ee also* Dawn X. Henderson, *When "Giftedness" Is a Guise for Exclusion*, PSYCHOL. TODAY (June 2, 2017), https://perma.cc/CEW4-66P3; Anna M. Phillips, *After Number of Gifted Soars, a Fight for Kindergarten Slots*, N.Y. TIMES (Apr. 13, 2012), https://perma.cc/Y3N4-UMG5.

[244] KUSCERA & ORFIELD, *supra* note 204.

[245] *See* Christopher Mathias, *These Maps Show Just How Segregated New York City Really Is*, HUFFPOST (Dec. 6, 2017), https://perma.cc/YA8X-8DH5; *see also* Aaron Short, *NYC Has the Country's Most Segregated Public Schools: Report*, N.Y. POST (Mar. 25, 2014, 2:53 PM), https://perma.cc/N6AR-DSHC; Kyla Calvert Mason, *New York State Singled Out for Most Segregated Schools*, PBS NEWSHOUR (Mar 27, 2014, 2:11 PM), https://perma.cc/6KUC-FUP9.

[246] *See* Ethan Geringer-Sameth, *New York City Is Waist-Deep in a School Desegregation Conversation - How Did We Get Here?*, GOTHAM GAZETTE (Sept. 3, 2019), https://perma.cc/D4LK-8CS9 ("In 2014 and 2015, grassroots advocates, parents, and educators in Community School Districts 1, 3, 13, and 15 became more active organizing around school-by-school, as well as district-level, integration plans.").

[247] *See* Emma Whitford, *UWS Parents Push Back Against Rezoning That Would Integrate Schools*, GOTHAMIST (Oct. 29, 2015, 12:20 PM), https://perma.cc/BK99-NJER.

[248] Kate Taylor, *Rezoning Plan for Schools on Upper West Side Is Approved After Bitter Fight*, N.Y. TIMES (Nov. 22, 2016), https://perma.cc/9Q9Q-839R; Kate Taylor, *Manhattan Rezoning Fight Involves a School Called 'Persistently Dangerous*,*'* N.Y. TIMES (Oct. 27, 2015), https://perma.cc/R895-GPT4.

would go to."[249] At no point did he speak about the wishes and expectations of those unable to select their child's district, nor did he speak to the differences in experience among students within the same school system.

The response to segregation from the Mayor and the DOE (collectively "the City") remained weak for years. Mayor de Blasio and his then-Chancellor, Carmen Fariña, failed to grapple with the racial injustice of the issue. They would notably avoid using the words "segregation" and "integration" in their responses.[250] Chancellor Fariña expressed skepticism about the need for "diversity" within schools, let alone classrooms,[251] and she often demurred on DOE-led initiatives due to heightened concerns about forcing integration policies "down people's throats."[252] In response to agitation from grassroot advocates, the City issued a "diversity plan" in June 2017 that was remarkably unambitious.[253]

Under the plan's primary goal, the DOE sought to increase the number of students enrolled in racially representative schools by 50,000 over five years.[254] This goal had multiple issues. First, the DOE defined a school as racially representative even if Black and Latinx students made

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[249] Patrick Wall, *De Blasio: City Must Respect Families' Investments Amid School Diversity Debates*, CHALKBEAT (Nov. 6, 2015), https://perma.cc/PRX5-MEQ7.

[250] *See* Alex Zimmerman, *A Month into the Job, It's Clear Chancellor Carranza Isn't Carmen Fariña Version 2.0*, CHALKBEAT (May 4, 2018), https://perma.cc/V8GE-YP4F (explaining that unlike Fariña and the Mayor, Carranza routinely uses the words "segregation" and "integration" and appears comfortable criticizing a constituency the administration has been careful not to alienate: affluent white parents); Alex Zimmerman, *De Blasio Decries 'Segregation' amid Specialized High School Debate – a Term He Has Avoided*, CHALKBEAT (Mar. 22, 2019), https://perma.cc/URT4-55GY.

[251] Amy Zimmer & Noah Hurowitz, *Schools Boss Touts Pen Pal System As Substitute for Racial Integration*, DNAINFO (Oct. 29, 2015, 11:59 AM), https://perma.cc/KD39-TGJA. In an effort to promote diversity, Chancellor Fariña pitched a "sister schools" model where affluent schools would collaborate with low-income schools, share resources from wealthy PTAs, and, controversially, become acquainted with other students through school visitations and a pen pal program. Fariña was quoted as saying that "[d]iversity for its own sake . . . is not going to be what takes us where we need to go," and that "you don't need to have diversity within one building." *Id.*

[252] Patrick Wall, *Searching for Answers to Segregation, Fariña Enlists Top Deputy and Solicits Local Ideas*, CHALKBEAT (Feb. 10, 2016), https://perma.cc/SH62-73WS.

[253] Significantly, this plan was chided by many for failing to identify the issue or to include the words "integration" or "segregation." *See* Elizabeth A. Harris, *De Blasio Won't Call New York Schools 'Segregated' but Defends His Diversity Plan*, N.Y. TIMES (June 8, 2017), https://perma.cc/3CLE-4D2E; Kate Taylor, *Long-Awaited Plan for Integrating Schools Proves Mostly Small-Bore*, N.Y. TIMES (June 6, 2017), https://perma.cc/2QUY-J48Z; Amy Zimmer, *City's Sweeping Plan to Integrate Schools Includes Few Concrete Details*, DNAINFO (June 6, 2017, 4:13 PM), https://perma.cc/VV42-QB6C.

[254] *See* Zimmer, *supra* note 253.

up ninety percent of the school population.[255] Given that Black and Latinx students constituted seventy percent of students citywide, the ninety percent figure still represented an extreme case of racial isolation by most acceptable desegregation measures.[256] Second, measuring success with the number of students in a specific school setting was odd given the risk that a small number of large schools could skew the results of what was meant to be a systemwide solution.[257] Finally, the DOE's benchmark for success–a 50,000 student increase to those attending a "racially representative" school–could not represent victory in any substantive sense when taking into account the other one million students enrolled within the system. In fact, shortly after the plan's release, a statistical report revealed that the City's diversity goals for enrollment would be met simply through demographic trends already underway at the time.[258]

B. Equitable Solutions from an Unlikely Source

One bright spot in the City's 2017 plan was the creation of a School Diversity Advisory Group ("SDAG"), chaired by civil rights experts and comprised of an array of perspectives regarding school segregation.[259]

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[255] NICOLE MADER & ANA CARLA SANT'ANNA COSTA, THE NEW SCH. CTR. FOR N.Y.C. AFFAIRS, NO HEAVY LIFTING REQUIRED: NEW YORK CITY'S UNAMBITIOUS SCHOOL 'DIVERSITY' PLAN (2018), https://perma.cc/8V4F-Y2QA.

[256] "By most measures accepted in the extensive academic literature on school segregation, many of the schools within the DOE's racially representative range would still count as intensely segregated." *Id.*; *see* KUSCERA & ORFIELD, *supra* note 204, at 32 (defining "segregated schools" as schools where 50-100% of the student body are students of color and "intensely segregated schools" as schools where 90-100% of the student body are students of color).

[257] For example, the largest middle school in the 2016-17 school year was I.S. 61 Leonardo Da Vinci in Queens. This school had 2,175 students and was 88.7% Latinx and 2.9% Black. Assuming that the total number of enrolled students remained constant, the City's plan gave this school five years to swap out only thirty-four black and Latinx students for students of another race. If the school succeeded in this modest endeavor, all 2,175 students would count towards "success," representing 4.35% of the citywide goal. N.Y.C. DEP'T OF EDUC., DEMOGRAPHIC SNAPSHOT - CITYWIDE, BOROUGH, DISTRICT, AND SCHOOL (2019), https://infohub.nyced.org/docs/default-source/default-document-library/demographic-snapshot-2014-15-to-2018-19-(public).xlsx (listing demographic figures which form the basis for the numbers calculated above). As shown by the example above, relying on an inflection point presents additional problems for measuring true progress. At the time, 105 schools in NYC enrolled between 90.1 and 92% Black and Latinx students. These schools could count as "racially representative" under the City plan by enrolling an average of 10 non-Black and non-Latinx students in their respective student bodies. *See* MADER & SANT'ANNA COSTA, *supra* note 255.

[258] *See* MADER & SANT'ANNA COSTA, *supra* note 255 (demonstrating that the number of white and Asian students is growing in NYC while the number of Black students is decreasing).

[259] N.Y.C. DEP'T OF EDUC., EQUITY AND EXCELLENCE FOR ALL: DIVERSITY IN NEW YORK CITY PUBLIC SCHOOLS 4 (2017), https://perma.cc/5KHM-6VXW ("The School Diversity Advisory Group will be chaired by José Calderón, President, Hispanic Federation; Maya Wiley,

Among the most influential activists in the community were two youth-led groups, IntegrateNYC[260] and Teens Take Charge ("TTC").[261] Both groups gave students a platform, helped them develop as organizers, and used the students' unique and on-the-ground perspectives to solicit policy proposals and concrete tools.[262] Students from both groups were invited to participate in the SDAG, which was tasked with issuing recommendations to the DOE and the Mayor.[263] Impressively, IntegrateNYC's policy platform has been adopted as the baseline structure for the SDAG's recommendations to the Mayor and Department of Education.[264]

The SDAG's adoption of IntegrateNYC's platform was significant because both IntegrateNYC and Teens Take Charge center equity in their messaging and highlight the role that white supremacy, racism, and classism have played in New York City school admission policies, both historically and to this day.[265] For IntegrateNYC, the perspective is not limited to the demographic makeup of the students in a school. Rather, it has gone beyond to include the makeup of staff and teachers, the cultural competencies of these employees, and the cultural relevance of the curriculum.[266] Their platform also demands the use of restorative justice practices in lieu of suspensions and funding reforms in the form of increased funds and equitable distribution of resources across every New York City high school program.[267] This framework has been colloquially called the "5 Rs of Real Integration" ("5 Rs" hereinafter) and is divided

chair of Civilian Complaint Review Board and Professor of Urban Policy and Management at the New School; and Hazel Dukes, President of the NAACP New York State Conference. The Advisory Group will include city government stakeholders, local and national experts on school diversity, parents, advocates, students, and other community leaders.").

[260] INTEGRATENYC, https://perma.cc/JF9F-CHY2 (last visited Oct. 25, 2019).

[261] TEENS TAKE CHARGE, https://perma.cc/YDH5-DK7R (last visited Oct. 25, 2019).

[262] *See generally id.*; INTEGRATENYC, *supra* note 260.

[263] *See* Christina Veiga, *Who's Who on New York City's School Diversity Advisory Group*, CHALKBEAT (Jan. 30, 2018), https://perma.cc/N6BB-SXY4.

[264] *See generally* SCH. DIVERSITY ADVISORY GRP., MAKING THE GRADE: THE PATH TO REAL INTEGRATION AND EQUITY FOR NYC PUBLIC SCHOOL STUDENTS 7 (2019) [hereinafter SCH. DIVERSITY ADVISORY GRP., MAKING THE GRADE], https://perma.cc/GSX6-8ZKD ("Inspired by students, we adopted IntegrateNYC's 5Rs of Real Integration."); SCH. DIVERSITY ADVISORY GRP., MAKING THE GRADE II: NEW PROGRAMS FOR BETTER SCHOOLS (2019) [hereinafter SCH. DIVERSITY ADVISORY GRP., MAKING THE GRADE II], https://perma.cc/X8DR-CE6J.

[265] *Enrollment Equity Plan*, TEENS TAKE CHARGE, https://perma.cc/88VW-FML7 (last visited Feb. 1, 2020) (discussing the need for culturally responsive curricula, anti-bias training and continuing professional development, and programs and curricula that promote tolerance and inclusion).

[266] *Real Integration*, INTEGRATENYC, https://perma.cc/P89T-ZEV5 (last visited Feb. 1, 2020).

[267] *Id.*

into five categories: race and enrollment, resources, relationships across identities, restorative justice, and representation of school faculty.[268]

Both organizations' platforms, and the 5 Rs in particular, manage to confront aspects of the educational system that exist within all four pillars of racial injustice: race-motivated impairments, race-motivated benefits, colorblind impairments, and colorblind benefits.

As discussed earlier, disparities in access—while difficult to address—are a necessary target for solutions corresponding to race-motivated impairments and race-motivated benefits. The platforms of IntegrateNYC and Teens Take Charge seek to democratize schools through hiring and enrollment reforms. Through the latter, both platforms also seek to break up the concentrations of white families in specific schools and specific programs and challenge the premise that these popular destinations belong to those who merit them.

Both platforms also challenge access disparities directly. First, both platforms call for increased teacher diversity and request inclusive hiring and diversity campaigns.[269] Next, both plans take on the central issue of racially inequitable enrollment. IntegrateNYC's plan calls for replacing the DOE's algorithm used for the high school matching process with a "student and community-designed" version that would prioritize socioeconomic and racial diversity in the admissions process.[270] The proposal from Teens Take Charge would utilize racial disparities in school performance to desegregate high school enrollment practices. Establishing academic thresholds in the same algorithm targeted by IntegrateNYC, TTC's Enrollment Equity Plan would also require that each high school's incoming freshman class admit at least 25% of students that passed middle school state tests and no more than 75% that did not.[271] This plan would also target the New York City specialized high schools, which have been a symbol for the racial issues of the City system.[272] These schools rely on

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[268] *Id.*

[269] *See Policy Platform,* TEENS TAKE CHARGE, https://perma.cc/9NVC-KT7D (last visited Feb. 18, 2020); *Real Integration,* supra note 266 (calling for more diversity among teachers, faculty, staff, and administration in DOE schools and supporting NYC Men Teach, an existing diversity program in the DOE); *#StillNotEqual*, INTEGRATENYC, https://perma.cc/X8KX-MV3M (last visited Oct. 25, 2019).

[270] Due to *Parents Involved*, this wouldn't be done with consideration of an individual's race. Rather, several race-neutral proxies would be used to achieve racial diversity in accordance with Justice Kennedy's concurrence.

[271] *Enrollment Equity Plan*, *supra* note 265.

[272] Although the New York City school system is nearly 70% Black and Latinx, in 2019 just over 10% of students admitted into the city's seven specialized high schools relying on the SHSAT were Black and Latinx. *See supra* note 102. In Stuyvesant High School, the most competitive school, only 7 Black students and 33 Latinx students were admitted into the class

a single multiple-choice test to determine admission;[273] the plan would require these schools to offer seats to the top 7% of students from every middle school in the city.[274] TTC's policy platform also calls for the elimination of admissions screening at all levels, including elementary school G&T programs, middle schools, and high schools.[275] All of these have been identified as perpetuators of racial disparities in the system. Abandoning academic screens and test-based admission also decentralizes merit in access to desirable programs and lays the groundwork for questioning whether ability and potential mirror the current metrics for merit overall.

Within the education context, school suspensions are the primary type of colorblind impairment yielding similar outcomes to the disparities found in criminal justice.[276] Indeed, selective enforcement of wide-ranging rules is an issue in the classroom as well; IntegrateNYC's Julisa Perez noted that, for IntegrateNYC, this policy prong was created in response to an instance where students unjustifiably and inexplicably received different punishments for their involvement in the same incident.[277] The students' platforms address disparities in school suspensions on several

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of 895. Eliza Shapiro, *Only 7 Black Students Got into Stuyvesant, N.Y.'s Most Selective High School, Out of 895 Spots*, N.Y. TIMES (Mar. 18, 2019), https://perma.cc/84P6-4XT5.

[273] *Id*.

[274] *Enrollment Equity Plan*, *supra* note 265. A similarly designed plan has famously been used by the University of Texas at Austin. *See Fisher v. Univ. of Texas at Austin*, 136 S. Ct. 2198, 2204 (2016) ("As its name suggests, the Top Ten Percent Law guarantees college admission to students who graduate from a Texas high school in the top 10 percent of their class. Those students may choose to attend any of the public universities in the State.").

[275] *Policy Platform*, *supra* note 269.

[276] Black, Latinx, and Native American students are suspended at far higher rates than their enrollment. Defenders of these disparities point to the behaviors of students of color, suggesting personal culpability. However, this narrative is severely blunted by the fact that these disparities hold constant even for preschool students. Among these mostly four-year-old students, Black children make up eighteen percent of the classroom but account for nearly half of all out-of-school suspensions. Melinda D. Anderson, *Why Are So Many Preschoolers Getting Suspended?*, ATLANTIC (Dec. 7, 2015), https://perma.cc/K39Z-363G; *see* Rasheed Malik, *New Data Reveal 250 Preschoolers Are Suspended or Expelled Every Day*, CTR. FOR AM. PROGRESS (Nov. 6, 2017, 9:01 AM), https://perma.cc/HL7Q-2NDV ("[B]lack children are 2.2 times more likely to be suspended or expelled than other children."). Studies have shown that Black children attract more attention than white children and receive more suspensions despite similar behavior. This is yet another parallel to criminal justice, where Blacks are overrepresented in marijuana arrests even though they use marijuana at similar rates as whites. One explanation is that Blacks are under heightened surveillance and policing, much like Black students are under heightened attention in the classroom. *See Policy Platform*, TEENS TAKE CHARGE, https://perma.cc/5AZ3-7Q9H (last visited Oct. 25, 2019) ("School discipline systems modeled on the criminal justice system are dangerous, discriminatory, and do not work.").

[277] Interview with Julisa Perez, *supra* note 232.

fronts. The proposed approach calls for increasing cross-cultural understanding from staff[278] and shifting away from a punitive paradigm. The latter is accomplished by exchanging school-assigned police officers for guidance counselors and requiring restorative justice practices to be the primary tool for maintaining order.[279] Cultural competency among staff and instructors can work to reduce tendencies borne of implicit bias and can prevent scenarios where students of color are singled out for behavior that is not atypical. By confronting race directly, this type of solution should reduce disparities.

Restorative justice and other divestments from punitive practices are also critical for racial equity. For one, like most proposed solutions to colorblind impairments, both types of proposals would reduce the use of the problematic practice. What places these requests above typical solutions, however, is the creation of productive alternatives that impose fewer harms, if any. In this regard, restorative justice in the school setting bears a striking resemblance to prison abolition in the criminal justice setting—where advocates seek to reimagine how to respond to so-called bad behavior. Like prison abolition, restorative justice seeks to provide productive solutions and resources in spaces where such tools may be lacking and where the current practices disproportionately harm people of color.[280]

The students' platforms also seek to address the final pillar, colorblind benefits. Like past advocates, IntegrateNYC and TTC seek to bring more funding into the school system overall. Both IntegrateNYC and TTC have specifically requested full payment of the Foundation Aid funding designated for New York City schools in the wake of the *CFE* litigation.[281] However, they also desire progressive distribution to close the gaps between individual schools.[282] In this area, TTC has singled out

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[278] *Real Integration*, *supra* note 266 (demanding culturally responsive training for all teachers, PTA, and staff); *Policy Platform*, *supra* note 275 ("Ensure all teachers receive anti-bias training and follow-up professional development.").

[279] *See* sources cited *supra* note 278.

[280] *See generally* Cullors, *supra* note 108, at 1686 ("Abolition calls on us not only to destabilize, deconstruct, and demolish oppressive systems, institutions, and practices, but also to repair histories of harm across the board.").

[281] *See Policy Platform*, *supra* note 275 ("Despite attempts to create an equitable funding formula, deep resource inequities persist across our schools. These inequities are rooted in the racial and socioeconomic segregation across the system. [The state government must] deliver the $1.2 billion in Foundation Aid New York City is owed from the Campaign for Fiscal Equity lawsuit."); *Real Integration, supra* note 266 (aligning policy plan with Alliance for Quality Education and the Fair Play Coalition demanding the pursuit of "$1.6 billion owed to NYC Public Schools from the CFE v. State of NY" litigation).

[282] IntegrateNYC's platform calls for an annual "equity check" and accountability report to ensure equitable equipment, programming, sports teams, and AP course offerings. They also call for DOE recognition of inequalities in sports access across race and a redesigned

the disparities in parent teacher association ("PTA") funding—a major source of resource inequity in New York City.[283] As part of their policy platform, they called for the redistribution of PTA-generated funds from the wealthiest schools to those "schools in need."[284]

While discussing school funding, Julisa Perez described ways she sees inequity across different schools.[285] She noted that IntegrateNYC "[does not] think it's just at all to ask students to perform in the same way when they're given completely different resources."[286] She explained that, to IntegrateNYC, funding is not solved by providing the same level of support across the board.[287] Rather:

> Some people are so far forgotten that they need a little bit more resources to be able to achieve . . . [S]ome students will need extra support because of their family situation, their home situation . . . [E]verybody should really be able to succeed and nobody should be failing in school.[288]

Overall, though it is unlikely that these students have ever had racial justice issues framed as the four pillars, it is remarkable that they have contemplated solutions across each one. Further, it is notable that these solutions address the principles necessary for dismantling white supremacy. Their messaging identifies the racist past and grapples with the complicated legacies of racial injustice: merit, punishment, and unjustified entitlement.

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system to make all sports programs accessible to all students. *Real Integration, supra* note 266.

[283] Though NYC is a single district, individual schools can have varying levels of funding through parent-teacher organizations. Kyle Spencer, *Way Beyond Bake Sales: The $1 Million PTA*, N.Y. TIMES (June 1, 2012), https://perma.cc/H9C7-VZE2. In 2017, New York City had nineteen of the top fifty richest PTAs in the country. CATHERINE BROWN ET AL., CTR. FOR AM. PROGRESS, HIDDEN MONEY: THE OUTSIZED ROLE OF PARENT CONTRIBUTIONS IN SCHOOL FINANCE 21-23 (2017), https://perma.cc/PVQ3-5QEA.

[284] *Policy Platform*, *supra* note 275. This type of plan is not unprecedented. It has been carried out in the Santa Monica-Malibu school district in California, where most donations are pooled across the district and then distributed equally to all schools. *See* Dana Goldstein, *PTA Gift for Someone Else's Child? A Touchy Subject in California*, N.Y. TIMES (Apr. 8, 2017), https://perma.cc/H7CT-ZYQH.

[285] Interview with Julisa Perez, *supra* note 232.

[286] *Id.*

[287] *Id.*

[288] *Id.*

C. Where Is This Movement Now and What to Look for Next

The students leading the charge achieved a major accomplishment in having a formal governmental advisory group adopt their ambitious framing—especially since most think of segregation as an issue of enrollment only. Their vision of reform and change is equity-focused and designed to create equal opportunities regardless of background. However, there are still obstacles ahead. Racial justice advocates should monitor this movement to see what lessons can be learned and what issues may be uncovered.

In February 2019, the SDAG issued its first of two reports. This report included 67 recommendations to the DOE.[289] Organized along and addressed each of the 5 Rs, the recommendations varied in content and specificity. Overall, they reflected significant improvement over the City's initial diversity plan in 2017.[290] In June 2019, Mayor de Blasio declared that he would formally adopt the overwhelming majority of these recommendations and only explicitly rejected two.[291]

There are positive signs among the recommendations that were adopted, but here, implementation will be the central question.[292] Further,

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[289] *See* SCH. DIVERSITY ADVISORY GRP., MAKING THE GRADE, *supra* note 264.

[290] *Id.* at 62-65 (recommending that the DOE "be more ambitious and more realistic" in regard to the original goals laid out in the City's 2017 plan and that the City set short-term racial and socio-economic goals using local opportunities, set goals based on borough-wide averages for medium-term goals, and aspire toward long-term citywide goals).

[291] Press Release, Office of the Mayor, Mayor de Blasio, Schools Chancellor Carranza Announce Adoption of School Diversity Advisory Group Recommendations (June 10, 2019), https://perma.cc/BY9Q-VNNU; SCH. DIVERSITY ADVISORY GRP., FINAL SDAG RECOMMENDATION RESPONSES 2, 6 (2019), https://perma.cc/Q6SM-86YT. These two recommendations called for the DOE to create a Chief Integration Officer and for the City to analyze the benefits of moving NYPD school safety officers to DOE supervision. Outright rejection of both is very disconcerting for racial justice purposes. From a basic organizational standpoint, it is critical to have a designated official with significant decision-making power assigned to facilitate reforms, community-based or otherwise. As noted above, decentralized power has been a historical obstacle to racial equity pursuits. The strong denial of the mildly worded police-related recommendation indicates that the City may not seriously view this reform as an opportunity to address discipline. The presence of officers on school campuses exacerbates the racial disparities in school discipline and incorporates some of the most damaging aspects of the criminal justice system into an educational setting. In rejecting a recommendation to examine whether officers should be supervised by the DOE, rather than the NYPD, public safety appears to outweigh considerations of racial equity in a process about integration. From my experience, a fulsome effort to undo racial disparities in various contexts would require reimagining the role of police in schools.

[292] Notably, the DOE adopted recommendations regarding culturally responsive curricula, restorative discipline practices, and staff diversity. SCH. DIVERSITY ADVISORY GRP., *supra* note 264. Since these recommendations lacked specific details or milestones, the City can claim success in various situations.

some policies were "adopted" but were slightly altered or made less specific. In one extremely relevant example, the SDAG called for "[l]aunch[ing] a Task Force to recommend equitable PTA fundraising strategies."[293] Because New York City is a single district under New York State funding formulas, funding disparities between city schools are primarily caused by differences in PTA funding.[294] In adopting this policy, the City adjusted the language, removed the word "equitable" and agreed to "[l]aunch a Task Force to examine PA and PTA capacity – including with resources/fundraising and structure/organizing – to make recommendations to *increase capacity for PTAs overall*."[295] This revision strongly suggests that the City is not interested in any redistributive policy, nor even a progressive city-funded subsidy to address disparities. Rather, it appears that the City is encouraging funding increases across the board and is replicating past mistakes with colorblind benefits.

In August 2019, the SDAG released a final set of recommendations focused on G&T programs, admission screens, and district boundaries. The report containing these recommendations spoke at length about the segregative role of G&T programs and exclusionary admissions policies. For G&T programs, the report highlighted that admissions programs for these programs have discriminated against low-income students[296] and have increased the racial segregation within and across schools.[297] For admission screens, the report identified the ways in which admission policies have shaped school demographics.[298] In identifying the damaging effects of both G&T programs and exclusionary admissions, the SDAG recommended that the DOE replace segregated G&T programs with inclusionary enrichment programs that include individualized study plans and recommended eliminating exclusionary admission programs that create segregation.[299] These recommendations have proven to be extremely

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293 SCH. DIVERSITY ADVISORY GRP., *supra* note 264, at 4.

294 *See* sources cited *supra* note 282.

295 SCH. DIVERSITY ADVISORY GRP., *supra* note 264, at 4 (emphasis added).

296 SCH. DIVERSITY ADVISORY GRP., MAKING THE GRADE II, *supra* note 264, at 24.

297 *Id.* at 28-29.

298 *Id.* at 22.

299 SCH. DIVERSITY ADVISORY GRP., MAKING THE GRADE II, *supra* note 264, at 9.

controversial.[300] Though the New York City Council passed a bill codifying the SDAG and extending the body's tenure,[301] the DOE and the Mayor have not yet announced whether they will adopt the second set of recommendations.

Overall the SDAG recommendations and DOE response indicate the benefits and shortcomings of pursuing reform in this manner. Litigation-based remedies provide less opportunity to attack the colorblind principles underlying discriminatory policies. It is also extraordinary that the SDAG and DOE have adopted a student-conceived and equity-centered model for reform that extends beyond the initial presentation of the issue: disparities in enrollment. But, even with these successes, this particular reform could benefit from the authority that comes with a court order. The City's response to the SDAG's first set of recommendations—rejections and material alterations—and to the second set—inaction and silence—reveal some trepidation with this reform effort. Without a finding of illegality or unconstitutionality, the DOE is mostly motivated by political considerations.[302] This is particularly difficult given the various communities involved, the sensitivity surrounding racial issues, and the particular concerns parents feel about school policies. As such, the DOE has made adjustments to potentially divisive proposals and has been vague about the policies it has committed to adopting. Therefore, as with any reform, the true test will be in the implementation of the policies. This will be difficult given the size of the DOE and the task at hand, and this will be significantly more difficult without a designated officer.[303] Overall, the City's response indicates that it recognizes the need for change, but that it is not fully aligned with the principles pushed by the impacted communities.

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[300] *See* Selim Algar, *Gifted-and-Talented Purge Will Spark Asian Exodus: Activist*, N.Y. POST (Aug. 28, 2019, 6:49 PM), https://perma.cc/4HJX-R58T; Richard Chen, Opinion, *Eliminating Gifted Programs Further Segregates NYC*, KINGS COUNTY POL. (Aug. 29, 2019), https://perma.cc/YZ98-WYGX; Max Eden, *Killing Gifted & Talented Programs Is de Blasio's Next Step in War on Excellence in Education*, N.Y. POST (Aug. 28, 2019, 7:13 PM), https://perma.cc/LLR9-CLYM; Julia Marsh, *Corey Johnson Opposes Cutting Gifted School Programs*, N.Y. POST (Aug. 27, 2019, 1:37 PM), https://perma.cc/NY53-TJPQ; Bob McManus, *How to Destroy a School System*, CITY J. (Aug. 28, 2019), https://perma.cc/CHE3-QQVY.

[301] Meaghan McGoldrick, *Council Passes New Measures to Increase School Diversity*, BROOKLYN DAILY EAGLE (Nov. 18, 2019), https://perma.cc/87WX-DYV7.

[302] Though IntegrateNYC is primarily a community-based grassroots movement, litigation is also part of its strategy. In discussing the significance of this moment, Julisa Perez recognizes the importance of the City adopting the bulk of the SDAG's recommendations. However, she notes that integration has not been a priority for New York City decisionmakers. To this she added, "as a community we're going to stand strong and show them that is has to be one of their priorities." Interview with Julisa Perez, *supra* note 232.

[303] *See supra* note 290.

Crucially, much remains to be seen regarding the aspects of the public system that correspond to race-motivated impairments and race-motivated benefits: admissions to both highly desirable schools and programs. These components of the system have not only separated privileged students from underserved students. They have also reserved some of the most elite programs, middle schools, and high schools for privileged New Yorkers and have reliably excluded Black and Latinx students. These policies reflect the greatest opportunity to narrow the race gap in New York schools and therefore will be the most contentious battleground. Though much will depend on whether the DOE eliminates exclusionary admissions and replaces G&T programs, it is telling that the SDAG did not do everything possible to tackle these pillars. In particular, the SDAG did not suggest eliminating district lines,[304] adopting the student groups' algorithmic admission policies that have been viewed as a possible alternative following *Parents Involved*,[305] nor reforming admissions policies to the specialized high schools.[306] These limitations are likely the result of a consensus-based process involving over forty individuals. It is also possible that the SDAG focused solely on eliminating the barriers of entry because they believe reallocating benefits or advantages to students of color could run afoul of the Equal Protection Clause. It is unclear if this was a motivation because the Supreme Court's jurisprudence has historically had a chilling effect when it comes to New York City integration efforts. Regardless, at this point, additional changes to admissions will have to occur outside of the initial SDAG process and will have to involve pressure on city officials. If successful, and if opportunity is finally democratized in a district of 1.1 million students, then this movement can serve as a model for other cities in the country and will represent a small step toward bridging the Two Americas.

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[304] Instead, they called for redrafting lines. *See* SCH. DIVERSITY ADVISORY GRP., MAKING THE GRADE II, *supra* note 264, at 12.

[305] *See* SCH. DIVERSITY ADVISORY GRP., MAKING THE GRADE II, *supra* note 264, at 33 (explaining that the SDAG directed the DOE to examine this particular plan, but did not formally include its adoption within its recommendations); Micheal J. Alves, Fulfilling the Promise of *Brown* and Diversity Conscious Choice-Based Assignments, Address at the National Conference on Magnet Schools 2, 4 (May 17, 2014), https://perma.cc/3TL3-G646; Ciara McCarthy, *NYC to Roll Out School Integration in the Lower East Side*, PATCH (Oct. 27, 2017, 3:51 PM), https://perma.cc/R3Y4-ZJSH (describing how controlled choice is another form of an algorithmic process that allows for increased integration without an individualized assessment of race—the type of assessment outlawed in *Parents Involved*—and explaining that this model, which takes into account factors like income, temporary housing, and English learners, has been adopted by a New York school district—District 1—which encompasses the Lower East Side); *Enrollment Equity Plan*, *supra* note 265 (proposing a high school matching process).

[306] *See School Diversity Group: NYC Should Phase out Gifted Programs, Curb Selective Screening in Admissions*, BKLYNER (Aug. 27, 2019, 2:05 PM), https://perma.cc/R452-HKC2.

CONCLUSION

Through the four pillars, I have attempted to propose a framework for understanding racial injustice and for understanding why solutions have historically fallen short. I have also suggested a case study for additional research and examination. Naturally, there are limitations to this Article. Namely, racial injustice in America was omnipresent and it is hard to capture something so nebulous into a neat schema. Moreover, I note that the New York-focused examples may indicate unique characteristics and features missing in other contexts. I encourage others to expand on this framework with examples of their own to analyze whether racial grievances fall into these categories in other regions of the nation.

In discussing this framework and this case study, however, the central question is whether reform efforts are well suited for addressing a type of racial harm and if they create a solution that can close a racial disparity. I hope that this Article helps racial justice advocates in their pursuit of solutions and in the framing of their reforms. I also hope that this Article adds to the ongoing conversations about what is necessary and what can work to improve the outcomes and opportunities for people of color, following centuries of oppression.