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TAKE BACK THE COURT

The Supreme Court Threatens Racial Justice and Racial Progress

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Executive Summary

I. INTRODUCTION:

- The Court's conservative majority, now strengthened, and the judicial philosophies and jurisprudence of the six conservative justices on matters of race pose one of the gravest threats to racial justice and racial progress this country has ever seen.
- From voting rights to economic justice, the Roberts Court has issued decisions that tip the scales even further away from racial justice and equality. A 6-3 Supreme Court threatens racial justice efforts across the board, and the threat goes far beyond immediate conservative targets like affirmative action and employment discrimination.
- With the addition of Justice Barrett, the Supreme Court now has a supermajority of racial conservatives whose regressive positions include the belief that affirmative action is racism; voluntary school integration is illegal; the meaning of the Constitution as written by slaveholders is rigid law; 21st-century law should be interpreted on the basis of 18th century norms; states' rights can invalidate national legislation, leaving millions of Black and Brown People with unequal access to government benefits; and the right to vote can be blocked and limited by state and local governments with a long history of discriminating against minority populations.
- There are several cases before the Court this term with stark racial justice implications. Cases in the federal courts pipeline as well as cases that have yet to emerge will threaten existing civil rights precedents, challenge progressive policies, make it harder to challenge discrimination or enact policies that remedy discrimination, and exacerbate existing racial disparities in all aspects of American life.

II. THE SUPREME COURT HAS SHROUDED THE EVISCERATION OF RACIAL JUSTICE UNDER THE VEIL OF RACE NEUTRALITY

- Racial conservatives on the Supreme Court have leveraged a noxious, racist theory—colorblindness—to shroud the evisceration of racial justice and racial progress under the veil of race neutrality. Under the pretense of a race-neutral idea, the Court's racial conservatives have been able to curtail and even destroy policies designed to advance racial justice.
- The adherence to colorblindness runs deep in conservative legal circles, and rests on the belief that governmental choices that consider race—even choices that *redress* historic or current race discrimination in *favor* of racial minorities—violate the Constitution. This philosophy is devastating for racial justice and threatens everything from voting rights to access to affordable housing to affirmative action programs.

III: RACIAL JUSTICE ISSUES AT STAKE AT THE SUPREME COURT

- *The Court facilitates voter suppression* by consistently gutting voter protections and validating practices that dilute the vote of racial minorities such as racial gerrymandering. Refusing to protect minority voters is a classic example of the "colorblind" judicial philosophy that conservative justices promote.
- *The Court opposes affirmative action* and is likely to strike down any policy effort to affirmatively redress past discrimination. The conservative narrative that race-conscious anti-discrimination policies are discriminatory or equivalent to historical preferences for white people puts generations of anti-discrimination law at risk.
- *The Court permits employment discrimination.* Disparate impact doctrine, which allows litigants to prove discrimination based on effects, rather than solely discriminatory intent, is at risk under the new 6-3 Court.
- *The Court allows police brutality* by expanding and misapplying a doctrine known as "qualified immunity," which protects government employees from federal lawsuits, and shields police officers from civil liability for the use of excessive force. The Court has made it all but impossible to convict police officers of misconduct.
- *The Court blocks criminal justice reforms.* With their colorblind philosophy, the conservative members of the Court willfully ignore how changes in sentencing, jury verdicts, and Fourth Amendment jurisprudence adversely affect Black people. Decisions on cases technically outside the criminal justice system, like qualified immunity and First Amendment cases, likewise stand in the way of meaningful changes to how this country treats Black people.

IV: RACIAL JUSTICE AND THE JUSTICES

- *Chief Justice John Roberts* treats as equivalent racial bias against white Americans and Black Americans and opposes voting rights, affirmative action, and fair housing. He is perhaps the Court's chief proponent of colorblindness, enabling him to block racial progress while maintaining the pretense of racial neutrality. His harmful views on race are not limited to voting rights cases, as perhaps most profoundly on display in jurisprudence he has championed to limit *Brown v. Board of Education's* requirement of school integration.
- *Justice Clarence Thomas* believes affirmative action is "indiscriminate social engineering" and opposes voting rights, affirmative action, and desegregation.
- *Justice Samuel Alito* imagines white Americans as primary victims of racial discrimination and opposes voting rights, equal justice, and fair housing. He refuses to recognize the clear ties—both historically and in the present day—between judicial questions and discriminatory outcomes, and admonishes other justices for making such connections. He is a consistent vote against racial justice and staunchly upholds the racist status quo. While he is offended by the idea that race might play a role in racially gerrymandered legislative maps across the former Confederacy, Alito is quick to cry "racism" against white Americans and has consistently characterized white Americans as the real victims of racial discrimination. He plays to white identity politics, denies the fact of racism against minorities and minority groups, and characterizes any attempt to ameliorate conditions for Black Americans as discrimination *against white Americans*.

- *Justice Neil Gorsuch* overwhelmingly denies relief in death penalty cases which disproportionately affect Black defendants. He has rejected challenges to the use of lethal injection, denied scores of habeas cases resulting in death sentences from Oklahoma state convictions, and ruled against ineffective assistance of counsel claims. Justice Gorsuch sides more with the prosecution than with criminal defendants in appeals, and his judicial philosophy will likely contribute to immeasurable harm to racial justice progress.
- *Justice Brett Kavanaugh* is a reliable conservative vote in cases concerning racial justice and civil rights, and consistently defers to law enforcement, including in Fourth Amendment cases in which he repeatedly finds the actions of law enforcement to be reasonable. Justice Kavanaugh has worked with anti-affirmative action groups, publicly railed against affirmative action in the media, and espoused beliefs in "legal colorblindness" that are deeply harmful to people of color.
- *Justice Amy Coney Barrett* opposes voting rights and employment nondiscrimination and does not believe that a white supervisor's use of the n-word creates a hostile work environment.

IV. CONCLUSION

- The 6-3 Court reflects the effort of white conservatives and their allies to hold on to power in an America that is changing demographically and politically.
- Conservatives have been working in coordination for decades to achieve the current supermajority. They will continue strategically to place cases in the federal courts pipeline that challenge policies of progressive governing coalitions, threaten existing civil rights precedents, make it harder to challenge discrimination or enact policies that remediate discrimination, and widen existing racial disparities in all aspects of American life.
- The Court's conservative majority pose one of the gravest threats to racial justice and racial progress this country has ever seen and is a formidable barrier to the achievement of a just and equitable nation.

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I. Introduction

President Biden may have unseated Donald Trump from the White House, but he can't unseat the hundreds of conservative judges Trump appointed to the federal bench. Trump leaves a legacy of an ultraconservative bloc in the federal judiciary—from the district courts to the Supreme Court. Before Justice Amy Coney Barrett's confirmation, the Supreme Court's conservative majority was already hostile to racial justice. From voting rights to economic justice, the Roberts Court has issued decisions that tip the scales even further away from racial justice and equality. With the addition of Justice Barrett, the Supreme Court now has a supermajority of racial conservatives whose regressive positions include the belief that affirmative action is racism and even that voluntary school integration is illegal; that the meaning of the Constitution as written by slaveholders is rigid law and that 21st-century laws should be interpreted on the basis of beliefs of the 18th century; that states' rights can invalidate national legislation, leaving millions of Black and Brown people in the South, for example, without the same access to government benefits as people in other states; and that the right to vote can be blocked and limited by state and local governments with a long history of discriminating against minority populations.

There are several cases before the Court this term with stark racial justice implications. They include a case that concerns life sentences without parole for juveniles;[1] a case related to *Bivens*, a doctrine scorned by conservatives that is often the only mechanism to hold federal law enforcement officers accountable;[2] a challenge to the Trump Administration's memo that seeks to exclude noncitizens from the census count for the purposes of apportionment, which threatens to redirect government resources and political power from more diverse areas to whiter areas;[3] and a case that will decide whether the Court's previous decision invalidating non-unanimous juries applies retroactively to cases on federal collateral review.[4] In November, the Court heard the case *California v. Texas*, which seeks to eliminate the Affordable Care Act, with potentially disastrous implications for communities of color.[5] Minority communities have seen large gains in health coverage due to the ACA, with the uninsured rate decreasing most dramatically for Latinos.[6] If the Court overturns the ACA in the middle of a pandemic that is already disproportionately affecting Black, Latinx, and Indigenous populations, the health and health care of people of color will be in even greater peril. Justice Roberts provided the fifth vote to uphold the ACA in the 2012 case *NFIB v. Sebelius*, but Justice Barrett has written that she believes that case was wrongly decided. Finally, as former President Trump has stated clearly, conservatives aimed to use the 6-3 Court to undermine the election and suppress the votes of racial minorities.

As the sampling of cases that the newly constituted Court will hear demonstrates, a 6-3 Court poses a broad threat to racial justice that goes far beyond obvious targets such as affirmative action or equal employment opportunity. The Court regularly hears cases on economic justice, environmental justice, reproductive justice, and criminal justice that materially impact everyday lives, particularly the lives of people of color.

The 6-3 Court reflects the effort of white conservatives and their allies to hold on to power in an America that is changing demographically and politically. Conservatives have been working for decades to achieve the current supermajority, and will continue strategically to place cases in the federal court pipeline that challenge policies of progressive governing coalitions, threaten existing civil rights precedents, make it harder to challenge discrimination or enact policies that remediate discrimination, and widen existing racial disparities in all aspects of American life. The conservative supermajority is a formidable barrier to the achievement of a just and equitable nation.

Part II of this report describes how the Supreme Court has leveraged the idea of "colorblindness" under the veil of race neutrality to shroud the evisceration of racial justice and racial progress. Part III addresses three high-stakes racial justice issues: voting rights, equal employment opportunity, and criminal justice. Part IV surveys the six conservative justices and their positions on issues that intersect with racial justice, positions that almost uniformly threaten racial progress.

II. The Supreme Court Has Shrouded the Evisceration of Racial Justice under the Veil of Race Neutrality

Racial conservatives on the Supreme Court have leveraged a noxious, racist theory—colorblindness—to shroud the evisceration of racial justice and racial progress under the veil of race neutrality. Under the pretense of race-neutral idea, the Court's racial conservatives have been able to curtail and even destroy policies designed to advance racial justice.

As perhaps the Court's most ardent advocate of colorblindness, Chief Justice John Roberts wrote in his landmark anti-affirmative action majority opinion, *Parents Involved in Community Schools v. Seattle School District No. 1,* "[t]he way to stop discriminating on the basis of race is to stop discriminating on the basis of race[.]"[7] His colorblind philosophy is more nefarious than it sounds, as it denies the existence, let alone pervasiveness, of white supremacy and white privilege in American society.

The adherence to colorblindness runs deep in conservative legal circles, and rests on the belief that governmental choices that consider race—even choices that *favor* racial minorities—violate the Constitution.[8] This philosophy is devastating for racial justice and threatens everything from voting rights to access to affordable housing to affirmative action programs.

The Constitution was first characterized as colorblind in the context of *defending* racial integration and to defeat segregationist laws.[9] Justice Harlan famously wrote in his dissent to the majority opinion in *Plessy v. Ferguson* that upheld segregation laws: "Our constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law."[10] Thurgood Marshall relied on the colorblind theory when arguing *Brown v. Board of Education* before the Supreme Court,[11] and the justices unanimously adopted this vision in declaring school segregation unconstitutional.[12]

But as the tides turned with the passage of the landmark civil rights laws in the 1960s, conservative judges began to flip the colorblindness argument on its head. White litigants argued that racially progressive policies meant to remedy the centuries-long harms of slavery, violence, and segregation toward African Americans instead represented unconstitutional discrimination

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toward white people.[13] Conservative judges, including conservative justices on the Supreme Court, adopted that argument—and still do today.[14] Contrast that with a progressive reading of the Constitution, which Justice Sonia Sotomayor championed in her dissent in *Schuette*, another affirmative action case:

> *In my colleagues' view, examining the racial impact of legislation only perpetuates racial discrimination. This refusal to accept the stark reality that race matters is regrettable. The way to stop discrimination on the basis of race is to speak openly and candidly on the subject of race, and to apply the Constitution with eyes open to the unfortunate effects of centuries of racial discrimination.*[15]

As Chief Justice, Roberts leads the "colorblind" Constitution charge anathema to Justice Sotomayor's vision. His beliefs are based not only on his selective interpretation of the Constitution—which aligns with what white conservatives want—but also on a highly distorted[16] interpretation of affirmative action's consequences for minority students that disregards the lived experience of people of color. In responding to Justice Sotomayor's dissent in *Schuette*, specifically her point that race consciousness can help lessen the sense of doubt that minority students may have about whether they belong at an institution, Justice Roberts conjectured as a powerful white man of immense privilege that "racial preferences may themselves have the debilitating effect of reinforcing precisely that doubt, and—if so . . . the preferences may do more harm than good."[17]

In her groundbreaking exposé of racialized mass incarceration, *The New Jim Crow*, scholar Michelle Alexander prosecutes the case against colorblindness, explaining:

> *"Saying that one does not care about race is offered as an exculpatory virtue, when in fact it can be a form of cruelty. It is precisely because we, as a nation, have not cared much about African Americans that we have allowed our criminal justice system to create a new racial undercaste."*[18]

Tragically, Justice Roberts and the conservatives on the Court disregard this scholarship and will continue to use colorblindness as an organizing principle to obstruct and roll back racial progress.

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III. Racial Justice Issues at Stake at the Supreme Court

The Court facilitates voter suppression

The Roberts Court has consistently gutted voter protections and has validated practices that dilute the vote of racial minorities, such as racial gerrymandering. Even before joining the Court, as a Department of Justice lawyer Roberts fought efforts to make it easier to prove racial discrimination in the Voting Rights Act.[19] Roberts then helped the George W. Bush team prepare arguments for *Bush v. Gore,* a decision that halted the legitimate recount of questionable ballots cast in Florida and handed Bush the presidency.[20] In *Shelby County*, Chief Justice Roberts struck a death blow to voting rights, authoring a 5-4 majority opinion striking down Section 4(b), one of the Act's key provisions. Section 4(b) provided a formula to determine which jurisdictions—often those with histories of racist voting laws in the former Jim Crow South—must meet a preclearance requirement before changing voting laws or practices.[21] Roberts effectively invalidated Section 4(b) nonetheless, citing what he characterized as "the Act's extraordinary measures, including its disparate treatment of the States."[22] As a result, GOP voter suppression schemes have thrived, denying millions of mostly Black and Latinx voters access to the ballot box.[23]

The results of *Shelby County* have been devastating and widespread. Hours after the decision, North Carolina and Texas moved to enact voter ID laws meant to keep poor, nonwhite citizens from voting.[24] More than 1,600 polling places closed down between 2012 and 2018 in locations previously covered by VRA preclearance.[25] These closures disproportionately harm Black and other minority communities, and Black voters now wait on average more than 45 percent longer than white voters to cast a vote.[26]

Refusing to protect minority voters is a classic example of the "colorblind" judicial philosophy that conservative justices promote. The hallmark of colorblindness is the idea that race is irrelevant to judicial decisions—even when centuries of racism necessitate racially conscious judicial decision-making. Purportedly neutral voting requirements, like requiring identification for all voters, have a disparate impact on voters of color, a fact that colorblind jurists ignore, despite extensive evidence to the contrary.[27] Twenty-five percent of Black voting-age citizens lack a current government-issued ID, compared to eight percent of white voting-age citizens.[28] Black voters also wait longer to vote: voters in predominantly Black areas are more than 74 percent more likely to wait thirty minutes or more to vote than voters in other neighborhoods.[29]

Roberts's "crusade against the Voting Rights Act is ongoing."[30] In *North Carolina State Conference of NAACP v. McCrory*, just after *Shelby County*, North Carolina passed new election laws that restricted the forms of ID voters could use and targeted "African Americans with almost surgical precision," according to the federal appeals court that initially struck the new election laws down.[31] Roberts and the three other conservative justices voted to reverse the court of appeals decision and reinstate the law, but Justice Scalia's death resulted in a 4-4 tie, preserving the Fourth Circuit's decision. In the 2018 *Abbott v. Perez* decision, the conservatives upheld all but one of Texas' congressional and state legislative districts, which "racially gerrymandered" the state's growing Black and Latinx populations by diluting their voting strength.[32] The harms wrought by *Abbott* are manifold. Racial gerrymandering helped Republicans retain or take control of a number of state legislatures, which in turn gives these legislators the opportunity to further racially gerrymander districts after the Census allocates seats.[33]

In the first half of 2020, voting-rights advocates were 0-4 at the Supreme Court, even with Justice Ginsburg on the bench. Through these four decisions, the Supreme Court reversed a federal judge's order to expand Wisconsin's window for receiving absentee ballots in the primary, rejected an attempt by the Texas Democratic Party to remove barriers to absentee voting, rejected measures to

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the same effect in Alabama, and preserved an Eleventh Circuit order preventing hundreds of thousands of formerly incarcerated, newly enfranchised Floridians from casting votes in the primary.[34] The Supreme Court's liberal justices decried this "trend of condoning disenfranchisement," which would naturally fall most heavily on people and communities of color.[35] Just this October, the Court ruled in a 5-3 decision that Alabama could ban curbside voting. This trend toward limiting the franchise is all but certain to grow, now that Amy Coney Barrett is seated.

In the current term, the Supreme Court granted review in an Arizona voting-rights case, *Brnovich v. Democratic National Committee*, which it will likely hear in March 2021. *Brnovich* involves two types of restrictions, one that requires election officials to discard ballots cast in the wrong precinct, and another prohibiting community organizers from collecting constituent ballots. The Ninth Circuit struck down the restrictions as a violation of the Voting Rights Act precisely because they disproportionately and adversely affected minority voters.[36] However, given other Roberts Court decisions hostile to the Voting Rights Act and the addition of Justice Barrett, the Court will likely reverse the Ninth Circuit.

In the run-up to the 2020 election, the Supreme Court churned out decisions on vital election issues in "real" time, almost on a daily basis. On October 26, 2020, the same day the Senate confirmed Barrett's nomination, the Court handed down a decision that rejected an effort to extend Wisconsin's mail-in voting deadline in light of the pandemic.[37] In a 5-3 partisan split, the conservatives rejected counting ballots postmarked on or before election day. Justice Kavanaugh explained his decision on the grounds that "the District Court changed Wisconsin's election rules too close to the election."[38] Kavanaugh's fellow conservative justices determined that this procedural issue outweighed the need for the voters of Wisconsin to have their ballots fairly counted.

Justice Kavanaugh and Justice Gorsuch's *DNC v. Wisconsin* opinion underscores an ominous break with precedent protecting voters from gerrymandering. And the fact that the Court ultimately rejected baseless challenges to electoral results only underscores its desire to appear as a rational actor in comparison to the chaos of the Trump administration.[39] Kavanaugh's decision in *DNC v. Wisconsin* cited *Bush v. Gore* at length, even though the Court circumscribed its ignominious decision as, "limited to the *present* circumstances, for the problem of equal protection in election processes generally presents many complexities."[40] Justice Gorsuch's concurring opinion was even more jarring, "threaten[ing] a century of voting rights law."[41] For Gorsuch, "The Constitution provides that state legislatures—not federal judges, not state judges, not state governors, not other state officials—bear primary responsibility for setting election rules."[42] This view, according to commentators, has two profound implications that break with precedent: first, that state supreme courts "may lose their power to enforce state constitutions that protect voting rights" and governors might lose the power to veto discriminatory election laws; and second, that the Supreme Court could "overrule a state supreme court on a question of state law."[43] The political implications are striking: Gorsuch and Kavanaugh want to re-allocate authority over key election questions from state supreme courts and governors to either gerrymandered, Republican-dominated state legislative houses or to the conservative Supreme Court itself. This problem is particularly pronounced in the battleground states of Wisconsin, Michigan, and Pennsylvania, all of which have Democratic governors but Republican-controlled legislative chambers, in large part because of gerrymandering.[44]

With Justice Barrett now on the Court, the prospect for voting rights beyond the 2020 election is bleak. Though the Supreme Court did not overturn the voters' will in a free and fair election, its decisions and those of the lower

federal courts are cause for concern. Data show that the conservative justices have sided overwhelmingly with Republican party litigants in 2020 voting cases at the expense of protecting the rights of voters—especially the hard-won rights of voters of color.[45] With Barrett's confirmation, the Court's six conservatives have a clear path to further dismantle voting-rights protections. Section 2 of the Voting Rights Act, which enables courts to overturn state laws that disproportionately impact minority voters, could be next in the crosshairs.[46]And the likeliest effect will be to disenfranchise the very voters for whom the Voting Right Act was enacted —minority voters—who have been killed, beaten, threatened, taxed, and systematically blocked from voting throughout American history.

The Court oppose affirmative action

A 6-3 conservative supermajority is likely to strike down any policy effort to affirmatively redress past discrimination. The conservative narrative that race-conscious anti-discrimination policies are discriminatory or equivalent to historical preferences for white people puts generations of anti-discrimination law at risk.[47] Indeed, affirmative action, a target of the conservative legal movement for decades, is on the chopping block in 2021. The Supreme Court's last major affirmative action decision was in *Fisher v. Texas* in 2016, when the Court decided 5-4—with Justice Kennedy providing the crucial vote—to uphold the University of Texas's race-conscious admissions policy.[48] Justices Roberts, Thomas, and Alito were all in the minority in that case and vehemently opposed to the policy. The three Trump-appointed justices consistently demonstrate open hostility to affirmative action and race-conscious policies.

Conservatives have laid the foundation for new affirmative action cases to reach the Supreme Court in the near future. A conservative challenge to Harvard's admissions policy has already reached the First Circuit Court of Appeals.[49] Though the First Circuit recently ruled in favor of Harvard, it is only a matter of time before this case—or one like it—reaches the Supreme Court.[50] The Trump administration prioritized the systematic dismantling of affirmative action. In 2018, the administration revoked President Obama's federal guidelines that urged schools across the nation to continue affirmative action programs. In 2019, it filed suit against Yale to challenge the use of affirmative action in the admissions process.[51] And in 2020, it argued against affirmative action in the Harvard Federal Court of Appeals Case. The Supreme Court's 6-3 conservative majority is quite likely to allow and even encourage ongoing dismantling of affirmative action programs.

The Court permits employment discrimination

Disparate impact doctrine, which allows litigants to prove discrimination based on effects, rather than solely discriminatory intent, is also at risk under the new 6-3 Court. In *Texas Department of Housing and Community Affairs v. Inclusive Communities Project*, a 5-4 decision, in which Justice Kennedy again joined the Court's liberals to form a majority, the Court reaffirmed that disparate-impact claims based on the disproportionate impact of a facially race-neutral policy or decision on minorities were cognizable under the Fair Housing Act.[52] This 2015 decision was the Court's most recent affirmation of disparate impact liability. If plaintiffs can no longer prove race discrimination by disparate impact, they will have to prove that defendants intentionally discriminated, a much more difficult standard to meet, given that "it is unlikely today that an actor would explicitly discriminate under all conditions; it is much more likely that, where discrimination occurs, it does so in the context of more nuanced decisions that can be explained based upon reasons other than illicit bias" (*Woods v. City of Greensboro*, 855 F.3d 639, 651 [4th Cir. 2017]). This would leave many plaintiffs without the ability to redress their harms and would cement and allow for the proliferation of discriminatory policies.

Justice Alito's dissent in *Inclusive Communitie*s attacks disparate impact writ large.[53] Joined by Thomas and Roberts, he not only casts doubt on disparate impact in the housing context, but also applies negatively Justice O'Connor's concurrence in *Smith v. City of Jackson*, a 2005 case that upheld disparate impact claims under the Age Discrimination in Employment Act. Alito states that the Court was "read[ing] far too much" into *Griggs v. Duke Power Co*., a half-century old anti-discrimination precedent that held an employer liable for practices with an adverse impact on minority employees without the need to show that the practice or policy was intentionally discriminatory.[54] If *Inclusive Communities* were decided today, there is a real likelihood that Justice Alito's dissent

would be the majority opinion. In this way, the Court could limit the use of disparate impact theory—one of the more straightforward pathways for litigating systemic discrimination in federal court.[55] Alito's strict adherence to the belief that only intentional discrimination cases have merit is a harbinger of the colorblind attitude to which the Court's conservative bloc clings. A colorblind approach to judicial decision-making stunts any sophisticated analysis of how implicit bias impacts decision making and of the role that implicit bias should play in shaping contemporary discrimination jurisprudence. Indeed, as the nation has moved from the era of open, flagrant Jim-Crow-era racism to (sometimes) more subtle implicit bias, the Court needs now more than ever to recognize disparate impact claims.

The Court allows police brutality and blocks criminal justice reforms

George Floyd's murder at the hands of the Minneapolis police sparked massive protests and a national reckoning with this country's long, atrocious history of slavery, lynching, and the maltreatment of Black people. The scourge of violence against Black people, especially police and other state-sanctioned violence, rose to the fore and prompted clarion calls for sweeping criminal justice reform. Study after study, in conjunction with the lived experience of Black Americans, exposes evidence of deep racial bias at

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every juncture in the criminal justice process. Black people and other minorities compared to similarly situated white people, for example, are much more likely to be pulled over and searched during a traffic stop, to face charges and indictments, to be levied higher bails, to be sentenced more harshly by judges, and to have a family member incarcerated. Blacks and Latinos are much more likely to be victims of police violence.[56] One Harvard study found that Black people are 3.2 times (> 300%) more likely than white people to be killed by the police.[57]

By expanding and misapplying a doctrine known as "qualified immunity," which protects government employees from federal lawsuits and shields police officers from civil liability for the use of excessive force, the Court has made it all but impossible to convict police officers of misconduct. This past summer, the Court declined to grant certiorari to hear eight cases involving this doctrine.[58] The qualified immunity doctrine protects police officers and other government workers sued for misconduct, unless the officer violated a "clearly established legal precedent."[59] In practice, the Court's conservatives have applied the doctrine in such a way that allows police officers to avoid consequences for violating the constitutional rights of Americans, often people of color, whom they are supposed to protect and defend.

One case the Court declined to review, *Baxter v. Bracey*, involved a burglary in which a police dog bit the alleged burglar, Alexander Baxter. Baxter argued that he had already surrendered to the police when the dog attacked him.[60] The Sixth Circuit threw out Baxter's case on grounds of qualified immunity because it was not clear that the officers had violated a clearly established legal precedent.[61] The precedent? A case in which a dog was unleashed on a person who was lying down. Mr. Baxter had been sitting with his hands up when attacked. [62] The Sixth Circuit split hairs and found the two situations too dissimilar.

Even the liberal justices have been loath to reform the Court's qualified immunity jurisprudence. In *Baxter*, only Justice Thomas broke rank and dissented from the Court's seven-justice majority denial of certiorari. In his dissent, Thomas explains that Congress passed the Civil Rights Act of 1871 (codified and now known as Section 1983) in the wake of Reconstruction to respond to "the reign of terror imposed by the Klan upon black citizens and their white sympathizers in the Southern States."[63]

Instead of staying true to that goal, which was to provide a remedy against state officials for violating constitutional rights, Thomas writes that the Court developed a qualified immunity doctrine that has no basis in the statutory text, which "makes no mention of defenses or immunities."[64] Thomas's dissent is rooted in his originalist approach to jurisprudence, which looks to the original text of the Constitution or laws to understand their current meaning—an approach that often, but not always, leads to conservative decisions.[65] The Court adopted the "clearly established law" test now engrained in the qualified immunity inquiry, Thomas writes, not in fidelity to congressional purpose, but for purposes of judicial efficiency.[66] Though Thomas would have granted certiorari to reconsider the Court's qualified immunity doctrine, no other Justice joined his dissent. Today, with the 6-3 conservative majority, there is almost no chance that the Court will reconsider this warped doctrine of its own creation, which thwarts Congress's intent to allow people to sue state officers for violations of their constitutional rights.[67]

The Black Lives Matter movement is also threatened by conservative courts. In December 2019, the Fifth Circuit ruled that a case by a police officer against DeRay Mckesson, a Black Lives Matter organizer, could proceed, despite Mr. Mckesson's invocation of a First Amendment defense. At a 2016 protest in Baton Rouge, Louisiana, over the police killing of Alton Sterling, an unidentified protestor threw a rock at a police officer.[68] The police officer, "John Doe," sued Mckesson, one of the leaders of the protest, for his injury under a negligence theory.[69] The Fifth Circuit sided with the officer, holding that the First Amendment did not immunize Mckesson from suit, even though he neither participated in nor encouraged violence.[70] On November 2, 2020, the Court directed the case to the Louisiana Supreme Court to decide a novel issue of state law before grappling with the First Amendment issue.[71] Nevertheless, the Fifth Circuit's First Amendment decision remains a dangerous harbinger of what other courts could do to limit the right to protest. A petition for certiorari is currently pending in the Supreme Court.

Decisions such as that of the Fifth Circuit threaten to undermine this generation's foundational grass roots movements for racial justice and social advancement. "If the law had allowed anyone to sue leaders of social justice movements over the violent actions of others," said the American Civil Liberties Union (ACLU) national legal director Tony Mauro in response to the Fifth Circuit's decision, "there would have been no civil rights movement."[72] If the conservative majority on the Supreme Court decides to take up Mckesson's case, even the most fundamental rights of speech, protest, and petition may be at risk.

The Court will also hear other cases concerning police brutality and criminal justice this term. In *Torres v. Madrid*, for example, the Court will consider what constitutes a "seizure" under the Fourth Amendment.[73] Ms. Torres was sitting in her car when two unidentified police officers approached her. Ms. Torres fled in self-defense because she thought the police were carjackers, and the police shot her in the back as she drove away.[74] The Fourth Amendment prohibits excessive searches and seizures, and individuals can sue for deprivations of their Fourth Amendment constitutional rights under Section 1983.[75] The Tenth Circuit, however, ruled that Ms. Torres was not illegally "seized," because she managed to escape, and held she had no viable lawsuit against the police.[76] The Court recently heard oral argument in the case, during which Justice Alito appeared to side with the police officer's definition of seizure.[77] If the rest of the conservative bloc follows suit, victims of police violence, who are disproportionately Black, will have no remedy for these types of violations of their constitutional rights.[78]

This term, the Court will also consider *Jones v. Mississippi*, which asks whether an official must make a finding that a minor is "permanently incorrigible" before sentencing the minor to life in prison without parole.[79] It will decide whether its decision in *Louisiana v. Ramos*, which incorporated the federal requirement of unanimity in jury verdicts for serious criminal offenses against the states,[80] applies to certain pending federal cases.[81]

Based on this country's history of discrimination and ongoing structural bias in the criminal justice system, all of these decisions will disproportionately impact Black communities. With their colorblind philosophy, the conservative members of the Court willfully ignore how changes in sentencing, jury verdicts, and Fourth Amendment jurisprudence adversely affect Black people. And decisions on cases technically outside the criminal justice system, such as qualified immunity and First Amendment cases, likewise stand in the way of meaningful changes to how this country treats Black people. The decisive 6-3 conservative majority on the Court is a formidable barrier to desperately needed equity reforms in our criminal justice policy.

> The Court's conservative majority, now strengthened, and the judicial philosophies and jurisprudence of the six conservative justices on matters of race pose one of the gravest threats to racial justice and racial progress this country has ever seen.

IV. Racial Justice and the Justices

Chief Justice John Roberts

Chief Justice Roberts equates racial bias against white and Black Americans and opposes voting rights, affirmative action, and fair housing. As noted above, Roberts is perhaps the Court's chief proponent of colorblindness. Justice Roberts's commitment to colorblindness runs deep, and enables him to block racial progress while maintaining the pretense of racial neutrality.

The trajectory of Roberts's career and his accompanying views on race are telling. Freshly graduated from Harvard Law School, Roberts went on to clerk for Supreme Court Justice William Rehnquist, who became Chief Justice in 1986. "[U]ltra-conservative" Rehnquist was known as the "Lone Ranger" for his radically right-wing views.[82] When Rehnquist himself was a young clerk on the Supreme Court, he revealed incredibly in a memo that, "I realize that it is an unpopular and unhumanitarian position, for which I have been excoriated by 'liberal' colleagues, but I think *Plessy v. Ferguson* was right and should be re-affirmed."[83]

The formative impact Rehnquist's judicial philosophy had on the young John Roberts is clear and is directly relevant to his attempts to roll back civil rights protections today—especially dismantling the Voting Rights Act.[84] Of particular note was Justice Rehnquist's hostility toward voting rights—a view that Roberts eagerly adopted and applied as he moved on from his clerkship toward a position in the Reagan Department of Justice.[85] In 1982, as the House of Representatives debated whether to amend Section 2 of the Voting Rights Act to include an effects test (i.e. one that would protect against racially discriminatory effects of voting laws regardless of proof of intent) versus an intentional discrimination test, Roberts was charged with convincing Congress to adopt the latter.[86] He wrote more than 25 memos in support of this view, arguing in one that "Violations of Section 2 should not be made too easy to prove, since they provide a basis for the most intrusive interference imaginable by federal courts into state and local processes."[87]

Roberts's preferred version of the Voting Rights Act was defeated in 1982, but he would have his way more than thirty years later when he authored the majority opinion in *Shelby County v. Holder*.[88] As discussed in more detail in the Voting Rights Section, *Shelby County* took the teeth out of Section 5 of the Voting Rights Act, which had required states with a history of discriminating against minorities in voting to "pre-clear" changes to their voting laws with the Department of Justice.[89] Because the Voting Rights Act had been successful in reducing disparities between Black and white voters, Roberts reasoned, the federal enforcement arm of the law was no longer needed.[90] To his reasoning, the very success of the Voting Rights Act justified its demise.

The gutting of the Voting Rights Act has been especially alarming in a year when the Supreme Court could have been the ultimate arbiter of the presidential election. The last time the Supreme Court decided a presidential election, in *Bush v. Gore*, it handed what would become an eight-year presidency to George W. Bush, who had lost the national popular vote. Roberts assisted with the Bush team's legal strategy,[91] as did Brett Kavanaugh and Amy Coney Barrett.[92] With a newly confirmed sixth conservative justice, a global pandemic, and widespread propaganda about mail-in voting, it is not unreasonable to believe that had the election been closer and if Trump had more clever counsel, the Supreme Court's conservative majority may have sided with him.

Part and parcel of his jurisprudence, Justice Roberts's "race talk"—the language he uses to talk about race—gives tremendous insight into his true racial ideology. Roberts's language encapsulates what Dr. Eduardo Bonilla-Silva, a sociology professor at Duke University, calls a post-racial perspective in his book *Racism without Racists: Color-Blind Racism and the Persistence of Racial*

Inequality in America. Four features characterize the post-racial perspective: (1) a failure to see or recognize racism, (2) a belief that individual failures, not discrimination, lead to racial inequality, (3) an assumption that racial minorities have dysfunctional cultures that stymie their progress, and (4) a belief that inequality is natural and need not be remedied by policy decisions.[93] In *Disrupting White Fragility and Colorblind Racism*, Alicia L. Brunson and Chris Benedict Cartwright build on Dr. Bonilla-Silva's framework with an additional component: the "minimization of race."[94]

Justice Roberts's colorblindness epitomizes the post-racial vision. Roberts consistently adheres to conservative legal positions even when presented with unconverted evidence of racial discrimination. He refuses to give credence to policies that aim to address racism and wields the Constitution as a weapon against transformative ideas like affirmative action. In one disturbing passage from *Shelby County*, Roberts declines to recognize the new ways racism continues to manifest in the United States to justify striking down the coverage formula in the Voting Rights Act—a formula that was crucial to protecting the right to vote for millions of Black voters. Fifty years after Congress created the coverage formula in 1965, the formula had no further utility because progress against racism had been so successful:

> *But history did not end in 1965. By the time the Act was reauthorized in 2006, there had been 40 more years of it. In assessing the "current need" for a preclearance system that treats States differently from one another today, that history cannot be ignored. During that time, largely because of the Voting Rights Act, voting tests were abolished, disparities in voter registration and turnout due to race were erased, and African–Americans attained political office in record numbers. And yet the coverage formula that Congress reauthorized in 2006 ignores these developments, keeping the focus on decades-old data relevant to decades-old problems, rather than current data reflecting current needs.*[95]

Precisely because the VRA had been "successful" in Justice Roberts's eyes, it now had to be gutted.

Justice Roberts's harmful views on race are not limited to voting rights cases, and are perhaps most profoundly on display in jurisprudence he has championed to limit *Brown v. Board of Education's* requirement of school integration. More than 65 years after the Court's ruling in *Brown v. Board of Education,* more than 50 percent of American schoolchildren still live in racially concentrated school districts.[96] This imbalance hurts nonwhite students. School districts in minority communities are on average allocated $2,200 less per student per year than majority white districts.[97] Justice Roberts's restrictive approach toward schools that voluntarily attempt to fix that inequity is encapsulated in *Parents Involved in Community Schools v. Seattle School District No. 1,* an anti-integration ruling that a plurality of the Court adopted and that is poised to garner majority support if and when the Court takes a similar case.

In *Parents Involved,* two school districts, one in Seattle and the other in Kentucky, had voluntarily adopted plans to integrate public schools to ensure a racial balance across the districts.[98] The Court, led by Justice Roberts for the plurality, held that strict scrutiny applied because the integration plans discriminated on the basis of race, even though the plans were meant to address what the dissent noted as "highly segregated" school districts.[99] Justice Roberts moreover concluded that the schools had no compelling interest in remedying the effects of past discrimination in schools since the Seattle district had never been officially segregated and the Kentucky district—which had been legally segregated and later subjected to court-ordered integration—had complied with the judicial mandate to desegregate.[100] In so concluding, Roberts clung to a post-racial vision that equated adherence to judicial decrees and legal standards as sufficient to address decades of segregation.

The Court then noted that the compelling interest in racial diversity recognized in *Grutter v. Bollinger* only applied to higher education, and was not applicable to local school districts.[101] Because neither compelling interest was met, Roberts reasoned, the desegregation plans failed under the strict scrutiny test. Though Justice Kennedy's concurring opinion narrowed the plurality opinion and left open the possibility that school districts could create carefully crafted race-based integration plans, he has been replaced by Justice Kavanaugh.[102] And, now that Amy Coney Barrett has joined the Court, a strong conservative majority is likely to side with Roberts's plurality and sharply limit any measures to integrate public schools.

Justice Roberts's views on racial justice also threaten fair housing and access to affordable housing. *Texas*

Department of Housing and Community Affairs v. Inclusive Communities Project[103] dealt with the question of whether the Fair Housing Act (FHA), which prevents discrimination in housing transactions based on race (among other characteristics), provided for an intentional discrimination standard or an effects-based standard to prove violations of the Act. In the case, a Texas non-profit organization challenged the government's award of low-income housing tax credits, which were concentrated in urban areas with predominantly Black populations, as an unlawful discriminatory policy that perpetuated segregation.[104] The non-profit organization relied on a disparate-impact, statistical argument to bring its claim.[105] Justice Kennedy's majority agreed with the *eleven* courts of appeals that had considered the issue, and held that the FHA indeed allowed plaintiffs to bring disparate impact claims to prove discrimination in housing.[106] But Roberts, true to his colorblind jurisprudence, joined the dissent, arguing that the FHA prohibited only intentional discrimination.[107] He had the same view back in 1983, when he wrote in a memo to the White House that an "effects test" in the Fair Housing Act was a form of "[g]overnmental intrusion."[108]

Here again, Roberts attempted to make his colorblind vision of a post-racial society into law, refusing to recognize the need for broad-based policies to remedy racism, and also refusing to recognize the reality that intentional discrimination allegations are exceedingly difficult to prove in court. Conservative jurists often cast blame on judicial activism by liberal judges for making progressive law where there is none. (This is a fallacy—conservatives have their own brand of judicial activism.)[109] But Roberts need not have engaged in what he might see as judicial activism here. Roberts needed only to determine that the FHA allowed disparate impact claims—a legal reading that eleven courts of appeals could not ignore.

Time and time again, Justice Roberts has leaned into his colorblind, post-racial philosophy, falsely conflating remedial race consciousness with discrimination. His philosophy prevailed in *Shelby County*, and in all likelihood will prevail in affirmative action and fair housing cases under a new conservative supermajority. And according to the numbers, Justice Roberts is the most influential and powerful justice on the Court today. Indeed, in 2019, he was in the majority for 97 percent of cases, more than any other justice.[110] Chief Justices are especially powerful because they often wield the power to assign who gets to write the written opinion, and, if they assign it to themselves, shape the tenor of that opinion.[111] The Court's new ultra-conservative supermajority will give more potency to Chief Justice Roberts and his harmful views on race.

Justice Clarence Thomas

Justice Clarence Thomas believes affirmative action is a form of undesirable social engineering and opposes voting rights, affirmative action, and desegregation. Justice Thomas is the only Black justice on the Court and only the second in its history, and he has a unique and deeply conservative view of race. Currently the longest-serving justice on the Court, Thomas, according to a recent study, "fuse[s]…elements of black nationalism and black conservatism"[112] and sees social reform as "indiscriminate social engineering."[113] Throughout his time on the Court, Thomas has viewed ameliorative reform efforts, whether in the context of voting rights or affirmative action, with skepticism and sometimes outright hostility. While often alone in dissent or concurrence, Thomas's influence stands to grow with the conservative grip on the federal judiciary. In fact, former President Trump's list of 20 additional judicial prospects to replace Justice Ginsburg included six Thomas clerks.[114] A survey of Thomas's jurisprudence on some of the issues that implicate racial justice reveals an ultra-conservative vision of how law and policy should work.

Thomas's biography looms large in his jurisprudence on race. He has spoken and written about his own experience as what he describes as an aggrieved beneficiary of affirmative action, which he believes shrouded his time at Yale Law School. Writing in his autobiography, Thomas lamented that "a law degree from Yale meant one thing for white graduates and another for blacks, no matter how much anyone denied it. I'd graduated from one of America's top law schools, but racial preferences had robbed my achievement of its true value."[115]

Whether stemming from his own lived experience or not, Thomas believes that affirmative action is unconstitutional. He believes that affirmative action triggers "strict scrutiny," an exacting standard of judicial

review that requires that the program is narrowly tailored to a compelling governmental interest. Thomas holds that affirmative action programs do not pass this hurdle.[116] And, he adheres to "color-blindness" and views all racial classifications, whether in the context of affirmative action or voting rights, as anathema to the Constitution. In a searing dissent in the 2003 landmark affirmative action case *Grutter v. Bollinger*, Thomas criticized the majority's decision to uphold the use of race in admission to Michigan Law School.[117] Thomas quoted Frederick Douglass before claiming that he believed "blacks can achieve in every avenue of American life without the meddling of university administrators."[118] Thomas asserted that instead of providing educational benefits, affirmative action harms Black students because "racial (and other sorts) of heterogeneity actually impairs learning among black students."[119] Moreover, according to Thomas, stigma attaches to all Black students at universities because of affirmative action. As he explained, "When blacks take positions in the highest places of government, industry, or academia, it is an open question today whether their skin color played a part in their advancement."[120] Concluding, Thomas called the racial oppressors of Frederick Douglass's day the "intellectual ancestors of the Law School."[121]

Incredibly, in the 2013 affirmative action case *Fisher I*, Thomas compared affirmative action to both slavery and segregation. He claimed that the University was following in the "inauspicious footsteps" of "[s]laveholders [who] argued that slavery was a 'positive good' that civilized blacks and elevated them in every dimension of life."[122] Thomas then likened the paternalism of segregationists who "asserted that segregation was not only benign, but good for black students" to the University of Texas's affirmative action policy.[123] In Thomas's view, "The university's professed good intentions cannot excuse its outright racial discrimination any more than such intentions justified the now denounced arguments of slaveholders and segregationists."[124] The concurrence is emblematic of Thomas's approach: he invokes the history of racial oppression to argue that reform efforts are either doomed to fail or worse, invidious.

After *Fisher I* was remanded and Texas's admissions scheme upheld in 2016, Thomas wrote a brief dissent, replaying the themes of his *Grutter* dissent and *Fisher I* opinion. He stated that any use of race in higher education admissions violates the Equal Protection Clause, and he called the idea that affirmative action produces educational benefits "a faddish theory."[125] In Thomas's view, affirmative action's use of race "demeans us all."[126]

Justice Thomas is skeptical about desegregation. In *Missouri v. Jenkins,* a case in which the majority held that a Missouri District Court's school desegregation effort exceeded the court's remedial authority, Justice Thomas questioned the value of desegregation, writing in a concurring opinion "that desegregation has not produced the predicted leaps forward in black educational achievement."[127] While this is facially true, Thomas takes aim at remedial efforts rather than the historic and continued systemic racism that underpins everything in American society from housing to economic opportunity to education. Thomas ignores the fact that lagging Black education achievement does not follow from desegregation but rather from the web of "social and economic disadvantage—not only poverty, but a host of associated conditions—[that] depresses student performance."[128]

Thomas added that segregation itself "was not unconstitutional because it might have caused psychological feelings of inferiority" but rather because it relied on race-based classifications.[129] *De facto* segregation is perfectly constitutional in Thomas's telling—indeed, Thomas suggested that the historically black college model might work for middle and high schools, where Black students might "learn as well when surrounded by members of their own race as when they are in an integrated environment."[130] Finally, Thomas cautioned that "the federal courts should avoid using racial equality as a pretext for solving social problems that do not violate the Constitution."[131]

A strain of nihilism about the possibility of achieving racial justice runs through Thomas's work on voting rights as well. In the 1994 Voting Rights Act case *Holder v. Hall*, for instance, Justice Thomas argued that African-Americans should come to terms with their minoritarian status and political weakness. He argued in a concurring opinion, "If a minority group is unable to control seats, that result may plausibly be attributed to the inescapable

fact that, in a majoritarian system, numerical minorities lose elections."[132] He believes any attempt to ensure representation for minority groups violates the colorblind Constitution and sows racial divide. Thomas wrote, "Few devices could be better designed to exacerbate racial tensions than the consciously segregated districting system currently being constructed in the name of the Voting Rights Act."[133] He warned that creating safe Black-majority districts "can only deepen racial divisions."[134]

Thomas holds even more extreme views on voting rights than Chief Justice Roberts. In *Shelby County,* Thomas joined the Roberts majority opinion in striking down Section 4(b), the provision of the Voting Rights Act that created a formula for determining which jurisdictions that historically engaged in voter suppression must receive federal preclearance for changing voting systems. But Thomas would go beyond Roberts's gutting of the VRA,

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arguing that Section 5, which creates the preclearance requirement, is also unconstitutional.[135] Somewhat surprisingly, Justice Thomas did join the four liberals on the Court in the 2017 case *Cooper v. Harris*, which held that North Carolina used race too heavily in drawing the 1st and 12th Congressional districts following the 2010 census.[136] The Republican-controlled state legislature drew these districts as majority Black and relied on racial considerations, which prompted the constitutional challenge. But this is an outlier case given Justice Thomas's overall track record.[137]

Truer to form, in a 2015 dissenting opinion in *Alabama Legislative Black Caucus v. Alabama*, Justice Thomas criticized the majority's rejection of Alabama's racial gerrymandering. Thomas chillingly rejected the Supreme Court's entire voting-rights jurisprudence that, he claimed, had created "conflict between our color-blind Constitution and the 'consciously segregated districting system' the Court has required in the name of equality."[138] As he wrote in that case, he did

> *not pretend that Alabama is blameless when it comes to its sordid history of racial politics. But, today the State is not the one that is culpable. Its redistricting effort was indeed tainted, but it was tainted by our voting rights jurisprudence and the uses to which the Voting Rights Act has been put. Long ago, the DOJ and special-interest groups like the ACLU hijacked the Act, and they have been using it ever since to achieve their vision of maximized black electoral strength, often at the expense of the voters they purport to help.*[139]

Thomas is thus perhaps the most hawkish among the current justices in his opposition to the Voting Rights Act.

Troubling views about race inform Thomas's opinions on an array of topics, from eminent domain to the Second Amendment. On discrimination, Justice Thomas argued in a dissent in *Texas Dept. of Housing and Community v. Inclusive Communities Project, Inc.*, that the Court's *Griggs v. Duke Power* unanimous decision, which enabled disparate-impact liability under Title VII of the Civil Rights Act, was mistaken.[140] Thomas's preferred outcome would make it much more difficult for Black plaintiffs to prevail on discrimination claims. If Thomas's view prevails—as it soon might—there would be no disparate-impact liability for either Title VII or the Fair Housing Act.[141]

While Thomas is not a conventional conservative in the mold of others on the Court—he pays close attention to questions of race and writes often of African-American history—his jurisprudence would nonetheless make it more difficult for Black Americans to enroll in certain universities, press discrimination cases, or cast a ballot. A Court in which Justice Thomas writes more majority opinions would be even more hostile to racial justice.

Justice Samuel Alito

Justice Alito imagines white Americans as primary victims of racial discrimination and opposes voting rights, equal justice, and fair housing. Alito has earned a reputation as "the most consistent conservative" of the Supreme Court justices.[142] Almost without fail, he toes the partisan line on a range of issues, especially those that implicate race.[143] With another conservative Justice on the Court, Justice Alito may well be able to build majority coalitions across the spectrum of issues, shifting the Court's alignment even more to the right.

Before his nomination and confirmation as a Supreme Court Justice, Alito had a fifteen-year career as a conservative judge. During that period, he wrote dissents "arguing for tighter standards for plaintiffs seeking trial on their race, gender and disability discrimination claims" and dissented from a ruling that the prosecution had "unconstitutionally used its peremptory challenges to exclude all the black prospective jurors."[144]

Since arriving on the Court, Alito has consistently denied the legacy and persistence of anti-Black racism while at the same time painting white Americans as the victims of racial discrimination in several contexts, from employment discrimination to affirmative action. Indeed, Alito has created a jurisprudence of "white racial innocence," lashing out at even his conservative colleagues for suggesting racism might play a role in American public life.[145] In one recent outburst, Alito spent six paragraphs chiding his fellow Justices for discussing anti-Black racism.[146] Just this year, Alito again lashed out at the suggestion that racism might play a role in American life. In *Department of Commerce v. New York*, the high-profile case about including a citizenship question on the census, Alito off-handedly dismissed any criticism that the Trump administration's policy might be "racist."[147]

In the last decade, Alito wrote a concurring opinion in *Ricci v. DeStefano*, a 2009 case in which he asserted that a conspiracy denied promotions to mostly white firefighters. In that case, Alito did believe that there was racial discrimination—but only against the primarily white firefighters. As he wrote, "Petitioners were denied promotions for which they qualified because of the race and ethnicity of the firefighters who achieved the highest scores on the City's exam."[148]

In the 2016 case *Fisher v. University of Texas*, Alito claimed that white Americans were victims of racial discrimination. He wrote a lengthy dissent in which he claimed the majority was "simply wrong"[149] for signing off on this "affirmative action gone berserk."[150] In that dissent, Alito characterized the University of Texas's use of race in admissions decisions as "systematic racial discrimination"—against white students.[151] The University of Texas, according to Alito, "relies on a series of unsupported and noxious racial assumptions"—against white students.[152] In upholding this "discrimination"—against white students—the Court was "remarkably wrong."[153]

A majority opinion by Justice Gorsuch in *Ramos v. Louisiana* triggered Alito's aggrieved dissent. Gorsuch's majority opinion, which incorporated the Sixth Amendment's unanimous jury requirement for criminal conviction against the states, pointed to the history of racism in creating non-unanimous jury laws, especially in the Jim Crow South.[154] This invocation of racism incensed Alito. It is, Justice Alito wrote, one of "the worst current trends," rather than the "rational and civil discourse" the Court should promote.[155] Alito griped,

> *Too much public discourse today is sullied by ad hominem rhetoric, that is, attempts to discredit an argument not by proving that it is unsound but by attacking the character or motives of the argument's proponents. The majority regrettably succumbs to this trend. At the start of its opinion, the majority asks this rhetorical question: "Why do Louisiana and Oregon allow nonunanimous convictions?" And the answer it suggests? Racism, white supremacy, the Ku Klux Klan.*[156]

Confronting America's history of racism, Alito asserts, is entirely out of place. Before discussing the merits of the majority opinion, Alito dismissed the invocation of racism in the context of non-unanimous jury laws. Surveying individuals and institutions that promoted non-unanimous verdicts, Alito concluded, "Racists all? Of course not. So all the talk about the Klan, etc., is entirely out of place."[157]

As these cases illustrate, Alito's judicial philosophy is less of the Justice Roberts "colorblind" variety than simply overtly hostile to invocations of race. Alito refuses to recognize the clear ties—both historically and in the present day—between judicial questions and discriminatory outcomes, and admonishes other justices for making such connections. It remains an open question which approach—Roberts's (arguably) more tactful, colorblind approach or Alito's bald animosity toward discussions of racism—is more dangerous. Regardless, both twisted visions of a post-racial society stand in the way of racial progress.

Alito's distaste for discussions of race is not limited to judges. Alito also took umbrage at the idea that racism might inform state policymakers in drawing legislative maps. In *Abbott v. Perez*, Alito's opinion was one "in a string of opinions bristling at the idea that racism still shapes many policymakers' decisions today."[158] In that case, handed down in June 2018, Alito upheld all but one of Texas's racially gerrymandered congressional and state legislative districts. Alito sympathized with the Texas lawmakers who had created a racially gerrymandered map, noting, "[s]ince the Equal Protection Clause restricts consideration of race and the VRA demands consideration of race, a legislature attempting to produce a lawful districting plan is vulnerable to "'competing hazards of liability.'"[159] Alito's sympathies lay with the "vulnerable" state legislators rather than with the disenfranchised Black and Latinx voters of Texas.

That same month, Alito wrote another 5-4 opinion that enabled states to suppress voting rights, especially those of Black Americans. In *Husted v. A Philip Randolph Institute*, Alito's majority opinion upheld an Ohio law that flags voters for removal if they sit out one federal election. The voters then receive postcards asking for address confirmation. If voters do not respond or vote in the next two federal elections, they are purged from the rolls. Critically, this law purged 1.2 million people in Ohio, disproportionately impacting communities of color.[160] Alito framed the purge as an attempt "to keep the State's voting lists up to date" and suggested that the lawsuit challenging the purge was an attack by "advocacy groups" against Ohio officials.[161]

On criminal-justice issues, Alito is "the Court's most consistent conservative."[162] In one particularly memorable case with gruesome implications, Alito was the lone justice to dissent from a majority opinion that struck down a Florida death penalty scheme that enabled judges to condemn people to death based on facts not found by a jury.[163] Alito's position would have stripped (often Black) defendants of critical protections. On discrimination, Justice Alito argued in a dissent in *Texas Dept. of Housing and Community v. Inclusive Communities Project, Inc.*, that the Fair Housing Act did not abide disparate-impact liability.[164] His view would not allow liability for anything other than so-called "intentional" discrimination.

Alito is one of the less heralded Justices, but he is a consistent vote against racial justice. When not positioning white Americans as victims of reverse racism, Alito staunchly upholds the racist status quo. While he is offended by the idea that race might play a role in racially gerrymandered legislative maps across the former Confederacy, Alito is quick to cry "racism" against white Americans. Indeed, he has consistently characterized white Americans as the real victims of racial discrimination. He plays to white identity politics, denies the fact of racism against minorities and minority groups, and characterizes any attempt to ameliorate conditions for Black Americans as discrimination *against white Americans*. In short, Alito is hostile to racial justice. With Justice Barrett now seated, Alito is likely to find himself in the majority on a number of issues that will harm Black Americans in this county.

Justice Neil Gorsuch

Justice Gorsuch's record on racial justice appears to be more nuanced than those of some of the other conservatives on the Court, but it is far from unblemished. After spending more than a decade on the Tenth Circuit, where he amassed a consistently conservative record, Justice Gorsuch was elevated to the Supreme Court in 2017 following Justice Scalia's death in 2016. (Mitch McConnell, of course, refused to allow President Obama to fill Scalia's seat during the nearly one year remaining of his presidency).[165] In a report on then-Judge Gorsuch's record at the time he was nominated to the Court, the ACLU called his decisions on employment discrimination "unexceptional" and his beliefs about the Equal Protection doctrine "within the mainstream of judicial precedent."[166] Parallel to that seemingly benign record, however, lie more insidious rulings that threaten racial justice at the Supreme Court.

Justice Gorsuch's recent decisions on voting rights offer a window into the threats he poses to racial justice. On

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October 26, days before the election, Justice Gorsuch concurred with a Supreme Court decision that blocked a lower court's extension of Wisconsin's deadline to return absentee ballots. The district court ruled that Wisconsin's law requiring that absentee ballots be received by election day violated the Constitution.[167] Justice Gorsuch, joined by Justice Kavanaugh, cast aside the lower court's reasoning that because Wisconsin was a COVID hotspot, voters ought to be given some leeway to cast absentee ballots beyond the election day deadline.[168] The liberal wing of the court disagreed, noting that in April 2020 at least 80,000 ballots arrived after election day in the Wisconsin presidential primary.[169] Now, months later, Justice Kagan noted, COVID in Wisconsin was "more than twenty times worse" than in the spring.[170] But not even a global pandemic and skyrocketing infection rates in Wisconsin persuaded Justice Gorsuch. The Court's decision was much more than a procedural quibble. Justice Gorsuch's decision had real-world impacts on minority voters. Voters of color are more likely to have their absentee ballots rejected because they arrive late (mail service in poor areas is less reliable than in more affluent areas), or because of postage costs, or because they lack experience voting absentee and are more likely to make mistakes.[171] Gorsuch's vote against extending the deadline disenfranchised an untold number of voters of color.

Gorsuch also voted to grant a stay in a Pennsylvania case in which Republicans sought to overrule a Pennsylvania Supreme Court ruling that extended the deadline to receive and count some mail-in ballots by three days.[172] The stay, if allowed, would have prevented the ballots from being counted in time.[173]

While Justice Gorsuch's recent voting rights record serves as perhaps the most visible indicator of the threat he poses to racial justice, his presence on the Court jeopardizes racial progress across a range of issues. His death penalty opinions are particularly concerning. Even

before his confirmation, the ACLU report found that Gorsuch "overwhelmingly denied relief in capital cases,"[174] which disproportionately affect Black defendants.[175] He has rejected challenges to the use of lethal injection, denied "scores" of habeas cases resulting in death sentences from Oklahoma state convictions, and ruled against ineffective assistance of counsel claims.[176] This trend has continued during his tenure on the Court. In *Bucklew v. Precythe*, writing for a 5-4 majority, Justice Gorsuch rejected a challenge to Missouri's use of lethal injections for executions. The death-row inmate, Gorsuch held, had failed to show evidence that the alternative method he proposed for his execution was feasible and readily available and that the proposed alternative would significantly reduce the pain of execution.[177] Concerningly, Justice Gorsuch concludes in his ominous opinion that, "The people of Missouri . . . deserve better."[178] "Better," according to Justice Gorsuch, means speeding up the process of executions and denying due process to the people on death row. Gorsuch also forecloses the possibility (at least for a conservative bloc) of "ending capital punishment by judicial fiat."[179] He writes, "Under our Constitution, the question of capital punishment belongs to the people and their representatives, not the courts, to resolve."[180]

Justice Gorsuch sides more with the prosecution than with criminal defendants in appeals.[181] In *United States v. Coleman*, a Tenth Circuit case, then-Judge Gorsuch denied a defendant's attempt to suppress evidence based on what the defendant argued was a racially-motivated stop.[182] Gorsuch rejected the statistical evidence the defendant provided because the evidence did not speak to this particular officer's motivation in making the stop.[183] He also bought the prosecution's argument that the government official conducted the search because Mr. Coleman looked nervous, not because of some underlying racial animus.[184] Moreover, in *Blackwell v. Strain*, Judge Gorsuch signed on to what the ACLU called "a far more questionable opinion" than that in *Coleman*.[185] Gorsuch joined an opinion that again rejected statistical evidence as to racially-motivated stops of Black truck drivers, this time granting the officer who conducted the stop qualified immunity.[186] Even the fact that the official in the case made the Black truck driver "wait an inordinately long period of time before conducting the inspection of his vehicle; accused him of being under the influence of drugs or alcohol; administered a field sobriety test; told him he had a 'problem,' subjected him to a subsequent unwarranted breathalyzer test," and more, was not enough for Justice Gorsuch to find evidence of racial animus.[187] "For all we know," Judge Murphy wrote on behalf of himself and Justice Gorsuch, the officer "behaves in this same manner toward all of the truckers he interacts with . . . regardless of their race."[188] This bent toward requiring proof of motivation even when presented with strong circumstantial and statistical evidence of racial animus continues to bode ill for racial justice from the Court.

Justice Gorsuch's judicial philosophy will likely contribute to immeasurable harm to racial justice progress. As the Court ushers in a new era of conservative dominance, with Justice Gorsuch taking the role of the "wild card," his vote may count more now than ever.[189]

Justice Brett Kavanaugh

Justice Kavanaugh is a reliable conservative vote in cases concerning racial justice and civil rights. He has joined the Court's other conservatives to issue unsigned rulings that make up what is known as the Court's "shadow docket" to undermine voting rights during the 2020 election.[190] He has also joined conservative opinions in the Court's blockbuster cases in recent years concerning DACA, the census, reproductive justice, and partisan gerrymandering—all of which have a stark impact on racial justice and all of which demonstrate that Kavanaugh has moved the Court's conservative bloc to the right. As the second-most junior justice on the Court, he has not written many landmark opinions. However, in his majority opinion in *McKinney v. Arizona,* Kavanaugh ruled that it is within the appellate court's purview to reweigh aggravating and mitigating circumstances in sentencing in lieu of deferring to a jury to conduct that analysis, thereby affirming the defendants' death sentences and demonstrating a regressive approach to criminal justice issues.

During his time on the D.C. Circuit, Justice Kavanaugh consistently deferred to law enforcement, including in Fourth Amendment cases in which he repeatedly found the actions of law enforcement to be reasonable.[191] And in a dissenting opinion, he expressed an alarmingly expansive view of qualified immunity and the use of the doctrine to shield law enforcement from liability.[192] He also routinely ruled against workers in employment

discrimination cases, accepting employers' pretextual justifications for employment decisions despite evidence of discrimination, and expressed hostility toward the disparate impact theory of discrimination, a critical tool for civil rights plaintiffs.[193] In a preview of Justice Kavanaugh's record on voting rights at the Supreme Court, as a lower court judge on a three-judge district court panel, he precleared South Carolina's voter identification law, a law that the Department of Justice had determined would imperil the voting rights of tens of thousands minority citizens.[194] Even more troubling, Justice Kavanaugh declined to join a concurring opinion in that case that emphasized the continued importance of the Voting Rights Act and the Section 5 review process.[195] Justice Kavanaugh's work prior to becoming a judge demonstrates a hostility toward race consciousness and affirmative action. Justice Kavanaugh worked with anti-affirmative action groups on an amicus brief in *Rice v. Cayetano*[196] and publicly railed against affirmative action in the media.[197] He has publicly espoused beliefs in "legal colorblindness" that are deeply harmful to people of color.[198]

Justice Amy Coney Barrett

Justice Amy Coney Barrett opposes voting rights and employment nondiscrimination and does not believe that a white supervisor's use of the n-word creates a hostile work environment. Justice Barrett's limited record from her time on the Seventh Circuit, short though it was, as well as her academic writings, raise grave concerns about how she would rule on racial justice issues.[199] One of her most concerning opinions as a circuit judge is *Smith v. Illinois Department of Transportation*.[200] In that decision, she held that the plaintiff's white supervisor's use of the n-word did not create a sufficient showing of a hostile work environment. Notably, even Justice Kavanaugh, who, as discussed above, has a troubling record on racial justice and employment discrimination, came to the opposite conclusion when he considered the same issue during his tenure on the DC Circuit.[201]

Justice Barrett's opinions in other Seventh Circuit cases demonstrate a hostility toward employment discrimination claims, including *EEOC v. AutoZone*, a case in which she ruled that an employer's segregation of employees on the basis of race is permissible as long as the segregation does not result in unequal "pay, benefits or job responsibilities."[202] This embrace of the long discredited and repudiated separate-but-equal doctrine view suggests a willingness to undermine *Brown v. Board of Education* despite her reference to that case as a "super-precedent" during her confirmation hearings. Justice Barrett's vote in *AutoZone* demonstrates that, like the other conservative Justices, her views align with the false belief in a post-racial society. Just as Justice Roberts wrote that the United States had made enough racial progress to eviscerate the VRA, Justice Barrett's position in *AutoZone* implies the principles that underlie *Brown* are no longer relevant.

In criminal justice and policing cases, Justice Barrett has allowed officers to use excessive force.[203] And, in a dissenting opinion, she held that a prohibition on firearm possession by felons violates the Second Amendment.[204] Far from indicating a willingness to uphold the rights of the incarcerated people more broadly, Barrett went out of her way to distinguish the Second Amendment from the right to vote. Shockingly, Barrett believes that the right to vote is a civic right that can be limited to "virtuous citizens."[205] Justice Barrett also would have upheld the Trump administration's proposal to subject green card applicants to a wealth test, ignoring the chilling effect on immigrant and minority communities' access to public benefits.[206] These decisions align with the post-racial ideal that communities of color exhibit some sort of moral failing that should cut off their access to crucial rights and benefits.

Justice Barrett served on the bench for just three years prior to her confirmation to the Supreme Court, and her legal scholarship provides important supplemental insights into her views on racial justice. Barrett's scholarship espouses an extreme form of originalism and casts doubt on stare decisis.[207] She offers an originalist argument that calls the 14th Amendment's validity into question, referencing a hypothetical decision of a member of Congress "to rely on the Section Five power conferred by the possibly illegitimate Fourteenth Amendment."[208] In the same article, Justice Barrett seems to imply that under her brand of originalism, *Brown* was wrongly decided. At her confirmation hearings, she reinforced a trend among former President Trump's judicial nominees by refusing to say that *Brown* was correctly decided, noting instead that *Brown* is a case that "no one questions anymore."[209] It seems quite likely that Justice Barrett will help her conservative colleagues undermine racial justice and roll back racial progress.[210]

> Before Justice Amy Coney Barrett's confirmation, the Supreme Court's conservative majority was already hostile to racial justice. With the addition of Justice Barrett, the Supreme Court now has a supermajority of racial conservatives.

IV. Conclusion

A 6-3 Supreme Court threatens racial justice efforts across the board and goes far beyond immediate conservative targets such as affirmative action and employment discrimination. Cases in the federal courts pipeline as well as cases that have yet to emerge will challenge policies of progressive coalitions, threaten existing civil rights precedents, make it harder to challenge discrimination or enact policies that remedy discrimination, and exacerbate existing racial disparities in all aspects of American life. The Court's conservative majority, now strengthened, and the judicial philosophies and jurisprudence of the six conservative justices on matters of race pose one of the gravest threats to racial justice and racial progress this country has ever seen.

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EQUAL JUSTICE SOCIETY

The Equal Justice Society is transforming the nation's consciousness on race through law, social science, and the arts. Led by President Eva Paterson, our legal strategy aims to broaden conceptions of present-day discrimination to include unconscious and structural bias by using social science, structural analysis, and real-life experience. Currently, EJS targets its advocacy efforts on school discipline, special education, and the school-to-prison pipeline, race-conscious remedies, and inequities in the criminal justice system. The Oakland, Calif.-based nonprofit also engages the arts and artists in creating work and performances that allow wider audiences to understand social justice issues and struggles.

TAKE BACK THE COURT

Take Back the Court's mission is to inform the public about the danger that the Supreme Court poses to democracy, and about the viability of court expansion—adding seats to the Court—as the only strategy that re-balances the court after its 2016 theft and allows Congress and the administration to restore democracy and address emergencies such as climate change, racial injustice, voter suppression, women's rights, reproductive justice, gun violence, immigration, and LGBTQ rights.