“A profound elegy on race relations in the Age of Trump...”

Paul Butler,
MSNBC Legal Analyst

CENTER ON RACE, LAW AND JUSTICE presents

Voting Rights and Discrimination Insights from the book

Whitelash: Unmasking White Grievance at the Ballot Box

September 23, 2020
4 - 5:30 p.m.
Zoom Webinar

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Speaker Bios

Matt Gallaway
Senior Editor, Cambridge University Press
Matt Gallaway is a Senior Editor at Cambridge University Press, where he acquires books on social justice, law and technology, and other law-oriented subjects.
Matt commission monographs, coursebooks/general-interest titles, and research handbooks for the law list on antitrust, intellectual property, development, law and technology (including privacy, surveillance, and automation), environmental law/global warming.
He also commissions US-focused titles on Supreme Court jurisprudence, policing, economic inequality, health care, property/housing issues, labor law, voting rights, and the legal rights of disadvantaged classes.
He received his J.D. at New York University School of Law.

Christina Greer
Associate Professor of Political Science, Fordham University
Christina Greer is an Associate Professor of Political Science at Fordham University - Lincoln Center (Manhattan) campus. Her research and teaching focus on American politics, black ethnic politics, urban politics, quantitative methods, Congress, New York City and New York State politics, campaigns and elections, and public opinion. Prof. Greer's book Black Ethnics: Race, Immigration, and the Pursuit of the American Dream (Oxford University Press) investigates the increasingly ethnically diverse black populations in the US from Africa and the Caribbean. She finds that both ethnicity and a shared racial identity matter and also affect the policy choices and preferences for black groups. Professor Greer is currently writing her second manuscript and conducting research on the history of all African Americans who have run for the executive office in the U.S. Her research interests also include mayors and public policy in urban centers. Her previous work has compared criminal activity and political responses in Boston and Baltimore. She is the host and producer of The Aftermath with Christina Greer on Ozy.com http://www.ozy.com/topic/the-aftermath. Prof. Greer received her BA from Tufts University and her MA, MPhil, and PhD in Political Science from Columbia University.

Darren Hutchinson
Raymond & Miriam Ehrlich Eminent Scholar Chair; Professor of Law; Associate Dean for Faculty Development, University of Florida Levin College of Law
Professor Darren Hutchinson currently holds the prestigious Raymond & Miriam Ehrlich Eminent Scholar Chair at the Levin College of Law. He has written extensively on issues related to Constitutional Law, Critical Race Theory, Law and Sexuality, and Social Identity Theory. His numerous publications have appeared in many prestigious journals including the Cornell Law Review, the Washington University Law Review, the UCLA Law Review, the Alabama Law Review, the Illinois Law Review, the Tulane Law Review, the Michigan Journal of Race and Law, the University of Pennsylvania Journal of Constitutional Law, and the Journal of Law and Inequality. At the University of Florida Levin College of Law, Professor Hutchinson teaches
Constitutional Law, Remedies, Race and the Law, and Civil Rights Seminar. He received a B.A. from the University of Pennsylvania and a J.D. from Yale Law School.

Before joining the Levin College of Law faculty, Professor Hutchinson was an Associate Professor at Southern Methodist University School of Law and a Professor at American University, Washington College of Law.

Prior to his career in teaching law, Professor Hutchinson practiced commercial litigation at Cleary, Gottlieb, Steen and Hamilton in New York City. He also clerked for the late Honorable Mary Johnson Lowe, a former United States District Judge in the Southern District of New York.

Professor Hutchinson has delivered lectures at numerous universities, including Yale, Stanford, Columbia, the University of Pennsylvania, the University of Michigan, the University of California at Berkeley, the University of Virginia, Cornell, Georgetown, and Boston University. During the fall of 1999, Professor Hutchinson was a Visiting Scholar at Yale Law School, and during the Spring of 2002 he was a Visiting Professor at the University of Pennsylvania Law School.

Professor Hutchinson also authors Dissenting Justice — a blog related to law and politics. This blog is also available and more active on Facebook. The content of these blogs do not reflect the views of the University of Florida or the State of Florida; the blog receives no funding from the State of Florida.

Audrey McFarlane
Associate Dean of Faculty Research and Development; Dean Julius Isaacson Professor of Law, University of Baltimore School of Law

Audrey McFarlane’s research and teaching focus on areas of law related to economic development. Her scholarship examines the ways in which economic development is not a neutral policy that government can advance without addressing significant structural issues related to race, class and geography. Her most recent works have focused on how mixed income housing reflects social domination and seeks to manage discrimination and how constitutional doctrine should evaluate the propriety of inclusionary zoning in ways that account for developers’ role and influence on development decision-making. Professor McFarlane has also written on a range of topics including how norms of property law contribute to recurrent foreclosure crises, the insights of critical race theory for eminent domain and regulatory takings, and democratic theoretical justifications for community participation in economic development. She has been a visiting professor at Northeastern School of Law, Seattle University School of Law and University of Maryland School of Law.

Professor McFarlane has an A.B. from Harvard-Radcliffe and a J.D. from Stanford Law School where she was a member of the Stanford Law Review. She joined the University of Baltimore School of Law faculty after clerking for the Hon. A. Leon Higginbotham, Jr., Chief Judge of the United States Court of Appeals for the Third Circuit, and working as an associate at the Washington D.C. law firm of Wilmer Cutler and Pickering. At UB, she teaches courses in Property, Land Use, Local Government and Local Economic Development.
Janai Nelson, Esq.
Associate Director-Counsel, NAACP Legal Defense and Educational Fund

Janai S. Nelson is Associate Director-Counsel of the NAACP Legal Defense and Educational Fund, Inc. (LDF). As an organizational thought-leader at LDF, Nelson works with the President and Director-Counsel to determine and execute LDF’s strategic vision and oversee the operation of its programs, including having served as interim director of LDF’s Thurgood Marshall Institute. She is also a member of LDF’s litigation and policy teams, and was one of the lead counsel in Veasey v. Abbott (2018), a federal challenge to Texas’s voter ID law. Prior to joining LDF in June 2014, Nelson was Associate Dean for Faculty Scholarship and Associate Director of the Ronald H. Brown Center for Civil Rights and Economic Development at St. John’s University School of Law where she was also a full professor of law.

During her eight years at St. John’s, Nelson launched and led an annual student program at the Supreme Court of the United States and assisted in the direction The Ronald H. Brown Prep Program for College Students, an award-winning law school pipeline program, among countless other service activities.

Nelson is recipient of the 2013 Derrick A. Bell Award from the American Association of Law Schools (AALS) Section on Minority Groups and was named one of Lawyers of Color’s 50 Under 50 minority professors making an impact in legal education. Her scholarship centers on domestic and comparative election law, race, and democratic theory and she has taught courses in Election Law and Political Participation, Comparative Election Law, Voting Rights, Professional Responsibility, and Constitutional Law. Nelson’s most recent scholarly publication, Counting Change: Ensuring an Inclusive Census for Communities of Color, 119 Colum. L. Rev. (2019), advances a theory of representational equality in which all U.S. residents “are to be counted — and served — as constituents” and that centers the Census and the accurate count of the country’s most vulnerable populations in the functioning of our democracy. Prior to that, she published The Causal Context of Disparate Vote Denial, 54 B.C. L. Rev. 579 (2013), which examines Section 2 of Voting Rights Act as a disparate impact standard and the racial dimensions of modern vote denial. Her article, The First Amendment, Equal Protection, and Felon Disfranchisement: A New Viewpoint, 64 Fl. L. Rev. 111 (2013), explores the intersection of the First Amendment and the equal protection clause in reconsidering the constitutionality of felon disfranchisement in the United States. She also has several ongoing writing projects, including a chapter in a forthcoming book and a law review article on partisan gerrymandering in the wake of the decisions of the preceding Supreme Court term.

Prior to entering academia, Nelson was a Fulbright Scholar at the Legal Resources Center in Accra, Ghana, where she researched the political disfranchisement of persons with criminal convictions and the advancement of democracy in Ghana. Her research as a Fulbright Scholar is the basis of a publication entitled, Fair Measure of the Right to Vote: A Comparative Perspective of Voting Rights Enforcement in a Maturing Democracy, 18 Cardozo J. Comp. & Int’l L. Rev. 425 (2010). Prior to receiving the Fulbright award, Nelson was the Director of LDF’s Political Participation Group where she oversaw all voting related litigation and matters, litigated voting rights and redistricting cases, and worked on criminal justice issues on behalf of African
Americans and other under-served communities. While at LDF, she argued en banc before the Second Circuit and served as lead counsel in Hayden v. Pataki, a felon disfranchisement case that challenged New York State laws that deny the right to vote to people who are incarcerated and on parole for a felony conviction. She was also part of the team of civil rights attorneys representing African- and Haitian-American voters in NAACP v. Hood (a class action suit that arose out of the 2000 general elections) and one of the counsel representing a death row inmate whose sentence was commuted in 2003 by the U.S. Supreme Court in Banks v. Dretke.

Nelson began practicing law as the 1998 recipient of an NAACP LDF/Fried Frank Fellowship. She received a B.A. from New York University and a J.D. from UCLA School of Law where she served as Articles Editor of the UCLA Law Review, Consulting Editor of the National Black Law Journal, and Associate Editor of the UCLA Women’s Law Journal. Upon graduating from law school, Nelson clerked for the Honorable Theodore McMillian on the United States Court of Appeals for the Eighth Circuit (1997-1998) and the Honorable David H. Coar on the United States District Court for the Northern District of Illinois (1996-1997). She has been published on issues of domestic and comparative election law, democracy, race, and criminal justice and is a contributor to Thomson Reuters and Huffington Post. Nelson has also appeared on CNN, InsideOut, public radio and other media as an election law expert and regularly speaks at conferences and symposia nationwide.

Tanya Katerí Hernández
Archibald R. Murray Professor of Law, Fordham Law School

Tanya Katerí Hernández is the Archibald R. Murray Professor of Law at Fordham University School of Law, where she teaches Anti-Discrimination Law, Comparative Employment Discrimination, Critical Race Theory, The Science of Implicit Bias and the Law: New Pathways to Social Justice, and Trusts & Wills. She received her A.B. from Brown University, and her J.D. from Yale Law School, where she served as Note Topics Editor of the Yale Law Journal.

Professor Hernández is an internationally recognized comparative race law expert and Fulbright Scholar who has visited at the Université Paris Ouest Nanterre La Défense, in Paris and the University of the West Indies Law School, in Trinidad. She has previously served as a Law and Public Policy Affairs Fellow at Princeton University, a Faculty Fellow at the Institute for Research on Women at Rutgers University; a Faculty Fellow at the Fred T. Korematsu Center for Law and Equality, and as a Scholar in Residence at the Schomburg Center for Research in Black Culture. Professor Hernández is a Fellow of the American Bar Foundation, the American Law Institute, and the Academia Puertorriqueña de Jurisprudencia y Legislación. Hispanic Business Magazine selected her as one of its annual 100 Most Influential Hispanics. Professor Hernández serves on the editorial boards of the Revista Brasileira de Direito e Justiça/Brazilian Journal of Law and Justice, and the Latino Studies Journal published by Palgrave-Macmillian Press.

Professor Hernández’s scholarly interest is in the study of comparative race relations and anti-discrimination law, and her work in that area has been published in numerous university law reviews like Cornell, Harvard, N.Y.U., U.C. Berkeley, Yale and in news outlets like the New York Times, among other publications including her books Racial Subordination in Latin America: The Role of the State, Customary Law and the New Civil Rights Response (including
"We did great with the African American community. So good. Remember—remember the famous line, because I talk about crime, I talk about lack of education, I talk about no jobs. And I’d say, what the hell do you have to lose? Right? It’s true. And they’re smart, and they picked up on it like you wouldn’t believe. And you know what else? They didn’t come out to vote for Hillary. They didn’t come out. And that was a big—so thank you to the African American community.”

—President-elect Donald Trump in Hershey, Pennsylvania, approximately a month after the November 2016 election

Donald Trump ran the most racially incendiary presidential campaign in modern times. So, it’s odd enough that he would transparently misrepresent his performance among black voters: he took 8 percent of the black vote in 2016 to Hillary Clinton’s 88 percent. But it’s shocking that he would thank blacks, who were denied the right to vote for much of American history, for choosing to stay home and not exercise that right. It is incriminating because the Trump campaign—whether in conjunction with Russian nationals or independently, we do not yet know—admitted to attempting to suppress the black vote. Said one senior Trump campaign official to Bloomberg News shortly before the election, “We have three major voter suppression operations under way,” identifying African Americans as one of its targets. Meanwhile, black voters were also the target of Russian social media trolls attempting to suppress black turnout, an operation that would become the subject of indictments made in former FBI director Robert Mueller’s investigation of Russian interference in the 2016 election.

To many readers, preying on African Americans to suppress their vote will call to mind what has become a ubiquitous analogy thanks to Michelle Alexander’s work, The New Jim Crow. There is no practical difference between an intent to deprive African Americans of the right to vote, as was...
done during Jim Crow, and an intent to suppress their vote, as was done by the Trump campaign and the Republican Party in 2016 and several previous election cycles. There may not even be a legal distinction. Cloaked in the power of the state as the nominee of one of the country’s two major political parties, Trump set out to dilute the votes of black citizens. He did so in a manner that if done by the state of Mississippi, for instance, would surely constitute a violation of Section 2 of the Voting Rights Act of 1965, which prohibits any practice that results in a denial or abridgement of “the right of any citizen of the United States to vote on account of race or color.”

Added to the Trump campaign’s and Republicans’ suppression activities were the candidate’s racial statements, which continued into his presidency and which, if made in any American workplace, would constitute direct evidence of discrimination. For decades, racial appeals and voter suppression have been pillars of Republican electoral strategy. Racial appeals are intended to drive up white turnout; suppression efforts, often disguised as ballot integrity measures, are intended to drive down minority turnout. Trump’s 2016 campaign was different only in degree rather than kind. Mexicans were rapists. Muslims were terrorists. China—but not Russia—was America’s enemy. Blacks were “living in hell.” No American of color was spared insult, even when Trump essayed a compliment. Most of Trump’s political rallies were lily-white, so at one rally, to deflect criticism of the racial tenor of his campaign, Trump sought to identify a black supporter: “Oh, look at my African-American over here. Look at him. Are you the greatest?”

So went the 2016 campaign. And so has gone the Trump presidency. Indeed, after President Trump tweeted in the summer of 2019 that four congresswomen of color—all U.S. citizens and all but one born in the U.S.—should “go back and help fix” the countries from which they came, Pulitzer Prize-winning historian Jon Meacham said of Trump: “He has joined Andrew Johnson as the most racist president in American history.”

Is it possible that in a country where citizens cannot legally discriminate against each other—not in employment, not in housing, not in private contracts—the president of the United States can be as racist as he pleases? And has our tolerance of the president’s and his party’s racial rhetoric reached a point of allowing them to openly—and legally—advocate the suppression of minority votes? In this chapter and the next, I argue that our answers must be a resounding “No.” I demonstrate below that the antidiscrimination norm extends to candidates—both successful ones and unsuccessful ones—and to the parties that support them, not only as a matter of principle but also as a matter of law. When candidates and parties prevail by making racial appeals and suppressing minority votes, the law should not presume that they are
capable of governing on behalf of all citizens. Rather, the laws enacted by such candidates and parties should be subject to heightened scrutiny for invidious discrimination.

THE LAW OF RACIAL APPEALS

Racial appeals during political campaigns have long been treated as evidence of intentional discrimination under the Equal Protection Clause of the Fourteenth Amendment, and as evidence of minority vote dilution under the Voting Rights Act of 1965. In White v. Regester, for instance, the Supreme Court sustained a district court’s finding that the state of Texas had intentionally discriminated against black and Latino voters in the creation of two multimember electoral districts. The district court’s finding was based in part on a history of “racial campaign tactics in white precincts to defeat candidates who had the overwhelming support of the black community.”10 Yet the broader objective of the Court in White, as in any constitutional or statutory racial vote dilution case, was to determine whether the black and Latino plaintiffs had “less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice.”11 To answer this question, the Court examined not merely racial appeals made during elections but also the social and political inequality of the appeals’ targets. Among other factors, the Court probed historical discrimination against blacks and Latinos in Dallas County and Bexar County, Texas, as well as current economic disparities between these groups and whites, and the responsiveness of elected officials to their needs.12

To better understand how and why social positionality influences the use and potency of racial appeals, consider a few examples from the 2018 midterm elections. In one, Republican Congresswoman Claudia Tenney of upstate New York criticized her Democratic opponent, Anthony Brindisi, an Italian American, by implying that Brindisi’s father was connected to the mafia. Tenney stated that Brindisi’s father was “very heavily involved with the organized crime in Utica for many years, representing them.”13 Tenney’s statement is a racial or ethnic slur intended to summon stereotypes of Italians in voters’ evaluation of her opponent. Yet, Tenney’s ability to marginalize her opponent using racial or ethnic stereotype depends on the social vulnerability of the group to which her target belongs. Italian Americans as a group are today not more economically, politically, or socially vulnerable than any other cohort of white Americans.

In contrast, when Republican Congressman John Faso targeted his Democratic African American opponent, Antonio Delgado, a former
Rhodes Scholar, for his previous career as a rapper whose lyrics criticized America’s history of racial injustice, the potential for whitelash was high. Delgado’s lyrics criticized some of the country’s forefathers as “dead presidents” who “believe in white supremacy.” Alluding to the (white) demographics of his congressional district, Faso contended that Delgado’s lyrics were “inconsistent with the views of the people of the 19th District and America.” Faso’s surrogates were even blunter, claiming that Delgado’s lyrics raised issues of “culture and commonality with the district and its values.” Delgado, in turn, decoded these euphemisms: “In his [Faso’s] dated mind-set, he thinks it’s accurate to suggest that if you’re black or if you’re of a certain race, you can’t be of this community.”

Congressman Ron DeSantis of Florida opened his 2018 gubernatorial campaign against Tallahassee Mayor Andrew Gillum with similar racial allusions. After capturing the Republican nomination, DeSantis took to Fox News to proclaim that Floridians should oppose Gillum because “[t]he last thing we need to do is to monkey this up by trying to embrace a socialist agenda with huge tax increases and bankrupting the state.” DeSantis’s deployment of the term “monkey” in reference to his African American opponent set off a firestorm of criticism. Even a former chairman of the Republican National Committee, Michael Steele, himself an African American, joined the chorus: “It’s how white folks talk about black men who are successful.”

Lest there be any doubt about the racial connotations of DeSantis’s statement, Fox News—ordinarily a breeding ground for race rhetoric—issued a statement condemning DeSantis’s remarks: “We do not condone this language and wanted to make our viewers aware that he has since clarified his statement.” But DeSantis’s “clarification” was merely a denial that his words had racist intent. Almost all uses of racial appeals—even those deployed by white nationalists—are accompanied by similar denials.

Factual differences aside, the social difference between, on the one hand, Delgado and Gillum as targets of a racial appeal and, on the other, Brindisi, a white man, as a target is vast: Delgado and Gillum hail from an economically, politically, and socially vulnerable group. Appeals deployed against members of such a group reinforce their inequality and thus demonstrate an intent to discriminate against them. As we have seen in earlier chapters, the law deciphers an actor’s intent in different ways depending on the circumstances and the specific provisions being litigated. In constitutional adjudication, one constant across cases is that demonstrating that a government action is more burdensome for one racial group than another does not, on its own, show discriminatory intent. In a much-criticized 1976 ruling, Washington
v. Davis, the Supreme Court announced that plaintiffs seeking to invalidate a law as racially discriminatory must show that it was passed with a discriminatory purpose, although the law’s disproportionate impact might be proof of such purpose. Washington v. Davis, however, does not consider the possibility that the racial appeals relevant to deciding whether a particular electoral arrangement violates the Equal Protection Clause (the issue in White v. Regester) may be more broadly relevant to an assessment of whether other actions of the government also discriminate based on race.

Far from abrogating the ordinary constitutional rule that disparate impact alone does not constitute discriminatory intent, racial appeals actively target disadvantaged groups. Their disparate impact is not random, and their purpose is always to sow contempt among a majority against a minority. Shaw v. Reno, a case involving North Carolina’s attempt to create majority–minority congressional districts to rectify the 100-year drought of black congressional representation from the state, looked at the question of disparate impact and concluded that a district favoring a minority racial group could discriminate against the majority group:

When a district obviously is created solely to effectuate the perceived common interests of one racial group, elected officials are more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole. This is altogether antithetical to our system of representative democracy.

If the Supreme Court found that even actions intended to remedy past discrimination can convey a license to discriminate, what must racial appeals by incumbent politicians and other candidates convey? In evaluating the intent of a speaker, we must follow the Court’s teachings in Shaw that the mere claim of an innocent or salutary purpose does not sanitize the statement; its racial content—which will sometimes be discernible on its face and other times be implicit—warrants elevated suspicion. The Supreme Court justified its exacting scrutiny of North Carolina’s redistricting plan because “the very reason that the Equal Protection Clause demands strict scrutiny of all racial classifications is because without it, a court cannot determine whether or not the discrimination truly is ‘benign.’” Government speech that separates citizens on the basis of race is as suspect as government action that does the same, because what elected officials (and those aspiring to office) say may be evidence of the discriminatory intent of what they ultimately do.

Racial appeals by political candidates mirror prohibited discriminatory action by the state in another important respect. Whether at the level of conscious thought (i.e., active intent) or cognitive processes (i.e., latent...
intent), such appeals attempt to maintain social and racial castes. Yet, the Supreme Court has determined that state action intended to maintain a “status quo” in racial discrimination violates the Fourteenth Amendment Equal Protection Clause. Thus, in *Hunter v. Underwood*, a case in which the Court struck down Alabama’s felony disenfranchisement statute as racially discriminatory, the Court held that a subsequent nonracial rationale for the statute did not purge its original discriminatory intent. It was enough for the Court that the statute’s “original enactment was motivated by a desire to discriminate against blacks on account of race and the section continues to this day to have that effect.” Similarly, racial appeals by candidates interact with historical discrimination to perpetuate its effects; the modern ratiocinations for such appeals—which are often mere pretexts—cannot cleanse their racist origins and effects.

Some may argue that candidates represent their own interests, not those of the state; therefore, their actions cannot be imputed to the government—the only entity for which the Fourteenth and Fifteenth Amendments forbid racial discrimination. Since, however, the federal government, states, and localities are run by elected candidates, the discriminatory intent of a candidate is relevant to determining the racial neutrality of government actions. Representatives Faso, DeSantis, and Tenney, all perpetrators of racial appeals, were both candidates and lawmakers when they made them. It’s implausible to think that politicians who are inclined to make racial appeals during campaigns will abandon their discriminatory mindset once in office.

Let’s set to one side the obvious recent case of Donald Trump, to be discussed shortly. At the time, Vice President George H. W. Bush’s 1988 presidential campaign was viewed as one of the most racialized in modern history. Bush used Willie Horton, a black man who committed rape and assault of a white couple while out of jail on a weekend furlough program, to cast his opponent, Governor Michael Dukakis, as soft on crime. Said Bush campaign manager Lee Atwater: “By the time we’re finished, they’re going to wonder whether Willie Horton is Dukakis’s running mate.” Bush’s appeals to race would not end after the campaign, however. He vetoed the Civil Rights Act of 1990, misleadingly labeling it as a “quota bill, regardless of how its authors dress it up.” Even after Congress added a provision making quotas illegal, Bush continued his racial rhetoric, arguing “[y]ou can’t put a sign on a pig and say it’s a horse.” Yet the horse that President Bush was riding galloped straight out of 1964, when Bush unsuccessfully ran for the U.S. Senate on a platform opposing the landmark Civil Rights Act of 1964.

The notion that a candidate might run on racial appeals but govern as an equalitarian defies not just common sense and history but legal precept.
Under the “stray remarks doctrine” in Title VII employment discrimination law, “comments that, while perhaps discriminatory, do not truly show that discrimination was a motivating factor in the relevant employment decision” are excluded from consideration by courts. Yet even where a decision-maker utters a comment outside the context of a specific decisional process, if the comment reflects “a highly discriminatory attitude” on the part of the speaker, it can be a sign of discriminatory intent. Thus, in *Morris v. McCarthy*, a black supervisor’s comment that “the little white woman better stand in line” was evidence of his discriminatory attitude, even though it was not made directly in the context of the decision to suspend the white employee who was the subject of the comment. And so it is with racial appeals during campaigns. They can be evidence of a discriminatory attitude and thus may later prove the intent behind an elected official’s vote or decision that bears disproportionately on the minority group or groups who are the subject of such appeals. This is especially so where the candidate engages in a pattern of such remarks or continues such remarks once elected, as Donald Trump has.

Arguably, a politician’s racial appeals can never constitute a stray remark, particularly when, as is often the case, the politician responds with a denial instead of an apology. Whereas an employer’s decisions are limited to the terms and conditions of our employment, politicians’ decisions affect that and far more in our lives. Thus, while it may make sense to focus on the specific statements made at the time of an employer’s adverse decision, it makes far less sense to similarly confine the temporal relevance of discriminatory statements made in the political process. Congressman Steve King of Iowa, for instance, has engaged in a range of racist conduct over the years, even retweeting Nazi propaganda and displaying a small Confederate flag on his desk. If King proposed in the House of Representatives, as he did when he was in the Iowa legislature, a bill to make English the official language of the country, should we ignore his past racist statements and conduct in assessing the intent of the legislation merely because they were not made in the course of debating the legislation? How much sense would that make? If politicians make statements or take actions that suggest bigotry or a discriminatory attitude, their behavior bears on the race neutrality of their official actions—including legislation they propose and votes they take once elected.

In addition to racial appeals by candidates, those made by other agents of political parties also can and should be considered as evidence of an intent to discriminate by the government. In a series of cases dating back to 1927—called the “white primary cases”—the Supreme Court rejected attempts by the state of Texas to evade the requirements of the Fourteenth and Fifteenth Amendments by assigning the function of nominating major-party candidates
to state parties and private organizations. In so doing, the Court ruled that “electoral practices implemented by political parties have the potential to ‘deny[ ] or abridg[e] the right to vote on account of race or color . . . .’” If electoral practices by a political party can cause unconstitutional racial harm, then racial appeals made by the party through its agents similarly are evidence of an intent to inflict such harm.

When Michigan Republicans recently attempted to eliminate “straight-ticket” voting, which allows a voter to select all the candidates of one party by pulling a single lever or shading a single space on a ballot, a federal district court found that the law harmed black voters in part because of the history of racialized appeals in Michigan elections. In this case, *Michigan State A. Phillip Randolph Institute v. Johnson*, the court cited comments made by Ron Weiser, a finance chairman of the Republican National Committee who would later become chairman of the Michigan State Republican Party. Weiser, a leading proponent of the attempt to vanquish straight-ticket voting, had publicly expressed confidence in Republicans’ 2012 prospects in Michigan because, in Detroit, a predominantly black city, “[t]here’s no machine to go to the pool halls and the barbershops and put those people on buses, and then bus them from precinct to precinct where they vote multiple times. There’s no machine to get ’em to stop playing pool and drinking beer in the pool hall.” Similarly, a Republican state senator was quoted in the *Detroit Free Press* as saying “if we do not suppress the Detroit vote, we’re going to have a tough time in this election.” Statements like these exemplified the racialized tenor of elections in Michigan and placed in context the law that eliminated straight-ticket voting, which, while neutral on its face, disproportionately harmed black voters. Racial appeals by party officials helped to indict the law.

The bluntness of these racial appeals by political parties often eclipses those of candidates. In 2012, for instance, the chairman of the Republican Party of Columbus, Ohio, stated, “I guess I really actually feel we shouldn’t contort the voting process to accommodate the urban—read African-American—voter-turnout machine.” Scott Jensen, a former speaker of the Wisconsin state assembly, was more circumspect in orchestrating racial appeals with a local chamber of commerce, which was effectively an arm of the state Republican Party. A senior vice president of the Metropolitan Milwaukee Chamber of Commerce suggested to Jensen that in the event of the defeat of the Republican-preferred candidate for a state supreme court seat, “we need to start messaging ‘widespread reports of election fraud’ so we are positively set up for the recount regardless of the final number[.]” Jensen responded, “Yes.
Anything fishy should be highlighted. Stories should be solicited by talk radio hosts.”38

CLAIMS OF VOTER FRAUD AS RACIAL APPEALS

The exchange between Jensen and the chamber of commerce vice president does not mention race. Nor does it have to, to be understood as racial. In evaluating the role of racial appeals in the dilution of minority political power, courts probe both “overt and subtle racial appeals.”39 And, as the legendary political operative Lee Atwater attested, subtle appeals are often more effective than unadorned racial rhetoric.40 This is especially true where the racial appeal urges potentially illegal conduct like voter suppression.

The racial appeals cited by the court in Michigan State A. Phillip Randolph Institute v. Johnson were statements that, in themselves, were subtle calls to suppress the black vote. This case thus illustrates that racial appeals and voter suppression are frequently tandem strategies. The case likewise sketches how racial appeals are often infused with the narrative of voter fraud. In Republican circles, the face of voter fraud, like the face of criminality generally, is rarely white; instead, people of color are the perpetrators. Put another way, claims of voter fraud would have far less traction if they were directed at white retirement communities in Florida rather than urban centers throughout the country. Thus, in Michigan, it was Detroiter whom Republican officials worried would vote “multiple times.” In Democratic National Committee v. Reagan, a case arising out of Arizona, Republican memes of voter fraud took the form of a video posted on Facebook and YouTube that “showed surveillance footage of a man of apparent Hispanic heritage appearing to deliver early ballots.” Commentary from the chairman of the Maricopa County Republican Party described the Latino-appearing man as a “thug” and stated that the man was about to stuff the ballot box.41 Yet when presented with actual evidence that the Republican candidate in a 2018 North Carolina congressional race had hired an operative who illegally collected and filled out absentee ballots, the chairman of the state Republican Party insisted that its candidate be seated despite his campaign’s involvement with fraud.42 The chairman, Robin Hayes, invoked a refrain that Republicans categorically reject when they accuse Democrats of election fraud: “No election is perfect.”43

The venerable John McCain was widely lauded for resisting outward racial appeals during his 2008 campaign against Barack Obama. Yet what McCain
could not resist—indeed, what Republicans across the temperamental and ideological spectrum cannot resist—is the old-fashioned canard of minority voter fraud. During the 2008 campaign, McCain linked Obama’s work as a community organizer in Chicago to ACORN, a national network of community service organizations that served the poor and disadvantaged, including through voter registration drives. During a nationally televised debate with Obama, McCain suggested that ACORN was “on the verge of maybe perpetrating one of the greatest frauds in voter history in this country, maybe destroying the fabric of democracy.”

Destroying the fabric of democracy? To be sure, ACORN, which hired low-wage workers to conduct its voter registration drives, turned in invalid registrations as well as valid ones. Then again, county boards of registration exist for a reason: to check registration forms for accuracy. Moreover, McCain’s and Republicans’ charges of “voter fraud” were trained on in-person voter fraud, an oft-spoken but rarely proven boogeyman. Whatever the imperfections of ACORN’s registration drives, there was no proof that any invalid registration ever resulted in an invalid vote being cast.

As the McCain example demonstrates, to credit President Trump alone with moving the nation into an age of alternative facts would be to forget the Republican Party’s common embrace of the alternative fact of voter fraud. Belief in the existence of widespread voter fraud has in effect become a plank of the Republican platform. But Andrew Gumbel, a reporter for *The Guardian*, exposes the inconvenient truth about this belief in his book *Down for the Count*:

The problem ... was that they were chasing the wrong target. Study after study has shown in-person voter fraud to be a rarity in the modern era—“more rare than getting struck by lightning,” in the words of one report from the Brennan Center for Justice—because it is difficult to get away with and even more difficult to organize on any scale. On the handful of occasions when ineligible voters have tried to cast ballots, it has usually been because of a misunderstanding or a clerical error.

Indeed, no less a political figure than Al Cardenas, the former chairman of the Republican Party of Florida, who was a fixture in the Florida 2000 recount imbroglio, has disclaimed the existence of in-person voter fraud. Asked in response to candidate Donald Trump’s claims of voter fraud whether large-scale voter fraud existed in the United States, Cardenas responded: “Oh, my, there isn’t, hasn’t been. And our country has been spending 200-plus years to get it just right.” Cardenas went on to decry Trump’s predictions of voter fraud in the 2016 contest:
We in this country know that transparency works. We appreciate and frankly adore the right to have the free, peaceful transfer of power from the president to [sic] the eventual winner. We in America have always celebrated the way we have elections ... To taint it with unproven facts, taint it with accusations, to me, it is just a shame. It shouldn’t be done.45

Unable to demonstrate in-person voter fraud (as in a voter impersonating someone else), Republicans are now attempting to criminalize voter confusion. Many of the people involved just happen to be African Americans. In Alamance County, North Carolina, a Republican district attorney charged a dozen citizens—nine of them black—with voting illegally because they cast a ballot while on probation or parole for a felony.49 The North Carolina statute requires no criminal intent; thus, the fact that the accused did not know it was illegal for them to vote was irrelevant. Similar prosecutions have occurred in Texas, Kansas, Idaho, and other states.50 In many of these states, as in North Carolina, the laws that disenfranchise felons have their roots in the Jim Crow era, when such statutes were passed as part of a comprehensive stratagem to deprive blacks of the right to vote.51 The strategy of the GOP is no less comprehensive today, sparing only the violence of Jim Crow but otherwise determined to limit the minority franchise.

How do we know this? GOP leaders do not dissemble their intent. The speaker of the Pennsylvania House of Representatives famously boasted in 2012 that “[v]oter ID ... is going to allow Governor Romney to win the state of Pennsylvania.”52 Although Romney wound up losing Pennsylvania, the state’s Republican chairman still credited its voter ID law with reducing Obama’s margin of victory: “Think about this: We cut Obama by 5 percent, which was big. A lot of people lost sight of that. He beat McCain by 10 percent; he only beat Romney by 5 percent. And I think that probably photo ID helped a bit in that.”53 Republican Congressman Glenn Grothman of Wisconsin accurately predicted that Wisconsin’s stringent voter ID law would help the GOP presidential nominee carry Wisconsin for the first time since 1984. After commenting on the weaknesses of Hillary Clinton, Grothman added: “And now we have photo ID, and I think photo ID is going to make a little bit of a difference as well.”54 Why would photo ID help Republicans and not Democrats, particularly when there is virtually no evidence of voter fraud? According to Grothman, “I think we [Republicans] believe that, insofar as there are inappropriate things, people who vote inappropriately are more likely to vote Democrat.”55

The stereotype that Grothman paints is an effective propellant among Republicans for the myth of voter fraud because it is rooted in race. After
Wisconsin implemented its voter ID law, black voter turnout in the state declined by 19 percent between the 2012 and 2016 elections.\textsuperscript{56} The decline in black turnout nationally for the same period was only 4.5 percent. A study by the University of Wisconsin found that nearly 17,000 voters in Dane County and heavily black Milwaukee County may have decided to sit out the 2016 election because of the voter ID law.\textsuperscript{57} Wisconsin’s precipitous, disproportionate drop allowed Donald Trump to carry Wisconsin by less than 1 percent. Despite President Trump’s erroneous view that Americans must have photo identification to buy groceries,\textsuperscript{58} nearly 11 percent of Americans lack a photo ID, and this group is composed disproportionately of minorities and the poor.\textsuperscript{59} The explicit partisan intentions of Republicans, the absence of proof of voter fraud that would be prevented by a photo ID requirement, and the disproportionate impact of voter ID on minorities suggest, singularly and in combination, a scheme to suppress the minority vote.

There is more. Just as the building of Confederate monuments spiked after the ruling in Brown v. Board of Education,\textsuperscript{60} voter ID laws became a Republican fixation only after the election of the first black president, Barack Obama. These laws, like Confederate monuments, and like the felony disenfranchisement statutes enacted after Reconstruction, are whitelash against the advancement of racial minorities. According to the National Conference of State Legislatures, “In 2011, 2012 and 2013, the pace of adoption accelerated. States without ID requirements continued to adopt them, and states that had less-strict requirements adopted stricter ones.”\textsuperscript{61} The states with the strictest requirements lean Republican and have large minority populations or urban centers in which the states’ minorities cluster.\textsuperscript{62}

Despite all this circumstantial evidence of racially discriminatory intent, Republicans frequently claim that politics, not race, drives their quest for voting restrictions. The Supreme Court’s decision in Crawford v. Marion County Election Board gives plausibility to their otherwise absurd argument.\textsuperscript{63} There, even after noting that “[t]he record contains no evidence of any [in-person voter] fraud actually occurring in Indiana at any time in its history,” the Court upheld an Indiana photo voter ID requirement.\textsuperscript{64} Presented with evidence that Republicans in Indiana had passed the legislation for political reasons, Justice John Paul Stevens, a progressive, offered this head-scratcher unsupported by legal precedent: “[I]f a nondiscriminatory law is supported by valid neutral justifications, those justifications should not be disregarded simply because partisan interests may have provided one motivation for the votes of individual legislators.”\textsuperscript{65}
Justice Stevens’s assertion in this case that gaming the right to vote is okay if it’s based on opposition to the other side’s political beliefs runs contrary to his own views in political gerrymandering cases: In *Vieth v. Jubelirer*, Stevens insisted that “political affiliation is not an appropriate standard for excluding voters from a congressional district.” How, then, could partisanship be an appropriate basis for making it more difficult for members of one party to vote than members of another?

To the extent that the Court in *Crawford* believed that Indiana demonstrated neutral, nonpartisan justifications for its photo voter ID law, those justifications were speculative. Rather than showing any evidence that in-person voter fraud had occurred or was even remotely likely to occur, Indiana offered far less proof than the government did in *Citizens United v. Federal Election Commission*. In that case, the Court ruled on free speech grounds that corporations could use their general treasury funds for campaign ads opposing or supporting candidates. Justice Kennedy, writing for the majority, rejected the government’s prohibition of such spending on the grounds that the government had not offered proof that corporate expenditures on behalf of candidates create quid pro quo corruption. It makes little sense that when the government seeks to curtail the influence of money in elections, it must bring its A—game, but when it seeks to punish members of opposing political parties by making it more difficult for them to vote, speculative justifications will suffice.

In fact, the law says otherwise. In a democracy, government has no more right to make it harder for political opponents to vote than it does to exclude them from serving in a state legislature. Moreover, even if the right to spend and the right to vote in elections are not identical situations, *Crawford* requires that burdens on the right to vote be “nondiscriminatory.” Yet Republicans themselves talk publicly about Democrats being the targets of voter ID laws, so how can these laws be nondiscriminatory? Substituting “Democrat” for “black” or “Hispanic” does not erase the racial identity of the targeted populations. More importantly, black, Hispanic, Asian, and Native American voters certainly do not give up their racial identity when they choose a partisan affiliation. Indeed, under standard First Amendment doctrine, these groups are free to define their political identity according to their racial identity. That is, black voters have the right to organize politically around issues that have a distinct impact on their community. As discussed in Chapters 2 and 4, white Americans are increasingly doing the same, for very different reasons than people of color, and these white identifiers are overwhelmingly Republican. Thus, to allow a state legislature to enact voting restrictions that
disproportionately harm voters of color is to permit it, functionally, to discriminate based on race.

Republicans know this, for when it comes to the messy question of what is racial versus what is merely political, the eye of the beholder matters. And what do Republicans behold when they see the Democratic Party? Black people. In a 2018 paper, political scientist Douglas Ahler and researcher Gaurav Sood demonstrated that members of one party tend to substantially overestimate the share of “party-stereotypical” groups in the opposing party.70 They found that “[w]hile most people overestimate the share of party-stereotypical groups in the parties, the extent to which they overestimate varies by partisanship . . . Republicans’ perceptions of Democratic composition exhibit significantly more bias than Democrats.”71 Thus, Republican respondents in Ahler and Sood’s study significantly overestimated the Democratic Party’s share of union members, gays, blacks, and atheists.72 Indeed, Republicans believed that blacks constitute nearly half of the Democratic Party (46.4 percent) when their actual composition is closer to a quarter (23.9 percent).

These projections of stereotypes have real-world consequences. According to Ahler and Sood:

[B]eliefs about out-party composition affect perceptions of where opposing-party supporters stand on the issues. These findings provide a potential explanation for why people tend to overestimate the extremity of opposing partisans . . . Beyond beliefs about extremity, we suspect that perceptions about party composition affect people’s beliefs about the parties’ priorities . . . More generally, we suspect that people associate a narrow set of policy demands with each party-stereotypical group and think these groups have sway over the party’s agenda.73

If Republicans believe that the Democratic Party has been captured by blacks, then efforts by Republicans to harm Democrats politically constitute efforts to harm blacks. Moreover, in considering the intent behind voter ID laws and other suppression vehicles, courts should not ignore the general discriminatory attitudes of Republican voters. For instance, a Reuters poll taken prior to the 2016 elections showed that Trump supporters were more likely than supporters of his Republican rivals or of Hillary Clinton to believe that blacks were “criminal,” “lazy,” “unintelligent,” and “violent.”74 Are we to believe that Republican voters and the politicians they elect successfully compartmentalize this bigotry when supporting or enacting legislation that disadvantages fellow citizens who they believe are inferior and whose presence they overestimate in the opposition party? Voter ID laws and other suppression measures are racial appeals by another name. Moreover, because advocacy for
these types of restrictions may be evidence of a general discriminatory attitude toward persons of color, passage of voter suppression measures may be evidence of a racially discriminatory motive in the passage of other measures that disproportionately harm people of color. Courts must evaluate the content of these laws using the strictest constitutional standard.

WHY NOT JUST OUTLAW RACIAL APPEALS?

Before turning to a more in-depth discussion of how racism in electoral campaigns can be used as evidence of racial discrimination in governing, the reader should understand the constitutional limitations of any remedy against candidates and parties for using racial appeals. In Vanasco v. Schwartz, political candidates challenged the constitutionality of the New York Fair Campaign Code. The code made unlawful

“during the course of any campaign for nomination or election to public office or party position,” by means of “campaign literature, media advertisements or broadcasts, public speeches, press releases, writings or otherwise,” “attacks on a candidate based on race, sex, religion or ethnic background” . . . any “misrepresentation of any candidate’s qualifications” including the use of “personal vilification” and “scurrilous attacks” . . . any “misrepresentation of a candidate’s position” . . . and any “misrepresentation of any candidate’s party affiliation or party endorsement” . . .

In short, the law would have prohibited much of the kind of dishonest, race-baiting conduct engaged in by political campaigns, including Trump’s 2016 campaign. A federal district court invalidated the statute, concluding in part that

[i]t would be a retreat from reality to hold that voters do not consider race, religion, sex or ethnic background when choosing political candidates. Speech is often provocative and indeed offensive, but unless it falls into one of those “well defined and narrowly limited classes” of unprotected speech (e.g., “fighting words”) it enjoys constitutional protection.

The United States Supreme Court summarily affirmed the district court’s judgment without opinion. Vanasco teaches that we cannot preempt a candidate’s or a party’s racial appeals, even when such appeals have as their purpose the suppression of minority votes—an action which, if undertaken by the state, would constitute a violation of the Equal Protection Clause of the Fourteenth Amendment and the Voting Rights Act of 1965. Yet a candidate’s or party’s racial appeals are still
relevant evidence of a racially discriminatory attitude and thus can be used to contest the neutrality of a law that carries the candidate’s or the party’s imprimatur. To this scenario we now turn.

DONALD TRUMP AS A SYMPTOM; HIS WORDS AND ACTIONS AS EVIDENCE

Donald Trump has practiced in the extreme the twin pillars of Republican electoral strategy—racial appeals and minority voter suppression—and extended them to governance. Table 7–1 captures some, but by no means all, of the ongoing insults and degradations to which Trump has subjected people of color while in office. His behavior and actions should have consequences for how courts assess challenges to laws and executive orders enacted during his administration that adversely affect people of color. Trump, however, is not unique, nor should be the remedy for such racial appeals. As former President Barack Obama stated in his first public rebuke of Trump and Trumpism:

The status quo pushes back. Sometimes the backlash comes from people who are genuinely, if wrongly, fearful of change. More often it’s manufactured by the powerful and the privileged who want to keep us divided and keep us angry and keep us cynical because it helps them maintain the status quo and keep their privilege . . . It did not start with Donald Trump. He is a symptom, not the cause. He’s just capitalizing on resentments that politicians have been fanning for years, a fear and anger that’s rooted in our past but it’s also born out of the enormous upheavals that have taken place . . .

Perhaps Trump’s most transparent nod to race-baiting is his obsessive criticism of black athletes who express political views. What else would explain any American president devoting as much attention as Trump has to NFL players—almost all black—kneeling to protest police misconduct against blacks? The bash-athletes strategy plays on white stereotypes of black men and licenses others to do the same. Thus, Republican U.S. Senate candidate Corey Stewart joined Trump’s chorus when he referred to NFL players as “thugs”:

A lot of these guys, I mean, they’re thugs, they are beating up their girlfriends and their wives. You know, they’ve got, you know, children all over the place that they don’t pay attention to, don’t father, with many different women, they are womanizers. These are not people that we should have our sons, or any of
our children look up to. We need to have our children look up to real role models.\textsuperscript{80}

Fox News talk show host Laura Ingraham directed this jibe at basketball star LeBron James: “It’s always unwise to seek political advice from someone who

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**Table 7–1 Examples of Trump’s Comments Degrading People of Color**

<table>
<thead>
<tr>
<th>Scenario and Date</th>
<th>Comment</th>
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<tbody>
<tr>
<td>A tweet about Puerto Rico’s efforts to recover from Hurricane Maria, September 30, 2017</td>
<td>“Such poor leadership ability by the Mayor of San Juan, and others in Puerto Rico, who are not able to get their workers to help. They want everything to be done for them when it should be a community effort.”</td>
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<tr>
<td>A tweet about star basketball player LeBron James, an African American, and CNN anchor Don Lemon, also black, August 3, 2018</td>
<td>“Lebron James was just interviewed by the dumbest man on television, Don Lemon. He made Lebron look smart, which isn’t easy to do.”</td>
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<td>A tweet about former Congressional Black Caucus leader Maxine Waters, June 25, 2018</td>
<td>“Congresswoman Maxine Waters, an extraordinarily low IQ person, has become, together with Nancy Pelosi, the Face of the Democrat Party. She has just called for harm to supporters, of which there are many, of the Make America Great Again movement. Be careful what you wish for Max!”</td>
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<tr>
<td>A tweet about former White House aide Omarosa Manigault Newman, August 14, 2018</td>
<td>“When you give a crazed, crying lowlife a break, and give her a job at the White House, I guess it just didn’t work out. Good work by General Kelly for quickly firing that dog!”</td>
</tr>
<tr>
<td>A comment on illegal immigrants, May 16, 2018</td>
<td>“We have people coming into the country, or trying to come in—we’re stopping a lot of them. You wouldn’t believe how bad these people are. These aren’t people, these are animals, and we’re taking them out of the country at a level and at a rate that’s never happened before.”</td>
</tr>
<tr>
<td>In speech in Ohio after his first State of the Union address, remarking on Democrats, many of them members of the Congressional Black Caucus, who refused to applaud during his address, February 5, 2018</td>
<td>“You’re up there, you’ve got half the room going totally crazy—wild, they loved everything, they want to do something great for our country… And you have the other side—even on positive news, really positive news like that—they were like death. And un-American. Un-American. Somebody said, ‘treasonous.’ I mean, yeah, I guess, why not? Can we call that treason? Why not! I mean they certainly didn’t seem to love our country very much.”</td>
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</table>
gets paid $100 million a year to bounce a ball. Keep the political comments to yourselves... Shut up and dribble.” She then criticized James’s riposte to her as “barely intelligible” and “ungrammatical.”

To many Trump supporters, these attacks are not just about black athletes. They are about black people generally. As the 2016 Reuters poll indicates, almost half of Trump supporters believed black Americans were more violent than whites. The same proportion viewed them as more “criminal,” and 40 percent saw them as lazier than whites. There is perhaps no more menacing an image by which to stoke these stereotypes than 300-pound black football players and 6’7” basketball players. In assessing the harm of racial appeals, society and courts should look not only at what is said, but also, given existing racial predispositions, how it is heard. Many of the white voters that Trump and the Republican Party depend on for their political lifeblood embrace what political scientist Keith Reeves refers to as the “attributional blame” notion of racial inequality—that is, deficiencies in character explain blacks’ lack of parity with whites. Reeves’s research confirmed that these types of voters will usually be reluctant to support a black candidate. Racial appeals exploit their predispositions.

The Supreme Court punted on the first opportunity it had to hold Trump liable for his racial rhetoric. In Trump v. Hawaii, the Supreme Court upheld on national security grounds President Trump’s executive order severely restricting the entry into the United States of citizens from six predominantly Muslim countries. In addition to statutory grounds, the plaintiffs challenged the executive order as a violation of the Establishment Clause of the First Amendment, which provides that “Congress shall make no law respecting an establishment of religion.” They contended that President Trump’s executive order was little more than a thinly veiled Muslim ban of the sort he had called for during the campaign. Because, however, the executive order was facially neutral—that is, it did not ban Muslims as such—and because it was purportedly issued for reasons of national security, the Court applied a deferential standard of review that allowed the order to stand.

The plaintiffs relied on several campaign statements by candidate Trump disparaging Islam as a religion or otherwise denigrating Muslims. For instance, Trump had called for “a total and complete shutdown of Muslims entering the United States,” a policy position that remained on his campaign website seven months into his presidency. Once elected, Trump candidly admitted that the purpose behind an earlier iteration of his executive order was to make it more difficult for Muslim refugees to enter the U.S. and easier for Christian refugees. Yet, given the national security context in which the Establishment Clause issue had arisen, the most the five-justice majority was
willing to make of Trump’s statements was to imply that he had performed “unevenly” in living up to the American creed of religious tolerance.91

As dissatisfying as the Trump v. Hawaii ruling is, it is no license for candidates to spew racial hatred without consequence. Rather, lower courts have already limited the case to the unique national security setting in which it arose. In Centro Presente v. United States Department of Homeland Security, for example, resident aliens from El Salvador, Honduras, and Haiti challenged the Trump administration’s attempt to revoke their temporary protection status (TPS). TPS allows citizens of designated countries to lawfully remain in the United States for as long as conditions in those countries make the resident alien’s return unsafe.92 The plaintiffs alleged that it was not an improvement in conditions in their home countries, but rather racial animus, that prompted the Trump administration’s change in designation. Among the evidence they cited were anti-Latino statements made by Trump both as a candidate and as president.93 Trump’s 2015 references to Mexican immigrants as “rapists” and drug couriers came full circle to haunt a policy initiative. The court found that the plaintiffs had stated a cause of action for racial discrimination in violation of the Constitution. Trump v. Hawaii, the court held, was not a barrier to their claim because “the determination at issue in this case does not concern national security.”94

It is not merely what Trump has said as candidate and president that casts a racial pall over his policies. The policies often indict themselves. With no proof of voter fraud other than his belief that voting is “rigged,” President Trump created the Presidential Advisory Commission on Election Integrity.95 He appointed as its vice chair Kansas Secretary of State Kris Kobach, who would soon come under grand jury investigation for illegally failing to register voters in 2016.96 Kobach was also held in contempt by a federal court for failing to comply with a court order that his office register voters without requiring them to present proof of citizenship.97 Conspicuously absent from the scope of the election commission’s charge was an investigation into Russian meddling in the 2016 presidential contest—surely a type of voting “fraud” or “rigging.” Despite the unequivocal assessment of U.S. intelligence agencies that Russia had interfered with the 2016 election to help Trump, President Trump consistently cast doubt on those findings.98

In an act that former CIA Director John Brennan called “treason,” President Trump stood side-by-side with Russian President Vladimir Putin at a press conference in Helsinki, Finland, and, when asked whether Russia had meddled in the 2016 election, said: “My people came to me. They said they think it’s Russia. I have President Putin; he just said it’s not Russia. I will say this: I don’t see any reason why it would be.”99 Although Trump would
later implausibly claim that he misspoke in Helsinki, by any measure he has shown far more interest in the fiction that 3 million to 5 million people voted illegally in 2016 than in pursuing the factual claims of American intelligence agencies about Russian interference.\(^\text{100}\)

A toothless Republican Congress did the same. As Trump supporters began donning t-shirts that read “I’d rather be a Russian than Democrat,”\(^\text{101}\) Republicans in Congress betrayed the insincerity of their party’s concern with election integrity by defeating a Democratic amendment to bolster funding for election cybersecurity and improved voting equipment.\(^\text{102}\)

Moreover, the House Intelligence Committee continued to deny that Putin had interfered in the election in order to help Trump—even after Putin himself admitted to the world during the Helsinki news conference that he preferred Trump to Clinton during the 2016 election.\(^\text{103}\) The only election integrity Republicans really appeared to value was the kind that helped their party’s political fortunes.

That brand of “election integrity” requires suppressing the votes of minorities. Cambridge Analytica, a political consulting firm that employed Steve Bannon as its vice president before he joined the Trump campaign, deployed social media to target African Americans with “voter disengagement” techniques.\(^\text{104}\) Testifying before the Senate Intelligence Committee, a Cambridge Analytica whistleblower, Christopher Wylie, told Congress that Bannon had deliberately sought to suppress the votes of blacks and other liberal constituencies. Wylie later elaborated to the media that black voters were a prime target of Bannon’s and Cambridge Analytica’s operations.\(^\text{105}\)

Indeed, during the final days of the 2016 campaign, the Trump campaign candidly admitted that its only path to victory lay in shrinking the electorate. According to the campaign, this required the demobilization of blacks, young women, and white liberals.\(^\text{106}\)

The Trump campaign’s black voter suppression efforts tell us a great deal about the racial rationale behind much Republican “election integrity” legislation generally. If the nominal head of the Republican Party, candidate Donald Trump, believed that his only path to the presidency was by shrinking the electorate, there is little reason to believe that this type of thinking does not permeate the motivations of Republican legislatures considering voter ID laws and other voting restrictions. Republicans at the highest echelons of their party keep revealing, even if unwittingly, why Republicans target minority votes for suppression. Courts need only listen to conclude that voter ID laws and other Republican-backed voting restrictions are simply types of racial appeals that are part and parcel of whitelash.
Introduction

The Long Night of Déjà Vu

Election night, Tuesday, November 8, 2016, seemed interminable for many Americans. It certainly was for me. I was scheduled to teach an election law class the following day, during which my students and I would discuss the legal implications of the presidential and congressional elections. But before that, I had to fulfill a commitment to speak to a high school audience about the election. I was to address students at Chicago’s Legal Prep Charter Academy first thing Wednesday morning—a daunting task because I had been up all night puzzling over election returns that had elevated a reality television show host, Donald Trump, to the most powerful position in the world.

In the wee hours of the morning on election night, when it became clear that Trump would clinch a victory in the Electoral College, I penned an op-ed for the Huffington Post titled “Will White Voters Never Learn?” White voters had delivered mightily for Trump, who bested Hillary Clinton by a 21-point margin among this demographic. Black voters had hewed to their overwhelmingly Democratic bent: Clinton beat Trump 10 to 1 among them. Surprisingly, although Latinos preferred Clinton by better than 2 to 1, they nonetheless gave Trump nearly 30 percent of their vote, a curious tally for an ethnic group that had borne the brunt of Trump’s racial ridicule. Still, white Americans constituted 71 percent of the electorate, and they delivered the White House to Trump, particularly in three key states: Michigan, Pennsylvania, and Wisconsin. Why?

In my Huffington Post opinion piece, I argued that white voters had yet again succumbed to a classic American con job. A candidate pitched himself as an elixir to the nation’s supposed equalitarian excesses, and white voters—eager to assert control over “their” nation—drank it readily, oblivious to the tonic that would follow. Richard Nixon campaigned in 1968 on “law and order,” only to be driven from the White House by the lawlessness of Watergate. Ronald Reagan’s crusades against “welfare queens” and “reverse discrimination” against whites did nothing to halt globalization’s and
technology’s indiscriminate appetite for the jobs of the working- and middle-class whites who propelled Reagan to victory in 1980. George H. W. Bush’s 1988 campaign used the racial boogeyman of convicted felon Willie Horton to notch a victory over Massachusetts governor Michael Dukakis, only to be booted out of office after one term in the throes of a recession. George W. Bush was effectively installed to the presidency by Reagan’s and the elder Bush’s conservative Supreme Court majority in Bush v. Gore. Two wars and a Great Recession later, the world was still paying the price when Trump came along.

As an objective historical matter, when white voters have moved right in the post-Civil Rights era, the shifts have usually been accompanied by race as a national issue or divide, and the outcomes have come at a handsome cost to white voters and the nation generally. What made white voters think 2016 would be different? More to the point of this book, what made white voters think they were at liberty to keep making the same calculation, prodded at least in part by their disapproval of racial liberality, whether defined by their perception of a welfare state that had become too generous, a government that protected minorities at their expense, or an out-of-control immigration policy? Voting, after all, is not some impressionistic exercise unbounded by norms. It is, instead, an occasion when citizens directly assume the levers of democratic government in order to select their representatives. If we do not allow the government to discriminate based on race, we cannot allow voters to do so in choosing the government’s elected personnel.

The hard part about this proposition, of course, is proving that a voter or a group of voters has voted with discriminatory animus toward another group. At the Legal Prep Charter Academy where I spoke the morning after the election, Trump’s racial animus was taken as a given among the overwhelmingly black student body, as it had been among many black voters. One student blurted, “He hates us.” As a law professor, I would never allow such a raw, unsubstantiated statement to stand in one of my classes, so I tried to engage the students about the bases for their suspicions that Trump would be the president only of white America. Their data points were at least as good as those of many of the talking heads I heard on television throughout the campaign and on election night.

One commentator in particular, CNN’s Van Jones, had labored memorably to make sense of Trump’s victory on election night. Clearly shaken by the impending result, Jones opined on national television:

This was many things. This was a rebellion against the elites, true. It was a complete reinvention of politics and polls, it’s true. But it was also something else. We’ve talked about . . . everything but race tonight. We’ve talked
about income. We’ve talked about class. We’ve talked about region. We haven’t talked about race. This was a white-lash against a changing country. It was a white-lash against a black president, in part.³

Whitelash is a portmanteau derived from the term “white backlash.” Consciously or not, Jones had revived the term from debates during the 1960s. In 1964, after Republican presidential candidate Senator Barry Goldwater unsuccessfully opposed passage of the Civil Rights Act of 1964, Senator Allen J. Ellender, a Louisiana Democrat, predicted a “whitelash” among voters against the act’s enforcement.⁴ Similarly, segregationist Alabama governor George Wallace’s highly successful third-party presidential run in 1968, in which he won five southern states, was dubbed “The Wallace Whitelash.” In short, whitelash describes the reactionary impulse of many white voters toward racial equality movements and societal shifts they perceive as excessive. Of necessity, then, the phenomenon is based on the erroneous, racist view that racial inequality is a natural order and that whites should control the pace at which it is dismantled.

It is one thing to coin or revive a pithy term but quite another to supply a clear framework for its use. Claiming or even explaining whitelash is easy; proving its existence among millions of voters is the difficult task. As I later reflected on my discussion with the students at Legal Prep and continued to read the voluminous postmortems of the 2016 election, it struck me that popular discourse on the question of whether racism had driven Trump’s election was divorced from the way lawyers and legal scholars talk about whether race has influenced a decision. I’ve taught election law and employment law for a quarter-century, and I have litigated employment discrimination cases. Bringing together these two areas of focus, I realized that we could apply the frameworks of antidiscrimination law to the collective decision-making of voters to ascertain whether their support for or opposition to a candidate was based on racial animus.

I do not necessarily or even primarily mean racial animus against a specific candidate, but rather animus toward racially identifiable groups of the candidate’s supporters, who in turn engender biases against the candidate. For instance, while credible evidence suggests that misogyny hobbled Hillary Clinton’s chances in the general election,⁵ no one claims that her race did. Instead, her identification with racial progressivity, and Trump’s identification with the opposite, acted as racial proxies in the 2016 election, as such ideological positioning has in many elections past.

Antidiscrimination law’s frameworks for ascertaining racial bias are not superior to other ways of thinking about and discussing race and the 2016
election. They are, however, a different lens, and they are surprisingly intuitive. Indeed, because antidiscrimination law governs important facets of every American’s life—from workplace discrimination to our ability to buy and sell property as we choose—it must, at its core, be comprehensible by the public. I argue in these pages that the same legal precepts that prevent us from refusing to hire a Latino based on his national origin or prevent a legislature from passing a law that makes it more difficult for blacks to vote also prohibit voters from casting a ballot based on racial animus—even if racial animus is one motivation among several.

Moreover, the tools that courts have historically used to ascertain racist motivations on the part of decision-makers like legislators and employers can and should be applied to voters in candidate elections. Where a breach of the antidiscrimination norm is found, legal remedies exist. These remedies may not change the mind or vote of the discriminatory voter, but they can mitigate the effects of the voter’s discrimination on the body politic.

There is a certain irony, however, to advancing antidiscrimination law as a corrective to voters’ racial misconduct: under conservative jurisprudence, antidiscrimination law is just as likely to perpetuate discrimination as it is to inhibit it. This conundrum requires understanding whitelash not just as an electoral phenomenon but rather as a social one that connects the political branches of government, the judiciary, and organic reactionary movements like white nationalism. Through voter ID laws and the dismantling of voting protections for minorities, a racially regressive judiciary makes voter whitelash easier to express. Once an electoral victory is achieved, the racially regressive bent of the judiciary gets reinforced by the appointment of additional “conservative” judges—a term that, as we shall see, now correlates rather well with the denial of civil rights to minorities and women. Meanwhile, as politicians like Donald Trump shred the veneer of respectability politics, white nationalists percolate just outside mainstream conservatism—close enough to have a decided effect. The convergence of these ostensibly disparate parts is the sum of whitelash—the sustained push to retard or retreat from racial equality.

Using the 2016 presidential election as a focal point, this book unpacks contemporary whitelash by applying antidiscrimination law. Rather than plunge into the niceties of legal doctrine, I use a series of legal analogies to help orient the reader. Reflecting my years as an employment law scholar, my analogies often ask you to equate the voter with an employer who is making a hiring decision. At other times, you are an employee who stands to be adversely impacted by an employer’s arbitrary decision-making, in much the same way as a voter is negatively affected by a politician’s refusal to rely on facts when making decisions. Sometimes, you are placed in the shoes of a juror,
who, like a voter, must adjudicate the merits of a case that has two sides. In still other instances, you are asked to place yourself in the position of a legislator voting on a proposed statute, something that voters are asked to do in a referendum or citizens’ initiative. What is the commonality among these heuristics? In each, racial discrimination is forbidden. Why, then, should we allow it in candidate elections?

Chapters 1 through 3 set forth the architecture of what I refer to throughout this book as the “antidiscrimination norm.” Chapter 1 focuses largely on how the 2016 presidential contest violated modern understandings of this norm by reverting to primitive forms of racial appeals. Using abundant social science data, Chapter 2, “The Exoneration of White Voters,” discusses and then debunks the plausibility of white voters’ denial that race played a role in their 2016 decision. Chapter 3, “White Voters and the Law of Alternative Facts,” argues that voting, like law, requires a respect for facts, and that racial stereotypes are necessarily at odds with a fidelity to facts.

Chapters 4 and 5 place whitelash in its broader framing beyond the ballot box—a reach that nevertheless fortifies its potency at the ballot box. Chapter 4, “The Sirens of White Nationalism,” demonstrates the impact of heretofore fringe political philosophies and groups on mainstream conservatism and the electoral viability of the Republican Party. Chapter 5, “Law as Pretext,” explains how conservative jurisprudence reinforces voter whitelash and racial inequality more generally.

In everyday parlance, when someone practices one thing and does the opposite, we call it hypocrisy. In law, this type of behavior is evidence of pretext—an untruth proffered to cover up the real illicit or discriminatory reason for one’s actions. In Chapter 6, “Voting While White,” I survey the myriad contradictions that undergird white voters’ support for conservative candidates, contradictions that reveal many white voters professing a belief in small or limited government while feeding at the government’s trough. If they are not really supporting conservative candidates because of a belief in the core tenet of conservatism—limited government—why are whites supporting these candidates? In light of white voters’ racial predispositions in the 2016 election, racial animus is a distinctly credible possibility, as I argue in Chapters 1 and 2. Ironically, however, because progressives stand ready to rescue the social safety net that many white voters spurn hypocritically, voter whitelash goes unchecked.

So how should our democracy respond to whitelash if the two-party system itself encourages it? In Chapters 7 and 8, I propose legal remedies to curtail the impact of whitelash on our body politic. Constitutional guarantees of free speech and free association necessarily limit the government’s ability to
prevent citizens from casting votes based on racial animus. Still, the citizen who votes is participating in a state-sponsored exercise, the outcome of which constitutes “state action” for the purpose of determining whether, under the Constitution’s requirement of equal protection, an election’s process or result impermissibly discriminates against an identifiable group of citizens. The remedies I propose fit within established legal doctrine that I introduce to readers through the legal analogies used early on.

Viewed as a vector of white racial resentment, whitelash is not a uniquely American problem, yet America has a unique role in its spread and deterrence. A nation that boasts of its ability to encourage democracy throughout the world must be mindful of its similar ability to foster racist ideology. The conclusion of this book discusses this cautionary truth.

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I arrived at my election law class the evening after the 2016 presidential election still shocked by the results and with the words “He hates us” seared in my memory. In a democracy, no citizen, let alone a child, should sense this of the nation’s leader. Yet a July 2018 Quinnipiac University poll found that 49 percent of Americans believed President Trump was a “racist.”6 Forty-seven percent of respondents believed he was not. That a nation can hear the same words, view the same actions, and reach opposite conclusions demonstrates the need for a shared lexicon about racial discrimination. In the pages that follow, largely by analogy, I have adapted the vocabulary of our justice system—the place where every citizen can go to right a wrong, and a central feature of any democracy—to look at the 2016 election through a new lens.

The right to vote should never be used to spite one’s fellow citizens. When it has been misused in this fashion, white voters have “cut off their noses to spite their faces,” and democracy itself has repeatedly suffered. How long will we allow this recurring harm before it strikes a final, fatal blow?