

Affirmative Action: Where Do We Go From Here?

By JOHN A. POWELL*

Introduction

IF ONE TAKES A SNAPSHOT of any given moment in time, or if one takes a snapshot of a person, it does not tell anything. To understand that moment in time one would need to know, where people have been, where they are going, and their background up to that moment. Too often, affirmative action, and battles over its function are fought with this limited knowledge—little more than a snapshot is taken. Part of the problem with the way we think about affirmative action is that we divorce it from everything else. It has become common for us to say, “We have an eighteen-year-old kid who wants to go to college. We have devised a test. We do not know how good the test is or how bad the test is, but it is a test. How did the applicant do on the test? With that information, we now know how we are going to distribute what apparently are scarce social resources.”

Though a bit simplified, this is the process that we have made many of the issues connected to affirmative action—opportunity, fairness, justice, well being, representation, sustainability, democracy—dependent upon. Affirmative action is a difficult issue. Part of the difficulty is attributable to its nature, which presents complex questions and considerations, and part of the difficulty results when we approach affirmative action as if it is a singular issue. We conflate a lot when it comes to affirmative action—questions, issues, and even the models themselves—and are left with a large amount of unpacking to do.

In *The Imperative of Integration*, Elizabeth Anderson explains four different models of affirmative action: compensatory, diversity, a cor-

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recting-decisions model,¹ and an integrative model.² With each model, she explains how each one actually renders very different results, very different foundations, and very different aspirations.³ Anderson's work illuminates:

[A] policy under popular assault in a democracy is at additional risk if its practitioners do not fully grasp the principles that make sense of it, if their rationales feed racial myths and stigmas, if they fail to educate the population about the continuing causes of race-based disadvantage, and if they have only weak answers to fundamental objections.⁴

Put differently, the current challenges and future risks compel us to be mindful of two critical dynamics: (1) our willingness to engage affirmative action's complexity, and (2) where and when we mix up principles and rationales. As Anderson and others have noted, affirmative action is under popular assault.⁵

This Article addresses the theme "Affirmative Action: Where do we go from here?" by attempting to unpack affirmative action and a few principles and rationales that have left us with little more than a snapshot. Part I discusses the distortions related to "critical mass" and race. Part II discusses the relationship between decision-making and the unconscious. Part III touches on racialized U.S. space. Part IV, briefly discusses situatedness⁶ and examples of efforts to navigate it.

1. Anderson describes this model as the "discrimination-blocking model." ELIZABETH ANDERSON, *THE IMPERATIVE OF INTEGRATION* 135 (2013).

2. *Id.*

3. *Id.* at 135–36.

4. *Id.* at 137.

5. *Id.* ("[A]ffirmative action is in peril. An ongoing campaign to ban it state by state has succeeded in eliminating state-sponsored affirmative action in California, Washington, Michigan, Florida, and Nebraska, with more states on the way."); *see also* *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) (barring a voluntary racial integration program by a school district that had not been found to be guilty of unconstitutional segregation); *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013). In *Fisher*, seven Justices clearly endorsed the proposition that all race-based classifications, whether benign or invidious, are subject to strict scrutiny review. *Fisher*, 133 S. Ct. at 2421–22.

6. JOHN A. POWELL, *RACING TO JUSTICE: TRANSFORMING OUR CONCEPTIONS OF SELF AND OTHER TO BUILD AN INCLUSIVE SOCIETY* 17 (2012) ("To fully understand the importance of situatedness, one must look at how the interaction of institutions creates and distributes opportunity benefits and burdens.").

Consider the goal of moving everyone from the first floor to the fifth floor of a building. The means of conveyance available is an escalator. For most people, this will suffice, but for those using wheelchairs, today's escalators are practically useless. The goal for a person using a wheelchair is the same as it is for everyone else, but the strategy employed will have to take situatedness into account. An escalator will not be an effective mode of transportation: the wheelchair user may need an elevator.

Id. at 233–34.

Finally, in Part V, I conclude with a few final thoughts about racial polarization in today's society.

I. Critical Mass and Race

Part of the difficulty in addressing affirmative action is that we are dealing with incredibly complex concepts and terms that we often do not understand. In *Grutter v. Bollinger*,⁷ the Supreme Court endorsed the principle that universities could create admissions policies that consider race, along with other factors, to increase the number of underrepresented students to achieve a "critical mass."⁸ During oral arguments in *Fisher v. University of Texas at Austin*,⁹ questions about the University of Texas's practice of tailoring admissions policies to achieve this critical mass abounded.¹⁰ Chief Justice Roberts remarked:

[M]y job . . . [is] to determine if your use of race is narrowly tailored to a compelling interest. The compelling interest you identify is attaining a critical mass of minority students at the University of Texas, but you won't tell me what the critical mass is. How am I supposed to do the job that our precedents say I should do?

. . .

. . . [W]hen will we know that you've reached a critical mass?¹¹

Working with the understanding that racial quotas are legally impermissible mechanisms¹² and that racial balancing is a legally insufficient interest,¹³ strong answers were lacking to what are now fundamental objections.¹⁴ This was further evidenced later during oral arguments. On the issue of critical mass, Justice Scalia and Solicitor General Donald Verrilli Jr. had the following exchange:

General Verrilli: And I will say, I do think, as the number of minority enrollees gets higher, the burden on the university to do that is going to get harder to meet. But I don't think—I don't think there is a number, and I don't think it would be prudent for this Court to suggest that there is a number, because it would raise exactly the

7. 539 U.S. 306 (2003).

8. *Id.* at 340.

9. Transcript of Oral Argument, *Fisher*, 133 S. Ct. 2411 (2013) (No. 11-345) [hereinafter *Fisher* Oral Argument].

10. *Id. passim.*

11. *Id.* at 46.

12. See *Grutter*, 539 U.S. at 389 ("The dissenting opinion by THE CHIEF JUSTICE . . . demonstrates beyond question why the concept of critical mass is a delusion used by the Law School to mask its attempt to make race an automatic factor in most instances and to achieve numerical goals indistinguishable from quotas. An effort to achieve racial balance among the minorities the school seeks to attract is . . . 'patently unconstitutional.'").

13. *Id.* at 323–24.

14. See *id.* at 334 ("To be narrowly tailored, a race-conscious admissions program cannot use a quota system.").

kind of problem that I—that I think Justice Kennedy identified in the *Grutter* dissent of creating hydraulic pressure towards that number.

Justice Scalia: We should probably stop calling it critical mass then, because mass, you know, assumes numbers, either in size or a certain weight.

General Verrilli: I agree.

Justice Scalia: So we should stop calling it mass.

General Verrilli: I agree.

Justice Scalia: Call it a cloud or something like that.

(Laughter)

General Verrilli: I agree that critical mass—the idea of critical mass has taken on a life of its own in a way that’s not helpful because it doesn’t focus the inquiry where it should be.¹⁵

Are these responses coherent? How do we typically answer Chief Justice Roberts’s and Justice Scalia’s questions? As I have noted before, a reasonable definition of critical mass in this context could be the following: “[Critical mass is] the diverse proportion of a student body, supported by some empirical evidence, which is necessary to realize the benefits of diversity within the educational environment.”¹⁶ While this definition requires additional inquiries and shared understandings—e.g., What do we believe are the benefits of diversity?—it is specific and contextual enough to allow for the following response to be given?

The concept of critical mass is a bit complex but it is not foreign to everyday realities and considerations. The concept is not rooted in arithmetic, so specifying a number is not necessary or necessarily helpful.¹⁷ The concept of critical mass comes from physics.¹⁸ We can think of it this way. How many cigarettes does one have to smoke to get cancer? Or how much radiation exposure must one endure before developing cancer? Much work has been done to responsibly and accurately answer these questions. In other words, we will know when we have reached a critical mass similar to how we have answered those

15. *Fisher* Oral Argument, *supra* note 9, at 70–71.

16. See John A. Powell, *The Many Faces of Affirmative Action*, HUFFINGTON POST (Oct. 17, 2012), http://www.huffingtonpost.com/john-a-powell/university-of-texas-affirmative-action_b_1971046.html.

17. *Critical Mass Definition*, ENCYCLOPEDIA BRITANNICA ONLINE, <http://www.britannica.com/EBchecked/topic/143385/critical-mass> (last visited Jan. 28, 2014) (“[C]ritical mass, in nuclear physics, [is] the minimum amount of a given fissile material necessary to achieve a self-sustaining fission chain reaction under stated conditions. Its size *depends on several factors*, including the kind of fissile material used, its concentration and purity, and the composition and geometry of the surrounding reaction system.”) (emphasis added).

18. *Id.*

questions—by accounting for a variety of factors and their arrangements. Specific numbers are not determinative.¹⁹

If we are to establish credibility, common ground, and coherence around relevant principles and concepts, inherent complexities can and must be acknowledged and narrated. At times, the Court has occasionally latched onto race's complexity, and has done so in a way that favors the upper class.²⁰ Again, the oral argument in *Fisher* is illustrative of the court dealing with this complexity.²¹ In many ways, the Justices and attorneys were struggling to figure out what is race and what is the role of affirmative action today.²²

What is it then? What is race? Social scientists have taught us that race is socially constructed.²³ What social scientists have not taught us—what we have not learned—is that everything is socially constructed, including the self.²⁴ There are people who argue, “We should not use race in our analysis because race is not biologically grounded. Instead we should use something else.”²⁵ Yet, no one has argued, “We should not analyze the self. It is a fiction.” The question is not so much whether race is social or biological, but rather what

19. *Id.*

20. john a. powell, *Constitutionalism and the Extreme Poor: Neo-Dred Scott and the Contemporary “Discrete and Insular Minorities,”* 60 *DRAKE L. REV.* 1069, 1069–71 (2012) (“The Lochner Era, which most students study, is also the Jim Crow Era. . . . The Lochner Era was predicated in part on the *Santa Clara* decision [*Santa Clara Cnty. v. S. Pac. R.R. Co.*, 118 U.S. 394 (1886)], which held that corporations are persons under the Fourteenth Amendment and therefore afforded due process protections. This claim was asserted and later prevailed during a period where real people—the freedmen in particular—were granted limited protection by the Court under the same amendments. . . . The Lochner Era is part of the process of judicial structuring of the market, including our national economy and our broader conceptualization of the market economy for the benefit of the corporate elites at the expense of workers and other non-elites. In doing so it created a structure that was not just hostile to workers, but hostile to both state and federal regulation.”) (footnotes omitted).

21. See *Fisher* Oral Argument, *supra* note 9, at 40–46, 59–63.

22. See *id.* at 43–45.

23. See MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES FROM THE 1960S TO THE 1980S* 4 (1986); DAVID R. ROEDIGER, *THE WAGES OF WHITENESS: RACE AND THE MAKING OF THE AMERICAN WORKING CLASS* 133–56 (2007) (describing the racial evolution of nonwhite Irish Americans into white Irish Americans); GEORGE YANCEY, *WHO IS WHITE?: LATINOS, ASIANS, AND THE NEW BLACK/NONBLACK DIVIDE* 16 (2003) (predicting that, similar to certain racial groups in the past, some of today's nonwhite racial groups may be considered white in the future); AUDREY SMEDLEY & BRIAN D. SMEDLEY, *RACE IN NORTH AMERICA: ORIGIN AND EVOLUTION OF A WORLDVIEW* 5–6 (4th ed. 2011).

24. BRUCE HOOD, *THE SELF ILLUSION: HOW THE SOCIAL BRAIN CREATES IDENTITY* 71 (2012).

25. See SMEDLEY & SMEDLEY, *supra* note 23, at XI (“Biological anthropologists, geneticists, and human biologists now claim that they no longer accept ‘race’ as having any validity in the biological sciences.”).

social practices are constructing race? Similar to how social practices shape how we see ourselves, social practices create how we see race. We must go beyond merely saying and accepting that race is socially constructed. Much like affirmative action, the practices that construct race are complex and multiple. Race is not one thing. It is not slavery. It is not Jim Crow. Rather, race consists of many factors that come together—where we live, where we were raised, language, and social and spatial separation.²⁶ To dig deeper, the construction of race is not limited to black people; it is a construction of all of us and particularly whites.²⁷

Without understanding these different complexities, we distort the issues and discussion. It becomes about the color of someone's skin, when what we are really talking about is something else. We are talking about that *something else* without naming it. When discussing affirmative action, like race, we deal with many variables including culture, neighborhoods, family, access to resources, segregation, and even our history and aspirations; though much of the time these variables remain unspoken. Thus the question becomes how do we begin to unpack affirmative action?

As I mentioned in the opening, Anderson's *The Imperative of Integration* has laid some of the groundwork.²⁸ Specifically, Anderson compares four models of race-based affirmative action in the United States: compensatory, discrimination-blocking, diversity, and integrative.²⁹ The compensatory model uses affirmative action as a tool to "compensate for the effects of past discrimination,"³⁰ while "[t]he discrimination-blocking model represents affirmative action as a tool for counteracting continuing discrimination."³¹ The final two models focus on institutions as a whole. "The diversity model represents racial preferences as a [tool] to increase the cultural and epistemic diversity of the institution practicing it."³² "The integrative model represents racial preferences as a [tool] to racially integrate the main institutions of civil society."³³

26. See ROEDIGER, *supra* note 23, at 134–37; YANCEY, *supra* note 23, at 16; OMI & WILKINSON, *supra* note 23, at 4; SMEDLEY & SMEDLEY, *supra* note 23, at 5.

27. See ROEDIGER, *supra* note 23, at 5; YANCEY, *supra* note 23, at 150–51.

28. ANDERSON, *supra* note 1, at 135.

29. *Id.*

30. *Id.*

31. *Id.* at 136.

32. *Id.* at 135.

33. *Id.* at 136.

Anderson helps us sort through what we have been doing and attempting to do with affirmative action. Her framing reveals our limited understanding of the nature and depth of not only affirmative action but related problems and solutions. Moreover, Anderson prefers the integrative model and highlights the shortcomings of the other models.³⁴ The compensatory model, according to Anderson, “suffers from a limited account of the causes of current unjust race-based disadvantages . . . and raises worries about how much longer these programs can be justified.”³⁵ The diversity model, on the other hand,

fails to account for the scope and weight of affirmative action preferences, . . . faces difficulties in explaining why, if race is a proxy, the relevant characteristic cannot be directly targeted instead, why people rather than disembodied ideas need to be present, and why, if racial preferences can be justified as instrumental to institutional goals, they cannot be turned against disadvantaged groups.³⁶

The correcting-decisions model is inadequate in that it “offers an incomplete account of current obstacles to equal opportunity: it focuses only on current discrimination, not on segregation and the lingering effects of past discrimination.”³⁷ Ultimately, Anderson settles on the integrative model: “[I]nstead of waiting for injustice to happen and compensating afterward, or merely blocking discriminatory mechanisms that retain their force, it aims to dismantle the continuing causes of race-based injustice,” namely segregation and stigmatization.³⁸

Anderson is clear about affirmative action, how it has been used, and how it can be used. She moves us closer to unpacking current and cumulative effects that intersect with affirmative action and race. To do this, we must not only be clearer on our conceptions of injustice, we must also be clearer about who we are and where we are socially located.

II. Decisionmaking and the Unconscious

Consider the following four numbers. The first number is forty. The second number is eleven million. The third number is ten to the

34. *Id.* at 154 (“The integrative model offers a complete account of the scope and weight of affirmative action preferences and of race-based injustice and answers or avoids the objections to the other models.”).

35. *Id.* at 153.

36. *Id.*

37. *Id.* at 148.

38. *Id.* at 154.

eightieth power—that is ten with eighty zeros after it. And the last number is ten to the millionth power—that is ten with a million zeros after it. What do these numbers represent? Forty is the number of bits³⁹ humans can consciously process.⁴⁰ That is it—only forty bits of information. Eleven million is the number of bits of information humans can unconsciously process in a second.⁴¹ That is to say, one might process forty bits consciously and eleven million bits unconsciously, every second. Roughly ten to the eightieth power represents the number of atoms in the known observable universe.⁴² Finally, it has been suggested that ten to the millionth power represents the total number of computations that human minds are capable of making.⁴³ But how is this relevant to affirmative action?

When discussing what goes on in our minds, we usually are referring to the forty bits of consciously processed information. For example, questions such as, “What do you think?”; “Why did you make that decision?”; and “How do you explain what happened?” only touch on those forty bits.⁴⁴ We are *not* referring to the eleven million bits per second of unconsciously processed information, even though research shows that we are forever affected by what is going on behind our

39. *Bit Definition*, PC MAGAZINE ONLINE, <http://www.pcmag.com/encyclopedia/term/38671/bit> (last visited Nov. 8, 2013) (“[Bits are] the smallest element[s] of computer storage. . . . [They] are widely used as a measurement for network transmission.”).

40. TIMOTHY WILSON, STRANGERS TO OURSELVES: DISCOVERING THE ADAPTIVE UNCONSCIOUS 24 (2004) (“The most liberal estimate is that people can process consciously about 40 pieces of information per second.”).

41. *Id.*

42. John Carl Villanueva, *Atoms in the Universe*, UNIVERSE TODAY (July 30, 2009), <http://www.universetoday.com/36302/atoms-in-the-universe/>.

43. See TOR NORRETRANDERS, *THE USER ILLUSION: CUTTING CONSCIOUSNESS DOWN TO SIZE* 143 (1999) (“Measurements of the channel capacity of the brain are harder to undertake experimentally, but we can estimate the magnitude. Karl Kùpfmùller arrives at a figure of ten billion bits a second, or far more than we take in from our surroundings. He calculates the number of nerve cells at ten billion, each of which can process one bit per second. His figures are very conservative: There are more like a hundred billion nerve cells, each equipped with an average of ten thousand connections to other nerve cells and thus able to handle more than one bit/sec. But no matter how high the precise figure, these figures really are what you could call astronomical. There are maybe a hundred billion stars in the Milky Way—and for each of them we have a nerve cell in our head. The number of connections is beyond comprehension: a million billion links between these hundred billion cell.”).

44. See, e.g., WILSON, *supra* note 40, at 24; CLAUDE M. STEELE, *WHISTLING VIVALDI: HOW STEREOTYPES AFFECT US AND WHAT WE CAN DO* 61 (2011) (though not discussing the amount of the mind that specifically deals with unconscious thought, speaking directly to the fact that there are many things, like race, that humans subconsciously take into account).

backs and in our environment.⁴⁵ In other words, the unconscious eleven million bits of information always affect us.⁴⁶ Moreover, we have different tests and measures to quantify the unconscious, especially unconscious biases.⁴⁷ We do not have to treat the unconscious the way that some of us treat race. We do not have to ask, “Is the unconscious real?”⁴⁸

Similarly, race is also critical to what we experience, and how we behave, at the unconscious level.⁴⁹ We know that people have tremendous racial anxiety at a conscious and unconscious level and that this is not just true of black Americans.⁵⁰ In some ways, this is truer with white Americans.⁵¹ People say, “Well, why are we talking about race? I never think about race.” Those people are only talking about the forty bits of information that they consciously perceive.⁵² In any given sec-

45. See WILSON, *supra* note 40, at 24; STEELE, *supra* note 44, at 61.

46. WILSON, *supra* note 40, at 24; see also *The Situation of Reason*, SITUATIONIST (Apr. 15, 2009), <http://thesituationist.wordpress.com/tag/strangers-to-ourselves/>.

47. See CHERYL STAATS, KIRWAN INST. FOR THE STUDY OF RACE AND ETHNICITY, STATE OF THE SCIENCE: IMPLICIT BIAS REVIEW 22–26 (2013), http://kirwaninstitute.osu.edu/docs/SOTS-Implicit_Bias.pdf.

48. WILSON, *supra* note 40, at 23 (“A . . . working definition of the unconscious is mental processes that are inaccessible to consciousness but that influence judgment, feelings, or behavior.”).

49. See STEELE, *supra* note 44, at 1–2.

50. *Id.* at 121. As Claude M. Steele reminds us, identity threats and anxiety are a part of everyone’s life; anxiety can be experienced even when people do not know they are experiencing it; and anxiety can increase heart rates, raise blood pressure, dramatically increase ruminative thinking, interfere with working memory, and deteriorate performance on challenging tasks. *Id.*

51. See Michael I. Norton & Samuel R. Sommers, *Whites See Racism as a Zero-Sum Game that They Are Now Losing*, 6 PERSPECTIVES ON PSYCHOL. SCI. 215, 215 (2011), available at <http://ase.tufts.edu/psychology/sommerslab/documents/raceInterNortonSommers2011.pdf> (“We show that this emerging belief reflects Whites’ view of racism as a zero-sum game, such that decreases in perceived bias against Blacks over the past six decades are associated with increases in perceived bias against Whites—a relationship not observed in Blacks’ perceptions. Moreover, these changes in Whites’ conceptions of racism are extreme enough that Whites have now come to view anti-White bias as a bigger societal problem than anti-Black bias.”). Frank L. Samson, Assistant Professor of Sociology at the University of Miami, found that white adults in California “generally favor admissions policies that place a high priority on high school grade-point averages and standardized test scores. But when these white people are focused on the success of Asian-American students, their views change.” Scott Jaschik, *Meritocracy or Bias*, INSIDE HIGHER ED (Aug. 13, 2013), <http://www.insidehighered.com/news/2013/08/13/white-definitions-merit-and-admissions-change-when-they-think-about-asian-americans>.

52. See WILSON, *supra* note 40, at 24; IAN HANEY-LOPEZ, *DOG WHISTLE POLITICS: HOW CODED RACIAL APPEALS HAVE REINVENTED RACISM AND WRECKED THE MIDDLE CLASS* (2014) (describing how politicians deploy veiled racial appeals to persuade voters, mainly white voters, to support policies that favor the extremely rich yet hamper their own interests).

ond, almost eleven million bits of information has them (and us) constantly thinking about race.⁵³

This understanding is consequential. The structures that exist internally (e.g., the mind) and externally (e.g., physical spaces and institutions and their arrangements) produce and re-produce racial meanings and racialized outcomes.⁵⁴ It is not uncommon to hear, “We are not going to pay attention to race. We are just going to look at the individual.” But, this is simply untrue. Humans’ cognitive decision-making processes cannot easily look at the individual without certain types of biases.⁵⁵ If we acknowledge and do the work that is increasingly understood in the field of neuroscience, and name it, we can then understand that most of what is taking place at the unconscious level is not about race, *per se*.⁵⁶ This understanding profoundly shifts the way we understand what it means to be a person. And it should profoundly shift our thinking around fairness and affirmative action.

What does it mean to say that it is not about race, *per se*? The unconscious, where all this work is happening, is largely social, not private.⁵⁷ The unconscious absorbs and processes social cues, social mechanisms, and social associations that come from people’s environ-

53. See WILSON, *supra* note 40, at 24.

54. For example, before widespread U.S. immigration reform was pursued:

Leo Chavez studied U.S. magazine covers devoted to immigration between 1965 and 2000 and classified them as affirmative, alarmist, or neutral in their portrayal of immigrants. Covers coded as “affirmative” used text and images to celebrate immigration; “alarmist” covers used text and images to convey problems, fears, or dangers associated with immigration; and “neutral” covers were covers were accompanied by articles that offered balanced and factual coverage of immigration issues that was neither affirmative nor alarmist.

Chavez found that alarmist themes overwhelmingly predominated in coverage of immigration after 1965, characterizing two-thirds of all covers devoted to the topic from 1965 through 1999, compared with just 9 percent classifiable as neutral and 19 percent as affirmative . . . 18 percent of the alarmist covers appeared in the 1970s, 38 percent were published in the 1980s, and 45 percent appeared in the 1990s. Upsurges in alarmist text and imagery also coincided with recessionary periods in the United States.

DOUGLAS MASSEY, CATEGORICALLY UNEQUAL: THE AMERICAN STRATIFICATION SYSTEM 132–33 (2007) (citation omitted).

55. See STAATS, *supra* note 47 at 22–26.

56. CASS SUNSTEIN, SIMPLER: THE FUTURE OF GOVERNMENT 37 (2013). Cass Sunstein refers to a similar concept and effect that she calls choice architecture. “We can understand choice architecture as the design of the social environment in a way that influences people’s choices . . .” *Id.*

57. See HOOD, *supra* note 24, at 280. Many think of the unconscious or subconscious as a cognitive process that is unique to the individual, instead of a cognitive process that is interrelated and interdependent upon socially constructed environments, social interactions, and structural arrangements. *Id.*; WILSON, *supra* note 40, at 26 (“Children do not spend hours studying vocabulary lists and attending classes on grammar and syntax. They

ment, and each of our brains is continuously organizing incoming information.⁵⁸ Simply put, our environment has profound effects on who we are and how we navigate the world.⁵⁹ The question then is, what type of structures will move us (internally and externally) forward?

III. Moving Within, Around, or Beyond Racialized Space?

Though the Supreme Court will be dealing with affirmative action for a long time, and although there has been a 4-4-1 split on the Supreme Court in the *Fisher* decision,⁶⁰ the Court can shift very easily. It is incoherent, however, for the Supreme Court to recognize that students are in deeply segregated educational spaces, while also asserting that race shouldn't matter.⁶¹ Social spaces in the United States are racialized. These racialized and racially segregated spaces (e.g., residential, educational, religious, employment) belie the claim that race should not matter.⁶² American society and its social structures are organized around race and economic segregation.⁶³ This racialization is

would be hard pressed to explain what participles are, despite their ability to use them fluently. Humans learn to speak with no effort or intention.”).

58. See WILSON, *supra* note 40, at 26 (“Implicit learning is defined as learning without effort or awareness of exactly what has been learned. . . . [I]t is clear that the adaptive unconscious is capable of learning complex information, and indeed under some circumstances it learns information better and faster than our conscious minds.”).

59. YANCEY, *supra* note 23, at 16 (“Eduardo Bonilla-Silva argues that a racialized social system approach is the best way to understand racism. He defines racialized social structures as societies in which economic, political, social, and ideological levels are partially structured by the placement of actors in racial categories. Individuals within these racialized social systems receive different levels of rewards or costs depending on their placement. The contrasting benefits that distinct racial actors receive from this system provide different motivation for those actors to either change or maintain the racial status quo.”); see generally RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* (2008) (detailing how people can design environments that make it easier for others to make healthier, safer, and better decisions).

60. See *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013).

61. *Id.* at 2433. This incoherence was not lost on Justice Ginsburg. In her dissent, she remarked, “I have said before and reiterate here that only an ostrich could regard the supposedly [race-]neutral alternatives as race unconscious.” *Id.*

62. See Brief of Housing Scholars as Amici Curiae Supporting Respondents at 1–3, *Twp. of Mount Holly v. Mt. Holly Gardens Citizens in Action, Inc.*, 134 S. Ct. 636 (2013) (No. 11-1507), 2013 WL 5820524.

63. See *id.* at 1 (describing the history of federal, state, and local governmental policies that created racially segregated patterns in U.S. metropolitan regions); see generally *WHERE CREDIT IS DUE: BRINGING EQUITY TO CREDIT AND HOUSING AFTER THE MARKET MELTDOWN* (Christy Rogers & John A. Powell eds., 2013) (discussing that effects on local and global economies are rarely structured in language pointing to structural racism); DOUGLAS MASSEY & NANCY DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* 3 (1993); MELVIN OLIVER & THOMAS SHAPIRO, *BLACK WEALTH / WHITE WEALTH: A*

widespread, such that the organization of space around race is not limited to poor blacks or wealthy whites.⁶⁴ When we wrestle with the question, “Where do we go from here?” we are not wrestling with or deciding between socioeconomic status versus race. In many ways, this is a false dichotomy.⁶⁵

Multiple factors define who we are. Socioeconomic status is one of them, but it is just one. The experience of blacks—and certainly low-income blacks—is not the same as the experience of whites. Gunnar Myrdal spoke of this dynamic in 1944 in his book *An American Dilemma*.⁶⁶ He was Swedish.⁶⁷ He did not have a major interest in the fight.⁶⁸ He noticed, at the time, and argued, that the situations of the poor negro and the poor white in the United States are fundamentally different.⁶⁹ How is it that so many smart people still fail to understand that? Is it just too complex? Is it willful ignorance? Do they get something out of not understanding it?

What I want to suggest in terms of the different ways of thinking about affirmative action and sorting through the complexity is related to Anderson’s four models. At the core, the models she details and the structures that have racialized (and that do racialize) U.S. space are merely tools. How, then, do we actually build a United States? How do

NEW PERSPECTIVE ON RACIAL INEQUALITY 153 (Taylor & Francis Group 2d ed. 2006) (1997); Valerie Strauss, *Report: Public Schools More Segregated Now than 40 Years Ago*, WASHINGTON POST (Aug. 29, 2013), <http://www.washingtonpost.com/blogs/answer-sheet/wp/2013/08/29/report-public-schools-more-segregated-now-than-40-years-ago/> (noting that African-American students are more isolated than they were forty years ago).

64. See MASSEY & DENTON, *supra* note 63, at 38–39; see generally SHERYLL CASHIN, *THE FAILURES OF INTEGRATION: HOW RACE AND CLASS ARE UNDERMINING THE AMERICAN DREAM* 15 (2004) (“Affluent blacks in the Los Angeles area are . . . more segregated than poor Latinos.”).

65. See GUNNAR MYRDAL, *AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY* 75 (Twentieth Anniversary ed. 1962) (1944) (“We hear it said *nowadays* that there is no ‘race problem,’ but only a ‘class problem.’ . . . From a practical angle there is a point in this reasoning. But from a theoretical angle it contains escapism in new form. . . . And it tends to conceal the whole system of special deprivations visited upon the Negro only because he is not white.”).

66. *Id.* at 97–98.

67. Gunnar Myrdal, *Analyst of Race Crisis, Dies*, N.Y. TIMES (May 18, 1987), at A1.

68. See MYRDAL, *supra* note 65, at xlvi (“There was no lack of competent scholars in the United States who were deeply interested in the problem and had already devoted themselves to its study, but the whole question had been for nearly a hundred years so charged with emotion that it appeared wise to seek as the responsible head of the undertaking someone who could approach his task with a fresh mind, uninfluenced by traditional attitudes or by earlier conclusions, and it was therefore decided to ‘import’ a general director. . . . [T]he search was limited to countries of high intellectual and scholarly standards . . . and . . . ended in the selection of Dr. Gunnar Myrdal . . .”).

69. See *id.*

we build an inclusive society? What are the right mechanisms to decide? How do we distribute what are apparently scarce resources?”

These questions and affirmative action itself are deeply political. They are not merely about test questions. They are not how an applicant performed on a specific mindset bubble test. The future of affirmative action is about who we are and who we are going to become as a nation.

Now, there are some tactical things we could do. We could say, okay, we are not going to use race. The Court constrained our use of race, so we are forced to use other things. We can use geography.⁷⁰ But this, too, is contradictory. The reason geography works as a mechanism for achieving race-based goals is because American society is racially segregated.⁷¹ Think about what society—including the Court—is essentially saying.⁷² It seems to say, “We are using the fact that we can’t use race, to use race in another place where we can use it.” The fact that schools in Texas, in San Francisco, and in Oakland, are racially and economically segregated is indisputable.⁷³ The Court has not yet meaningfully acknowledged that. And of course, in *Parents*

70. See Meredith P. Richards, Kori J. Stroub, Julian Vasquez Heilig & Michael R. Volonnino, *Achieving Diversity in the Parents Involved Era: Evidence for Geographic Integration Plans in Metropolitan School Districts*, 14 BERKELEY J. AFR.-AM. L. & POL’Y 65, 68–69 (2012) (“This article examines one promising and innovative policy strategy, pioneered by Berkeley Unified School District (USD), which leverages persistent patterns of residential racial and economic segregation by assigning students to schools on the basis of characteristics of the neighborhoods in which they reside. Such plans exploit historic patterns of neighborhood racial and socioeconomic segregation, presuming that neighborhood characteristics will reliably predict student characteristics. Thus, a school that is diverse in terms of the neighborhoods it represents will also have a comparably diverse student body.”).

71. See generally Ilyce Glink, *U.S. Housing Market Remains Deeply Segregated*, CBS NEWS (June 20, 2012), http://www.cbsnews.com/8301-505145_162-57443862/u.s-housing-market-remains-deeply-segregated/ (discussing racial segregation in the context of the real estate market in the United States).

72. See *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 789 (2007) (Kennedy, J., concurring) (suggesting the creation of “attendance zones with general recognition of the demographics of neighborhoods”); *Am. Civil Rights Found. v. Berkeley United Sch. Dist.*, 90 Cal. Rptr. 3d 789, 798-99 (1st Dist. 2009) (holding that Berkeley United School District’s plan, which leverages persistent patterns of residential racial segregation by assigning students to schools on the basis of the characteristics of the neighborhoods, is not racially discriminatory or preferential).

73. See Monica Kortsha, *UT Study Shows Jim Crow-era Segregation Persists in Texas Schools*, THE HORN (Aug. 20, 2013), http://www.readthehorn.com/news/82309/ut_study_shows_jim_crow_era_segregation_persists_in_texas_schools; John R. Logan & Brian J. Stults, *The Persistence of Segregation in the Metropolis: New Findings from the 2010 Census*, PROJECT US 2010, at 6–7 (2011), <http://www.s4.brown.edu/us2010/Data/Report/report2.pdf>; Katie Worth, *Brown University Study Says San Francisco Makes Small Gains in Integration*, S.F. EXAMINER (Mar. 26, 2011), <http://www.sfexaminer.com/sanfrancisco/brown-university-study-says-san-francisco-makes-small-gains-in-integration/Content?oid=2172026>.

Involved,⁷⁴ not only does the Court not acknowledge it, they might as well have said, “You can’t fix it. We’re not going to allow you to fix it. But, when the student is seventeen or eighteen, take a snapshot. We don’t want to hear about, you know, what kind of high school he or she went to. We don’t want to hear if certain neighborhood schools don’t offer AP classes. We don’t want to hear if he or she had good teachers.” This is fundamentally incoherent and really dishonest. Ultimately, we are dealing with political questions that will be decided politically.

IV. Situatedness

We are profoundly complex. As a concept, race is also incredibly complex and deals with our social, structural, and political location within society.⁷⁵ As such, we are not all situated the same. In fact, not all white people are situated the same. The elites—whites and non-whites—are not situated like the rest of us. How the elites think and how a particular racial group appears to think are often not the same. Social location matters: it shapes people’s identities, anxieties, and allegiances.⁷⁶ To this point, the elites are strategic. The 2012 Presidential election made this plain.

Newt Gingrich gave several speeches before the election in which he attacked undocumented immigrants.⁷⁷ There were others who said and implied, “Build an electric fence. Keep them out of our country.

74. *Parents Involved*, 551 U.S. 701.

75. See YANCEY, *supra* note 23, at 10.

76. See STEELE, *supra* note 44, at 76–79. People are consciously and unconsciously cognizant of social location and social hierarchies. *Id.* According to Claude Steele, this phenomenon has been documented in hundreds of studies, with different samples of people, in dozens of countries around the world. *Id.* The mere act of assigning two groups different labels (e.g., “over-estimator” vs. “under-estimator”) can lead people to discriminate against the other group (out-group), even when their group (in-group) ultimately receives less benefits (and is harmed more) as a result of the discrimination. *Id.*

77. Kasie Hunt, *Gingrich: Bilingual Classes Teach ‘Ghetto’ Language*, WASHINGTON POST (Apr. 1, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/03/31/AR2007033100992.html> (“The American people believe English should be the official language of the government. . . . We should replace bilingual education with immersion in English so people learn the common language of the country and they learn the language of prosperity, not the language of living in a ghetto. . . . Citizenship requires passing a test on American history in English. If that’s true, then we do not have to create ballots in any language except English.”). Mr. Gingrich stated in 1995 that “bilingualism poses ‘long-term dangers to the fabric of our nation’ and that ‘allowing bilingualism to continue to grow is very dangerous.’” *Id.* See also Press Release, Mitt Romney Newt’s No Good, Very Bad Morning in Miami (Jan. 25, 2012), available at <http://www.presidency.ucsb.edu/ws/?pid=99303>.

They're destroying our country."⁷⁸ The election marked a drastic change in conservative politicians' and commentators' position.⁷⁹

The neuroscience field is relevant to such shifts and developments. We can measure an individual's and a group's inclination to unconsciously perceive humans as humans⁸⁰ (as opposed to unconsciously misperceiving humans to be, for example, apes).⁸¹ Credible research has shown that people who are perceived to be Black or Latino are at times unconsciously linked to non-human and negative associations.⁸² This cognitive development among people, however, was not publicly engaged and typically is not. During the debates and on

78. Edward Wyatt, *Cain Proposes Electric Fence*, N.Y. TIMES (Oct. 15, 2011), <http://the-caucus.blogs.nytimes.com/2011/10/15/cain-proposes-electrified-border-fence/>. Before claiming that he was only joking, Presidential hopeful Herman Cain spoke multiple times about an electric fence: "It's going to be 20 feet high. It's going to have barbed wire on the top. It's going to be electrified. And there's going to be a sign on the other side saying, 'It will kill you — Warning.'" *Id.* Adding that it was improper to accuse him of being insensitive, but rather "it's insensitive for them to be killing our citizens, killing our border agents. That's what's insensitive. And that mess has to stop." *Id.*; see also Joshua Chaffee, *GOP Memo on Immigration: Don't Use the Phrase 'Electric Fence'*, MSNBC (Nov. 7, 2013), <http://www.msnbc.com/nw-with-alex-wagner/gop-memo-immigration-dont-use-the-phrase> ("A Republican super PAC is urging conservatives to stop using incendiary terms when discussing immigration.").

79. Joe Garofoli, *Latino Power: Suddenly, Sean Hannity Wants Immigration Reform*, S.F. GATE (Nov. 9 2012), <http://blog.sfgate.com/nov05election/2012/11/09/latino-power-suddenly-sean-hannity-wants-immigration-reform/>; Brad Knickerbocker, *Did Newt Gingrich Just Flip-flop on Immigration?*, CHRISTIAN SCIENCE MONITOR (Nov. 26, 2011) <http://www.csmonitor.com/USA/Politics/The-Vote/2011/1126/Did-Newt-Gingrich-just-flip-flop-on-immigration>.

80. Lasana T. Harris & Susan T. Fiske, *Social Neuroscience Evidence for Dehumanised Perception*, 20 EUROPEAN REVIEW OF SOC. PSYCHOL. 192, 192 (2009) ("Our perception makes category errors. People sometimes perceive other people as if they are animals or objects, and objects or animals as if they are people.").

81. See STAATS, *supra* note 47, at 24, 44; Phillip Goff et al., *Not Yet Human: Implicit Knowledge, Historical Dehumanization, and Contemporary Consequences*, 94 J. PERSONALITY & SOC. PSYCHOL. 292, 292–93 (2008).

82. See Shankar Vedantam, *See No Bias*, WASHINGTON POST, Jan. 23, 2005, at W12 available at <http://www.washingtonpost.com/wp-dyn/articles/A27067-2005Jan21.html> ("It was as if African American names were insect names and European American names were flower names. I had as much trouble pairing African American names with pleasant words as I did insect names with pleasant words."); Mary Ann Gwinn, *'Blindspot' an Eye-opening Look at Our Unconscious Biases*, SEATTLE TIMES (Feb. 11, 2013), available at http://seattletimes.com/html/books/2020316721_litlife11xml.html ("They found that, when forced to make rapid choices on a list, it was much easier and quicker for people to sort things they had a pleasant association with (flowers and happy words like 'heaven') than unpleasant (insects and yucky words like 'evil'). They expanded the concept and soon, they were asking subjects to sort faces of various races (white, black, Hispanic, Asian) along with pleasant and unpleasant words (health, agony). They learned that in general, people's unconscious associations make them faster at clumping white faces with pleasant words than black faces with pleasant words.").

campaign trails, we only heard and analyzed the forty bits per second of conscious information: They don't deserve to be here. They are destroying everything good about America.⁸³ The discussion that followed often centered on what was said, as opposed to how listening individual's and groups' unconscious minds would be affected.

Here, the aftermath of the election was telling. After the election, conservative commentators went back on national television with a different message: There needs to be a "pathway [for immigrants] to citizenship."⁸⁴ Conservatives, including supporters of Newt Gingrich, had been down this road before.⁸⁵ Republicans knew the conservative base would likely be thinking, "Two weeks ago, you were telling us we need to destroy these people—that they were a threat to everything we love. How can you say this now?"⁸⁶ At the unconscious level, the conservative base might have been thinking, "They're not even people. They're terrible." Conservative pundits' response was terse, things have changed. Our positions have "evolved," and "the language of dealing with Latinos has to be changed."⁸⁷

Conservatives have realized enough voters did not accept their former strategies, and now it is time to change their approach.⁸⁸ In some ways, this is actually very significant.⁸⁹ The elite's actions—in terms of how they have attempted to educate and organize the non-elite—will continue to be incredibly instructive.⁹⁰ To this point, we

83. See Josh Israel, *The Eight Most Xenophobic Stances of Tom Tancredo, Candidate for Colorado*, THINK PROGRESS (May 23, 2013), <http://thinkprogress.org/immigration/2013/05/23/2052411/xenophobic-tom-tancredo-colorado-governor/> (highlighting comments made by former Congressman Tom Tancredo (R), who finished second in the 2010 Colorado gubernatorial race as an American Constitution Party candidate and is currently seeking the Republican nomination for governor in the 2014 election).

84. Hilary Tone, *Fox News Hosts Embrace Immigrants Now that the GOP Needs Them*, MEDIA MATTERS (Nov. 9, 2012), [http://mediamatters.org/research/2012/11/09/fox-news-hosts-embrace-immigrants-now-that-the/191316](http://mediamatters.org/research/2012/11/09/fox-news-hosts-embrace-immigrants-now-that-the/).

85. Knickerbocker, *supra* note 79. Immediately following Gingrich's unexpected declarations on immigration, Tim Albrecht, Deputy Chief of Staff to Gov. Terry Branstad in Iowa (the state holding the first caucuses in January), tweeted: "Newt did himself significant harm on immigration among caucus and primary voters." *Id.*

86. See generally *id.*

87. See Tone, *supra* note 84.

88. *Id.*

89. See generally HANEY-LOPEZ, *supra* note 52 (explaining that social scientists are not the only ones paying attention to forces that shape people's identities, anxieties, and allegiances).

90. See *An Immigration Debate Based on Reality*, GINGRICH PRODUCTIONS (Feb. 8, 2013), <http://www.gingrichproductions.com/2013/02/an-immigration-debate-based-on-reality/> ("[A]s the current immigration debate heats up it is critical for us to recognize that words and attitudes really matter. Understanding what people hear matters. We may not mean to

should be aware of and preparing for these and other shifts in society and politics, including the pending shift in the Court.⁹¹

This brings us to Justice Kennedy who has said he is against vocalization, using programs that tell each student they are different specifically because of race.⁹² He is concerned about white resentment and he is attempting to parse out a different way of thinking about race and affirmative action that does not excite resentment.⁹³ He has not really figured it out. How Kennedy—and other elites and decision-makers—figures this out, both legally, but also politically, in part depends on us.

Conclusion

It is important that we drill-down and think what we are doing when we talk about race and what should happen next with affirmative action. Will we do more than just take snapshots? Many have discussed and pondered the importance of having President Obama in

say what people hear we [sic] say. After decades in politics this is a lesson I have learned the hard way.”).

91. *Biographies of Current Justices of the Supreme Court*, SUPREME COURT OF THE UNITED STATES, <http://www.supremecourt.gov/about/biographies.aspx> (last visited Feb. 7, 2014). Justice Ginsberg is eighty years old, Justice Scalia is seventy-seven years old, Justice Kennedy is seventy-seven years old, and Justice Breyer is seventy-five years old. *Id.*

92. *See* *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 788 (2007) (Kennedy, J., concurring) (“If school authorities are concerned that the student-body compositions of certain schools interfere with the objective of offering an equal educational opportunity to all of their students, they are free to devise race-conscious measures to address the problem in a general way and without treating each student in different fashion solely on the basis of a systematic, individual typing by race. School boards may pursue the goal of bringing together students of diverse backgrounds and races through other means, including strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race. These mechanisms are race conscious but do not lead to different treatment based on a *classification that tells* each student he or she is to be defined by race”) (emphasis added).

93. *See id.* at 796–97 (“So, the argument proceeds, if race is the problem, then perhaps race is the solution. The argument ignores the dangers presented by individual classifications, dangers that are not as pressing when the same ends are achieved by more indirect means To be forced to live under a state-mandated racial label is inconsistent with the dignity of individuals in our society. And it is a label that an individual is powerless to change. Governmental classifications that command people to march in different directions based on racial typologies can cause a new divisiveness. The practice can lead to corrosive discourse, where race serves not as an element of our diverse heritage but instead as a bargaining chip in the political process. On the other hand race-conscious measures that do not rely on differential treatment based on individual classifications present these problems to a lesser degree.”); *see also* Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Equality Ground of Decision in Race Equality Cases*, 120 *YALE L.J.* 1278 (2011).

the White House.⁹⁴ There is very strong evidence that the United States is more racially polarized now than before Barack Obama was elected President.⁹⁵ This is to say that there is more explicit and implicit resentment—e.g., anti-black resentment—than before Obama was in the White House.⁹⁶

This post-Obama resentment is consistent with voting rights patterns and the Court's recent decision that has undermined the Voting Rights Act.⁹⁷ The ruling in *Shelby County v. Holder*⁹⁸ came down after

94. John Avlon, *The Obama Haters Book Club*, DAILY BEAST (Oct. 26, 2010), <http://www.thedailybeast.com/articles/2010/10/26/anti-obama-books-the-secret-hate-driving-the-mid-term-elections.html> (“Just two years into his term, some 46 books demonizing the president have been published At this point in Bush’s presidency there were only five anti-W books (a total no doubt depressed by the national unity that emerged in the wake of 9/11) [A] rough count of anti-Clinton books at this point in his presidency reached only 11, despite an approval rating in the mid-30s and the onset of the 1994 Republican Revolution.”).

95. Henry Wolff, *Race and the 2012 Election*, AMERICAN RENAISSANCE (Nov. 9, 2012), <http://www.amren.com/features/2012/11/race-and-the-2012-election/> (“Mr. Romney is the first presidential candidate in US history to receive so high a share of the white vote and still lose the election.”); David C. Wilson, *The Elephant in the Exit Poll Results: Most White Women Supported Romney*, HUFFINGTON POST (Nov. 8, 2012), http://www.huffingtonpost.com/david-c-wilson/the-elephant-in-the-exit_b_2094354.html (“All white voters regardless of age . . . voted a majority for Romney. All other racial ethnic groups, regardless of age, voted unanimously for Obama.”); Colleen Curry, *Hate Groups Grow as Racial Tipping Point Changes Demographics*, ABC NEWS (May 18, 2012), <http://abcnews.go.com/US/militias-hate-groups-grow-response-minority-population-boom/story?id=16370136> (“Marilyn Mayo, co-director of the Anti-Defamation League’s Center on Extremism, said white supremacist groups have increased their efforts to recruit and plot based on the changing racial makeup of America.”).

96. “In all, 51% of Americans now express explicit anti-black attitudes, compared with 48% in a similar 2008 survey. When measured by an implicit racial attitudes test, the number of Americans with anti-black sentiments jumped to 56%, up from 49% during the last presidential election. In both tests, the share of Americans expressing pro-black attitudes fell.” AP, *AP poll: U.S. majority have prejudice against blacks*, USA TODAY (October 27, 2012), <http://www.usatoday.com/story/news/politics/2012/10/27/poll-black-prejudice-america/1662067/>.

97. Stephen Menendian, *Shelby County v. Holder: Extend Voting Rights Nationwide*, BERKELEY BLOG (June 29, 2013), <http://blogs.berkeley.edu/2013/06/29/shelby-county-v-holder-extend-voting-rights-nationwide/> (“[T]he Court . . . overturned the *formula* used to determine which jurisdictions were covered, in effect nullifying the preclearance requirement. After *Shelby*, section 5 remains on the books, but dead law. No states or jurisdictions are covered by it Section 5 of the Voting Rights Act is not only historically significant, but stands as a contemporary example of the kinds of structural reforms necessary to improve local conditions and guarantee equal citizenship. It is a model for addressing structural harms in a dynamic system. Section 2’s individualistic, case by case [sic] approach cannot account for perpetually novel forms of exclusion. Overturning the coverage formula virtually guarantees, if not encourages, such exclusion.”). For a breakdown of the increase in voter ID laws and their requirements, see *Voter Identification Requirements*, NAT’L CONFERENCE OF STATE LEG. (Oct. 17, 2013), <http://www.ncsl.org/legislatures-elections/elections/voter-id.aspx>.

an election determined that “Obama losses among white voters came primarily from the South, in Republican strongholds that Obama was already expected to lose.”⁹⁹ How could the South be any more racially polarized?¹⁰⁰

We are in a complex place. There are different places in the country and different places within the non-black community and the black community. I think part of figuring out what should happen next involves embracing this complexity and seeing if we can build a United States.

98. *Shelby County v. Holder*, 133 S. Ct. 2612 (2013).

99. Brett LoGiurato, *Barack Obama Never Had a Problem with White Voters*, BUSINESS INSIDER (Nov. 8, 2012), <http://www.businessinsider.com/obama-white-vote-exit-polls-election-ohio-wisconsin-iowa-2012-11> (“In Missouri, for example, the president won only 32% of whites, down from 42% in 2008. In Virginia and Florida, he won only 37% of the white vote, down from 39% and 42%, respectively. In North Carolina, Obama only managed to capture 31% of white voters, down four points from 2008. In other parts of the Republican-heavy South—South Carolina, Georgia, and Tennessee, for example—the numbers were even worse.”).

100. Stephen Ansolabehere, Nathaniel Persily & Charles Stewart III, *Regional Differences in Racial Polarization in the 2012 Presidential Election: Implications for the Constitutionality of Section 5 of the Voting Rights Act*, 126 HARV. L. REV. F. 205, 205 (2013) (“[C]ontrary to much conventional wisdom, racial polarization had actually increased in the 2008 election, especially in the areas covered by section 5 of the [Voting Rights Act]. We find ourselves in much the same position now as we did three years ago. We also find ourselves coming to the same conclusions, which have become, if anything, more strongly supported by recent data. Voting in the covered jurisdictions has become even more polarized over the last four years, as the gap between whites and racial minorities has continued to grow.”); Stephanie Chen, *Growing Hate Groups Blame Obama, Economy*, CNN (Feb. 29, 2009), http://www.cnn.com/2009/US/02/26/hate.groups.report/index.html?eref=ib_topstories (“Most of the hate groups are located in the South.”); Mark Potok, *The Year in Hate and Extremism*, SOUTHERN POVERTY LAW CTR., <http://www.splcenter.org/home/2013/spring/the-year-in-hate-and-extremism> (last visited Jan. 28, 2014) (“Daniel Miller, president of the secessionist Texas National Movement, said that his membership shot up 400% after Obama’s re-election.”); Christopher S. Elmendorf & Douglas M. Spencer, *The Geography of Racial Stereotyping: Evidence and Implications for VRA Preclearance After Shelby County* 47-48 (UC Davis Legal Studies Research, Working Paper No. 339, 2013), available at <http://ssrn.com/abstract=2262954> (“Except for Virginia, the Southern covered states rank in the top 1/3 of the nation by the Google-search measure of racial animus Highton’s ranking puts all seven of the covered Southern states into the top tercile by anti-black prejudice, including Virginia (ranked #14).”).

