

## The 2016 Election, the Supreme Court, and Racial Justice

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The election of the first African-American president led to claims that the United States had moved to a post-racial society.<sup>1</sup> This, of course, was not the first time that there have been such declarations. Almost from the moment the Civil War ended and the Thirteenth Amendment abolished slavery, there were declarations that the United States had moved beyond race. Indeed, the Supreme Court made such a pronouncement in 1883 in the *Civil Rights Cases*.<sup>2</sup> In invalidating a federal law that prohibited racial discrimination by places of public accommodation, the Court proclaimed:

When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen, or a man, are to be protected in the ordinary modes by which other men's rights are protected.<sup>3</sup>

But the United States is not now, and perhaps never can be, post-racial. The repeated incidents of white police killing African-American men show that policing in the United States is not post-racial. The incarceration rate among African-American men is more than 3,000 per 100,000 citizens, roughly 6 times the rate among white men.<sup>4</sup> An African-American male born in 2001 has a 32 percent chance of serving time in prison at some point in his

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<sup>1</sup> See generally *Beyond the Final Frontier: A "Post-Racial" America?*, 25 Harv Black-Letter L J 1 (2009) (collecting articles on post-racialism); Mario L. Barnes, Erwin Chemerinsky, and Trina Jones, *A Post-Race Equal Protection?*, 98 Georgetown L J 967, 976 (2010) (observing that "the United States appears to be in a state of racial fatigue. . . . Post-racialism makes it unnecessary to focus on the problems. Being post-racial feels good.").

<sup>2</sup> 109 US 3 (1883).

<sup>3</sup> Id at 25.

<sup>4</sup> E. Ann Carson and William J. Sabol, *Prisoners in 2011* \*8 (Bureau of Justice Statistics, Dec 2012), archived at <http://perma.cc/NK65-E4S5>.

life, while a white male born at the same time has a 6 percent chance of being sent to prison.<sup>5</sup> While the median income level of African-American families has increased over the last two decades, it is still less than two-thirds that of white families.<sup>6</sup> Moreover, “[m]iddle-class blacks . . . earn seventy cents for every dollar earned by middle-class whites but they possess only fifteen cents for every dollar of wealth held by middle-class whites.”<sup>7</sup> The legacy of slavery, the history of race discrimination in every corner of society, and continuing racial inequalities all make it impossible for this country to be post-racial.

What might the 2016 presidential election mean with regard to the Supreme Court and race? The simple reality is that the next president, especially if he or she serves two terms, is likely to fill three and perhaps four vacancies on the Supreme Court depending on whether Judge Merrick Garland is confirmed to replace Justice Antonin Scalia. Since 1971, seventy-eight years old is the average age at which a Supreme Court justice has left the bench.<sup>8</sup> In 2017, the year the next president is inaugurated, there will be three justices seventy-eight or older: Justices Ruth Bader Ginsburg, Anthony Kennedy, and Stephen Breyer.

What might replacing these justices (and Scalia) mean for racial justice in the United States? Consider two examples: affirmative action and disparate impact liability. Both are crucial to remedying the long history of race discrimination in the United States and achieving racial justice. As for both, who fills the coming vacancies on the Supreme Court will be crucial in determining the law.

This, of course, is a product both of who is the next president and who controls the US Senate. If the president and the Senate leadership are from the same political party, virtually any nominee is likely to be confirmed. Confirmation fights—at least those

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<sup>5</sup> Thomas P. Bonczar, *Prevalence of Imprisonment in the U.S. Population, 1974-2001* \*1 (Bureau of Justice Statistics, Aug 2003), archived at <http://perma.cc/4UVC-GDWD>.

<sup>6</sup> In 2008, the poverty rate was 8.6 percent for non-Hispanic whites, 24.7 percent for blacks, 11.8 percent for Asians, and 23.2 percent for Hispanics. Carmen DeNavas-Walt, Bernadette D. Proctor, and Jessica C. Smith, *Income, Poverty, and Health Insurance Coverage in the United States: 2008* \*13 (US Census Bureau, Sept 2009), archived at <http://perma.cc/92XW-XJG7>.

<sup>7</sup> Melvin L. Oliver and Thomas M. Shapiro, *Black Wealth/White Wealth: A New Perspective on Racial Inequality* 7–8 (Routledge, 2d ed 2006).

<sup>8</sup> *Judgment Day 2016: The Future of the Supreme Court as a Critical Issue in the 2016 Presidential Election* \*3 (People for the American Way, 2015), archived at <http://perma.cc/ZS6Z-RNWF>.

with a chance of success—occur when the president and the Senate are of different political parties. For example, the last three nominees to be denied confirmation—Judges Robert Bork, Harold Carswell, and Clement Haynsworth—were nominated by a Republican president when there was a Senate controlled by Democrats. No one questions that Garland would be quickly confirmed if there were a Democratic Senate today. In fact, it is unlikely that Garland would be the nominee if the Democrats had control of the Senate. President Barack Obama likely would have picked someone more liberal than the moderate Garland.

In considering what this election will mean for race and the Constitution, it is easiest to predict what will happen if the president and the Senate are of the same political party. A Democratic president then could, and likely would, pick someone who will be progressive with regard to the racial issues discussed below. A Republican president could, and likely would, pick someone who will be conservative with regard to these racial issues. If the president and the Senate are of different political parties, the nominees are likely to be more moderate. But still it is possible to imagine how any Democratic or any Republican nominee for the Supreme Court would deal with these issues.

#### I. AFFIRMATIVE ACTION

On the current Court, three justices are strong foes of affirmative action and would eliminate all efforts to use racial classifications to benefit minorities: Chief Justice John Roberts and Justices Clarence Thomas and Samuel Alito. For example, in *Parents Involved in Community Schools v Seattle School District No 1*,<sup>9</sup> Roberts—joined by Justices Scalia, Thomas, and Alito—proclaimed that the Constitution requires that the government be color-blind and rejected the argument that diversity in education is a compelling interest.<sup>10</sup> Roberts concluded his opinion by declaring: “The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”<sup>11</sup>

Four justices on the current Court support affirmative action to enhance diversity in higher education and likely to remedy past discrimination: Justices Ruth Bader Ginsburg, Stephen Breyer,

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<sup>9</sup> 551 US 701 (2007).

<sup>10</sup> *Id.* at 729–33.

<sup>11</sup> *Id.* at 748.

Sonia Sotomayor, and Elena Kagan. Sotomayor has been especially eloquent and forceful in defending the need for race-conscious programs and declared:

This refusal to accept the stark reality that race matters is regrettable. The way to stop discrimination on the basis of race is to speak openly and candidly on the subject of race, and to apply the Constitution with eyes open to the unfortunate effects of centuries of racial discrimination.<sup>12</sup>

Finally, Justice Kennedy did not join the parts of Roberts's opinion in *Parents Involved* proclaiming that the Constitution requires that the government always be color-blind or rejecting the argument that diversity is a compelling interest. But since coming on the Court in 1988, Kennedy had never voted to uphold an affirmative action plan—not in education, not in contracting, not in employment—until *Fisher v University of Texas at Austin*<sup>13</sup> was decided on June 23, 2016.

The *Fisher* cases involved the admissions policy for undergraduates at the University of Texas at Austin. To facilitate diversity, Texas adopted a policy of taking the top 10 percent from high schools across the state.<sup>14</sup> For the time period covered by the litigation, about 70 percent to 80 percent of the undergraduates were admitted via this Top Ten Percent Plan.<sup>15</sup> Texas found, though, that this did not yield the desired diversity. In the fall of 2002, African-Americans comprised only 3.4 percent of the students and Hispanics comprised only 14.3 percent. This was less than the fall 1996 levels, despite a significant increase in the Hispanic population of Texas during this time period.<sup>16</sup>

In 2004, the Regents of the University of Texas adopted a policy to further diversity. This involved a “holistic” review of each application, with race being a small part of the consideration.<sup>17</sup> Each applicant was assigned a numerical score, and placed on a grid, based on two assessments: an Academic Index (based on grades and test scores) and a Personal Achievement Index. The Personal Achievement Index was a product of the evaluation of

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<sup>12</sup> *Schuetz v Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality by Any Means Necessary (BAMN)*, 134 S Ct 1623, 1676 (2014) (Sotomayor dissenting).

<sup>13</sup> *Fisher v University of Texas at Austin*, 2016 WL 3434399 (US) (“Fisher II”).

<sup>14</sup> *Fisher v University of Texas at Austin*, 758 F3d 633, 637 (5th Cir 2014).

<sup>15</sup> *Id.* at 654 n 121.

<sup>16</sup> Brief for Respondents, *Fisher v University of Texas at Austin*, No 11-345, \*10 (US filed Aug 6, 2012) (available on Westlaw at 2012 WL 3245488).

<sup>17</sup> *Id.* at \*7.

two essays and a Personal Achievement Score. Race was one of seven factors used in determining an applicant's Personal Achievement Score.<sup>18</sup>

In 2008, Abigail Fisher applied to the University of Texas at Austin and was not admitted to its undergraduate program. She sued claiming that the use of race in the admissions process violated equal protection. The district court ruled in favor of the University of Texas and the Fifth Circuit affirmed.<sup>19</sup>

The University of Texas plan seemed to be exactly what the Supreme Court upheld in *Grutter v Bollinger*.<sup>20</sup> There the Court, in a 5–4 decision, held that colleges and universities have a compelling interest in having a diverse student body and may use race as one factor in admissions decisions to enhance diversity.<sup>21</sup> In fact, in *Grutter*, the Court indicated that for the next twenty-five years colleges and universities should be able to engage in such affirmative action programs.<sup>22</sup>

The district court and the court of appeals upheld the Texas program based on *Grutter*.<sup>23</sup> But the Supreme Court, in 2013, reversed and remanded.<sup>24</sup> The Court held that in order to engage in affirmative action, a college or university must demonstrate that no race-neutral means can achieve diversity.<sup>25</sup> On remand, the Fifth Circuit found that Texas had met this burden.<sup>26</sup> The Court again granted review.

To the surprise of many, the Supreme Court, in a 4–3 decision, affirmed and upheld the University of Texas program.<sup>27</sup> Perhaps the most surprising aspect of the decision was the tone of Kennedy's majority opinion. To be sure, the Court reaffirmed that the burden is on the educational institution to prove that there is no race-neutral way to achieve diversity.<sup>28</sup> But the Court found that the University of Texas had met this burden.<sup>29</sup> The Court said that a college or university does not need to "specify the particular level of minority enrollment" needed for a critical mass of

<sup>18</sup> Id at \*12–13.

<sup>19</sup> *Fisher v University of Texas at Austin*, 631 F3d 213, 246–47 (5th Cir 2011).

<sup>20</sup> 539 US 306 (2003).

<sup>21</sup> Id at 341.

<sup>22</sup> Id at 343.

<sup>23</sup> *Fisher v University of Texas at Austin*, 631 F3d 213, 247 (5th Cir 2011).

<sup>24</sup> See *Fisher v University of Texas at Austin*, 133 S Ct 2411, 2422 (2013) ("Fisher I").

<sup>25</sup> Id at 2420.

<sup>26</sup> *Fisher v University of Texas at Austin*, 758 F3d 633, 654 (5th Cir 2014).

<sup>27</sup> *Fisher II*, 2016 WL 3434399 at \*7.

<sup>28</sup> Id at \*7.

<sup>29</sup> Id at \*11–12.

minority students<sup>30</sup> and that Texas had assessed its need for race-conscious review “with care” and made a “reasonable determination . . . that [it] had not yet attained its goals.”<sup>31</sup>

Most importantly, the Court expressed the need for deference to educational institutions. The Court declared: “Considerable deference is owed to a university in defining those intangible characteristics, like student body diversity, that are central to its identity and educational mission. . . . In striking this sensitive balance, public universities, like the States themselves, can serve as ‘laboratories for experimentation.’”<sup>32</sup>

Never before had Kennedy voted to uphold an affirmative action plan. Never before had he written of the need to defer to educational institutions or to allow experimentation in terms of how to achieve diversity.

Colleges and universities still must prove their need for diversity and for affirmative action.<sup>33</sup> The Court also stressed that a college or university that is engaged in affirmative action has a continuing obligation to reassess the admission program’s constitutionality and effectiveness and must tailor its approach to “ensur[e] that race plays no greater role than is necessary to meet its compelling interests.”<sup>34</sup> But these, as the Court’s decision indicates, are manageable burdens.

If a Democratic president is elected, the future of affirmative action is secure. There are now five votes for affirmative action, and replacing Scalia with a Democratic nominee likely would create a sixth vote. In the longer term, replacing Scalia and Kennedy with supporters of affirmative action, along with replacing Ginsburg and Breyer with justices with this view, would mean that affirmative action would continue and likely be allowed to be far more robust.

But what if a Republican is elected president in 2016 and can replace all four of these justices? Affirmative action surely would be at an end. *Grutter*, which allows colleges and universities to use race as one factor among many in admissions decisions,<sup>35</sup> is certain to be overruled. There would be a devastating effect on diversity in higher education, especially at more elite institutions. The experience of California is illustrative. In 1996, California

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<sup>30</sup> Id at \*10.

<sup>31</sup> *Fisher II*, 2016 WL 3434399 at \*11.

<sup>32</sup> Id at \*14.

<sup>33</sup> Id at \*9.

<sup>34</sup> Id.

<sup>35</sup> *Grutter*, 539 US at 340.

voters adopted an initiative—Proposition 209—to eliminate affirmative action in education, contracting, and employment.<sup>36</sup> In a brief to the Supreme Court, the president and chancellors of the University of California explained that “[t]he abandonment of race-conscious admissions policies resulted in an immediate and precipitous decline in the rates at which underrepresented-minority students applied to, were admitted to, and enrolled at” the university.<sup>37</sup>

At the University of California, Los Angeles, for example, admission rates for underrepresented minorities plummeted from 52.4 percent in 1995 (before Proposition 209) to 24 percent in 1998. As a result, the percentage of underrepresented minorities fell by more than half: from 30.1 percent of the entering class in 1995 to 14.3 percent in 1998.<sup>38</sup> The admissions rate for underrepresented minorities at UCLA reached a new low of 13.6 percent in 2012.<sup>39</sup>

The decline in minority representation in the University of California system has come even as the minority population in California has increased. At UCLA, for example, the proportion of Hispanic freshmen among those enrolled declined from 23 percent in 1995 to 17 percent in 2011, even though the proportion of Hispanic, college-aged persons in California increased from 41 percent to 49 percent during that same period. The proportion of black freshmen among those enrolled at UCLA declined from 8 percent in 1995 to 3 percent in 2011, even though the proportion of black, college-aged persons in California increased from 8 percent to 9 percent during that same period.<sup>40</sup>

The University of California system also saw declines in minority representation at its graduate programs and professional schools. As Sotomayor noted:

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<sup>36</sup> Charles Gesheker, *The Effects of Proposition 209 on California: Higher Education, Public Employment, and Contracting* (NAS, Sept 25, 2008), archived at <http://perma.cc/284H-JRNZ>.

<sup>37</sup> Brief for the President and Chancellors of the University of California as Amici Curiae in Support of Respondents, *Schuetz v Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality by Any Means Necessary (BAMN)*, No 12-682, \*10 (US filed Aug 30, 2013) (available on Westlaw at 2013 WL 4769428) (“President and Chancellors Brief”).

<sup>38</sup> *Id.* at \*12.

<sup>39</sup> *Id.* See also Brief of California Social Science Researchers and Admissions Experts as Amici Curiae in Support of Respondents, *Schuetz v Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality by Any Means Necessary (BAMN)*, No 12-682, \*28 (US filed Aug 30, 2013) (available on Westlaw at 2013 WL 4761323).

<sup>40</sup> *Schuetz*, 134 S Ct at 1680 (Sotomayor dissenting).

In 2005, underrepresented minorities made up 17 percent of the university's new medical students, which is actually a lower rate than the 17.4 percent reported in 1975, three years before *Bakke*. The numbers at the law schools are even more alarming. In 2005, underrepresented minorities made up 12 percent of entering law students, well below the 20.1 percent in 1975.<sup>41</sup>

The long history of race discrimination means that race-neutral admissions simply will not yield racial diversity, especially at elite colleges and universities. That has been the experience in California and Michigan and every state that has eliminated affirmative action. Diversity matters enormously in the education of all students and whether it continues will depend on who wins the 2016 presidential election and picks the next Supreme Court justices.

## II. DISPARATE IMPACT

Rarely do decisionmakers express racist or sexist motives for adopting laws and government policies. Yet laws and policies frequently have a greatly disparate impact on racial minorities. To pick a single example, for years there was a gross disparity—as much as 100-to-1—between sentences for crack and powder cocaine. African-Americans and Latinos were disproportionately likely to use crack cocaine, while whites were much more likely to use powder cocaine. Thus, “[t]he weight of that 100–1 sentencing ratio has fallen most heavily on blacks, who accounted for more than 88 percent of federal crack cocaine distribution convictions. . . . In contrast, whites made up 32 percent of powder convictions in that time period.”<sup>42</sup> For example, people of color accounted for over 98 percent of persons sent to California prisons for possession of crack cocaine for sale. From 2005 to 2010, blacks accounted for 77.4 percent of state prison commitments for crack possession for sale, while Latinos accounted for 18.1 percent. Blacks make up 6.6 percent of the California population, Latinos 38.2 percent.<sup>43</sup> In the Fair Sentencing Act of 2010,<sup>44</sup> which President Obama signed into law in August 2010, Congress lowered

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<sup>41</sup> *Id.* (Sotomayor dissenting) (citation omitted).

<sup>42</sup> Henry J. Reske, *Congress Asked to Lower Crack Penalties*, 81 ABA J 30, 30 (July 1995).

<sup>43</sup> Gerald F. Uelman and Alex Kreit, 1 *Drug Abuse and the Law Sourcebook* § 3:33 (Thompson Reuters 2014). See also David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 *Stan L Rev* 1283, 1285 (1995).

<sup>44</sup> Pub L No 111-220, 124 Stat 2372, codified in various sections of Title 21.



the 100-to-1 sentencing disparity between crack cocaine and powder cocaine to a ratio of 18-to-1.<sup>45</sup>

But the Supreme Court has made it clear that proof of a racially disparate impact is not enough to demonstrate the existence of a racial classification.<sup>46</sup> The Supreme Court held that the disparities between crack and powder cocaine did not violate equal protection because there was not proof of a racially discriminatory purpose.<sup>47</sup> Lower courts have consistently rejected such equal protection challenges.<sup>48</sup>

In a series of cases, the Court has held that if a law is facially race neutral, proving a racial classification requires demonstrating both discriminatory impact *and* discriminatory intent. *Washington v Davis*<sup>49</sup> was a key case articulating this requirement.<sup>50</sup> Applicants to the police force in Washington, DC, were required to take a test, and statistics revealed that blacks failed the examination much more often than whites. The Supreme Court, however, held that proof of a discriminatory impact is insufficient, by itself, to show the existence of a racial classification. Justice Byron White, writing for the majority, said that the Court never had held that “a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact.”<sup>51</sup> The Court explained that discriminatory impact, “[s]tanding alone, . . . does not trigger the rule that racial classifications are to be subjected to the strictest scrutiny and are justifiable by only the weightiest of considerations.”<sup>52</sup>

In other words, laws that are facially neutral as to race and national origin will receive more than rational basis review only if there is proof of a discriminatory purpose. Many times the Court has reaffirmed this principle that discriminatory impact is not sufficient to prove a racial classification. For example, in *City of Mobile, Alabama v Bolden*,<sup>53</sup> the Supreme Court held that an

<sup>45</sup> 124 Stat at 2372.

<sup>46</sup> See, for example, *McCleskey v Kemp*, 481 US 279, 292 (1987); *Washington v Davis*, 426 US 229, 239 (1976).

<sup>47</sup> See *United States v Armstrong*, 517 US 456, 469–71 (1996) (rejecting a selective prosecution challenge to crack versus powder cocaine sentencing disparities).

<sup>48</sup> Sklansky, 47 Stan L Rev at 1303 (cited in note 43) (observing that lower courts have “mechanically” applied rational basis review to dismiss equal protection challenges to criminal sentencing disparities between crack and powder cocaine).

<sup>49</sup> 426 US 229 (1976).

<sup>50</sup> See *id* at 241.

<sup>51</sup> *Id* at 239.

<sup>52</sup> *Davis*, 426 US at 242 (citation omitted).

<sup>53</sup> 446 US 55 (1980).

election system that had the impact of disadvantaging minorities was not to be subjected to strict scrutiny unless there was proof of a discriminatory purpose.<sup>54</sup> *Bolden* involved a challenge to Mobile, Alabama's use of an at-large election for its city council. The city was predominately white, with a sizeable African-American population. The long history of racially polarized voting meant that only whites were elected in the at-large system.<sup>55</sup> Nonetheless, the Supreme Court found no equal protection violation because there was not sufficient evidence of a discriminatory purpose. The Court declared: "[O]nly if there is purposeful discrimination can there be a violation of the Equal Protection Clause. . . . [T]his principle applies to claims of racial discrimination affecting voting just as it does to other claims of racial discrimination."<sup>56</sup>

Cases such as *Davis* and *Bolden* clearly establish that proof of a discriminatory impact is not sufficient by itself to prove an equal protection violation; there also must be proof of a discriminatory purpose. This creates an enormous obstacle to using the Constitution to remedy race discrimination.

The next presidential election and who replaces as many as four justices could make all of the difference as to the future of disparate impact liability. The election of a Democrat could create a majority that would be willing to reconsider precedents requiring proof of a discriminatory intent in order to demonstrate a racial classification. Such a Court would be much more likely to recognize that racially disparate impacts in areas such as criminal justice, employment, housing, voting, and many others likely reflect unconscious racism and the continuing legacy of America's racial history.<sup>57</sup>

To pick a single example, the continued racial disparity in carrying out the death penalty might cause a Court dominated by Democratic appointees to reconsider *McCleskey v Kemp*.<sup>58</sup> In *McCleskey*, the Supreme Court held that proof of disparate impact in the administration of the death penalty was insufficient to show an equal protection violation.<sup>59</sup> Statistics powerfully demonstrated racial inequality in the imposition of capital punishment.

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<sup>54</sup> Id at 62.

<sup>55</sup> Id at 71.

<sup>56</sup> Id at 66–67.

<sup>57</sup> See generally Daniel R. Ortiz, *The Myth of Intent in Equal Protection*, 41 Stan L Rev 1105 (1989); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 Stan L Rev 317 (1987).

<sup>58</sup> 481 US 279 (1987).

<sup>59</sup> Id at 297.

A study conducted by Professors David Baldus, Charles Pulaski, and George Woodworth found that the death penalty was imposed in 22 percent of the cases involving black defendants and white victims; in 8 percent of the cases involving white defendants and white victims; in 1 percent of the cases involving black defendants and black victims; and in 3 percent of the cases involving white defendants and black victims.<sup>60</sup> They found that “prosecutors sought the death penalty in 70% of the cases involving black defendants and white victims; 32% of the cases involving white defendants and white victims; 15% of the cases involving black defendants and black victims; and 19% of the cases involving white defendants and black victims.”<sup>61</sup> After adjusting for many other variables, they concluded that “defendants charged with killing white victims were 4.3 times as likely to receive a death sentence as defendants charged with killing blacks.”<sup>62</sup>

The Supreme Court, however, said that for the defendant to demonstrate an equal protection violation, he “must prove that the decisionmakers in *his* case acted with discriminatory purpose.”<sup>63</sup> Because the defendant could not prove that the prosecutor or jury in his case was biased, no equal protection violation existed. Moreover, the Court said that to challenge the law authorizing capital punishment, the defendant “would have to prove that the Georgia Legislature enacted or maintained the death penalty statute *because of* an anticipated racially discriminatory effect.”<sup>64</sup>

*McCleskey* was a 5–4 decision, and a Court with six Democratic appointees would likely be willing to reconsider it.<sup>65</sup> More generally, it would be a Court willing to reconsider the requirement for proof of discriminatory intent in order to establish an equal protection violation. This is crucial to having the Constitution fulfill the promise of the Fourteenth Amendment and creating a more racially equal society.

By sharp contrast, if a Republican wins the presidency and fills these Supreme Court vacancies, there is a strong likelihood

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<sup>60</sup> Id at 286–87.

<sup>61</sup> Id at 287.

<sup>62</sup> *McCleskey*, 481 US at 287.

<sup>63</sup> Id at 292.

<sup>64</sup> Id at 298.

<sup>65</sup> In fact, if a Democrat wins there likely would be a majority to declare the death penalty unconstitutional as cruel and unusual punishment. See *Glossip v Gross*, 135 S Ct 2726, 2755–56 (2015) (Breyer dissenting) (arguing that the Court should reconsider the constitutionality of the death penalty and explaining why it might be found unconstitutional).

that statutes which allow liability based on proof of racially disparate impact will be declared unconstitutional. Although the Constitution requires proof of discriminatory intent to establish a racial classification, Congress is able to provide more protection. Many civil rights statutes, such as Title VII with regard to employment discrimination, Section 2 of the Voting Rights Act of 1965, and the Fair Housing Act, allow liability based on proof of a policy that causes a racially disparate impact.<sup>66</sup>

But conservative justices have questioned the constitutionality, let alone the desirability, of disparate impact liability. In *Ricci v DeStefano*,<sup>67</sup> in a concurring opinion, Justice Scalia set out the argument as to why disparate impact liability would be unconstitutional.<sup>68</sup> He said that disparate impact liability requires that decisionmakers look at race and that the Constitution requires that decisionmakers be color-blind.<sup>69</sup> More recently, Justice Thomas sharply criticized disparate impact liability and declared: “We should drop the pretense that *Griggs*’ interpretation of Title VII was legitimate.”<sup>70</sup>

A Court with seven Republican-appointed justices might find that all disparate impact liability under federal, state, and local laws is unconstitutional. This would have a devastating effect on civil rights litigation in the United States.

#### CONCLUSION

The most important issue in the 2016 presidential election should be who will fill the vacancies on the Supreme Court. Replacing as many as four justices will affect literally every aspect of constitutional law. It will affect all of us, often in the most important and intimate aspects of our lives. It most definitely will affect how the Court deals with race. We are not a post-racial society, and we need a Court that recognizes this and creates an equal protection jurisprudence that advances racial equality.

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<sup>66</sup> See generally, for example, *Texas Department of Housing and Community Affairs v Inclusive Communities Project, Inc.*, 135 S Ct 2507 (2015) (upholding disparate impact liability upon proof of a policy that causes a disparate impact and reviewing other statutes that allow disparate impact liability).

<sup>67</sup> 557 US 557 (2009).

<sup>68</sup> Id at 594 (Scalia concurring).

<sup>69</sup> Id at 594–96 (Scalia concurring).

<sup>70</sup> *Inclusive Communities Project*, 135 S Ct at 2526 (Thomas dissenting).