Introduction

Post-Racial Constitutionalism and the Roberts Court offers the first comprehensive Critical Race Theory examination and critique of how the Supreme Court advances post-racialism as a normative principle in constitutional doctrine, namely an illusion that racism no longer exists; equal opportunity is not affected by race; and racial discrimination claims should be viewed skeptically in a colorblind or post-racial society. In advancing process values such as equal opportunity and non-racial decision-making, the Court perpetuates structural inequality through neutral process rhetoric and illusory democratic ideals. Because the Court stands for principles embodied in the legitimacy of the rule of law and societal cohesion, the citizenry must embrace its constitutional rulings. As this book will illustrate, the Court has instead perpetuated a democratic myth that so much societal progress has been made that race has been transcended. Through ostensibly neutral rationales, the Court advances false or contrived judicial narratives undermining the confidence that historically oppressed minorities can have in the Court as an institution.

During his confirmation hearings, Chief Justice Roberts proclaimed that judges should act as "neutral umpires" in adjudicating cases. Far from calling balls and strikes, the Roberts Court has perfected a manner of judicial umpiring that is deceptively neutral – it advances formalism and adherence to a process-based reasoning that is ostensibly democratic but reinforces inequality. At this moment, the United States is witnessing the devastating effects of racist hate rhetoric in the public square, impacting people of color and other excluded communities, and a largely unexplained aspect of this societal phenomena is how the Court is actively engaged in rationalizing oppression. This jurisprudential dialogue is largely hidden from public view, by the doctrinal camouflage of neutral rhetoric.

Its impact, however, is devastating for the nation and no less (or particularly) on the subjugated communities it affects, whose oppression is rationalized by the democratic myth.

The Roberts Court's race jurisprudence has advanced post-racialism premised on a rhetorical stance of adhering to a legal principle of neutrality that is often disingenuous yet disconcertingly effective and disruptive. Predictably, whenever race is

a factor in decision-making, there are set assumptions that guide the reasoning and shape the outcomes of the Court's race decisions. Indeed, in race cases, the results can be said to be virtually pre-determined. This post-racial determinism means that race-conscious remedial approaches like affirmative action, school integration plans, employment hiring and promotion practices, voting rights, and fair housing initiatives will be struck down.

All the Court's race decisions are unified by post-racial constitutionalism – racial oppression is rationalized through a series of doctrinal myths that shape the core of the Court's jurisprudence. The Roberts Court represents the current manifestation of post-racial constitutionalism. When it comes to acknowledging the salience of race as an organizing principle of subordination in American society, the Court has always been post-racial. We are in the Third Reconstruction,[1] a period of fleeting progress followed by retrenchment and retrogression after the two-term presidency of the first African-American president, Barack H. Obama.[2] However, the starting point for analyzing the Court's post-racial constitutionalism is the neutrality inherent in its doctrinal rationales in the *Civil Rights Cases* and *Plessy v. Ferguson*. Both decisions are rooted in formalistic equality.

It is important to frame the Roberts Court's post-racial constitutionalism in reference to the Courts that preceded it. The Burger Court is post-racial in its transitional position[3] between the liberal Warren Court and the colorblind conservatism of the Rehnquist Court.[4] Both Courts actively seek to move beyond race by embracing neutrality and formalistic equality. None of the Courts embrace substantive equality, so race is either discarded to preserve white entitlements and privilege or balanced so as not to disturb it.

Under the Roberts Court's doctrinal approach, neutrality has nothing to do with fairness, as it serves as a rationalization of systemic oppression. Because race is inherently suspect, in the Roberts Court's worldview, there is no place for it as a factor in governmental decision-making: accordingly, context is irrelevant, history is disconnected, and the present-day effects of past discrimination are dismissed as mere societal discrimination. Today's Court equates neutrality with colorblindness as an absolute ideal and thus post-racialism means that the United States is over race – race has been transcended and racism is over in America unless it is so blatant as to be obvious. In fact, to point to race as explicative of a discriminatory outcome is to in fact be guilty of racism. Thus, the Roberts Court's doctrine of neutrality – that

[1] The Rev. Dr. William J. Barber II, and Jonathan Wilson-Hartgrove, The Third Reconstruction: How a Moral Movement Is Overcoming the Politics of Division and Fear (2016).

[2] Keeanga-Yamahatta Taylor, From #BlackLivesMatter to Black Liberation 136–52 (2016); Peniel E. Joseph, Dark Nights, Bright Days: From Black Power to Barack Obama 203–08 (2010).

[3] Michael J. Graetz and Linda Greenhouse, The Burger Court and the Rise of the Judicial Right 8–9 (2016).

[4] Craig Bradley, The Rehnquist Legacy 369–81 (2006).

"the way to stop discrimination on the basis of race is to stop discriminating on the basis of race"[5] – advances several post-racial themes in its jurisprudence: (i) so much racial progress has been made that race-conscious remedies are obsolete (and unfair to whites in a neutral process); (ii) race neutrality means that there is an universality to the experiences of all racial groups, so that racial discrimination claims are viewed skeptically because oppression is not analyzed structurally (the Constitution protects individuals, not racial groups); (iii) because race is inherently suspect, there can be no distinction between state-mandated oppression and race-conscious remedial measures to eradicate caste; and (iv) the significance of anti-discrimination law is diminished by distancing language employed by the Court.

In a recent book review of Joan Biskupic's *The Chief: The Life and Turbulent Times of Chief Justice John Roberts* (Basic Books 2019), Adam Cohen notes that "Roberts, in fact, regularly opposes the rights of blacks, gay people, the poor and other relatively powerless groups."[6] There is no moderating influence here; the only question now is how far the Court will go in diluting or undermining substantive equality and the implications for traditionally marginalized groups. This is the hallmark of the Roberts Court's post-racial constitutionalism; Cohen describes it as "a bias against the weak." This is what makes the Court's pronouncement of the illusory process values underlying the democratic myth so treacherous.

Post-Racial Constitutionalism has four defining goals. First, it identifies and critiques how the Roberts Court has actively rationalized systemic oppression through neutral rhetoric and the elevation of process-based decisional values. By placing the Roberts Court in historical context to the Reconstruction, Burger, and Rehnquist Courts, it is clear that the Supreme Court has always been post-racial. Second, it unpacks how the Court advances neutrality by embracing process values rooted in the democratic myth of inclusivity and openness. Third, it connects the Roberts Court's post-racial rhetoric to its decisions to illustrate the doctrinal concepts of post-racial constitutionalism. Finally, the book builds on and refines the Critical Race Theory tenet of the permanence of racism by connecting this proposition with current public discourse around race. The Roberts Court's post-racial constitutionalism legitimizes structural inequality through ostensibly neutral rhetoric. A core principle of the Roberts Court's post-racial constitutionalism is its strict allegiance to process-based values. This means that the Court consistently favors neutrality over substantive outcomes that advance substantive equality. Substantive equality, or the eradication of all systemic oppression, is discarded in favor of flawed normative principles that simply confirm the persistence of inequality without addressing it.

[5] Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 747–48 (2007).

[6] Adam Cohen, *The "Enigma" Who Is the Chief Justice of the United States*, N.Y. Times, www.nytimes.com/2019/03/18/books/review/joan-biskupic-chief-life-turbulent-times-chief-justice-john-roberts.html.

The Supreme Court has played an essential role in the maintenance of white domination and advancement of anti-Black racism. It legitimizes structural inequality and all its devastatingly oppressive manifestations mainly by utilizing neutrality as a rationale for its decision-making and tacit acceptance of inequality as the natural state of affairs of subjugation. The roots of this perspective and its pernicious effects go back to the nation's failed Reconstruction.

Emerging from the immoral savagery of slavery and the nation's failed attempt at redeeming its promise of substantive equality, the U.S. Supreme Court was readily predisposed to post-racialism. Because America was built on a series of constructed myths that serve to obscure and revise the sheer brutality of its oppression of nonwhite peoples, substantive equality has remained elusive.

In fact, the Court has always been post-racial, throughout its history to the present day. The Court has skillfully crafted legal rationales, doctrines, and neutral narratives that diminish the centrality of race in American society and instead advance neutrality as the touchstone of equality. It is virtually impossible, under the Court's race jurisprudence, to advance the anti-discrimination and anti-subjugation principles embodied in the Fourteenth Amendment and anti-discrimination statutes. This is the essence of post-racial constitutionalism: singular events like the end of slavery and Reconstruction; the eradication of *Plessy v. Ferguson*'s[7] separate but equal colorline in *Brown v. Board of Education*;[8] the passage of the Civil Rights Act of 1964 and the Voting Rights Act of 1965, a century after the original promise of full citizenship under the Reconstruction Amendments; and, in 2008, the election of President Barack Obama, all denote transformative societal progress to the Court so that race is irrelevant and race-conscious remedial measures are constitutionally invalid. The history of progress for the formerly oppressed is linear and unbroken to the Court. Each societal epoch marks the end of formalized oppression, and neutrality is then deployed to rationalize the persistence of racism – or to simply move on because focusing on race is exhausting and divisive.[9]

"Post-racialism denies that the nation today is in any important way proximate to its historical past."[10] Because racism is rare, the Court espouses the rhetoric of progress: the eradication of all systemic oppression is discarded in favor of the normative principle of post-racial constitutionalism, which simply explains the persistence of inequality without addressing it.

The U.S. Supreme Court has always protected whiteness as a political and property interest, which meant that post-racialism was the guiding principle of analysis during the First Reconstruction and continues to be so to this day. That is, the Court reflects the mood of the political community that sufficient societal progress

[7] 163 U.S. 537 (1896).
[8] 347 U.S. 483 (1954).
[9] Darren Lenard Hutchinson, *Racial Exhaustion*, 86 Wash. U. L. Rev. 917 (2009).
[10] Khiara M. Bridges, Critical Race Theory: A Primer 5 (2019).

has been made, and that any further race-conscious remedial efforts are illegitimate racial outcomes. When formalized oppression ended, post-racial systemic oppression took its place and transcending race was integral to the sustainability of white dominance. Since the abolition of slavery and the overruling of *Dred Scott v. Sanford*[11] by the Civil War, the Court has aggressively limited substantive equality by advancing formalism and neutrality through Reconstruction, *Brown* and the civil rights era to the present day.[12]

Historically, colorblindness (or ignoring race while simultaneously acknowledging it) and post-racialism (embracing ephemeral progress to transcend race) have always animated the Court's race jurisprudence. Post-racial constitutionalism is the culmination of these two conceptual propositions. Chapter 1 canvases the doctrinal underpinnings of the *Civil Rights Cases*[13] and *Plessy*. What is striking about these post-Reconstruction decisions is how modern they are in neutralizing the present-day effects of past discrimination, and in formalizing equality rather than advancing it substantively.

The Roberts Court is not only linked to the post-racial historicism identified in the *Civil Rights Cases* and *Plessy*, but the thread also continues to the Burger and Rehnquist Courts' conceptions of transitional equality and post-racial colorblindness. Chapter 2 posits that the Burger and Rehnquist Courts' efforts to neutralize race led to the Roberts Court's post-racial constitutionalism.

There is a discernible doctrinal pattern in the Burger Court's (1969–1986) race jurisprudence – it moves from sweeping affirmations of remedial power to eradicate structural inequality[14] to neutral rationalizations of the subordinating dynamics underlying the status quo.[15] Post-racial colorblindness depicts the Rehnquist Court's (1986–2005) jurisprudential enterprise of neutralizing race so that history, and its present-day effects, is never acknowledged; discrimination is narrowly defined with an emphasis on lessening any burden on white interests;[16] and, dismantling structural inequality and racial subordination is not a feature of the Court's interpretation of the Fourteenth Amendment, which seeks only to rationalize formalistic equality.[17]

All the Courts – Burger, Rehnquist, and Roberts[18] – are post-racial, but they seek to transcend race in distinct ways based upon neutrality. The Burger Court eschews

[11] 60 U.S. 393 (1856).
[12] Laurence H. Tribe, American Constitutional Law § 5–12, at 330 n. 3 (1988).
[13] 109 U.S. 3 (1883).
[14] *Swann v. Charlotte Mecklenburg Bd. of Ed.*, 402 U.S. 1 (1971).
[15] *Milliken v. Bradley*, 418 U.S. 717 (1974); *San Antonio v. Rodriguez*, 411 U.S. 1 (1973).
[16] *Grutter v. Bollinger*, 539 U.S. 306 (2003).
[17] *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).
[18] Adam Cohen, Supreme Inequality: The Supreme Court's Fifty-Year Battle for a More Unjust America xviii (2020) ("In the five decades since [Chief Justice Burger] arrived, there have been only conservative chief justices: Burger, William Rehnquist, and John Roberts. Since January 1971, when the last two Nixon justices arrived, these conservative justices have consistently had conservative majorities behind them."). "The Court, overall, has done much more harm than good

race in order to dilute the constitutional mandate of *Brown v. Board of Education*;[19] it erects a nearly insurmountable standard of proof by requiring discriminatory intent by the state;[20] it re-conceptualizes affirmative action so that white interests and privilege are not unduly burdened by positive remedial measures for Blacks and other historically oppressed groups;[21] and it adopts a neutral marketplace analysis of Title VII, preserving the entitlement interests of white workers at the expense of true structural change in employment.[22]

This is the Burger Court's transitional equality, an incrementalistic interpretation of anti-discrimination law, and its remedial potential, so that any significant societal progress is relative and subject to the limits imposed by the Court. Equality ebbs and flows based on how persuasively the Court can articulate neutral rationales for any divergence from the status quo that benefits African Americans and disrupts the settled expectations of white privilege. This is the essence of retrenchment and retrogression.

The Rehnquist Court goes even further in its post-racial neutrality. Essentially, the Rehnquist Court, with its strict adherence to colorblind constitutionalism, advances formalistic equality. Scholars have referenced this as a shift from the Fourteenth Amendment's anti-subordination principle to an anti-differentiation principle that, devoid of history and context, mandates that African Americans and whites be treated the same because the Constitution protects individuals, not racial groups.[23] There is no viable distinction, to the Court, between oppressive state action and race-conscious remedial action by the state. Liberal individualism, then, serves as a key rhetorical component in constitutionalizing white privilege by privileging reverse discrimination claims, concluding that anti-discrimination law is outdated (or should be given a temporal limit), and expanding colorblindness so broadly that this leads to post-racial constitutionalism. Neutrality means that race is so subsumed amongst other neutral factors that it is irrelevant – the Rehnquist Court consistently advances the rhetoric of post-racial colorblind neutrality. An example of this is how the Rehnquist Court, in an opinion authored by Justice O'Connor, reaffirms the diversity principle, in *Bakke*, by concluding that it is a compelling interest and that race, among many factors, can be considered in enrolling a diverse law school class. A "critical mass" of diverse students would provide educational *benefits* to the institution. This is a neutral conception of equality with no mention of eradicating structural inequality; the Court is post-racial in its assessment of the remedial

with regard to race. The beneficial decisions during the seventeen years of the Warren Court cannot outweigh the horrendous ones in the century and a half before that or the troubling ones since. There is a strong case against the Supreme Court in the area of race." Erwin Chemerinsky, The Case against the Supreme Court 53 (2014).

[19] 347 U.S. 483 (1954).

[20] *Washington v. Davis*, 426 U.S. 229 (1976).

[21] *Regents of the Univ. of Ca. v. Bakke*, 438 U.S. 265 (1978).

[22] *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984).

[23] Cass R. Sunstein, The Partial Constitution 340 (1993).

purpose of diversity. Many scholars have referenced this post-racial effect rooted in the protection of white interests.[24]

The Roberts Court (2005–) goes the furthest. A core principle of the Roberts Court's post-racial constitutionalism is its strict allegiance to process-based values. Post-racial constitutionalism shifts the analysis from anti-subordination to anti-differentiation to anti-remediation because all state-sanctioned racial oppression has been abolished. This means that the Court actively ignores structural inequality and rationalizes this approach by adopting new standards of proof which are ostensibly neutral, but which make it virtually impossible to prove discrimination. The Court has decided that discrimination, in large part, no longer exists so any consideration of race means that decisions are being made on the impermissible basis of race.

The Burger Court leads directly to this result, setting the stage for both the Rehnquist Court's post-racial colorblindness and the Roberts Court's post-racial constitutionalism.

The Burger Court is generally conceptualized as a transitional institutional bridge between the liberalism of the Warren Court and the hard swing to the right of the Rehnquist Court, but this is an incomplete assessment of the Court's doctrinal role in fashioning colorblind constitutionalism as antecedent to post-racial constitutionalism.[25] Canvassing the Burger Court's race jurisprudence in school integration cases, the doctrinal evolution of the discriminatory intent standard, the early affirmative action decisions, and its disjointed Title VII decisions protecting the expectation interests of white employees, Chapter 2 explores the doctrinal themes embodied in these decisions to illuminate the connection between the Burger Court's transitional equality and the Rehnquist Court's post-racial colorblindness. This vein of colorblindness leads directly to the Roberts Court's post-racial constitutionalism.

Since formalistic equality is the touchstone of the Court's race jurisprudence, the Rehnquist Court actively crafts decisions that neutralize race by ignoring history and context, defining discrimination so narrowly that it does not exist, and offering neutral explanations for inequality. Rationalization of oppression and structural inequality is a defining characteristic of Rhetorical Neutrality. In every permutation of the Court's race jurisprudence, there is a conscious attempt to conceptualize race as irrelevant, so that neutral principles define the Court's decision-making. This ultimately leads the Roberts Court to be actively engaged in dismantling anti-discrimination law.

[24] *See, for example*, Osamudia James, *White Like Me: The Negative Impact of the Diversity Rationale on White Identity Formation*, 89 N.Y.U. L. Rev. 425, 450 (2014); Eboni S. Nelson, *Examining the Costs of Diversity*, 63 U. Miami L. Rev. 577, 582 n. 22 (2009); Bryan K. Fair, *Re(caste)ing Equality Theory: Will Grutter Survive by 2028?* 7 U. Pa. J. Const. L. 721, 761 (2003).

[25] Michael J. Graetz and Linda Greenhouse, The Burger Court and the Rise of the Judicial Right (2016).

Building upon the previous chapters' deconstruction of neutrality, Chapter 3 turns to the Roberts Court and its post-racial constitutionalism. Justice Kennedy, the chief author of the Court's post-racial constitutionalism, consistently tries to transcend race in the Court's race jurisprudence by emphasizing race neutrality as a guiding principle. The doctrinal shift is from the Rehnquist Court's balancing of interests, so as not to disrupt white privilege while pursuing process-based equality through neutrality, to the Roberts Court's explicit dismissal of race as a relevant consideration and the inevitable conclusion that anti-discrimination law is unnecessary. Each subsequent chapter explores a distinct conceptual feature of the Roberts Court's post-racial constitutionalism.

Conceptualizing the Roberts Court's post-racial process discourse, Chapter 4 highlights how the Court's post-racialism was used to weaponize participatory democracy and allow political majorities to undermine positive remedial approaches to structural inequality. In *Schuette v. Coalition to Defend Affirmative Action*,[26] the Court upheld a voter initiative to amend the Michigan Constitution to prohibit the consideration of race in state decision-making. By empowering the voters to "interpret" the anti-discrimination principle of the Fourteenth Amendment, the decision not only radically revises established precedent focusing on the structural dimensions of race-based subjugation, but it also constitutionalizes post-racial discourse against affirmative action. Instead of protecting discrete and insular minorities[27] from an unconstitutional restructuring of the political system, the Court promotes a democratic myth: a direct democracy movement advancing the tenets of post-racialism and formalistic equality is privileged over the anti-subordination principle of the Fourteenth Amendment. Process neutrality reinforces inequality.

Examining the Roberts Court's conception of race, diversity, and education, Chapter 5 offers a critique of the fraught concept of diversity. Diversity relies heavily on difference, an open marketplace of ideas, and the educational benefits accruing from it, but this educational enhancement is skewed toward developing the tolerance of white students rather than disrupting the structural barriers of exclusion that isolate and oppress students of color. Writing for the Court in *Fisher I*[28] and *Fisher II*,[29] Justice Kennedy's opinions embody the doctrinal shift from post-racial colorblindness to post-racial constitutionalism. Where post-racial colorblindness sought to explain the insignificance of race by neutralizing it (Rehnquist Court), post-racial constitutionalism advances the view that race has been transcended in light of the full attainment of formal equality (Roberts Court).

[26] 572 U.S. 291 (2014).
[27] United States v. Carolene Products Co., 304 U.S. 144, 152 n. 4 (1938).
[28] 570 U.S. 297 (2013).
[29] 579 U.S. 365 (2016).

An animating feature of the Roberts Court's post-racial constitutionalism is its radical reinterpretation of anti-discrimination statutes, so that their very purpose is neutralized or gutted altogether. Chapter 6 posits that the Roberts Court transplants a new discriminatory intent standard, borrowed from its equal protection jurisprudence, into Title VII. A hallmark of the Roberts Court's post-racialism is the protection of the expectation interests of whites. The Court turns Title VII law inside out to protect white privilege. In yet another decision by Justice Kennedy, in *Ricci v. DeStefano*,[30] the Court re-conceptualizes disparate impact liability under Title VII to require a "strong basis in evidence" that an employer would be subject to a disparate impact lawsuit if it fails to adopt a race-conscious remedial approach. Notwithstanding the city of New Haven's attempt to redress the disproportionate exclusion of African Americans from the fire department officer's corps, the remedial decision to throw out skewed test results is viewed as intentional discrimination (disparate treatment) by the employer. The Court's approach legitimizes the reverse discrimination suit brought by white firefighters who passed the officer's examination, and views the structural inequality evinced in the disproportionate failure of African-American candidates as statutorily irrelevant.

The Roberts Court has extended its devastating reach to housing discrimination law as well. Exposing the doctrinal tension in the Court's novel conceptualization of disparate impact, Chapter 7 dissects the reasoning in *Texas Department of Housing and Community Affairs v. Inclusive Communities*,[31] which ostensibly reaches a good result, holding that disparate impact claims are properly cognizable under the Fair Housing Act. At first glance, the opinion restores the statutory primacy of disparate impact analysis where it had been casually discarded in *Ricci*. But there is much more at work here. A jurisprudential calling card of the Roberts Court is to deploy neutral principles that promote openness, accessibility, and inclusion while substantially undermining the very framework that would provide for such substantive equality. Structural inequality is rationalized, and substantive equality is illusory because it is completely limited by neutrality.

In the same manner that Justice Kennedy did in his decision in *Ricci*, eviscerating disparate impact liability under Title VII, he constructs a novel conception of disparate impact, which is deferential to the neutral operations of the housing marketplace. So, economics and profit determine the viability of disparate impact claims under the Fair Housing Act. There are neutral reasons for disproportionate housing disparities for the poor and people of color, and the Court is all too eager to find them. This means that the Court ignores both the racial and structural factors underlying housing segregation. The Court emphasizes the limitations on disparate impact liability more than the actual substantive protections embodied in the Fair Housing Act.

[30] 557 U.S. 557 (2009).
[31] 576 U.S. 519 (2015).

Starting with its post-racial pronouncement in *Shelby County v. Holder* that history did not end in 1965, the Court has prioritized returning power to the states to determine how elections are conducted, ignoring the lasting impact of voter discrimination and suppression against people of color and the poor. Chapter 8 focuses on three recent decisions – *Shelby County v. Holder*,[32] *Husted v. A. Philip Randolph Institute*,[33] and *Rucho v. Common Cause*[34] – that effectively undermine participation in the democratic process. Each decision disempowers African Americans in a manner that suggests that the Court is actually targeting them, so as to ensure that they remain a subjugated group and any relative social justice progress is overturned: in *Shelby County*, the Court discards the Voting Rights Act as unnecessary because of the "progress" made by Blacks in the political process and the fact that "old" discrimination has been effectively eradicated; *Husted* permits the removal of nearly 1 million voters from Ohio's voting rolls based on the Court's hyper-technical reading of a law crafted to prevent voter fraud where none existed; and *Rucho* insulates the political process from any judicial scrutiny concluding that partisan gerrymandering is a non-justiciable political question.

Recently, during the devastating outbreak of the COVID-19 virus, with confirmed cases and deaths rising exponentially across the United States and globally, the Court, in a *per curiam* opinion, intervened to block an extension to receive absentee ballots for an additional six days after an election primary in Wisconsin. Ignoring the well-documented anxiety and fear caused by this historic pandemic, the Court glibly concluded that such an extension "fundamentally alters the nature of the election."[35] The Court's decision gave Wisconsin voters a stark, existential choice – either go to the polls and risk contracting the deadly virus or forfeit their constitutional right to vote. Such rank partisanship undermines the legitimacy of the Court.[36]

All of this points to how, under the Roberts Court's post-racial constitutionalism, the Court is re-envisioning federalism and the structural Constitution so that states have more power to enact legislation designed to address ostensibly neutral concerns like voter identification fraud, access to the polls, and election procedures. However, these serve to displace people of color, especially African Americans, who have been consistently targeted for exclusion.

Essentially, this book accepts Derrick Bell's trenchant insight about the permanence of racism;[37] and, examines how ostensibly neutral doctrines and decisional outcomes, articulated by the Roberts Court, have not only failed to incorporate the

[32] 570 U.S. 529 (2013).
[33] 138 S. Ct.1833 (2018).
[34] 139 S. Ct. 2484 (2019).
[35] *Republican Nat'l C'tee v. Democratic Nat'l C'tee*, 589 U.S. __ (2020) (April 6, 2020), 140 S.Ct. 1205, 1207 (2020).
[36] Linda Greenhouse, *NYT Opinion: The Supreme Court Fails Us*, N.Y. Times, April 9, 2020, www.nytimes.com/2020/04/09/opinion/wisconsin-primary-supreme-court.html.
[37] Derrick Bell, Faces at the Bottom of the Well (1993).