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## **The Unintended Consequences of *Griggs v. Duke Power Co.***

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# The Unintended Consequences of *Griggs v. Duke Power Co.*

Ilana Redstone\*

*When the Supreme Court decided Griggs v. Duke Power Co. in 1971, the Justices gave crucial weight to the Civil Rights Act of 1964. Up to that point, anti-discrimination cases relied heavily on the ability to demonstrate the intent to treat someone differently because of their race. And demonstrating racist intent generally required being able to rule out other plausible explanations for differential treatment. But because plausible non-racist explanations exist in most situations, this approach meant that some unknown number of discrimination cases were lost—or never brought forward—when racial discrimination did, in fact, occur. By making disparate outcomes a violation of Title VII of the new act, the Court legally equated discrimination without racist intent and discrimination with racist intent, making winning such cases significantly easier. However, this victory for civil rights legislation also cleared the way for a fundamental moral shift—one that created serious problems for democratic discourse. Because racism is a moral wrong and because discrimination is understood to be an expression of racism, once disparate outcomes were considered indicative of discrimination, such outcomes were themselves considered indicative of racism.*

*The equation of racism with racist intent and racism without racist intent (determined by impact) contributed to a new moral framework that treated political positions that didn't align with these assumptions as evidence of moral failure. The self-evident moral wrongness of racism helped fuel the voluntary adoption of preventive policies and practices based on this new definition, creating a twofold problem. One was that dissenters were largely politically conservatives, which meant that the new definition of racism now covered conservative political opinions. The other was that this framework was absorbed into American institutional life, ultimately shaping everything from DEI battles, to corporate hiring, to battles over campus speech and political discourse. While this shift emerged from the laudable goal of addressing racial inequality, the sweeping changes it paved the way for were never subject to democratic deliberation. This meant the associated costs and benefits were never openly evaluated. Opening that conversation now means starting with the following question: What price are we, as a society, willing to pay for advancing the Civil Rights Movement?*

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## INTRODUCTION

When the Supreme Court decided *Griggs v. Duke Power Co.*<sup>1</sup> in 1971, the Justices had every reason to believe they were ruling on an important, but straightforward, employment discrimination case. Straightforward because it gave real power to the relatively new, bipartisan-passed,<sup>2</sup> Civil Rights Act of 1964.<sup>3</sup> Up to that point, anti-discrimination cases relied heavily on the ability to demonstrate the intent to treat someone differently because of their race.<sup>4</sup> And demonstrating racist intent generally required being able to rule out other plausible explanations for differential treatment. But because plausible non-racist explanations exist in the majority of circumstances, that meant that some unknown number of would-be discrimination cases were lost—or never brought forward—when racial discrimination did, in fact, occur. By making disparate outcomes a violation of Title VII of the new act, the Court legally equated discrimination *without* racist intent and discrimination (as indicated by disparate outcomes) *with* racist intent. While this made winning such cases significantly easier, this victory for civil rights legislation also cleared the way for a fundamental moral shift—one that created problems for democratic discourse.

Because racism is a moral wrong and because discrimination is understood to be an expression of racism, once disparate outcomes were considered indicative of discrimination, such outcomes were themselves considered indicative of racism. The equation of racism with racist intent and racism without racist intent contributed to a new moral framework that treated political positions that didn't align with these assumptions as evidence of moral failure. What's more, the self-evident moral wrongness of racism helped fuel the voluntary adoption of preventive policies and practices based on this new definition. The problem then became twofold. One was that dissenters were largely politically conservatives, which meant that the new definition of racism now covered conservative political opinions. The other was that this definition was absorbed into American institutional life, ultimately shaping everything from DEI battles to corporate hiring to battles over campus speech and political discourse.

While this shift emerged from the laudable goal of addressing racial inequality, the sweeping changes it paved the way for were never subject to democratic deliberation. This meant that the associated costs and benefits were never openly evaluated. Opening that conversation now means starting with the following question: *What price are we, as a society, willing to pay for advancing the Civil Rights Movement?*

To be sure, given the facts of the particular case, the Court's decision in *Griggs* would likely have seemed so obviously morally correct at the time that there would have been little reason to consider the impact it would have on contemporary thinking about equality, fairness, identity, and disagreement itself. Moreover, the decision did not emerge in isolation. Rather, the Justices' decision gave practical force to the words of former President Lyndon Johnson

<sup>1</sup> *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

<sup>2</sup> *Roll Call Tally on Civil Rights Act 1964, June 19, 1964*, NAT'L ARCHIVES (June 19, 1964), <https://www.archives.gov/legislative/features/civil-rights-1964/senate-roll-call.html>.

<sup>3</sup> Someone could argue that the bipartisan passage of the 1964 Civil Rights Act is misleading because the parties then don't neatly map onto modern lines. While it is true that some number of Southern Democrats of 1964 would likely align with today's Republican Party in terms of ideology or regional identity (e.g., Dixiecrats). See generally, Robert N. Lupton & Seth C. McKee, *Dixie's Drivers: Core Values and the Southern Republican Realignment*, 82 J. POL. 921 (2020), <https://www.journals.uchicago.edu/doi/abs/10.1086/707489>. Robert N. Lupton & Seth C. McKee, *Dixie's Drivers: Core Values and the Southern Republican Realignment*, 82 J. Pol. 921 (2020). But that alone doesn't substantiate the claim. For the argument that the bipartisan passage was an illusion to hold, the Republicans of 1964 would have to be "Democrats" in terms of the modern party—and there is simply no evidence that this was the case. Rather, the more likely conclusion is that the Act drew support from members of both parties across the political spectrum.

<sup>4</sup> *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954); *Hernandez v. Texas*, 347 U.S. 475 (1954); *Robinson v. Florida*, 378 U.S. 153 (1964); *Anderson v. Martin*, 375 U.S. 399 (1964); *Strauder v. West Virginia*, 100 U.S. 303 (1879); *Gibson v. Mississippi*, 162 U.S. 565 (1896); *Norris v. Alabama*, 294 U.S. 587 (1935); *Mo. ex rel. Gaines v. Canada*, 305 U.S. 337 (1938); *Sipuel v. Bd. of Regents*, 332 U.S. 631 (1948); *Sweatt v. Painter*, 339 U.S. 629 (1950); *McLaurin v. Okla. State Regents for Higher Educ.*, 339 U.S. 637 (1950); *Griffin v. Cnty. Sch. Bd. of Prince Edward Island*, 377 U.S. 218 (1964); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

himself when he said only six years earlier, “equal opportunity is essential, but not enough, not enough.”<sup>5</sup> Johnson’s words captured the emerging consensus at the time among civil rights leaders and liberal policymakers that formal equality—identical treatment regardless of race—was insufficient to remedy the accumulated effects of centuries of racial exclusion.<sup>6</sup> The *Griggs* decision gave legal weight to a mechanism for identifying when such formal equality had failed: if practices produced racial disparities, that disparity itself became evidence that something was wrong. Unequal outcomes signaled that more needed to be done, even when no discriminatory intent could be shown. This represented a fundamental shift away from asking whether policies and practices *treated* people the same to asking whether they *affected* people the same. And while this idea of focusing on outcomes over intent didn’t originate with the Court, their decision gave it constitutional authority.

Indeed, by declaring that “good intent or absence of discriminatory intent does not redeem employment procedures”<sup>7</sup> that produce disparate racial outcomes, the Court resolved a disagreement about inequality and racism that most people probably did not realize was happening. What had previously been one view among multiple—that disparate outcomes were evidence of discrimination—became the authoritative definition, backed by the highest legal authority in the land.

While it may have been impossible to foresee the full scope of the decision’s downstream impact, Chief Justice Warren Burger knew it was important. In July 1971, when he was asked to name landmark cases from the previous terms, he deferred to others’ assessments but noted that pundits and scholars had identified *Griggs v. Duke Power Co.* as particularly significant.<sup>8</sup> Regardless of whether he was prescient on this point, the ruling’s effects have reverberated through American society in ways that extend far beyond employment law.

The present Article serves two purposes. The first is to trace the consequences of this legal shift in conceptions of racism, while also considering the implications of the resulting moral framework.<sup>9</sup> While legal scholars have extensively analyzed disparate impact theory within employment law, much less attention has been paid to how the *Griggs*-backed redefinition reshaped moral evaluations in institutions and across parts of American society.<sup>10</sup>

The second purpose of this Article is to identify a fundamental problem with this transformation. While redefining discrimination to focus on impact rather than intent likely emerged from well-intentioned efforts to address concealed bias and historical injustice, its broader application created a serious problem for democracy by labeling disagreement as racist or otherwise immoral.

The present analysis devotes more attention to the first purpose than the second. This is in part because the downstream changes of this moral shift are poorly understood. They are often mistaken for problems with names like political polarization or the lack of civil discourse.

<sup>5</sup> Lyndon Johnson, *Commencement Address at Howard University: “To Fulfill These Rights.”*, THE AM. PRESIDENCY PROJECT (June 4, 1965), <https://www.presidency.ucsb.edu/documents/commencement-address-howard-university-fulfill-these-rights>.

<sup>6</sup> *Id.*

<sup>7</sup> *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971).

<sup>8</sup> *View from The Burger Court – An Interview With Chief Justice Warren Burger 1971 – Past Daily Reference Room*, PAST DAILY (1971), <https://pastdaily.com/2016/12/10/view-from-the-burger-court-an-interview-with-chief-justice-warren-burger-1971-past-daily-reference-room/>.

<sup>9</sup> See *Griggs*, 401 U.S. at 432.

<sup>10</sup> See, e.g., Herbert N. Bernhardt, *Griggs v. Duke Power Co.: The Implications for Private and Public Employers*, 50 TEX. L. REV. 901 (1971) (discussing some of the questions *Griggs* didn’t answer); David Garrow, *Toward a Definitive History of Griggs v. Duke Power Co.*, 67 VAND. L. REV. 197 (2014) (discussing the case’s overlooked importance); ROBERT BELTON, THE CRUSADE FOR EQUALITY IN THE WORKPLACE (2014) (discussing his firsthand experience representing the plaintiff in the lower courts); Michael Evan Gold, *Griggs’ Folly: An Essay on the Theory, Problems, and Origin of the Adverse Impact Definition of Employment Discrimination*, 7 INDUS. RELS. L.J. 429 (1985) (arguing for a return to a narrower version of employment discrimination); Elaine Shoben, *Disparate Impact Theory in Employment Discrimination: What’s Griggs Still Good For? What Not?*, SCHOLARLY WORKS (2004), <https://scholars.law.unlv.edu/facpub/579> (arguing *Griggs* is an untapped resource for plaintiffs); *Employment Discrimination: The Burden Is on Business – Griggs v. Duke Power Co.*, 31 MD. L. REV. 255 (1971) (discussing the challenges with the demonstration of “business necessity”); Hugh Steven Wilson, *A Second Look at Griggs v. Duke Power Company: Ruminations on Job Testing, Discrimination, and the Role of the Federal Courts*, 58 VA. L. REV. 844 (1972) (looking closely at the link between job testing and discrimination); Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701 (2006) (arguing that whatever gains were made by *Griggs* could have been achieved in other ways).

Yet, as concerning as these factors are, they are effects, not the source or the mechanism. The other reason the Article devotes more time to the first purpose than the second is because understanding the fundamental problem—the moral condemnation of disagreement—follows directly from understanding how thoroughly the new moral framework has been adopted.

One of the consequences of misunderstanding the consequences of the transformation described here is that proposed solutions either can't work or will exacerbate the problem. Because this concerns a change in how people think about racism and bigotry, attempts to challenge efforts to reduce racism—as defined by impact, not intent—will be met with strong opposition. They will be seen as enabling racism itself, which they are under the outcomes-based definition.

This deep opposition is why, for instance, executive bans on DEI and the restoration of “meritocracy”<sup>11</sup>—are destined to make political divisions worse. Executive orders cannot undo a transformation rooted in moral conviction. And yet, the problem with erasing space for morally legitimate disagreement isn't simply that it makes it difficult for people to get along in a pluralistic society. On the contrary, having this space is necessary for democracy itself to succeed. It builds the kind of social trust and trust in institutions that allow people to live with disagreement, even when they feel their opponents are deeply wrong.

That trust is incompatible with a moral framework where, for instance, supporting merit-based hiring is dismissed as perpetuating *systemic racism*,<sup>12</sup> questioning diversity training effectiveness is treated as evidence of racial animus,<sup>13</sup> academic research on achievement gaps is condemned as racist pseudoscience,<sup>14</sup> and policy proposals emphasizing individual choices and behaviors—whether in school discipline or addressing inequality—are characterized as targeting minorities or victim-blaming rather than as alternative explanations worthy of consideration.<sup>15</sup>

People understandably resent being called bigots for political views they feel they have reasoned their way into. Psychologically, this reaction is predictable. A moral accusation clashes with the belief that one arrived at an opinion through careful thought, creating the kind of unresolved internal tension Festinger's theory of cognitive dissonance describes.<sup>16</sup> Research on moral typecasting shows that moral judgments are typically interpreted as assessments of a person's intentions, will, and moral character—not simply evaluations of an argument.<sup>17</sup> A label like “bigot” fits that structure: it signals a defective moral will. Because labels that imply one is biased can feel like a challenge to both autonomy and moral identity, the resulting hostility or resentment often endures—a pattern documented in Dobbin and Kalev's research on DEI backlash.<sup>18</sup>

<sup>11</sup> See Exec. Order No. 14281 of 2025, 90 Fed. Reg. 17537; see also Exec. Order No. 14190 of 2025, 90 Fed. Reg. 8853; Exec. Order No. 14151 of 2025, 90 Fed. Reg. 8339.

<sup>12</sup> Throughout this paper, systemic racism appears in italics to emphasize that this represents a specific theoretical framework—one that defines racism in terms of outcomes and institutional effects rather than individual intent or explicit bias. “Trading Action for Access”: *The Myth of Meritocracy and the Failure to Remedy Structural Discrimination*, 121 HARV. L. REV. 2156 (2008), <http://www.jstor.org/stable/40042735>; Dana Brownlee, *Bill Maher's 'But What About Merit' Commentary Exposes The Racist Conditioning Of Many 'Good White People'*, FORBES, Nov. 2022, <https://www.forbes.com/sites/danabrownlee/2022/11/15/bill-mahers-but-what-about-merit-commentary-highlights-the-racist-conditioning-of-many-good-white-people/>.

<sup>13</sup> Erica L. Green, *As Trump Attacks Diversity, a Racist Undercurrent Surfaces*, N.Y. TIMES (Feb. 3, 2025), <https://www.ny-times.com/2025/02/03/us/politics/trump-diversity-racism.html>.

<sup>14</sup> Ibram X. Kendi, *Why the Academic Achievement Gap Is a Racist Idea*, (Oct. 20, 2016), <https://www.aaihs.org/why-the-academic-achievement-gap-is-a-racist-idea/>.

<sup>15</sup> See Anne Gregory et al., *Good Intentions Are Not Enough: Centering Equity in School Discipline Reform*, 50 SCH. PSYCH. REV. 206 (2021), <https://doi.org/10.1080/2372966X.2020.1861911>.

<sup>16</sup> See generally LEON FESTINGER, A THEORY OF COGNITIVE DISSONANCE. (1957), <https://psycnet.apa.org/record/1993-97948-000>.

<sup>17</sup> Kurt Gray, Liane Young & Adam Waytz, *Mind Perception Is the Essence of Morality*, 23 PSYCHOL INQ 101 (2012); Kurt Gray & Daniel M. Wegner, *Morality Takes Two: Dyadic Morality and Mind Perception*, in THE SOCIAL PSYCHOLOGY OF MORALITY: EXPLORING THE CAUSES OF GOOD AND EVIL 109 (M. Mikulincer & P.R. Shaver eds., 2012).

<sup>18</sup> Frank Dobbin & Alexandra Kalev, *Why Diversity Programs Fail: And What Works Better*, HARV. BUS. REV., July–Aug. 2016, at 52, 55.

As this Article shows, that resentment becomes evident in the attraction to figures willing to stand up to moral judgement, whose refusal to be cowed becomes its own form of vindication. Resentment transforms the terrain of political disagreement, because the injury isn't just to a person's ideas but to his sense of himself as a moral agent capable of reason.

Moral delegitimization destroys the basic trust required for democratic disagreement—the trust that your fellow citizens see you as someone worth reasoning with rather than someone to be defeated and reeducated. Without that trust, concession means validating the very people who denied your standing as a reasonable person—something few people will be eager to do.

The first step towards understanding this development is to consider the context of the *Griggs v. Duke Power Co.* case itself.<sup>19</sup> The Parts that follow discuss how the disparate-outcomes-equal-racism, impact-over-intent moral framework spread, analyze why it is a problem, and consider possible responses.

## I. THE GRIGGS CASE

Willie Griggs was a black Duke Power employee who, along with twelve co-workers, filed a class action lawsuit against his employer, who had a history of restricting opportunities for black employees.<sup>20</sup> Specifically, in the 1950s, Duke Power limited black employees to the labor department, where the highest-paying position earned less than the lowest-paid position in any other department.<sup>21</sup> In 1955, the company required high school diplomas for advancement and offered to pay two-thirds of the costs for employees to obtain them—except for those in the labor department.<sup>22</sup>

On July 2, 1965,<sup>23</sup> the day after the Civil Rights Act took effect, Duke Power added employment and transfer tests—the Bennett Mechanical Comprehension Test and the Wonderlic IQ test—to its roster of requirements.<sup>24</sup> The company set the cutoffs at the national median for high-school graduates. Unsurprisingly, at a time when graduation rates dramatically differed by race, 58 percent of whites passed compared to six percent of blacks.<sup>25</sup>

Understanding the Court's response to this situation requires consideration of the legal framework available for anti-discrimination cases at the time. Prior to the 1964 Act, such cases relied primarily on the Equal Protection Clause ("EPC") of the 14<sup>th</sup> Amendment,<sup>26</sup> which had significant constraints. First, it applied only to state actors, and not to private employers.<sup>27</sup> Second, it generally required proof of discriminatory intent, as later affirmed in *Washington v. Davis*.<sup>28</sup> In other words, most successful anti-discrimination cases brought under the EPC required clear evidence that plaintiffs were treated differently *because* of their race, as in *Johnson*

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<sup>19</sup> Political scientist and commentator Richard Hanania has also flagged the importance of this case for its broader societal effects. See RICHARD HANANIA, *THE ORIGINS OF WOKE: CIVIL RIGHTS LAW, CORPORATE AMERICA, AND THE TRIUMPH OF IDENTITY POLITICS* (2023).

<sup>20</sup> *Griggs v. Duke Power Co.*, 401 U.S. 424, 427 (1971).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 431.

<sup>23</sup> While the Civil Rights Act of 1964 was signed into law in July 1964, enforcement and practical effect of Title VII began in July 1965. This allowed time for establishment of the EEOC. U.S. Equal Employment Opportunity Comm'n, *EEOC History: 1964 - 1969*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, <https://www.eeoc.gov/history/eeoc-history-1964-1969> (last visited Nov. 14, 2025).

<sup>24</sup> *Griggs*, 401 U.S. at 428.

<sup>25</sup> *Id.* at 430 n.6.

<sup>26</sup> *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954); *Hernandez v. Texas*, 347 U.S. 475 (1954); *Robinson v. Florida*, 378 U.S. 153 (1964); *Anderson v. Martin*, 375 U.S. 399 (1964); *Strauder v. West Virginia*, 100 U.S. 303 (1879); *Gibson v. Mississippi*, 162 U.S. 565 (1896); *Norris v. Alabama*, 294 U.S. 587 (1935); *Mo. ex rel. Gaines v. Canada*, 305 U.S. 337 (1938); *Sipuel v. Bd. of Regents*, 332 U.S. 631 (1948); *Sweatt v. Painter*, 339 U.S. 629 (1950); *McLaurin v. Okla. State Regents for Higher Educ.*, 339 U.S. 637 (1950); *Griffin v. Cnty. Sch. Bd. of Prince Edward Island*, 377 U.S. 218 (1964); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

<sup>27</sup> U.S. CONST. amend. XIV, § 1 ("No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

<sup>28</sup> *Washington v. Davis*, 426 U.S. 229 (1976).

*v. Virginia*<sup>29</sup> and *Alston v. Sch. Bd. of Norfolk*.<sup>30</sup> Because Title VII of the Civil Rights Act of 1964 covered the private sector, it solved the first problem easily.

The second problem for cases brought under the EPC was the need to show evidence of discriminatory intent. This was more complicated to solve, as doing so had obvious tradeoffs. Continuing to require evidence of racist intent would likely continue to create false negatives—cases where the employer had discriminatory intent but got away with the practice in question because that intent couldn’t be proven. At the same time, eliminating the intent requirement would likely increase the number of false positives—cases where there was no discriminatory intent, but that were treated as violations of anti-discrimination law anyway. The difference between the two approaches was stark. The first defined discrimination as deliberately differential treatment. The second defined it as any policy or practice producing unequal outcomes, independent of the reasoning behind it.

While historically, as with the Equal Protection Clause, racist intent was seen as integral to the concept, that was starting to change by the late 1960s and early 1970s.<sup>31</sup> By 1970, academic and activist circles were increasingly leaning towards the very redefinition the court would adopt, where racism was defined in terms of disparate outcomes rather than individual motives.<sup>32</sup> Such a shift was appealing in part because it offered an explanation for persistent racial inequality<sup>33</sup> that didn’t place the blame on members of minority groups that had historically been disadvantaged.<sup>34</sup>

This approach to thinking about inequality was evident in several salient works around the time. Charles Hamilton and Stokely Carmichael’s “Black Power” (1967) argued that racism operated through institutional arrangements rather than individual prejudice.<sup>35</sup> The Kerner Commission Report (1968) explicitly identifies “white institutions” as a primary cause of urban unrest.<sup>36</sup> The organizing work of activists like Frances Fox Piven and Richard Cloward (1968) around welfare rights in the 1960s demonstrated systemic approaches to addressing racial inequality in practice.<sup>37</sup> Even Gunnar Myrdal’s “An American Dilemma” (1944) criticized how American systems perpetuated racial disadvantage through structural arrangements rather than individual malice.<sup>38</sup> The NAACP’s legal strategy from 1925-1950, as documented by Mark Tushnet, focused on the structural unfairness of “separate but equal.”<sup>39</sup> And Kenneth and Mamie Clark’s “doll tests” around 1950 showed that black children had internalized racial hierarchy by preschool age through subtle systemic messaging rather than explicit instruction.<sup>40</sup>

<sup>29</sup> 373 U.S. 61 (1963) (per curiam). In *Johnson*, the Court held that the petitioner’s conviction violated the Equal Protection Clause because the only reason he was ordered to move was his race: he was told to sit in the section of the courtroom designated for black spectators and, as the Court noted, “at no time did he behave in a boisterous or abusive manner,” meaning there was no justification for treating him differently apart from his race. *Id.* at 62.

<sup>30</sup> 112 F.2d 992 (4th Cir. 1940). In *Alston*, the court found a clear Equal Protection violation because the School Board paid black teachers substantially less “based solely upon their race and color.” *Id.* at 994.

<sup>31</sup> While intent is an internal state not directly accessible to outsiders, historically courts have inferred racist motives when no plausible non-racial explanation for the unequal treatment existed.

<sup>32</sup> Throughout this analysis, I use “racism” and “discrimination” largely interchangeably. The link comes from the way discrimination is viewed as a primary mechanism through which racial animus is expressed. *Encyclopedia of Multicultural Psychology*, in RACISM AND DISCRIMINATION 397 (Yo Jackson ed., 2006), <https://sk.sagepub.com/ency/edvol/multiculturalpsychology/chpt/racism-discrimination#>.

<sup>33</sup> Rakesh Kochhar and Mohamad Moslimani, *Wealth Gaps across Racial and Ethnic Groups*, PEW RSCH. CTR. (Dec. 4, 2023), <https://www.pewresearch.org/2023/12/04/wealth-gaps-across-racial-and-ethnic-groups/>.

<sup>34</sup> ROBERT A. MARGO, *The Competitive Dynamics of Racial Exclusion: Employment Segregation in the South, 1900 to 1950*, in RACE AND SCHOOLING IN THE SOUTH, 1880-1950: AN ECONOMIC HISTORY 87 (1990).

<sup>35</sup> STOKELY CARMICHAEL & CHARLES V. HAMILTON, BLACK POWER: THE POLITICS OF LIBERATION 44 (1967).

<sup>36</sup> KERNER COMMISSION, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 2 (1968).

<sup>37</sup> See Richard A. Cloward & Frances Fox Piven, *The Urban Crisis and the Consolidation of National Power*, 29 PROCEEDINGS OF THE ACADEMY OF POLITICAL SCIENCE 159 (1968); see also Frances Fox Piven & Richard A. Cloward, *The Case against Urban Desegregation*, 12 SOC. WORK 12 (1967).

<sup>38</sup> See GUNNAR MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY 307 (1944).

<sup>39</sup> MARK V. TUSHNET, THE NAACP’S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925-1950 xi (1987).

<sup>40</sup> Kenneth B. Clark & Mamie B. Clark, *Emotional Factors in Racial Identification and Preference in Negro Children*, 19 J. NEGRO EDUC. 341 (1950).

In other words, the Burger Court didn't invent the idea that disparate outcomes indicate discrimination or that intent should be irrelevant when considering racism. What it provided was definitional authority and institutional legitimacy—for an understanding that, up to that point, would have had to compete with more traditional intent-based definitions.

As a private North Carolina company, prior to the Civil Rights Act, Duke Power had been free to act on its hiring preferences,<sup>41</sup> which clearly included limiting opportunities for black employees specifically. When doing so was no longer legal, the timing of the company's new employee tests, combined with the dramatically different pass rates, suggested the company had figured out a way to achieve the same discriminatory ends through facially neutral policies. And yet, *proving* this was their goal presented a challenge. After all, the company could genuinely point out that all employees were subject to the same testing requirements. That meant that, under a definition of discrimination where intent matters and racist intent can be inferred only when there's no other plausible explanation, the Court had few tools to deploy against a company that appeared to be trying to skirt the new civil rights law. They could, however, use a different standard to determine discrimination in the first place: disparate impact.

On March 8, 1971, the Court delivered a unanimous decision holding for the plaintiffs, carefully avoiding any tangled accusation of bad motives. On the contrary, Chief Justice Warren Burger wrote: "We do not suggest that either the District Court or the Court of Appeals erred in examining the employer's intent; but good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability."<sup>42</sup> The combination of Duke Power's apparent discriminatory preferences with the timing of its new policies the day after the Civil Rights Act went into effect provided the Court with a strong justification to move towards an intent-blind definition, one whose application had the potential for far broader application.

After the Supreme Court decided *Griggs*, the judiciary applied the theory of disparate impact to a variety of other federal nondiscrimination statutes, including Title VI of the 1964 Civil Rights Act<sup>43</sup> and the Fair Housing Act.<sup>44</sup> It also appeared in academic legal scholarship,<sup>45</sup> suggesting that the impact-over-intent framework had become a broader template for identifying discrimination. While these early examples were largely confined to the legal world, the moral shift faced no such constraint.

When the Court declared that employment requirements producing disparate racial outcomes violated Title VII—the same law prohibiting *intentional* racial discrimination—it legally equated the two phenomena. This made facially neutral policies with disparate effects not just problematic, but legally indistinguishable from deliberate discrimination. In practice, it meant that there was no longer a meaningful legal difference between an employer trying to hide racist motives and one who had completely benign motives. The logic for the subsequent moral equation was simple: Racism is morally wrong. Discrimination is the expression of racism. Disparate outcomes now count as discrimination under Title VII. Therefore, practices producing disparate outcomes—regardless of intent—became morally indistinguishable from racism itself. The moral pressure to eliminate racism helps explain why the institutional transformation documented below—including diversity offices, bias response teams, equity-linked compensation, mandatory diversity statements—occurred primarily through voluntary

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<sup>41</sup> See, e.g., *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961).

<sup>42</sup> *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971).

<sup>43</sup> See 42 U.S.C. § 2000d.

<sup>44</sup> See generally 42 U.S.C. §§ 3601–3619.

<sup>45</sup> See *Alexander v. Choate*, 469 U.S. 287 (1985); see also *Tex. Dep't of Hous. and Cmty. Affs. v. Inclusive Cmty. Project, Inc.*, 576 U.S. 519 (2015); Alfred W. Blumrosen, *Strangers in Paradise: Griggs v. Duke Power Co. and the Concept of Employment Discrimination*, 71 MICH. L. REV. 59 (1972); BARBARA LINDEMANN SCHLEI & PAUL GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW* (1976).

adoption. Organizations embraced these practices because impact-over-intent thinking had become morally authoritative, not because any law compelled them to do so.

To be sure, the Court created a “business necessity” exception to the *Griggs* decision.<sup>46</sup> This allowed employers to defend practices with disparate effects *if* the practice was deemed essential to job performance.<sup>47</sup> Legally, this meant a shift from requiring plaintiffs to prove discrimination occurred to requiring employers to prove it didn’t. The disparate outcomes could be considered enough to establish a case unless the employer could justify the practice as essential to business operations.

Morally, however, there could be no corresponding exception. Once the framework linked disparate outcomes to discrimination, they were linked to racism or bias. And racism is wrong regardless of the circumstances. This meant that disparate outcomes were morally wrong regardless of whether they met the standard for a legal exception.

In some ways, the resilience of the impact-over-intent principle became clear when it faced a serious legal setback. The power of the disparate impact theory as judicial doctrine was severely weakened in the 1989 decision *Ward’s Cove Packing Co. v. Atonio*.<sup>48</sup> In *Atonio*, the Court both shifted the burden to the plaintiffs and loosened the standard for employers to demonstrate business necessity.<sup>49</sup> In response, Congress passed the Civil Rights Act of 1991,<sup>50</sup> effectively overturning this change.<sup>51</sup> The 1991 Act made disparate impact statutory law,<sup>52</sup> strengthened the plaintiff’s position,<sup>53</sup> and restored the higher “business necessity” standard by requiring employers to prove that the challenged practice is job-related and consistent with business necessity.<sup>54</sup> Its bipartisan passage<sup>55</sup> suggested that viewing disparate outcomes as inherently problematic had become moral common sense.

## II. FROM LEGAL DOCTRINE TO MORAL FRAMEWORK

Since fighting discrimination amounted to fighting racism, the moral high ground went to those committed to doing just that. This was no less the case under the expanded definition. This sense of being morally right likely made the shift to the new moral framework more comprehensive than any legal mandate with the same goal could have achieved.

American institutions once operated under a framework that defined anti-discrimination obligations primarily in terms of avoiding obviously illegal practices rather than monitoring statistical outcomes. For instance, testimony before Congress in 1962 revealed an emphasis on formal policy compliance rather than outcome measurement,<sup>56</sup> with executives from major employers describing their efforts in terms of equal access to opportunities rather than proportional results. Federal enforcement agencies concentrated on procedural violations and complaint processing rather than systematic effects monitoring.<sup>57</sup> And, while it’s a single point of

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<sup>46</sup> *Griggs*, 401 U.S. at 431.

<sup>47</sup> *Id.*

<sup>48</sup> 490 U.S. 642 (1989).

<sup>49</sup> *Id.* at 658.

<sup>50</sup> Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in scattered sections of 42 U.S.C.).

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

<sup>52</sup> *See id.* at § 3.

<sup>53</sup> *See id.* at § 105.

<sup>54</sup> *See id.* at § 3.

<sup>55</sup> U.S. Senate, *U.S. Senate Roll Call Votes 102nd Congress - 1st Session*, U.S. SENATE (Oct. 30, 1991), [https://www.senate.gov/legislative/LIS/roll\\_call\\_votes/vote1021/vote\\_102\\_1\\_00238.html](https://www.senate.gov/legislative/LIS/roll_call_votes/vote1021/vote_102_1_00238.html).

<sup>56</sup> *See Hearings Before the Special Subcommittee on Labor of the Committee on Education and Labor House of Representatives, 87th Congress*, (1962), <https://babel.hathitrust.org/cgi/pt?id=umn.31951d03524063c&seq=7&q1=discrimination> (showing the testimony of Vice President of the International Hotel and Restaurant Employees & International Bartender Union AFL-CIO. Charles McDonough).

<sup>57</sup> *See* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, FIRST ANNUAL REPORT (1967); *see also* FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT: A REPORT OF THE UNITED STATES COMMISSION ON CIVIL RIGHTS 1971, <https://babel.hathitrust.org/cgi/pt?id=uc1.b4179842&seq=7>.

comparison, these stand in sharp contrast to the 2023 EEOC report, which reads “the agency prioritized tackling systemic discrimination in all forms and on all bases.”<sup>58</sup>

Part I outlined the basic logic of the moral shift as follows: Racism is morally wrong. Discrimination is the expression of racism. Disparate outcomes now count as discrimination under Title VII. Therefore, practices producing disparate outcomes—regardless of intent—became morally indistinguishable from racism itself.

This logic leads to several additional conclusions, including: institutions and practices must be examined for hidden bias (if racism operates without intent, it is present anywhere there is inequality); the subjective disadvantage of groups is authoritative (since bigotry cannot be identified through perpetrator intent, it must be identified through victim impact); inequality and the racism can only be addressed by race-conscious policies (facially neutral policies sustain and reproduce inequality); and the world is best understood through the lens of power where the group with better outcomes dominates. (Systemic racism is about group domination and domination is fundamentally about power. Therefore, to understand systemic racism, the social world is best analyzed in terms of power relations: how one group has the ability to set norms, control resources, and define standards, while other groups are subjected to those norms and standards.)

The preceding paragraph isn’t meant to be an exhaustive list of downstream consequences. Rather, it contains examples of how extensions of the original claim lead to concepts that simultaneously advance the civil rights battle against bigotry while also closing the door to the possibility of morally legitimate disagreement. To see why, consider: Regarding the first example, asking whether racism was present, rather than how it manifested, now meant defending a racist system. For the second, advocating for race neutral policies was complicity in maintaining the racial hierarchy. The same complicity is true with the third example, if someone were to suggest that power isn’t always so easily determined or that its role can be complicated.

In each case, disagreement is tied to supporting a racist system. Understanding the breadth and depth of the adoption of this framework is crucial because this demonization of political opinions destroys social trust.

#### *A. Academic Validation and Expansion (1970s-1980s)*

Now that the legal authority was behind an impact-based view of discrimination, the academic scholarship that had used that definition was no longer just theoretical; it was practically relevant.<sup>59</sup> Researchers developing frameworks for understanding *systemic racism*—an academic term encapsulating the idea of racism without racist intent—found their work indirectly validated.

Examples of this scholarship include James M. Jones’s “Prejudice and Racism,”<sup>60</sup> which provided psychology’s first comprehensive framework for understanding racism as operating on individual, institutional, and cultural levels. Jones argued that institutional racism functions independently of personal attitudes or conscious bias.<sup>61</sup> Robert Blauner’s “Racial Oppression in America,” published shortly after the *Griggs* decision, argued that oppression occurs through institutional mechanisms regardless of individual intent, explicitly rejecting the relevance of white individuals’ racial attitudes and focusing instead on systemic outcomes.<sup>62</sup>

Psychologist Chester Pierce captured the diminished importance of intent when he wrote about “offensive mechanisms” in 1970, stating: “Most offensive actions are not gross and crippling. They are subtle and stunning . . . Our system does not stand in need of new laws

<sup>58</sup> See U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, 2023 ANNUAL PERFORMANCE REPORT (2024), <https://www.eeoc.gov/2023-annual-performance-report>, “A Message from the Chair” at the start of the report.

<sup>59</sup> See *supra* notes 35–40.

<sup>60</sup> See generally JAMES M. JONES, PREJUDICE AND RACISM 265 (1972).

<sup>61</sup> *Id.* at 5.

<sup>62</sup> See, e.g., BOB BLAUNER, RACIAL OPPRESSION IN AMERICA 9 (1972).

or innovative plans as much as it stands in need of eliminating offensive maneuvers from any process of interaction.”<sup>63</sup> Pierce’s emphasis on “subtle” rather than “gross” actions and his focus on eliminating harmful effects regardless of awareness or intent extended impact-over-intent logic to interpersonal interactions.<sup>64</sup>

Scholars operationalized and applied the impact-based definition to their work. A Google Scholar search conducted in fall 2025 revealed the corresponding growth of academic interest in “*systemic racism*.” Such a search returned 39 results from 1900–1960, 13 from 1961–1970, 31 from 1971–1980, and 93 from 1981–1990. Then, after the Civil Rights Act of 1991, the numbers explode: 1,060 results from 1991–2000, 4,670 from 2001–2010, 17,200 from 2011–2020, and 34,600 from 2021–mid 2025.<sup>65</sup>

The legal backing of the impact-based definition helped create a new moral imperative: If disparate outcomes constituted discrimination regardless of intent, then tolerating such outcomes was tantamount to tolerating discrimination. Institutions and individuals that failed to address disparate effects were perpetuating discrimination, while those that actively worked to eliminate disparate outcomes were fulfilling a commitment to civil rights. The demand for legal compliance might have brought people along grudgingly. The moral authority implied by the new definition simply told them it was the right thing to do.

### III. THE TRANSFORMATION ACCELERATES

The period from 1990 to 2020 witnessed the institutionalization of impact-over-intent frameworks across various domains of American society. Multiple converging developments—psychological research that appeared to validate outcome-based approaches, institutional mechanisms that made comprehensive outcome monitoring feasible, and professional incentives that encouraged adoption of this framework—helped transform the definition used in *Griggs* from a legal doctrine into the morally correct way to see the world.

#### A. Systemic Racism

By the 1980s, academic scholarship, building on the earlier work of Jones, Hamilton, Carmichael, Pierce, and others from the previous decade, had developed comprehensive frameworks for understanding discrimination as a systemic phenomenon.<sup>66</sup> But a challenge persisted. From a research standpoint, these theoretical frameworks left a crucial question unanswered: If discrimination could occur through facially neutral policies implemented even by people who consciously rejected prejudice, what was the actual mechanism producing these results? At a minimum, without identifying a specific causal mechanism, designing effective interventions would be difficult. Besides, it was one thing to say racism lived in systems and institutions, it was another to explain how.

To be sure, part of the answer to the mechanism question had to do with history. Past discriminatory policies and practices had created durable disadvantages that persisted even after

<sup>63</sup> CHESTER PIERCE, *Offensive Mechanisms*, in IN THE BLACK SEVENTIES 265, 265 (Floyd Barbour ed., 1970).

<sup>64</sup> *Id.* at 266.

<sup>65</sup> These searches were done in Google Scholar on November 15, 2025. The search used “systemic racism,” with quotes, and excluded citations.

<sup>66</sup> See, e.g., Talmadge Anderson, *Black Encounter of Racism and Elitism in White Academe: A Critique of the System*, 18 J. BLACK STUD. 259 (1988), <https://doi.org/10.1177/002193478801800301>; Jenny Williams, *Redefining Institutional Racism*, 8 ETHNIC & RACIAL STUD. (1985), <https://www.tandfonline.com/doi/abs/10.1080/01419870.1985.9993490>; Graham C. Kinloch, *Contemporary Forms of Institutional Racism*, 9 W. J. BLACK STUD. 40 (1985), <https://www.proquest.com/docview/1311834249/citation/A703797DAE6D4D16PQ/1>; Vine Deloria, *Institutional Racism*, 5 EXPLS. IN ETHNIC STUD. 40 (1982), <https://online.ucpress.edu/esr/article/5/1/40/105327/Institutional-Racism>.

the policies themselves had ended.<sup>67</sup> From the 1930s through the 1960s, federal housing policies systematically excluded black families from homeownership opportunities through redlining, FHA loan exclusions, and restrictive covenants.<sup>68</sup> During the same period, educational segregation meant black schools were underfunded—in 1930, per-pupil spending for black students was roughly 25-30 percent of that for white students across the South.<sup>69</sup> Meanwhile, labor market exclusion barred black workers from unions, skilled trades, and professional networks that provided pathways to middle-class employment.<sup>70</sup> This historical context created a level of cumulative disadvantage across generations that likely wouldn't have otherwise existed. And it meant that parents with restricted wealth struggled to invest in their children's education, families excluded from homeownership struggled to access equity for business ventures, and workers barred from professional networks struggled to provide career guidance to their children.<sup>71</sup>

As compelling as the legacy effects argument was, it fell short of implying a clear solution. In part, that was because even after recognizing that historical discrimination created burdensome and unfair disadvantages, there was no way to know what portion of current inequality could be traced to such practices and what portion was the result of factors like cultural differences, individual choices, or socioeconomic variables unrelated to race. But there was another nagging question too. Even if modern racial inequality were entirely the result of past practices, reasonable people could disagree about what that might imply in terms of corrective remedy, since the people paying to right past wrongs wouldn't necessarily be the people who implemented those wrongful policies.

And yet, these kinds of questions became morally suspect too. After all, suggesting that some portion of inequality might stem from factors other than discrimination could be characterized as a denial that discrimination occurred. And questioning whether current generations should bear financial responsibility for historical wrongs could be characterized as indifference to racial injustice.

In this line of thinking, complexity becomes a casualty. And yet, it's only when disparate outcomes are seen to have multiple causes—historical discrimination, contemporary racial barriers, cultural factors, individual choices—that citizens can reasonably disagree about policy responses. A recognition of that causal complexity allows for deliberation over whether to emphasize reparations or opportunity creation, whether to focus on removing barriers or ensuring outcomes, and whether or to what extent current institutions bear responsibility for past wrongs. When inequality is seen as resulting entirely from discrimination (past or present), these become questions with obvious moral answers rather than questions to consider.

In addition to its inability to provide an answer to the question of what historical injustice meant for the present moment, the legacy effects argument had another limitation. It positioned discrimination as fundamentally a problem of the past—something that created persistent effects but wasn't actively being reproduced in the present. For many people observing ongoing racial disparities, this explanation felt implausible. There was a widespread sense, particularly on the political left, that racist attitudes hadn't disappeared with the new civil rights legislation. Instead, they had simply been driven underground by changing social norms.<sup>72</sup>

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<sup>67</sup> See *Black Americans and the Vote*, NAT'L ARCHIVES (Oct. 7, 2020), <https://www.archives.gov/research/african-americans/vote> (when it came to voting); see also James Gilbert Cassedy, *African Americans and the American Labor Movement*, NAT'L ARCHIVES (Aug. 15, 2016), <https://www.archives.gov/publications/prologue/1997/summer/american-labor-movement.html> (when it came to union membership).

<sup>68</sup> See *Redlining*, FED. RSRV. HIST. (June 2, 2023), <https://www.federalreservehistory.org/essays/redlining>.

<sup>69</sup> See David Card et al., *School Equalization in the Shadow of Jim Crow: Causes and Consequences of Resource Disparity in Mississippi circa 1940*, NBER WORKING PAPER 32496 (2024).

<sup>70</sup> MARGO, *supra* note 34.

<sup>71</sup> Thomas A. DiPrete & Gregory M. Eirich, *Cumulative Advantage as a Mechanism for Inequality: A Review of Theoretical and Empirical Developments*, 32 ANN. REV. SOCIO. 271 (2006).

<sup>72</sup> See, e.g., Jon Nordheimer, *'The Dream,' 1973: Blacks Move Painfully Toward Full Equality*, N.Y. TIMES (Aug. 26, 1973), <https://www.nytimes.com/1973/08/26/archives/-the-dream-1973-blacks-move-painfully-toward-full-eq-quality-death-.html>; William Greider, *After Dr. King: Strong Currents of Social Change*, WASH. POST (Apr. 2, 1978),

Beginning in the 1990s, developments in psychological research seemed to validate this view. The Implicit Association Test (IAT), developed by Anthony Greenwald, Mahzarin Banaji, and colleagues, gave weight to the idea that discrimination was indeed ongoing and pervasive.<sup>73</sup> In particular, it suggested that people could harbor unconscious and negative racial associations that contradicted their stated beliefs.<sup>74</sup>

Without the institutional backing of the impact-over-intent framework, the IAT might have remained an interesting psychological discovery about cognitive bias. It added to research on the kind of mental shortcuts and systematic errors that psychologists had been documenting for decades.<sup>75</sup> Only this time, the findings had profound social and empirical meaning.

By showing *how* unequal outcomes could indicate racism and discrimination regardless of intent, unconscious bias research both validated a core claim of *systemic racism* theorists and provided a second causal mechanism beyond just legacy effects of old policies. While historical discrimination explained how past policies could produce contemporary disparities, the new line of research suggested that discrimination was also occurring in real time through the decisions of otherwise well-meaning individuals. Together, these two mechanisms—historical and contemporary—appeared to offer a complete explanation for persistent inequality.

The link between unconscious bias and systemic racism seemed bidirectional and reinforcing. Unconscious bias could be a cause systemic racism. If everyone harbored unconscious biases, discriminatory outcomes would naturally emerge from normal organizational decision-making without requiring explicit prejudice or conscious coordination. Systems could be racist by aggregating the unconscious biases of well-intentioned individuals across hiring, lending, educational, criminal justice, and other processes. At the same time, it could also be a consequence. After all, if individuals are primed to internalize negative associations about minority groups from a young age, unconscious bias would be a logical result.

This new field of research arguably conferred credibility to academic theories of colorblind racism—the idea that the belief that race shouldn’t be a factor in how people are treated or how decisions are made denies the importance of race, perpetuates racial inequality, and is itself a form of racism—that were difficult to prove with data.<sup>76</sup> If people harbor unconscious biases they’re unaware of, then claims of colorblindness naturally become suspect. Someone who believes they treat everyone equally might still be acting on hidden prejudices. The IAT seemed to provide empirical evidence for what colorblind racism theorists had long argued—that professed neutrality could mask racism even from the person professing it.

Colorblind racism complemented *systemic racism* frameworks by explaining how discrimination could persist even when individuals consciously rejected racist beliefs. While *systemic racism* theorists focused mainly on institutional outcomes,<sup>77</sup> colorblind racism theorists

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<https://www.washingtonpost.com/archive/politics/1978/04/02/after-dr-king-strong-currents-of-social-change/2949ece7-46c5-4c24-a7d1-d7413054def1/>; TIME, *Black America 1970*, TIME (Apr. 6, 1970), <https://time.com/archive/6877043/black-america-1970/>.

<sup>73</sup> Anthony G. Greenwald, Brian A. Nosek & Mahzarin R. Banaji, *Understanding and Using the Implicit Association Test: I. An Improved Scoring Algorithm*, 85 J. PERSONALITY & SOC. PSYCH. 197 (2003).

<sup>74</sup> See A.G. Greenwald, D.H. McGhee & J.L.K. Schwartz, *Implicit Association Test*, (1998); see also Greenwald, Nosek & Banaji, *supra* note 73.

<sup>75</sup> See, e.g., William F. Wright, *Cognitive Information Processing Biases: Implications for Producers and Users of Financial Information*, 11 DECISION SCI. 284 (1980), <https://onlinelibrary.wiley.com/doi/abs/10.1111/j.1540-5915.1980.tb01139.x>; James H. Barnes Jr., *Cognitive Biases and Their Impact on Strategic Planning*, 5 STRATEGIC MGMT. J. 129 (1984), <https://onlinelibrary.wiley.com/doi/abs/10.1002/smj.4250050204>; Ronnie Janoff-Bulman, Christine Timko & Linda L. Carli, *Cognitive Biases in Blaming the Victim*, 21 J. EXPERIMENTAL SOC. PSYCH. 161 (1985), <https://www.sciencedirect.com/science/article/pii/0022103185900137>; Kenneth A. Dodge & Cynthia L. Frame, *Social Cognitive Biases and Deficits in Aggressive Boys*, 53 CHILD DEV. 620 (1982), <https://www.jstor-org.proxy2.library.illinois.edu/stable/1129373?seq=1>.

<sup>76</sup> See, e.g., EDUARDO BONILLA-SILVA, RACISM WITHOUT RACISTS (2003); B. Keith Payne & Jason W. Hannay, *Implicit Bias Reflects Systemic Racism*, 25 TRENDS IN COGNITIVE SCI. 927 (2021); Olachi J. Mezu-Ndubuisi, *Unmasking Systemic Racism and Unconscious Bias in Medical Workplaces: A Call to Servant Leadership*, 10 J. AM. HEART ASS’N 1 (2021).

<sup>77</sup> See, e.g., National Academies of Sciences, Engineering, and Medicine, *1 Setting the Foundation: Studying Race and Structural Racism Responsibly*, in STRUCTURAL RACISM AND RIGOROUS MODELS OF SOCIAL INEQUITY: PROCEEDINGS OF A WORKSHOP (2022), <https://nap.nationalacademies.org/read/26690/chapter/3>; WILLIAM JULIUS WILSON, THE TRULY DISADVANTAGED: THE

explained an ideological mechanism:<sup>78</sup> a refusal to acknowledge race enabled discriminatory systems to continue operating. Unconscious bias research transformed suspicions about hidden bias into scientific findings about psychological processes.

Social psychologist Claude Steele's research on stereotype threat offered another crucial mechanism showing how discrimination could occur without biased decision-makers.<sup>79</sup> Stereotype threat demonstrated that simply being in situations where negative stereotypes about one's group might apply—like black students taking standardized tests<sup>80</sup> or women taking math exams<sup>81</sup>—could impair performance by creating anxiety and cognitive load. The concept suggested that discriminatory outcomes could emerge from the mere existence of stereotypes in the cultural environment, regardless of whether any individual held or acted on them.<sup>82</sup> If people could be racist without realizing it (through unconscious bias) and those being tested could have their performance undermined (through stereotype-laden environments), then discrimination could occur on both sides of any evaluative interaction.

Around the same time, other scholars were applying impact-over-intent logic to institutional policies across multiple identity categories. Kimberlé Crenshaw's intersectionality theory extended the framework by demonstrating how facially neutral policies could produce discriminatory effects across overlapping identity categories.<sup>83</sup> Just as disparate racial outcomes indicated discrimination regardless of intent, Crenshaw showed that people with multiple disadvantaged identities could be overlooked in anti-discrimination claims that focused separate analyses race and gender.<sup>84</sup>

Despite the legal and moral authority the impact-over-intent concept held, both implicit bias and stereotype threat research faced methodological challenges that revealed a deeper problem with how the framework operated in practice. Critics questioned whether the IAT predicted any actual discriminatory behavior, raising questions about whether it measured meaningful bias or simply cultural familiarity with stereotypes.<sup>85</sup> Similarly, stereotype threat research demonstrated that awareness of negative stereotypes could impair performance, but it didn't address whether the underlying stereotypes reflected any real group differences in skills or preparation. Some social psychological research suggested that some stereotypes, while often exaggerated, contained kernels of statistical truth about group differences.<sup>86</sup> This raised a fundamental question: If some stereotypes reflected observable patterns rather than pure bias, was the problem the stereotype or the pattern that helped create the stereotype?

INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY, SECOND EDITION (2012), <https://press.uchicago.edu/ucp/books/book/chicago/T/bo13375722.html>.

<sup>78</sup> See, e.g., CW Smith, *The Making of a Mantra: Americans' Racial Ideologies in the Era of Black, Blue, and All Lives Matter*, 8 J. RACE, ETHNICITY, & POLS. 371 (2023), <https://scholars.duke.edu/publication/1594813>; Jacqueline Yi et al., *Ignoring Race and Denying Racism: A Meta-Analysis of the Associations between Colorblind Racial Ideology, Anti-Blackness, and Other Variables Antithetical to Racial Justice*, 70 J. COUNSELING PSYCH. 258 (2023), <https://doi.apa.org/doi/10.1037/cou0000618>.

<sup>79</sup> See Claude M. Steele, *Stereotyping and Its Threat Are Real*, 53 AM. PSYCH. 680 (1998); see also Claude M. Steele, *A Threat in the Air: How Stereotypes Shape Intellectual Identity and Performance*, 52 AM. PSYCH. 613 (1997); Claude M. Steele & Joshua Aronson, *Stereotype Threat and the Intellectual Test Performance of African Americans*, 69 PERSONALITY & SOC. PSYCH. 797 (1995).

<sup>80</sup> Steele and Aronson, *supra* note 79.

<sup>81</sup> Michael Inzlicht & Talia Ben-Zeev, *A Threatening Intellectual Environment: Why Females Are Susceptible to Experiencing Problem-Solving Deficits in the Presence of Males*, 11 PSYCH. SCI. 365 (2000), <https://journals.sagepub.com/doi/10.1111/1467-9280.00272>.

<sup>82</sup> Steele, *supra* note 79; Jaysson T. Brooks, *Defining Stereotype Threat and Why It Matters*, 5 J. PEDIATRIC ORTHOPAEDIC SOC'Y N. AM. 576 (2023), <https://www.sciencedirect.com/science/article/pii/S2768276524000968>.

<sup>83</sup> Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color*, 43 STAN. L. REV. 1241 (1991).

<sup>84</sup> *Id.*

<sup>85</sup> See, e.g., Hal R. Arkes & Philip E. Tetlock, *Attributions of Implicit Prejudice, or "Would Jesse Jackson 'Fail' the Implicit Association Test?"*, 15 PSYCH. INQUIRY 257 (2004), [https://doi.org/10.1207/s15327965pli1504\\_01](https://doi.org/10.1207/s15327965pli1504_01); Jared M. Bartels & Patricia Schoenrade, *The Implicit Association Test in Introductory Psychology Textbooks: Blind Spot for Controversy*, 21 PSYCH. LEARNING & TEACHING (2021); Justine E. Tinkler, *Controversies in Implicit Race Bias Research*, SOCIO. COMPASS (2012).

<sup>86</sup> See LEE JUSSIM ET AL., *Limitations, Contestations, Failures, and Falsification of Dramatic Claims in Intergroup Relations*, in HANDBOOK OF PREJUDICE, STEREOTYPING, AND DISCRIMINATION (3d ed. 2024); LEE JUSSIM ET AL., *The Politics of Social Psychological Science: Distortions in the Social Psychology of Intergroup Relations*, in SOCIAL PSYCHOLOGY OF POLITICAL POLARIZATION (Piercarlo Valdesolo & Jesse Graham eds., 2016).

IAT research in particular helped create what amounted to an unfalsifiable system: Failure to find evidence of unconscious bias could always be dismissed as inadequate measurement rather than evidence that bias might not be present. This meant that, within the *systemic racism* paradigm, any institution or individual could be presumed to harbor bias, and the absence of measurable animus simply indicated the need for more sophisticated detection methods rather than the possibility that discrimination might not be occurring.

The research just described aligned with the evolving moral reasoning about inequality. The ubiquity of racism and other forms of bias suggested by the research made disagreement or denial willfully blind at best, actively complicit at worst. And yet, the logic for each claim could be traced back to the starting assumption: that disparities indicate discrimination. Once you accept this as given, intent becomes irrelevant—what matters is the outcome. And once intent is irrelevant, unconscious bias, stereotype threat, and colorblind racism all become mechanisms through which discrimination operates. But without that starting assumption, these same research findings support much narrower claims.

For instance, unconscious bias research shows that people form automatic associations but doesn't establish whether these associations translate into discriminatory behavior with meaningful real-world effects. Stereotype threat demonstrates that anxiety about confirming negative stereotypes can impair performance in testing situations but doesn't reveal how much of any achievement gap this explains, whether gaps would disappear if stereotype threat were eliminated, or whether pre-existing differences might account for some portion of observed disparities in outcomes. Historical discrimination explains how past policies created disadvantages but doesn't determine whether current disparities primarily reflect those legacy effects, ongoing discrimination, or other factors entirely. Colorblind ideology might be criticized as naive or insufficient, but equating it with racism requires first accepting that maintaining race-neutral principles in the face of disparate outcomes constitutes discrimination.

Ultimately, if bias operates without awareness and leaves no detectable trace, then the absence of evidence cannot disprove its presence—it only reveals the limitations of detection or the observer's own blind spots. When bias is presumed always present, skepticism becomes complicity, and inquiry itself becomes injustice.<sup>87</sup>

The implications of this research for the moral shift discussed in this Article were at least as significant as the empirical findings. The combination of three key ideas—racism is a moral wrong, discrimination is the expression of racism, disparities indicate discrimination—meant that the moral high road naturally went to the people who were fighting against visible measures of inequality. Conversely, anyone defending practices that produced disparities, regardless of their stated reasons for doing so, was effectively defending discrimination and therefore occupying morally indefensible ground. Not only that, but someone who questioned whether unconscious bias explained achievement gaps, whether the proposed remedies would work, or whether there might be costs to consider, wasn't offering a different analysis—they were, wittingly or not, defending a system that perpetuated racism. And there was no morally legitimate way a person could take such a position.

It didn't take long for the impact-over-intent moral logic to extend to individual interactions, following Chester Pierce's earlier work on subtle "offensive mechanisms."<sup>88</sup> Just as intent didn't matter for the evaluation of institutional policies—hiring practices that produced disparate outcomes, disciplinary procedures with unequal effects, or educational requirements with differential pass rates were all discriminatory—it didn't matter for interpersonal harm either.

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<sup>87</sup> See, e.g., Jacqueline Yi et al., *Ignoring Race and Denying Racism: A Meta-Analysis of the Associations between Colorblind Racial Ideology, Anti-Blackness, and Other Variables Antithetical to Racial Justice*, 70 J. COUNSELING PSYCH. 258 (2023).

<sup>88</sup> PIERCE, *supra* note 63.

The impact-over-intent principle meant doing everything possible to reduce racial gaps in outcomes; it also meant eliminating well-intentioned comments that could cause psychological harm to the same groups disadvantaged by systemic racism. Psychologist Derald Wing Sue applied this logic to everyday social interactions with his research on what came to be known as microaggressions.<sup>89</sup> Sue argued that subtle comments—even those meant as compliments but that could be interpreted as insulting or racist, like “You speak good English”—could have serious psychological consequences.<sup>90</sup> The question of whether such comments cause measurable psychological harm remains empirically contested,<sup>91</sup> but that debate is separate from simply observing how the concept of microaggressions is an extension of impact-over-intent thinking.

Further research extended microaggression analysis beyond Sue’s original racial framework to a wider array of contexts, including hierarchical dynamics in higher education and clinical medicine where physicians’ well-intentioned remarks could undermine patient care.<sup>92</sup> As scholars expanded the scope—from, for instance, race to gender microaggressions and from workplace to educational settings—they also developed standardized measurement instruments like the Racial Microaggressions Scale to quantify this subtle form of discrimination.<sup>93</sup> By 2020, systematic reviews documented the proliferation of microaggression research across educational environments, providing empirical validation for the principle that discriminatory harm could occur through unintentional racism in everyday interactions.<sup>94</sup> These kinds of claims—about domination, offense, unintentional racism—are visible in conceptually related movements emerging around the same time in education and corporate America.

### *B. Multiculturalism and Diversity*

In the educational space, scholar James Banks—sometimes referred to as the “father” of multicultural education<sup>95</sup>—showed how well-intentioned and facially neutral educational practices could also reinforce discriminatory patterns. Banks argued that “many school, college, and university practices related to race, ethnicity, language, and religion are harmful to students and reinforce many of the stereotypes and discriminatory practices in Western societies.”<sup>96</sup> To Banks, this confirmed that educators should monitor outcomes rather than rely on good intentions.<sup>97</sup> For instance, Banks argued that educators should monitor the proportional representation of students of color in disciplinary actions and gifted programs.<sup>98</sup>

Multiculturalism developed primarily as a philosophy for curriculum reform and pedagogical practice.<sup>99</sup> Despite the development of various pedagogical tools, the concept was

<sup>89</sup> See DERALD WING SUE, *MICROAGGRESSIONS IN EVERYDAY LIFE: RACE, GENDER, AND SEXUAL ORIENTATION* (2010).

<sup>90</sup> Derald Wing Sue, *Racial Microaggressions in Everyday Life*, PSYCH. TODAY (2010), <https://www.psychologytoday.com/us/blog/microaggressions-in-everyday-life/201010/racial-microaggressions-in-everyday-life>.

<sup>91</sup> Scott O. Lilienfeld, *Microaggressions: Strong Claims, Inadequate Evidence*, 12 PERSPS. PSYCHOL SCI 138 (2017), <https://doi.org/10.1177/1745691616659391>.

<sup>92</sup> See Sonny Nordmarken, *Microaggressions*, 1 TRANSGENDER STUD. Q. 129 (2014); Kathryn Young, Myron Anderson & Saran Stewart, *Hierarchical Microaggressions in Higher Education*, 8 J. DIVERSITY IN HIGHER EDUC. 61 (2015); Lauren Freeman & Heather Stewart, *Microaggressions in Clinical Medicine*, 28 KENNEDY INST. ETHICS J. 411 (2018).

<sup>93</sup> C.M. CAPODILUPO ET AL., *The Manifestation of Gender Microaggressions*, in MICROAGGRESSIONS AND MARGINALITY: MANIFESTATION, DYNAMICS, AND IMPACT 193 (Derald Wing Sue ed., 2010); Susan R. Torres-Harding, Alejandro L. Andrade Jr. & Crist E. Romero Diaz, *The Racial Microaggressions Scale (RMAS): A New Scale to Measure Experiences of Racial Microaggressions in People of Color*, 18 CULTURAL DIVERSITY & ETHNIC MINORITY PSYCH. 153 (2012).

<sup>94</sup> Dotun Ogunyemi et al., *Microaggressions in the Learning Environment: A Systematic Review*, 13 J. DIVERSITY IN HIGHER EDUC. 97 (2020).

<sup>95</sup> James A. Banks, UNIV. OF WASH., <https://education.uw.edu/about/directory/james-banks> (last visited Nov. 15, 2025).

<sup>96</sup> JAMES A. BANKS, *AN INTRODUCTION TO MULTICULTURAL EDUCATION* 1 (5th ed. 2014).

<sup>97</sup> See, e.g., *id.* at 37.

<sup>98</sup> See *id.* at 42.

<sup>99</sup> The following include a few examples teaching aids developed with a focus on multicultural education. See, e.g., Paul C. Gorski, *What We’re Teaching Teachers: An Analysis of Multicultural Teacher Education Coursework Syllabi*, 25 TEACHING & TCHR. EDUC. 309 (2009); Kezia McNeal, *The Influence of a Multicultural Teacher Education Program on Teachers’ Multicultural Practices*, 16 INTERCULTURAL EDUC. 405 (2006); Gretchen McAllister & Jacqueline Jordan Irvine, *Cross Cultural Competency and Multicultural Teacher Education*, 70 REV. EDUC. RSCH. (2000); Geneva Gay & Tyrone C. Howard, *Multicultural Teacher*

complicated in the sense that it required institutions to think through which cultural practices warranted recognition, which didn't, and how to restructure curricula around multiple ways of knowing, and how to balance competing cultural claims.<sup>100</sup> These were inherently subjective judgments requiring ongoing deliberation.

Nevertheless, Banks's multicultural education framework anticipated themes that would later appear in corporate and institutional diversity initiatives as the terminology evolved from "multiculturalism" to "cultural diversity" to simply "diversity."

The evolution to "cultural diversity" and then simply "diversity" helped change a cultural philosophy into a focus on demographic representation—something that could be counted, tracked, and evaluated against benchmarks.<sup>101</sup> Diversity could be measured through the percentage of employees, students, or faculty from different demographic groups. Not only that, but diversity evaluation didn't require examining intentions—an organization either had proportional representation, or it didn't. And like the broader framework it came from, a lack of diversity became presumptive evidence of discriminatory barriers,<sup>102</sup> moving the relevant question from "do processes treat people fairly?" to "do outcomes look proportional?"

The focus on diversity also expanded the concept beyond cultural characteristics to include a wider range of identity categories—like race, gender, age, disability status, sexual orientation, and socioeconomic background. This broader scope helped make the concept portable across institutional contexts that had little connection to educational philosophy or multicultural theory.

Unlike earlier concepts like "equal opportunity" or "non-discrimination" which could be satisfied through procedural fairness and intent-based compliance, a focus on diversity required the continuous monitoring of demographic composition across institutional functions. A university could not claim to be "diverse" based solely on its evenly-applied admission policies or stated commitments—diversity required demonstrable representation across student bodies, faculty, and staff. Similarly, a corporation could not achieve "diversity" through equal treatment alone—it demanded measurable demographic outcomes in hiring, promotion, and leadership positions. Where multiculturalism had once focused on cultural sensitivity and inclusion as educational values, diversity meant concrete metrics that could be tracked, reported, and used to evaluate institutional performance.

An early marker of the growing importance of diversity included the founding of the American Institute for Managing Diversity (AIMD) in 1984 at Atlanta's Morehouse College. An archive of the AIMD website, from 2002, posts the organization's description as follows: "AIMD helps organizations understand the business imperative for managing diversity, provides ongoing insights into the strategic implementation of diversity, identifies and categorizes trends in diversity management, and suggests new areas of research critical to successful application."<sup>103</sup> One of AIMD's research reports described the lack of diversity as "stem[ming] from organizational systems, (such as policies and practices of recruitment and selection,

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*Education for the 21st Century*, 36 TCHR. EDUCATOR 1 (2010); Marilyn Cochran-Smith, *The Multiple Meanings of Multicultural Teacher Education: A Conceptual Framework*, 30 TCHR. EDUC. Q. 7 (2003).

<sup>100</sup> See, e.g., Warren Crichlow et al., *Multicultural Ways of Knowing: Implications for Practice*, 172 J. EDUC.

<sup>101</sup> The term "cultural diversity" appeared across corporate, government, and non-profit contexts where questions of curriculum and pedagogy were not central concerns. See, e.g., Gianmarco I.P. Ottaviano & Giovanni Peri, *The Economic Value of Cultural Diversity: Evidence from US Cities*, 6 J. ECON. GEOGRAPHY 9 (2006); Richard W. Brislin & Eugene S. Kim, *Cultural Diversity in People's Understanding and Uses of Time*, 52 APPLIED PSYCH. 363 (2003); David C. Thomas, *Cultural Diversity and Work Group Effectiveness: An Experimental Study*, 30 J. CROSS-CULTURAL PSYCH. (1999); Patricia L. Nemetz & Sandra L. Christensen, *The Challenge of Cultural Diversity: Harnessing a Diversity of Views to Understand Multiculturalism*, 21 ACAD. MGMT. REV. (1996); Roland G. Tharp, *Cultural Diversity and Treatment of Children*, 59 J. CONSULTING & CLINICAL PSYCH. 799 (1991); Rachel E. Spector, *Cultural Diversity in Health and Illness*, 13 J. TRANSCULTURAL NURSING (2002).

<sup>102</sup> See, e.g., WINFRED ARTHUR & DENNIS DOVERSPIKE, *Achieving Diversity and Reducing Discrimination in the Workplace Through Human Resource Management Practices: Implications of Research and Theory for Staffing, Training, and Rewarding Performance*, in DISCRIMINATION AT WORK (Robert L. Dipboye & Adrienne Colella eds., 2005).

<sup>103</sup> *About AIMD*, AM. INST. FOR MANAGING DIVERSITY (Feb. 4, 2002), [https://web.archive.org/web/20020204201106/http://www.aimd.org/about\\_aimd.htm](https://web.archive.org/web/20020204201106/http://www.aimd.org/about_aimd.htm).



systematic discrimination in our society. In deciding how to answer that let us consider the facts.<sup>111</sup>

Those facts, according to Clinton, were disparate outcomes:

The unemployment rate for African Americans remains about twice that of whites. The Hispanic rate is still much higher. Women have narrowed the earnings gap, but still make only 72 percent as much as men do for comparable jobs. The average income for a Hispanic woman with a college degree is still less than the average income of a white man with a high school diploma.<sup>112</sup>

Clinton's presidential endorsement of statistical disparities as evidence of systematic discrimination represented another layer of political weight given to the impact-over-intent framework. He reinforced his view on the irrelevance of intent further by referencing unconscious bias research: "Evidence abounds in other ways of the persistence of the kind of bigotry that can affect the way we think even if we're not conscious of it, in hiring and promotion and business and educational decisions."<sup>113</sup>

This political mainstreaming was also reflected in the growth of AIMD's audience. By 2002, 18 years after AIMD began, their sponsors included large companies like Avon Products Foundation, BellCore, Danner Corporation, First Data Corporation, General Motors Corporation, SmithKline Beecham Foundation, The Coca-Cola Company, Union Carbide Corporation, Union Pacific Railroad Company, and the United Parcel Service Foundation.<sup>114</sup>

Sociologists Erin Kelly and Frank Dobbin have described this shift in the corporate world as follows: "During the 1970s, active federal enforcement of equal employment opportunity (EEO) and affirmative action (AA) law, coupled with ambiguity about the terms of compliance, stimulated employers to hire antidiscrimination specialists to fashion EEO/AA programs."<sup>115</sup> Kelly and Dobbin explained how professional constituencies enabled the institutional survival of diversity practices through this strategic retheorization, but they didn't address that this was more than just organizational adaptation.<sup>116</sup> By successfully reframing disparate outcomes as business problems requiring business solutions, these specialists helped cement the underlying assumption that such outcomes were required correction, regardless of their causes.

### *C. Diversity Expansion and a Shift in the Meaning of Harm*

Although Kelly and Dobbin's analysis included data up to the mid-1990s, the institutional dynamics they identified accelerated significantly in the following decades. The retheorization process they described—from affirmative action and equal employment opportunity to diversity management—spread quickly. One visible example of this was the expansion of specialized university administrators focused on this area.

In 2003, Dr. William Harvey, then Vice President of the Center for Advancement of Racial and Ethnic Equity (CAREE) at the American Council on Education, established the National Association of Diversity Officers in Higher Education.<sup>117</sup> At the time of writing, their

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *About AIMD*, *supra* note 103.

<sup>115</sup> Erin Kelly & Frank Dobbin, *How Affirmative Action Became Diversity Management: Employer Response to Antidiscrimination Law, 1961 to 1996*, 41 AM. BEHAV. SCIENTIST (1998).

<sup>116</sup> *Id.*

<sup>117</sup> NADAOHE, *Our Values*, NAT'L ASS'N OF DIVERSITY OFFS. IN HIGHER EDUC., <https://www.nadohe.org/stories/who-we-are> (last visited Aug. 16, 2025).

website described the organization as “lead[ing] the national and international conversation on diversity, equity, and inclusion in postsecondary education.”<sup>118</sup> When the group started, there were 30 members representing 30 institutions.<sup>119</sup> It took fewer than six months for them to reach 120. By 2025, they had over 2,200 members.<sup>120</sup>

The subsequent shift from “diversity” to “diversity, equity, and inclusion” (DEI) broadened the focus further. Simply counting people of different racial, ethnic, and gender backgrounds wasn’t sufficient. Institutions needed to actively ensure “equity” in outcomes and “inclusion” in people’s experiences. This expansion made it even more difficult to maintain moral standing while questioning DEI initiatives, since opposing them could be characterized not just as defending discrimination, but as actively perpetuating inequity and exclusion.

The DEI framework operationalized the impact-based view of racism and bigotry through the development of diversity offices and training initiatives. In some cases, universities wove this view into hiring and promotion itself.

Higher education began requiring diversity statements in hiring and promotions, with one article tracing the first instance of this practice to 2001.<sup>121</sup> In 2015, the sprawling University of California system revised its policies, noting that “contributions in all areas of faculty achievement that promote equal opportunity and diversity should be given due recognition” when it comes to promotion and tenure.<sup>122</sup> In 2018, Jerry Kang, UCLA’s then-vice chancellor for equity, diversity, and inclusion, said the decision made “all the sense in the world”—demonstrating how thoroughly the effects-based approach had been internalized by university administrators.<sup>123</sup>

Outside of campus life, there was a steady increase in the number of diversity professionals more generally. By 2025, the Future of Jobs report by the World Economic Forum found that 83 percent of employers in their survey have implemented diversity, equity, and inclusion measures, up from 67 percent even two years earlier.<sup>124</sup> When it came to future growth, over half (51 percent) reported plans to implement “comprehensive diversity, equity, and inclusion training” for managers and staff and 42 percent reported a plan to “set diversity, equity, and inclusion goals, targets, or quotas.”<sup>125</sup> Pew Research found a similarly supportive attitude among employees, showing that 56 percent believe that focusing on DEI at work is a “good thing.”<sup>126</sup>

Again, the problem for democracy isn’t the focus on racial and ethnic diversity per se, it’s the elimination of the space for morally legitimate dissent. The more the moral framework spread, the more suspicious disagreement appeared.

The emphasis on DEI wasn’t just among employers. Professional associations and accreditation bodies began incorporating diversity and inclusion standards as well. Grant-making organizations, both public and private, as well as academic journals began paying close attention to the racial and ethnic makeup of their contributors and grantees.<sup>127</sup> In 2018, Boeing and the National Science Foundation partnered to make a \$21 million investment in workforce

<sup>118</sup> NADAOE, *About*, NAT’L ASS’N OF DIVERSITY OFFS. IN HIGHER EDUC., <https://www.nadohe.org/about> (last visited Aug. 16, 2025).

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> Megan Zahneis, *The Uncertain Future of Diversity Statements*, CHRON. HIGHER EDUC. (Sept. 9, 2024), <https://www.chronicle.com/article/the-uncertain-future-of-diversity-statements>.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> WORLD ECON. F., *FUTURE OF JOBS REPORT* (2025), [https://reports.weforum.org/docs/WEF\\_Future\\_of\\_Jobs\\_Report\\_2025.pdf](https://reports.weforum.org/docs/WEF_Future_of_Jobs_Report_2025.pdf).

<sup>125</sup> *Id.*

<sup>126</sup> Rachel Minkin, *Diversity, Equity and Inclusion in the Workplace*, PEW RSCH. CTR. (May 17, 2023), <https://www.pewresearch.org/social-trends/2023/05/17/diversity-equity-and-inclusion-in-the-workplace/>.

<sup>127</sup> See Katherine J. Wu, *Scientific Journals Commit to Diversity but Lack the Data*, N.Y. TIMES (Oct. 30, 2020), <https://www.nytimes.com/2020/10/30/science/diversity-science-journals.html>; see also Emily Vaughn, *What’s Behind The Research Funding Gap For Black Scientists?*, NPR (Oct. 18, 2019), <https://www.npr.org/sections/health-shots/2019/10/18/768690216/whats-behind-the-research-funding-gap-for-black-scientists>; Susan Tebben, *Study: Education Funding Should Reflect Racial Disparities*, OHIO CAP. J. (Feb. 28, 2023), <https://ohiocapitaljournal.com/2023/02/28/study-education-funding-should-reflect-racial-disparities/>.

development and diversity in STEM.<sup>128</sup> That same year, the National Science Foundation awarded a \$3 million grant for a project called “Inclusive Learning and Teaching in Undergraduate STEM Instruction,” designed to “train current and future university faculty in teaching methods that are more inclusive to diverse populations.”<sup>129</sup> As recently as 2022, the Department of Energy required applicants to structure their efforts to promote “researchers and students of color and from other underrepresented groups.”<sup>130</sup>

The same logic was also being applied to campus harassment policies. The impact-over-intent framework meant that harassment could be defined by any behavior that made someone feel uncomfortable, regardless of frequency, severity, or the speaker’s intentions. The subjective experience of harm by the affected party became sufficient evidence of wrongdoing, regardless of whether the harm was intended. In some cases, impact-over-intent training began during orientation.<sup>131</sup>

As early as 2008, the Foundation for Individual Rights and Education (now known as the Foundation for Individual Rights and Expression) wrote of such harassment policies in an article about speech codes. When providing specific examples, the article stated:

Western Michigan University’s harassment policy actually bans ‘sexism,’ which it defines as ‘the perception and treatment of any person, not as an individual, but as a member of a category based on sex.’ The University of Iowa, meanwhile, defines sexual harassment as something that ‘occurs when somebody says or does something sexually related that you don’t want them to say or do, regardless of who it is.’ Davidson College’s Sexual Harassment Policy prohibits the use of ‘patronizing remarks,’ and even goes on to explicitly prohibit ‘comments or inquiries about dating.’<sup>132</sup>

Under such policies, efforts to reduce harassment could turn everyday social interactions into violations. After all, all that was needed to run afoul of the policy was for one person to consider what was said to be an offensive remark.

Campuses created mechanisms to detect and respond to these previously invisible forms of discrimination. Bias response teams were tasked with investigating any reported behavior that created a negative campus climate for members of protected groups—as reflected in Western Washington University’s policy stating that “a bias incident may occur whether or not there is an intent to cause a negative impact.”<sup>133</sup> By 2017, the Foundation for Individual Rights in Education documented such teams at over 100 universities.<sup>134</sup>

By the 2010s, disparate impact and impact-over-intent thinking played out in social movements, as well. Elements of the 2017 #MeToo movement applied it to gender-based violence and harassment advocacy, treating the victim’s experience of harm as definitive

<sup>128</sup> Boeing, *Boeing, National Science Foundation Announce Partnership, \$21 Million Investment in Workforce Development and Diversity in STEM*, BOEING (Sept. 24, 2018), <https://boeing.mediaroom.com/2018-09-24-Boeing-National-Science-Foundation-announce-partnership-21-million-investment-in-workforce-development-and-diversity-in-STEM>.

<sup>129</sup> Kayla Driessen, *Northwestern Leads Multi-University Effort to Increase Diversity in STEM Fields*, NORTHWESTERN NOW (Nov. 8, 2018), <https://news.northwestern.edu/stories/2018/november/nsf-grants-3-million-to-develop-inclusive-stem-curriculum/>.

<sup>130</sup> Adrian Cho, *Department of Energy Requires Plans to Promote Diversity from Grant Applicants*, SCI. (Oct. 5, 2022), <https://www.science.org/content/article/departement-energy-requires-plans-promote-diversity-grant-applicants>.

<sup>131</sup> Laura Stampler, *These Colleges Are Actually Taking Action to Make Their Campuses More Inclusive*, TEEN VOGUE (Sept. 7, 2016), <https://www.teenvogue.com/story/colleges-universities-training-spot-address-microaggressions-inclusivity>; Denise L. F. Davis et al., *Start the Way You Want to Finish: An Intensive Diversity, Equity, Inclusion Orientation Curriculum in Undergraduate Medical Education*, 8 J. MED. EDUC. CURRICULUM DEV. 23821205211000352 (2021), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7975489/>.

<sup>132</sup> Greg Lukianoff, *Campus Speech Codes: Absurd, Tenacious, and Everywhere*, FIRE (May 28, 2008), <https://www.thefire.org/news/blogs/eternally-radical-idea/campus-speech-codes-absurd-tenacious-and-everywhere>.

<sup>133</sup> Office of Equity, *Report a Bias Incident*, W. WASH. UNIV., <https://equity.wvu.edu/sebrt/report-bias-incident> (last visited Nov. 15, 2025).

<sup>134</sup> *Bias Response Team Report 2017*, FIRE (2017), <https://www.thefire.org/sites/default/files/2022/09/Bias%20Response%20Team%20Report%202017.pdf>.

regardless of ambiguous circumstances, mixed signals, or disputes over what actually occurred.<sup>135</sup> Environmental justice movements applied impact-over-intent thinking in their documentation of the way policies produced different effects on ethnic and national origin communities regardless of stated policy intentions, as well as how environmental hazards disproportionately impacted minority communities.<sup>136</sup>

These movements could even be mutually reinforcing by providing intellectual validation for each other's approaches. Organizations like Everyday Feminism, a supporter of #MeToo, explicitly argued that "it doesn't matter whether we, deep down, believe ourselves to be \_\_\_\_-ist or whether we intended our actions to be hurtful or \_\_\_\_-ist . . . If the impact of our actions is the furthering of oppression, then that's all that matters."<sup>137</sup>

The institutional momentum built during this period further entrenched the moral framework that vilified disagreement, while also setting the stage for the cultural transformation that occurred next. When social unrest demanded an immediate response to racial inequality, institutions already had the administrative apparatus and moral frameworks in place to implement impact-over-intent solutions quickly and comprehensively.

#### IV. CULTURAL TRANSFORMATION

When it comes to systemic inequality, among the most significant events to occur in recent years was the killing of George Floyd, an unarmed black man. In late May 2020, a video surfaced of his tragic death at the hands of Minneapolis police.<sup>138</sup> While the Black Lives Matter (BLM) movement that led the response to Floyd's killing had been around since 2013, his death brought unprecedented national and international attention to the problem.<sup>139</sup> The framework of *systemic racism* positioned police violence not as an isolated problem, but as symptomatic of racism operating across all American institutions—from hiring practices to educational outcomes to healthcare access.<sup>140</sup> The image of a knee pressed against Floyd's neck for nearly nine minutes became a visceral symbol of how systemic forces could crush black lives with abandon.<sup>141</sup>

The nationwide demonstrations that followed—sometimes referred to as a "racial reckoning"—took the pressure for institutional action to a new level.<sup>142</sup> This pressure further accelerated the adoption of the kinds of impact-based approaches already mentioned, including

<sup>135</sup> Catherine Thorbecke, *Celebrities Who Helped Launch #MeToo Movement React to Kavanaugh Hearing - ABC News*, ABC NEWS (Sept. 27, 2018), <https://abcnews.go.com/GMA/News/celebrities-helped-launch-metoo-movement-react-kavanaugh-hearing/story?id=58126207>.

<sup>136</sup> See, e.g., Omar Saleem, *Overcoming Environmental Discrimination: The Need for a Disparate Impact Test and Improved Notice Requirements in Facility Siting Decisions*, 19 COLUM. J. ENV'T L. 211 (1994); Jimmy White, *Environmental Justice: Is Disparate Impact Enough*, 50 MERCER L. REV. 1155 (1999); Julia B. Latham Worsham, *Disparate Impact Lawsuits under Title VI, Section 602: Can a Legal Tool Build Environmental Justice*, 27 B.C. ENV'T AFFS. L. REV. 631 (2000); Sheila Foster, *Environmental Justice in an Era of Devolved Collaboration*, 26 HARV. ENV'T L. REV. 459 (2002); Sheila Foster, *Justice from the Ground Up: Distributive Inequities, Grassroots Resistance, and the Transformative Politics of the Environmental Justice Movement*, 86 CALIF. L. REV. 775 (1998).

<sup>137</sup> Jamie Utt, *Intent vs. Impact: Why Your Intentions Don't Really Matter*, EVERYDAY FEMINISM (July 30, 2013), <https://everyday-feminism.com/2013/07/intentions-dont-really-matter/>.

<sup>138</sup> Yamiche Alcindor & Amna Nawaz, *What We Know about George Floyd's Death in Minneapolis Police Custody*, PBS NEWS (May 26, 2020), <https://www.pbs.org/newshour/nation/what-we-know-about-george-floyds-death-in-minneapolis-police-custody>.

<sup>139</sup> *About Black Lives Matter*, BLACK LIVES MATTER, <https://blacklivesmatter.com/about/> (last visited Aug. 20, 2025).

<sup>140</sup> NAACP Issues Statement Surrounding the Events of Protest in Minneapolis, NAACP (May 28, 2020), <https://naacp.org/articles/naacp-issues-statement-surrounding-events-protest-minneapolis>.

<sup>141</sup> Yassmin Abdel-Magied, *Why the Protests in the U.S. Are an Awakening for Non-Black People Around the World*, TIME (June 5, 2020), <https://time.com/5848914/global-protests-racism-police/>.

<sup>142</sup> See T. Elon Dancy II & Christopher M. Wright, *Institutional Diversity and Its Discontents: Antiracism, University Political Economy, and George Floyd Uprising Statements*, 59 EDUC. STUD. 339 (2023), <https://doi.org/10.1080/00131946.2023.2217309>; Karthik Balakrishnan et al., *Racial Diversity Exposure and Firm Responses Following the Murder of George Floyd*, 61 J. ACCT. RSCH. 737 (2023), <https://onlinelibrary.wiley.com/doi/abs/10.1111/1475-679X.12484>; Noor Toraif et al., *From Colorblind to Systemic Racism: Emergence of a Rhetorical Shift in Higher Education Discourse in Response to the Murder of George Floyd*, 18 PLOS ONE (2023); Rafael Copat, *Racial Diversity Exposure and Firm Responses Following the Murder of George Floyd*, HARVARD L. SCH. F. ON CORP. GOVERNANCE (May 9, 2023), <https://corpgov.law.harvard.edu/2023/05/09/racial-diversity-exposure-and-firm-responses-following-the-murder-of-george-floyd/>.

corporate diversity programs and university bias response teams.<sup>143</sup> The emotional power of Floyd's death made questioning the reasoning behind these approaches appear callous, while supporting them became a way for institutions to demonstrate their commitment to addressing the systemic weight that was limiting opportunities for people of color across all domains of American life.<sup>144</sup>

Because Floyd's death was seen as a symbol of how *systemic racism* operated across all institutions—not just policing—the logical response was to examine and reform all institutional practices that might produce unequal effects or make members of minority groups feel unwelcome. A failure to attend to either could be viewed as support for white racial domination.

Companies moved quickly to demonstrate their commitment in ways that went beyond previous decades—issuing public statements, making multi-million dollar commitments, and implementing DEI training faster than before.<sup>145</sup> According to McKinsey & Company, “in 2020, the global market for DEI—that is, dollars spent by companies on DEI-related efforts such as employee resource groups—was estimated at \$7.5 billion and was projected to more than double by 2026.”<sup>146</sup>

The post-2020 period also saw widespread corporate adoption of “anti-racism” efforts, a concept popularized by scholar Ibram X. Kendi that also rejected the role of intent and the possibility of neutrality.<sup>147</sup> Corporate commitments to “anti-racism” during this period embraced Kendi's framework that it wasn't enough for them to simply be non-racist; they needed to pay constant attention to effects rather than rely on good intentions.<sup>148</sup> Companies began conducting reviews of their historical practices, with some issuing public apologies for past policies that had disadvantaged certain groups.<sup>149</sup>

The integration of diversity, equity, and inclusion metrics into executive compensation packages during this period institutionalized the impact-over-intent principle at the highest

<sup>143</sup> Tracy Jan, Jena McGregor & Meghan Hoyer, *Big Business Pledged Nearly \$50 Billion for Racial Justice after George Floyd's Death. Where Did the Money Go?*, WASH. POST (Aug. 23, 2021), <https://www.washingtonpost.com/business/interactive/2021/george-floyd-corporate-america-racial-justice/>; Maria M. Lewis, Raquel Muñoz & Vanessa Miller, *The Politicization of Education Law and the Implications for Re-Envisioning the Law School Curriculum for Racial Justice*, 24 RUTGERS RACE & L. REV. 1 (2022).

<sup>144</sup> See, e.g., Sandra Caballero, *7 Ways Your Organisation Can Start to Uproot Systemic Racism in the Workplace*, WORLD ECON. F. (June 15, 2020), <https://www.weforum.org/stories/2020/06/7-steps-organisations-corporations-uproot-systemic-racism-workplace-diversity-leadership-intersectionality/>; Am. Coll. Physicians, *ACP Proposes Policies and Action to Confront Systemic Racism, Discrimination and Injustices in Health and Law Enforcement*, AM. COLL. PHYSICIANS (June 19, 2020), <https://www.acponline.org/acp-newsroom/acp-proposes-policies-and-action-to-confront-systemic-racism-discrimination-and-injustices-in-health>; Columbia Univ., *Columbia's Commitment to Antiracism*, COLUMBIA UNIV. (July 21, 2020), <https://president.columbia.edu/news/columbias-commitment-antiracism>; Gillian Friedman, *Here's What Companies Are Promising to Do to Fight Racism*, N.Y. TIMES (Aug. 23, 2020), <https://www.nytimes.com/article/companies-racism-george-floyd-protests.html>.

<sup>145</sup> See, e.g., Daniela De la Parra et al., *Racial Diversity Exposure and Firm Responses Following the Murder of George Floyd*, HARVARD L. SCH. F. ON CORP. GOVERNANCE (May 9, 2023), <https://corpgov.law.harvard.edu/2023/05/09/racial-diversity-exposure-and-firm-responses-following-the-murder-of-george-floyd/>; Natalie Sherman, *George Floyd: Why Are Companies Speaking up This Time?*, BBC, June 6, 2020, <https://www.bbc.com/news/business-52896265>; Candice Norwood, *Racial Bias Trainings Surged after George Floyd's Death. A Year Later, Experts Are Still Waiting for "bold" Change*, PBS NEWS (May 25, 2021), <https://www.pbs.org/newshour/nation/racial-bias-trainings-surged-after-george-floyds-death-a-year-later-experts-are-still-waiting-for-bold-change>; Jan, McGregor, & Hoyer, *supra* note 143.

<sup>146</sup> “Show Me That This Is Possible”: *Inspiring the Journey to Achieve Inclusion in the Workforce*, MCKINSEY & CO., <https://www.mckinsey.com/about-us/new-at-mckinsey-blog/most-diversity-initiatives-fall-short-but-success-is-within-reach-with-these-five-factors> (last visited July 18, 2025).

<sup>147</sup> Owen Jones, *Ibram X Kendi on Why Not Being Racist Is Not Enough*, THE GUARDIAN, Aug. 14, 2019, <https://www.theguardian.com/world/2019/aug/14/ibram-x-kendi-on-why-not-being-racist-is-not-enough>.

<sup>148</sup> Janet Nguyen, *A Year Later, How Are Corporations Doing on Promises They Made to Fight for Racial Justice?*, MARKETPLACE (May 24, 2021), <https://www.marketplace.org/story/2021/05/24/a-year-later-how-are-corporations-doing-on-promises-they-made-to-fight-for-racial-justice>.

<sup>149</sup> See, e.g., Tracy Jan et al., *As Big Corporations Say 'Black Lives Matter,' Their Track Records Raise Skepticism*, WASH. POST (June 13, 2020), <https://www.washingtonpost.com/business/2020/06/13/after-years-marginalizing-black-employees-customers-corporate-america-says-black-lives-matter/>; Time Editorial Board, *Editorial: An Examination of The Times' Failures on Race, Our Apology and a Path Forward*, L.A. TIMES (Sept. 27, 2020), <https://www.latimes.com/opinion/story/2020-09-27/los-angeles-times-apology-racism>; John Eligon & Jenny Gross, *Kansas City Star Apologizes for Racism in Decades of Reporting*, N.Y. TIMES, Dec. 21, 2020, <https://www.nytimes.com/2020/12/21/us/kansas-city-star-apology.html>; Sara Ashley O'Brien, *Glossier, a Billion-Dollar Beauty Brand, Apologizes to Former Retail Workers after Racism Allegations*, CNN (Aug. 18, 2020), <https://www.cnn.com/2020/08/18/tech/glossier-apology-retail-workers>.

level of corporate governance.<sup>150</sup> CEO and senior leadership bonuses began to include diversity targets, with executives evaluated on their ability to achieve measurable outcomes rather than their personal commitments to diversity-related activities.<sup>151</sup> This meant they could lose compensation for failing to meet hiring quotas or demographic targets, regardless of whether they operated in markets with limited diverse talent pools or whether they personally championed diversity initiatives. In some cases, the traditional corporate emphasis on “meritocracy” was abandoned in favor of systems that acknowledged and corrected for systemic barriers, further applying the insight that neutral processes can produce discriminatory effects.<sup>152</sup>

Corporate supplier diversity programs aimed to extend the impact-over-intent principle to vendor relationships, suggesting that companies analyze their supply chains to ensure proportional representation of minority businesses.<sup>153</sup> Additional pressure came in the form of the parallel rise of Environmental, Social, and Governance (ESG) investing, where diversity and inclusion metrics became key components of the “Social” criteria that investors used to evaluate companies. This integration suggested that DEI performance was no longer just a matter of corporate policy or legal compliance—it could become tied to access to capital and investment funds.<sup>154</sup>

While the “racial reckoning” of 2020 didn’t mark the origin of many of the ideas described here, it signaled a major step towards their widespread acceptance and increased the sense of moral urgency. That, in turn, made questioning or challenging impact-based definitions of discrimination, racism, and harm even more likely to result in social and professional consequences.

### *A. Political Mainstreaming and International Adoption*

The integration of the impact-over-intent principle into electoral campaigns and political messaging suggested yet another level of mainstreaming in American political discourse. Progressive political candidates began incorporating *systemic racism* analysis into campaign platforms<sup>155</sup>, drawing on the academic frameworks developed over previous decades and on the institutional practices implemented in corporate and campus settings.

The examples that follow are not meant to be exhaustive. Tracking every instance of this framework’s appearance in contemporary politics would require a separate study entirely. Rather, these cases suggest that the impact-over-intent logic has thoroughly permeated discourse, becoming a standard feature of progressive political communication.

Senator Bernie Sanders’s 2020 presidential campaign exemplified this integration, with a platform that explicitly stated: “It’s time to bring a systemic approach to *systemic racism*.”

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<sup>150</sup> Katica Roy, *This Is Why We Need to Tie Executive Compensation to DEI Goals*, FAST CO. (Dec. 14, 2023), <https://www.fast-company.com/90995331/tie-executive-compensation-dei-goals>.

<sup>151</sup> See, e.g., Peter Eavis, *Want More Diversity? Some Experts Say Reward C.E.O.s for It*, N.Y. TIMES, July 14, 2020, <https://www.nytimes.com/2020/07/14/business/economy/corporate-diversity-pay-compensation.html>.

<sup>152</sup> Tawanna Black & Amy Liu, *A Year after George Floyd’s Murder, Corporate Promises Haven’t Made Minneapolis More Equal*, BROOKINGS (June 17, 2021), <https://www.brookings.edu/articles/a-year-after-george-floyds-murder-corporate-promises-havent-made-minneapolis-more-equal/>.

<sup>153</sup> Milan Prilepok et al., *Expand Diversity among Your Suppliers—and Add Value to Your Organization*, MCKINSEY & CO. (May 17, 2022), <https://www.mckinsey.com/capabilities/operations/our-insights/expand-diversity-among-your-suppliers-and-add-value-to-your-organization>.

<sup>154</sup> *Does a Company’s ESG Score Have a Measurable Impact on Its Market Value?*, DELOITTE. (Aug. 2, 2023), <https://www.deloitte.com/ch/en/services/consulting-financial/research/does-a-company-esg-score-have-a-measurable-impact-on-its-market-value.html>.

<sup>155</sup> See, e.g., *Racial Justice | Bernie Sanders Official Website*, <https://web.archive.org/web/20200823035658/https://bernieanders.com/issues/racial-justice/> (last visited Nov. 15, 2025); Errin Haines, *Warren Discusses Fight to End Systemic Racism as Some Discuss Her as Potential VP - The Washington Post*, WASH. POST (July 2, 2020), [https://www.washingtonpost.com/politics/2020/07/02/warren-discusses-fight-end-systemic-racism-some-discuss-her-potential-vp/?utm\\_source=chatgpt.com](https://www.washingtonpost.com/politics/2020/07/02/warren-discusses-fight-end-systemic-racism-some-discuss-her-potential-vp/?utm_source=chatgpt.com); “*This Is a Country of Possibilities*”: Kamala Harris’s Speech in Full, THE GUARDIAN (Nov. 8, 2020, at 14:49 ET), <https://www.theguardian.com/us-news/2020/nov/08/this-is-a-country-of-possibilities-kamala-harriss-speech-in-full>.

Structural problems require structural solutions, and together we can meet that challenge.”<sup>156</sup> He declared, “We are going to root out institutional racism wherever it exists.”<sup>157</sup>

Congresswoman Alexandria Ocasio-Cortez has provided another example of this thinking, as has Rep. Ilhan Omar. When Ocasio-Cortez said, “Algorithms are still made by human beings, and those algorithms are still pegged to basic human assumptions . . . They’re just automated assumptions. And if you don’t fix the bias, then you are just automating the bias,” she was applying intent-over-intent logic.<sup>158</sup> If algorithms produce disparate racial outcomes, they are discriminatory regardless of whether programmers intended bias or consciously designed racist systems. The focus is on effects—biased outputs make algorithms problematic, not the motivations or awareness of their creators. And Omar has introduced a package of bills to “address *systemic racism* embedded within policing.”<sup>159</sup>

Progressive candidates and elected officials have also increasingly adopted campaign messaging that rejects colorblind policy approaches in favor of targeted interventions designed to address measured disparities.<sup>160</sup> This has represented a fundamental shift from traditional liberal emphasis on equal treatment toward a progressive focus on equal outcomes, directly reflecting the idea that colorblind, or race-neutral, approaches mask discriminatory effects.<sup>161</sup>

American academic and institutional development has had an international influence as well. To consider just two examples, similar thinking was visible in Justin Trudeau’s political leadership in Canada, with his government explicitly acknowledging “systemic discrimination.”<sup>162</sup> To be sure, the commissioner for the Royal Canadian Mounted Police demurred on this claim with the following statement: “I think that if systemic racism is meaning that racism is entrenched in our policies and procedures, I would say that we don’t have systemic racism.”<sup>163</sup> But, as discussed throughout this Article, she’d come down on the wrong side of a question with one morally viable answer. Two days later, she amended her earlier comments when she said, “I did acknowledge that we, like others, have racism in our organization, but I did not say definitively that systemic racism exists in the RCMP. I should have.”<sup>164</sup>

Similar language appeared in a report commissioned by the Metropolitan Police Service in the UK. Dr. Shereen Daniels, the author of the report, stated “Systemic racism is not a matter of perception” and focused on “structural drivers of disproportionality in policing outcomes for Black Londoners.”<sup>165</sup>

### *B. Acceleration and Enforcement*

Unlike the top-down implementation of impact-over-intent thinking in corporate and campus settings, social activist movements—including BLM—created pressure from the bottom up. They were able to bypass traditional institutional hierarchies and decision-making processes, creating an urgency and emotional intensity that academic arguments alone struggle to generate. Especially after the killing of George Floyd, the grass roots pressure to fight racism

<sup>156</sup> *Racial Justice | Bernie Sanders Official Website*, *supra* note 155.

<sup>157</sup> *Id.*

<sup>158</sup> Danny Li, *AOC Is Right: Algorithms Will Always Be Biased As Long As There’s Systemic Racism in This Country*, SLATE (Feb. 1, 2019), <https://slate.com/news-and-politics/2019/02/aoc-algorithms-racist-bias.html>.

<sup>159</sup> *Rep. Omar Reintroduces Package of Police Accountability Legislation*, ILHAN OMAR | MINNESOTA’S 5TH DIST. (June 3, 2025), <https://omar.house.gov/media/press-releases/rep-omar-reintroduces-package-police-accountability-legislation>.

<sup>160</sup> Astead W. Herndon, *2020 Democrats Embrace Race-Conscious Policies, Including Reparations*, N.Y. TIMES (Feb. 21, 2019), <https://www.nytimes.com/2019/02/21/us/politics/2020-democrats-race-policy.html>.

<sup>161</sup> *See, e.g.*, BONILLA-SILVA, *supra* note 76, at 7.

<sup>162</sup> Leyland Cecco, *Canada Urged to Open Its Eyes to Systemic Racism in Wake of Police Violence*, THE GUARDIAN (June 14, 2020, at 12:47 ET), <https://www.theguardian.com/world/2020/jun/14/canada-systemic-racism-history>.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> Metro. Police, *Metropolitan Police Publishes Dr Shereen Daniels’ Independently Commissioned Report into Racism in the Met*, METRO. POLICE (Nov. 7, 2025), <https://news.met.police.uk/news/metropolitan-police-publishes-dr-shereen-daniels-independently-commissioned-report-into-racism-in-the-met-503047>.

was often intense, as demonstrated by events like Amy Cooper's and Christian Cooper's Central Park confrontation. Occurring the same day as Floyd's death, May 25, the video quickly went viral.<sup>166</sup> Amy Cooper's stated intentions—that she felt threatened and was calling for help—became irrelevant to the moral evaluation of the situation. Cooper was fired from her job within 24 hours because the viral video showed a white woman calling police on a black man.<sup>167</sup> She was widely interpreted as perpetuating dangerous racial stereotypes, regardless of what her motives were.<sup>168</sup> And, yet, approximately fifteen months later, this version was publicly challenged, including with the possibility that Christian Cooper was the one who threatened Amy Cooper.<sup>169</sup>

Similarly, in June 2020, when a San Diego PG&E employee was seen making a hand gesture that looked to some like a white power sign, it didn't matter that he said he was just cracking his knuckles.<sup>170</sup> He was fired anyway: what observers interpreted the gesture to mean was all that mattered, regardless of his stated intentions.<sup>171</sup>

This climate meant that when Harvard's Black Law Student Association demanded "immediate action"<sup>172</sup> or Columbia's Mobilized African Diaspora gave administrators "48 hours"<sup>173</sup> to respond, the institutions knew they faced the prospect of viral campaigns that could generate millions of posts and create reputational crises in a very short amount of time.

Because proportional outcomes and perceived impact were what mattered, and both the inequality and the failure to address it were often highly visible, refusing to capitulate was easily taken as evidence of complicity. While this played into longstanding social pressure to avoid being publicly labeled as racist, it often resulted in internal tension too. After all, many of the organizations in question had internalized—or had pockets of employees that had internalized—the same moral framework. Ultimately, this meant institutions couldn't dismiss viral campaigns as external attacks from unreasonable activists even if they wanted to.

The post-2020 period also saw new institutional mechanisms that formally embedded impact-over-intent evaluation into government operations. These included an executive order requiring federal agencies to assess whether their programs produced equitable outcomes across racial and ethnic groups.<sup>174</sup> Progressive legislators introduced bills explicitly requiring equity impact assessments for proposed policies.<sup>175</sup> And the Financial Services Racial Equity, Inclusion, and Economic Justice Act was proposed in part to ensure that the Federal Reserve Board would "carry out its duties in a manner that supports the elimination of racial and ethnic disparities in employment, income, wealth, and access to affordable credit."<sup>176</sup> Seattle's "Race

<sup>166</sup> Braktkton Booker, *White Woman Who Called Police On Black Bird-Watcher In Central Park Has Been Fired*, NPR (Feb. 16, 2021), <https://www.npr.org/2020/05/26/862230724/white-woman-who-called-police-on-black-bird-watcher-in-central-park-placed-on-le>.

<sup>167</sup> *Id.*

<sup>168</sup> See Sandra Guzman, *Amy Cooper in Central Park Exposed the Danger of Birding While Black. But I've Always Known It.*, THINK (May 30, 2020), <https://www.nbcnews.com/think/opinion/amy-cooper-central-park-exposed-danger-birding-while-black-1218826>; see also Megan Phelps-Roper, *The Real Story of "The Central Park Karen,"* (Apr. 9, 2024), <https://www.thefp.com/p/the-real-story-of-the-central-park>.

<sup>169</sup> Phelps-Roper, *supra* note 168.

<sup>170</sup> Priya Sridhar, *SDG&E Worker Fired Over Alleged Racist Gesture Says He Was Cracking Knuckles – NBC 7 San Diego*, NBC SAN DIEGO (June 15, 2020), <https://www.nbcsandiego.com/news/local/sdge-worker-fired-over-alleged-racist-gesture-says-he-was-cracking-knuckles/2347414/>.

<sup>171</sup> *Id.*

<sup>172</sup> *Harvard's Black Law Student Association's Letter to the Administration Regarding Black Lives*, HARVARD BLACK L. STUDENTS ASS'N (June 5, 2020), <https://orgs.law.harvard.edu/blsa/2020/06/05/harvards-black-law-student-associations-letter-to-the-administration-regarding-black-lives/>.

<sup>173</sup> Dia Gill, *Mobilized African Diaspora Demands Columbia Confront Its Anti-Black History, Gives Administrators 48 Hours to Respond*, COLUMBIA DAILY SPECTATOR, <https://www.columbiaspectator.com/news/2020/08/31/student-group-mobilized-african-diaspora-calls-on-university-to-stop-supporting-nypd-confront-anti-black-history/> (last visited Aug. 19, 2025).

<sup>174</sup> *Advancing Racial Equity and Support for Underserved Communities Through the Federal Government*, FED. REG. (Jan. 25, 2021), <https://www.federalregister.gov/documents/2021/01/25/2021-01753/advancing-racial-equity-and-support-for-underserved-communities-through-the-federal-government>.

<sup>175</sup> REKHA BALU ET AL., *HOW MIGHT EQUITY SCORING APPLY TO FEDERAL LEGISLATION?: EXAMPLES FROM RECENT FAMILY POLICY PROPOSALS* (2022), <https://www.urban.org/research/publication/how-might-equity-scoring-apply-federal-legislation>.

<sup>176</sup> Rep. Maxine Waters, *H.R.2543 - 117th Congress (2021-2022): Financial Services Racial Equity, Inclusion, and Economic Justice Act*, (June 21, 2022), <https://www.congress.gov/bills/117/congress/house-bill/2543>.

and Social Justice Initiative,” established in 2004 and expanded throughout the 2010s, exemplifies this approach at the city level by requiring all departments to evaluate their policies and practices for discriminatory effects regardless of departmental intent or stated goals.<sup>177</sup>

By 2025, what had begun as a set of ideas about racism and inequality that were largely limited to activist and academic circles had spread in a way that was difficult, if not impossible, to foresee. The impact-over-intent understanding had been confirmed as part of an attempt to legally strengthen anti-discrimination law and had evolved into a dominant moral framework for evaluating justice across American society. The problem was that this transformation created a fundamental tension between the social pressure to fight racism and the space for morally legitimate disagreement that democracy requires.

## V. THE BACKLASH

The legal equation of discrimination (understood as an expression of racism) *without* racist intent and discrimination *with* racist intent cleared the way for the moral equation of racism with racist intent and racism without racist intent. And, since both are positioned as fighting racism—a clear moral wrong—the new moral framework naturally assumed a position of authority. Authority that showed up: in corporate diversity specialists who reframed disparate outcomes as business problems requiring correction, regardless of cause; in academic research on unconscious bias that transformed suspicions about hidden prejudice into scientific findings about universal psychological processes; in a climate where well-intentioned comments could constitute racism based solely on their impact; and in the shift from multiculturalism to diversity to DEI that created measurable metrics that institutions could be evaluated against, transforming aspirational ideals into concrete performance standards.

And yet, this conferral of moral authority based on a politically contested assumption has consequences. While a full discussion of the contours of these consequences warrants a separate article, below are a few highlights.

One of the most predictable consequences of treating people as morally deficient for their political beliefs is resentment. Because the term “resentment” when it comes to politics has been used in multiple ways, it’s important clarify what is meant here. Often, in the context of conservative political views, resentment refers to the idea of *racial* resentment, in the sense that conservative views stem from racial animus and hostility. The basic idea is that white conservatives hold anti-progressive opinions because they fear the significant racial and ethnic demographic change that took place in the second half of the 20<sup>th</sup> century.<sup>178</sup> They don’t want to lose power—culturally, economically, and politically—to people who don’t look like, sound, or behave like them. Or so goes the thinking.

This explanation is, in turn, seen as validated and supported by academic studies that empirically link racist and conservative views.<sup>179</sup> The problem is that those studies largely measure racism as the rejection of the concept of systemic or structural racism.<sup>180</sup> Using this as

<sup>177</sup> SEATTLE, WASH. ORDINANCES 126799 (2023).

<sup>178</sup> See, e.g., Jamelle Bouie, *White Elephant: Trump’s Support Comes from White Resentment*, SLATE (Sept. 1, 2017), [https://slate.com/news-and-politics/2017/09/trumps-support-comes-from-white-resentment.html?pay=1763232845821&support\\_journalism=please](https://slate.com/news-and-politics/2017/09/trumps-support-comes-from-white-resentment.html?pay=1763232845821&support_journalism=please); Adam M. Enders & Jamil S. Scott, *White Racial Resentment Has Been Gaining Political Power for Decades - The Washington Post*, WASH. POST (Jan. 15, 2018), <https://www.washingtonpost.com/news/monkey-cage/wp/2018/01/15/white-racial-resentment-has-been-gaining-political-power-for-decades/>; Theodore R. Johnson, *The Role of Racial Resentment in Our Politics*, BRENNAN CTR. FOR JUST. (Sept. 17, 2025), <https://www.brennancenter.org/our-work/analysis-opinion/role-racial-resentment-our-politics>.

<sup>179</sup> Abigail M. Folberg et al., *Racism Underlies Seemingly Race-Neutral Conservative Criticisms of DEI Statements among Black and White People in the United States*, 97 J. OCCUPATIONAL & ORGANIZATIONAL PSYCH. 791 (2024), <https://onlinelibrary.wiley.com/doi/abs/10.1111/joop.12491>; Harold Meyerson, *How Racist Are Republicans? Very.*, AM. PROSPECT (Oct. 22, 2020), <https://prospect.org/api/content/2830ff7e-14a0-11eb-8a6d-1244d5f7c7c6/>.

<sup>180</sup> TODD G. MORRISON & MARK KISS, *Modern Racism Scale*, in *ENCYCLOPEDIA OF PERSONALITY AND INDIVIDUAL DIFFERENCES 1* (Virgil Zeigler-Hill & Todd K. Shackelford eds., 2017), [http://link.springer.com/10.1007/978-3-319-28099-8\\_1251-1](http://link.springer.com/10.1007/978-3-319-28099-8_1251-1); P. J. Henry

a measure amounts to saying something to the effect of: you're racist because you reject the idea of systemic racism, and you reject the idea of systemic racism because you're racist. Which, to use a non-political example, is a little like saying the evidence of a person's arrogance is that he won't admit that he's arrogant, and he won't admit he's arrogant is because of his arrogance. There's no space for the person to not be, in that case, arrogant. Similarly, the measures of racism that use a denial of systemic racism as an indicator leave no space for a non-racist way to reject the idea.

Perhaps unsurprisingly, people generally don't respond well to having their character impugned for political views they believed to be principled, reasoned, and fair. The character impugning communicates to the people with the "wrong" ideas that those with the "right" ideas don't see them as moral equals whose values, thinking, and principles are worthy of consideration and engagement. Not only that, but those with the "wrong" views are seen as participating in "know your place aggression" or being driven by a sense of "white victimhood."<sup>181</sup>

This frustration is likely exacerbated when the attribution of racist motives and character impugning happens in the context of a democracy that claims to value political pluralism or in institutions that claim to be politically neutral. The act of maintaining an explicit commitment to political pluralism while simultaneously undermining the same can come across as dishonest or even manipulative.

As this kind of condemnation persists over time, and is absorbed into more contexts, this reservoir of resentment grows. And unlike anger or frustration, resentment tends not to simply peter out. It festers and waits for a chance to hit back. Worse still, because of its corrosive effects, resentment breeds contempt—in both directions. Those who embrace the impact-based framework come to view dissenters as either too ignorant to understand how racism and bigotry work or too callous to care. And those who reject the framework come to view its adherents not as people pursuing justice through a different lens but as sanctimonious accusers who've abandoned reason for nonsensical moral posturing. Because of its effects on trust, this mutual contempt is corrosive in ways that ordinary political disagreement is not. After all, it's generally possible to negotiate with someone whose policy preferences differ from yours. It's far more difficult to negotiate with someone you see as fundamentally morally flawed, and you're unlikely to extend trust to people whose contempt for you is palpable. The erosion of trust, combined with the pool of deep resentment, has powerful effects on democratic viability.

To avoid any confusion, it's worth noting that the kinds of constraints described here aren't legal restrictions on speech or formal censorship. Only in rare cases are people being told they are legally not permitted to express themselves.<sup>182</sup> And yet, when non-progressive perspectives are automatically categorized as morally illegitimate rather than different, the space for democratic debate contracts regardless of what people are legally permitted to say. With that in mind, below are two of the most serious consequences of this framework for democracy.

### *A. Institutional Trust When the Truth Is Ideological*

The absorption of this moral framework into institutions that people expect to be relatively neutral—in particular, universities, media organizations, and professional associations—has created a particularly serious problem. Adopting the impact-based framework as an operating assumption goes hand in hand with treating contestable claims as settled facts. In this case, racial inequality as evidence of racism shifts from interpretive framework to established truth.

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& David O. Sears, *The Symbolic Racism 2000 Scale*, 23 POL. PSYCH. 253 (2002), <https://onlinelibrary.wiley.com/doi/full/10.1111/0162-895X.00281>.

<sup>181</sup> Alex Samuels & Neil Lewis Jr., *How White Victimhood Fuels Republican Politics*, FIVETHIRTYEIGHT (Mar. 21, 2022), <https://fivethirtyeight.com/features/how-white-victimhood-fuels-republican-politics/>.

<sup>182</sup> Exceptions include true threats ("I'm going to shoot you tomorrow."), incitement to imminent lawless action ("Everyone grab a rock right now and break those windows!"), criminal solicitation ("I'll pay you \$500 to burn down that store tonight."), and defamation ("Dr. Smith intentionally infects her patients with diseases.").

This leads to the idea that educational achievement gaps are due to systemic racism.<sup>183</sup> That concerns about immigration reflect coded bigotry.<sup>184</sup> And that opposition to race-conscious policies reveals complicity in oppression.<sup>185</sup> These claims may be true, partially true, or false—but under this equation, they’re treated as given. And yet, when institutions charged with knowledge production and verification operate from predetermined moral conclusions, they undermine their own credibility.<sup>186</sup>

This is easy to see when considering the perspective of someone who doesn’t share the same framework. For starters, such a person would see universities mandating diversity statements, media coverage framing policy debates in terms of racial justice, professional organizations declaring that neutrality perpetuates harm—and conclude that these institutions have been captured by a particular worldview masquerading as objective truth. So much so that they can’t or won’t acknowledge that it’s a worldview at all. Whether achievement gaps primarily reflect systemic racism, whether opposition to affirmative action indicates bias, whether concerns about immigration are coded bigotry—these are precisely the kinds of questions open societies need institutions to help think through. They can’t tolerate the choosing of sides and the presentation of one interpretation as reality itself.

There’s another way a hypothetical non-progressive person would see such institutions as making ideological claims and treating them as given. Specifically, institutions that treat views not aligned with the impact-over-intent framework as racist claim to tell the people who hold those views something about themselves that they themselves know to be false. In other words, a person could oppose race-based admissions or support stricter immigration enforcement for reasons she understands to be principled—concerns about fairness, rule of law, unintended consequences. That person knows her own mind and knows whether racial animus motivates her views. When trusted and supposedly neutral institutions declare that her positions reveal racism or complicity in oppression, they’re making a claim about her character and motivations that she has every reason to know is wrong.

When the two components are combined—that institutional truth claims have become ideological in nature and that institutions make assertions about character that a non-progressive person would believe to be an unfair description—wholesale skepticism of those institutions is an understandable response. As in, “if they’re wrong about me, and wrong in a way that serves their ideological commitments, other claims they make likely serve those commitments too.”

And, as the current analysis has detailed, the person who doesn’t share the impact-over-intent framework isn’t irrational or even wrong in this conclusion. Once a person believes universities are distorting reality on questions of race and discrimination, he has little reason not to question their credibility on topics ranging from climate science to public health to economic research. This is how the framework meant to advance racial justice ends up corroding trust in the very institutions that produce and disseminate knowledge about racial justice—and about everything else.

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<sup>183</sup> See, e.g., Office of Communications, *Letter from President Eisgruber on the University's Efforts to Combat Systemic Racism*, PRINCETON UNIV. (Sept. 2, 2020), <https://www.princeton.edu/news/2020/09/02/letter-president-eisgruber-universitys-efforts-combat-systemic-racism>.

<sup>184</sup> Stephen Starr, *US White Supremacist Groups Emboldened with 'Ethnic and Racial Hatred' as Trump Stokes Immigration Fears*, THE GUARDIAN (Feb. 22, 2025), <https://www.theguardian.com/us-news/2025/feb/22/white-supremacist-groups-emboldened-trump-immigration>.

<sup>185</sup> Erica L. Green, *As Trump Attacks Diversity, a Racist Undercurrent Surfaces*, N.Y. TIMES (Feb. 3, 2025), <https://www.ny-times.com/2025/02/03/us/politics/trump-diversity-racism.html>.

<sup>186</sup> Philip Hunter, *Is Political Correctness Damaging Science?*, 6 EMBO REPS. 405 (2005), <https://www.embo-press.org/doi/full/10.1038/sj.embor.7400395>.

### *B. The Appeal of Norm-Breaking Leaders*

This resentment described above creates an appetite for leaders who will stand up to the sanctimony. When the social cost of dissenting from the moral framework is high—when questioning diversity initiatives risks being labeled racist, when supporting colorblind policies invites accusations of perpetuating oppression—there’s an enormous desire for figures who will say what others are thinking but fear to express. The people willing to play this role in an environment where dissent is morally stigmatized are willing to absorb the accusation of bigotry.

But here’s the problem: if someone isn’t deterred by the social consequences of being called racist in one context (as unfairly as the term may be deployed), they’re likely not deterred by social consequences in other contexts either. The same defiance that makes them appealing to people exhausted by moral policing can make them indifferent to other social norms as well—norms around truthfulness, procedural fairness, basic civility, democratic guardrails. The framework that leads to the moral condemnation of disagreement creates demand for leaders who will resist moral bullying, but the leaders who emerge to meet that demand often resist far more than that. What begins as appetite for someone who’ll push back against sanctimony can easily become tolerance for someone who pushes back against democratic norms more broadly.

This is not to say that anyone who criticizes the impact-based framework is a norm-breaker, or that the framework’s excesses justify violations of democratic principles. It’s to say that when a moral framework makes ordinary disagreement socially and professionally costly, it changes who is willing to voice that disagreement publicly. And the collective demand for such voices—for people who cannot be cowed, who will not apologize, who are undeterred by accusations of bigotry—creates conditions where norm-breaking becomes not a liability but an asset. This dynamic helps explain Trump’s political rise and the appeal of increasingly transgressive conservative rhetoric, where defiance of prevailing moral norms becomes a marker of credibility and strength rather than disqualification. The resentment the framework generates doesn’t just make people angry; it makes them willing to empower leaders whose defiance extends well beyond the specific moral claims they find objectionable.

## VI. RESTORING DEMOCRATIC DELIBERATION

When faced with the actions of the Duke Power Company, the Supreme Court addressed what appeared to be a clear instance of discriminatory intent hiding behind facially neutral employment tests.<sup>187</sup> Not only that, but they made a decision that may have been necessary to move the civil rights movement forward. Duke Power Co. implemented the Wonderlic IQ test and the Bennett Mechanical Comprehension Test the day after the Civil Rights Act took effect—tests with dramatically different pass rates by race—timing that suggested the tests reflected a desire to achieve the same discriminatory effects without violating the new civil rights law.

Yet, by ruling that “good intent or absence of discriminatory intent does not redeem” practices with disparate effects<sup>188</sup>, the Court legally equated violations of Title VII that stem from discrimination with racist intent with discrimination as indicated by disparate outcomes regardless of intent. Because racism is a clear moral wrong, discrimination is understood to be an expression of racism, disparate outcomes themselves became evidence of racism itself. With the goal of giving strength to the Civil Rights Act of 1964, the Court’s decision put institutional weight behind a shift in how much of American society came to understand wrongdoing

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<sup>187</sup> *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971).

<sup>188</sup> *Id.*

itself.<sup>189</sup> That change made the adherence to many traditionally conservative political positions de facto evidence of racism.

The problem now is that the same moral framework that successfully advanced the civil rights movement poses real challenges for democratic engagement. The question posed at the outset was: *What price are we, as a society, willing to pay for advancing the Civil Rights Movement?* Figuring out the answer requires democratic deliberation.

The consequences of this transformation were likely made worse by the fact that any discussion of the meaning and impact of the dual ideas that disparities equal discrimination and intent doesn't matter never took place. The absence of public discussion meant there was no opportunity to recognize or address the tensions between impact-based evaluation and democratic governance before the framework became institutionally entrenched. Although, to be sure, decades ago it would have been difficult to foresee how the new moral framework—one empowered by the Supreme Court—would reshape American institutional life, transform campus speech policies, and redefine political discourse.

One consequence of misunderstanding how this situation developed is misguided attempts to fix the problem. This includes executive attempts at change through administrative action. But both the original transformation and any attempt at an executive reversal leave the underlying moral questions unresolved while perpetuating the dynamic where fundamental questions about justice are settled through decree rather than democratic engagement.

Whether expanding or contracting the role of impact-based evaluation, lasting institutional change will require public consensus built over these competing visions of equality and justice, with a full understanding of the impact of collective choices. And this democratic conversation must grapple with how thoroughly the impact-over-intent framework has been institutionalized across American society.

The analysis in this Article reveals that reversing this transformation requires more than laws or executive orders—it requires confronting the moral conviction that has driven voluntary adoption across academic institutions, corporate diversity programs, campus speech policies, and political discourse. It requires understanding that, while academics cite unconscious bias research, corporations reference business necessity, universities point to inclusive campus climates, and politicians invoke systemic racism analysis, these mutually reinforcing justifications exist in an intellectual ecosystem where questioning the framework became increasingly difficult.

The claim in this Article is narrow, but consequential: Without the equation provided by the Supreme Court's 1971 decision, impact-over-intent thinking would likely have remained confined to academic discourse rather than becoming operationalized across American institutional life. Once unintentional discrimination was legally equated with intentional discrimination, the moral equivalence was not far behind.

Regardless, the consequences demand attention now. The democratic conversation that probably couldn't have happened five decades ago has become necessary. That means considering the following questions: What does it mean to say that intent doesn't matter for determining discrimination or harm? Or to say that inequality points to racism? What are the costs and benefits of treating all disparities as evidence of bias? Are merit-based systems inherently suspect? Should they be? Are they still a worthy goal? What are the costs of a climate where disagreement on issues around race, identity, and fairness becomes morally illegitimate?

This conversation comes with one more crucial recognition: If the strength of democracy matters, the status quo isn't an option. A society can treat disparities as evidence of discrimination (and intent as irrelevant) when it comes to claims of harm, or it can preserve space for legitimate disagreement—but it cannot have both. Regardless of how this choice is resolved, it must be made explicitly. Explicit deliberation forces all parties to openly acknowledge the

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<sup>189</sup> *Id.*

legitimate concerns on both sides and makes it harder to dismiss disagreement as evidence of bigotry or ignorance. With that in mind, the path forward requires:

**Acknowledging Tradeoffs.** Treating all disparities as evidence of discrimination eliminates democratic space for disagreement. Choosing this path requires acknowledging that it prioritizes equality of outcomes over democratic process.

**Restoring Space for Legitimate Disagreement.** This means acknowledging that reasonable people can disagree about approaches to achieving equality, and about tradeoffs and definitions of harm, without being racist. It also means treating merit-based systems, equal treatment standards, and other policy approaches as legitimate positions rather than evidence of moral failure.

**Reintegrating Intent.** Institutions and individuals need to return to requiring evidence of harmful intent before passing moral judgments—whether in employment decisions, campus interactions, or everyday social encounters.

These implications must be clearly understood. The course correction suggested here isn't perfect. Some people with discriminatory motives *will* successfully hide their intentions and escape accountability. Some instances of genuine bias *will* escape detection. And some harmful comments *will* go unpunished because intent cannot be proven. But the alternative—treating any statement or policy that causes offense or produces disparate outcomes as presumptively wrong—is corrosive to democratic deliberation itself.

The transformation documented in this analysis demonstrates that even the most well-intentioned shifts require democratic scrutiny. Restoring that scrutiny—the deliberation that should have accompanied such a fundamental redefinition of justice—may be the only path to preserving both democratic self-governance and meaningful progress toward racial equality.

## CONCLUSION

The progression to contemporary impact-over-intent culture represents one of the most significant but unexamined transformations in American institutional life. A framework that was instantiated in a Supreme Court decision about employment discrimination cleared the way for a transformation in how American society understands justice itself.

The scope of this shift has been remarkable; it became the intellectual and moral foundation for campus bias response teams investigating everyday social interactions, corporate executive compensation tied to demographic outcomes, academic hiring processes requiring diversity statements, government equity audits evaluating all policies by their statistical effects on different groups, and political campaigns explicitly rejecting colorblind approaches as inherently racist.

And yet, the stakes extend well beyond civil rights policy. The question is whether American society can figure out how to maintain both its commitment to equality and rebuild its foundation of social trust. Whether it is possible to preserve space for reasonable disagreement on fundamental questions of justice while continuing to make progress toward a more equal society.