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WHITENESS AND REMEDY: UNDER-RULING CIVIL RIGHTS IN WALKER V. CITY OF MESQUITE

Martha R. Mahoney†

INTRODUCTION

Teenagers quote “rules” on how fictional characters survive horror movies: “Never have sex. (Virgins always live.) . . . Never say, ‘I’ll be right back.’” Another rule predicts the fate of black characters in action films: “The brother always dies first.” Unsurprisingly, these movie “rules” reflect racist and sexist attitudes in American culture. This Article criticizes a trend in recent cases protecting white plaintiffs and argues that courts must not develop “rules” protecting whiteness as a core concern of the requirement that race-conscious remedies for racial discrimination be narrowly tailored. Since early 1987, white plaintiffs have almost never lost on the merits in the

† Professor of Law, University of Miami School of Law. I am grateful to Ken Casebeer, Donna Coker, John Ely, Marc Fajer, Darren Hutchinson, Joan Mahoney, Stephanie Wildman, and especially to Florence Roisman for suggestions and comments, to Martha Fineman and the participants in the Symposium on Discrimination and Inequality at Cornell Law School, to Michelle Williams and Sasha Abele for research assistance, and to the University of Miami School of Law for summer research support.

1 SCREAM (Dimension Files 1996).
3 Michael Fischl summed up the 1989 Supreme Court term tersely: “White men win.” Richard Michael Fischl, Job Bias Barrage, Legal Times, Aug. 7, 1989, at S12. A broad study of all cases to which the Supreme Court denied certiorari during the same period I describe herein would be necessary to determine with certainty whether the Court’s overall pattern is to consistently deny review in cases that undermined civil rights rulings, and such a study is beyond the scope of this Article. Interestingly, in two recent cases involving whites and civil rights remedies in which the Court denied certiorari, whites won in Walker v. City of Mesquite, 181 F.3d 98 (5th Cir.), reh’g denied, 181 F.3d 98 (5th Cir. 1999), cert. denied, 129 S.Ct. 969 (2000) (“Walker 1”), but lost in McNamara v. City of Chicago, 138 F.3d 1219 (7th Cir.), cert. denied, 525 U.S. 981 (1998). In McNamara, Judge Richard Posner said narrow tailoring required “as a practical matter” that the remedy “discriminates against whites as little as possible consistent with effective remediation,” 138 F.3d at 1222, but upheld a race-based promotions remedy. See infra text accompanying note 239. The danger with which I am concerned is that the standards applied in Walker, similar to the standard articulated in McNamara, treat protection of whites or whiteness as a core concern of “narrow tailoring” analysis.

4 There are four cases that could arguably be called departures from this “rule” in which white plaintiffs did not win outright, but they were not losses on the merits. See Texas v. Lesage, 120 S. Ct. 467 (1999) (per curiam); Hunt v. Cromartie, 526 U.S. 541 (1999); Lawyer v. DOJ, 521 U.S. 567 (1997); United States v. Hays, 515 U.S. 737 (1995).
Supreme Court when challenging structural gains by minorities. In *Walker v. City of Mesquite* (*Walker V*), the Fifth Circuit held that white homeowners have a constitutional right not to have their neighborhoods selected on the basis of their whiteness for remedying intransigent and longstanding discrimination against black public housing tenants which included exclusion from white neighborhoods. Although the Supreme Court has previously treated the project of remedying racial discrimination as a compelling interest justifying the use of race, it denied certiorari. I call this “under-ruling”: the court permits the undermining of constitutional protection for people of color and invites the destruction of its own doctrine. Like movie “rules” that reflect contemporary prejudice, under-ruling civil rights reflects and preserves white privilege.

Critical theorists know that "the master's tools will never dismantle the master's house." Critical race theory (CRT) developed new theoretical tools that permit harm to be identified more clearly and remedy to be constructed with greater specificity. Those tools are applied in this Article to questions of remedy for proven unconstitutional racial segregation in public housing. In this context, the “master’s house” is not literal—though mansions built with the profits of slavery still dot the southern countryside—but a symbol for the construction of white housing in a metropolitan economy and geography built on white privilege and black subordination. In *Walker V*, the Fifth Circuit held that, after years of resistance by defendants to the implementation of voluntary agreements and remedial orders, white homeowners could still block a federal court’s order to build two small apartment complexes in white neighborhoods. In Texas, through the under-ruling process, it is now purportedly unconstitutional to dismantle the master’s house with any tools at all.

The closest to a true loss on the merits was *Texas v. Lesage*, the Lesage Court held that a white applicant, who was “an African immigrant of Caucasian descent,” *Lesage*, 120 S. Ct. at 467, was not treated unfairly by the admissions process of the University of Texas, even though the university considered race when admitting students, see id. at 467-69. For a discussion of winning and losing claims by white plaintiffs, see infra Part IV.A.

5 I would include in this category challenges to voting districts or challenges to programs considering race in the award of government contracts, for example, but would exclude cases in which white plaintiffs allege individual claims of race discrimination by a particular actor rather than by policy, see, e.g., *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701 (1989) (holding that, where a white football coach alleged reassignment based on his race but did not challenge structures or practices in school district as favoring minorities, the municipality and school district were not vicariously liable for discrimination). I do not consider cases brought by minorities rather than by white plaintiffs or intervenors.

6 169 F.3d 973 (5th Cir.), reh'g denied, 181 F.3d 98 (5th Cir. 1999); *cert. denied*, 120 S. Ct. 969 (2000).


9 See *Walker V*, 169 F.3d at 987.
Segregation in public housing is only one part of metropolitan racial segregation, but it is uniquely important. It is supported by state action and affects low-income people who have little choice about where to live and are vulnerable to the linkage of poverty with the concentration of minorities. Lawsuits challenging public housing segregation are ponderous and last for years. Remedies seldom reach far enough to address the large structures of segregation; public housing segregation is deeply embedded in metropolitan patterns of inequality that also include schools and public services.

Oddly, because of the way the idea of "race" occurs in American social and legal discourse, courts and commentators often seemed to perceive the harm of segregation as too great a concentration of minorities—"in the framework of many public housing cases, too much..."


The state-initiated, -supported, and -maintained residential separation of whites and African-Americans allows a number of basic discriminatory decisions to be made and implemented without actually confronting the staggering conflict between the values of freedom and equality to which we have subscribed as a nation and the realities of a system in which whites benefit from the deprivation of African-Americans.

Id. This reflects a common approach to housing segregation in the literature on urban development. For example, the term "racially impacted" is routinely used to describe neighborhoods that are predominantly African American; areas that are predominantly white are called "non-impacted." See, e.g., Florence Wagman Roisman & Philip Tegeler, Improving and Expanding Housing Opportunities for Poor People of Color: Recent Developments in Federal and State Courts, 24 CLEARINGHOUSE REV. 312, 332 (1990) (describing 1987 consent decree in the Walker case in which the Dallas Housing Authority agreed "to construct 100 units of low-rent public housing in 'non-racially impacted areas'"; Michael H. Schill, Privatizing Federal Low Income Housing Assistance: The Case of Public Housing, 75 CORNELL L. REV. 878, 911-12 (1990) (using term "non-racially impacted" as synonymous with "non-minority"); see also Jackson v. Okaloosa County, 21 F.3d 1531, 1531 n.1 (11th Cir. 1994) (explaining "racially impacted" as meaning that "that the percentage of persons of a particular race living in a racially impacted area exceeds twice the percentage living in the county," (emphasis added), but then using the term to refer to a mostly-African-American census tract but not a larger, majority white area). Douglas Massey and Nancy Denton treat "segregation" and "ghettoization" as virtually interchangeable terms. See, e.g., DOUGLAS MASSEY & NANCY DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS 9 (1993) ("Our fundamental argument is that racial segregation—and its characteristic institutional form, the black ghetto—are the key structural factors responsible for the perpetuation of black poverty in the United States.").

John Calmore is the main theorist who has criticized this approach. His argument emphasizes "spatial equality" for black communities. See John O. Calmore, Fair Housing vs. Fair Housing: The Problems with Providing Increased Housing Opportunities Through Spatial Deconcentration, 14 CLEARINGHOUSE REV. 7 (1980) [hereinafter Calmore, Fair Housing] (calling for new housing to be built in black communities and criticizing regulations of the U.S. Department of Housing and Urban Development that discourage such new construction); John O. Calmore, Racialized Space and the Culture of Segregation: "Hewing a Stone of Hope from a Mountain of Despair," 143 U. PA. L. REV. 1233 (1995) [hereinafter Calmore, Racialized Space] (criticizing Douglas Massey's emphasis on crime as an ideological drift to the right because it provides support for a politically right agenda); John O. Calmore, Spatial Equality and the
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blackness. Rather than allowing whiteness to remain an invisible dominant norm, critical race theory reveals whiteness and blackness to be parts of the same social construction. Inner city racial concentration and suburban racial exclusion are the obverse sides of the coin of segregation. Treating both exclusionary privileged whiteness and subordinated concentrated blackness as problems resolves theoretical tensions in housing desegregation remedies between equalization of conditions for residents of public housing and mobility for those tenants within metropolitan areas. It also permits the tailoring of reme-


In this Article, the "whiteness" was the subject of the court's explicit protection, and the "blackness" was the genesis of the plaintiff class of black residents in public housing. The core question is whether whiteness will be protected against remedial orders that will place black housing tenants in white neighborhoods; the Walker V court points to Latino communities as an example of alternative locations for public housing so that whiteness need not be a classification it must use. See Walker V, 169 F.3d at 987.

See, e.g., Michelle Adams, Separate and [Un]Equal: Housing Choice, Mobility, and Equalization in the Federally Subsidized Housing Program, 71 TUL. L. Rev. 413, 419 (1996). Professor Adams noted:

In a sense, these two approaches [emphasizing equality and integration] are part of a dialectical exchange that has preoccupied many members of the black community for generations. Remedies for systemic housing discrimination against low-income black Americans must be responsive to the needs of the black community and yet, at the same time, build upon the jurisprudence and doctrine that has developed within the integration ideal. Id. (footnote omitted). The first article on mobility remedies and a thorough review of all mobility plans at the time is Florence Wagman Roisman & Hilary Botein, Housing Mobility and Life Opportunities, 27 CLEARINGHOUSE Rev. 335 (1993); see also Florence Wagman Roisman, The Lessons of American Apartheid: The Necessity and Means of Promoting Residential Racial Integration, 81 IOWA L. Rev. 479 (1995) (reviewing DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS (1993)); Roisman & Tegeler, supra note 11 (reviewing remedies in cases brought under federal law). But cf. Michael H. Schill, Deconcentrating the Inner City Poor, 67 CHI.-KENT L. Rev. 795 (1991) (arguing for deconcentration strategies over enrichment strategies); David Blair-Loy, Comment, A Time to Pull Down, and a Time to Build Up: The Constitutionality of Rebuilding...
dies with great precision to circumstances of tenants and the harms of segregation.

Part I of this Article discusses segregation in public housing, Section 8 programs that provide housing assistance through certificates and touches, and the Walker litigation. Part II reviews insights from critical race theory that are particularly helpful in analyzing questions of segregation in public housing, emphasizing the social construction of whiteness as a transparent, dominant norm. Because whiteness feels natural and neutral to white people, interference with whiteness may seem intrusive, while the maintenance of whiteness may seem unnoticeable. Part III applies these theories to remedies for public housing segregation.

Part IV examines questions of race and remedy in Supreme Court precedents and in the recent Fifth Circuit opinion in Walker V, emphasizing the way the Walker court treated the issue of narrow tailoring in race-conscious remedies. The Walker V panel made two crucial mistakes on this question. First, it held that narrow tailoring required that race-neutral measures must not only be considered, but must be adopted in preference to race-conscious measures if they could provide a remedy, ignoring the district court's findings that certain race-conscious measures were necessary for remedy. Under this approach, the second prong of the Supreme Court's approach—narrow tailoring—undermines the first prong—the justification of the use of race by showing a compelling government interest. Using race therefore really means "not" using race—a contradiction that critical race theory explains as a paradigmatically white perspective on race. Second, when considering the award of relief to plaintiffs and the question of locations for remedial housing, the Fifth Circuit misunderstood the meaning of the term "race-neutral;" it proposed remedial alternatives that were in fact race-conscious but nonetheless refused to allow white neighborhoods to be selected for remedial construction. I argue that these concepts are not only doctrinally wrong but also constitutionalize a typically white viewpoint regarding race and neutrality.

Illegally Segregated Public Housing, 88 Nw. U. L. Rev. 1537, 1557-67 (1994) (arguing that it is unconstitutional to rebuild segregated public housing unless rebuilding promotes desegregation).

15 See Walker V, 169 F.3d at 9833.
16 See, e.g., Calmore, supra note 12, at 70 ("[C]olorblindness is a white paradigm, not really colorblind at all.").
17 See infra notes 242-44.
I

WALKER V. CITY OF MESQUITE AND
PUBLIC HOUSING SEGREGATION

A. Racial Segregation in Subsidized Housing Programs

Public housing in America has historically been racially segregated.18 Public housing for senior citizens is generally more white than family public housing.19 The Department of Housing and Urban Development (HUD) helped create segregated conditions and its actions exacerbated segregation.20 Professor Roisman notes that "[t]he few desegregative steps HUD has taken generally have been motivated by civil rights suits filed against the Department."21 It is common for desegregation cases to take many years,22 and it is not unusual for defendants to resist compliance with remedial orders.23


19 HUD reported in 1994 that "[f]amily developments are predominantly African American, while elderly developments are largely white." Goering et al., supra note 18, at 2. It further reported:

In family developments, 20 percent of heads of households are white, 64 percent African American, 13 percent Hispanic, and 2 percent Asian.

Although only 34 percent of all households in public housing developments reside in elderly developments, they constitute 52 percent of all whites in public housing developments. In elderly developments, heads of household are 55 percent white, 35 percent African American, 8 percent Hispanic, and 2 percent Asian.

Id.

20 See Massey & Denton, supra note 11, at 186-216.

21 Roisman, Long Overdue, supra note 18, at 172.


23 Litigation resulting from school and housing segregation in Yonkers, New York has been one of most egregious examples. Initiated in 1980, see Spallone v. United States, 493 U.S. 265, 268 (1990), the first remedial order in the case was issued in 1986. See id. The
Section 8 of the Low-Income Housing Act provides certificates or vouchers for tenants to pay for units in the private housing market. Section 8 can be used to integrate assisted tenants into middle-income neighborhoods. However, there are persistent problems with Section 8 certificate programs which often reproduce racial concentration. Section 8 certificate holders encounter private sector discrimination; they also experience difficulties in the private sector's continued resistance caused the district court to impose heavy fines on the city, which the Supreme Court upheld, see id. at 276, and fines for individual contempt against individual city council members for failure to vote in favor of a remedial ordinance. The Court found the district court abused its discretion in light of the reasonable probability that contempt sanctions against the city alone would have succeeded; only if that approach failed to produce compliance should individual sanctions have been considered. See id. at 280. The Yonkers case was still in litigation in the late 1990s. See United States v. City of Yonkers, 96 F.3d 600 (2d Cir. 1996), cert. denied, New York v. Yonkers Bd. of Educ., 521 U.S. 1104 (1997); on remand to United States v. Yonkers Bd. of Educ., 992 F. Supp. 672 (S.D.N.Y.), modified, 30 F. Supp. 2d 650 (S.D.N.Y. 1998).

Of course, homeowners in those neighborhoods receive significant government subsidies themselves: the deduction from income subject to federal tax of interest paid on loans for private home purchases and property taxes paid to local governments. John Charles Boger proposes national Fair Share legislation that would facilitate desegregation, including measures to modify the federal tax code so that property holders in municipalities that choose to ignore their prescribed housing goals would progressively lose their mortgage interest and property tax deductions. These tax code modifications would have a dual purpose: First, to prompt citizens to encourage municipalities to comply with federal law, thereby hastening metropolitan integration; second, to reverse the economic advantages that currently flow toward property holders in segregated communities.

sector such as higher security deposits.\textsuperscript{28} HUD reduced its "fair market rent" calculation in 1995; even before that, HUD's fair market rent payments were insufficient to make housing in many white neighborhoods affordable.\textsuperscript{29} Therefore, despite the fact that Section 8 certificates are sought by many tenants currently in public housing,\textsuperscript{30} certificates may reproduce residential segregation unless they are combined with race-conscious programs.\textsuperscript{31}

\textbf{B. A Brief History of the \textit{Walker} Litigation}

Dallas and the Dallas Housing Authority (DHA) built all family public housing in minority areas of Dallas.\textsuperscript{32} Between 1955 and 1989, Dallas built no new public housing because the housing projects might have had to be placed in white areas.\textsuperscript{33} Tenant selection and assignment plans were "crafted and administered to maintain racially segregated projects,"\textsuperscript{34} and "Section 8 [certificate and voucher] housing programs were operated to discourage blacks from moving into white areas of metropolitan Dallas."\textsuperscript{35} For decades, African Americans were purposefully confined by state, local, and federal actions to existing housing in "minority areas" or predominantly black housing projects in "minority areas."\textsuperscript{36} The enor-

\begin{footnotes}
\footnote{28}{For a comprehensive discussion of current problems experienced by Section 8 tenants, see \textit{New York State Advisory Comm. to the U.S. Comm. on Civil Rights, Equal Housing Opportunities in New York: An Evaluation of Section 8 Housing Programs in Buffalo, Rochester, and Syracuse 11-13} (1999) (noting as barriers to Section 8 mobility residency preferences, inadequate public transportation, failure of Section 8 administrators to share listings with each other and with community groups, security deposits, multiple applications for different housing programs, lack of mobility counseling, and discrimination).}
\footnote{29}{See \textit{Roisman, Long Overdue}, supra note 18, at 174.}
\footnote{30}{See Philip D. Tegeler et al., \textit{Transforming Section 8: Using Federal Housing Subsidies to Promote Individual Housing Choice and Desegregation}, 30 \textit{Harv. C.R.-C.L. L. Rev.} 451, 453 (1995).}
\footnote{31}{Obviously, these certificates can be used to move to minority middle-class neighborhoods as well as to white neighborhoods, so that they may provide a variety of housing choices for tenants. See infra notes 57-60 and accompanying text.}
\footnote{32}{See \textit{Walker v. City of Mesquite}, 169 F.3d 973, 976 (5th Cir.), \textit{reh'g denied}, 181 F.3d 98 (5th Cir. 1999), \textit{cert. denied}, 120 S. Ct. 969 (2000).}
\footnote{33}{See \textit{id.} The Fifth Circuit called the history of public housing in Dallas "a sordid tale of overt and covert racial discrimination and segregation." \textit{Id}.}
\footnote{34}{\textit{Id}.}
\footnote{35}{\textit{Id}.}
\footnote{36}{\textit{Id.} The \textit{Walker V} court contrasted the term "minority areas" with "white areas" when describing the history of public housing in Dallas. \textit{Id}. at 976. Latinos were subject to discrimination in public housing in Dallas as well: just as the West Dallas project was originally built to "solve the Negro housing problem," \textit{Walker v. United States HUD}, 734 F. Supp. 1289, 1296 (N.D. Tex. 1989) ("\textit{Walker III}"), \textit{vacated and remanded}, 912 F.2d 819 (5th Cir. 1990), the city had originally built separate projects for "Mexicans" or "Latin-Americans." \textit{Id}. In 1965, the city had two "Mexican" projects; by 1974, the West Dallas projects that had been white or Latino had become mostly black but, in a different part of the city, the "Little Mexico" project still remained 100% Latino. \textit{Id}.}
mous West Dallas project was ""a gigantic monument to segregation and neglect.""\textsuperscript{37}

The *Walker* case began when black plaintiffs sued in 1985 over race discrimination in the public housing and Section 8 programs in Dallas and its suburbs.\textsuperscript{38} In 1987, a consent decree required the creation of new public housing opportunities in predominantly white areas of the city.\textsuperscript{39} The defendants also agreed to develop a nondiscriminatory tenant selection and assignment plan and to use Section 8 existing housing support for ""mobility""—to assist black families in locating housing in predominantly white areas.\textsuperscript{40} After the defendants resisted implementation of the plan and violated the agreements, in 1992 a district judge vacated the decree and granted summary judgment for the plaintiffs on the issue of liability.\textsuperscript{41} A trial on the question of remedy was held in 1994,\textsuperscript{42} and remedial orders were entered against the DHA and HUD in 1995 and 1996.\textsuperscript{43} HUD was ordered to demolish most of the huge West Dallas project\textsuperscript{44} and to replace 2807 demolished units by developing replacements through Section 8 certificates and construction of new units.\textsuperscript{45}

The district court held a hearing on the efficacy of the Section 8 program and found that it alone would not be an adequate remedy for various reasons: a lack of three- and four-bedroom units, unavailability of Section 8 units and disinterest of landlords in renting to Section 8 tenants in mostly white areas, disparity between HUD's fair market rent and the cost of available units, and tenant frustration with seeking units in white areas, which led to tenants remaining in minority areas.\textsuperscript{46} Also, some members of the plaintiff class preferred living in a unit owned and operated by DHA to finding a unit on their own.\textsuperscript{47} The court found that Section 8 certificates and vouchers must

\textsuperscript{37} *Walker III*, 734 F. Supp. at 1306 (quoting the 1987 letter to the district court from two Dallas city council members).

\textsuperscript{38} See *Walker v. United States HUD*, 734 F. Supp. 1231, 1233 (N.D. Tex. 1989) (*Walker I*), *vacated and remanded*, 912 F.2d 819 (5th Cir. 1990). The plaintiffs sued suburban cities for failure to participate in the Section 8 program. See id. HUD and the Dallas Housing Authority were joined in the suit. See id. The defendant suburban cities were later dismissed from the suit after agreeing not to contest remedial measures. See id. The City of Dallas was joined later. See *Walker III*, 734 F. Supp. at 1290. By 1999, the remaining defendants were Dallas, the Dallas Housing Authority, and HUD. See *Walker V*, 169 F.3d at 975.

\textsuperscript{39} See *Walker I*, 734 F. Supp. at 1234.

\textsuperscript{40} See id. at 1235.

\textsuperscript{41} See *Walker V*, 169 F.3d at 977.

\textsuperscript{42} See id.

\textsuperscript{43} See id. at 977.

\textsuperscript{44} The West Dallas project was the second largest in the country, and was in extremely poor condition. See *Walker III*, 734 F. Supp. at 1295, 1296 & n.2.

\textsuperscript{45} See *Walker V*, 169 F.3d at 977.

\textsuperscript{46} See id. at 984.

\textsuperscript{47} See id.
be combined with new construction or acquisition in predominantly white areas to remedy past discrimination and therefore ordered construction of a limited number of new housing units in predominantly white areas of Dallas. All new housing opportunities would be created in predominantly white areas until half the total opportunities were in such areas. The new apartments to be constructed in white neighborhoods would be populated by people who were success stories in the Family Self-Sufficiency Program and designed in consultation with nearby communities.

White homeowners sued to block the construction of the new units, and their case was consolidated for trial with the Walker case. The district court held against the white homeowners, but in Walker V, the Fifth Circuit vacated and remanded the district court's order to build the housing in white neighborhoods. Ironically, the district court had put great effort into making housing acceptable to white neighborhoods, including a requirement of consultation with the neighbors in the planning process and occupancy by employed tenants. The Fifth Circuit treated the careful and consultative planning as evidence of the dangers of public housing and therefore an argument against the remedial plan, rather than as evidence of a narrowly tailored remedy with minimal negative impact on white neighborhoods.

The Fifth Circuit held that the white homeowners had a constitutional right not to have their neighborhoods selected on the basis of their whiteness for remedial housing construction, at least on the facts presented here. The remedial use of race must be narrowly tailored, which the Fifth Circuit believed meant the use of race-neutral measures if at all possible. Because Section 8 might operate successfully as a race-neutral program, the court held that it must be attempted as a

48 See Walker V, 169 F.3d at 976. The majority of units could be replaced through Section 8 vouchers and certificates, subject to court oversight. See id. at 977-78.
49 See id.
50 See id. at 986. The Family Self-Sufficiency Program emphasizes upward mobility through employment or education and demands rigorous adherence to housing rules. See id. at 986 n.35.
51 See id. at 987.
52 The white homeowners were found to have standing, see id. at 976, because their neighborhoods had been selected for the location of public housing based on the race of the residents and therefore faced the threatened "harm" of having public housing put into their neighborhoods based on the possibility of decline in property values and in quality of life. See id. at 980.
53 See id. at 987.
54 See id. (finding that the stringent controls show "considerable sensitivity to the fact that public housing has in the past been disgracefully neglected in Dallas" and stating that while the remedial order "attempts to placate [homeowners'] fears of deterioration in their neighborhoods" it also "lends credibility to those fears").
55 See id.
race-neutral measure despite findings by the district court that the program would not sufficiently remedy segregation in Dallas.\(^{56}\) The Fifth Circuit found that the fact that 285 black families—about ten percent of Section 8 recipients—had moved to white areas with Section 8 certificates between 1994 and 1996 showed that Section 8 could become a workable desegregatory program, despite its past weaknesses.\(^{57}\) Astonishingly, although the Fifth Circuit proposed some measures that it believed could be undertaken to resolve some of the problems identified by the district court, the Walker \(V\) opinion did not address the rest of those problems, including the insufficient availability of larger apartments.\(^{58}\) Because this lawsuit involved only black plaintiffs, not all minorities, the Fifth Circuit saw no reason to locate housing opportunities only in white neighborhoods, asserting that remedial housing could also be placed in neighborhoods that included Hispanics.\(^{59}\) The proper criteria should therefore be “a vigorous Section 8 program, non-black neighborhoods, census tracts in which no public housing currently exists, or non-poor neighborhoods.”\(^{60}\) Because the Fifth Circuit imagined that there were “promising, non-racially discriminatory ways” to continue to desegregate public housing in Dallas, it vacated and remanded the district court’s order that units be located in white areas.\(^{61}\)

\(^{56}\) See id. at 985.

\(^{57}\) See id. at 984. A plan to move holders of Section 8 certificates and vouchers to areas where there were few other section 8 tenants had resulted in approximately 21% of the black holders of such certificates moving to white neighborhoods between 1987 and 1996. See id. at 984 & n.25; see also Roisman & Botein, supra note 13, at 340-41 (discussing the Dallas housing mobility program). The section 8 mobility program that resulted in progress during 1994-96 was not race-neutral but race-conscious, requiring placement of black tenants into areas not “impacted” by minority racial concentrations or concentrations of poverty. See generally Walker \(I\), 734 F. Supp. 1231, 1240-41, 1247-61 (N.D. Tex. 1989) (discussing DHA’s failure to meet consent decree requirements to move tenants to “non-impacted areas” between 1987 and 1989 and reprinting the consent decree), vacated and remanded, 912 F.2d 819 (5th Cir. 1990); id. at 1260 (specifying that the units “shall be located in non-racially impacted areas pursuant to HUD’s site-selection regulations”). The Fifth Circuit apparently considered “race-neutral” any remedial structure that did not use the classification white and race-conscious any plan that put blacks into “white” neighborhoods. See infra Part IV.B.

\(^{58}\) See Walker \(V\), 169 F.3d at 984 (noting this problem among others). The Fifth Circuit did not directly address these problems when discussing the workability of Section 8 remedy. See id. at 985-86.

\(^{59}\) See id. at 987.

\(^{60}\) Id. (emphasis added). Of course, moving “blacks” to “nonblack” areas is a race-conscious program, and “nonblack” is a racial classification. See infra Part IV.B; cf. John Hart Ely, Standing to Challenge Pro-Minority Gerrymanders, 111 Harv. L. Rev. 576, 585 n.33 (1997) (arguing that “nonblack” is a racial classification).

\(^{61}\) See Walker \(V\), 169 F.3d at 987.
II
INSIGHTS FROM CRITICAL RACE THEORY

A common early criticism of critical theory was that it was not practical: it didn’t “do” anything; it consisted only of deconstruction, or perhaps only destruction. In fact, critical theory articulates the harm of racial oppression with richness and specificity, providing firm underpinnings for undertaking transformative work. These insights can help determine which remedial options will precisely target the harms of segregation. In this Part, I review several insights of critical race theory and feminist theory that contribute greatly to the analysis of the harms of segregation. Part III applies these concepts to remedies in public housing cases like Walker.

A. The Social Construction of Race

Race as a social construction with many meanings and multiple constructed identities: The literature on this question is vast and by now well-established. Race is neither a skin color, nor a natural or biological division of humankind. The concept of race is historically located, culturally and socially specific, and therefore continually under construction in our own time. Once race was understood as a social construction, scholars identified different meanings and concepts attached to the term race itself. Further scholarly work identified whiteness as a racial construction, protected as a dominant norm by its ability to appear neutral and natural to white people. The concept of whiteness will be explored in detail in Part II.B.


Second, in awarding relief and in proposing locations for remedial housing, the Fifth Circuit misunderstood the meaning of the term “race-neutral;” it proposed remedial alternatives that were in fact race-conscious but refused to allow white neighborhoods to be selected for remedial construction.
The critique of colorblindness: Scholars pointed to the impossibility of ignoring race in America, the destructive search for colorblindness, and the importance of race consciousness. Critical scholarship emphasized the importance of recognizing racial constructions. Concurrently, the critique of the intent standard emphasized the futility of distinguishing unconstitutional discrimination based on the intent of the governmental actor. An individualistic model of racism underlies the intent model. Critical race theorists pointed instead to a system of cultural meanings and a political and social economy organized to produce certain forms of power and privilege.

The relationship between race and economic subordination: This relationship can involve the analysis of oppression, for example, the intersection of race and poverty for poor African Americans in public housing and inner city neighborhoods, and the relationship between public housing and exclusion from access to work within metropolitan economies. More broadly, scholarly attention to the intersection of class and race provided theoretical tools to examine the tendency in the United States to imagine subordination as a matter of either race.

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67 See Gotanda, supra note 65, at 16-23 (arguing that “nonrecognition is self-contradictory”).


69 See Frankenberg, supra note 68, at 11.

70 Fundamentally, this is part of the critique of liberalism identified by Richard Delgado and Jean Stefancic as an important theme in Critical Race Theory. See Delgado & Stefancic, CRT I, supra note 63, at 462.

71 See, e.g., Alan David Freeman, Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine, 62 Minn. L. Rev. 1049, 1054-55 (1978) (describing the way that law adopts the perspective of the perpetrator and “views racial discrimination not as a social phenomenon, but merely as the misguided conduct of particular actors,” and linking the perpetrator perspective to a “fault model” that requires finding intent to discriminate).


73 See generally Power, Privilege and Law: A Civil Rights Reader (Leslie Bender & Daan Braveman eds., 1995) (gathering many articles on critical race theory and organizing one chapter, “Construction of Exclusion in Law,” by categories including “racial classifications,” “gender and sexuality,” “the poor,” and “people with disabilities”; also, including in chapter on “Identity” a section called “Intersections and Patterns of Power and Privilege”).

or class, rather than understanding that both are important simultaneously. White privilege and residential segregation diminish class consciousness for white people; they help to construct a middle-class sensibility in white people. Critical work on race and space borrowed from other areas of social theory the idea of the racial construction of social space. Critical theorists pointed out that the concept of race has no natural truth or meaning, but derives some of its meaning from its spatial construction in contemporary society.

Intersectionality and the critique of essentialism: Kimberlé Crenshaw identified the experience of African-American women as neither merely the product of gender oppression, nor of sexual subordination—nor was it a product of each added to the other. Rather, women of color faced particular sorts of oppression based on the combination of their race and gender. Further, Martha Fineman’s work on dependency and single mothers identified dependency as inevitable in human existence; it also identified “derivative dependency” in caregivers—those who take care of the dependent—because their time available for other work is reduced by caregiving. One cannot adequately theorize the situation of low-income black women caring

75 See John O. Calmore, Exploring the Significance of Race and Class in Representing the Black Poor, 61 OR. L. REV. 201, 215 (1982) (“[A]dvances made in the name of the race have enhanced the opportunities of more privileged blacks but have failed to address the problems of the black poor.”).


77 See David Delaney, Race, Place, and the Law, 1836-1948 (1998); Paul A. Jargowsky, Poverty and Place: Ghettoes, Barrios, and the American City (1997).


80 For example, Angela Harris criticized feminist theorists, such as Catharine MacKinnon, for describing the experience of women based on that of white women, as if that experience must stand either for the oppression of all women or for the minimum oppression experienced by women. See Angela P. Harris, Race and Essentialism in Feminist Legal Theory, 42 STAN. L. REV. 581, 590-601 (1990).

81 See Martha Albertson Fineman, The Neutered Mother, The Sexual Family, and Other Twentieth Century Tragedies 162-63 (1995) (arguing that dependency and caregiving rather than sexual ties through marriage should be the fundamental basis for family law); see also Lucie E. White, No Exit: Rethinking “Welfare Dependency” from a Different Ground, 81 GEO. L.J. 1961 (1993) (giving examples of demands of family on single mothers and arguing that the suggestions that welfare mothers get a husband or get a job do not actually address the multiple burdens these mothers face).
for dependents in public housing unless all these factors are part of the analysis.

B. Whiteness in Theory and Action

Some of the insights from critical race theory most important to public housing issues involve the construction of whiteness. Whiteness is a distinct socially constructed identity. The concept of race derives part of its power from seeming to be a natural phenomenon—or at least a coherent social category. The concept of race is inherently relational; the concept acquires meaning only in the context of historical development and existing race relations. To have meaning, it must describe more than one social group and the relations between groups. The set of social and cultural meanings that make up the concept of race continues to shift and change within our own time. Because it is historical, social, and relational, race as a concept is not comprehensible separately from social relations of domination and subordination. Michael Omi and Howard Winant describe the theory of race as "shaped by actually existing race relations in any given historical period," and always subject to contestation. Social constructions are nevertheless "real," because we live under their power and our view of the world is constrained by them. The set of beliefs and cultural meanings that make up race is powerful. Once race exists as a social construction, it is reproduced in society, in a process we cannot halt simply by refusing to participate in it. An individual decision not to "do race" or "be racial" cannot transform the subordination and dominance that characterize both individual and collective life in racialized society; furthermore, society cannot make subordination and dominance disappear by attempting to not recognize racial constructions.

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82 The literature on whiteness has grown rapidly during the 1990s. For an overview on the literature, see Critical White Studies: Looking Behind the Mirror (Richard Delgado & Jean Stefancic eds., 1997). For representative works on the topic, see, for example, Flagg, supra note 66; Ian F. Haney-López, White by Law: The Legal Construction of Race (1996); White Reign: Deploying Whiteness in America (Joe L. Kincheloe et al. eds., 1998); Whiteness: The Communication of Social Identity (Thomas K. Nakayama & Judith N. Martin eds., 1999).


84 Michael Omi & Howard Winant, Racial Formation in the United States From the 1960s to the 1990s 11 (1986).

85 For example, Omi and Winant identify a transition in the 1920s from biologicist and social Darwinian views of race to an ethnicity-based paradigm and the challenge that the ethnicity-based paradigm, in turn, faced in 1960s. See id. at 9-11.

In recent years, social and legal theorists have focused on exploring whiteness as a racial identity. As a first part of this project, the dominant norm which is transparent to those within its sphere, was made visible and cognizable. Ruth Frankenberg divides whiteness into a set of "linked dimensions": a location of structural advantage and race privilege; a standpoint from which white people look at themselves, at others, and at society; and a set of cultural practices that are usually unmarked and unnamed. The interaction of the material world and the ways we explain and understand it generate "experience"; therefore, the experience of whiteness is something continuously constructed, reconstructed, and transformed for white people.

White people have difficulty perceiving whiteness. Like culture, race is something we notice in ourselves only in relation to

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88 See FLAGG, supra note 66, at 957 (defining the "transparency phenomenon").

89 Ruth Frankenberg notes that this is difficult, in part because the concept of whiteness has been discussed openly in the United States mostly by advocates of white supremacy. See FRANKENBERG, supra note 68, at 232.

90 Id. at 1. Frankenberg defines whiteness as the cumulative way that race shapes the lives of white people. Id.

91 Frankenberg notes:

Discursive repertoires may reinforce, contradict, conceal, explain, or "explain away" the materiality or the history of a given situation. Their interconnection, rather than material life alone, is in fact what generates "experience"; and, given this, the "experience" of living as a white woman in the United States is continually being transformed.

Id. at 2.

92 "For a significant number of young white women, being white felt like being cultureless." Id. at 196. One woman described "the formlessness of being white":

Being a Californian, I'm sure it has its hallmarks, but to me they were invisible. ... If I had an ethnic base to identify from, if I was even Irish American, that would have been something formed, if I was a working-class woman, that would have been something formed. But to be a Heinz 57 American, a white, class-confused American, land of the Kleenex type American, is so formless in and of itself. It only takes shape in relation to other people.

Id.

93 Anthropologist Renato Rosaldo describes "culture" as something one does not perceive oneself as having; culture is something that is seen in someone else. See RENATO ROSALDO, CULTURE AND TRUTH: THE REMAKING OF SOCIAL ANALYSIS 198-99 (1989); cf. Mari J. Matsuda, Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction, 100 YALE L.J. 1299 (1991) (indicating that we hear accent in others, but not in ourselves). According to Rosaldo, culture is perceived in inverse proportion with power: the less full citizenship one possesses, the more culture one is likely to have. See ROSALDO, supra, at 198-99. What we ourselves do and think is the way we are, normal and neutral, like the air we breathe, transparent to us—not culture. See id. at 198.
others. Although privileged identity requires reinforcement and maintenance, protection against seeing the mechanisms that maintain privilege is an important component of the privilege itself. The manifestations of privilege seem elusive and subtle to whites who seek to identify them. Whiteness facilitates achievement, diminishes conflict, and grants access, all while diminishing awareness of one’s own race. One of the privileges of whiteness is, therefore, not-seeing our privilege, including not seeing how whites’ actions appear to those defined into the category “Other.” Whites cannot simply opt out of the process of formation of white racial consciousness that takes the form of unconsciousness. Whiteness therefore easily reproduces itself even when whites have no conscious will to exclude—as when people find desirable friends, acquaintances, and job candidates to be others like themselves—as well as when exclusion is conscious and willful.

Whites see themselves as acting as individuals, rather than as members of a culture. The idea of self without culture and not part of a collectivity is itself part of white cultural dominance in the United States. The racial privilege that facilitates mobility and comfort in ordinary life is particularly difficult for whites to see. In contrast,


95 When Peggy McIntosh identified forty-six ways she experienced white privilege in her daily life, her list included things that happen because she is white and things that do not happen because she is white, such as the ability to shop alone and confident that she will not be followed or harassed. See id. at 25; see also Regina Austin, “A Nation of Thieves”: Securing Black People’s Right to Shop and to Sell in White America, 1994 Utah L. Rev 147, 147 (“[I]n so very many areas of public life, blacks in general are treated like an outlaw people.”).

96 McIntosh conceptualizes her white privilege as “an invisible weightless knapsack of special provisions, assurances, tools, maps, guides, codebooks, passports, visas, clothes, compass, emergency gear, and blank checks.” See McIntosh, supra note 94, at 25. The knapsack includes unearned assets (things that should be entitlements of humanity and that everyone should have in a just society, but which in fact are awarded to the dominant race) and unearned power conferred systematically (those things that are damaging in human terms even as they bring advantage and are associated only with dominance, such as the freedom not to be concerned about the needs, culture, or reality of others).

97 The difficulty of whites in perceiving white privilege has affected the way discrimination is understood. See, e.g., Crenshaw, supra note 79, at 151 (“[S]ex and race discrimination have come to be defined in terms of the experiences of those who are privileged but for their racial or sexual characteristics.”); see also id. at 152 (“[T]he problem is that [Black women] can receive protection only to the extent that their experiences are recognizable similar to those whose experiences tend to be reflected in antidiscrimination doctrine.”). See generally Flagg, supra note 66 (explaining that the transparency of whiteness to whites affects the way whites perceive “intentional” discrimination).

98 Peggy McIntosh notes that she was raised to see herself as an individual and not as part of a culture. See McIntosh, supra note 94, at 24.

99 See, e.g., Lena Williams, When Blacks Shop, Bias Often Accompanies Sale, N.Y. Times, Apr. 30, 1991, at A1 (describing the experience of a young black man stopped by police for returning to a bank to ask questions and get brochures, then sitting in his car to read them, who was suspected of being a bank robber).
whiteness is visible when it appears to be the basis on which well-being is threatened.

The meaning of whiteness cannot be separated from racism. White dominance is the product of a social history of racial power and subordination and of contemporary racial constructions, which merged a variety of ethnic, regional, social and economic phenomena into a dominant phenomenon of whiteness. Exploring whiteness therefore permits dominant norms to be deprived of some normative power without first determining whether a particular event is understood by whites as racist (usually meaning a conscious sense of prejudice, bias, antagonism, or the will to dominate or exploit). Most whites understand racism as something that a second party (the racist actor) does to a third party (the subordinated person of a minority race). Because of whites' difficulty in perceiving whiteness, racism appears to us a phenomenon distinct from ourselves. Since the dominant norm of whiteness and the mechanisms of its reproduction are transparent to us, bigotry and prejudice—individualized and intentional—become the focus of white interest. Whites do, however, sense racism when they experience hostility or resentment against themselves as whites, or even in the discomfort inflicted by being forced to feel conscious of whiteness. Both hostility in others and self-consciousness become interventions in the norm of white transparency and the apparently natural state of affairs in which whites prosper. In the logic of white privilege, making whites feel white is itself racist.

Ruth Frankenberg analyzed the discursive repertoires used by white women to discuss race. She explains that white people routinely practice color evasion and power evasion. Color evasion occurs when white people insist they do not notice their own color or the color of others. Power evasion occurs when whites acknowledge perceiving color but deny the existence of any connection between color and power.

Whiteness appears to whites as a state of nature, not as a social construction. Whiteness is not generally visible to whites until it is endangered. Transformative programs threaten color evasion and power evasion as well as white numerical or social dominance. It is nearness of the Other that creates "race" for white people. Segregation created white neighborhoods, but most whites spontaneously see

100 See Frankenberg, supra note 68, at 174.
102 See Frankenberg, supra note 68, at 6.
103 See Mahoney, Segregation, supra note 76, at 1667.
104 See Frankenberg, supra note 68, passim.
105 See id. at 142-43.
106 See id. at 14-15.
these as “neighborhoods” rather than “white neighborhoods” until desegregation threatens—then suddenly they have a race, which seems an inappropriate ground for interference with the state of nature.

The call to do away with race in decision making has great resonance for whites when combined with the assertion that immigrants have no historic guilt for black subordination; these arguments both oppose racism and simultaneously protect whites. The call to “just stop doing race” is consistent with a sense of justice as involving rejection of racism and attractive because positioned white perception continually misses the ongoing reproduction of race. Because whites perceive race as meaning “Other,” the call to stop making racial classifications also has appeal beyond its instrumental use in protecting white interests; morally and emotionally, it seems cleansing. This approach nicely suits those whites who oppose racism, believe they are not racist, and believe they face discrimination against themselves for being white.

The dominance of white norms is partly supported by the fact that dominance looks like a state of nature to white people. Residence in “good neighborhoods” therefore appears to whites to define the merit of the residents, not the social construction of whiteness. The white belief in whiteness as natural is important in understanding the resistance to race remedy in the field of law. To avoid reproducing white privilege, we need to apply these insights to race remedy, the subject of Part III below, and to courts’ resistance to race remedies, the subject of Part IV.

III
RETHINKING RACE AND THE HARIIOS OF SEGREGATION: IMPLICATIONS FOR REMEDY

A. Metropolitan Segregation and the Ongoing Construction of Race

Assisted housing in America is thoroughly organized around racial lines. Most importantly, programs and projects are located within metropolitan areas that reflect broad segregated patterns of exclusionary white neighborhoods and impoverished neighborhoods of

107 See Mahoney, Segregation, supra note 76, at 1660-69.
108 See sources cited supra note 18.
color. As Charles Abrams\textsuperscript{109} and Kenneth Jackson\textsuperscript{111} have explained, the federal government had been responsible for the creation of maps that governed mortgage lending. Those maps—the genesis of “redlining”—ranked as unacceptable for mortgage lending and underwriting the areas where people of color lived.\textsuperscript{112} Once segregated neighborhoods developed, segregation could be rationalized and naturalized: both the original maps and today’s residential patterns could be falsely perceived be the result of a “natural” preference for living near one’s own kind.\textsuperscript{113} Segregation appears unproblematically either as the result of white preferences for living near whites and a deep, natural, and unchanging white aversion to living near people of color—especially African Americans—or of the preference of African Americans to live near other black people.\textsuperscript{114}

Redlining was not natural, but a regulatory structure that enforced segregation on the market.\textsuperscript{115} During the years of expanding suburbanization, federal loans and federally insured loans were refused to minorities. Equally important, lenders refused to make loans and agencies refused to insure loans in neighborhoods in which minorities lived.\textsuperscript{116} Many whites say they want to live in an environment that is not all white.\textsuperscript{117} Imagine a developer who actually wanted to make about five percent of his units available to African Americans to satisfy the preference for some integration that whites express. That

\textsuperscript{109} See, e.g., Massey & Denton, supra note 11, at 2 (“The most salient feature of postwar segregation is the concentration of blacks in central cities and whites in suburbs.”).

\textsuperscript{110} In the mid-1950s, Charles Abrams wrote a searching critique of the role of federal housing programs in segregating American cities and suburbs. See Charles Abrams, Forbidden Neighbors: A Study of Prejudice in Housing (1955). Abrams’s insights were not much incorporated into the theoretical treatment of segregation in law until the past ten years; but they have been important to scholars working in the field of race and space.

\textsuperscript{111} See Kenneth T. Jackson, Crabgrass Frontier: The Suburbanization of the United States 190-230 (1985) (emphasizing importance of federal government’s role in producing segregation and in shaping private-sector discrimination).

\textsuperscript{112} See id. at 197-203.

\textsuperscript{113} But see Mahoney, Segregation, supra note 76, at 1669-72 (noting that whites claim a preference for “living in slightly desegregated communities”). But studies consistently show that segregation is not natural: “The extensive literature on the causes of residential racial segregation substantially agrees on three propositions: Residential racial segregation is not ‘natural’; it is not generally the result of black preference; and it is not primarily the product of economic differences between blacks and whites.” Roisman, supra note 13, at 487-88 (footnotes omitted).

\textsuperscript{114} See Massey & Denton, supra note 11, at 1-2.

\textsuperscript{115} See id. at 203-18.

\textsuperscript{116} See id.

\textsuperscript{117} Many whites generally state that they would prefer a small percentage of people of color—noticeably different from blacks’ preference of a neighborhood that had approximately equal percentages of blacks and whites. See Massey & Denton, supra note 11, at 89 (citing Reynolds Farley et al., Barriers to the Racial Integration of Neighborhoods: The Detroit Case, 104 Annals Am. Acad. Pol. & Soc. Sci. 441 (1979); Reynolds Farley et al., “Chocolate City, Vanilla Suburbs”: Will the Trend Toward Racially Separate Committees Continue?, 330 Soc. Sci. Res. 7 (1978)).
developer would not have qualified for federally funded or underwritten mortgages or for many forms of mortgage insurance. Obviously, this practice would affect both the ability to buy the homes and to resell them. Therefore, if whites actually desired desegregated living environments and were actually pleased to have black neighbors, their homes would still have been worth less, simply because of the presence of people of color nearby.  

Redlining makes whites who believe in integration into market losers.  

Counterintuitively, redlining also reveals that whiteness—far from being natural—is inherently unstable. Whites will not sufficiently police whiteness on their own initiative; therefore, whiteness must be policed by lenders and insurers to create and protect white neighborhoods. Redlining reflects racism, but it also breeds racism by creating negative economic consequences for integration and punishing deviation from racist norms. The isolation of whites from people of color, in addition to the existence of white privilege, breeds fear of the Other and the continuation of white dominant norms.

Just as metropolitan segregation constructs whiteness as natural and dominant, it simultaneously constructs blackness through ghettosisation. Ghettoes are defined by both race and joblessness. They are not merely neighborhoods where minorities live, but rather neighborhoods that reflect a lack of choice about where to live, economic oppression, and the linkage of economic oppression and race. Initially, ghettoization reflected the exclusion of blacks from growing areas of both jobs and new housing. Public housing became stigmatized in a process that stigmatized poor people’s housing in an increasingly prosperous America after World War II, and a simultaneous process in which racially segregated projects in increasingly

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118 See Mahoney, Segregation, supra note 76, at 1671-72.
119 Telephone conversation with Michelle Adams (March 1997). I am grateful to Professor Michelle Adams for this formulation of the problem.
120 Defining ghettoes by both race and joblessness avoids the problem of treating all black neighborhoods as ghettoes. See William Julius Wilson, The Truly Disadvantaged: The Inner City, The Underclass, and Public Policy 93-106 (1987); Mahoney, supra note 74, at 1266-68; see also Massey & Denton, supra note 11, at 2 (emphasizing structured links between segregation of blacks and poverty).
121 Elsewhere I have noted that:

[h]ousing projects became predominantly black because of the exclusion of blacks from even subsistence-level employment. The shift from an upwardly mobile population to a chronically underemployed population coincided with the racial transformation of the public housing population as a whole. These shifts are not coincidental, but describe different parts of the same phenomenon: a segregatory process in which white people and jobs left the cities. Mahoney, supra note 74, at 1253 (citations omitted).
122 In contrast, whites willingly moved in well-built white projects in New Orleans during 1960s, even though they did not seem to need them on a wide scale, while there were long waiting lists at mostly black projects. See id. at 1281-84.
ghettoized cities were also stigmatized—as too black. The association of ghettos with public housing then became part of the process by which white America constructed its image of African Americans. Black communities increasingly became associated with high permanent unemployment rates. The effects of a declining economy were placed heavily on African-American communities and then were treated as inherent characteristics of those communities. Insidiously, unemployment and ultimately unemployability became identified with blackness.

This process of the construction of race and space had two related results: Black communities became defined in part to white America by the unemployability of their residents. In addition, residents of low-income black communities were increasingly likely to be identified as unworthy of employment relative to other demographic groups and other African Americans. One study found that employers bluntly described their biases in hiring, generalized about whites and blacks, and asserted that whites had a better work ethic than blacks.

The preconceptions held by the employers were somewhat affected by class, which they determined by interpreting the ways employees dressed and spoke. Geography was also important: "inner city" was equated with "Black, poor, uneducated, unskilled, lacking in

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123 See id. at 1265 (describing the development of this stigma in New Orleans: "Once the majority of tenants were black, ... [a] cultural shift occurred that stigmatized [public housing], making it more undesirable. Once completely defined by race, public housing was more stigmatized than the first black projects had been, when they were smaller, hopeful, in mixed-income neighborhoods, and matched by white projects").

124 Site selection in minority neighborhoods by public officials helped segregate public housing. See Roisman, Intentional Racial Discrimination, supra note 18. The processes of ghettoization and impoverishment surrounded projects which had often been built in minority neighborhoods and segregated by government policy. See, e.g., Mahoney, supra note 74 (describing New Orleans housing projects).

125 See Wilson, supra note 120, at 31.

126 See Mahoney, Segregation, supra note 76, at 1682 ("The development of an underclass, the feminization of poverty, and related phenomena were treated as racial phenomena and discussed in political and social discourse as characteristics of black inner-city communities, when in fact they are part of the nationwide transitions in work opportunity that now impact white working people as well as blacks."); Mahoney, supra note 74, at 1286 (noting the danger of the stereotype that black joblessness is due to cultural qualities inherent in black inner-city communities (citing Wilson, supra note 120, at 14)).

127 See Joleen Kirschenman & Kathryn M. Neckerman, "We'd Love to Hire Them, But ...": The Meaning of Race for Employers, in THE URBAN UNDERCLASS 203, 203-04 (Christopher Jencks & Paul E. Peterson eds., 1991) (noting that in employers' eyes black race and ethnicity reinforce various other characteristics, such as instability, uncooperativeness, and dishonesty); see also Massey & Denton, supra note 11, at 94-95 (reporting white stereotypes of blacks including failure to care for homes, lower work ethic, less ambition, and greater tendency to commit crimes).

values, crime, gangs, drugs, and unstable families."129 “Suburb,” in contrast, meant “white, middle class, educated, skilled, and stable families.”130 Residence in public housing or the inner city signalled lower-class status, identified with undesirable characteristics as employees.131 It is hardly surprising, therefore, that some studies have found that black families who move to the suburbs find greater success at finding employment.132 The greater number of suburban jobs is extremely important,133 but it is also noteworthy that these tenants have moved to a more advantaged position with regard to address discrimination: they are not only closer to the jobs, employers may also be more likely to hire them.134

B. The Harm of Segregation and the Importance of Race-Conscious Relief

Race-conscious relief is crucial in housing segregation cases, and an understanding of the harm of segregation is fundamental to developing well-constructed remedies. Most studies of housing segregation treat the concentration of minorities and the link between ghettoization and poverty as the harms of segregation.135 The Supreme Court has adopted an increasingly formalistic approach to racial segregation over the past decade; it treats racial identification or classification of race as inherently harmful except when it appears “natural” to the Court and therefore not to have been caused by the state.136 Justice O’Connor’s discussion of race in Shaw v. Reno137 shows that she equates racial classification with racial separation; she sees separation as

129 Id. at 215.
130 Id.
131 See id. at 216.
133 See id.
134 See id. at 346-50.
135 To Massey and Denton, the concentration and hypersegregation of blacks as the result of separation is the relevant harm. See Massey & Denton, supra note 11, at 74-78, 129.
136 See discussion infra Part IV. The term “natural” appears in Justice O’Connor’s concurrence in Missouri v. Jenkins, 515 U.S. 70, 111 (1995) (O’Connor, J., concurring) (“Whether the white exodus . . . was caused by the District Court’s remedial orders or by natural, if unfortunate, demographic forces . . . the segregative effects . . . did not transcend its geographical boundaries.”) (emphasis added). The Fifth Circuit adopted this view in Walker V when it treated the selection of sites for housing in white neighborhoods as “race conscious,” see Walker v. City of Mesquite, 169 F.3d 973, 982 (5th Cir.), reh’g denied, 181 F.3d 98 (5th Cir. 1999), cert. denied, 120 S. Ct. 969 (2000) (“In short, is it constitutional in this case to implement a race-conscious site selection criterion for newly built or acquired public housing?”), but never treated the whiteness of those neighborhoods as unnatural or problematic.
an inherent harm, rather than seeing the construction of _subordination and privilege_ as the crucial issue in race cases. In such an analysis, segregation becomes an issue of racial classification and separation rather than an issue of dominance and privilege on one side and subordination and poverty on the other. If race is inherently about power, however, then segregation must be about power as well. Formalism about race or segregation misses important questions: the importance of self-definition by subordinated groups, including the right to live with themselves or others as they choose and to gain whatever power they can, and the inefficacy of remedies that, after structuring a racial world, attempt to blink race away by preferring race-neutral measures.

Segregation creates a link between blackness and subordination; simultaneously, it links whiteness and privilege. Only if whiteness is an invisible dominant norm can “segregation” mean “blackness” or “Otherness.” This is not merely a quarrel over terminology. Rather, problematizing _whiteness_ as well as _blackness_ permits an entirely different concept of remedy. The crucial legal question in cases like _Walker_ is whether the record supports race-conscious relief. If so, identical standards need not be applied to mostly black areas and mostly white areas; rather, remedial programs can and do create standards tailored to the needs of different communities. Standards and classifications in remedial plans can then closely fit or can be narrowly tailored to remedy precisely the harms of segregation.

Defining both privileged exclusionary whiteness and subordinated ghettoized blackness as the harms of segregation ultimately supports both “mobility” and “equalization” measures. Mobility plans focus on desegregation; at a minimum, their goal is to end the confinement of African Americans to mostly black communities. Equalization remedies seek to improve conditions for black communities. If whiteness is part of the harm of segregation, however, desegregation itself will be defined as involving changes to whiteness and mobility will be organized differently.

Most remedial plans are based on one of two concepts of “race.” In the formal-race approach, race means the same thing for blacks

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138 See id. at 649-51.
139 For a thoughtful discussion of the concerns over each of these issues within the black community, see Adams, _supra_ note 13, at 457-63.
140 See discussion _infra_ Part IV.C.
141 For example, some remedies involve, as did the earlier _Walker_ decree, some improvement of rundown housing units, projects, and neighborhoods, as well as desegregatory measures. See Adams, _supra_ note 13, at 465-67.
142 See id. at 447-63.
143 See id. at 464-85.
144 See id. at 447-63.
145 See id. at 464-85.
and whites, and the separation of the races is itself the harm.\textsuperscript{146} The remedy under this approach would be to make all housing assistance contingent on moving to an area in which the tenant's race does not predominate, for example, through the use of restricted Section 8 certificates.\textsuperscript{147} There are practical problems with this approach: whites sometimes decline housing assistance rather than make integrative moves, and many waiting lists are made up mostly of African Americans, thereby making actual integration difficult. In the other and probably the most common approach, race tends to be a synonym for blackness.\textsuperscript{148} Blackness is conceptualized as the problem, and whiteness remains an invisible, dominant norm. Under this approach, remedy means enabling black people to move out of black neighborhoods, either through unit-based approaches (enabling blacks to move to new sites in white areas) or tenant-based approaches (giving black tenants certificates or vouchers so that they can move to white areas).\textsuperscript{149}

Problematizing whiteness shifts the focus of remedial interest and applies different standards to mostly white and mostly black areas. A mandatory desegregation approach could be applied in white areas; it would develop standards that would make it impossible for white areas to remain exclusionary, but would offer blacks a choice about whether to integrate with white areas or remain in black areas. An equalization plan combined with options to make desegregatory moves could be applied in black areas. For example, housing units in mostly white areas, such as senior housing, could be converted to family occupancy.\textsuperscript{150} Vacancies could be held open longer to permit housing authorities to find a tenant who wanted to make a desegregatory move. This approach would treat whiteness itself as a problem to be remedied, and it would remedy the exclusion of blacks from the privileges of white areas. African-American areas present somewhat different questions, especially when blacks are disproportionately over-represented in waiting lists for assisted housing in many cities.\textsuperscript{151}

\textsuperscript{146} These plans, of course, do not define "race" as a concept before deploying the concept; rather, they incorporate a certain way of thinking about race, such as "formal race," see Gotanda, supra note 65, in the way they describe the harm they seek to remedy.\textsuperscript{147} In Sanders v. HUD, "desegregative Section 8 certificates" were one component of a multifaceted remedial plan. Sanders v. HUD, 872 F. Supp. 216, 219 (W.D. Pa. 1994).\textsuperscript{148} See supra note 12.\textsuperscript{149} Gautreaux is the classic example of this approach. See sources cited supra note 22.\textsuperscript{150} To avoid site resistance, existing housing can be modified, for example, by combining smaller units into larger units. See Julian & Daniel, supra note 10, at 675.\textsuperscript{151} See United States v. Starrett City Assocs., 840 F.2d 1096, 1098-99 (2d Cir. 1988). When there are long waiting lists with many minority applicants and opportunities in white areas are scarce, the Starrett City problem is reproduced: either choice or subsidy is eliminated for minority applicants. On the other hand, whites will receive "desegregatory" offers quickly, because most of the housing opportunities that arise will be in mostly black areas. Criteria that disfavor minorities or reduce their choices were disfavored in Starrett
identifiably black areas, remedy would focus on uplift and equalization. Desegregatory offers could be made but held open less time, so that black people on the waiting list would not be shut out of available housing for long. This approach would solve the Starrett City problem:\footnote{\textsuperscript{152}} minorities would never be prevented from getting housing that they were prepared to accept.

Furthermore, mobility for African Americans could include breaking the link between blackness and poverty,\footnote{\textsuperscript{153}} rather than simply rejecting blackness. Instead of writing standards that focus solely on using Section 8 certificates to relocate tenants to \textit{racially} diverse areas, effective remedies could permit the use of at least some certificates to relocate African-American tenants from impoverished areas to \textit{economically} thriving areas, even if the new neighborhoods already had significant numbers of African-American residents. I am not endorsing the proposals of the \textit{Walker} court that “nonpoor, nonblack” neighborhoods are the appropriate venue for locating remedial housing. Substituting “nonpoor” neighborhoods for white neighborhoods may fail to achieve the important goal of remedying racial exclusion and at worst could increase the poverty rate in neighborhoods occupied by people of color.

Effective remedy requires \textit{simultaneously} taking actions that desegregate by race and that deconcentrate poverty. It is important not to merge these two standards either by equating racial segregation with ending poverty or by refusing to take race-conscious action at all. Be-

\footnotesize{City. See \textit{id.} at 1101-03. The straightforward solution, of course, is to provide significantly \textit{more} housing and to end the artificially constructed zero-sum game. I am grateful to Florence Roisman for pointing out this solution.}

\footnote{\textsuperscript{152} Starrett has used racial quotas to maintain racial diversity in its housing complex. When black applicants sued, the court enjoined the city’s practice, despite its argument that quotas were adopted “at the behest of the state solely to achieve and maintain integration and were not motivated by racial animus.” \textit{Id.} at 1099.}

\footnote{\textsuperscript{153} See \textit{Adams, supra} note 13, at 464 (proposing that equalization remedies involve housing code enforcement provision of amenities and tenant services, demolition of dilapidated housing with one-for-one replacement of demolished units, and “real community development addressing neighborhood conditions municipal services, and exposure to environmental hazards”); \textit{cf. Calmore, Spatial Equality, supra} note 11, at 1488. John Calmore states:}

\footnotesize{Twenty-five years ago, the Kerner Commission Report concluded that the future of our cities would be enhanced only through the combination of enrichment programs designed to improve the quality of life in black communities and programs designed to encourage integration of substantial numbers of blacks into American society beyond the ghetto. The Report warned us that integration would not occur quickly and therefore, that enrichment had to be an important adjunct to any program of integration. Spatial equality recognizes the continuing validity of this warning. It thus demands, as a matter of justice, that the enrichment program finally receive the policy attention and financial commitment necessary to compensate for decades of neglect and active exploitation. \textit{Id.}}
cause there has been more than one element to the oppression of segregation, different remedial benefits may be achieved by enabling low-income African Americans to move into formerly all-white neighborhoods than by moving them out of some all-black neighborhoods with high concentrations of poverty. The combination of mandatory desegregation of white areas with some freedom of choice for black tenants would support both goals and address the core harms of segregation.154

Ultimately, race-conscious relief is necessary to the project of ending segregation. Segregation involves many systems simultaneously constructing relations of power and subordination: discriminatory acts in renting or selling housing by individuals, corporations, and governments; the availability, effectiveness, and affordability of transportation systems, schools, childcare provisions, and other necessary supports for family life; the price of housing relative to income; the ages and sizes of families needing assistance relative to the sizes of units available; and many other factors. Some problems may appear race-neutral, but nonetheless have obvious impact on effective desegregation. For example, families needing three or more bedrooms encounter great difficulty finding units in the suburbs that are affordable on the fair market rent payments set by HUD.155 If only smaller households needing fewer bedrooms move to mostly white areas, then some desegregation will occur but greater numbers of people will live in truly segregated conditions—that is, not only will they live in mostly black areas, but they will not have a choice about it.

Some factors that appear race-neutral, however, merit closer examination. For example, in areas where cars are the main form of transportation, public transportation is often weak—a seemingly neutral observation. Yet, the American Bar Foundation has found that black customers are systematically charged more for cars by dealers than white customers.156 Although current Supreme Court decisions ban the creation of racial preference programs to compensate for “societal” discrimination,157 the issue in housing cases is how to cure proven racial discrimination when so many social factors reinforce the current structures of power.

For whites, the concentration of blacks somewhere other than near white neighborhoods is the spatial phenomenon that allows whiteness to remain both exclusive—physically populated mostly by

154 See Adams, supra note 13, at 485 (emphasizing housing choice as a theme).
155 See Roisman, Long Overdue, supra note 18, at 134 (describing problems with fair market rent levels).
white persons—and a dominant norm—unnoticed except when threatened. Breaking down the walls of exclusion therefore has the effect of breaking down white dominance as well as making white spaces less white. Contesting the social construction of blackness involves in part defending the strengths and potential of black people and their neighborhoods and in part opening the privileges associated with white areas to blacks. Under these circumstances, race-targeted programs are vital to ensuring that transformation is possible and effective.

C. Critical Race Theory: Useful Tools for Practical Problems

Critical race theory provides insights that can guide the development of remedial plans.

_The social construction of race:_ Residential segregation is one of the social forces that makes race seem like a natural phenomenon rather than a social construction. Just as we perceive our homes as physical reality rather than as bundles of property rights protected by law, we view our communities as a living society with its physical artifacts—this is my neighbor’s yard, this is my driveway—rather than as constructed phenomena within social space. Therefore, as they naturalize race, segregated residential neighborhoods also naturalize racism and the prevailing distribution of power. Gary Orfield has pointed out that courts use housing segregation to avoid recognizing school segregation. Similarly, the concepts of black consumers or employees as undesirable have been reinforced by the structures of segregation, including redlining and isolation of whole communities from employment opportunities.

The failure of American government and society to undertake a thorough effort to dismantle residential racial segregation also naturalizes race and racism. Segregated housing appears to be the inevitable result of many individual choices—just the way people want to live. Segregation seems a natural expression of race because it

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158 See Mahoney, Segregation, supra note 76, at 1661.
159 See id. at 1662.
161 Justice Stewart in his concurring opinion in _Milliken v. Bradley_, 418 U.S. 717 (1974), noted:

It is this essential fact of a predominantly Negro school population in Detroit—caused by unknown and perhaps unknowable factors such as immigration, birth rates, economic changes, or cumulative acts of private racial fears—that accounts for the “growing core of Negro schools,” a “core” that has grown to include virtually the entire city.

_Id._ at 756 n.2 (Stewart, J., concurring).
seems so difficult to alter: after all, we’ve had the Fair Housing Act now for more than three decades, and it hasn’t changed much; we tried to improve public housing, but it didn’t work; this is simply the way things are.\textsuperscript{162} Therefore, remedial plans could address the construction of race by explaining in detail all the efforts that would actually be required to remedy the current construction of subordination and inferiority, even if all those measures were not attempted in this remedial plan because of financial or other constraints. Progress would be measured against actual need as well as program goals; programs would be evaluated systematically in light of what was the scope of this remedial plan as well as what was undertaken. This approach would help to denaturalize race and racism. Especially important, it would oppose narratives of the inevitability of oppression and the impossibility of transformation.

The relationship between race and economic subordination: Effective remedial measures would plan for employment decisions as well as housing opportunities; they would weigh the potential effects on desegregation of all development decisions undertaken in the area, not merely housing location.\textsuperscript{163} They would incorporate a variety of measures to counter both lack of jobs and the construction of unemployability at the individual and the community level.\textsuperscript{164}

The links between race and space: If we really recognized the contribution by past government actions to the construction of race and to the distribution of work and housing across entire metropolitan areas, the scope of remedy would broaden considerably. We would think

\textsuperscript{162} For example, Florence Roisman points out that at a conference on the results of Mount Laurel, participants were asked whether segregation was just impossible to change. In her article, Roisman points out that no race-based transformation had been attempted in Mount Laurel cases. See Florence Wagman Roisman, The Role of the State, the Necessity of Race-Conscious Remedies and Other Lessons from the Mount Laurel Study, 27 SETON HALL L. REV. 1386, 1394 (1997). Instead, the Mount Laurel housing programs stand for the difficulty of achieving desegregation while using only race-neutral measures. Cf. DAVID L. KIRP ET AL., OUR TOWN: RACE, HOUSING, AND THE SOUL OF SUBURBIA (1995) (providing a detailed account of resistance to change in Mount Laurel, New Jersey).

\textsuperscript{163} See Mahoney, Segregation, supra note 76, at 1673.

\textsuperscript{164} This final category might include job training programs and subsidized car loans for job transportation; location decisions for desegregative housing should be based on access to jobs and transportation. It might also include involving residents in employment bias testing for address discrimination, changing street names of minority applicant addresses to study change in the results, and publicizing success of these measures to public housing residents. James Rosenbaum proposes to make cars, better public transportation, employment training, and child care assistance part of mobility remedies such as the Gauthreaux program. See James E. Rosenbaum et al., Can the Kerner Commission’s Housing Strategy Improve Employment, Education, and Social Integration for Low-Income Blacks, in RACE, POVERTY, AND AMERICAN CITIES 273 (John Charles Boger & Judith Welch Wegner eds., 1996). Cf. Roisman, Long Overdue, supra note 18, at 176-77 (emphasizing the importance of employment).
more expansively about the sorts of government decisions involved in urban segregation and also about the justification for a variety of measures in desegregatory programs. Particularly, we would seek to develop innovative programs that deal with the construction of race—the ways in which segregation has bred racism—and not merely with the physical arrangement of persons into mostly black and mostly white communities.

As Richard Ford has pointed out, courts and commentators frequently assume that segregative choices usually result from people's "natural" desire to live with their own kind—particularly low-income whites' naturalized (inevitable, unchanging, and unchangeable) racism that makes them unwilling to live with African Americans. Under an ideal remedial plan, everyone of any race who is willing to make desegregative offers should be able to choose to move to anywhere their race does not predominate, even desegregating choices

165 See Ford, infra note 78, at 1368.

166 Tenant assignment plans could treat choice for tenants as dangerous, since either blacks or whites might choose to live in communities where their own race predominates would mandate making only one offer of a housing unit in a desegregatory location to any applicant who reached the top of a waiting list and removing applicants who declined desegregatory offers from the list (or moving them to the bottom of the list). One federal district court has recognized that

[i]t is of course well understood by those who must deal with problems of bigotry and discrimination that the noble words "freedom of choice" often are a euphemism for "racism." If the person at the top of the list of housing applications had to accept the first available unit physically suitable for his individual needs, or else be dropped to the bottom of the list, it is inconceivable that after some twenty-five years the racial complexion of LMHA's old housing projects would not at least be the same as that of the list of housing applicants, if not of the community as a whole.


However, this approach may be of limited effectiveness for structural reasons. While it would successfully deny or delay housing assistance for whites who were unwilling to move to mostly-black areas, see Roisman, Long Overdue, supra note 18, at 171, such policies will have little impact on white applicants for senior citizen housing, the housing type sought by many white applicants, because senior citizen housing is most likely to be located in mostly-white areas. African-American senior citizens offered housing in mostly-white areas should be able to consider whether they are satisfied with the offered location in relation to their family needs, which may well have been affected by pervasive segregation in metropolitan areas.

In addition to their structural limits, the emphasis on limiting choices for tenants inherently reflects the view that tenants' and applicants' individual preferences are a primary cause of housing segregation. Remedial plans should recognize and correct systemic problems of urban development, the location of assisted units, pervasive housing discrimination against people of color throughout the housing market, and the construction of prejudice through redlining.

167 Sanders v. United States HUD, 872 F. Supp. 216 (W.D. Pa. 1994), the recent case from the Pittsburgh area, uses a similar approach to remedy via consent decree, giving tenants a choice of all desegregatory options available at the time:

Section VI of the [consent) decree calls for the eventual merger of the public housing and Section 8 waiting lists. Individuals on the two lists will
are not the only options permitted for housing applicants. Group moves could be arranged simultaneously by holding apartments open until a group of tenants are ready to move together. Remedial plans should address the systemic power and profit questions that helped create housing segregation. Among other measures, this would necessitate bringing all assisted housing programs in any area into any remedial scheme. Furthermore, remedial programs should explore and address the extent to which administration of housing programs created financial incentives favoring construction by developers of small apartments in newer assisted housing units rather than larger apartments; since the difficulty of finding apartments of adequate size in suburban areas has posed obstacles to desegregation. Finally, the importance of constructing some units as well as using certificates and vouchers should be immediately apparent: the desegregation of white neighborhoods to make all neighborhoods available to formerly excluded black public housing tenants should neither depend entirely on a black family’s success in breaking the color line nor depend on whether they will later move to a different area for a new job or for some other reason; rather, it is appropriate to ensure some durably positioned housing that continues to accomplish desegregatory goals.

*The intersection of race and gender*: Recognizing the intersectional interests of black women heads of low-income households would en-

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168 For criticisms on mandatory desegregation approaches, see Calmore, *Fair Housing*, supra note 11; Calmore, *Racialized Space*, supra note 11; and Calmore, *Spatial Equality*, supra note 11.

169 See, e.g., DeBolt v. Espy, 47 F.3d 777, 778-82 (6th Cir. 1995) (describing a system of awarding contracts and incentives to produce relatively small apartments and holding that plaintiff lacks standing because theories of incentives involved conjecture).

170 See supra text accompanying note 155.
rich remedial planning for mobility or equalization. Martha Fineman describes the "inevitable" dependency of childhood, old age, and illness and "derivative dependency" of caregivers. Equalization remedies could therefore include high quality child care for early mornings and evenings that would continue through elementary school age, better transportation between projects, access to employment, and increased ownership of automobiles if public transportation is inadequate. Mobility remedies would analyze local obstacles to the earning power of women heads of households. Theories of mismatch between skills and spatial concentration of African Americans would have to be reevaluated in light of the market for women's labor and discrimination against women—particularly against black women—within labor markets. Given race-conscious tools and the understanding of race as a social construction, truly transformative remedial measures are both necessary and possible to create.

171 FINEMAN, supra note 81, at 162-63.
172 See Koeninger, supra note 27, at 447-49 (arguing that women are sometimes disfavored by the obligation to search for housing and negotiate with private landlords and that improved public housing can meet important needs for some women).
173 For example, are these women shut out from only nearby jobs or shut out from many other jobs? If suburbanization is an option, which jobs might be available there? Are there jobs near older housing projects that might be more available with more work against discrimination, more training, more counseling, or more aggressive job placement programs? For a discussion of gender and spatial mismatch, see Roisman, Long Overdue, supra note 18, at 177 (citing Susan Hanson & Geraldine Pratt, Gender, Work, and Space (1995)).
174 See, e.g., JOHN F. KAIN & JOHN M. QUIGLEY, HOUSING MARKETS AND RACIAL DISCRIMINATION: A MICROECONOMIC ANALYSIS 87-90 (1975) (detailing the interrelationships between the workplace and the residential choices of black workers); WILSON, supra note 120, at 42, 100-01 (emphasizing structural problems creating inner-city joblessness); Harry J. Holzer & Wayne Vroman, Mismatches and the Urban Labor Market, in URBAN LABOR MARKETS AND JOB OPPORTUNITY 81, 82-86, 89-91 (George E. Peterson & Wayne Vroman eds., 1992) (surveying spatial mismatch literature); James H. Johnson, Jr. & Melvin L. Oliver, Structural Changes in the U.S. Economy and Black Male Joblessness: A Reassessment, in URBAN LABOR MARKETS AND JOB OPPORTUNITY, supra, at 113, 113-19, 139-44 (finding that deconcentration of jobs to suburban locations diminishes employment for blacks); see also Schill, supra note 11, at 808-31 (discussing spatial mismatch arguments for deconcentration of the inner-city poor).
175 Women's decisions about moving might be based on moving out of some isolated ghetto areas. But they might find it less important to move out of some inner cities, if those particular urban locations had good access to work. Conversely, in some areas or for some women, the move to suburbs might be more important. I am grateful to Florence Roisman for pointing out that spatial mismatch theories did not consider gender. See Roisman, Long Overdue, supra note 18, at 176-77 (discussing the particularity of women's needs in mobility remedies).
IV

A WHITE FORTRESS IN THE STATE OF NATURE: PROTECTING PRIVILEGE AGAINST CHANGE

Walker V has two striking qualities: first, it is so white, and, second, it is so wrong. Section A below explains how whiteness has colored the Supreme Court’s thinking in recent cases brought by white plaintiffs seeking protection against structural gains made by people of color. Walker—the Fifth Circuit case—is consistent with the identifiably white thinking in recent Supreme Court cases, even though it is doctrinally inconsistent with those cases. Section B examines the concepts of whiteness and of narrow tailoring in Supreme Court opinions. In Walker V, the Fifth Circuit refashioned narrow tailoring around a uniquely white and illogical view of race that contradicted Supreme Court doctrine. While it incorporated much of the worst of the Supreme Court’s thinking in positioned white terms, the Fifth Circuit failed to reckon with the Court’s repeated statements about justifications for the use of race in remedies. Section C discusses the apparent pattern in the Rehnquist Court: whites virtually never lose on the merits when challenging civil rights gains by minorities." This section reviews the flawed reasoning in Walker and argues that the Supreme Court’s failure to reverse must not stamp with approval a covert rule that “[w]hite men win.”

A. Positioned White Perception in Judicial Opinions

Recent Supreme Court decisions directly restrict the remedial powers of federal courts and adopt identifiably white views of race. In Shaw v. Reno \(^{178}\) and Adarand Constructors, Inc. v. Pena, \(^{179}\) Justice O’Connor called racial classifications “odious.” \(^{180}\) This is consistent with the concept of color evasion: race is something that good white people simply do not notice. As Frankenberg points out, however, color evasion grows out of racism: \(^{181}\) noticing race is bad, because race itself is bad—because “race” in America historically meant black/inferior/subordinated/Other. If no relations of power were attached to

\(^{176}\) The plaintiff in Adarand would have lost under Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990), overruled by Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995)—Metro Broadcasting was the only case in which a white plaintiff had lost on a civil rights challenge in the 1990s. But the Adarand Court took the case and overruled Metro Broadcasting, which it had decided only five years earlier! See discussion infra Part IV.C (discussing civil rights litigation trends). Minorities frequently lost in civil rights cases during this period, but sometimes did win. See, e.g., Chisom v. Roemer, 501 U.S. 380 (1991).

\(^{177}\) Fischl, supra note 3, at 812.


\(^{180}\) Adarand Constructors, 515 U.S. at 214 (internal quotation marks omitted); Shaw, 509 U.S. at 643 (internal quotation marks omitted).

\(^{181}\) See Frankenberg, supra note 68, at 20.
race, it would not offend. Shaw and its progeny are marked by reasoning that is both color and power evasive. The Shaw opinion is color evasive because, as many scholars point out,182 districts are not suspect when they are mostly white and are located near other whites, no matter how oddly shaped they are. Only proximity to the Other triggers suspicion. Shaw also is power evasive: it is the use of racial categories, not the exercise of power resulting in racial subordination, that creates a constitutional violation.

Color and power evasions also mark Adarand v. Pena and City of Richmond v. J.A. Croson Co.,183 the cases dealing with affirmative action in the award of government contracts at the federal and local level. Croson reviewed a set-aside program in the context of awarding municipal contracts.184 The Court rejected any standard of review that is more deferential than strict scrutiny for programs in which the racial classification at issue benefitted historically oppressed minorities.185 The Court first held that strict scrutiny must be applied in reviewing the creation of a minority set-aside program for contractors in Richmond, Virginia.186 Applying strict scrutiny, the Court then held that the city had not sufficiently established a connection between actions by the city in furtherance of public or private discrimination and the low number of black contractors bidding on public contracts.187 By refusing to assume that minority interest in a field will emerge in "lockstep proportion"188 to their presence in the population, the Court effectively assumes that minorities do not want the same career opportunities that whites want.189

Croson is power evasive: it assumes that absent legally sufficient proof to the contrary, white power does not reproduce itself. The years of white-majority city government in Richmond granting virtually all city contracts to whites did not show a racial use of power to the Court. Black power, on the other hand, is dangerous: the Court emphasizes the cause for concern when the new city government, which has a bare majority of black members, enacts a set-aside program.

184 See J.A. Croson, 488 U.S. at 493.
185 See id. at 493-94.
186 See id. at 498-504.
187 See id. at 505.
188 Id. at 471.
189 The success of the "lack of interest" argument in discrimination cases has been documented by Vicki Schultz—the willingness to attribute employment structures skewed by race and gender to the interest levels of excluded groups. See Vicki Schultz & Stephen Petterson, Race, Gender, Work and Choice: An Empirical Study of the Lack of Interest Defense in Title VII Cases Challenging Job Segregation, 59 U. Chi. L. Rev. 1073, 1074 (1992).
The *Adarand* Court held that even the federal government could not consider race as a category of presumptive disadvantage—even in a program in which disadvantaged whites were eligible for affirmative action.\(^{190}\) The *Adarand* decision, like *Croson*, is power evasive because it denies the connection between minority race and the history of exclusion from employment and government contracting.\(^{191}\)

In *Missouri v. Jenkins*,\(^ {192}\) the Court dealt directly with the remedial powers of federal courts. The district court had imposed an ambitious remedial scheme to compensate for de jure school segregation and consequent total disrepair and decay of an urban school system.\(^ {193}\) The remedy forced the state to finance a high-quality school system—including magnet schools—and ordered ambitious measures to finance reconstruction that survived review in the Supreme Court.\(^ {194}\) Several years later, when the state disputed an order to fund a pay increase for instructional and noninstructional personnel,\(^ {195}\) the Supreme Court agreed to decide whether the order was within the scope of the remedy\(^ {196}\) and then struck down the remedial scheme.\(^ {197}\) The Court asserted that tempting white students to return to the Kansas City schools from other districts was as impermissible as a district court in Detroit assuming control of more than twenty suburban school systems in *Milliken v. Bradley*.\(^ {198}\) Justice O'Connor, concurring in *Jenkins*, suggested that "natural, if unfortunate, demographic forces" may have caused departure to suburbs and racial concentration of the Kansas City school system, or that the damage might have been caused by desegregation.\(^ {199}\) Both the majority and the concur-


\(^{191}\) The *Adarand* decision is power evasive in a different sense as well: it applies the same standard of strict scrutiny to federal and state actions taken to correct racial injustice.


\(^{193}\) See *Jenkins*, 515 U.S. at 74-80.

\(^{194}\) See *Milliken v. Bradley*, 418 U.S. 717, 752-53 (1974). The original *Jenkins* defendants included HUD and suburban school districts for their contributions to school segregation. However, the Eighth Circuit earlier held that under *Milliken* the suburban school districts could not be included in the remedy. See *Jenkins v. Missouri*, 807 F.2d 657, 665 (8th Cir. 1986) (affirming the district court's dismissal of case against school district where there was no proof of discriminatory intent in the establishment or alteration of school district boundaries). The Supreme Court denied certiorari on most of the remedy, but reviewed certain aspects of the district court's financial orders, striking down some and upholding others. See *Missouri v. Jenkins*, 495 U.S. 33 (1990).

\(^{195}\) See *Jenkins*, 515 U.S. at 80.

\(^{196}\) See id. at 84.

\(^{197}\) See id. at 101-02.

\(^{198}\) 418 U.S. 717, 752-53 (1974). This formulation is ironic; both should have been constitutionally permissible, but both were struck down by the Supreme Court.

\(^{199}\) *Jenkins*, 515 U.S. at 111 (O'Connor, J., concurring). The district court had found that segregation caused the harm to the schools—a holding that implicitly recognized the social construction of race and segregation as a source of racism and fear. Justice O'Connor, instead, looked only at white flight and thought that, absent desegregation, flight would not have occurred.
rences in *Jenkins* treated the whiteness of suburbs as natural and unproblematic, even though only Justice O'Connor used the term.

The dissents in *Jenkins*\(^{200}\) complained that the majority had effectively overruled *Hills v. Gautreaux*,\(^{201}\) which had been understood to authorize remedial actions in areas outside the boundaries within which the segregated program had operated. Chief Justice Rehnquist's opinion for the majority stated that *Gautreaux* had not been overruled because the case had never approved interdistrict remedies; rather, he said, *Gautreaux* had held that those remedies were not impermissible as a matter of law, reversed the appellate court's finding that interdistrict remedies were permissible, and remanded for the district court's determinations.\(^{202}\)

*Gautreaux* recognized HUD's participation in an area-wide market;\(^{203}\) proving an interdistrict violation would permit interdistrict remedy. But as Kenneth Casebeer points out, a belief in the market as a natural force tends to "cure" even overtly discriminatory past behavior.\(^{204}\) Market "cures" occur when "natural" forces are believed to cause housing segregation, or when past discriminatory state actions, are not directly related to minority contracting but fall under the rubric of "societal" discrimination beyond the reach of municipal action.\(^{205}\) Nonetheless, under these cases, race-conscious remedy is still possible.\(^{206}\) *Gautreaux* is still good

\(^{200}\) See id. at 174-75 (Souter, J., dissenting).


\(^{202}\) See *Jenkins*, 515 U.S. at 97-98. Peculiarly, Chief Justice Rehnquist also distinguished *Gautreaux* on the ground that it dealt with HUD rather than with a state actor. See id. at 98. Of course, *Adarand*, decided at about the same time, announced as a principle of "congruence" that all state, federal, and municipal actions that classify by race are to be reviewed with strict scrutiny. See *Adarand Constructors, Inc. v. Pena*, 515, U.S. 200, 224 (1995). Under *Adarand*, therefore, the federal government has no more power to take transformative action without being subject to strict scrutiny than do the states.

\(^{203}\) See *Gautreaux*, 425 U.S. at 299.


This is the double bind of our oppression—both the fact of injustice and the systematic denial of responsibility for those realities oppress. . . . [T]he ability to trace state responsibility and complicity disappears into Nobody's Market, freezing the already acquired fruits of past discrimination and making further attempts at attacking past inequality a new cost to someone else. In effect, now all are innocents in the new regime. The Empty State pardons all market participants.

\(^{205}\) See, e.g., *Miller v. Johnson*, 515 U.S. 900 (1995) (holding that the Voting Rights Act must be read in light of the strict scrutiny for all actions that classify by race and threatening to hold unconstitutional any race-conscious action).

\(^{206}\) See *Adarand Constructors Inc. v. Pena*, 515 U.S. 200, 237 (1995) ("[W]e wish to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.'" (citation omitted)).
law, and remedying racial discrimination is a permissible use of race.207

In Walker V, the Fifth Circuit adopted a concept of race and race neutrality that is more explicitly protective of whiteness than even the positions taken in recent years by the Supreme Court. At the same time, the court invented a standard for narrow tailoring that essentially reads race out of remedies for past race discrimination—a position the Supreme Court has repeatedly rejected.

The Walker V opinion therefore defends whiteness when it is endangered but never acknowledges the genesis of whiteness. The Fifth Circuit acknowledged that after the end of de jure segregation the DHA had protected white neighborhoods by avoiding construction of any new projects.208 However, the opinion treated the resulting whiteness in white neighborhoods as a natural phenomenon rather than the product of the same process that produced black concentration. If Dallas and the DHA, assisted by the federal HUD, had not kept black public housing tenants out of white neighborhoods, those neighborhoods could hardly have remained all-white. In the Fifth Circuit's typically white world view, segregation means the creation of blackness, but not the creation of protection of whiteness. Interference with whiteness, but not the maintenance of whiteness, is condemned as "race"-based action. Walker manifests typically white discomfort with the identification of whiteness as a problem. Because the Fifth Circuit treats whiteness as a neutral, dominant norm, the Walker V opinion is able to treat the identification of whiteness—the classification and selection of neighborhoods by the category "white"—as unconstitutional racial discrimination.

B. How Narrow? How Neutral?

Remedying racial discrimination is a compelling interest justifying the use of race209 in actions by the state.210 "[T]he nature of the [constitutional] violation determines the scope of the remedy."211

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207 See supra Part III.B (discussing justifiable use of race-conscious remedies).
208 See Walker v. City of Mesquite, 169 F.3d 973, 976 (5th Cir.), reh'g denied, 181 F.3d 98 (5th Cir. 1999), cert. denied, 120 S. Ct. 969 (2000).
209 The Adarand Court noted:
The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it. As recently as 1987, for example, every Justice of this Court agreed that the Alabama Department of Public Safety’s pervasive, systematic, and obstinate discriminatory conduct justified a narrowly tailored race-based remedy.
Adarand Constructors, 515 U.S. at 237 (internal quotation marks omitted).
210 Not every current Supreme Court Justice agrees: Justice Scalia asserts that race cannot be used even to remedy proven past racial discrimination. See id. at 239.
Race-conscious remedies were upheld in *United States v. Paradise*\(^2\) and in *Hills v. Gautreaux*.\(^2\) In *Gautreaux*, the Court found that when "the wrong committed by HUD confined the respondents to segregated public housing," it was "entirely appropriate . . . to order CHA and HUD to attempt to create housing alternatives for the respondents in the Chicago suburbs."\(^2\) In *Adarand*, Justice O'Connor went to great lengths to establish that race-conscious remedies remain possible: "When race-based action is necessary to further a compelling interest, such action is within constitutional constraints if it satisfies the 'narrow tailoring' test this Court has set out in previous cases."\(^2\)

Could the requirement of narrow tailoring make race-neutral measures mandatory, even when programs to remedy race discrimination were otherwise justified because of compelling state interest? If so, the second prong of the Supreme Court's constitutional test would then obviously swallow the first entirely. Furthermore, if this could be the meaning of "narrowly tailored," then what would "race-neutral" mean? The *Walker* court both misstated the necessity for race-neutral measures and misunderstood the term race-neutral itself. As I will explain below, the program preferred by the Fifth Circuit in *Walker V* is not race-neutral but rather explicitly protective of whiteness.

First, it is worth noting that race-neutral measures have not achieved desegregatory goals. An important lesson can be drawn from the *Mount Laurel* cases in New Jersey.\(^2\) The litigation began as a challenge to racial segregation by poor black and Hispanic plaintiffs; but the New Jersey Supreme Court transformed it into a decision about the rights to affordable housing for all who had difficulty paying for relatively high-priced housing in the suburbs.\(^2\) After years of historic litigation, new affordable housing legislation, and the construction of affordable housing, segregation still remained. Of the units studied in the comprehensive review of implementation,\(^2\) 81 percent of all suburban affordable housing units are occupied by white households, 85 percent of urban units by black or Latino house-

\(^{212}\) 480 U.S. 149 (1987).
\(^{213}\) 492 U.S. 284 (1976).
\(^{214}\) *Gautreaux*, 425 U.S. at 299.
\(^{215}\) *Adarand Constructors*, 515 U.S. at 237 (referring to remedies for "the practice and the lingering effects of racial discrimination").
\(^{217}\) See Roisman, *supra* note 162, at 1387, 1391-92.
\(^{218}\) The units studied were those which used the state agencies for implementation. However, there was no reason to think that more minorities would be housed in the units not in the study. *See id.* at 1391.
Racial separation persisted regardless of class: poor whites of any age were in the suburbs and poor people who were black or Latino were in the cities. 

"[T]wenty years of experience with Mount Laurel has shown that constitutional doctrine, legislations, regulations, and ordinances that do not mention race and ethnicity do not produce racial and ethnic desegregation." As Florence Roisman argues, one of the principal lessons . . . . is that to deal with race, courts, legislatures, and agencies must address race, and not use income or anything else as a proxy for race. Studies of Section 8 housing around the United States published after the district court's remedial order show that, without race-conscious intervention, Section 8 often fails to produce desegregation.

The Fifth Circuit was wrong about the efficacy of non-race-targeted measures. To strike the programs ordered by the district court and impose its own white-protective substitute, the Fifth Circuit had to ignore the district court's findings that the construction of housing for the plaintiff class in white neighborhoods was necessary to achieve desegregation. It also had to distort Supreme Court precedent.

In Croson and Adarand, the Supreme Court did not use the term "narrow tailoring" in the same context as the Fifth Circuit did in Walker V. Those opinions applied the narrow tailoring standard to legislative actions in the absence of a finding of fault. The Court in Adarand and Croson held that the programs were not narrowly tailored to address the justification for the government action. The use of race must be tailored to remedy the identified harm, and race-neutral alternatives must have been considered before race-conscious programs were enacted. Furthermore, in Croson, the extension of relief

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219 Id. at 1388 (quoting Naomi Bailin Wish & Stephen Eisdorfer, Center for Public Service, Seton Hall Univ., The Impact of the Mount Laurel Initiatives: An Analysis of the Characteristics of Applicants and Occupants (1996)).
220 See id. at 1391.
221 Id. at 1394.
222 Id.
223 See sources cited supra note 27.
224 See Walker V, 169 F.3d at 984.
225 See Ian Ayres, Narrow Tailoring, 43 U.C.L.A. L. Rev. 1781, 1791-93 (1996) (arguing that equating the "no-less-restrictive-alternative" approach with race-neutral measures is incorrect even in reviewing legislative decisions lacking evidence of discriminatory intent).
226 Restrictions imposed on Legal Services during the 1990s may badly hurt the remedial effort in housing desegregation cases. See Legal Aid Soc'y v. Legal Servs. Corp., 145 F.3d 1017, 1031 (9th Cir. 1998) (upholding restrictions). Although Legal Services lawyers only participated in some desegregation suits, banning the lawyers who usually know most about housing for poor people will make it more difficult to develop the rich factual predicate necessary to settle a lawsuit with a race-conscious remedy and also to assemble facts to defend the remedy as narrowly tailored.
to people unrelated to the plaintiff class indicated both that the program was not narrowly tailored and that its purpose might not be truly remedial:

If a 30% set-aside was "narrowly tailored" to compensate black contractors for past discrimination, one may legitimately ask why they are forced to share this "remedial relief" with an Aleut citizen who moves to Richmond tomorrow? The gross overinclusiveness of Richmond's racial preference strongly impugns the city's claim of remedial motivation.228

Ian Ayers has recognized the Court's concern with avoiding harm to third parties and their concern with the least restrictive measures, but he criticized the Court's equating those issues with race-neutral measures when reviewing legislative programs like those in Croson and Adarand.229 Ayers argues that race-neutral measures may be harmful because they can be both underinclusive and overinclusive: they are overinclusive because they help many white businessmen who suffered little or no competitive disadvantage under the old regime.230 Ayers points out that the Court also ought to fear underinclusiveness—failure to reach some people of color whose previous exclusion created the need for these programs—if narrow tailoring is the goal.231 Obviously, underinclusiveness would undermine effective remedy. Therefore, confusing the analysis of least restrictive measures with race-neutral measures interferes with effective remedy. Therefore, confusing the analysis of least restrictive measures with race-neutral measures interferes with effective remedy.

The only case to apply the narrow tailoring standard to judicial decrees was United States v. Paradise, a plurality opinion in which a majority of Justices applied the standard to a remedy for proven discrimination.232 In Paradise, a district court imposed a quota mandating one-for-one promotions233 to remedy proven race discrimination against black state troopers in Alabama. The United States appealed

228 J.A. Croson, 488 U.S. at 506 (citations omitted).
229 See Ayres, supra note 225, at 1787 (noting that the Court's main fear in this area has been overinclusiveness).
230 See id. Professor Ayres further noted:
If preferring the minuscule number of Aleuts in Richmond is "grossly overinclusive," then extending preferences to a much larger class of whites a fortiori would fail the narrow tailoring requirement. Whites, even more than Aleuts, are not the victims of race discrimination. Narrowly tailoring the beneficiary class for remedial subsidies so that it will not be overinclusive necessitates explicit racial classifications.
Id.
231 See id. at 1786 n.13.
233 After the failure of the Department of Public Safety to implement two consent decrees to develop a promotion plan that had no adverse impact on black troopers, the court ordered that 50% of promotions to corporal be black troopers and 50% of other
on the grounds that the order violated the rights of white state troopers. Justices Brennan, Marshall, Blackmun, and Powell applied the narrow-tailoring standard and held that it was satisfied by a temporary one-for-one promotion quota, given the history of race discrimination. Justice Stevens disagreed and stated that narrow tailoring should not be required; instead, in judicial remedies that were fashioned to overcome years of resistance the courts had "broad and flexible" equitable powers. Justice O'Connor, joined by Justices Rehnquist, Scalia, and White stated that the order was not narrowly tailored. Justice O'Connor stated that the plan failed to survive strict scrutiny, because it was intended to terrorize the defendant Department into adopting a plan with no adverse impact on blacks rather than being based on any consideration of the proportionate presence of black troopers, and because the court had not considered alternative plans, such as appointing a trustee to design a promotion plan to implement the consent decree or using fines to ensure compliance with the consent decree. The Paradise opinions identified factors that must be reviewed to determine whether a judicial plan to remedy race discrimination is narrowly tailored:

In determining whether an affirmative-action remedy is narrowly drawn to achieve its goal, I have thought that five factors may be relevant: (i) the efficacy of alternative remedies; (ii) the planned duration of the remedy; (iii) the relationship between the percentage of minority workers to be employed and the percentage of minority group members in the relevant population or work force; (iv) the availability of waiver provisions if the hiring plan could not be met; and (v) the effect of the remedy upon innocent third parties. Based on Ayres's critique of the treatment of overinclusiveness in Croson, however, it is possible that the Court's ultimate concern with narrow tailoring is the final Paradise question (impact on rights of third parties) and that the real interest of the Court with regard to that prong lies in how a particular instance of classification affects white people. That understanding would make Justice O'Connor's po-

234 See id. at 177-79. Justice Brennan wrote the opinion for the plurality. See id. at 153. Justice Powell concurred, while suggesting specific factors to apply in the analysis of the narrow tailoring. See id. at 186-89 (Powell, J., concurring).
235 See id. at 190 (Stevens, J., concurring in judgment).
236 See id. at 196-97 (O'Connor, J., dissenting).
237 See id. at 198-200 (O'Connor, J., dissenting).
238 Id. at 187 (Powell, J., concurring) (citation omitted). Justice Brennan's plurality opinion outlined almost identical factors, see id. at 171, and after applying these factors, found that the one-for-one promotion quota in Paradise was "narrowly tailored to serve its general purpose." Id.
sition in *Croson* intellectually consistent—overinclusion of whites would effectuate the narrow tailoring if the well-being of white people were really the point of inquiry. In a recent decision, that was precisely how Judge Richard Posner summed it up: "So the only available justification is the remedial one, and it requires proof . . . that the remedy is narrowly tailored to the violation, which means, as a practical matter, that it discriminates against whites as little as possible consistent with effective remediation." Judge Posner is wrong to reduce the question to impact on whites because all *Paradise* factors must be weighed so that efficacy in remedy is not diminished in importance, and so that whites are not casually equated with innocent parties. However, even his formulation would not help the Fifth Circuit in *Walker V*, however, since Judge Posner emphasized "effective remediation" and upheld race-based promotions—a measure far more intrusive for affected white employees than the location of well-designed public housing near the white Dallas homeowners. Furthermore, Judge Posner did not argue that "race neutral" measures must be used instead of race-conscious ones when the use of race was justified as a remedy. Finally, the Fifth Circuit was wrong to equate white homeowners, who had no identified individual roles creating segregation, with white neighborhoods whose whiteness had been protected through segregation, as if both residents and neighborhoods could be innocent third parties.

The district court in *Walker* faced a history of resistance to remedy that was comparable in time to that at issue in *Paradise*, but involving even more intransigent refusal to implement previous remedial agreements. The court had adopted alternative plans with which the defendants had not complied, and it could examine the past practice of race-neutral measures for their effectiveness. It considered and rejected alternatives including reliance on Section 8 certificates alone to accomplish desegregation. Therefore, the narrow-tailoring standards both in the *Paradise* dissents and plurality opinions had been satisfied.

The Fifth Circuit claimed that it was applying the *Paradise* factors but nonetheless held that the district court must attempt to use "race

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239 McNamara v. City of Chicago, 138 F.3d 1219, 1222 (7th Cir. 1998) cert. denied (November 1998) (upholding race-based promotions in the Chicago fire department as part of a plan to remedy proven race discrimination).

240 The segregated West Dallas project was built in 1955, *Walker V*, 169 F.3d at 977, 44 years before the *Walker V* decision. The first remedial consent decree was issued in 1987, *id.*; the remedial order under review in *Walker V* was issued in 1997, 10 years later, *id.* at 978. In Paradise, resistance to remedy had continued for 11 years prior to the district court's order, 480 U.S. at 153.

241 See *Walker V*, 169 F.3d at 983.
neutral" measures to remedy race discrimination. Confusion about race-neutrality pervades the entire Walker V opinion. Bizarrely, the Walker court calls "race neutral" a plan to give certificates to African Americans who were victims of discrimination, even when it approves sending these tenants to "nonblack" neighborhoods, but it calls "race-conscious" a plan to put two small apartment complexes into white neighborhoods. By the end of Walker V, only interference with whiteness is treated "race-conscious" remedial action. Mixing blacks with nonpoor areas is "race-neutral." Putting black tenants into "non-black" neighborhoods is considered race-neutral! But putting them into white neighborhoods is considered "race-conscious" and therefore not narrowly tailored. In Walker, interference with whiteness is "race-consciousness" but classifying by the categories "black" or "nonblack" is not! Ultimately, Walker V constitutionalizes a right in whites to protect whiteness itself against remedies for the proven race discrimination that helped create whiteness.

In Adarand, O'Connor stated that strict scrutiny, which would now be applied to all race-conscious state actions, need not inevitably be fatal. The parallel to Adarand's concept of race neutrality would be a program enacted without a finding of past discrimination that would assist public housing residents without regard to their race or move all residents of any race into neighborhoods chosen without considering race. The district court had found after extensive examination that race-targeted remedies were needed to achieve the government's compelling interest in redressing proven race discrimination.

The Walker V court's concept of "race-neutrality" is actually the opposite of the approach taken by the Supreme Court in Croson and Adarand. Those decisions concerned the award of assistance to beneficiaries chosen on the basis of race in the absence of findings of discrimination and struck down the grant of particular benefits to minorities on the basis of race. In Walker, the plaintiff class was black and, under the remedial scheme that the Walker court seems to approve, benefits would flow to black tenants and applicants. Therefore, the remedy is clearly race-conscious under Croson and Adarand.

In Walker V, narrow tailoring was interpreted to mean that even when a remedy must be race-conscious because a race-based plaintiff class has

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242 See id. at 988.
243 See id. at 982.
244 See Ely, supra note 60, at 585 n.33 (comparing "[b]lack/non-black" with "white/non-white" as racial classifications).
246 See Walker V, 169 F.3d at 978.
shown systematic harm on the basis of race, every aspect of the remedy—recipient of benefits, manner of relief, and so on—must attempt to be race-neutral. In this interpretation, the underlying meaning of "narrowly tailored to address a compelling government interest" is written out of the law. Whites, who have most to gain from retaining the status quo, will benefit most if race is removed from every remedial provision. In cases like Croson and Adarand, at least some whites will receive benefits if the award of business contracts is based on small size or disadvantage rather than minority race. In cases like Walker, fewer whites will be impacted by a remedial plan that was purportedly designed to remedy the process of exclusion from white areas. Therefore, all Walker V achieves is the protection of whites from interference with the whiteness of their environment—at least when that interference is made on the basis of race!

Ultimately, Walker V states a position that reflects uniquely white logic. Remedies that classify by race are justified if they serve a compelling governmental interest, such as remedying proven racial discrimination. But to meet the narrow-tailoring standard, they must attempt to avoid using race as a classification in any possible aspect of remedy. Therefore, under the logic of Walker V, the only acceptable way to use race is not to use race! This position only makes sense as a manifestation of white discomfort with the concept of race and white insistence on perceiving whiteness as natural.

C. Under-Ruling Civil Rights

White plaintiffs challenging civil rights gains reached a watershed in 1989, when the Supreme Court decided Martin v. Wilks and City of Richmond v. J.A. Croson Co. After 1987, the year of the Paradise decision, I found fourteen cases in which white plaintiffs brought such challenges to the Supreme Court. Whites won outright in nine: Martin v. Wilks, City of Richmond v. J.A. Croson Co., Adarand Constructors, Inc. v. Slater ("Adarand II"), Adarand Constructors, Inc. v.
*Pena* ("Adarand I"),
*Bush v. Vera*,
*Shaw v. Hunt* ("Shaw II"),
*Miller v. Johnson*,
*Shaw v. Reno* ("Shaw I"),
and *Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville* ("Jacksonville Contractors"). The only white plaintiff to fail substantively in a challenge to gains for minorities in the Supreme Court—the plaintiff in *Metro Broadcasting v. FCC, Inc.*—was vindicated retrospectively when that case was overruled in *Adarand Constructors, Inc. v. Pena*.

In four cases, whites did not win outright in the Supreme Court; but in three of these, whites did not really lose, either. In *Hunt v. Cromartie*, summary judgment had been granted below in favor of white plaintiffs challenging the congressional district in North Carolina that had been redrawn after the *Shaw* cases. The Supreme Court held that triable issues existed as to whether the legislature's motive was impermissibly racial; racial motive would not be presumed from the shape of the district when motive was disputed. The Supreme Court reversed the summary judgment, but the Court expressed no opinion on whether the white plaintiffs would ultimately prevail at trial. In *Lawyer v. DOJ*, white plaintiffs had challenged redistricting in court and succeeded in obtaining a settlement, but one plaintiff was dissatisfied with the relief they had won. The Supreme Court held that the district court had not been erroneous in approving the

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254 515 U.S. 200 (1995) (applying strict scrutiny to federal government affirmative action program that considered race as a presumptive factor showing disadvantage).

255 517 U.S. 952 (1996) (involving a situation in which not all plaintiffs were white, but the challenged districts benefitted African Americans).


263 See id. at 548-49.

264 See id. at 554.


266 See id. at 569. The *Lawyer* opinion does not refer to Lawyer's race. Lawyer was "a white ... lawyer." Editorial, *Confusion Reigns*, St. Petersburg Times, July 2, 1997, at 1A; see also Larry Dougherty, *Court Upholds Hargrett's District*, St. Petersburg Times, June 26, 1997, at 1B (describing Martin Lawyer as a "self-described 'aging liberal' and legal aid lawyer who nevertheless thought that Florida's effort to elect minority legislators had gone too far").

Intervention was permitted by several parties including both houses of the Florida legislature and black and Hispanic residents of the challenged district. All parties reached a settlement and the districts were redrawn. Only Lawyer tried to appeal the result. See *Lawyer*, 521 U.S. at 572.
settlement to Lawyer’s lawsuit. In United States v. Hays, the district court struck down the mostly minority districts on Hays’s challenge; the court struck them down again with a different group of plaintiffs, including Hays, after the Supreme Court held that Hays and the original plaintiffs lacked standing because they did not live in the mostly minority district—the real subject of the challenge.

Arguably, the only real loser during this whole period was Francois Daniel Lesage, “an African immigrant of Caucasian descent” who sued the University of Texas after being denied admission to a graduate program in an admissions process which he alleged considered race. Because the admissions criteria placed Lesage lower than many other applicants and his recommendations were weak, he had been rejected relatively early when the pool was narrowed to forty applicants for twenty spaces. The Supreme Court held in a per curiam decision that the government could defeat liability by demonstrating that it would have made the same decision absent the consideration of race, even though the injury was “the inability to compete on an equal footing.” However, even Lesage’s loss is somewhat qualified. The University of Texas had apparently stopped using a race-based admissions policy after Hopwood v. Texas, Lesage’s case was remanded because the possibility of injunctive relief had not been considered separately from his claim for damages below and because he had raised other claims. Apparently, if Texas had not discontinued race-conscious admissions Lesage’s claim for injunctive relief might have continued.

Of course, the triumphant procession of white plaintiffs in the Supreme Court cannot establish the total protection of whites—a complete assessment would require examining all cases in which review was denied as well as those taken by the Court for consideration. But Walker V was a case that needed reversal: its reasoning is

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267 See Lawyer, 521 U.S. at 578.
268 515 U.S. 737 (1995). Like Lawyer, the Hays opinion is so coy about race that the plaintiff’s race is never mentioned—he was white. See J. Morgan Kousser, Colorblind Injustice: Minority Voting Rights and the Undoing of the Second Reconstruction 407-09 (1999).
271 See id. (reversing per curiam appellate court’s reversal of summary judgment for defendant University of Texas).
273 See Lesage, 120 S. Ct. at 468.
274 Id.
275 78 F.3d 932 (5th Cir.), cert. denied, 518 U.S. 1033 (1996).
276 See Lesage, 120 S. Ct. at 469.
277 This Article does not attempt a comprehensive review of all cases in which the Supreme Court denied certiorari. See supra note 3.
different than that of any other case on housing remedies; its citations to other cases reveal profound confusion over the meaning of race-consciousness and race-neutrality; and its mistaken view of narrow tailoring threatens to effectively eliminate the use of race in plans to remedy race discrimination. No matter why the Supreme Court chose to deny review, allowing the *Walker V* decision to stand was both wrong and dangerous.

In addition to the mistakes about the application of the narrow-tailoring requirement, the *Walker V* opinion by Judge Edith Jones manifested great confusion about the meaning of race-consciousness when citing other cases. The *Walker V* opinion cites the *Birmingham* case as demonstrating progress achieved “without the use of a race-conscious remedy.” The *Birmingham* case, however, explains that, after an affirmative action ordinance was vetoed by the Mayor, "a subsequent measure was enacted which placed responsibility on various department heads to set and achieve minority employment goals.” A plan that has department heads “set and achieve minority employment goals” is clearly race-conscious. The distinction being drawn by the *Birmingham* court was that there was no quota involved, not that the plan was not race-conscious. Again, Judge Jones misunderstood race consciousnes in her reference to the *Yonkers* litigation, which she described as “using a geographical site selection criterion for public housing.” The cited page does refer to the re-

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279 The Department of Justice had supported the plaintiffs at the motion for rehearing but opposed the petition for certiorari, arguing, inter alia, that although the *Walker* decision was wrong, it did not entirely rule out all possibility of race-based remedies if the district court examined further alternatives on remand. Brief for Respondent at 19, *Walker V* (No. 99-296).

280 *See In re Birmingham Reverse Discrimination Employment Litig.*, 20 F.3d 1525 (11th Cir. 1994).

281 *Walker v. City of Mesquite*, 169 F.3d 973, 984 n.27 (5th Cir. 1999). The opinion has no pin cite for the proposition that this progress was “without . . . a race-conscious remedy.” *Id.*

282 *See 20 F.3d at 1546.*

283 *Id.*

284 *Id.*

285 The court noted that “the City had implemented effective alternatives to race-based quotas to remedy its prior discriminatory behavior.” *Id.*

286 *Walker V*, 169 F.3d at 985 (citing United States v. Yonkers Bd. of Educ., 837 F.2d 1181, 1184, 1236-37 (2d Cir. 1987)).
quirement that public housing be placed outside Southwest Yonkers; but previously the same opinion had described the remedial locations for public housing as being in "nonminority" areas, which clearly refers to areas that were neither black nor Hispanic but white.

The Walker V opinion suggests that when a defendant begins cooperating with remedy after years of resistance this will render race-conscious relief unnecessary. Under the Walker theory, any governmental entity could discriminate at will for many years and still could, at the very last moment, switch to compliance with antidiscrimination laws and remedial orders and thereby avoid having its previous discrimination undone through race-targeted relief. This is inconsistent with Paradise and would make remedial orders virtually impossible, since they could be obviated by the last-minute position shifts by defendants.

Finally, the Fifth Circuit manifested a paradigmatically white view of housing choices in Walker V, stating that with Section 8 certificates "market forces and personal preferences" can guide "the homemaking decision." The court treated as inconsequential the district court's finding that some tenants prefer not to have Section 8 certificates, as a justification for making available some unit-based aid! Of course, in this view, "market forces and personal preferences" lead to freedom rather than confinement. This is a white view because it discounts the experience of people of color, which is often to the contrary. Furthermore, the court treated the expressed personal preferences without weight. Meaningful personal preferences are those achieved without public housing—the way many white people would prefer the choices to be made—rather than preferences some members of the plaintiff class expressed to the district court. Taken together, Walker creates dangerous doctrine, inconsistent with the Supreme Court's holdings on race-conscious remedies. The explicit and implicit protection of whites and whiteness in Walker merited review and reversal, and its confusion about race consciousness and narrow tailoring should not be adopted by other courts.

CONCLUSION

Are white neighborhoods segregated? Plainly, the Walker V court thought not. The court apparently believed that segregation meant

288 See id. at 1226 (discussing necessity of grouping blacks and Hispanics together as minorities in Yonkers).
289 See Walker V, 169 F.3d at 985 (describing the city of Dallas as a cooperating defendant and contrasting with the defendant's resistance in Paradise.)
290 Id. at 988.
291 Id.
blackness, and that "race-consciousness" meant bringing blackness into whiteness. These perspectives are uniquely white ways of looking at race and segregation. It is not surprising that their application to the facts in *Walker* had the result of protecting white privilege. These perspectives are not inevitable, however. The narrow-tailoring doctrine cannot be permitted to constitutionalize white concepts of race-neutrality in a way that shields whiteness from transformation.

The *Walker* V court missed the real issue: Too much whiteness is a social problem. The linkage between blackness, poverty, and concentration is part of the same process that linked whiteness, privilege, and exclusion. Mandatory desegregation of white neighborhoods is the solution. The real point of remedy should be transforming the social construction of race as well as the geography of metropolitan areas. Housing segregation affects popular concepts of employment and employability, of education and community, and of the nature and needs of female-headed households. We need creative scope in housing remedies and attention to the multiple harms segregation has wrought. Rather than viewing concepts of whiteness as natural, remedies for public housing segregation should reveal and end the mechanisms that have created and reproduced racial exclusion and subordination.