I. Executive Summary

As a signatory to the Convention on the Elimination of Racial Discrimination (CERD), [1] the United States is under an obligation to condemn racial discrimination and pursue a policy of eliminating racial discrimination, in all its forms (art. 2, ¶1). The U.S. has not taken seriously the duty under Article 2 of CERD to affirmatively address racial discrimination. Instead, the U.S. has rationalized racial discriminatory effects as not covered by U.S. law. Sometimes these effects are caused by explicit government polices. At other times they are caused by private actors. Frequently, it is a combination of both.

The Convention defines racial discrimination (art. 1, ¶1) to mean distinctions, exclusions, restrictions or preferences based on race which have "the purpose *or effect*" of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in any field of public life. CERD's definition of discrimination is unequivocal: *effects* and racially disparate outcomes caused by individual action or government practices or policies, singularly or collectively, are of primary concern.

Contrary to CERD, U.S. law defines racial discrimination more narrowly in at least two critical respects. First, with few exceptions U.S. law narrowly defines cognizable racial discrimination by requiring evidence of *intent* to discriminate. Section II demonstrates that such a requirement is contrary to the framework of CERD and does not reflect the real-world operation of discriminatory behavior in contemporary American society. As recognized by CERD, discrimination can be the product of facially race neutral polices and practices as well as unintentional action and inaction of individuals. This observation is not controversial and yet fails to be robustly recognized in U.S. law.

Second, U.S. law fails to recognize that racial discrimination in American society often arises from the interactions, both public and private, over time and across domains. Section III details how racial discrimination manifests itself in these ways and argues that to correct for unjustifiable and cumulative racial impacts, U.S. courts and policy makers must adopt an inter-institutional perspective. Although Article 1 and General Recommendation XIV of CERD are concerned with racially disparate effects of policies and practices involving this intersectionality, U.S. courts have been increasingly reluctant to redress discrimination in one domain that is caused by interactions in other domains. The definition of discrimination under CERD also extends to private as well as public action. Although the U.S. has reserved to the Convention with respect to the regulation of private conduct beyond what is required under domestic law, the United States is responsible for addressing unjustifiable racial impacts that result from the interaction of public and private actions.

Section IV of the report outlines the duty of all U.S. Government authorities to act in conformity with and to take *affirmative measures* to meet the requirements under CERD

[1] International Convention on the Elimination of All Forms of Racial Discrimination opened for signature Mar. 7, 1966, art. 1(1), 660 U.N.T.S. 195, 216 (entered into force Jan. 4, 1969; adopted by the United States November 20, 1994) [hereinafter CERD].

(art.2). Although the U.S. complies with laws that satisfy many of CERD's mandates, it is increasingly backing away from affirmative measures to remedy racialized outcomes two ways.

First, compliance with Article 2 requires the United States to pursue by all appropriate means and without delay a policy of eliminating racial discrimination. Decision-making authority, however, is highly fragmented in the United States, which has important implications for racial equity. Institutional actors are often unable to disrupt racialized outcomes that stem from policies across domains. Well-intentioned institutional actors in one domain, such as education, can work at cross-purposes with actors in another domain, such as criminal justice, exacerbating conditions for communities of color. Furthermore, without formal coordination, various government authorities are less effective in preventing and responding to racialized disasters such as Hurricanes Katrina and Rita. Therefore, Article 2 requires that the United States enhance coordination among federal branches of government and state and local governing bodies.

Second, although the Committee emphasized that the adoption of special measures in cases of persistent disparities are an obligation of the state,[2] the U.S. has attempted to rationalize policy-based discrimination as resulting from conditions beyond its control, either private decision making or courts interpreting U.S. laws.[3] For example, the U.S. federal government most recently argued for, and the Supreme Court ruled in favor of, the elimination of race-conscious student assignment policies in elementary and secondary education, despite a finding that the government had a compelling interest in addressing racial isolation.[4] The Court not only failed to remedy the harmful effects of racial discrimination, it severely limited the capacity of other governmental entities to voluntarily address them. By adopting this "color-blind" approach, both the executive and judicial branches of government exacerbate the effects of discriminatory practices and policies, thwarting integration efforts of local governing bodies in violation of Article 2.

Subsequent sections of this report draw attention to the many discrete areas in which the U.S. is failing to uphold its obligations under the Treaty. This section emphasizes the need to bring U.S. law in alignment with framework envisioned in CERD in order to effectively address racial discrimination and promote and sustain genuine multi-racial, multi-ethnic integration.

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[2] Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States of America, A/56/18, ¶ 399, 14/08/2001.

[3] Under U.S law, courts not only apply law, but also play a role in interpreting law both as a matter of the judicial function and as a matter of judicial review. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). Judicial review is the power of a court to review laws for their Constitutionality. Although Congress may reverse or overturn judicial interpretation of a statute, the U.S. Supreme Court has the final authority to interpret the Constitution itself. *See* The Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991) for an instance in which the Congress modified some of the basic procedural and substantive rights provided by federal law in employment discrimination cases in response to a series of Supreme Court decisions that limited the rights of employees who had sued their employers for discrimination.

[4] Parents Involved in Community Schools v. Seattle School Dist. No. 1, 127 S. Ct. 2738 (2007).

II. The "intent doctrine" in U.S. anti-discrimination law is inconsistent with the CERD framework.

The U.S. legal standard requiring that victims of discrimination prove "intent" to discriminate as a condition to getting a remedy is a major barrier to addressing racial inequality in general and meeting CERD obligations in particular. Such a requirement is contrary to the framework of CERD and does not reflect the real-world operation of discriminatory behavior in contemporary American society. As recognized by CERD, discrimination can be the product of facially race neutral polices and practices as well as an unintended consequence of individual action.

Racial discrimination is often the unintentional, but predictable consequence of public or private action.

The Convention defines racial discrimination (Art. 1, ¶1) to mean distinctions, exclusions, restrictions or preferences based on race which have "the purpose *or effect*" of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in any field of public life. Although the CERD definition recognizes purposeful discrimination, racially disparate outcomes and effects are of equal concern.[5] Contrary to CERD, plaintiffs alleging racial discrimination in U.S. courts must prove that the defendant was motivated by racial animus, and that this discriminatory intent was the cause of plaintiff's harm.

It is not that the text of pertinent Constitutional or statutory provisions preclude a reading that accounts for unjustifiable racial impacts.[6] Instead, U.S. courts have increasingly interpreted these provisions narrowly, especially with respect to racial discrimination. In 1976, the U.S Supreme Court, reviewing an Equal Protection Clause claim, limited the scope of the Fourteenth Amendment's protection against discrimination by announcing the "intent doctrine."[7] Under this doctrine, a plaintiff who alleges discrimination in violation of the Equal Protection Clause must prove that the discriminating actor or agency "selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable racial group."[8] This requirement of intent to discriminate in spite of predictable, adverse effects upon an identifiable group is inconsistent with the paradigm envisioned in CERD and effectively bars most discrimination plaintiffs from pursuing Equal Protection claims.

The Government's report alleges that "statistical proof of racial disparity, particularly when combined with other circumstantial evidence, is probative of the discriminatory

[5] As defined in Article 1 and General Recommendation XIV, racial discrimination includes distinctions and exclusions that have an "unjustifiable disparate impact" upon the rights of freedoms of particular racial or ethnic groups.
[6] *See* the Equal Protection Clause, U.S. Constitution XIV, §1: "No state… shall deny to person within its jurisdiction the equal protection of the laws."
[7] Washington v. Davis, 426 U.S. 229 (1976).
[8] Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256, 279 (1979)

intent necessary to make out a[n equal protection] claim."[9] Thus, the report seems to suggest that the intent doctrine is not a substantial bar to bringing discrimination claims.

However, relevant case law suggests that under the Equal Protection Clause, an unjustifiable disparate impact is clearly insufficient to establish racial discrimination. If a discriminatory zoning decision, for example, is made at a city council meeting where residents made explicitly racist comments, the decision is still presumed to be non-racist, unless plaintiffs could prove discriminatory intent on the part of the council members.[10] The sole intent of the city council may well have been to stabilize property values, and as such, with the intent of excluding poor residents from the community, they deliberately choose not to rezone the property. Even if the council likely associated poverty with blacks, such a predictable adverse outcome on a racial group is insufficient under U.S. law to establish a claim of racial discrimination.

One of the most significant and tragic applications of this doctrine is highlighted by a landmark study filed with the United States Supreme Court in *McCleskey v. Kemp.*[11] The study showed that prosecutors seek the death penalty in 70 percent of cases involving Black defendants and White victims, yet only in 19 percent of cases involving White defendants and Black victims. Further, White victim cases are 11 times more likely to result in death sentences than Black victim cases. Despite this evidence, the Supreme Court held that the state's capital sentencing process was not administered in a racially discriminatory manner in violation of the Equal Protection Clause because a mere correlation between the racial characteristics and the application of the death penalty did not prove that the application of the death penalty to the McCleskey was motivated by racial prejudice.

The intent doctrine makes incorrect assumptions about how people behave and make decisions.

This constricted "intent doctrine" permeates U.S. antidiscrimination law, ignores much of what we know about the dynamics of discrimination, and deprives many of redress for discrimination. The extraordinarily high burden almost requires a civil rights plaintiff to find a "smoking gun" statement expressing outward racial animus. Aside from the obvious problems inherent in requiring a private plaintiff to offer proof of a government actor or agency's unspoken motivations, the futility of the intent doctrine stems from a fundamental misconception about how discrimination operates. Although social psychologists of the mid-twentieth century believed discrimination resulted from the discriminator's conscious motivation ("intent"), modern social science has greatly expanded our understanding of discrimination and how it infiltrates interpersonal, intergroup, and structural relationships.[12]

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[9] U.S. 2007 CERD Report, ¶ 319

[10] *See* Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 (1977).

[11] 481 U.S. 279 (1987).

[12] Eric K. Yamamoto, et al., Redefining Discrimination: Using Social Cognition Theory to Challenge the Faulty Assumptions of the "Intent Doctrine" in Anti-Discrimination Law (2004) (unpublished manuscript, on file with the Equal Justice Society). *See* also Charles R. Lawrence, III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 323 (1987).

In recent years, social science research has shown that we all have subconscious or implicit biases—beliefs, attitudes, and expectations that are based on stereotypes about the race, gender, age, or other group to which an individual belongs. Though most of us are completely unaware of their influence on our subconscious, these biases affect how we perceive, interpret, and understand others' actions.[13] Because these attitudes—unrecognized on the conscious level but powerful at the subconscious level—influence choices and decisions, individual and institutional discrimination can occur even in the absence of blatant prejudice, ill will, or animus.

To demonstrate and analyze this process, psychologists developed the "implicit association test," which measures unconscious attitudes toward various groups of people by tracking the response time required to match up pleasant and unpleasant words such as "love," "kindness," "trust" and "fear," "hatred," "dishonor," respectively, with images of individuals who belong to "in-groups" and "out-groups"—Caucasians juxtaposed against African Americans or males juxtaposed against females, for example.[14] More than two-thirds of test takers register bias toward stigmatized groups.[15]

Most recently, a 2005 study compared the relationship between employers' explicit or conscious attitudes toward hiring members of a certain group and the employers' actual hiring practices.[16] The employers said they were equally likely to hire ex-offenders and non-offenders and equally likely that they would hire white and Black ex-offenders. However, in practice, the employers were unlikely to hire white ex-offenders, and even less likely to hire Black ex-offenders. Though it is possible that the subjects of the study intentionally inflated their "non-discriminatory" scores on the surveys, it is more likely that the subjects neither wanted nor intended to discriminate and yet, when faced with a real-world decision, *acted* in a discriminatory manner.

These are just samples from a voluminous body of literature in which researchers grapple with the implications of unconscious bias and its meaning for discrimination law.[17] Taken together, the studies show that the intent doctrine's requirement that a plaintiff prove the discriminating actor or agency's motivations creates an insurmountable barrier. It turns out that biased decision-making may result not from discriminatory motivation,

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[13] Because of these implicit biases, identical actions or opinions of two people of different social groups often are interpreted differently, depending upon the group to which each belongs. *See also* Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1161 (1995).

[14] James L. Outtz, Implicit (Unconscious) Bias, (February, 2006) (unpublished manuscript, on file with the Equal Justice Society). The test is available at https://implicit.harvard.edu/implicit.

[15] Anthony Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations* 94 CAL. L. REV. 945 (2006).

[16] Devah Pager & Lincoln Quillan, *Walking the Talk? What Employers Say Versus What They Do*, 70 AM. SOC. REV. 355 (2005).

[17] *See also* John F. Dovidio, Kerry Kawakami & Samuel L. Gaertner, *Implicit and Explicit Prejudice and Interracial Interaction*, 82 J. PERSONALITY & SOC. PSYCHOL. 62 (2002) (discussing how implicit and explicit racial attitudes and assumptions predict behavior); Nilanjana Dasgupta, *Implicit Ingroup Favoritism, Outgroup Favoritism, and Their Behavioral Manifestations*, 17 SOC. JUST. RES.143 (2004) (compilation of research demonstrating biased behavior in employment situations).

as current legal models presume, but from a variety of unintentional categorization-related judgment errors that characterize normal human cognitive functioning.[18]

Courts have most sharply drawn the intent requirement in the area of race. Unlike race discrimination, courts have recognized the unconscious application of stereotypes in the age discrimination context. "Age discrimination is not the same as the insidious discrimination based on race or creed prejudices and bigotry. Those discriminations result in nonemployment because of feelings about a person entirely unrelated to his ability to do a job. This is hardly a problem for the older jobseeker. Discrimination arises for him because of assumptions that are made about the effects of age on performance."[19] Courts have interpreted language in the Age Discrimination in Employment Act[20] identical to language in Title VII's section 703(a) [21] as requiring only that age have "made a difference" or "played a part" in a decision-making process.[22] In contrast, under the "disparate treatment" standard for Title VII cases, a plaintiff must prove that the discriminator was motivated at least in part by an intent to discriminate.[23] As discussed earlier, the bar for equal protection cases is even higher. If, as research shows, even the discriminating actor is not consciously aware of the underlying motivations, how can a third party possibly prove the actor's intent? As long as the intent doctrine remains a central tenet of Equal Protection jurisprudence, all but the most overt discrimination will be left largely unchallenged.

III. Racial discrimination in American society often arises from interactions, both public and private, across domains and must be corrected under CERD.

The United States is responsible for failing to address unjustifiable racial impacts that result from the influence of public conduct on private decision-making.

The definition of discrimination under CERD extends to private as well as public distinctions and exclusions that have the purpose or effect of nullifying or impairing the enjoyment of human rights or fundamental freedoms (art. 1, ¶1) The States Party has a

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[18] Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 Stan. L. Rev. 1161 (1995).

[19] Syvock v. Milwaukee Boiler Mfg. Co., 665 F.2d 149, 155 (7th Cir. 1981) (quoting 113 Cong. Rec. 34,742 (1967) (remarks of Rep. Burke)).

[20] The Age Discrimination in Employment Act, 29 U.S.C. s 623(a) (1988), provides in pertinent part:

(a) It shall be unlawful for an employer --

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age.

[21] Section 703, Title VII of the Civil Rights Act of 1964: "(a) It shall be an unlawful employment practice for an employer -

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."

[22] *See* Grant v. Hazelett Strip-Casting Corp., 880 F.2d 1564, 1568 (2d Cir. 1989) (holding that an inference of discrimination can be drawn absent direct evidence of discriminatory intent).

[23] International Brotherhood. of Teamsters v. United States, 431 U.S. 324, 335, n.15 (1977) ("'Disparate treatment' such as is alleged in the present case is the most easily understood type of discrimination.").

duty to prohibit and eliminate all forms of discrimination (art. 2, ¶1). Although the U.S. has reserved to the Convention with respect to the regulation of private conduct beyond that which is required under domestic U.S. law, that is not a license to ignore the role of local, state, and federal government complicity in contributing to racial discrimination. Article 2, ¶1(c) extends the CERD prohibition to laws or regulations that perpetuate racial discrimination. Increasingly, policies, institutions, and private decision-making are interactive. The decisions of private individuals are often responsive to institutional arrangements and public policies in ways that perpetuate discrimination. To fulfill its obligations under CERD, the U.S. cannot hide behind the claim of private action where government has been or remains implicated.

The development of the segregated housing market provides an example of the influence of public actions on private decision-making. Residential racial segregation in the U.S. was systematically promoted by federal programs such as the Home Owners Loan Corporation and the Federal Housing Authority (FHA), which insured private sector loans. From 1938 through the end of the 1950s, the FHA insured mortgages on nearly one-third of all new housing produced annually in the United States.[24] But the FHA's *Underwriting Manuals* considered blacks' 'adverse influences' on property values and instructed personnel not to insure mortgages on homes unless they were in 'racially homogenous' white neighborhoods. Under its eligibility ranking system, the FHA actually refused to lend money to or underwrite loans for whites if they moved to areas where people of color lived.

As private lenders adopted policies conforming to these guidelines, this system became part of the "free" market. Although the FHA removed explicitly racist language from its manuals in the 1950s, private appraisal associations, real estate agents and firms, and banks continued to use such language through the 1970s.[25] These practices, along with local control and overt discrimination, made it difficult, if not impossible for blacks to own homes. The FHA also encouraged private residents to maintain restrictive covenants banning African Americans from certain neighborhoods. Some scholars have estimated that racially restrictive covenants were in place in more than half of all new subdivisions built in the United States until 1948, when the United States Supreme Court declared them unenforceable.[26]

In their place, local governments began and continue to employ suburban housing and land use policies to promote larger lot development, sustain property values, depress the growth of suburban rental housing, and limit the influx of African American and Latino households.[27] Despite acknowledging that such zoning decisions predictably "bear more heavily on racial minorities," the U.S. Supreme Court has not found them in violation of the Equal Protection Clause.[28] The FHA continues to provide building and

[24] Kevin Fox Gotham, *Urban Space, Restrictive Covenants and the Origins of Racial Residential Segregation in a US City, 1900-50*, 24 INT'L J. OF URB. AND REGIONAL RES. 616, 625 (2000).
[25] *Id.* at 626.
[26] *Id.* at 616, *Shelley v. Kraemer*, 334 U.S. 1 (1948).
[27] Rolf Pendall, *Local Land Use Regulations and the Chain of Exclusion*, 66 J. AM. PLANNING ASS'N 125 (Spring 2000).
[28] Arlington Heights, 429 U.S. at 269-70.

homeownership subsidies that draw whites out of central cities and channel capital into suburban housing construction.[29] The Court on a number of occasions has even used the segregated housing market to justify segregation in other areas.[30]

This combination of public and private racial discrimination has produced entrenched patterns of residential segregation and resources disparities that exist today. Even after recognizing its discriminatory role, the federal government has done virtually nothing to disestablish what has been described as a hyper-segregated housing market.[31] Indeed, the federal and state governments continue to promote segregation by concentrating low income housing in segregated areas through the Low Income Housing Tax Credit program (LIHTC), which has produced over one million units. As of 2000, three-quarters of the nation's traditional assisted housing units, and 58 percent of its Low Income Housing Tax Credit units, were located in central cities, which were home to only 37 percent of the nation's metropolitan population.[32] This program has not been successfully challenged in court because the federal government has not explicitly pursued it.[33]

Housing practices have not only segregated people of color from opportunity, they have also produced a highly racialized pattern in wealth accumulation.[34] Achieving home ownership through the thirty-year mortgage became the primary mechanism by which most families created wealth.[35] Renters accumulate no equity, while homeowners almost always secure financial gains that exceed inflation. For blacks, these missed opportunities at home ownership compounded over time. In 2000, in spite of significant past efforts to reduce housing discrimination and important recent efforts to address mortgage discrimination and boost homeownership rates for people of color, non-Hispanic white households enjoyed a median net worth of $79,400, *eight times* the net worth of Hispanic households and *ten times* the net worth of African American households.[36] Even at similar levels of income, significant gaps remain.[37]

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[29] Gotham, *supra* note 24, at 617.
[30] *See* Milliken v. Bradley, 418 U.S. 717 (1974).
[31] *See* DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS (1993); KENNETH T. JACKSON, CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES (1985).
[32] LANCE FREEMAN, BROOKINGS INSTITUTE, SITING AFFORDABLE HOUSING: LOCATION AND NEIGHBORHOOD TRENDS OF LOW INCOME HOUSING TAX CREDIT DEVELOPMENTS IN THE 1990'S (2004), http://www.brookings.edu/urban/publications/20040405_Freeman.htm
[33] Thompson v. HUD, 220 F.3d 241, (4th Cir. 2000).
[34] MELVIN L. OLIVER & THOMAS M. OLIVER, BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY (1995).
[35] Home equity constitutes the bulk of household assets for all racial and ethnic groups. SHAWNA ORZECHOWSKI AND PETER SEPIELLA, U.S. CENSUS BUREAU, NET WORTH AND ASSET OWNERSHIP OF HOUSEHOLDS: 1998 AND 2000, CURRENT POPULATION REPORTS P70-88, (MAY 2003), http://www.census.gov/prod/2003pubs/p70-88.pdf.
[36] *Id.*
[37] THOMAS M. SHAPIRO, THE HIDDEN COST OF BEING AFRICAN AMERICAN: HOW WEALTH PERPETUATES INEQUALITY 47-56 (2004).

Racial and economic segregation remains severe in most metropolitan regions in the U.S. and is exacerbated by fragmented local government policies.[38] Unlike many countries that fund essential public services either by aggregating property taxes at the state or federal level, the U.S. funds on a very local fragmented level, building on the segregation that is already in place. Public infrastructure and basic services like transportation, education, public safety, and recreation are either funded or controlled largely at the local level. For example, schools in the U.S. are organized into local school districts that are required to fund a substantial portion of the cost of education through local property tax revenues. Because local district boundaries mirror municipal boundaries, the economic and racial segregation resulting from exclusionary land usage creates vast discrepancies in the resources that districts are able to generate through property taxes. As a consequence, the drawing of municipal boundaries has powerful implications for private decision-making.[39]

Myron Orfield's review of fiscal capacity in the 25 largest metropolitan areas in 1998 revealed a significant tax-base inequality between jurisdictions. [40] Districts in areas that require the construction of expensive homes, which are also predominantly White districts, have significantly more revenue to dedicate to education than districts that allow for affordable housing, which tend to have large populations of color. Consequently, residents of many large urban areas pay a spatial premium for the uneven distribution of opportunities and resources that typifies our metropolitan regions.[41]

Despite the inequalities that result, the U.S. has failed to put an end to this discriminatory funding system and its negative impact on life opportunities. In the landmark case, *San Antonio v. Rodriguez*, the Supreme Court held that an educational funding system based on local property taxes that resulted in large disparities in per-pupil spending between predominantly White districts and predominantly Black and Latino districts did not violate the Constitution because plaintiffs in this case were unable to show that the funding disparities involved were the result of intentional racial discrimination. [42]

Historical and contemporary government policies and practices have incentivized private behavior resulting in unjustifiable racial impacts that deny educational opportunities and fair housing with implications for racial inequities in a number of other domains, including health care and criminal justice. The CERD Committee observed in General Recommendation 19 that racial segregation may be a product of government policies as well as the unintended *by-product* of the actions of private persons. The U.S. cannot

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[38] For more information regarding the nexus between fragmentation and segregation *see* john a. powell, *Sprawl, Fragmentation, and the Persistence of Racial Inequality: Limiting Civil Rights by Fragmenting Space, in* GREG SQUIRES, ED., URBAN SPRAWL: CAUSES, CONSEQUENCES, AND POLICY RESPONSES (2002).
[39] MYRON ORFIELD, METROPOLITICS: A REGIONAL AGENDA FOR COMMUNITY AND STABILITY (1998).
[40] *Id.*
[41] MICHAEL A. STOLL, BROOKINGS INSTITUTION, JOB SPRAWL AND THE SPATIAL MISMATCH BETWEEN BLACKS AND JOBS (2005).
[42] See San Antonio School District v. Rodriguez, 411 US 1, 14 (1973) (*citing* TEXAS RESEARCH LEAGUE, PUBLIC SCHOOL FINANCE PROBLEMS IN TEXAS 9, 13 (Interim Report 1972) (stating that Alamo Heights, because of its relative wealth, paid approximately $100 per pupil; Edgewood, on the other hand, paid only $8.46 per pupil)).

defend its actions on grounds of private conduct when its own policies spur private decision makers to act in predictable ways with clear racial effects. As Justice Kennedy wrote, "the distinction between government and private action… can be amorphous both as a matter of historical fact and as a matter of present-day finding of fact. Laws arise from culture and vice versa. Neither can assign to the other all responsibility for persisting injustices."[43] In both instances, the U.S. is responsible for failing to address the unjustifiable racial impacts that flow from its policies and practices. CERD requires the U.S. to review and nullify policies that continue to perpetuate racial discrimination.

The United States must look at how racial discrimination manifests as a consequence of policies and practices in multiple domains.

As defined in Article 1 and General Recommendation XIV, racial discrimination includes distinctions and exclusions that have an "unjustifiable disparate impact" upon the rights of freedoms of particular racial or ethnic groups. The CERD is clearly concerned with effects and racially disparate outcomes when caused by policies or practices from multiple domains and not just the domain in question. This approach at times has been recognized in U.S. law. For example, the United States Supreme Court struck down a literacy test requirement for voter registration because of school segregation, recognizing that the schools' condition created a discriminatory effect in the use of the test in voting.[44]

In general, however, United States courts interpreting U.S. law have been increasingly reluctant to redress discrimination in one domain that is caused by interactions in other domains. For example, in *Wards Cove v. Atonio*, the Supreme Court decided that the use of statistical evidence showing racially stratified work force would no longer be sufficient to raise a rebuttable inference of discrimination.[45] The employees of the salmon cannery sued the company under Title VII's prohibition against employment discrimination.[46] They presented statistical evidence that nonwhites were overrepresented in lower paid, unskilled cannery jobs and under-represented in higher paid, skilled, noncannery jobs. Employees were hired through an informal process and recruited by white supervisors through word of mouth. Ruling against the employees, the Court held that plaintiffs alleging a disparate impact were required to show statistical disparity between the "qualified" applicants in the labor pool of the surrounding area and the numbers actually hired out of the group.[47] By requiring an analysis of the labor market that controls for background characteristics and the educational preparation of workers, the Court ignored the discrimination in education, housing, and health markets that created a racially

[43] Parents, 127 S. Ct. at 2795. *See also* Freeman v. Pitts, 503 U.S. 467, 495 (1992) (Kennedy, J.) ("In one sense of the term, vestiges of past segregation by state decree do remain in our society and in our schools. Past wrongs to the black race, wrongs committed by the State and in its name, are a stubborn fact of history. And stubborn facts of history linger and persist.").
[44] Galston County v. United States, 395 U.S. 285 (1969).
[45] 490 U.S. 642, 656 (1989).
[46] Civil Rights Act of 1964, tit. 7, 42 U.S.C. § 2000e-1 to -17 (1981).
[47] Wards Cove, 490 U.S. at 651.

stratified labor pool in the first place.[48] As the facts in the case record revealed, the salmon industry was completely segregated by residence and work environment which, Justice Stevens wrote in his dissent, resembled a plantation economy.[49]

Racialized outcomes are often the product of cumulative effects of discrimination over time and across domains.[50] For example, housing discrimination constrains many black and Hispanic youth to attend high-poverty schools.[51] Children in these schools are much less likely than their affluent peers to attend college, and more likely to drop out of school or complete their education in a correctional facility.[52] All three outcomes reduce the labor market options these young adults are likely to have, with grave implications for their chances to secure health and retirement benefits.[53] It follows that in order to fully understand why so many elderly African Americans and Hispanics live at or below the poverty line, we not only must retrace their life-long relationship to the labor market, but also their relationship to the housing market, and to the educational, and criminal justices.

Neighborhood conditions also directly affect African Americans' physical and mental health. Childhood obesity rates are high in low-income neighborhoods as fear of crime and the lack of playgrounds and parks in poor areas keeps children indoors.[54] Health risks also abound. Although African Americans represent only 12.7 % of the U.S. population, they account for 26 % of asthma deaths,[55] the highest rate of any racial/ethnic group.[56] This is outcome is predictable and largely the result of African Americans' homes being close to toxic dumps, toxic flumes and other environment

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[48] See Rebecca M. Blank, Tracing the Economic Impact of Cumulative Discrimination, Address at American Economic Association annual meeting (Jan. 2005) *in* AM. ECON. REV. PAPERS & PROC., May 2006.

[49] Wards Cove, 490 U.S. at 661-662.

[50] George C. Galster, *A Cumulative Causation Model of the Underclass: Implications for Urban Economic Development Policy in* THE METROPOLIS IN BLACK AND WHITE: PLACE, POWER, AND POLARIZATION, 190 (G.C. Galster and E.W. Hill, eds., 1992);.and Jurgen Friedrichs et. al , George Galster, and Sako Musterd, *Neighborhood Effects on Social Opportunities: The European and American Research and Policy Context*, HOUSING STUDIES, June 18, 2003, at 797; George Galster and Sean P. Killen, *The Geography of Metropolitan Opportunity: A Reconnaissance and Conceptual Framework*, HOUSING POLICY DEBATE, June 1, 1995. at 7; Margery Austin Turner and Dolores Acevedo-Garcia, *Why Housing Mobility? The Research Evidence Today*. PRRAC NEWSLETTER, January/February 2005.

[51] LISA ROBINSON & ANDREW GRANT-THOMAS, THE CIVIL RIGHTS PROJECT AT HARVARD UNIVERSITY, BARRIERS TO HOUSING - RACE, PLACE AND HOME: A CIVIL RIGHTS AND METROPOLITAN OPPORTUNITY AGENDA (September 2004). http://www.civilrightsproject.harvard.edu/research/metro/barriers_housing.php

[52] JOHANNA WALD AND DANIEL J. LOSEN, THE CIVIL RIGHTS PROJECT AT HARVARD UNIVERSITY, DEFINING AND REDIRECTING A SCHOOL-TO-PRISON PIPELINE (2003)., http://www.civilrightsproject.harvard.edu/research/pipeline03/FramingPaper.pdf

[53] *See* GARY ORFIELD (ED.), DROPOUTS IN AMERICA: CONFRONTING THE GRADUATION RATE CRISIS (2004); and JOHANNA WALD, LOSEN, DANIEL .J. (EDS.), DECONSTRUCTING THE SCHOOL-TO-PRISON PIPELINE (2003).

[54] PREVALENCE OF OVERWEIGHT AMONG CHILDREN AND ADOLESCENTS ,U. S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, CENTERS FOR DISEASE CONTROL AND PREVENTION, NATIONAL CENTER FOR HEALTH STATISTICS 2003-2004, http://www.cdc.gov/nchs/pressroom/06facts/obesity03_04.htm

[55] LUNG DISEASE DATA IN CULTURALLY DIVERSE COMMUNITIES: 2005, LUNG DISEASE DATA AT A GLANCE: ASTHMA (2005), http://www.lungusa.org.

[56] LUNG DISEASE DATA IN CULTURALLY DIVERSE COMMUNITIES (2005), http://www.lungusa.org/site/pp.asp?c=dvLUK9O0E&b=308858.

hazards. Segregation and unequal access to health care mean that racial minorities receive less and worse health care than whites do, exacerbating health disparities.[57]

Educators agree that this lack of health well-being in turn depresses student academic performance and achievement.[58] It would make little sense then to assert that discriminatory practices in health or housing should not be considered when looking at education. But this is the current position of the Supreme Court. Moreover, inequitable school systems and a youth control complex push kids out of school and into inadequate local job markets that deny families shelter and stability and incentivize an illicit economy. Felon disenfranchisement then commonly reduces the political participation of marginalized racial groups. Employment, health, wealth, crime and safety, delinquency and risky behavior, educational achievement, recreation and where one lives are all linked.[59]

To correct for the interaction between these domains and their unjustifiable racial impacts, U.S. Courts and policy makers must adopt an inter-institutional perspective. There are a number of limited examples where the Court has acknowledged the importance of a more holistic approach that is sensitive to the interactions between domains. For example, the Supreme Court noted that in determining if there was a voting rights violation, there should be a look at the totality of the circumstances instead of looking at one factor in isolation.[60] Unfortunately, this approach has not been extended to other areas, and more recent decision by the Court have suggested an inclination to take a narrow, singular approach.

Policy makers must also be free to address unjustifiable racial impacts that accumulate across domains.

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[57] David R. Williams and Chiquita Collins, *Racial Residential Segregation: A Fundamental Cause of Racial Disparities in Health*, 116 PUB. HEALTH REP. 404(2001). Specific health risks of segregated neighborhoods that the authors reference include: elevated risks of cause-specific and overall adult mortality, infant mortality and tuberculosis; elevated exposure to noxious pollutants and allergens; a lack of recreational facilities; higher cost, poorer quality groceries; and limited access to high quality medical care.

[58] RICHARD ROTHSTEIN, CLASS AND SCHOOLS: USING SOCIAL, ECONOMIC, AND EDUCATIONAL REFORM TO CLOSE THE BLACK-WHITE ACHIEVEMENT GAP (2004) and Richard L. Canfield, et. al., *Intellectual Impairment in Children with Blood Lead Concentrations below 10 µg per Deciliter*, 348 NEW ENG. J. MED. 1517 (2003).

[59] For examples of economic and employment impacts *see* Chengri Ding and Gerrit-Jan Knaap, *Property Values in Inner-City Neighborhoods: The Effects of Homeownership, Housing Investment, and Economic Development*, 13 HOUSING POLICY DEBATE 701 (2003). For examples of health, environmental justice and transportation impacts *see* Williams and Collins, *supra* note 57; Christopher R. Browning and Kathleen A. Cagney, *Moving Beyond Poverty: Neighborhood Structure, Social Processes and Health*, 44 J. HEALTH & SOC. BEHAV.552 (2003); Helen Epstein, *Enough To Make You Sick?*, N.Y.TIMES MAG. Oct. 12, 2003, 74; I.H. Yen and G.A. Kaplan, *Neighborhood Social Environment and Risk of Death: Multilevel evidence from the Alameda County Study*,149 AM. J. EPIDEMIOLOGY 898 (1999); Robert D. Bullard, *Addressing Urban Transportation Equity in the United States*, 31 FORDHAM URB. L. J. 1138 (2004). For crime and violence reports *see* Robert J. Sampson, Stephen W. Raudenbush, and Felton Earls, *Neighborhoods and Violent Crime: A Multi-Level Study of Collective Efficacy*, 277 SCIENCE 918 (1997).

[60] *Thornburg v. Gingles*, 478 U.S. 30 (1986).

It is not simply that U.S. courts have insufficiently accounted for the ways in which discrimination is caused in other domains. Increasingly, they are constraining the freedom of other policymakers to intervene. While condemning the segregation of public institutions in *Brown v. Board of Education*, [61] the U.S. Supreme Court emphasized the importance of an integrated society. Although subsequent court decisions drew back on the initial mandate of *Brown*, later drawing jurisdictional limitations on judicial authority to implement school integration,[62] and shielding local efforts to prevent housing integration,[63] the judiciary left no doubt that local, state, and national authorities could craft policies designed to foster societal integration and reduce racial discrimination.

The Courts are now construing the harm of racial discrimination as the harm of being classified on the basis of race. In *Parents Involved in Community Schools v. Seattle School Dist. No. 1*,[64] a case that involved the school districts of Seattle and Louisville, the U.S. Supreme Court affirmed the harms of a segregated society and the consequences for equal opportunity while striking down locally drawn efforts to address patterns of racial isolation. Previously, courts were placing limits on judicial authority to intervene, with the assumption that democratically elected policy makers were free to act. Now the Courts are constraining the response of public decision makers by insisting on a narrow reading of the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. Programs designed to benefit racially marginalized groups are being circumscribed or struck down as U.S. courts review these distinctions with the same scrutiny that they give to distinctions drawn with clear racial animus.[65] In a sense, society is moving backwards. The courts have recognized the importance and impact of integration since *Brown*, but now there is little that government is permitted to do about it.

Schools have started to resegregate just as the courts have adopted a more stringent definition of discrimination after years of substantial progress. More than five decades after *Brown* the nation's public schools remain extremely segregated by race and class, with most urban African American and many Hispanic students isolated from real educational opportunity in poor school districts.

- A growing number of students of color are attending predominately non-white schools, that are under resourced and these schools are segregated by both race and class. Urban African American children remain concentrated in the poorest performing and most economically segregated school districts in the

[61] 347 U.S. 483 (1954).
[62] Milliken, v. Bradley, 418 U.S. 717 (1974).
[63] Arlington Heights, 429 U.S. 252 (1977).
[64] 127 S. Ct. 2738 (2007).
[65] *See Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995). (The Court held that all racial classifications, imposed by whatever federal, state, or local government actor, must be analyzed by a reviewing court under a standard of "strict scrutiny.")

nation. Almost half of African American students in the U.S. attend a central city school district, compared to 17% of White students.[66]

- Research measuring dissimilarity for metropolitan school districts in 2000 found that African American/White dissimilarity in schools was .65. Thus, nearly 2 out of 3 children would need to transfer schools to integrate the nation's metropolitan school districts. While neighborhood segregation declined slightly during the 1990's, school segregation increased.[67]
- The average African American child attends a school with a 65% student poverty rate, compared to 30% for the average White student's school. Segregated high poverty schools are also failing many students of color. Students attending majority non-white schools have lower standardized test scores, far greater drop-out rates, and significantly lower college attendance rates, than do students from majority white schools. Three quarters of White students in ninth grade graduate on time while only half of African American students finish high school with a diploma in four years.[68]

Although racial discrimination was indeed deliberate and intentional, today it is likely to be the result of policies and institutions that are no longer explicitly designed to discriminate. Yet the effects are cumulative and well known. CERD requires the U.S. to address these negative, racialized consequences. And while at times U.S. courts were more responsive them, recently the Supreme Court has been taking a narrow view of discrimination, which puts the U.S. out of step with CERD.

IV. There is a duty of all U.S. government authority to affirmatively act in conformity with CERD.

While many U.S. laws are consonant with its duties under CERD to prohibit racial discrimination, the CERD framework demands more than mere compliance with laws that happen to satisfy many of its mandates. First, the CERD framework envisions an approach in which the State Party undertakes to affirmatively eliminate all practices of racial discrimination by ensuring that all public authorities and public institutions, national or local, act in conformity with this obligation (art. 2, ¶1(a)). Secondly, the State Party also assumes full responsibility for reviewing governmental, national and local policies, and to amend, rescind, or nullify any laws and regulations which have the effect of creating or *perpetuating* racial discrimination (art. 2, ¶1(c)). Finally, each State Party is also required to introduce appropriate legislation to achieve these goals (art. 2, ¶1 (d)).

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[66] CHRISTOPHER SWANSON, EDUCATION POLICY CENTER, THE URBAN INSTITUTE, WHO GRADUATES? WHO DOESN'T A STATISTICAL PORTRAIT OF PUBLIC HIGH SCHOOL GRADUATION, CLASS OF 2001 (Feb. 25, 2004), http://www.urban.org/UploadedPDF/410934_WhoGraduates.pdf.

[67] JOHN LOGAN, LEWIS MUMFORD CENTER FOR COMPARATIVE URBAN AND REGIONAL SCHOOLS, 1990-2000, CHOOSING SEGREGATION: RACIAL IMBALANCE IN AMERICAN PUBLIC SCHOOLS, 1990-2000 (March 29, 2002), http://mumford.albany.edu/census/SchoolPop/SPReport/page1.html

[68] GARY ORFIELD ET AL., THE CIVIL RIGHTS PROJECT AT HARVARD UNIVERSITY, THE URBAN INSTITUTE, ADVOCATES FOR CHILDREN OF NEW YORK & THE CIVIL SOCIETY INSTITUTE, LOSING OUR FUTURE: HOW MINORITY YOUTH ARE BEING LEFT BEHIND BY THE GRADUATION RATE CRISIS (March, 2004), http://www.civilrightsproject.harvard.edu/research/dropouts/dropouts04.php.

Taken together, these articles require the U.S. to take affirmative measures to enhance coordination between federal branches and with state and local government bodies, in what can be a very fragmented system.

This fragmentation of decision-making authority has important implications for racial equity. First, institutional outcomes are shaped, often dramatically and inexorably, by inputs beyond the reach or control of particular institutional actors. Well-intentioned government actors hoping to intervene and disrupt processes that perpetuate racial discrimination often lack authority to control institutions that play an influential role in shaping racial outcomes. For example, racial and economic segregation of schools often stems from the fragmented policies and actions of multiple actors, including housing and planning authorities and education officials. Strategies designed by federal courts or school boards intended to foster integration and remediate racial discrimination often falter because of this fragmentation. The myriad of inputs that shape neighborhood dynamics, including private decision-making, family resources, and government policies like the No Child Left Behind Act,[69] do a great deal to shape educational outcomes, yet courts and schools exert little influence over any of them.

Second, absent efforts at coordination, even well-intentioned actors can produce misaligned and therefore discriminatory policies and practices. Many minority males in large urban school systems enter a "school-to-prison-to-dropout pipeline" created by education and juvenile justice systems working at cross-purposes. On the one hand, resources that could support the neediest students and forestall their incarceration are used instead to enhance school security, raise test scores, and attend to administrative details. Reducing the number of incarcerated students is rarely a focus of school reform efforts. On the other hand, contact with the juvenile justice system can doom struggling students to miss weeks or months of school; to receive inferior education while incarcerated; and, upon returning to public school, to try to catch up with coursework that may be unrelated to classes they took while detained. Few students who return to public schools manage to graduate.[70]

Third, the fragmentation of authority creates space for individual or institutional decision-makers to both ignore the predictable consequence of their acts as well as to act on the basis of unscrupulous, possibly willfully racist motives. Historically, "state's rights" has been the cry of many concerned with protecting or promoting local white privilege against federal government interference. Today, many municipalities couple "restrictive land use regulations … with costly infrastructure requirements and difficult approval processes that make affordable home building impractical, if not impossible."[71] The wish to manage growth and preserve open space may be a factor in some instances, but "Not In My Back Yard" (NIMBY) concerns are often in play, for example, acting on the fear that an influx of low-income or minority neighbors would reduce neighborhood quality and property values.

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[69] Pub. L. No. 107-110, 115 Stat. 1425 (2002) (codified in scattered sections of 20 U.S.C.).
[70] BALFANZ ET AL., NEIGHBORHOOD HIGH SCHOOLS AND THE JUVENILE JUSTICE SYSTEM: HOW NEITHER HELPS THE OTHER AND HOW THAT COULD CHANGE 81 (2003).
[71] ROBINSON & ANDREW GRANT-THOMAS, *supra* note 51, at 38.

Fourth, a lack of formal and institutionalized coordination across domains can hinder an effective response. The events of 9/11 highlighted how dispersed and uncoordinated government authority may be less effective in preventing and responding to negative outcomes. Similarly, the aftermath of Hurricanes Katrina and Rita highlighted the danger of a lack of formal and institutionalized coordination across domains. The stark conditions that resulted in so many deaths and dislocations, as well as the tragically inadequate and delayed governmental response, were a consequence of fractured government and institutional authority, as well as of past overlapping governmental policies.

In the first half of the twentieth century, New Orleans was a racially and culturally vibrant and heterogeneous city, despite its poverty. Until 1950, poverty was not geographically isolated and blacks and whites lived in close proximity in integrated communities. That changed dramatically around 1970, when federal housing and transportation policies in the city reduced racial and economic integration, after which the poor became highly concentrated in hyper-segregated neighborhoods. The number of concentrated-poverty neighborhoods in New Orleans actually grew by two-thirds between 1970 and 2000, even though the poverty rate stayed about the same (26–28 percent).[72] As a consequence, at the moment the levees broke, the Lower Ninth Ward was almost exclusively black. Despite these conditions, the middle class-oriented evacuation plan, which assumed car ownership, did not account for the fact that most of the city's poor black residents did not own vehicles. The racialized disinvestment across domains in schools, public health, and other critical institutions in the core city had existed for decades in New Orleans, unlike the wind and the water, but were inadequately addressed due to the lack of coordinated governmental action. The natural disaster was really a man-made one.

The obvious response to the splintering of decision-making authority is better alignment between the policies and practices of relevant institutions that would result in more racially just outcomes. In the context of 9/11, as described in the U.S. Report, this deadly lack of coordination lead Congress to create "a new Department of Homeland Security (DHS) in 2003. This Department combines a number of other departments, agencies, and portions of departments, such as the Coast Guard, the Transportation Security Administration, the Federal Emergency Management Agency, and the former Immigration and Naturalization Service."[73] The DHS brought together these various government agencies to increase their institutional coordination and to more effectively protect the U.S. The same must be done to remedy racial discrimination.

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[72] CENSUSSCOPE, www.censusscope.org/us/rank_dissimilarity_white_black.html; ALAN BERUBE & BRUCE KATZ, BROOKINGS INSTITUTION, KATRINA'S WINDOW: CONFRONTING CONCENTRATED POVERTY ACROSS AMERICA (2005). In fact, in 2000 New Orleans ranked twenty-ninth in the country based on black-white racial segregation and second among the fifty largest cities in the number of extreme-poverty neighborhoods. *Id.*

[73] *See* U.S. 2007 CERD Report, ¶44.

The U.S. recognizes its responsibility under CERD to force institutional compliance from above. It issued the understanding that despite the Constitutional division of jurisdictional authority, "to the extent that state and local governments exercise jurisdiction over such matters, the Federal Government shall, as necessary, take appropriate measures to ensure the fulfillment of this Convention."[74] The federal government is not without the tools to significantly influence decision making at the state or local level, although it has failed to yield them to comply with CERD. In its concluding observations, the CERD Committee emphasized that "irrespective of the relationship between the federal authorities, on the one hand, and the States, which have extensive jurisdiction and legislative powers, on the other, with regard to its obligation under the Convention, the Federal Government has the responsibility to ensure its implementation on its entire territory."[75]

There are programs at every level of government designed to address racial discrimination in domains such as housing, education, health care, employment, transportation and so on. However, these programs are not appropriately linked. Pursuant to CERD, the U.S. should implement a plan for providing oversight, review, coordination, and management of these policies so that they produce desired outcomes. These programs must be monitored to incorporate feedback, make adjustments and improvements to ensure that outcomes are achieved.

As required by CERD, while laws and regulations in the U.S. are under continuous legislative and administrative revision and judicial review through processes arising under U.S. law and custom, contrary to U.S. assertion,[76] the Government conducts these revisions and reviews in a manner that does not satisfy its duty to comply with the convention. For example, the U.S. Report contends that legislative and executive branch actions are constantly being assessed by the judiciary for their consistency with the U.S. Constitution and laws.[77] However, the U.S. fails to point out that the judiciary also reviews the meaning of the Constitution itself. If the judicial interpretation of anti-discrimination measures and the Equal Protection is not coterminous with definitions under CERD, then this review process cannot be thought to satisfy CERD mandates. Furthermore, the decisions of U.S. Courts cannot be thought to operate independently from the influence of government and outside the framework of law. They are no less subject to CERD mandates and the requirements of law than any other branch of government. The judiciary is a state organ that is bound to binding international treaties. All branches of U.S. government are under a duty to act in conformity with CERD.

The United States has experienced a long period of racial retrenchment. By using narrow evidential rules, adopting a strict intent standard, shifting the burden of proof to the plaintiff, treating laws which discriminate against historically disadvantaged groups the

[74] U.S. Reservations, Understandings and Declarations, International Convention on the Elimination of All Forms of Racial Discrimination**.** 140 Cong. Rec. 14326 (1994).
[75] Concluding observations of the Committee on the Elimination of Racial Discrimination : United States of America. 14/08/2001. A/56/18, ¶ 383.
[76] *See* U.S. 2007 CERD Report, ¶82.
[77] *Id*. at (¶ 91).

same as laws intended to help racially disadvantage groups, and by the refusal to look at interactions across domains, the United States has increasingly been out of step with what we know about how discrimination operates as well as with the CERD framework. The predictable result has been a steady weakening of anti-discrimination laws in incontrovertible conflict with CERD.

V. Recommendations

UNDER ARTICLE 1

- **Retool the "intent doctrine."**
  - The Federal Government should amend all relevant anti-discrimination statutes, including Titles VI (housing) and VII (employment) to explicitly include cases in which plaintiffs can show disparate or discriminatory impacts. Additionally, the Government should pass legislation that would account for cases that violate the CERD, but cannot currently be brought under the equal protection clause because of the existing "intent doctrine."

- **Continue to support social science research on implicit bias and its implications for improved anti-discrimination legislation**
  - The increasing judicial recognition of the existence and effects of unconscious bias, and the growing body of literature analyzing this phenomenon, provide guidance for litigation and legislation that will more effectively combat all types of discrimination. The Federal Government should continue to fund this body of research, as well as hold hearings to educate current legislators and members of the judiciary about the realities of implicit bias, and its relevance for crafting more effective anti-discrimination laws and policies.

- **Look to the laws of other countries and the international community**
  - Requiring a showing of intent to prove discrimination appears to be somewhat of an American anomaly. For instance, Canada and South Africa both rejected intent as an element of discrimination claims, finding that it acted as an insuperable barrier to victims seeking a remedy. Likewise, the European Union recently recognized that discrimination includes direct acts by someone knowingly discriminating against another,
  - as well as indirect acts not motivated by prejudice, but nevertheless resulting in discriminatory outcomes. Additionally, international treaties such as the International Covenant on Civil and Political Rights prohibit *all forms* of discrimination. These laws and policies should inform future legislation and judicial opinions in the areas of racial and other discrimination.

- **Redress Indirect Discrimination**
  - The Federal Government should amend all relevant anti-discrimination statutes, including Title VI of the Civil Rights Act of 1964, 42 USC §

2000d et seq., to outlaw direct and *indirect* discrimination on the basis of race, color or national origin, and explicitly reach the actions of federal, state and private actors. The primary purpose of the amended statutes shall be the eradication of social and economic inequities, especially those that are systemic in nature and deeply embedded in social structures, history, institutional practices and norms. In interpreting the amended statutes, courts shall further the stated purpose through special measures, legal and otherwise, that advance the interests of historically disadvantaged individuals, communities and social groups who were disposed, deprived of their human dignity and who continue to endure social and economic disadvantages.

- **Address Disparities Across Domains and at Predictable Points of Institutional Interaction**
  - The Federal government should affirmatively link housing, schools, employment, transportation, health care and other political and cultural opportunities. We have government programs in every domain and at every level of government, but they are not coordinated.
    - Congress should reconsider reauthorization of HOPE VI, proposed in 2005, which would have linked the siting of affordable housing with a plan to improve public school conditions in the area.[78]

  - The Federal and State Governments should provide legislative support and incentives for metropolitan-wide governing bodies to affirmatively link housing, schools, jobs and transportation, creating communities of opportunity.
    - E.g., Jefferson County (Louisville) consolidated their city and suburban school districts after *Milliken* failed to link city and suburban school integration efforts. It then consolidated the city and county governments in 2001. On a metropolitan-wide scale, the governing body linked housing and education by using Project-based Section 8 funding to locate affordable housing units in areas students of color wanted to go to school, until the funding dried up. Schools were released from busing orders once the neighborhood

[78] Draft Reauthorization Bill for the Hope VI Program. Prepared by Senator Barbara Mikulski (D-MD). Introduced on July 27, 2005. The bill would have required that every HOPE VI grant recipient establish, in partnership with local schools and the school superintendent, a comprehensive education reform and achievement strategy to turn the school that serves the HOPE VI development into a high performing school. The Department of Housing and Urban Development would have conducted site visits to HOPE VI applicants to assist in making funding decisions and requiring that Public Housing Authorities (PHA's) set new performance benchmarks for each component of their HOPE VI project, including benchmarks for linkages with schools, relocation of residents and achievement of self-sufficiency. Failure to meet benchmarks would have resulted in the Secretary imposing appropriate sanctions, such as the appointment of alternative administrators, imposition of financial penalties, or withdrawal of funding. For more information *see* http://mikulski.senate.gov/record.cfm?id=241669. For a summary of the reauthorization *see* http://www.clpha.org/page.cfm?pageID=729.

was integrated. These efforts went on politically, even after the federal court order to desegregate was lifted.

UNDER ARTICLE 2

- **Coordinate and Involve All Levels of Government**
  - The Federal Government should determine how to coordinate institutional actions in situations in which authority is dispersed among many different levels of government and when concerted action could result in more racially just outcomes.
  - All levels of government should acknowledge and address racial discrimination that arises from the interaction of race-neutral governmental policies and private decision-making.
  - All levels of government should conduct studies and monitor progress not of single decision points, but of the cumulative effects of many decision points over time that affect the distribution of life opportunities.
  - E.g., To map out why so many elderly African Americans and Hispanics live at or below the poverty line, the government could retrace their life-long relationship to the labor market, their relationship to the housing market, and to the educational and criminal justice systems.

- **Support affirmative measures.**
  - The Federal Government should reverse the trend of reading the Equal Protection Clause of the 14th Amendment very narrowly to exclude race-conscious measures to end discrimination and achieve integration.
    - It should seek to reverse the decision in *Parents Involved in Community Schools v. Seattle School Dist. No. 1* to allow for race-conscious student assignment plans in K-12 schools, at a minimum when other race-neutral policies have failed to integrate our schools. When the next lawsuit is filed raising this issue, the Solicitor General should defend the rights of the school districts to adopt race-conscious measures, contrary to the position it defended in *Parents.*
    - It should recommit to the importance of achieving integration across domains in neighborhoods, schools, and places of employment and leisure.

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