

ARTICLES

Race-Conscious Data: The New Political Taxonomy

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Well before the Court issued Students for Fair Admissions, archconservatives broadcast far more ambitious plans to dismantle the building blocks of race consciousness. The second Trump Administration now levies once-fringe demands: that employers abandon racial data collection, disparate impact doctrine, and even voluntary inquiries about racial self-identification. Such attempts to suppress information about race undermine our ability to redress its harms and the bedrock status of race consciousness within a democracy. This Article is the first to demonstrate how informational norms have assumed a crucial role in instantiating—or resisting—“colorblindness” in the Trump Era.

Through a conceptual integration of race studies, information science, and law, this Article reinterprets the legal frameworks governing information about racial identity. It introduces the term race-conscious data to refer to information that permits society to communicate racial identity, regardless of whether it is digitized. The Article then advances a new taxonomy of ideological positions regarding racial data gleaned from legal, social movement, and lay sources: (1) Liberal Data Guardians, (2) Race-Conscious Dignitarians, (3) Colorblind Regressives, (4) Libertarians, (5) Techno-Authoritarians, and (6) White Nationalists. A modernized taxonomy captures the full range of thought and rhetoric beyond right/left typologies in regulatory choices and their ideological assumptions.

Posing the question of race-conscious data to ideological formations uncovers the racial functions of competing legal claims. It reveals descriptive and normative values, particularly when race-silencing is selectively applied to spaces that confer material benefits of citizenship to

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non-whites. Workplaces and other fora for racial dialogue illustrate the compelling legal and practical barriers to a federal “colorblind” regime. Labor’s particular relationship with conceptualizing material harm will prove crucial in helping society navigate beyond abstraction ad absurdum. It remains possible to chart future policies addressing race, inequality, and law. As before, multilevel conceptual frameworks fill a vacuum in today’s debates over data’s functions as potentially beneficial, exploitative, or otherwise harmful.

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INTRODUCTION

Consider a possible near future at the close of the second Trump presidency:¹ *The Department of Justice (DOJ) announces that it will cease collecting data regarding our race across all civil rights work.*² In January 2025, President Donald Trump’s “day-one” orders suspended active investigations into police conduct that resulted in disproportionately more deaths for Black Americans than any other racial group.³ *But the FBI, as DOJ’s investigative arm, announces that it will cease tracking hate crimes motivated by race, ethnicity, or ancestry, although slurs from Trump officials against immigrants continue.*⁴ If local statistics

1. In the following vignette, past events appear in non-italicized font; italicized events describe possible near-futures and *cf.* denotes those sources.

2. *Cf.* Donald Devine, Dennis Dean Kirk & Paul Dans, *Central Personnel Agencies: Managing the Bureaucracy*, in 3 THE HERITAGE FOUND., PROJECT 2025, MANDATE FOR LEADERSHIP: THE CONSERVATIVE PROMISE 69, 72 (2023) [hereinafter PROJ. 2025] (arguing for eliminating use of racial classifications); Jonathan Berry, *Department of Labor and Related Agencies*, in 18 PROJ. 2025 at 581, 582–83 (same); Devlin Barrett, *Trump Recasts Mission of Justice Dept.’s Civil Rights Office, Prompting ‘Exodus,’* N.Y. TIMES (Apr. 28, 2025), <https://www.nytimes.com/2025/04/28/us/politics/trump-doj-civil-rights.html> (“[T]he [civil rights] division has been turned on its head and is now being used as a weapon against the very communities it was established to protect . . .” (quoting Vanita Gupta, former Assistant Attorney General for the Civil Rights Division under President Barack Obama)); Civil Rights Act of 1957, Pub. L. No. 85-315, 71 Stat. 634 (codified as amended in scattered sections of 28 U.S.C. and 42 U.S.C.); *About the Division*, DOJ: C.R. Div., <https://www.justice.gov/crt> [<https://perma.cc/8EDK-9LGV>] (last visited May 2, 2026) (describing mandate “to uphold the civil and constitutional rights of all persons” by enforcing non-discrimination based upon race, color, sex, disability, religion, familial status, national origin, and citizenship status).

3. *Cf.* Jacey Fortin, Devlin Barrett, Ernesto Londoño & Shaila Dewan, *Justice Dept. to End Oversight of Local Police Accused of Abuses*, N.Y. TIMES (May 21, 2025), <https://www.nytimes.com/2025/05/21/us/trump-police-consent-decrees.html> (reporting federal retreat from investigating or supervising “nearly two dozen police departments accused of civil rights violations”). From 2013 to 2022, police were three times more likely to kill Black people as compared to white people, with the highest disparities in Minneapolis (a comparative rate of 28 times higher) and Chicago (a rate 25 times higher). Sam Levin, *‘It Never Stops’: Killings by US Police Reach Record High*, THE GUARDIAN (Jan. 6, 2023, at 06:00 ET), <https://www.theguardian.com/us-news/2023/jan/06/us-police-killings-record-number-2022> [<https://perma.cc/SVCY-Y7ZB>]. By “Americans,” I refer to all who reside in the United States who intend to remain.

4. *Cf.* *Hate Crime in the United States Incident Analysis*, FBI CRIME DATA EXPLORER, <https://cde.ucr.cjis.gov/LATEST/webapp/#/pages/explorer/crime/hate-crime> (last visited May 2, 2026) (reporting

show that racialized violence persists—after escalating in recent years⁵—workers’ centers, civil rights groups, and neighborhood groups must now resort to social media to draw attention to patterns of violence that stem from issues in common across state lines. Eyewitness to these troubling shifts, employees of a technology firm publicly condemn their employer’s surveillance work for the administration,⁶ as existing race-related data relating to civil rights are removed by federal fiat or threat.⁷

Having condemned “DEI” practices among employers and educational institutions as “illegal,”⁸ the Trump Administration announces it will try to strike decades-old regulations collecting demographic data as to race, sex, and compensation from major employers, and threatens to sue those that continue to track racial self-identification, citing his own attempt to redefine “discrimination” itself as intent to “discriminate, exclude, or divide individuals based on race or sex.”⁹ Now, *many more* condemn the

6,469 incidents in 2023, in which anti-Black or African American crimes comprised more than half, or 51.2%, of incidents, four times more than the next highest racial or ethnic category).

5. The FBI’s 2023 statistics reflect a 41.5% increase in the number of hate crimes motivated by the target’s race, ethnicity, and ancestry, compared to 2019 totals for such hate crimes. *See id.* Worse, many assailants may continue to believe they may target non-whites under color of law. Ekow Yankah, *Deputization and Privileged White Violence*, 77 STAN. L. REV. 703, 716–17 (2025).

6. Cf. Bobby Allyn, *Former Palantir Workers Condemn Company’s Work with Trump Administration*, NPR (May 5, 2025, at 17:05 ET), <https://www.npr.org/2025/05/05/nx-s1-5387514/palantir-workers-letter-trump> [https://perma.cc/67XX-GGS3] (reporting letter by ex-software engineers, managers, and employees condemning \$30 million contract with ICE to track migrants with near “real-time visibility,” arguing company’s code of conduct states software “should protect the vulnerable and ensure the responsible development of artificial intelligence”); Anita Chan, *Immigrant Surveillance Machine: A Replay of Eugenic Technologies for Authoritarian Conditioning*, REVISTA: HARVARD REV. OF LATIN AM. (Sep. 28, 2025), <https://revista.drclas.harvard.edu/immigrant-surveillance-machine-a-replay-of-eugenic-technologies-for-authoritarian-conditioning> [https://perma.cc/R6QK-HFDP].

7. Cf. Tiffany Hsu, *The White House Frames the Past by Erasing Parts of It*, N.Y. TIMES (Apr. 5, 2025), <https://www.nytimes.com/2025/04/05/technology/trump-history-websites.html> (reporting thousands of federal webpages “taken down or modified” including content on hate crimes, low-income children, and veterans, with data, experts, and “mentions of words like ‘Black,’ ‘women’ and ‘discrimination’” gone); *infra* note 9.

8. Exec. Order No. 14151, 90 Fed. Reg. 8339 (Jan. 29, 2025) [hereinafter Ending “DEI” Programs EO] (directing Office of Personnel Management to eliminate all government equity initiatives; “DEI,” “DEIA,” or “Action Plans”; and equity-related grants or contracts within sixty days); CRAIG TRAINOR, U.S. DEP’T OF EDUC., OFF. FOR C.R., DEAR COLLEAGUE LETTER: TITLE VI OF THE CIVIL RIGHTS ACT IN LIGHT OF STUDENTS FOR FAIR ADMISSIONS V. HARVARD (2025) (purporting to prohibit publicly funded schools from implementing “DEI” policies and programs after Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181 (2023) [hereinafter *SFFA*], *withdrawn under court supervision*, Nat’l Educ. Ass’n v. U.S. Dep’t of Educ. (D.N.H. Feb. 18, 2026) (invalidating U.S. Department of Education 2025 “Dear Colleague” Letter)); Exec. Order No. 14398, 91 Fed. Reg. 16147 (Mar. 31, 2026) (hereinafter “DEI Discrimination by Federal Contractors” EO); EEOC, *Pending EO 12866 Regulatory Review: Rescission of EEO-1, EEO-2, EEO-3, EEO-4, EEO-5, and Reporting Requirement Under Title VII, the ADA, GINA, and the PWFA* (May 14, 2026), <https://www.reginfo.gov/public/do/eoDetails?rid=1382263>.

9. Memorandum from Att’y Gen., DOJ, to All DOJ Emps. on “Ending Illegal DEI and DEIA Discrimination and Preferences” 1 n.1 (Feb. 5, 2025) [hereinafter Bondi Memo] (prohibiting “programs, initiatives, or policies that discriminate, exclude, or divide individuals based on race or sex”); cf. Exec. Order No. 14173, 90 Fed. Reg. 8633 (Jan. 31, 2025) [hereinafter “Ending Discrimination” and Opportunity EO] (rescinding, *inter alia*, Exec. Order No. 11246, 30 Fed. Reg. 12319 (1965), *reprinted as amended* in 42 U.S.C. § 2000e (1994)); U.S. DEP’T OF EDUC. OFF. FOR C.R., FREQUENTLY ASKED

inversions of law to suppress race consciousness and democracy itself, and insist they are necessary to achieve equality and combat segregation.¹⁰

Meanwhile, an up-and-coming Louisiana suburb becomes visibly segregated by skin color. Renters for buildings closest to an open-spill polluter identify as primarily non-white, and buildings presumed to be cleaner and safer are mainly occupied by white renters. The local realtors' association reassures landlords that this outcome can be explained by differences in class and income. The 2027 Congress legislatively "derecognized" disparate-impact doctrine, a theory of liability for discrimination that could be established by evidence showing racially disparate systemic effects.¹¹ There is no "discrimination," no racism, and thus no harm, they say. Even as the Trump Administration has substantially merged all Americans' personal information across key agencies, the result of the \$908 million in contracts awarded to Palantir, taxpayer-funded software will not only monitor immigrants' activities and associations in real time, but also track known critics of the President.¹² While evidence of racial oppression is erased, some data will persist selectively for some whites, but otherwise serve to subjugate or disappear non-white communities.¹³

QUESTIONS ABOUT RACIAL PREFERENCES AND STEREOTYPES UNDER TITLE VI OF THE CIVIL RIGHTS ACT 2 (2025) [hereinafter DOE FAQ] (describing distinctions "solely because of their ancestry" as "odious to a free people" (quoting *Rice v. Cayetano*, 528 U.S. 495, 517 (2000)).

10. Cf. EEO LEADERS, ABANDONING THE COLLECTION OF EMPLOYMENT DATA WILL HARM EMPLOYERS AND WORKERS (May 15, 2026), <https://www.eeoleaders.org/s/EEO-Leaders-Response-to-EEO-1-etc-Rescission.pdf> [<https://perma.cc/8R47-G5X6>]; JUAN SEBASTIÁN PINTO ET AL., THE SCOURING OF THE SHIRE: A LETTER FROM CONCERNED PALANTIR ALUMNI TO THE TECH WORKERS OF SILICON VALLEY (May 5, 2025), <https://www.documentcloud.org/documents/25930212-the-scouring-of-the-shire> (warning by ex-data-mining workers that "[p]ublic statements have grown hostile to diversity, equity, and inclusion, principles that . . . remain essential for critiquing power"); Nat'l Ass'n of Diversity Officers in Higher Educ. v. Trump, 767 F. Supp. 3d 243, 258 (D. Md. 2025) (challenging the Trump Administration's policies to purportedly ban diversity, equity, and inclusion efforts in litigation by higher education officers of federal contractors, grantees, and private sector entities); *Tell Amazon: End contracts with ICE!*, LEFT VOICE (Feb. 3, 2026), <https://www.leftvoice.org/tell-amazon-end-contracts-with-ice> [<https://perma.cc/E2RH-MACE>] (describing Cyber Monday 2025 Amazon workers' rally outside of New York headquarters to demand end to "fueling mass deportations through Amazon Web Services' contracts with ICE and DHS"); *infra* notes 169–80 and accompanying text.

11. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971) (recognizing Title VII entity liability for practices that are "discriminatory in operation," in addition to "overt discrimination"); 42 U.S.C. § 2000e-2(a)(2) (codifying disparate impact as form of discrimination); cf. Exec. Order No. 14281, 90 Fed. Reg. 17537 (Apr. 28, 2025) [hereinafter "Revoking" Disparate Impact EO] (deprioritizing federal agency enforcement of disparate impact statutes, repealing related regulation, and claiming doctrine "imperils the effectiveness of civil rights laws by mandating, rather than proscribing, discrimination"); Rescinding Portions of Department of Justice Title VI Regulations To Conform More Closely With the Statutory Text and To Implement Executive Order 14281, 90 Fed. Reg. 57141 (Dec. 10, 2025) (to be codified at 28 C.F.R. pt. 42); Devine et al., *supra* note 2, at 72 (urging that disparate impact "could be ended legislatively or at least narrowed through the regulatory process"); *Louisiana v. U.S. EPA*, 712 F. Supp. 3d 820, 866 (W.D. La. 2024) (implying that the Environmental Protection Agency's disparate impact regulations pursuant to Title VI, 42 U.S.C. § 2000d-1, themselves constitute unlawful discrimination, and opining that "[p]ollution does not discriminate").

12. Cf. Sheera Frenkel & Aaron Krolik, *Trump Taps Palantir to Compile Data on Americans*, N.Y. TIMES (May 30, 2025), <https://www.nytimes.com/2025/05/30/technology/trump-palantir-data-americans.html>.

13. Cf. Hsu, *supra* note 7; *infra* Section II.B.6; Steven Hubbard, *Mission Creep: AI Surveillance at DHS Crosses Dangerous Line into Tracking Americans*, AM. IMMIGR. COUNCIL (Feb. 6, 2026), <https://>

Amid dramatic reconsolidations of power, claims about race and law that had once occupied the fringes of discourse now dangle at the fore. A second Trump presidency now catalyzes efforts to silence, destroy, and even persecute uses of racial identification and proceeds dangerously toward logical ends. Some claims advanced now have not been made in more than two centuries; yet many are wholly unprecedented. To wit: in spring 2023, a presidential blueprint known as *Project 2025* floated a claim that civil rights law bars even voluntary inquiries about racial identity,¹⁴ and urged the next administration to “prohibit racial classifications and quotas” because “Title VII flatly prohibits discrimination in employment on the basis of race, color, and national origin. . . . Crudely categorizing employees by race or ethnicity . . . forces individuals into categories that do not fully reflect their racial and ethnic heritage.”¹⁵

Without citing a shred of legal support, *Project 2025*’s authors simply express normative concerns.¹⁶ Their arguments seemed so specious that they failed to attract comment amid widespread public objections to *Project 2025*.

Yet minutes into his second inaugural address, President Trump vowed to “forge a . . . colorblind and merit-based” society by ending efforts that “socially engineer race and gender into every aspect of public and private life.”¹⁷ The next day, a new executive order (EO) purported to “end discrimination” and roll back federal contractors’ duties to ensure equal opportunity, including reporting race, gender, and other demographic data of their workforce annually.¹⁸ Unbounded claims about law and race, amplified by President Trump from podiums and

www.americanimmigrationcouncil.org/blog/ice-ai-surveillance-tracking-americans [<https://perma.cc/PQA9-392G>].

14. Berry, *supra* note 2, at 582–83; see Goldburn P. Maynard, Jr., *Enforced Colorblindness*, 81 WASH. & LEE L. REV. 1749, 1751–52 (2025) (documenting archconservative activist Edward Blum’s crusade against use of racial categories through multiple entities). In 1980, the Heritage Foundation, a conservative think tank, also provided President Reagan with a 3,000-page *Mandate for Leadership*, with “two-thirds of its recommendations [implemented] in the first year of his administration.” IAN HANEY LÓPEZ, *DOG WHISTLE POLITICS: HOW CODED RACIAL APPEALS HAVE REINVENTED RACISM AND WRECKED THE MIDDLE CLASS* 65–66 (2015).

15. Berry, *supra* note 2, at 582–83 (Berry was Solicitor of Labor and former Trump acting Department of Labor Assistant Secretary); see also *id.* at 680–81 (urging presidential review of Census “race and ethnicity questions” for “[o]verly intrusive questions or less crucial data”).

16. See *id.* at 582–83.

17. *The Inaugural Address*, WHITE HOUSE (Jan. 20, 2025), <https://www.whitehouse.gov/remarks/2025/01/the-inaugural-address> [<https://perma.cc/7MS7-MKYC>].

18. “Ending Discrimination” and Opportunity EO, *supra* note 9. Within mere weeks, the administration proceeded to freeze the Office of Federal Contract Compliance Programs (OFCCP) and pending agency investigations, at a time when tens of thousands of firms subject to EO 11246 held \$769.5 billion in federal contracts. Rebecca Klar, *Trump Order Forces Contractors to Weigh Bias Risk with DEI Fears*, BLOOMBERG L. (Feb. 10, 2025, at 05:05 ET), <https://news.bloomberglaw.com/daily-labor-report/trump-order-forces-contractors-to-weigh-bias-risk-with-dei-fears>; Exec. Order No. 11246, 3 C.F.R. 339 (1964–65); 41 C.F.R. 60–1.1 to 60–2.36; see discussion *infra* Section I.B; see also Berry, *supra* note 2, at 583–84 (urging rescission of Exec. Order No. 11246 and EEO-1 demographic collection). In addition, a January 20, 2025, executive order revoked President Biden’s order requiring virtually all U.S. agencies to develop Equity Action Plans. See Exec. Order No. 14091, 88 Fed. Reg. 10825 (Feb. 22, 2023) (requiring the creation of equity action plans); Ending “DEI” Programs EO, *supra* note 8 (revoking EO 14091).

in executive orders, edge the country toward several plausible, dystopic near-futures.

To simply call these policies “colorblind” risks missing this shift into new extremes of race-silencing and informational erasure.¹⁹ Under the threatened regime, Americans must abandon even voluntary racial self-identification. Within its first hundred days, the administration targeted key social institutions to erase references to racial identity: (1) preschool, K–12, and post-secondary schools, under Title VI; and (2) the federal government’s 400 agencies and commissions, under “equality” principles and the threat of criminal and civil prosecution.²⁰ As for (3) private employers, the administration appears to be waiting for a cultural tide to shift through the latter (classrooms and government offices), perhaps with a depleted labor movement. Rather than openly prohibit racial data collection from federal contractors,²¹ the first hundred days sought to destabilize race discourse and empiricism through “law”: investigating “DEI” programs not eliminated as “discriminatory” and derecognizing disparate impact theory.²² If the

19. Conflicting legal theories of equality emerged in the context of affirmative action and governmental institutions. Through opinions interpreting the Equal Protection Clause, U.S. CONST. amend. XIV, § 1, parties’ demands that governments cease to give “weight” to race in decisionmaking—particularly affirmative action and other efforts to diversify student admissions—became shorthand for demands for “colorblind” state action. See Kim Forde-Mazrui, *The Constitutional Implications of Race-Neutral Affirmative Action*, 88 GEO. L.J. 2331, 2332–36 (2000); *infra* Section II.B.3 (addressing a variety of positions purportedly in favor of “colorblindness”). *SFFA*’s rejection of discriminatory history to legitimize the continued validity of discussing race signaled a Roberts Court willing to further eliminate permissible uses of race by blurring the informational use of racial discourse. See *SFFA*, 600 U.S. 181, 226–27 (2023). In a ruling on discrimination experienced by white workers, Justice Thomas muscled that a race concept is inherently “overbroad” and increasingly “incoherent.” *Ames v. Ohio Dep’t of Youth Servs.*, 605 U.S. 303, 316 (2025) (Thomas, J., concurring) (citing *SFFA*, 600 U.S. at 293). However, Trump-era efforts to elide “racial classification,” originally by governmental actors alone with *any* act to solicit, document, or consider racial self-identification as presumptively unlawful—what I call *race-silencing*—is a textual card-trick designed to evade settled law and facts. See discussion *infra* Section II.B.3. Attacking empirical evidence through racial identification not only undermines disparate impact theory, but also individual Title VII disparate treatment claims, which often rely upon comparator evidence.

20. See DOE FAQ, *supra* note 9, at 8 (claiming Title VI bars “essay prompts in a way that require applicants to disclose their race” or “brief interviews in order to visually assess” race); Bondi Memo, *supra* note 9, at 1–2 (addressing department employees, citing *SFFA* and EO 14173). But see Titles VI & VII as amended, 42 U.S.C. §§ 2000d, 2000e.

21. EEOC, 2024 EEO-1 COMPONENT 1 DATA COLLECTION INSTRUCTION BOOKLET 7 (expiring Nov. 30, 2026); Anne Cullen, *EEOC Plans Employer Data Push Without ‘Nonbinary’ Option*, LAW360: EMP. AUTH. (Apr. 24, 2025, at 13:16 ET), <https://www.law360.com/employment-authority/articles/2329925>. However, the 2025 form purports to erase non-binary identity, eliminating the option. *Id.*

22. Ending “DEI” Programs EO, *supra* note 8, at § 2(a) (ordering the Office of Management and Budget to terminate all DEI and equity “mandates, policies, programs, preferences, and activities”); “Ending Discrimination” and Opportunity EO, *supra* note 9, at § 3(b)(4)(B) (requiring each agency to secure federal contractors’ and grantees’ agreement to comply with the False Claims Act, and “certify” compliance with “any applicable Federal anti-discrimination laws”); § 4(b) (threatening enforcement against “most egregious and discriminatory DEI practitioners in each sector of concern” with the Attorney General’s “plan of specific steps or measures to deter DEI programs or principles . . . that constitute illegal discrimination or preferences,” wherein “each agency shall identify up to nine potential civil compliance investigations of . . . large non-profit corporations or associations”); “Revoking”

touchstone of workplace civil rights is breached, the consequences for democracy itself will be devastating.

This Article is the first to identify and address two devolutionary aspects of this regime: (1) federal deployment of “law” to erase racial discourse from all core private and public social institutions; and (2) the co-optation of privacy and informational norms to eliminate all race-conscious applications of law.²³ As its second contribution, I link emergent labor activism and employer efforts to resist such misinformation-by-law under a conceptual integration of race, information science, and law.²⁴ To stand any chance of halting it in its tracks, we must expand our means of engaging our oldest technologies: law and racialization.²⁵

Disparate Impact EO, *supra* note 11, at 17537 (“It is the policy of the United States to eliminate the use of disparate-impact liability in all contexts to the maximum degree possible . . .”).

These slim, pseudo-legal policy documents purport to end “racial balancing” but stop short of claiming that *SFFA* applies outside of race-determinative university admissions to bar companies or employees from documenting or asking racial self-identification. See DOE FAQ, *supra* note 9, at 8 (citing *SFFA*, 600 U.S. at 230); Atinuke O. Adediran, *Racial Targets*, 118 Nw. U. L. REV. 1455, 1461 (2024) (“[P]rivate employment decisions are distinct from admissions decisions made by federally funded universities.”). The Court has prohibited proportionate racial representation “for its own sake” or “racial balancing” in admissions, *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 307 (1978), but a distinct standard governs private workplaces under Title VII, see *infra* notes 107–12 and accompanying text.

23. I revive Gary Peller’s earlier definition of race consciousness: a political practice that comprehends racialization as power. Gary Peller, *Race Consciousness*, 1990 DUKE L.J. 758, 761 (1990).

Trump-era race-silencing draws upon the “racial privacy” frame conservatives deployed in the 1990s and 2000s that failed to breach national settlements around official uses of data that advance racial remediation. See *infra* note 185. As an informational frame, privacy has been reanimated to erase racial data within all institutions and contractors subject to Section 1981, Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (codified as amended at 42 U.S.C. § 1981). *SFFA*, however, did not prohibit applicants from disclosing or discussing their race, nor universities from requesting voluntary racial self-identification. 600 U.S. at 230–31. Rather, *SFFA* extensively described racial disclosures alone that would *not* constitute race-based outcomes. 600 U.S. at 230–31.

24. Shortly after the 2025 inauguration, President Trump declared he would implement an initiative known as the “Department of Government Efficiency” (DOGE). See Exec. Order No. 14158, 90 Fed. Reg. 8441 (Jan. 20, 2025); Exec. Order No. 14219, 90 Fed. Reg. 10583 (Feb. 25, 2025). Labor unions and groups launched a wave of court challenges to DOGE’s unilateral access to federally held data, in addition to its evisceration of agencies historically engaged in civil and economic rights. Laurel Wamsley, *The Government Already Knows a Lot About You. DOGE is Trying to Access All of It*, WGBH (Mar. 11, 2025), <https://www.wgbh.org/news/2025-03-11/the-government-already-knows-a-lot-about-you-doge-is-trying-to-access-all-of-it> [<https://perma.cc/8SBJ-S32K>] (reporting at least “a dozen lawsuits” over DOGE’s access to federal data by unions and groups, noting multiple technology experts’ concerns that “Americans’ personal data could be sold, lost, or leaked[, or] used to enrich a few”); e.g., *Am. Fed’n of Gov’t Emps. v. U.S. Off. of Pers. Mgmt.*, No. 25-cv-1237, slip op. at 5 (S.D.N.Y. June 9, 2025) (enjoining Office of Personnel Management and DOGE’s access to government employees’ confidential information under Privacy Act and Administrative Procedure Act); *Am. Fed’n of Lab. & Cong. Indus. Orgs. v. U.S. Dep’t of Lab.*, No. 25-339, 2025 WL 1783899, at *3 (D.D.C. June 27, 2025) (challenging DOGE’s access to sensitive records kept by Departments of Labor, Health and Human Services, and other agencies).

25. As demonstrated *infra* Part I, formative nation-building elevated race to structural and institutional forms in U.S. law, whether or not races were named. See EDUARDO BONILLA-SILVA, *RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN AMERICA* 65–66 (2021) (examining the institutional racial orders imposed in key areas of public life); Charlton McIlwain, *Racial Formation, Inequality and the Political Economy of Web Traffic*, 20 INFO., COMM’N & SOC’Y 1073, 1075 (2017) (identifying vital yet subtle logics in “racial and technological

Woefully few researchers integrate racial analysis and data science. Those who have, however, pioneered insights into newer technologies and their tendencies to amplify bias.²⁶ Their time-sensitive findings have helped mitigate institutions' uncritical yet widespread adoption of data practices. Scholarly research as a whole, however, largely declines to test its assumptions about fairness in social ordering or its interpretation of racial information, even though such nuance is now within our analytical capacity.²⁷ Instead, archconservatives perceived race and racial data to be micro-foundational to social processes and institutions for decades,²⁸ with ending disparate impact a significant feature of their own multilevel conceptual framework.²⁹

What limits to such complex and unending threats remain within law? Some quarters now strive to seamlessly relate old "tech" to the new to preserve race consciousness. Workers, companies, and the public have begun to demonstrate integrative conceptual analyses rarely found in legal discourse. Whenever scholars undertake time-intensive research yet omit a racial lens to test their theoretical

systems [as a] starting point to understand . . . technological formation that is part of a broader historical trajectory of racial formation").

26. E.g., VIRGINIA EUBANKS, AUTOMATING INEQUALITY: HOW HIGH-TECH TOOLS PROFILE, POLICE, AND PUNISH THE POOR (2018); CATHY O'NEIL, WEAPONS OF MATH DESTRUCTION: HOW BIG DATA INCREASES INEQUALITY AND THREATENS DEMOCRACY (2016); SAFIYA UMOJA NOBLE, ALGORITHMS OF OPPRESSION: HOW SEARCH ENGINES REINFORCE RACISM 157–58 (2018); Joy Buolamwini & Timnit Gebru, *Gender Shades: Intersectional Accuracy Disparities in Commercial Gender Classification*, 81 PROCS. MACH. LEARNING RSCH. 77, 85–86 (2018) (concluding a face-recognition technology was less accurate for women and people with darker hued skin); RUHA BENJAMIN, RACE AFTER TECHNOLOGY 6 (2019) (conceptualizing racialization's reflective and predictive roles in encoding race as forms of social control); *NIST Study Evaluates Effects of Race, Age, Sex on Face Recognition Software*, NAT'L INST. STANDARDS & TECH. (Feb. 3, 2025), <https://www.nist.gov/news-events/news/2019/12/nist-study-evaluates-effects-race-age-sex-face-recognition-software> [<https://perma.cc/8PGV-R6BV>] (reporting vastly higher false positives for Asian and Black faces relative to Caucasian faces by a factor of 10 to 100 times).

27. See discussion *infra* Section I.B. Information science scholars have recently reopened inquiries into researchers' use and discussion of "race" and "discrimination" attributes, noting that they track oversimplified legal definitions. Amina A. Abdu, Irene V. Pasquetto & Abigail Z. Jacobs, *An Empirical Analysis of Racial Categories in the Algorithmic Fairness Literature*, in ACM CONFERENCE ON FAIRNESS, ACCOUNTABILITY, AND TRANSPARENCY 1324 (2023), <https://dl.acm.org/doi/epdf/10.1145/3593013.3594083>.

28. See TUKUFU ZUBERI, THICKER THAN BLOOD: HOW RACIAL STATISTICS LIE (2001) (identifying disjunction between most Americans' nuanced understandings of race and how statistics "quantify" race); MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES 105–09 (3d ed. 2015); RONALD D. ROTUNDA, THE POLITICS OF LANGUAGE: LIBERALISM AS WORD AND SYMBOL 6–7, 98 (1986).

29. See Berry, *supra* note 2, at 582–83; Laura Meckler & Devlin Barrett, *Trump Administration Seeks to Undo Decades-Long Rules on Discrimination*, WASH. POST (Jan. 5, 2021), https://www.washingtonpost.com/education/civil-rights-act-disparate-impact-discrimination/2021/01/05/4f57001a-4fc1-11eb-bda4-615aaefd0555_story.html (noting theory's elimination as a "longtime goal of conservative legal activists"); "Revoking" Disparate Impact EO, *supra* note 11. Contemporary use of the term "color-blind" assumes a "temporally-contained project of white supremacy in the United States," and misconceives it as a tool that emerged only after the successes of the civil rights movement. Jessica M. Eaglin, *On "Color-blind" and the Algorithm*, 112 GEO. L.J. 1385, 1399 (2024) (citing George Lipsitz, *The Sounds of Silence: How Race Neutrality Preserves White Supremacy*, in SEEING RACE AGAIN: COUNTERING COLORBLINDNESS ACROSS THE DISCIPLINES 23, 25 (Kimberlé Williams Crenshaw et al. eds., 2019)).

constructs,³⁰ our ability to comprehend the extent of damage to the rule of law remains limited as well.³¹ The end-product of such evasion: informational norms now occupy crucial, unacknowledged roles in weaponizing law to undermine race consciousness,³² here and abroad.³³

Race, information science, and law furnish pieces of the puzzle, yet progressive and conservative scholars alike have treated their synthesis as taboo.³⁴ To

30. NOBLE, *supra* note 26, at 60–61. Research that has meaningfully theorized the political and legal constraints of racialization within modern informational orders remains scant, but includes foundational works by Ruha Benjamin, Safiya Noble, Julie Cohen, Nick Couldry, and Ulises Mejias. *See, e.g.*, BENJAMIN, *supra* note 26, at 137–97 (describing effects of a “New Jim Code” and limits of technological benevolence); NOBLE, *supra* note 26, at 60–61 (applying information science to the Internet, with methodological focus on the “meaning-making process” as a social science); JULIE E. COHEN, BETWEEN TRUTH AND POWER: THE LEGAL CONSTRUCTIONS OF INFORMATIONAL CAPITALISM 225–28 (2019) (describing the “informational capitalism” framework); NICK COULDRY & ULISES A. MEJIAS, THE COSTS OF CONNECTION: HOW DATA IS COLONIZING HUMAN LIFE AND APPROPRIATING IT FOR CAPITALISM (2019) (introducing the “data colonialism” framework). Information science persists as the conceptual umbrella to information law and privacy law. In parallel, Ian Haney López leveled political-economic critiques of racial formation apart from new technologies that nevertheless remain crucial to evaluating new technologies. LÓPEZ, *supra* note 14, at 74–75 (examining class repercussions of racism and late U.S. racial formation and racial politics). Others examining complex facets of this intersection include information science scholars Amina Abdu, Danielle Citron, Alex Hanna, Abigail Jacobs, Charlton McIlwain, Lisa Nakamura, Irene Pasquetto, Jamila Smith-Loud, and Siva Vaidhyanathan, and legal scholars Ifeoma Ajunwa, Chaz Arnett, Khiara Bridges, Ignacio Cofone, Jessica Eaglin, Margaret Hu, Deen Freelon, Pauline Kim, Ngozi Okidegbe, Spencer Overton, Catherine Powell, Dorothy Roberts, Vincent Southerland, and Ari Ezra Waldman.

31. *See* DHS v. D.V.D., 145 S. Ct. 2153, 2158–59 (2025) (mem.) (Sotomayor, J., dissenting) (“[That] the Government had a duty to obey [court orders] until they were reversed by orderly and proper proceedings . . . is a bedrock of the rule of law. The Government’s misconduct threatens it to its core.” (citations omitted)); Sherilynn Ifill, *Police Brutality Is Part of Our Democratic Crisis: So Why Is It Left Out of Democracy Discussions?*, SHERILYNN’S NEWSLETTER (May 25, 2025), <https://sherrilyn.substack.com/p/police-brutality-is-part-of-our-democratic> [<https://perma.cc/6DW2-A5NQ>]. Despite drawing the lion’s share of commentary in recent decades, affirmative action is but one form of race consciousness within law. *See* Shirley Lin, *Race, Solidarity, and Commerce: Work Law as Privatized Public Law*, 55 ARIZ. ST. L.J. 813, 816 n.2, 823 (2023) (“Ordinary people’s movements tell a different story about how work conceptually melds race, solidarity, and commerce.”).

32. One immediate result of conceptual integration: U.S. scholars can scarce afford to avoid engaging with global data and anti-discrimination regulations that now spur our own. *See* COHEN, *supra* note 30, at 260; Gregory Schafer, *Globalization and Social Protection: The Impact of EU and International Rules in the Ratcheting Up of U.S. Privacy Standards*, 25 YALE J. INT’L L. 1, 4 (2000); *cf.* José Ignacio Torreblanca & Giorgos Verdi, *Glitch in the Matrix: How Europeans Should Respond to the Trump-Musk Tech Agenda*, EUR. COUNCIL ON FOREIGN RELS. (Dec. 17, 2024), <https://ecfr.eu/article/glitch-in-the-matrix-how-europeans-should-respond-to-the-trump-musk-tech-agenda> [<https://perma.cc/ZWS4-XLZF>] (describing the potential impact of U.S. digital policy on Europe).

33. *See infra* Section II.B.1; Mathias Möschel, *European Anti-Discrimination Law: The American Perspective*, in THE EUROPEAN UNION AS PROTECTOR AND PROMOTER OF EQUALITY 481 (Thomas Giegerich, ed. 2020).

34. On avoidance, see Peller, *supra* note 23, at 759 (observing taboo against explicit discussion of race consciousness in legal discourse until mitigated by Critical Race Theory scholarship). *Information science* refers to the field of study encompassing “information management, knowledge management, innovation management, organizational intelligence, information mediation, information appropriation, and information literacy.” ELAINE DA SILVA & MARTA LÍLIA POMIM VALENTIM, IGI GLOB., THE ROLE OF INFORMATION SCIENCE IN A COMPLEX SOCIETY at ii (2021). Thus, conceptual integrations of law and race span the social sciences, including sociology, political science, science and technology studies (STS), communications, history, and philosophy. *See generally* BENJAMIN, *supra* note 26

facilitate their conceptual integration, I apply the term *race-conscious data* to refer to all information that communicates racial identity: from the race, color, or ethnicity one volunteers or is assigned, to a refusal to state one. The term is politically agnostic to foster robust discussion. *Data* refers broadly to information on which “reasoning, discussion, or calculation” relies.³⁵ *Race-conscious* refers broadly to any communication of racial differentiation among people as a socio-political process.³⁶ Protracted battles over access to racial information—particularly in workplaces—mean that law will continue to suppress, preserve, or foster race consciousness.³⁷

As its third and final contribution, this Article introduces a political taxonomy of five ideologies and their positions with respect to race-conscious data: (1) *Liberal Data Guardians*; (2) *Race-Conscious Dignitarians*; (3) *Colorblind Regressives*, including *Race-Averse* and *Race-Denying*; (4) *Libertarians*, including *Techno-Libertarians*; and (5) *White Nationalists*.³⁸ Contemporary definitions and examples convey the full panoply of ideas in operation, their overlaps or contradictions, and shifts within some of the same actors over time.³⁹ In this way, law remains relevant once a president openly embraces techno-libertarianism, white nationalism, or both.⁴⁰ Under a comprehensive taxonomy, efforts to erase

(conceptualizing race in the employment of new technologies); Abdu et al., *supra* note 27 (discussing papers in algorithmic fairness literature that engage with race); Jessica M. Eaglin, *When Critical Race Theory Enters the Law & Technology Frame*, 26 MICH. J. RACE & L. 151, 154 (2021) (analyzing law, race, and technology research).

35. *Data* refers to its original concept of information on which “reasoning, discussion, or calculation” relies. *Data*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/data> [<https://perma.cc/ZW26-J8FD3>] (last visited May 6, 2026). Information need not be digitized to constitute *data*.

36. See CHARLES W. MILLS, *THE RACIAL CONTRACT* 18–19 (2d ed. 2022); see *infra* Sections I.A and II.B.5.

37. See *infra* Sections I.B and III.B; cf. IFEOMA AJUNWA, *THE QUANTIFIED WORKER: LAW AND TECHNOLOGY IN THE MODERN WORKPLACE* (2023) (focusing on surveillance and quantification of workers); Jamillah Bowman Williams, *Breaking Down Bias: Legal Mandates vs. Corporate Interests*, 92 WASH. L. REV. 1473, 1473 (2017) (testing efficacy of equity and inclusion rationales of business case, or legal liability, in addressing discrimination in work opportunities and outcomes); Shirley Lin, *Mass Accommodations: Signposts to a Hidden Jurisprudence*, 74 EMORY L.J. 313, 324–36 (2024) (discussing meso-level legal analysis of discrimination within companies and schools through lenses of Universal Design, the Theory of Racialized Organizations, and litigating aggregate claims). Far more commentary appears outside of work law scholarship. See Eaglin, *supra* note 29, at 1390 (examining lead “color-blind” discourses about algorithms and criminal law); Ngozi Okidegbe, *Discredited Data*, 107 CORN. L. REV. 2007, 2012, 2040–2043 (2022) (noting that biased data bases and knowledge from carceral systems contribute to algorithmic discrimination).

38. See *infra* Section II.B and Table 1.

39. As with informational integrity, rhetoric cannot be taken at face value without the aid of evaluative tools. Cf. COHEN, *supra* note 30, at 2, 15–47 (describing the importance of evaluative tools applied to informational integrity).

40. See *infra*, Sections II.B.3–4; Adam Clark Estes, *Trump’s Techno-Libertarian Dream Team Goes to Washington*, VOX (Nov. 11, 2024, at 06:45 ET) <https://www.vox.com/technology/383859/musk-trump-vance-silicon-valley> [<https://perma.cc/BA6S-6VF8>]; Zolan Kanno-Youngs, *Trump Casts Himself as a Protector of Persecuted White People*, N.Y. TIMES (May 21, 2025), <https://www.nytimes.com/2025/05/21/us/politics/trump-race-south-africa.html>.

or manipulate racial data at work, in schools, and other sites uncover a reversion to pre-democratic norms.⁴¹

This Article proceeds in three parts. Part I provides a historical analysis of the relationship between racial information and our status as a democracy. Materially oppressive, involuntary uses of racial identity under law marked a pre-democratic America. Civil war over the question of racial freedom rendered the beginnings of an inclusive, egalitarian democracy: a nation with a race conscience. By law, anti-discrimination norms yielded a social settlement over legitimate uses of racial data as: (1) a guardrail and common good, (2) a barometer, and (3) a social science. Against this backdrop, Part II deploys a taxonomic approach to racial meaning in light of dramatic departures from prior taxonomies. Section II.B presents a modernized taxonomy of the five ideological approaches to race-conscious data that reintegrates social disciplines as essential to law. Each approach may be identified by its principles and policies toward racial data in its conceptions of harm, accountability, and theories of the state.⁴² Part III addresses likely challenges to preserving uses of race-conscious data: asymmetries of power, surveillance, and control; commodification; and data integrity. Each contends with the colossal scale of data subject to law's control, often presented as race-neutral and thus underscoring the need for race-conscious tools beyond legal heuristics.⁴³

Recentering race-conscious data as legitimate and vital to democracy renders it cognizable, such that law may help—or at least, cannot hinder—society in its understanding that “[b]efore the data can be deracialized, we must deracialize the social circumstances that . . . create[] racial stratification.”⁴⁴ Addressing inequality hinges upon our continued ability to recognize race, relationships, and institutions as mutually defining. Disciplines realigning to meet this moment may assist

41. See discussion *infra*, Section I.A. The Reconstruction Amendments were transformative because they set out to “remake something of what the American social and legal culture had become[; and] tear out from the American soul its tradition of inequality[, replacing] it with a tradition and practice of equality.” Lawrence Lessig, *Reading the Constitution in Cyberspace*, 45 EMORY L.J. 869, 869–70 (1996).

42. See RUHA BENJAMIN, IMAGINATION: A MANIFESTO ix (2024) (referring to imagination interchangeably with “dreams and dreaming, ideas and ideologies”). Our examination focuses on EU laws and policies due to their globalized footprint, although other jurisdictions of course provide worthy and similar regulatory frames. These are beyond the scope of a single article.

43. See Frenkel & Krolik, *supra* note 12; DOROTHY ROBERTS, FATAL INVENTION: HOW SCIENCE, POLITICS, AND BIG BUSINESS RE-CREATE RACE IN THE TWENTY-FIRST CENTURY 3–4 (2011) (discussing race as a “political system” and “the main characteristic most Americans use to classify each other”). But see Emily Badger & Sheera Frenkel, *Trump Wants to Merge Government Data. Here Are 314 Things It Might Know About You.*, N.Y. TIMES (Apr. 9, 2025), <https://www.nytimes.com/2025/04/09/us/politics/trump-musk-data-access.html> (reporting IRS and DHS sharing of “closely held taxpayer data to help identify immigrants for deportation, over the objections of career employees”).

44. ZUBERI, *supra* note 28, at 102; accord ORLY LOBEL, THE EQUALITY MACHINE: HARNESSING DIGITAL TECHNOLOGY FOR A BRIGHTER, MORE INCLUSIVE FUTURE 70 (2023) (“Comparing outputs for different identities is a distributional question, a question of social justice, and it opens the door for a transformative shift in how we think about equality.”).

in restoring our understanding of law as a social science, one no more infallible than any other.⁴⁵

I. RACE CONSCIENCE: FROM PRE-DEMOCRACY TO DEMOCRACY

This Part examines how racialization, racial data, and race consciousness emerged as distinct concepts in relation to key U.S. institutions. It recounts formative uses of “race,” beginning with life-altering relationships between racial classification and material harm. Then, it reexamines ensuing settlements that came to support race-conscious uses of data to legitimate democratic institutions and processes. Deployed with trust, the following roles for race-conscious data emerged: guardrail and common good; barometer; and social science. Part II applies these relational concepts within a new political taxonomy.

A. IDENTITY AS STATUS: RACE-OPPRESSIVE USES

From their inception, U.S. racial practices relied upon definitions of “race” to exclude groups of people from citizenship.⁴⁶ Ideas about race developed to support claims about human variation, rather than existing as fixed or eternal attributes.⁴⁷ By claiming difference, European colonists justified social stratification throughout North America,⁴⁸ with non-whiteness the primary means of *othering*: to expel from territories of conquest, or to indenture, enslave, or otherwise deny humanity.⁴⁹ A

45. See CRITICAL (LEGAL) COLLECTIVE, RESIST/DEFEND/REIMAGINE PEDAGOGY: LEGAL EDUCATION AGAINST AUTHORITARIANISM 2–6 (Shirley Lin & Meena Roldán Oberdick eds., 2024). See generally Geoffrey Samuel, *Is Law Really a Social Science? A View from Comparative Law*, 67 CAMBRIDGE L.J. 288 (2008). On the public’s reassurance by the myth of liberal democracy as “self-correcting,” see OLUFEMI O. TAÍWÒ, ELITE CAPTURE: HOW THE POWERFUL TOOK OVER IDENTITY POLITICS (AND EVERYTHING ELSE) 23–24 (2022).

46. Racial concepts from this period continued racial practices from Europe. See ROBERTS, *supra* note 43, at 6. Sociologist Michael Banton helpfully distinguished modern connotations of “race” as primarily associated with the exclusion of certain people from privilege, while “ethnicity” is mainly an inclusive concept. MICHAEL BANTON, RACIAL THEORIES 199 (2d ed. 1998). In the United States, some identify with multiple categories simultaneously, for example, with a race and at least one ethnicity. *Id.* at 198. On “regime[s] of differential citizenship,” namely among those of Chinese, Japanese, and Mexican descent in the century following the Civil War, see Clarence Walker, *A Modest Proposal: Rethinking Black History, 1865–1965*, in MINORITY RELATIONS: INTERGROUP CONFLICT AND COOPERATION 250, 250–60 (Greg Robinson & Robert S. Chang, eds., 2017).

47. See OMI & WINANT, *supra* note 28, at 105, 115; BONILLA-SILVA, *supra* note 25, at 35–36. Social construction refers to how people imbue meaning to categories or groups based upon concepts from their environment. See BANTON, *supra* note 46, at 196–97. Under the sociological theory of racial formation, one’s “race” comes to refer to social, economic, or political conditions. See OMI & WINANT, *supra* note 28, at 79, 105–09.

48. See LÓPEZ, *supra* note 14, at 46–47 (noting colonists brought racial beliefs from larger patterns of colonialism and continued to invent “racial differences” to justify mistreatment of indigenous and African populations, even when self-organized by native nations and multiple languages, particularly West Africa); Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1716–17, 1716 n.19 (1993) (noting commonalities among indentured whites and enslaved people); see also Omi & Winant, *supra* note 28, at 130–32 (explaining racial despotism in the United States).

49. See LÓPEZ, *supra* note 14, at 46–47; *infra* Section II.B.6 (discussing white nationalism); see also Ariela J. Gross, *Litigating Whiteness: Trials of Racial Determination in the Nineteenth-Century South*, 108 YALE L.J. 109, 147–49 (1998) (explaining the impact of race on “reputation evidence”). See generally NOEL IGNATIEV, HOW THE IRISH BECAME WHITE (2d ed. 2009) (explaining how Catholic Irish

rigid, unforgiving hierarchy ensured that enslavement was the only life available to residents raced as Black.⁵⁰

Racial ideas were crucial to early U.S. political architecture and the slave economy. Such racial suppression, mandated by law to deny agency, rendered American society *pre*-democratic. Racial categories buttressed constitutional structures for the fledgling republic. The first laws called for denial of personhood, voting, representation, free movement, and other attributes of citizenship and equality.⁵¹ Delegates of the 1787 Constitutional Convention compromised upon counting a Black resident as only “three-fifths” of a white resident: in Article I, “free Persons” refers euphemistically to white people, “Indians” as people not to be taxed, and “all other Persons” to Black people.⁵² The openly algorithmic subsidy for Southern slaveholders further cemented white power and citizenship over enslaved populations.⁵³ The Three-Fifths Clause instantly inflated Southern states’ voting power—by roughly twenty extra Congressional seats annually—in the House of Representatives.⁵⁴

In 1790, the first Congress declared the right to naturalize and attain U.S. citizenship was limited to “white person[s].”⁵⁵ To define political representation, lawmakers also authorized a regular Census to sort residents into one of four explicitly and implicitly racialized groups: “white” (male or female); “other free persons” or “slaves,” referring to Black people; and “Natives” not subject to taxation.⁵⁶ Non-whites could not change their political and social status unless they convinced a court that they should be admitted into the “white” race.⁵⁷ The

immigrants to America in the eighteenth and nineteenth century fleeing caste and class oppression came to be “white”); Angela Onwuachi-Willig, *Multiracialism and the Social Construction of Race: The Story of Hudgins v. Wrights*, in *RACE LAW STORIES* (Rachel F. Moran & Devon W. Carbado, eds., 2008) (examining story of three generations of Wrights, enslaved by Hudgins, adjudicated to be non-Black and entitled to freedom).

50. See Harris, *supra* note 48, at 1716–17.

51. See JONES, *infra* note 62, at 134–36; U.S. CONST. art. 1, § 2, cl. 3, *amended by*, U.S. CONST. amend. XIV, § 2.

52. U.S. CONST. art. I, § 2, cl. 3. (including in “free persons” “those bound to Service for a Term of Years”).

53. Historians recognize at least two dimensions that defined national citizenship: “formal legal” citizenship and “full social and political citizenship.” See ARIELA J. GROSS, *WHAT BLOOD WON’T TELL: A HISTORY OF RACE ON TRIAL IN AMERICA* 7–8 (2008).

54. Brian D. Humes, Elaine K. Swift, Richard M. Vallely, Kenneth Finegold & Evelyn C. Fink, *Representation of the Antebellum South in the House Of Representatives: Measuring the Impact of the Three-Fifths Clause*, in *1 PARTY, PROCESS, AND POLITICAL CHANGE IN CONGRESS: NEW PERSPECTIVES ON THE HISTORY OF CONGRESS* 452, 454 (2002) (describing a study analyzing malapportionment from 1795 through 1861).

55. Naturalization Act of 1790, ch. 3, § 1, 1 Stat. 103, 103 (1790); IAN HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 1 (2d. ed. 2006).

56. Ch. 2, § 1, 1 Stat. 101 (1790). Native communities were acknowledged but still excluded from the national population count. GROSS, *supra* note 53, at 21. The Census omitted members of Indian nations from its count until 1860. Rose Buchanan, *Stand Up and Be Counted: Native Americans in the Federal Census*, NAT’L ARCHIVES: NEWS (Apr. 21, 2022), <https://www.archives.gov/news/articles/native-americans-census> [<https://perma.cc/HE7N-Q2PN>].

57. In 1850, the census acknowledged Black-white and Black-Native relations by adding “mulatto” and a notation for “color” when taking note if one was free or enslaved. See Gross, *supra* note 49;

federal government then merely served as an additional mediating function for how whiteness could be cemented as a superior status.

As U.S. colonists pushed west, Northerners who had all but abolished slavery after the American Revolution in their states influenced the growth of free Black communities beyond the South.⁵⁸ And a new Congressional policy, which permitted states to decree whether Black people's status would be "free" or slave, amplified the contradictions between race and citizenship.⁵⁹ By 1857, the Supreme Court interceded to declare Black Americans had "no rights"; they were not and could not be citizens.⁶⁰ Erasing the standing of Black freemen, seven Justices reimposed a pre-democratic tautology, all to elevate white slaveholding interests over even a statute to the contrary.⁶¹ Thus, in opinions crisscrossing the country, state courts "outright refused" to rely on *Dred Scott* or found ways to eliminate barriers to Black exercise of citizenship.⁶²

Ending slavery edged the republic toward democracy, a staggering achievement recognized around the world.⁶³ But violence and intransigence in a country that had just fought a civil war to dismantle the prior racial order marked a new period of authoritarianism.⁶⁴ Unionists sought a rule of law that placed non-whites on equal footing with whites, but disregard for the new federal authority

C. Matthew Snipp, *Racial Measurement in the American Census: Past Practices and Implications for the Future*, 29 ANN. REV. SOCIO. 563, 566 (2003).

58. GROSS, *supra* note 53 at 28–29 (noting, however, that the "vast majority of white Southerners were poor and . . . did not own slaves and never would").

59. *See id.* at 30.

60. *Scott v. Sandford*, 60 U.S. 393, 405 (1857) (enslaved party), *superseded by* U.S. CONST. amend. XIV. Throughout the nineteenth century, however, state and city localities sometimes exercised broad discretion over whom they considered citizens or which emigrants they were willing to naturalize as such. *See* GROSS, *supra* note 53 at 72.

61. *Scott*, 60 U.S. at 452 (declaring the Missouri Compromise of 1820, which designated all territories west of Missouri as free states, unconstitutional). In 1864, pro-abolition Senator Charles Sumner sought to remove the criterion of whiteness from the 1790 naturalization statute unsuccessfully. Angela M. Banks, *Respectability & the Quest for Citizenship*, 83 BROOK. L. REV. 1, 11 & n.50 (2017). While discussing a similar amendment regarding voting and office-holding eligibility in Montana, Sumner spoke for those formerly enslaved and their descendants; he spoke of how the "disgraced" *Sandford* Court used race in such a profoundly undemocratic way and stated it "ought to be expelled from its jurisprudence" and that "each branch of the government can interpret the Constitution for itself." CHARLES SUMNER, *Colored Suffrage in the Territory of Montana*, in 11 CHARLES SUMNER: HIS COMPLETE WORKS 62–63 (Lee and Shepard 1900) (1874), <https://readingroo.ms/4/8/3/7/48376/48376-h/48376-h.htm> [<https://perma.cc/P73V-UM2T>]. In 1870, however, naturalization was "extended to aliens of African nativity and to persons of African descent" only. Act of July 14, 1870, ch. 254, § 7, 16 Stat. 254, 255.

62. MARTHA S. JONES, BIRTHRIGHT CITIZENS: A HISTORY OF RACE AND RIGHTS IN ANTEBELLUM AMERICA 134–36 (2018) (discussing, *inter alia*, *Mitchell v. Lamar* (1857), *Ops. of the Justices of the Sup. Jud. Ct.*, on Question Propounded by the Senate, 44 Me. 505 (1857), *Anderson v. Milliken*, 9 Ohio St. 568 (1859)); *Op. of the Justices of the Sup. Jud. Ct.*, 41 N.H. 553 (1857).

63. *See* ERIC FONER, THE SECOND RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863–1877, at xxiii (1988).

64. *See* STEVEN LEVITSKY & DANIEL ZIBLATT, TYRANNY OF THE MINORITY: WHY AMERICAN DEMOCRACY REACHED THE BREAKING POINT 131 (2023) (observing that the U.S. South "succumbed to nearly a century of authoritarianism" after Reconstruction).

marked the end of Reconstruction.⁶⁵ Racial beliefs grew more complex and no less contentious as racial regimes decentralized.⁶⁶ Among workers, the point that systems structuring *is* resource distribution was not lost.⁶⁷

Race and color prejudice continued to stratify the institutions that could have influenced social attitudes or forged new and positive affective ties. White leaders accused Black people of receiving racial favoritism under the Civil Rights Act of 1866 and other Reconstruction-era laws because they diminished white privilege.⁶⁸ Courts openly spurned equality by sheltering racially segregated schools, neighborhoods, and transportation under public- and private-law actions alike.⁶⁹ States enacted Black Codes to deny Black and other non-whites the freedom to conduct business, own property, or travel; later, Jim Crow laws preserved racial segregation in voting, property ownership, marriage, and employment across society.⁷⁰ Those of lighter complexion sought to pass as white in hopes of mobility or survival.⁷¹ And strict immigration laws reshaped how the census would structure classification, often to limit the growing political and economic power of racial minorities and immigrants.⁷²

Retreat from Reconstruction left Americans to confront race and mediate that responsibility within the limits the law afforded them. But who wielded power sufficient to define a racial community—for themselves or someone else—still

65. See LAURA F. EDWARDS, *A LEGAL HISTORY OF THE CIVIL WAR AND RECONSTRUCTION: A NATION OF RIGHTS* 8 (Michael Grossberg & Christopher L. Tomlins eds., 2015) (“[J]udicial foot-dragging and political maneuvering in the 1870s turned back the clock nearly to where it had been before the war.”).

66. See *id.* at 5–6. After the Civil War, as parties continued to challenge racial concepts through the state, judges developed a shifting battery of tests to define “white.” LÓPEZ, *supra* note 55, at 2–13. These applied factors including skin color, physical features, national origin, ancestry, culture, and (most frequently) “common knowledge” and scientific testimony. *Id.*

67. See NANCY MACLEAN, *FREEDOM IS NOT ENOUGH: THE OPENING OF THE AMERICAN WORKPLACE* 3–4 (2006) (“[I]n challenging economic exclusion as a denial of full and fair citizenship, African Americans began a process that shifted the very axis of politics in the United States.”).

68. See RANDALL KENNEDY, *FOR DISCRIMINATION: RACE, AFFIRMATIVE ACTION, AND THE LAW* 23–25 (2013).

69. See, e.g., *Plessy v. Ferguson*, 163 U.S. 537, 541, 550–52 (1896) (upholding criminal statute used to prosecute Homer Plessy for refusing to ride in the car for people of color); *Chesapeake & Ohio & Sw. R.R. v. Wells*, 85 Tenn. 613, 613 (1887) (denying Ida B. Wells contract damages from railroad for physically removing her after her refusal to leave a car reserved for white male passengers only).

70. Trina Jones, *Shades of Brown: The Law of Skin Color*, 49 DUKE L.J. 1487, 1511–12 (2000); see KENNETH M. STAMPP, *THE ERA OF RECONSTRUCTION, 1865–1877*, at 112 (1966); Walker, *supra* note 46, at 252 (noting denial of citizenship entirely to Chinese and Japanese immigrants, and non-white status being assigned phenotypically as well as legally, as in the case of many Mexican Americans).

71. See Jones, *supra* note 70, at 1515–21. New racial categories for “Chinese and Indian” were added to the 1860 census, as well as “Japanese” in 1870. Snipp, *supra* note 57, at 566. In 1930, racial categories for Mexican, Filipino, Hindu, and Korean joined them, while Census enumerators were instructed to apply the one-drop rule (hypodescent) for Black people. *Id.* at 568. When Mexicans were incorporated by treaty as U.S. citizens in 1848, they were classified as white “for the most part” but treated as “Other” through segregation and voter suppression. GEORGE M. FREDRICKSON, *THE HISTORICAL CONSTRUCTION OF RACE AND CITIZENSHIP IN THE UNITED STATES* 10 (U.N. Rsch. Inst. for Soc. Dev. 2003); see also Harris, *Whiteness as Property*, *supra* note 48, at 1710–44, 1713 (describing the “economic logic” of racial passing within a white-dominated system).

72. OMI & WINANT, *supra* note 28, at 121–22.

hinged on agency.⁷³ As modern historians observe, the expansion of federal power after the Civil War unfolded in myriad, often contradictory ways across civic participation, civil rights, and economic policy.⁷⁴ Reformers redirected their efforts toward quickly evolving, broader sets of U.S. institutions to pursue racial integration.⁷⁵

B. INFORMED ANTI-DISCRIMINATION: RACE-CONSCIOUS USES OF LAW AND DATA

In the early twentieth century, formative periods for law and nation continued to align racialization with material harm. With the complexity of a far-flung populace, attitudes toward explicit use of racial data shifted as an expanding federal presence sought to fulfill earlier promises to rehabilitate law.⁷⁶ By the modern era, institutions became a principal means by which we learn about and forge social identities.⁷⁷ Three distinct features came to distinguish use of race-conscious data as equalizing: as guardrail and common good; as barometer; and as social science. Despite paternalistic or combative data tactics that undermined the rule of law, workplaces came to feature in the public's relationship with racial justice.

1. As Guardrail & Common Good

Information about race is a common good. This value is particularly salient in societies committed to racial integration, as common goods are collectively defined and cannot be reduced to individual subjectivities.⁷⁸ Like traffic rules and

73. See BANTON, *supra* note 46, at 196; Alex Hanna, Remi Denton, Andrew Smart & Jamila Smith-Loud, *Towards a Critical Race Methodology in Algorithmic Fairness*, ACM DIGITAL LIBRARY 501, 503–05 (Dec. 8, 2019), <https://arxiv.org/abs/1912.03593>.

74. EDWARDS, *supra* note 65, at 10; see Susan D. Carle, *A Social Movement History of Title VII Disparate Impact Analysis*, 63 FLA. L. REV. 251, 269–70 (2011); see also Cheryl I. Harris, *The Story of Plessy v. Ferguson: The Death and Resurrection of Racial Formalism*, in CONSTITUTIONAL LAW STORIES 187, 229 (Michael C. Dorf ed., 2d ed. 2009) (“*Plessy*’s demise as formal doctrine took over five decades, a protracted legal battle, and something of a social revolution.”).

75. See Peller, *supra* note 23, at 760; Lin, *supra* note 31, at 846–48. Jacquelyn Hall and others refer to these decades as the “long civil rights movement.” Jacquelyn Dowd Hall, *The Long Civil Rights Movement and the Political Uses of the Past*, 91 J. AM. HIST. 1233, 1235 (2005). Narratives often frame analysis through a “short” civil rights movement, typically beginning with the 1954 *Brown* decision and “culminat[ing] with the passage of the Civil Rights Act of 1964 and the Voting Rights Act of 1965.” *Id.* at 1234.

76. See Hanna et al., *supra* note 73, at 505.

77. See LAUREN B. EDELMAN, *Organizations, Institutions, and Law: The Sociological Significance of Philip Selznick’s Law Society, and Industrial Justice*, in THE ANTHEM COMPANION TO PHILIP SELZNICK 67, 67 (Paul van Seters ed., 2021) (arguing 1969 work on institutionalism conceptualized the “moral evolution of organizations as they become ‘institutions,’ or living entities infused with values”); Michael M. Oswalt, Jake Rosenfeld & Patrick Denice, *Power and Pay Secrecy*, 99 IND. L.J. 43, 97–98 (2023) (applying organizational theory to show power dynamics, once legitimated, obviate the need for coercive tactics).

78. The terms *common good* and *public good* are used interchangeably in the social sciences. See AMITAI ETZIONI, *THE COMMON GOOD* 1 (2004) (defining the *common good* as those interests that “serve all of us and the institutions we share and cherish – for instance, national defense or a healthy environment,” reaching intergenerational impact and extending beyond self-interest); BANTON, *supra* note 46, at 203–05 (describing clean air, public highways, and lighthouses as examples of *public goods*, as distinguished from private goods such as churches and “social clubs”). Identifying collective action as

highway guardrails, society designates common goods precisely because the attendant behaviors pose potentially high risks to all. In turn, public support for targeted laws to promote equality relies on knowledge of public affairs and a common sense of belonging.⁷⁹

Through race consciousness—a non-partisan political practice that comprehends racialization as a form of power⁸⁰—knowledge derived from racial data could now furnish guardrails against abuse and other democratic decline. Exposure to stories of discrimination as concrete deprivation rather than the mere process of classification rendered popular understanding of U.S. anti-discrimination law synonymous with equality by the 1950s.⁸¹ Statistics mattered. If legislative intent or explicit references to race in statutory text were absent to satisfy judicial review, the importance of racial statistics to convey the stark impact of unjust distributions grew proportionately.⁸² Rules remained either racially explicit or implicit.⁸³ They continued to work in tandem, whether government or community members enforced them. Americans

a tool of rational choice theory is one traditional approach, but among such other social sciences such as sociology, philosophy, and ethics, a broader family of theories can be described more flexibly under “rationalisations” arising from how individuals are socialized. *Id.* at 200–02.

79. See MICHAEL J. SANDEL, *DEMOCRACY’S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY* 5 (1996) (describing the latter as “a concern for the whole, a moral bond with the community whose fate is at stake” that characterized a republican theory of government); Lin, *supra* note 31, at 844, 856–57 (describing belated recognition of labor opposition to discrimination in the workplace as “public goods” by the NLRB in the 2010s).

80. See Peller, *supra* note 23, at 761.

81. See RISA L. GOLUBOFF, *THE LOST PROMISE OF CIVIL RIGHTS* 4–5 (2007). As a whole, social sciences challenge the legitimacy of limiting all political appeals to rational economic behavior. See TALİ MENDELBERG, *THE RACE CARD: CAMPAIGN STRATEGY, IMPLICIT MESSAGES, AND THE NORM OF EQUALITY* 17 (2001) (noting that while laws and material consequences can reinforce norms, norms broadly exert social force beyond that).

Voters came to expect a legal system to demonstrate its legitimacy through uniformity of rights as a déteinte against federalist disunity; the public remembers U.S. history, at least in public. See *id.*, at 17; see also, e.g., *infra* note 107 (quoting President Johnson upon signing Civil Rights Act of 1964). To understand how societies come to define tradition, historians demonstrate how “a multiplicity of institutions and media” communicates versions of the past, “including school, government ceremonies, popular amusements, art and literature, stories told by families and friends, and landscape features designated as historical either by government or popular practice.” David Glassberg, *Public History and the Study of Memory*, 18 *THE PUB. HISTORIAN* 7, 9 (1996). Moderating that understanding, however, historian Edwards observed modern legal and political discourse tend to overstate the extent to which Americans benefitted from federal government—including civil rights law. See EDWARDS, *supra* note 65, at 1–12 (critiquing mid-twentieth-century revisionist and subsequent legal-historical narratives for overstating the accomplishments, reach, and durability of federal authority and rights-based reforms).

82. See ANDREA FLYNN, SUSAN R. HOLMBERG, DORIAN T. WARREN & FELICIA J. WONG, *THE HIDDEN RULES OF RACE: BARRIERS TO AN INCLUSIVE ECONOMY* 169 (2017) (explaining facially race-neutral policies produce racially disparate outcomes and may conceal discriminatory intent, making impact-based evaluation necessary to assess policies by real-world effects rather than stated intent); *Washington v. Davis*, 426 U.S. 229, 242 (1976).

83. See FLYNN ET AL., *supra* note 82, at 8; Kim Forde-Mazrui, *Alternative Action After SFFA*, 76 *STAN. L. REV. ONLINE* 149, 157 (2024) (noting that even under originalist methodology, antebellum and Reconstruction-era statutes were not colorblind, but race-conscious, during Congressional debates); cf. Yankah, *supra* note 5, at 717–18 (noting KKK and other groups implemented racist violence under color of law, as law enforcement declined to protect communities commensurately across color lines).

became accustomed to race-conscious data precisely to test connections between the use of race and concrete, palpable harm.⁸⁴

Federal practice proved a watershed. Its own segregation of Black people from government posts marred such claims, as it embodied a federalized Black Code.⁸⁵ Only after the Brotherhood of Sleeping Car Porters pledged “ten, twenty, fifty thousand” would protest in D.C. did President Franklin Roosevelt bar racial discrimination in federal employment and within unions and firms engaged in war-related industries.⁸⁶ The 1941 executive order (EO) marked the first time a President explicitly addressed race since Reconstruction.⁸⁷

Greater transparency and the exchange of information about race set off political silencing of racial discourse as well, such as through curricular censorship and violence, rather than the outright legal erasure sought by the far-right.⁸⁸ Black and solidarist movements pressed for racial justice as sit-ins, marches,

84. Congress excluded domestic and agricultural workers from landmark wage protections and labor rights, its undemocratic nature apparent from a single glance at the racial compositions of those labor markets. 29 U.S.C. § 152(3) (excluding agricultural laborers and individuals employed “in the domestic service of any family or person at his home”); Llezlie Green Coleman, *Disrupting the Discrimination Narrative: An Argument for Wage and Hour Laws’ Inclusion in Antisubordination Advocacy*, 14 STAN. J. C.R. & C.L. 49, 82–83 (2018). The National Industrial Recovery Act of 1933, predecessor to the National Labor Relations Act, was “ostensibly colorblind” but its “codes” would have set “lower minimum wage rates in regions and occupations where Black workers predominated.” CEDRIC DE LEON, *FREEDOM TRAIN: BLACK POLITICS AND THE STORY OF INTERRACIAL LABOR SOLIDARITY* 71 (2025).

Exclusion of Black workers from the New Deal’s explicitly redistributive programs remains one of the most egregious examples of systemic racism from the last century. See OMI & WINANT, *supra* note 28, at 195; Joy Milligan, *Remembering: The Constitution and Federally Funded Apartheid*, 89 U. CHI. L. REV. 65, 146 (2022).

85. KENNETH R. MAYER, *WITH THE STROKE OF A PEN: EXECUTIVE ORDERS AND PRESIDENTIAL POWER* 185–86 (2001). Cf. Michael Z. Green, *Black-Labor Matters* 31 (2025) (unpublished manuscript) (on file with author) (connecting far-right strategies to dismantle protections for racial minority workers, particularly those that “bolstered Black advancement in this country,” undermine federal employment protections, labor law, and the NLRB, *inter alia*); Elisabeth Bumiller & Erica L. Green, *Trump Fires Black Officials From an Overwhelmingly White Administration*, N.Y. TIMES (Oct. 10, 2025), <https://www.nytimes.com/2025/10/08/us/politics/black-leaders-trump.html>.

86. RISA L. GOLUBOFF, *THE LOST PROMISE OF CIVIL RIGHTS* 237–38 (2007); Exec. Order No. 8802, 6 Fed. Reg. 3109 (June 27, 1941). The executive order also established the Fair Employment Practice Commission to receive complaints of discrimination. Exec. Order No. 8802, 6 Fed. Reg. 3109 (June 27, 1941).

87. Within another few years, President Truman banned racial segregation in the armed forces. Exec. Order No. 9981, 3 Fed. Reg. 4313 (July 28, 1948). The second Trump Administration’s mass layoffs of workers have “a particular impact on African Americans in civil service, as government employment has long been seen as a reliable pathway to Black middle-class prosperity.” Mitchell Hartman, *Government Job Cuts Have Disproportionate Effect on Black Federal Workers*, MARKETPLACE (May 21, 2025), <https://www.marketplace.org/story/2025/05/21/government-job-cuts-have-disproportionate-effect-on-black-federal-workers> [<https://perma.cc/557N-38GK>].

88. See JESSE HAGOPIAN, *TEACH TRUTH: THE STRUGGLE FOR ANTIRACIST EDUCATION* 144 (2025) (relating current attacks upon race consciousness in education to Black people’s “radical healing of organized remembering” to teach reading and other skills necessary for freedom). In West Virginia, racist arsonists struck three schools after a county voted to adopt new multicultural textbooks. CAROL MASON, *READING APPALACHIA FROM LEFT TO RIGHT: CONSERVATIVES AND THE 1974 KANAWHA COUNTY TEXTBOOK CONTROVERSY* 5 (2009). Then nascent, the Heritage Foundation publicly supported those attacking the texts as liberal or secular humanism. *Id.* at 111.

picketing, and boycotts spread across the country.⁸⁹ Indeed, during World War II, mass sacrifice of life and valor by soldiers across racial lines again put the lie to democracy once non-white military returned home to Jim Crow.⁹⁰ Americans were persuaded to pursue something entirely new: racial integration,⁹¹ where civil rights embodied a civic obligation for all to uproot discrimination.⁹²

By the turn of the millennium, the notion of a federal data infrastructure as a collective good seemed to have bridged even the deepest political divides. Under the mantle of “open government,” President Obama directed the U.S. Office of Management and Budget in 2009 to make federal data presumptively accessible with the aim of fostering transparency, participation, and collaboration.⁹³ Agencies began to model expansive and immediate public access to information, fostering such participation and favorable investment that Congress passed the Open, Public, Electronic, and Necessary (OPEN) Government Data Act⁹⁴ as part

89. See Lin, *supra* note 31, at 857. By the government’s estimates, Americans held nearly 1,000 civil rights demonstrations in 209 cities in a three-month period from May to July 1963. *About Everett M. Dirksen*, DIRKSEN CONG. CTR., <https://everettdirksen.dirksencenter.org/aboutdirksen.htm> [<https://perma.cc/8DHW-DQDK>] (last visited May 10, 2026).

90. See GOLUBOFF, *supra* note 86, at 41.

91. See William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1237–38 (2001).

92. See OMI & WINANT, *supra* note 28, at 108. Indeed, only after popular protests during this period did social scientists and scholars coalesce around race as a social construct, rather than biologically or intrinsically determined. *Id.* at 120. In 2025, a statistically representative study of mid- to large-sized U.S. firms (who employ at least 500 workers) that had engaged in DEI efforts reported that support for workforce diversity hiring goals was 86%, while support for programs intended to increase representation, including internship, mentorship programs, and leadership training was at 90%. ALIXANDRA POLLACK, DAVID GLASGOW, TARA VAN BOMMEL, CHRISTINA JOSEPH & KENJI YOSHINO, RISKS OF RETREAT: THE ENDURING INCLUSION IMPERATIVE 7, 28 (2025), <https://www.catalyst.org/en-us/insights/2025/risks-of-retreat-report> [<https://perma.cc/JG8D-F4VG>]. High levels of support hold true across generational and racial demographic groups. *Id.* at 7. *But see* Rachel Minkin, *Views of DEI Have Become Slightly More Negative Among U.S. Workers* (Nov. 19, 2024), <https://www.pewresearch.org/short-reads/2024/11/19/views-of-dei-have-become-slightly-more-negative-among-us-workers> [<https://perma.cc/G86R-SVAL>] (reporting support for “DEI” in late 2024 survey question elicited less support, at 54%, for “DEI” as “mainly [a] good thing” when compared with 56% in February 2023). With respect to President Trump’s 2025 policies to end “DEI” within federal government, 78% of Republican-leaning respondents approved, while 86% of Democrat-leaning respondents disapproved. JOCELYN KILEY & NIDA ASHEER, PEW RSCH. CTR., TRUMP’S JOB RATING DROPS, KEY POLICIES DRAW MAJORITY DISAPPROVAL AS HE NEARS 100 DAYS 31 (2025), https://www.pewresearch.org/wp-content/uploads/sites/20/2025/04/pp_2025-4-23_trump-100-days_report.pdf [<https://perma.cc/3N7M-8DMJ>].

93. The Obama administration related these concepts as constitutive of legitimate governance in these ways:

Transparency promotes accountability by providing the public with information about what the Government is doing. Participation allows members of the public to contribute ideas and expertise so that their government can make policies with the benefit of information that is widely dispersed in society. Collaboration improves the effectiveness . . . by encouraging partnerships and cooperation within [and across] . . . the Government and [with] private institutions.

Memorandum from Peter R. Orszag, Dir., U.S. Off. of Mgmt. and Budget, Exec. Off. of the President, on Open Government Directive (Dec. 8, 2009).

94. Foundations for Evidence-Based Policymaking Act of 2018, Pub. L. No. 115-435, § 202, 132 Stat. 5529 (2019).

of the Foundations for the Evidence-Based Policymaking Act of 2018.⁹⁵ But in step with rising political polarization, the first Trump Administration began to demonize diversity, equity, and inclusion (DEI) trainings and other allegedly “divisive concepts.”⁹⁶ The Biden–Harris Administration responded in 2021 by issuing a new executive order extolling racial data’s democratic functions, stating: “Affirmatively advancing equity, civil rights, racial justice, and equal opportunity is the responsibility of the whole of our Government,” and “requires a systematic approach to embedding fairness in decision-making processes . . . to redress inequities in [executive] policies and programs” that present societal barriers; and, in turn, the second Trump Administration moves to selectively obscure racially just hiring practices, official labor statistics, and census survey data.⁹⁷

2. As Barometer

Even in a strictly empirical role, racial data furnishes the knowledge society needs to navigate social and legal conflict. Trends in economic outcomes provide barometric readings for public governance and communities. Similarly, racial analyses help us understand how race operates systemically, beyond our subjective experience. At the entity level, information about racial practice began to provide more precise language to express structural inequality under Title VII and successive anti-discrimination laws.⁹⁸

95. *See id.* This enactment built upon a bipartisan consensus from President Obama’s 2009 order directing agencies to “proactively publish government information online in open formats and to take other steps toward building a culture of openness around data,” resulting in Data.gov, WeThePeople.gov, Challenge.gov, and USASpending.gov. *See* Anjanette Raymond, Beth Cate & Scott Shackelford, *US Takes Tentative Steps Toward Opening Up Government Data*, THE CONVERSATION (Mar. 6, 2019, at 06:40 ET), <https://theconversation.com/us-takes-tentative-steps-toward-opening-up-government-data-111956> [<https://perma.cc/96XU-MHVK>]. In the intervening years, however, it has become clear that openness, such as machine-readability of data, by itself cannot ensure accountable government. *See* Margaret Hu, *Critical Data Theory*, 65 WM. & MARY L. REV. 839, 844 (2024) (urging analysis of “government’s recent capture of big data and data surveillance architecture” with respect to surveillance and “automated decisionmaking”).

96. Exec. Order No. 13950, 85 Fed. Reg. 60683 (Sept. 28, 2020).

97. Exec. Order No. 13985, 86 Fed. Reg. 7009 (Jan. 25, 2021) (directing agencies to advance racial equity by removing barriers to equal opportunity and establishing an Interagency Working Group on Equitable Data to identify areas for improving federal data and its collection). In response to current administrative policies, former U.S. Department of Labor officials have framed President Johnson’s Executive Order 11246 as an extant obligation, to ensure “taxpayer dollars were not used to discriminate based on race” and other characteristics. Pamela Coukos et al., Open Letter to the Federal Contractor Community from Former U.S. DOL Officials 1 (Apr. 15, 2025) (on file with author).

98. *See* Sareeta Amrute, danah boyd, Alicia Demanuele, Pawan Minhas & Anubha Singh, *Trust in Information*, in TRUST ISSUES: AN ANTHOLOGY 9, 9 (2025) (“As information is read and presented in particular ways, it takes on meanings through different narrative frames, a process that is often described as the formation of knowledge.”); Lin, *supra* note 31, at 846–60, 847 (analyzing political theories expressed through competing theories within work law statutes, regulatory approaches, and jurisprudence, often centering collectivity and anti-subordination to “finish[] the project of Reconstruction and chang[e] American racial attitudes”).

In the modern era, concrete and material harms tied to racial classification can identify whether race is the proverbial distinction that makes a difference.⁹⁹ Federal and local governments possess rare economies of scale for broad information-gathering and expertise in areas of material well-being, as well as for autonomous study. Infrastructure for social statistics, specialized methods, and growing bases of historical documentation further democratized oversight of racial data.¹⁰⁰

Indeed, the federal government began to emphasize proportionality in hiring as an antidiscrimination tool in the 1950s and 1960s.¹⁰¹ Race became a fixture in discussions around proportionate representation. New bodies of data offered dynamic knowledge about race and inequality. In 1959, four years after the Montgomery bus boycotts, the Census revealed that 55% of Black respondents subsisted on incomes below the poverty line, compared with 18% of whites.¹⁰² After President Nixon took office, overall poverty levels for Blacks and whites shifted downward to 33.5% and 9.9%, respectively, yet a threefold disparity persisted.¹⁰³ Exposure to deep material differences humanized struggles against racism as civic responsibility.¹⁰⁴ Racial

99. Rather unhelpful for this discussion within legal circles is that “racial classification” has become a legal term of art that only applies to the far rarer act of a public (i.e., governmental) entity, rather than any person or entity in society. See Forde-Mazrui, *supra* note 83, at 160 (citing Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 299 (1978)). Thus, Court opinions on “racial classifications” often negatively “refer[] to a law that expressly includes race as an element such that the government is required or authorized to take account of race in administering the law.” Kim Forde-Mazrui, *The Canary-Blind Constitution: Must Government Ignore Racial Inequality?*, 79 L. & CONTEMP. PROBS. 53, 61 (2016). Eliding legally specific with lay meanings of “racial classification” drives much of Trump’s misrepresentation-by-law, as both bug and feature.

100. Accordingly, as with any other data, competing information, misinformation, or intentional disinformation about race becomes subject to public scrutiny. Cf. BLAKE EMERSON, *THE PUBLIC’S LAW* 139 (2019) (relating the EEOC’s “rational argumentation” about statistical effects as persuasive to Court recognition of disparate impact as discrimination); Griggs v. Duke Power Co., 401 U.S. 424, 427, 435 (1971) (finding measuring procedures for professional advancement only lawful so long as they measure the person for the job after hearing argumentation on racial discrimination in the workplace).

101. See JOHN DAVID SKRENTNY, *THE IRONIES OF AFFIRMATIVE ACTION: POLITICS, CULTURE, AND JUSTICE IN AMERICA* 115 (1996). In 1867, the government launched a national statistical program to “collect and diffuse” studies on education, although it covered an extensive area and decentralized education system, and staff to collect statistics was “almost nonexistent.” W. Vance Grant, *Statistics in the U.S. Department of Education: Highlights from the Past 120 Years*, in 120 YEARS OF AMERICAN EDUCATION: A STATISTICAL PORTRAIT I (Thomas D. Synder ed., 1993).

102. See *Historical Poverty Tables: People and Families – 1959 to 2024: Poverty Status of People by Family Relationship, Race, and Hispanic Origin*, U.S. CENSUS BUREAU (Aug. 15, 2025), <https://www.census.gov/data/tables/time-series/demo/income-poverty/historical-poverty-people.html> (click on hyperlink to Excel file “Table 2. Poverty Status of People by Family Relationship, Race, and Hispanic Origin [<1.0 MB]”). “Hispanic” people of any race began to be counted as of 1972, then reflecting a below-poverty rate of 22.8%. *Id.*

103. *Id.*

104. Cf. *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 312 (1977) (holding that statistical information of racial hiring disparities could be corroborated by anecdotal data of racial discrimination, over objections that companies should not be liable for broader societal barriers). Even earlier, publicizing racial data through in-person gatherings launched important dialogues that remain prominent today, including W.E.B. Du Bois’s curation of an exhibit to counter stereotypes and scientific racism through institutional data, surveys, charts, tables, and other texts at the 1900 Paris Exposition. JONATHAN W.Y. GRAY, *PUBLIC DATA CULTURES* 26–27 (2026).

data continued to reveal the nature of oppression as “mundane and systematic,” belying the individualist notion that “particular oppressors can and should always be identified and blamed.”¹⁰⁵

Most accounts of anti-discrimination law’s use of data tend to begin decades too late, such as with the 1971 Court’s recognition of disparate impact as a statistical theory of employment discrimination in *Griggs v. Duke Power Co.*¹⁰⁶ In employment, racial gulfs have always tended to be irrefutable. Between 1964 and 1966, the President and Congress allocated joint responsibility for racial justice in the labor market between the executive branch and major institutions.¹⁰⁷ For instance, just before Title VII took effect, the earnings of Black men relative to white men averaged .59, and rose to .70 by 1976.¹⁰⁸ But the rise in earnings has largely stalled, rising to .75 today.¹⁰⁹ Longitudinal studies such as these justify additional avenues for research and policymaking, including intersectional lenses of gender, immigration status, and education.

Labor markets best illustrate racial data’s core regulatory, democratic, and remedial functions. Laypeople tasked with interpreting and applying law understand the history and potential of rich information to inspire deterrence and intrinsic motivation.¹¹⁰ Pressed by civil rights movements, directives from Presidents Kennedy, Johnson, and Nixon for affirmative action plans and racial

105. IRIS MARION YOUNG, *JUSTICE AND THE POLITICS OF DIFFERENCE* 196 (1990). We turn to social science in the next section, Section I.B.3.

106. 401 U.S. 424, 431 (1971).

107. In signing the Civil Rights Act, President Johnson invoked a republican theory of government in which constitutional principles applied to public schooling, voting rights, and access to public accommodations, but also the labor market, to achieve equality:

We believe that all men are entitled to the blessings of liberty—yet millions are being deprived of those blessings, not because of their own failures, but because of the color of their skins The reasons are deeply embedded in history and tradition and the nature of man. We can understand without rancor or hatred how all this happens. But it cannot continue. Our Constitution, the foundation of our Republic, forbids it.

Eric S. Dreiband, *Celebration of Title VII at Forty*, 36 U. MEM. L. REV. 5, 14 (2005) (quoting President Johnson’s remarks); see also H.R. REP. NO. 914, pt.2, at 26–30 (1963) (discussing civil rights bill); SUBCOMM. ON LAB., S. COMM. ON LAB. & PUB. WELFARE, *LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972*, at 68–69 (1972) (discussing Title VII).

108. After 1964, figures revealed that Black employment gains were “concentrated in the post-1964 period; have not dissipated in the 1970s despite high rates of unemployment; and have been largest among more educated or skilled workers, younger workers, and female workers.” Richard B. Freeman, *Black Economic Progress After 1964: Who Has Gained and Why?*, in *STUDIES IN LABOR MARKETS* 248, 251 tbl. 8.1 (Sherwin Rosen ed., 1981).

109. *Median Weekly Earnings \$1,227 for Men, \$1,021 for Women, First Quarter 2024*, U.S. BUREAU LAB. STATS.: THE ECON. DAILY (May 2, 2024), <https://www.bls.gov/opub/ted/2024/median-weekly-earnings-1227-for-men-1021-for-women-first-quarter-2024.htm> [<https://perma.cc/M3D2-JSHJ>]. Median earnings for Black women (\$887), and Hispanic women (\$825) were, respectively, 85.3% and 79.3% of those for white women (\$1,040). *Id.*

110. See Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998); EEOC, *supra* note 21; Exec. Order No. 11246, 30 Fed. Reg. 12319 (Sep. 24, 1965); POLLACK ET AL., *supra* note 92.

data spurred employer action to make their hiring more inclusive.¹¹¹ The measures companies and unions then took to address structural inequity were specifically justified to address “manifest racial imbalances” in an express exception to Title VII’s anti-discrimination provision¹¹² so long as they did not “creat[e] an absolute bar” to other employees.¹¹³

Race as a routine demographic for self-attestation through the census, Title VII, Title VI, evidence-based rule-making, and other regulations elaborating upon statutory law solidified the public’s expectations around how civil rights ought to intervene as intertwined with material harm.¹¹⁴ Even as state uses of racial classifications have drawn stricter scrutiny, regardless of their purpose, the concept of independent “equity audits” have become routine in larger settings and institutions, beyond corporations, from school districts to real estate markets.¹¹⁵ Overly simplistic emphasis on raw numbers remains ripe for criticism if it elevates efficiency mindsets under unidimensional measures or empty symbolism.¹¹⁶ Instead, the greatest existential threat remains that of government abuse of racial and ethnic classification data, exemplified in the targeting and internment of Japanese-Americans during World War II through its misuse of 1940 census data to violate the Constitution.¹¹⁷ But the potential of such abuses does not

111. Exec. Order No. 10925, 26 Fed. Reg. 1977 (Mar. 6, 1961); Exec. Order No. 11246, 30 Fed. Reg. 12319; Exec. Order No. 11478, 34 Fed. Reg. 12985 (Aug. 8, 1969).

112. *United Steelworkers of Am., AFL-CIO-CLC v. Weber*, 443 U.S. 193, 197 (1979). *Cf. Ricci v. DeStefano*, 557 U.S. 557, 563 (2009).

113. *Johnson v. Transp. Agency*, 480 U.S. 616, 630 (1987) (citing *Weber*, 443 U.S. at 208). The Court further noted the affirmative action program at issue did not require “discharge of white workers and their replacement with new black hires.” *Id.*

114. 20 U.S.C. § 1094(a)(17) (setting annual reporting requirements of post-secondary schools to Department of Education about racial composition of students).

115. BENJAMIN, *supra* note 26, at 185–86 (noting variations in independence, transparency, and enforceability of equity audits); AJUNWA, *supra* note 37, at 367 (recommending audits for automated hiring systems).

116. Without a normative commitment to an evidentiary basis for claims about race and law, approaches to demographic inclusion can become wholly discretionary and pose the danger of empty symbolism. *See Anita Bernstein, Diversity May Be Justified*, 64 HASTINGS L.J. 201, 216 (2012) (“[D]iversity recognizes no entitlement based on historical injury. It permits power holders to do as they please.”); Maynard, *supra* note 14, at 1800 (criticizing efficiency facets of affirmative action approaches). *See generally* Linda Hamilton Krieger, Rachel Kahn Best & Lauren B. Edelman, *When “Best Practices” Win, Employees Lose: Symbolic Compliance and Judicial Inference in Federal Equal Employment Opportunity Cases*, 40 L. & SOC. INQUIRY 843 (2015) (finding that judicial use of institutional employment structures to infer nondiscrimination in EEO suits privileges employers). New York City’s auditing requirement for AI in employment decisions unfortunately has lagged from excessively vague definitions, despite early national attention. N.Y.C. ADMIN. CODE §§ 20-870 to 871; Lara Groves, Jacob Metcalf, Alayna Kennedy, Briana Vecchione & Andrew Strait, *Auditing Work: Exploring the New York City Algorithmic Bias Audit Regime*, ARXIV (Feb. 12, 2024, at 22:37 ET), <https://arxiv.org/abs/2402.08101> [<https://perma.cc/E83S-KPWJ>] (imparting lessons learned).

117. Lori Aratani, *Secret Use of Census Info Helped Send Japanese Americans to Internment Camps in WWII*, WASH. POST (Apr. 6, 2018), <https://www.washingtonpost.com/news/retropolis/wp/2018/04/03/secret-use-of-census-info-helped-send-japanese-americans-to-internment-camps-in-wwii>.

preclude the state nor institutions from generating best practices when publicly verified with meaningful oversight of accountability and intentions.¹¹⁸

Reaffirming these norms and histories, the first courts to evaluate challenges to the EOs targeting contractors' affirmative action and DEI activities granted nationwide injunctions in early 2025—often with passages admonishing the administration.¹¹⁹ Within the first 100 days of the second Trump Administration, veteran employment lawyers, too, reminded corporate clients that even if the current administration moved to formally rescind civil rights through the regulatory process, they may continue to follow the law, seek attorney-privileged advice, and voluntarily maintain diversity efforts. Indeed, in April 2025, the U.S. Equal Employment Opportunity Commission (EEOC) continued to require that private contractors disclose race, sex, and pay data ("EEO-1" disclosures) under decades-old rules that the Administration recognized it could not rescind unilaterally.¹²⁰

3. As Social Science

Concepts in race intrinsically rely upon social science, the means by which society recognizes, applies, and refines methods in defining knowledge

118. Rachel Arnow-Richman, *Finding Balance, Forging a Legacy: Harassers' Rights and Employer Best Practices in the Era of MeToo*, 54 U.S.F. L. REV. 1, 5 (2019).

119. See, e.g., Transcript of Bench Trial, Phase 1 (Closings) at 83, 85, Massachusetts v. Kennedy, No. 25-cv-10814 (D. Mass. July 2, 2025) (enjoining termination of federal grants under Trump Administration's Ending "DEI" Programs EO, "Ending Discrimination" and Opportunity EO, enjoining Exec. Order No. 14168, 90 Fed. Reg. 8650 (Jan. 30, 2025) [hereinafter Gender Ideology EO], and remarking: "[T]his represents racial discrimination and discrimination against America's LGBTQ community . . . I've never seen a record where racial discrimination was so palpable. I've sat on this bench now for 40 years . . ."); Malcolm Ferguson, *Reagan Appointee: Trump NIH Cuts Represent "Racial Discrimination,"* THE NEW REPUBLIC (June 16, 2025, at 16:25 ET), <https://newrepublic.com/post/196887/judge-trump-nih-cuts-racial-discrimination> [<https://perma.cc/LYS6-QY2Y>]; S.F. AIDS Found. v. Trump 786 F. Supp. 3d 1184, 1200–01, 1234 (N.D. Cal. June 9, 2025) (enjoining provisions terminating funding for programs that "promote gender ideology" and "equity-related grants or contracts" in executive orders 14168 and 14151). Free speech doctrines remain vital and highly relevant. See Nat'l Ass'n of Diversity Officers in Higher Educ. v. Trump, 767 F. Supp. 3d 243, 258 (D. Md. 2025) (granting injunction against President Trump executive orders 14151 and 14173, challenged by higher education officers of federal contractors, grantees, and private sector entities, on the basis of likely First Amendment violation and stating that "[e]nsuring equity, diversity, and inclusion has long been a goal, and at least in some contexts arguably a requirement, of federal anti-discrimination law"); Chi. Women in Trades v. Trump, 778 F. Supp. 3d 959, 972 (N.D. Ill. 2025) (holding that the certification requirement likely violated the First Amendment, and equity advancement termination provision likely infringed Spending Clause); New York v. Trump, No. 25-cv-39, slip op. at 44 (D.R.I. Mar. 6, 2025) (preliminarily enjoining federal agency defendants, halting "federal funds to the States under awarded grants, executed contracts, or other executed financial obligations" based on, *inter alia*, the DEI and Gender Ideology EOs).

120. See, e.g., Ogletree Deakins, Legally Compliant Voluntary Self-Identification Practices: To Ask or Not to Ask? (Apr. 16, 2025) (unpublished presentation notes) (on file with author); Joshua S. Roffman, Alissa A. Horvitz, James M. McCauley, "Diversity" and "Lawful" Are Not Contradictory Terms: Drawing the Line Between Lawful and Unlawful DEI/DEIA (Mar. 26, 2025), <https://connect.directemployers.org/viewdocument/20250326-diversity-and-lawful> [<https://perma.cc/MC3Y-ZVDR>]; EEOC, *supra* note 21, at 7–8. See also "DEI Discrimination by Federal Contractors" EO; and Pending EO 12866 Regulatory Review: Rescission of EEO-1, EEO-2, EEO-3, EEO-4, EEO-5, and Reporting Requirement Under Title VII, the ADA, GINA, and the PWFA, *supra* note 8.

itself.¹²¹ The truth that race is socially constructed—not innate, fixed, nor biological—is reaffirmed to laypersons when they experience that data, too, constructs a racial identity for them even when racial attributes are removed.¹²² When laws and policies advance civil rights, policymakers and judges openly rely upon fields of knowledge, including sociology, organizational theory, social statistics, political science, and history, as discussed below—among others.¹²³

Social science provides the bounds of meaningful debate on matters of race.¹²⁴ Members of the public fall back on their methods and norms, especially in the face of information overload. In 2002, when California voters braced for a referendum to prohibit state government collection of racial data, the American Sociological Association issued a report-length “statement” admonishing the move: “Refusing to acknowledge the fact of racial classification, feelings, and actions, and refusing to measure their consequences will not eliminate racial inequalities [but a]t best . . . will preserve the status quo.”¹²⁵ Californians rejected the “Racial Privacy Initiative” by a 28-point margin, 64–36.¹²⁶

Sociology and organizational psychology studies of institutions have documented their efforts to adapt to civil rights frameworks, particularly in employment. A far cry from the early census enumerators, questions of demographic

121. See Samuel, *supra* note 45, at 290–91 (observing that social science is “more than statistical method”); Hu, *supra* note 95, at 857–58 (“A foundational epistemological principle holds that all truths—what is accepted as knowledge and reality—are embedded in cultural and social narratives, even if those promoting the knowledge or reality cannot see this.”).

122. For seminal studies on this point from computer science, see MIRANDA BOGEN & AARON RIEKE, *HELP WANTED: AN EXAMINATION OF HIRING ALGORITHMS, EQUITY, AND BIAS* 45 (2018) (noting predictive tools reflect institutional or systemic biases when “past hiring decisions and evaluations . . . reveal and reproduce patterns of inequity at all stages of the hiring process, even when tools explicitly ignore race, gender, age, and other protected attributes”); Piotr Sapiezynski, Avijit Ghosh, Levi Kaplan, Aaron Rieke & Alan Mislove, *Algorithms That “Don’t See Color”: Comparing Biases in Lookalike and Special Ad Audiences*, ARXIV (May 31, 2022), <https://arxiv.org/abs/1912.07579> [<https://perma.cc/4X6S-MS5V>] (“[S]imply removing demographic features from the inputs of a large-scale, real-world algorithm will not always suffice to meaningfully change its outputs.”). Corollary to these entrenched data-based dynamics, human decisionmakers may titrate access to candidate information to advance anti-discrimination law. Naomi Schoenbaum, *Information Regulation as Antidiscrimination*, 60 U.C. DAVIS L. REV. (forthcoming 2026) (manuscript at 30–34). Undisputed within racial data debates, also, is that power suffuses “race” based upon who is racializing whom as part of a certain racial group. See BANTON, *supra* note 46, at 196 (distinguishing racial categories from social group membership, where the latter is defined by members’ self-consciousness of belonging to a group, the “relations between its members,” and degrees of identification).

123. See Arnow-Richmon, *supra* note 118, at 24; Hiba Hafiz, *Structural Labor Rights*, 119 MICH. L. REV. 651, 693–94 (2021); LAUREN B. EDELMAN, *WORKING LAW: COURTS, CORPORATIONS, AND SYMBOLIC CIVIL RIGHTS* 28 (2016).

124. Carle, *supra* note 74, at 270–80.

125. AM. SOCIO. ASS’N, *THE IMPORTANCE OF COLLECTING DATA AND DOING SOCIAL SCIENTIFIC RESEARCH ON RACE* 4 (2003).

126. Prop. 54: Classification by Race, Ethnicity, Color, or National Origin § 32(a) (2003); KEVIN SHELLEY, CAL. SEC’Y OF STATE, STATE OF CAL., STATEMENT OF VOTE: OCTOBER 7, 2003 STATEWIDE SPECIAL ELECTION xii–xiii (Nov. 14, 2003); see *Prop. 54 Supports Ignorance, Not Privacy*, NEWMEDIASWIRE (Sep. 23, 2003, at 03:00 ET), <https://www.newmediawire.com/news/prop-54-supports-ignorance-not-privacy-3068824> [<https://perma.cc/Y5UZ-4Y72>] (“Proponents call [Prop. 54] the Racial Privacy Initiative . . .”).

representation are as varied in purpose today to include evaluating the reach of government benefits and services,¹²⁷ access to quality classroom instruction,¹²⁸ exposure to criminal systems,¹²⁹ and decisions in immigration policy.¹³⁰ With richer depths of information available in policy deliberations, the public and courts both stand to benefit.¹³¹ Critical data studies are persuasive to the public as authoritative, particularly in labor and employment litigation. Now, social scientists routinely participate as expert witnesses in litigation¹³² and state regulation of market power.¹³³ Because numbers alone cannot definitively prove one reality over another, however, they contextualize the limits of knowledge as a vital component of public debate.¹³⁴

Independent of judicial developments, political scientists continue to pursue information studies, collection and regulation of racial data, and legal methodology. A burgeoning literature now interrogates the political economy of big data, platforms, and responses to regulatory interventions across parties.¹³⁵ In an early influential treatment, Julie Cohen predicted political dynamism and economic dominance could shelter the exercise of undemocratic political control through

127. See, e.g., Dorothy A. Brown, *Race and Class Matters in Tax Policy*, 107 COLUM. L. REV. 790, 796–97, 810–19 (2007); U.S. CENSUS BUREAU, AMERICAN COMMUNITY SURVEY INFORMATION GUIDE 1 (Oct. 2017).

128. See NAT'L CTR. FOR EDUC. STATS. (NCES), U.S. DEP'T OF EDUC., <https://nces.ed.gov> [<https://perma.cc/R583-WFXE>] (last visited May 11, 2026). A non-partisan statistical arm of the U.S. Department of Education publishes an annual “report card” about student academic achievement and experiences, to provide “meaningful results to improve education policy and practice since 1969.” *Id.*

129. See, e.g., Jessica M. Eaglin, *Racializing Algorithms*, 111 CALIF. L. REV. 753, 755–60 (2023).

130. See, e.g., Catherine Y. Kim & Amy Semet, *An Empirical Study of Political Control over Immigration Adjudication*, 108 GEO. L.J. 579, 586–87 (2020) (analyzing more than 830,000 removal proceedings to determine that a statistically significant predictor of removal in certain circumstances is the presidential administration in control at time of a deportation decision). See generally MING HSU CHEN, PURSUING CITIZENSHIP IN THE ENFORCEMENT ERA (2020).

131. In the formative period after the 1964 Civil Rights Act, the Court found statistical data important, credible, and persuasive evidence of discrimination. See, e.g., *Griggs v. Duke Power Co.*, 401 U.S. 424, 436 (1971); *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 307 (1977).

132. ZUBERI, *supra* note 28, at 135. As an auxiliary tool, statistics may not be used to answer the ultimate question of causation, a notoriously circular concept for social statisticians as well as legal audiences. *Id.* at 123–25, 133. Disparate impact analysis, as codified by statute, arose from the social science thinking of racial justice advocates in the 1940s. See discussion *supra* Section I.B.2.

133. Hafiz, *supra* note 123, at 693–94 (noting economists, policymakers, and antitrust experts in the Department of Justice and Federal Trade Commission “developed useful mechanisms for tempering imbalances between monopsonists and sellers” in the context of proposed mergers).

134. ZUBERI, *supra* note 28, at 135–37.

135. See, e.g., COHEN, *supra* note 30, at 3, 6; Chaz Amett, *Data: The New Cotton*, SOC. SCI. RSCH. COUNCIL: JUST TECH (May 25, 2022), <https://just-tech.ssrc.org/articles/data-the-new-cotton> [<https://perma.cc/4EVJ-G28Q>]. On the political economy of worker data, see BRISHEN ROGERS, DATA AND DEMOCRACY AT WORK: ADVANCED INFORMATION TECHNOLOGIES, LABOR LAW, AND THE NEW WORKING CLASS 7–10 (2023). See generally Julie E. Cohen, *Oligarchy, State, and Cryptopia*, 94 FORDHAM L. REV. 563 (2025); Chaz Amett, *Race, Surveillance, Resistance*, 81 OHIO ST. L.J. 1103 (2020).

new technologies.¹³⁶ For race-conscious law and data, however, workers' idea-tion of accountability remains undertheorized.¹³⁷

Gathering data from the general public requires trust.¹³⁸ Especially large entities must demonstrate how data processes are designed in consultation with stakeholders.¹³⁹ Bipartisan national policy justified investment in expertise and specialization such that in 1980, Congress entrusted the Office of Management and Budget (OMB) with coordinating federal statistical system activities to ensure "integ- rity, objectivity, impartiality, utility, and confidentiality of information col- lected for statistical purposes."¹⁴⁰

History, for its part, emphasizes the relational nature of biography, commu- nity identity, and circumstantial developments, including economic condi- tions.¹⁴¹ For this reason, companies that frame staff training on discrimination in accordance with civil rights compliance narratives have been documented as bolstering its effectiveness.¹⁴² Such firms signal their support for specific forms of equity, meaningfully assessing their relational data to "provide ongoing checks to measure and report their progress in an accountable

136. COHEN, *supra* note 30, at 225–28. Aptly, Cohen termed it the "authoritarian end run." *Id.* at 225; see also STEVEN LEVITSKY & DANIEL ZIBLATT, *HOW DEMOCRACIES DIE* 99 (2018) ("[W]e cannot rely on constitutions alone to safeguard democracy against would-be authoritarians").

137. Ironically, robust and rigorous models from the United States had been the envy of nations that— on paper— forbid the collection of racial and ethnic data yet continue to experience manifest racism and ethnonationalism. Philip Oltermann & Jon Henley, *France and Germany Urged to Rethink Reluctance to Gather Ethnicity Data*, THE GUARDIAN (June 16, 2020, at 11:19 ET), <https://www.theguardian.com/world/2020/jun/16/france-and-germany-urged-to-rethink-reluctance-to-gather-ethnicity-data> [<https://perma.cc/AD6Q-R2BV>] (describing the reluctance of Germany's and France's governments to collect official demographic data on race and ethnicity).

138. ARI EZRA WALDMAN, *PRIVACY AS TRUST: INFORMATION PRIVACY FOR AN INFORMATION AGE* 69–70 (2018) (arguing conceptions of privacy should include "injuries to the background structure of society that allows sharing to occur in the first place"); Amrute et al., *supra* note 98, at 14 (quoting danah boyd regarding safeguards around access to U.S. Census data); Janet A. Vertesi & danah boyd, *The Resource Bind: System Failure and Legitimacy Threats in Sociotechnical Organizations*, 17 SOCIOLOGICA 25 (2024).

139. Administrative law principles of notice and comment buttressed the accountability of executive rulemaking. See 5 U.S.C. § 553(b)–(d) (requiring for informal rulemaking: publication of a "general notice of proposed rule making . . . in the Federal Register" for the public "to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation," the incorporation into the rule of "a concise general statement of [its] basis and purpose," and publication of the agency's final rule).

140. *Revisions to OMB's Statistical Policy Directive No. 15: Standards for Maintaining, Collecting, and Presenting Federal Data on Race and Ethnicity*, 89 FED. REG. 22182–83 (Mar. 29, 2024). For racial data, as with all federal data, OMB centralizes relevant federal policies around "statistical collection procedures and methods" including "data classification" in administering federal programs such as the Census. Paperwork Reduction Act of 1980, § 3504(e).

141. E.J. Hobsbawm, *From Social History to the History of Society*, 100 DAEDALUS 20, 20–22 (1971) ("[T]he analytical base of any historical inquiry into the evolution of human societies must be the process of social production."); cf. Amrute et al., *supra* note 98, at 10.

142. Michael Z. Green, *(A)woke Workplaces*, 2023 WISC. L. REV. 811, 815 (2023); cf. Veronica Root Martinez & Gina-Gail S. Fletcher, *Equality Metrics*, 130 YALE L.J.F. 869 (2021) (applying social movement, corporate governance, compliance, and organizational behavior literatures to define "equality metrics" corporations may adopt, from disclosing current demographic diversity of entity workforces and supply chains, as well as measurable, specific plans to improve racial equity).

fashion.”¹⁴³ Importantly, unions and other labor organizations invest considerable resources in political education and socialization for their members and remain among the few formal organizations to do so.¹⁴⁴ As Parts II and III demonstrate, history and open-minded inquiry render race consciousness a dynamic, potentially positive source of identity and democracy, without devolving into white nationalism or rank stereotyping.

Race-conscious applications of law and data have fluctuated dramatically over centuries, testing norms, but the relationships between government and race remain an existential constant. A race-conscious polity lies at the heart of it: “America will be a multiracial democracy[,] or it will not be a democracy at all.”¹⁴⁵

II. RACE-CONSCIOUS DATA: THE NEW POLITICAL TAXONOMY

Race frustrates when we struggle to discuss inequality using language considered taboo, rather than legitimate.¹⁴⁶ Race consciousness, by contrast, is an understanding of racialization as a process of shared histories, both good and infamous,¹⁴⁷ and a desire to apply such knowledge toward overcoming material inequality. With social science, empirical measurement of racial difference itself may embrace further layers of “diversity, multiplicity, and heterogeneity.”¹⁴⁸

This Part assumes that race is knowable and its complexity warrants extensive study. Section II.A describes prior political taxonomies for racialization or racial information as a whole, although none address racial data in the aggregate. Section II.B introduces to the literature a modern political taxonomy, adaptable to future developments toward racial data. Presently, public opinion toward data practices evinces relative sophistication with informational political economy;

143. Green, *supra* note 142, at 815.

144. See Michael M. Oswalt, *Disorganized Labor (Law)*, 45 YALE L. & POL’Y REV. 80, 97 (2025); Shirley Lin & Michael Nunn, *Social Justice Unionism: Intersectionality in the Twenty-First Century Workplace*, 86 OHIO ST. L.J. 1, 3 (2026); see also Alexander Hertel-Fernandez, *Civic Organizations and the Political Participation of Cross-Pressured Americans: The Case of the Labor Movement*, 119 AM. POL. SCI. REV. 1173 (2025) (noting variations in union culture, and documenting means by which union activities transmit values and norms to members).

145. LEVITSKY & ZIBLATT, *supra* note 64, at 225.

146. See *supra* note 34 and accompanying text; KAREN E. FIELDS & BARBARA J. FIELDS, RACECRAFT: THE SOUL OF INEQUALITY IN AMERICAN LIFE 11–12 (2012) (observing discourses regarding economic class, inequality, and poverty are disfavored and marginalized in public debate, contributing to challenges in exploring race); john a. powell, *The Race and Class Nexus: An Intersectional Perspective*, 25 LAW & INEQ. 355, 356–58 (2007) (urging public discussion of race to account for its interrelationship with class, as one cannot be discussed distinctly from the other).

147. See BANTON, *supra* note 46, at 198 (describing racial groups as having “a long shared history, of which the group is conscious as distinguishing it from other groups, and the memory of which it keeps alive” (quoting *Mandla v. Dowell Lee* [1983] 2 A.C. 548 (HL) (appeal taken from Eng.))).

148. ZUBERI, *supra* note 28, at 141; see NAT’L ACADS. OF SCIS., ENG’G, & MED., USING POPULATION DESCRIPTORS IN GENETICS AND GENOMICS RESEARCH: A NEW FRAMEWORK FOR AN EVOLVING FIELD app. D (2023), <https://www.nationalacademies.org/read/26902/chapter/1> [<https://perma.cc/NQ9N-2PVD>] (modeling a decision tree for the use of racial and other population descriptors in biomedical research).

individuals need to be knowledgeable yet not necessarily experts in new technology to critique pertinent policies and their impacts.¹⁴⁹

A. PAST TAXONOMIES

Taxonomies that have influenced race commentary tend to develop in response to constitutional law developments in the courts. As those developed in decades past risk becoming obsolete under deeply contested equality jurisprudence, law's "old tech" functions—how law codes and prefers certain kinds of racial data, in particular—remain accessible frames.¹⁵⁰ As predecessors, they cannot be neglected in informing the ways modern ideological positions engage with racial data.

In 1991, Neil Gotanda enumerated four meanings society attached to the Court's race jurisprudence: status-race; historical-race; formal-race; and culture-race.¹⁵¹ Status-race considered and applied race "as an indicator of social status."¹⁵² Historical-race referred to race to "embod[y] past and continuing racial subordination" by detecting racialization as substantive repercussions from racial categories.¹⁵³ Formal-race referred to supposedly "neutral, apolitical" concepts that refer to "merely 'skin color' or country of ancestral origin . . . unconnected to social attributes such as culture, education, wealth, or language."¹⁵⁴ And as a precursor to concepts of race consciousness today, culture-race referred to using "Black" to refer to "African-American culture, community, and consciousness," supporting an inclusive rationale for diversity.¹⁵⁵ A contemporary critical theorist, Gary Peller, identified law and race discussions as splitting further into roughly two normative camps. Integrationism sought to "replace[] . . . prejudice and discrimination with reason and neutrality" as the orthodoxy of democracy.¹⁵⁶ Race consciousness, the latter group, framed race as a political practice linked to power.¹⁵⁷

Growing backlash toward race-conscious applications of law, most visibly in debates over affirmative action, led to refinements that accounted for more salient conservative political ideology.¹⁵⁸ Proponents of "colorblindness" argued that race

149. Cf. Ari Ezra Waldman, *Civil Society and the Crisis of Privacy Law*, 74 EMORY L.J. 1079, 1081, 1123 (2025) (discussing role of civil society in efforts to craft data privacy policies).

150. See also *supra* note 25 and accompanying text (defining "old tech").

151. Neil Gotanda, *A Critique of "Our Constitution Is Color-Blind"*, 44 STAN. L. REV. 1, 36–40, 56–59 (1991).

152. *Id.* at 4.

153. *Id.*

154. *Id.*

155. *Id.* at 4–5. While specific to Black racial experiences, such emphasis recognizes the centrality of anti-Blackness to U.S. racial thought. The influential taxonomy emerged precisely as conservatives concertedly attacked scholars over "political correctness," earlier culture warfare that melded strategies of canonizing American history; an "opposition to group rights"; and "the affirmation of free speech." TODD GITLIN, *THE TWILIGHT OF COMMON DREAMS: WHY AMERICA IS WRACKED BY CULTURE WARS* 166–69 (1995).

156. Peller, *supra* note 23, at 760.

157. *Id.* at 761.

158. See Mario L. Barnes, "The More Things Change . . .": New Moves for Legitimizing Racial Discrimination in a "Post-Race" World, 100 MINN. L. REV. 2043, 2051 n.29 (2016).

should not play any role in decisionmaking.¹⁵⁹ In 2018, Randall Kennedy further parsed this group into Colorblind Gradualists and Colorblind Immediatists.¹⁶⁰ Colorblind Gradualists believed that removing any role for race should be a “long-range aspiration” in light of ongoing impacts of its legacy.¹⁶¹ This position is perhaps best captured by Justice Blackmun’s admonition in *Regents of the University of California v. Bakke* that “in order to get beyond racism, we must first take account of race.”¹⁶² By contrast, Colorblind Immediatists believed any use of racial classification as a basis for decision-making must be eliminated.¹⁶³ The challenges of taxonomizing solely from judicial treatments of race became clear as Professor Kennedy conceded that a strategic basis for interpretation is whether the one calling legal balls or strikes is from “those with political influence.”¹⁶⁴ During a particular moment in time—after *Parents Involved in Community Schools v. Seattle School District No. 1*¹⁶⁵ but before *SFFA*—this last taxonomy did not fathom application to contexts beyond material, concrete harm.¹⁶⁶ Thus, today’s race-silencers wish to bypass law, norm, and history in favor of abstract, procedure-based white grievance.¹⁶⁷

159. KENNEDY, *supra* note 68, at 147. See David A. Strauss, *The Myth of Colorblindness*, 1986 SUP. CT. REV. 99, 117 (1986) (describing colorblindness to express an “ideal of a society in which race is as insignificant a factor as eye color”).

160. KENNEDY, *supra* note 68, at 147–48.

161. *Id.*

162. *Id.* at 147 (quoting 438 U.S. 265, 407 (1978) (Blackmun, J., concurring in part and dissenting in part)).

163. See *id.* at 147–48. However, even among Colorblind Immediatists, exceptions for “emergencies” would support a race-based decision by prison officials to segregate prisoners. *Id.* at 161 (citing *Johnson v. California*, 543 U.S. 499, 524 (2005) (Scalia, J., and Thomas, J., dissenting)).

164. *Id.* at 151–54.

165. 551 U.S. 701, 710–11 (2007) (holding that it was unconstitutional for a school district to rely upon students’ races in assigning them to particular schools in order to achieve a particular racial balance at each school).

166. Professor Kennedy hints at misinformation in a manner elliptical to those categories, noting conservatives have co-opted racial justice advocates’ invocations of “colorblind” democracy to oppose segregation during the 1950s and 60s. KENNEDY, *supra* note 68, at 155–56 (quoting Ralph Bunche, *inter alia*).

167. Cf. Maynard, *supra* note 116, at 1777–78 (“Colorblindness, . . . once used as a tool to dismantle racial hierarchy, is now seen as a tool to protect white ‘victims’ from [racial equity] efforts.” (footnote omitted)).

Americans have long struggled, with some success, to resist racial demagoguery and bridge profound political differences, even forging interracial solidarity and insisting on robust measures of equality in workplaces.¹⁶⁸ Today, we face the most strident calls for race-oppressive uses of law federally since the Civil War.¹⁶⁹

B. THE NEW POLITICAL TAXONOMY

Taxonomies facilitate societies in understanding and distinguishing ideologies, rhetoric, and the import of one policy over another.¹⁷⁰ Thus, across the political spectrum, legal strategies often seek to invert the order strategically: first, “law” provides politics with its seemingly unassailable “symbols of legitimacy”; then, these symbols serve as “building blocks of a political ideology.”¹⁷¹ A detailed taxonomy aids in disrupting such oversimplification.

Building upon and expanding prior taxonomies, this Section identifies five leading ideologies: (1) Liberal Data Guardians, (2) Race-Conscious Dignitarians, (3) Colorblind Regressives, (4) Libertarians, and (5) White Nationalists.¹⁷² This Section’s fundamental theoretical assumption is that race consciousness is a starting point for evaluating the treatment of racial information. The resulting taxonomy generates more productive evaluations beyond current arguments for or against “colorblindness” or distinctions only among centrist subgroups.¹⁷³ Instead, it equips readers to pierce superficial statements and identify the *content* of policy positions that are distinct, democratically beneficial, or self-contradictory.

168. Cf. Lin, *supra* note 31, at 859 (“If collectivity and solidarity were constitutional features of the economy during the New Deal, equal protection would overlap to the extent that solidarity, as of the Second Reconstruction, must always be interracial to be meaningful.”).

169. U.S. law thus far has failed to keep regressive interpretive methods from undermining equality. See Richard Thompson Ford, *Rethinking Rights After the Second Reconstruction*, 123 YALE L.J. 2942, 2949–50 (2014); STEVEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW* 232 (2008); CRITICAL (LEGAL) COLLECTIVE, *supra* note 45, at 2–6 (addressing effects of privileging legal formalist methods upon racial justice and the rule of law).

170. Observing common themes that constitute an ideology may clarify meaning, as in the example of policies tailored to a particular problem and justifications for interpreting law to address them. See BONILLA-SILVA, *supra* note 25, at 38–39 (noting that in a racialized social system, dominant or subordinate races alike have the capacity of developing frameworks to explain and justify—or challenge—the racial status quo).

171. STUART A. SCHEINGOLD, *THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE* 13 (Univ. of Mich. Press 2004); see also generally JUDITH N. SHKLAR, *LEGALISM* (1964) (exploring the relationships among law, morals, and politics).

172. This taxonomy is original to the literature. Long overdue, a modernized taxonomy invites expansion, updating, or elaboration by way of examples of entities and law or other reform proposals.

173. See, e.g., Richard Delgado, *Zero-Based Racial Politics: An Evaluation of Three Best-Case Arguments on Behalf of the Nonwhite Underclass*, 78 GEO. L.J. 1929, 1931–32 (1990) (examining “the moderate, principled right,” “moderate, principled left,” and “communitarian social-welfare theory”). Regardless of personal standpoints, all seem to agree that race is inherently political. Views of race can be taxonomized to permit stakeholders to understand how analytically, “old tech” (laws and our experiences with racial logics) relate and help us evaluate the infrastructure of new technologies. Jessica Eaglin’s recent identification of four “color-blind” discourses is an important disambiguation of rhetoric and debates over algorithms in criminal law systems. Eaglin, *supra* note 29, at 1390–97 & 1397 tbl. 1.

TABLE 1: TAXONOMY OF IDEOLOGIES WITH RESPECT TO RACE-CONSCIOUS DATA

Type	Description	Examples	Desired Law or Regulation
(1) Liberal Data Guardians	See Section II.B.1	Electronic Privacy Information Center; American Civil Liberties Union (ACLU) (2025); American Federation of Labor and Congress of Industrial Organizations (AFL-CIO); Democracy Forward ¹⁷⁴	General Data Protection Regulation of 2018 (GDPR) permission of limited processing of racial, ethnic, and other “special categories of personal data” under narrowly defined exceptions; entities regulated as data “controllers” or “processors”; worker organizing against privacy erosions; federal workers’ Department of Government Efficiency (DOGE) litigation; worker-specific “data privacy” policies ¹⁷⁵
(2) Race-Conscious Dignitarians	See Section II.B.2	Lawyers’ Committee for Civil Rights Under Law litigation against algorithmic bias; Amazon Labor Union-IBT 1. ¹⁷⁶	Interpreting and producing law for transparency and “fair digital spaces”; the AI Bill of Rights Act of 2025; opposing racialized work-force exploitation; safeguards for public and private access to sensitive data; repelling data capitalism and surveillance capitalism ¹⁷⁷

174. *About Us*, EPIC, <https://epic.org/about> (last visited May 11, 2026); *Privacy & Technology*, ACLU, <https://www.aclu.org/issues/privacy-technology> [<https://perma.cc/U425-9V6G>] (last visited May 11, 2026); AFL-CIO, ARTIFICIAL INTELLIGENCE: PRINCIPLES TO PROTECT WORKERS 4 (2025), <https://aflcio.org/reports/workers-first-ai> [<https://perma.cc/F36N-TQVK>]; *Stopping DOGE’s Unlawful Seizure of Americans’ Social Security Data*, DEMOCRACY FORWARD, <https://democracyforward.org/work/legal/stopping-doges-unlawful-seizure-of-americans-social-security-data> [<https://perma.cc/QJE3-EC2S>] (last visited May 11, 2026).

175. See Commission Regulation 2016/679, arts. 4(1), 9(1)–(2), 2016 O.J. (L 119) 1, 33, 38–39, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R0679> [<https://perma.cc/8PS9-JPY5>] [hereinafter GDPR] (addressing the processing of “special,” or sensitive categories of data, including information and allowing limited processing under narrowly defined exceptions); *id.* art. 4(7) (defining “controller” to include entity that “determines the purposes and means” of how personal information will be processed); *id.* art. 4(8) (defining “processor” as bodies who process personal data, including corporate entities and independent contractors); Complaint at 24, AFL-CIO v. U.S. Dep’t of Lab., No. 25-cv-339 (D.D.C. Feb. 5, 2025); *Am. Fed’n of Tchrs. v. Bessent*, 765 F. Supp. 3d 482, 492 (D. Md. 2025), *vacated and remanded*, 152 F.4th 162, 167 (4th Cir. 2025).

176. *Holding Meta Accountable for Racially Discriminatory Advertising Practices: A Legal Fight for Educational Equity & Digital Justice*, LAWYERS’ COMM. FOR C.R. UNDER L., <https://act.lawyerscommittee.org/ercvsmeta> [<https://perma.cc/A5UN-E2D3>] (last visited May 11, 2026); Amazon Labor Union, *supra* note 10.

177. See *Holding Meta Accountable*, *supra* note 176 (describing litigation challenging Meta’s race-steering advertising algorithms and demanding “fairness in digital advertising, transparency in AI-driven decision-making, and accountability for discrimination by tech companies”); *Equal Rts. Ctr. v. Meta Platforms, Inc.*, No. 2025-CAB-000814 (Super. Ct. D.C. July 24, 2025) (denying Meta’s motion

Type	Description	Examples	Desired Law or Regulation
(3) Colorblind Regressives	See Section II.B.3		
(a) Race-Averse		SFFA majority’s textualist, ahistorical misreadings of the 14th Amendment & <i>Brown v. Bd. of Educ.</i> ¹⁷⁸	Prohibit any determinative use of race in admissions decisions; require colleges to disclose to the federal government all student applicant data by race and GPA ¹⁷⁹
(b) Race-Denying		Trump Administration 2025 and 2026 EOs regarding “racial classification”; <i>Project 2025</i> ¹⁸⁰	Legally derecognize disparate impact theory; Trump Administration 2025 AI Plan to prohibit discussion of diversity, equity, inclusion, or any “woke” discourse as “misinformation” ¹⁸¹
(4) Libertarians	See Section II.B.4	CATO Institute; <i>Project 2025</i> ; ACLU (1990s) ¹⁸²	Functional elimination of federal agencies and purge of federal employees (“DOGE” Initiative) to disrupt the state; rejection of

to dismiss and permitting claims alleging discriminatory algorithmic ad delivery to proceed); Amazon Labor Union, *supra* note 10; Lin, *supra* note 31, at 868–72 (describing advocacy by warehouse workers’ union centering opposition to institutional racism in allocation of safety measures, wages, staffing, and dignity within Amazon); AI Civil Rights Act of 2025, H.R. 6356, 119th Cong. (2025). For RCDs, a ruling recognizing ancestral self-identification pursuant to GDPR art. 9(1)’s standards for handling race and ethnicity, as sensitive data, may advance self-determination. *See, e.g.*, Ciubotaru v. Moldova, App. No. 27138/04 (Apr. 27, 2010), <https://hudoc.echr.coe.int/eng?i=001-98445>. *See generally* Shoshanah Zuboff, THE AGE OF SURVEILLANCE CAPITALISM: THE FIGHT FOR A HUMAN FUTURE AT THE NEW FRONTIER OF POWER (2019) (defining surveillance capitalism); YESHIMABEIT MILNER & AMY TRAUB, DATA CAPITALISM + ALGORITHMIC RACISM (2021). *Algorithmic racism* refers to uses of big data that “intentionally or not, reproduce and spread racial disparities, shifting power and control” from racial minorities and communities. *Id.* at 32. *Data capitalism* is an economic strategy “built on the extraction and commodification of data and the use of big data and algorithms as tools to concentrate and consolidate power in ways that increase economic and racial inequality.” *Id.*

178. SFFA, 600 U.S. 181; *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

179. *See Ensuring Transparency in Higher Education Admissions*, WHITE HOUSE (Aug. 7, 2025), <https://www.whitehouse.gov/presidential-actions/2025/08/ensuring-transparency-in-higher-education-admissions> [https://perma.cc/Y9LH-5H9T].

180. *See* “DEI Discrimination by Federal Contractors” EO, *supra* note 8; “Revoking” Disparate Impact EO, *supra* note 11; Berry, *supra* note 2, at 582–83.

181. WHITE HOUSE, WINNING THE RACE: AMERICA’S AI ACTION PLAN 4 (July 2025); Exec. Order No. 14319, 90 Fed. Reg. 35389 (July 28, 2025).

182. *See Technology and Privacy*, CATO INST., <https://www.cato.org/technology-privacy> [https://perma.cc/BQM5-WTDL] (last visited May 11, 2026); *Privacy in America: Computers, Phones, and Privacy*, ACLU (Dec. 31, 1997), <https://www.aclu.org/documents/privacy-america-computers-phones-and-privacy> [https://perma.cc/UK5R-6F73].

Type	Description	Examples	Desired Law or Regulation
			content moderation rules, or rules against disinformation ¹⁸³ ; <i>Project 2025</i> appeals to racial privacy ¹⁸⁴
(5) <i>Techno-Authoritarians</i>	See Section II.B.5.	Peter Thiel; Palantir; Elon Musk; X ¹⁸⁵	Efforts to replace public institutions with privately controlled technologies; standardless integration of all government agencies’ data on all Americans, purportedly to eliminate “waste, fraud, and abuse,” but advance digital and physical surveillance ¹⁸⁶ ; creation of a federal “autism registry” ¹⁸⁷
(6) <i>White Nationalists</i>	See Section II.B.6	Policies and statements of President Trump; Vice President Vance; Stephen Miller ¹⁸⁸	2025 DOJ memorandum to federal funding recipients purporting to prohibit race among “criteria” in allocation of institutional “resources” ¹⁸⁹

183. See WHITE HOUSE, *supra* note 181, at 4.

184. See Exec. Order No. 14158, *supra* note 24 (establishing DOGE); Joshua Goodman & Ryan J. Foley, *These Federal Employees Were Purged by DOGE. Months Later, the Trump Administration Is Asking if They Want To Return*, PBS: NEWSHOUR (Sep. 24, 2025, at 15:06 ET), <https://www.pbs.org/newshour/politics/these-federal-employees-were-purged-by-doge-months-later-the-trump-administration-is-asking-if-they-want-to-return> [<https://perma.cc/X58C-SNRK>]; Elena Shao & Ashley Wu, *The Federal Work Force Cuts So Far*, Agency by Agency, N.Y. TIMES (May 12, 2025), <https://www.nytimes.com/interactive/2025/03/28/us/politics/trump-doge-federal-job-cuts.html> (reporting more than 99% staff reduction at the U.S. Agency for Global Media, U.S. Agency for International Development, and U.S. Interagency Council on Homelessness); Berry, *supra* note 2, at 583. On prior approaches of the ACLU toward privacy, see AMITAI ETZIONI, THE LIMITS OF PRIVACY (1999).

185. See *Privacy & Civil Liberties Engineering: (Palantir Explained, #5)*, PALANTIR (Jan. 26, 2022), <https://www.palantir.com/privacy-and-civil-liberties-engineering> [<https://perma.cc/79PE-HG3P>]; See Amy E. Stambach, *Silicon Governance: Elon Musk and the Techno-Libertarian Crisis in Public Administration*, ADMIN. THEORY & PRAXIS, Jan. 2026, at 6; *About Offensive Content*, X, <https://help.x.com/en/safety-and-security/offensive-posts-and-content> (last visited May 11 2026).

186. Exec. Order No. 14243, 90 Fed. Reg. 13681 (Mar. 25, 2025); see Frenkel & Krolik, *supra* note 12 and accompanying text.

187. See Alana Wise, *RFK Jr. Says Autism Database Will Use Medicare and Medicaid Info*, NPR (May 8, 2025, at 16:57 ET), <https://www.npr.org/2025/05/08/nx-s1-5391310/kennedy-autism-registry-database-hhs-nih-medicare-medicaid> [<https://perma.cc/8FVW-2QQH>].

188. See Kanno-Youngs, *supra* note 40; Steve Peoples, *Republican Senate Candidates Promote ‘Replacement’ Theory*, PBS: NEWSHOUR (May 17, 2022, at 20:11 ET), <https://www.pbs.org/newshour/politics/republican-senate-candidates-promote-replacement-theory>; Jean Guerrero, *Stephen Miller and White Nationalism*, PBS (Nov. 14, 2019, at 05:02 ET), <https://www.npr.org/2019/11/14/779208233/stephen-miller-and-white-nationalism> [<https://perma.cc/ZN8U-Z48C>].

189. Memorandum from Off. of Att’y Gen., DOJ, to All Fed. Agencies on “Guidance for Recipients of Federal Funding Regarding Unlawful Discrimination” (July 29, 2025); “DEI Discrimination by

Each of the ideologies within the modernized taxonomy is elaborated further below along: primary characteristics; principles; conceptions of harms; discursive strategies, both popular and legal; and favored policies with respect to racial data. The content of these categories may overlap, subdivide, shift over time, or come full circle upon one another.¹⁹⁰

1. Liberal Data Guardians

Liberal paradigms for law continue to center individualist rights-based views of equality, dominating political-economic thought since the late twentieth century.¹⁹¹ With respect to information about race in such democracies, approaches openly presume trade-offs among the development of knowledge, the neoclassical market, and individual rights: the *Liberal Data Guardian* (LDG) seeks to mediate these interests. Liberal intellectual tradition tends to eschew inquiry into assumptions driving its distinctions regarding the market and what renders its dynamics inherently fair.¹⁹² Profits derived from commerce, including the harvesting and commodification of data, are considered fixtures of the market economy. Thus, for *Liberal Data Guardians*, procedural protections are a primary means of protecting individuals, consumers, and other groups whose interests are framed around individual control.¹⁹³

Principles. A preeminently legal ideal of “balancing” interests¹⁹⁴ within a representative democracy underpins LDG approaches. The *Liberal Data Guardian* protects against public and private abuses of power to safeguard individual

Federal Contractors” EO, *supra* note 8, at 16147 (purporting to define “[p]rogram participation” as “membership or participation in, or access or admission to: training, mentoring, or leadership development programs; educational opportunities; clubs; associations; or similar opportunities that are sponsored or established by the contractor or subcontractor”).

190. Each entry refers to ideological themes and tendencies, as a single individual or organization can espouse several at once or change their approaches over time. This taxonomy is new to the literature because of the historic devaluation of critical inquiries at this intersection of law, race, and information science. *See, e.g.,* Peller, *supra* note 23, at 847; Devon W. Carbado, *States of Continuity or State of Exception? Race, Law and Politics in the Age of Trump*, 34 CONST. COMMENT. 1, 10–11 (2019) (critiquing racial politics of mainstream Democrats who urge colorblind practices and messaging in response to the first Trump presidency while making race-conscious appeals to white, working-class voters).

191. In the wake of the early twentieth century, liberalism evolved expansively as a broader family of political philosophies, supporting conservative, moderate, and progressive ideologies alike. *See* TELES, *supra* note 169, at 22–24, 44–46; JAMES E. FLEMING & LINDA C. MCCLAIN, ORDERED LIBERTY: RIGHTS, RESPONSIBILITIES, AND VIRTUES 1–2 (2013).

192. *See* Lin, *supra* note 31, at 833.

193. *See* COHEN, *supra* note 30, at 172 (“[T]he information-era regulatory approaches . . . reflect the distinctive imprint of neoliberal managerialism. They are procedurally informal, standard-based, mediated by expert professional networks, and increasingly financialized.”); Anupam Chander, Margot E. Kaminski & William McGeveran, *Catalyzing Privacy Law*, 105 MINN. L. REV. 1733, 1737 (2021) (demonstrating the centrality of U.S. “local networks and norm entrepreneurship” within the privacy sector, particularly in California, in competing “data globalization”); IGNACIO COFONE, THE PRIVACY FALLACY: HARM AND POWER IN THE INFORMATION ECONOMY 96–99 (2024) (arguing that privacy law’s focus on individual data rights reflect the “limits of the law’s traditionalist . . . focus[] on individual choices while ignoring harmful social dynamics”).

194. *See* Jud Mathews & Alec Stone Sweet, *All Things in Proportion? American Rights Review and the Problem of Balancing*, 60 EMORY L.J. 797, 814–819 (2010); *cf.* Big Brother Watch v. United Kingdom, App. Nos. 58170/13, 62322/14 & 24960/15, ¶¶ 347–355, 387–389 (May 25, 2021), <https://>

liberty. U.S. civil-rights-era doctrines laid the groundwork for Europe's approach, incorporating historic rights against group-based harm to ensure equality of opportunity.¹⁹⁵ The forerunner of liberal data governance is the European Union (EU) General Data Protection Regulation of 2018 (GDPR). Wielding considerable regulatory influence over U.S. multinational entities, it defines "sensitive data" to include information about race, ethnicity, and categories of historic political vulnerability, extending a presumption of special protection.¹⁹⁶ Among liberal democracies, the *LDG* approach weighs the harms of access and use of such data (i.e., processing, inferencing, storing, or disclosure) against public need and private-law commitments.¹⁹⁷ As the lead regulatory data framework, the GDPR's footprint is global.

Harms. *Liberal Data Guardians* conceive of harm as arising from unwanted informational disclosure and surveillance, and therefore invoke privacy-law conceptions of denying personal control, interiority, or self-determination.¹⁹⁸ For information about individuals' race, such risks expressly include racial discrimination and stigma, yet data guardianship approaches generally decline to intervene in

hudoc.echr.coe.int/eng?i=001-210077 (holding that bulk data implicate concern for sensitive information and law's role in proportionate processing).

195. See Julie Suk, *Disparate Impact Abroad*, in *A NATION OF WIDENING OPPORTUNITIES: THE CIVIL RIGHTS ACT AT 50*, at 283 (Ellen D. Katz & Samuel R. Bagenstos eds., 2015).

196. The GDPR extends presumptive protection to "special" or "sensitive" categories of personal data such as race and nationality that communicate historically or politically vulnerable social status. See GDPR, *supra* note 175, at arts. 4, 9(1)–(2), 13(2)(f), 14(2)(g), 15(1)(h); ORLA LYNSEY, *THE FOUNDATIONS OF EU DATA PROTECTION LAW* 82 (2016).

197. See, e.g., Josh Richman, *Report: ICE Using Palantir Tool That Feeds on Medicaid Data*, ELEC. FRONTIER FDN. (Jan. 15, 2026), <https://www.eff.org/deeplinks/2026/01/report-ice-using-palantir-tool-feeds-medicaid-data> [https://perma.cc/VV8K-W6KQ] (describing U.S. Immigration and Customs Enforcement as engaged in a "surveillance technology shopping spree"); Case C-311/18, *Data Prot. Comm'r v. Facebook Ireland Ltd.*, ECLI:EU:C:2020:559 (July 16, 2020) (striking EU–U.S. Privacy Shield framework as insufficient to protect against surveillance, rights violations, and other "risks" from U.S. authorities, problematizing firms' ability to contract for cross-border data transfers unless recipients outside EU comply with the GDPR); *Big Brother Watch v. United Kingdom*, App. Nos. 58170/13, 62322/14 & 24960/15 (May 25, 2021), <https://hudoc.echr.coe.int/eng?i=001-210077>. Interpreting precursor laws to the GDPR, the European Court of Human Rights decided that a police policy of indefinite retention of the DNA profile, fingerprints, and photograph of individuals culpable of drunk driving offenses violates the right to privacy. *Gaughran v. United Kingdom*, App. No. 45245/15, ¶ 70 (Feb. 13, 2020), <https://hudoc.echr.coe.int/eng?i=001-200817> (interpreting Council of Europe Convention 108 (1981)). The Court has also reasoned that DNA profiles may create "inferences to be drawn as to ethnic origin[,] mak[ing] their retention all the more sensitive and susceptible of affecting the right to private life," and that an "individual's ethnic identity" is an element of private life because "Article 6 of the Data Protection Convention [of 1981] . . . lists personal data revealing racial origin as a special category of data along with other sensitive information." *S. v. United Kingdom*, App. Nos. 30562/04 & 30566/04, ¶¶ 66, 76 (Dec. 4, 2008), <https://hudoc.echr.coe.int/eng?i=001-90051>. As of December 2025, an "AI Civil Rights Act" introduced in Congress would create enforceable civil right protections against AI-driven decisions of "consequential action." AI Civil Rights Act of 2025, *supra* note 177, at §§ 101, 102(a). As argued *infra*, inclusion of protections against algorithmic discrimination in the bill more closely align this AI governance with *Race-Conscious Dignitarians*.

198. Anita L. Allen, *Privacy-as-Data Control: Conceptual, Practical, and Moral Limits of the Paradigm*, 32 CONN. L. REV. 861, 861–63 (2000) (referencing a definition of privacy as "control over personal information").

power imbalances.¹⁹⁹ Paralleling the GDPR, *LDG* protections embrace anti-discrimination rights, a move that reserves opportunities for policymakers to acknowledge the systemic harms informational practices pose, even when promulgated under the framework of “data management.”²⁰⁰

Discursive Strategies. As of the 2000s, lay political discourse applying *Liberal Data Guardian* approaches became mainstream and wholly familiar to most Americans. As to knowledge, *LDGs* may support data “accuracy” without reserving further inquiry into social and power relations that produce the data.²⁰¹ A quarter century later, some *LDG* responses may have evolved in *Race-Conscious Dignitarian* approaches, discussed *infra*, such as the AI Civil Rights Bill of 2025 (EU AI Act). There, and in public debates over entities’ policies as to race, we find increasing recognition of racial disproportionality (i.e., disparate impact) as harm or evidence of constitutional obligation, beyond technological standardization.²⁰²

Legal discourse typical of a *Liberal Data Guardian* approach begins with data brokers, state infrastructure, and privacy. Sensitive-data protection frames tend to track dominant legal definitions of anti-discrimination law, and thus *LDG* approaches support civil rights and labor activism.²⁰³ Yet by the same dependence upon a liberal civil society, such efforts will destabilize when legal systems deteriorate. In line with centrist interpretations of anti-discrimination law, *LDGs* may cater to avowedly individual opportunities for success that eliminate “stereotyping” through reliance upon

199. *E.g.*, Case C-252/21, *Meta Platforms v. Bundeskartellamt*, ECLI:EU:C:2023:537, ¶¶ 64–73 (July 4, 2023) (interpreting GDPR art. 9(1) to prohibit processing personal data that can reveal racial or ethnic origin, political opinions, religious beliefs, health data, or sexual orientation, including cross-platform data collection, even if the controller did not intend to collect such data); see Orla Lynskey, *Complete and Effective Data Protection*, 76 CURRENT LEGAL PROBS. 297 (2023) (observing GDPR remains preoccupied with individual and formalistic approaches, while declining to address issues of power asymmetry). See generally LYNKEY, *supra* note 196 (describing how the draft GDPR on data protection impact assessments, data protection by design, and the security of sensitive data, all require the controller to consider the risks to the rights and freedoms of data subjects).

200. See, e.g., *Ciubotaru v. Moldova*, App. No. 27138/04, ¶¶ 49–56 (Apr. 27, 2010), <https://hudoc.echr.coe.int/eng?i=001-98445> (holding ethnic identity forms part of private life and State had positive obligation to respect individual self-identification, in petition for authorities to record ethnicity as “Romanian,” instead of “Moldovan”). In 2024, the Court of Justice of the European Union held that employers’ private law agreements with workers cannot supersede the protections of the GDPR with respect to the processing of workers’ data. Case C-65/23, *MK v. K GmbH*, ECLI:EU:C:2024:1051 (Dec. 19, 2024) (interpreting GDPR arts. 5, 6(1), 88(2)).

201. See Karen Yeung & Lee A. Bygrave, *Demystifying the Modernized European Data Protection Regime: Cross-Disciplinary Insights from Legal and Regulatory Governance Scholarship*, 16 REGUL. & GOVERNANCE 137 (2021) (noting EU’s hybrid “risk-based” approach to compliance and its basic objective of safeguarding fundamental rights).

202. See Ogletree Deakins, Bias Audits: Meeting California’s AI Regulations, and Emerging National Standards (Oct. 30, 2025) (unpublished slide presentation and notes on file with author); AI Civil Rights Act of 2025, *supra* note 177. I explore this phenomenon in a forthcoming project, *Disparate Impact Redux*.

203. See Paul Ohm, *Sensitive Information*, 88 S. CAL. L. REV. 1125, 1125 (2015) (identifying sensitive data as the dominant framework for information-based conceptions of privacy). On workers’ rights advocacy, the GDPR expressly includes labor activism as a category of sensitive data. GDPR, *supra* note 175, at art. 9(1) (enumerating trade union membership).

racial data.²⁰⁴ Disagreements may arise over the strength of existing legal infrastructures and institutions, and thus privacy law and anti-discrimination law frameworks may represent *LDG* compromises: preferred as an ideal, or as temporary, pragmatic measures until a consensus emerges with respect to new alternatives.²⁰⁵

Regulatory Preferences. *Liberal Data Guardians* mainly conceive of law and regulation of consumer rights with reference to a baseline for democracy. Data is deemed “sensitive” by social reference to history and present discrimination.²⁰⁶ Regulations that comport with *LDG* philosophy include informed consent; presumptive privacy as to “sensitive” data such as race and ethnicity; anti-surveillance policies; the right to be forgotten; and community control over police programs.²⁰⁷ Criticisms of laws that regulate major U.S. data brokers—the GDPR, EU AI Act, and others—include vagueness; lack of normative direction regarding allocation of “risk”;²⁰⁸ and limits to remedial uses of racial and other sensitive data apart from non-disclosure. Thus, current regulatory approaches that tackle “risks” to politically or historically vulnerable populations have not been coherently put into operation.²⁰⁹

2. Race-Conscious Dignitarians

For *Race-Conscious Dignitarians* (*RCDs*), law and government are not naturally justified because racism in society manifests in mundane and systemic ways.²¹⁰ Race consciousness informs this mode of analysis in policymaking and other vital developments, as Blackness and other racial identities may be imbued with multiple meanings through ongoing political processes. This lens is most identified with critical approaches, including interdisciplinarity, context-rich analysis, and institutional dynamics that shape the extent to which such concepts are valued and non-subordinating, thus supporting dignitary ends with universal reach.²¹¹ Where *Liberal Data Guardians* connect privacy, a predominantly race-neutral frame, with nondiscrimination commitments, for *Race-Conscious Dignitarians*, how one justifies the other suggests that interests broader than privacy are at stake. Litigation by civil

204. Cf. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 782–97 (2007) (Kennedy, J., concurring).

205. See, e.g., *infra* notes 207–09.

206. GDPR, *supra* note 175, at arts. 4, 9(2), 13(2)(f), 14(2)(g), 15(1)(h).

207. *Id.* at art. 9. For the fullest account to date, see generally Vincent Southerland, *The Master's Tool and a Mission: Using Community Control and Oversight Laws to Resist and Abolish Police Surveillance Technologies*, 70 UCLA L. REV. 2 (2023).

208. ARI EZRA WALDMAN, *ADVANCED INTRODUCTION TO U.S. DATA PRIVACY LAW* 72–75 (2023).

209. Kimberlé W. Crenshaw, *The Battle for Our Memory Is the Battle for Our Country*, TIME (May 1, 2025), <https://time.com/collections/george-floyd-america-reflection/7279984/kimberle-crenshaw-black-lives-matter-essay> [<https://perma.cc/BY4M-X58B>] (“All too often, decision-makers concede what they deem as symbolic fights in hopes of living to fight another day. . . . The much more disturbing reality is that the retrenchment is often deeper and more enduring than the modest and frequently symbolic reforms that the crisis engendered.”).

210. See, e.g., NIKHIL PAL SINGH, *BLACK IS A COUNTRY: RACE AND THE UNFINISHED STRUGGLE FOR DEMOCRACY* 213 (2004).

211. See Katherine K. Chen, *Using Extreme Cases to Understand Organizations*, in *HANDBOOK OF QUALITATIVE ORGANIZATIONAL RESEARCH: INNOVATIVE PATHWAYS AND METHODS* 33 (Kimberly D. Elsbach & Roderick M. Kramer eds., 2016).

rights organizations such as Lawyers' Committee for Civil Rights (LCCR) begins from an *LDG* frame of technological transparency and fair digital spaces by challenging Meta's practice of steering Black and non-Black users to very different universities' advertisements; as a public education effort, they challenge algorithmic bias.²¹²

Principles. For *Race-Conscious Dignitarians*, opposing subordination is a driving principle in evaluating decisions regarding race, and by extension, the purposes to which information about race is put. Combating the role of race in oppression is essential to morality, self-determination, and democracy. Distinct from liberal civil rights ideology, *RCDs* emphasize collectivity, systems thinking, and an inherent politics in the formation of any law—in line with twentieth-century American legal realist and critical legal theories.²¹³

Harms. *Race-Conscious Dignitarians* conceive of harms as material and palpable. They are often, but not always, anchored in a critique of markets and racial capitalism or political economy, as evidenced by greater traction of the terms data capitalism and surveillance capitalism.²¹⁴ However, uses of racial information give rise to dignitary harms in light of the relative agency located in shared accounts of history, intersectionality, and existing social relationships.²¹⁵ Many *RCDs*, and the GDPR's interpretation, understand the latter. For example, the European Court of Human Rights held that a government that uses identity-related information must allow individual control to guard against misrepresentation or discrimination; if combined with meaningful societal consultation and power-shifting in its final form, the AI Civil Rights Act of 2025 could be deemed *RCD* as proposed.²¹⁶ In a taxonomy that structurally identifies legal intervention along ideologies rather than state or non-state status, the norms for private entities are not presumed to differ.

Discursive Strategies. Lay *RCD* discourse may focus on subordination by individuals and ideologies reflected in systemic racism, racial disparities, politics, and the economy. Discursive strategies may also overlap with *LDG* approaches,

212. As information studies expert Safiya Noble asks, “cui bono—to whose benefit is it, and who holds the power to shape” a system, whether it’s the Internet or social practices? NOBLE, *supra* note 26, at 60. See generally BENJAMIN, *supra* note 26. LCCR’s lawsuit against Meta, *supra* note 177, and a broad array of groups’ concerns about the Trump Administration’s misuse of health and disability information to advance “eugenics,” *infra* notes 256, 258, 282, and 300, are prominent.

213. See Lin, *supra* note 31, at 825–26.

214. See *supra* Part I. See generally HISTORIES OF RACIAL CAPITALISM (Destin Jenkins & Justin Leroy eds., 2021); Arnett, *Data: The New Cotton*, *supra* note 135.

215. See McIlwain, *supra* note 25, at 1075–76 (posing theoretical framework for relationality of data, in conceptualizing racial inequality in technology through “a longstanding history and process of racial formation – the complex, racialized historical contexts, circumstances, interests and problems that predate” online technological environments); LISA NAKAMURA, CYBERTYPES: RACE, ETHNICITY, AND IDENTITY ON THE INTERNET 102–20 (2002) (describing natural means of relationships reflected and fostered by online technology, with challenges presented by hegemonic drop-down stereotypes that funnel identities to commercialize them).

216. Ciubotaru v. Moldova, App. No. 27138/04, ¶ 59 (Apr. 27, 2010), <https://hudoc.echr.coe.int/eng?i=001-98445>; see also AI Civil Rights Act of 2025, *supra* note 177 (providing enforceable protections against algorithmic discrimination, auditing pre- and post-deployment, and transparency requirements).

emphasizing the historical roots rendering certain ideas about social traits as sensitive, much as the GDPR chose to prohibit the collection of data regarding racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership, and the processing of genetic data, biometric data, data concerning health, or data concerning sexual orientation.²¹⁷ Opposing oppression in law, policing and prisons, education, and intersectional abuses by private and public actors is typical for race-conscious members of the public invested in dignity approaches to racial processes and information.

Regulatory Preferences. RCD legal discourse proceeds unabated and has visibly expanded within policy advocacy as of the second Trump presidency. RCD regulatory preferences foreground dignity, non-subordinating uses of race: primarily by centering its continued manifestation in discriminatory or carceral sources of data; equity audits; and recommendations to recenter those impacted most having meaningful say in design, development, and accountability.²¹⁸ Civil rights advocates and membership-based organizations have explicitly called for a first-in-kind AI Bill of Rights and other laws that ensure informational “transparency” and “fair” digital spaces and analogs; promote safeguards for public and private access to sensitive data; repel data capitalism and surveillance capitalism; and oppose racialized workforce stratification and exploitation.²¹⁹

3. Colorblind Regressives

Principles. Proponents of “colorblindness” assert a moral and legal equivalence between “the injustice of racial preferences against [B]lack [people] with [an] equal and opposite injustice of racial preferences against non[B]lacks.”²²⁰ On this ground, *Colorblind Regressives* (CRs) argue that all race-conscious measures are acts of “reverse racism.” In light of the archconservative turn, wholly inverting claims about civil rights law, Professor Kennedy’s taxonomy may now be subdivided to discern at least two categories of *Colorblind Regressives*: (a) *Race-Averse* and (b) *Race-Denying*.

217. GDPR, *supra* note 175, at art. 9(1); Press Release, Pressley, Clarke, Markey Reintroduce AI Civil Rights Act to Eliminate AI Discrimination (Dec. 3, 2025) (“As AI innovation grows, it is incumbent on us all to prioritize the safety, rights, and opportunity of all people—especially the Black, brown, and marginalized communities who disproportionately bear the burden of biased and discriminatory systems.”), <https://pressley.house.gov/2025/12/03/pressley-clarke-markey-reintroduce-ai-civil-rights-act-to-eliminate-ai-discrimination> [<https://perma.cc/FF2M-V7GM>].

218. See Solon Barocas & Andrew D. Selbst, *Big Data’s Disparate Impact*, 104 CALIF. L. REV. 671, 674–77 (2016) (discussing the limitations of anti-classification theory and disparate impact doctrines when applied to big data); Okidegbe, *supra* note 37, at 2040–43; Southerland, *supra* note 207, at 34, 65–78; Hilke Schellmann, *Auditors Are Testing Hiring Algorithms for Bias, But There’s No Easy Fix*, MIT TECH. REV. (Feb. 11, 2021), <https://www.technologyreview.com/2021/02/11/1017955/auditors-testing-ai-hiring-algorithms-bias-big-questions-remain> [<https://perma.cc/LGQ3-7ECB>].

219. See AI Civil Rights Act of 2025, *supra* note 177 (providing enforceable protections against algorithmic discrimination, auditing pre- and post-deployment, and transparency requirements); Press Release, Pressley, Clarke, Markey Reintroduce AI Civil Rights Act to Eliminate AI Discrimination, *supra* note 217; LAWYERS’ COMM. FOR C.R. UNDER L., *supra* note 177; Lin, *supra* note 31, at 868–72.

220. Amy Gutmann, *Responding to Racial Injustice*, in COLOR CONSCIOUS: THE POLITICAL MORALITY OF RACE 108–09 (1996). To this, we ought to respond that “it is far from obvious” that consciously relying in part on race “is wrong in a society that is still suffering from racial injustice.” *Id.* at 109.

Trump-era colorblindness rests upon a distortion of views favoring race consciousness to interrupt subordination.²²¹ The stakes are material, even if the hair-trigger harm is purely procedural and abstract. If the old tech of law and race can be described as “social engineering,” no policy can be immune from the accusation. In opposing race consciousness, *Colorblind Regressives* aligned with *Project 2025* have shifted colorblind gradualism into extreme race-silencing.

(a) *Race-Averse Colorblind Regressives* support the erasure of racial information and consciousness. They lay the groundwork for the *Race-Denying* variety. In political progression, they occupy only the first of three stages that have transpired to date. Stage one marks the very moment race consciousness is poised to legitimize a democracy as use of race in law and data offers measurable accountability across institutions. *Race-Averse CRs* are the colorblind gradualists who seek a transition between perceiving race and not denying racialization occurs. But *Race-Averse CRs* do not wish to engage in systematic power relations or history by looking forward in the abstract.

(b) *Race-Denying Colorblind Regressives* emerge at stage two. *Race-Denying CRs* aim to reassert white-dominant access to all material benefits of citizenship by declaring all uses of racial identification as illegal. This sets up backlash against any effective steps toward equality from stage one. President Trump, for example, openly boasts of replacing in “medical, aviation, and law-enforcement communities” those implied to be nonwhite and people with disabilities through diversity, equity, inclusion, and accessibility (DEIA) hiring as lacking merit or competence.²²²

The third stage is authoritarian, turning anti-discrimination law against itself to silence any argument that ideas about race in the nation’s first two centuries purported to deny *nonwhites*, rather than whites, bodily public safety, employment, health, and other material measures of citizenship.²²³ “To abandon facts is to abandon freedom,” history reminds us.²²⁴

221. See Eaglin, *supra* note 29, at 1399.

222. “Ending Discrimination” and Opportunity EO, *supra* note 9, at 8633. President Trump’s early 2025 pronouncements on DEI and DEIA efforts portrays them as undermining “individual merit, aptitude, hard work, and determination when selecting people for jobs and services in key sectors of American society, including all levels of government, and the medical, aviation, and law-enforcement communities.” *Id.*; see also LEVITSKY & ZIBLATT, *supra* note 64, at 171 (noting the first Trump Administration’s invocation of a pre-democratic legal system); GOLUBOFF, *supra* note 86, at 238–70; Modifications to the Regulations Implementing Section 503 of the Rehabilitation Act of 1973, as amended, 90 Fed. Reg. 28494 (July 1, 2025) (proposing rules to eliminate affirmative action requirements for people with disabilities under Section 503 of the Rehabilitation Act); Modifications to the Regulations Implementing the Vietnam Era Veterans’ Readjustment Assistance Act of 1974, as amended, 90 Fed. Reg. 28485 (July 1, 2025) (same, as to veteran status under the Vietnam Era Veterans Readjustment Act).

223. See Erica L. Green, *For Trump, Civil Rights Protections Should Help White Men*, N.Y. TIMES (May 25, 2025), <https://www.nytimes.com/2025/05/25/us/politics/trump-race-civil-right-white-men.html> (explaining how “Trump has turned to those same measures – not to help groups that have historically been discriminated against, but to remedy what he sees as the disenfranchisement of white men”).

224. TIMOTHY SNYDER, ON TYRANNY: TWENTY LESSONS FROM THE TWENTIETH CENTURY 65 (2017).

a. Race-Averse CRs

To *Race-Averse Colorblind Regressives*, state and private social uses of racial information create harm unless these actors cease acting upon racial information.

Principles. They presume the “social value of any characteristic linked to race is reduced to zero,” and such a process is in the decisionmaker’s control.²²⁵ As Gotanda observed, even when decisionmakers are “sensitive to the complexities of race and . . . consciously attempt[] to discount only ‘skin color’ or racial identification in an effort at racial neutrality, substantial complications remain.”²²⁶

Harms. *Race-Averse CRs* conceive of the harm from the process of assigning race, without the need for material, stigma-based, or otherwise contextualized grievance. These positions pose a Catch-22 of categorizing by race, acknowledging interracial distinction, then acting upon it by “ignoring” it. Much like the integrationists decades ago, those who claim that race does not exist may or may not understand when colorblindness operates as a proxy for whiteness.²²⁷

Discursive Strategies. In lay discourse, *Race-Averse CRs* use the language of “reverse discrimination” without relating history or power dynamics to the present day. They have acculturated into their popular discourse legal bumper slogans and anticlassification theory, as well as ahistorical textual methods.²²⁸

In legal discourse, any manner of affirmative action is now presumed harmful and unlawful by *Race-Averse CRs*. State initiatives to eliminate affirmative action, as in California, Michigan, and Nebraska, along with Trump-era policies now seeking to eliminate DEI and critical race theory (CRT), attempt to eliminate all affirmative acts of race consciousness.²²⁹ Like the *Race-Denying CRs*, they may go so far as to seek derecognition of disparate-impact doctrine, and implement the policies of the Trump-era Office of Personnel Management, “ending unlawful diversity requirements for the composition of hiring panels, as well as for the composition of candidate pools (also referred to as ‘diverse slate’ policies).”²³⁰

225. Neil Gotanda, *Failure of the Color-Blind Vision: Race, Ethnicity, and the California Civil Rights Initiative*, 23 HASTINGS CONST. L.Q. 1135, 1140 (1996).

226. *Id.*

227. See John A. Powell, *Living and Learning: Linking Housing and Education*, 80 MINN. L. REV. 749, 775–76 (1996) (connecting decades of racial integration policies in housing and education, which emphasized assimilation into white culture as a desired goal, to political demands for colorlessness or colorblindness (citing ARTHUR M. SCHLESINGER, JR., *THE DISUNITING OF AMERICA* (1992))).

228. See LÓPEZ, *supra* note 14, at 75; Leah M. Litman, *Disparate Discrimination*, 121 MICH. L. REV. 1, 18 (2022).

229. California Civil Rights Initiative, California Ballot Proposition 209 (adopted Nov. 6, 1986) (codified at CAL. CONST. art. I, § 31); The Michigan Civil Rights Initiative, Proposal 2 (approved Nov. 7, 2006; effective Dec. 22, 2006) (codified at MICH. CONST. art. 1, § 26); The Nebraska Civil Rights Initiative, Proposal 424 (approved Nov. 4, 2008; effective Dec. 10, 2008) (codified at NEB. CONST. art. I, § 30).

230. Memorandum from Charles Ezell, Acting Dr., U.S. Off. of Pers. Mgmt., on “Further Guidance Regarding Ending DEIA Offices, Programs and Initiatives” (Feb. 5, 2025), at 2 (commenting on EOs 14151, 14173, 14148). Of note, the memorandum continues: “This does not apply to, and agencies should retain, personnel, offices and procedures required by statute or regulation to counsel employees

b. Race-Denying CRs

The most extreme adherents are those who claim that race does not exist, regardless of how one self-identifies racially. *Race-Denying CRs* invest in ideas about race that conceivably only militate in favor of race-silencing by law: that race categories should not be used, much less documented or discussed.

Principles. *Race-Denying CRs* adhere to the claim that individuals, groups, or entities are not responsible for adversity arising from structural barriers or the past, instead advancing a purely individualistic definition of “merit.”²³¹ They are also, ironically, cynical toward the state (and therefore law) as a potential source of harm, as, presumptively, they view any equity-focused policy as administrative coercion unless it fully ceases to acknowledge race in all forms. Race-conscious equity, diversity, and inclusion practices in “corporations and universities” are malign, President Trump now claims, because their “foundational rhetoric and ideas *foster intergroup hostility and authoritarianism*.”²³² To portray race-conscious thought as inherently undemocratic is the axis to *Race-Denying CR* arguments for universal race-silencing.²³³

Harms. According to *Race-Denying CRs*, harm arises from breaks in abstraction and symmetry, without a need to show material, stigma-based, or other circumstances for grievance.²³⁴ However, once race is (improperly) considered, *Race-Denying CRs* may further argue that the market and current economic system are inherently meritocratic, deploying a manipulated resentment.²³⁵

Discursive Strategies. The lay discourse of *Race-Denying CR* wholly adopts legal formalism toward conservative populist ends. Race is inherently a negative and hostile value, its discourse a social albatross rather than a common good. To the extent it is mentioned, it is morally repugnant and amounts to a thought crime.²³⁶ Tautologies about stopping discrimination—by stopping discrimination—are unassailable.

allegedly subjected to discrimination, receive discrimination complaints, collect demographic data, and process accommodation requests.” *Id.* at 1–2.

231. YOUNG, *supra* note 105, at 193.

232. *Fact Sheet: President Donald J. Trump Protects Civil Rights and Merit-Based Opportunity by Ending Illegal DEI*, WHITE HOUSE (Jan. 22, 2025) (emphasis added), <https://www.whitehouse.gov/fact-sheets/2025/01/fact-sheet-president-donald-j-trump-protects-civil-rights-and-merit-based-opportunity-by-ending-illegal-dei> [<https://perma.cc/C4BP-M7H2>].

233. *See, e.g.*, “Ending Discrimination” and Opportunity EO, *supra* note 9; Exec. Order 14148, 90 Fed. Reg. 8237 (Jan. 28, 2025).

234. *See* Litman, *supra* note 228 (observing the Roberts Court’s approach to anticlassification theory finds discrimination if a law “either intentionally imposes disadvantages on an individual or group or the law explicitly mentions the disadvantaged group or group characteristic on the face of the law”); GEORGE C. CHRISTIE & PATRICK H. MARTIN, JURISPRUDENCE: TEXT AND READINGS ON THE PHILOSOPHY OF LAW 1158 (3d ed. 2008) (“[T]he asymmetrical nature of race is subsumed within a formalism—that race is no more than the racial identities of particular bodies which are all equal in law and in fact.”).

235. LÓPEZ, *supra* note 14, at 74–75. Dog whistle politics “convince[d] average Americans to support policies that transferred wealth and power to the already extremely wealthy and powerful.” *Id.* at 75.

236. In spring 2025, President Trump threatened to persecute highly visible legal employers that contravene his anti-“DEI” views. *E.g.*, Exec. Order No. 14263, 90 Fed. Reg. 15615, § 1 (Apr. 15, 2025)

In legal discourse, legal formalism and anti-classification theory accompany the erasure of societal knowledge and other epistemologies.²³⁷ History here, too, may be co-opted and inverted when law is treated as a system wholly apart from any social science.²³⁸

Regulatory Preferences. Favored policies of *Race-Denying CRs* include eliminating affirmative action, disparate-impact theory, DEI, and CRT. To achieve the coercive race-silencing laid out in *Project 2025*, every pillar institution must be regulated as a data broker of racial information: an exploitation of privacy doctrines advanced by *Liberal Data Guardians*. Accordingly, President Trump's July 2025 AI Plan overtly seeks to eliminate discussion of diversity, equity, inclusion, or "woke" discourse as "misinformation."²³⁹

4. Libertarians

Principles. *Libertarians* are characterized by the pursuit of individual freedom and antipathy to state regulation when understood to impose coercion.²⁴⁰ Individual freedom and autonomy are paramount; its most visible civic organization, the U.S. Libertarian Party, "reject[s] the notion that groups have inherent rights" and supports "the rights of the smallest minority, the individual."²⁴¹ In addition, the market may serve as the most reliable guarantor available,²⁴² a view that overlaps with self-identified liberals and, to a lesser extent, *Liberal Data Guardians*. *Libertarians* may support

(threat of prosecution). The author is a signatory to the Brief of *Amici Curiae* 775 Law Professors in Support of Plaintiff's Motion for Summary Judgment and Declaratory and Permanent Injunctive Relief at 21, *Susman Godfrey LLP v. Exec. Off. of the President*, No. 25-cv-01107 (D.D.C. 2025), Dkt. No. 59-1; the Brief of *Amici Curiae* 676 Law Professors in Support of Plaintiff's Motion for Summary Judgment at 18, *Wilmer Cutler Pickering Hale & Dorr LLP v. DOJ*, No. 25-cv-917 (D.D.C. 2025), Dkt. No. 32-1; and the Brief of *Amici Curiae* 676 Law Professors in Support of Plaintiff's Motion for Summary Judgment and for Declaratory and Permanent Injunctive Relief at 18, *Jenner & Block LLP v. DOJ*, No. 25-cv-00916 (D.D.C. 2025), Dkt. No. 36-1. As of January 2026, the EOs targeting the three firms and Perkins Coie LLP have been enjoined. Jared Foretek, *DOJ to Appeal Reinstatement of Clearance for Mark Zaid*, LAW360 (Jan. 7, 2026, at 21:32 ET), <https://www.law360.com/pulse/articles/2427719/doj-to-appeal-reinstatement-of-clearance-for-mark-zaid>.

237. See Devon W. Carbado & Cheryl I. Harris, *Intersectionality at 30: Mapping the Margins of Anti-Essentialism, Intersectionality, and Dominance Theory*, 132 HARV. L. REV. 2193, 2193 (2019); Shirley Lin, *Dehumanization "Because of Sex": The Multiaxial Approach to the Title VII Rights of Sexual Minorities*, 24 LEWIS & CLARK L. REV. 731, 745–54 (2020).

238. Milligan, *supra* note 84, at 76.

239. See, e.g., WHITE HOUSE, *supra* note 181, at 4; Exec. Order No. 14319, *supra* note 181 ("In the AI context, DEI includes the suppression or distortion of factual information about race or sex; manipulation of racial or sexual representation in model outputs; incorporation of concepts like critical race theory, transgenderism, unconscious bias, intersectionality, and systemic racism; and discrimination on the basis of race or sex.").

240. Bas van der Vossen & Billy Christmas, *Libertarianism*, STAN. ENCYC. OF PHIL. (Aug. 7, 2023), <https://plato.stanford.edu/entries/libertarianism> ("Libertarians take individual freedom as the paramount political value . . .").

241. *Our Platform*, LIBERTARIAN PARTY, <https://lp.org/platform-page> [<https://perma.cc/DAM3-6ARU>] (last visited May 11, 2026).

242. *Id.* (opposing "all interference by governments in the areas of voluntary and contractual relations among individuals" as "free traders" within the "only [economic system] compatible with the protection of individual rights, . . . the free market").

some state regulation but remain skeptical of some public goods.²⁴³ As of the 1970s, however, the role of social networks fueled a certain brand of libertarianism that set out to fill a cultural void in the United States: *Techno-Libertarians*.²⁴⁴ *Techno-Libertarians* primarily believe that technology may restore individual autonomy through anti-establishment means and could thrive if permitted to “self-regulat[e].”²⁴⁵

Harms. To *Libertarians*, harm arises from infringement upon autonomy, inter-erity, or risk of coercion. Across all strains of libertarianism, deregulation and life free of state interference is the idealized vehicle for furthering innovation and avoiding harm.²⁴⁶ *Techno-Libertarians* further describe harms from deprivation of information to rationalize deregulation of the internet and big tech companies.²⁴⁷

Discursive Strategies. In lay discourse, *Libertarians* advance individualist and autonomy-heavy narratives. Historically neither “right” nor “left,” some may justify anti-regulatory stances as a means of opposing bureaucracy and even as safeguarding pluralism in the current era.²⁴⁸

Techno-Libertarianism has begun to overtake U.S. policy, however, well beyond earlier questions of technology regulation.²⁴⁹ Born from late-twentieth-

243. See Tim Dickinson, *This Presidential Candidate Wants You to Be Able to Get an Abortion and Buy a Rocket Launcher*, ROLLING STONE (Sep. 10, 2024), <https://www.rollingstone.com/politics/politics-features/who-is-chase-oliver-libertarian-party-pick-president-1235099236> [https://perma.cc/R9HS-4PRN] (reporting candidate’s position on race discrimination rests upon free-market principles and only rare court involvement). The Libertarian Party is expressly opposed to redistribution. LIBERTARIAN PARTY, *supra* note 241.

244. MARGARET O’MARA, *THE CODE: SILICON VALLEY AND THE REMAKING OF AMERICA* 372 (2019) (applying a topic modeling approach).

245. Jodi L. Short, Reuel Schiller, Susan S. Silbey, Noah Jones, Babak Hemmatian & LeeAnna Bowman-Carpio, *The Dog That Didn’t Bark: Looking for Techno-Libertarian Ideology in a Decade of Public Discourse About Big Tech Regulation*, 19 OHIO ST. TECH. L.J. 1, 5, 12 (2023); see ALVIN TOFFLER, *FUTURE SHOCK* 186–87 (1970); Estes, *supra* note 40.

246. See, e.g., Exec. Order No. 14219, 90 Fed. Reg. 10583 (Feb. 25, 2025) (ordering implementation of a DOGE “Initiative”); *Directing the Repeal of Unlawful Regulations*, WHITE HOUSE (Apr. 9, 2025), <https://www.whitehouse.gov/presidential-actions/2025/04/directing-the-repeal-of-unlawful-regulations> [https://perma.cc/D6M5-WZ4N] (“Promoting economic growth and American innovation are top priorities of this Administration. Unlawful, unnecessary, and onerous regulations impede these objectives and impose massive costs on American consumers and American businesses.”).

247. Short et al., *supra* note 245, at 11–12 (attributing influence of techno-libertarian themes to “founders and funders” like Thiel and Musk).

248. See generally MICHAEL OTSUKA, *LIBERTARIANISM WITHOUT INEQUALITY* (2003) (positing that a Lockean libertarian belief in a “right of self-ownership” is not inherently incompatible with egalitarian distribution of social resources); Estes, *supra* note 40. As of 2025, the U.S. Libertarian Party responded to archconservative political discourse by including “race” among the categories of nondiscrimination in its platform: “We uphold and defend the rights of every person, regardless of their race, ethnicity, or any other aspect of their identity. Government should neither deny nor abridge any individual’s human right based upon sex, wealth, ethnicity, creed, age, national origin, personal habits, political preference, or sexual orientation.” LIBERTARIAN PARTY, *supra* note 241. In at least the 2014 elections, the Libertarian Party’s platform omitted race. See, e.g., Joshua Rawlings, *Issue Position: Discrimination*, VOTESMART (Jan. 1, 2014), <https://justfacts.votesmart.org/public-statement/889723/issue-position-discrimination> (“I condemn bigotry as irrational and repugnant. Government should neither deny nor abridge any individual’s human right based upon sex, wealth, ethnicity, creed, age, national origin, personal habits, political preference or sexual orientation.”).

249. See Estes, *supra* note 40.

century ideals of “techno-utopian” imagination, the ideology now wields powerful influence over our “ways of thinking and being in the world.”²⁵⁰ Within *Techno-Libertarian* ideology, claims of “free markets and information freedom” featured “in big tech’s discourse about itself and its lobbying strategy.”²⁵¹ Since 2010, public discourse in response has been dominated by calls for increased regulation of large platform companies, such that information-age commentators forewarned that *Techno-Libertarianism* may, in oligarchic form, transform into an ideology unrecognizable to libertarians: *Techno-Authoritarianism*.²⁵²

In legal discourse, conservative strains of both liberal and firmly anti-regulatory policies are prominent among *Libertarians*. Thus, multiple opportunities for overlap appear among *Colorblind Regressives* and *Liberal Data Guardians*. Eliminating regulation and separating the market from the government furthers the classic libertarian ethos of “escaping the state.”²⁵³

Regulatory Preferences. Mainstream *Libertarians* espouse policies that touch upon race and racial data and are bracketed by an absolutist position favoring free speech, regardless of the presence of racism or immorality.²⁵⁴ *Libertarians* traditionally oppose surveillance (although often more preoccupied with “citizens” over other U.S. residents); support the right to be forgotten; and reject the documentation of racial data.²⁵⁵

Expressions of *libertarian* ideology are not race-neutral or uniformly against surveillance policies, however. Among moderate *Libertarians*, regulation through private-law doctrines (property, contract, tort) or, for civil libertarians such as the American Civil Liberties Union (ACLU), brighter, clearer boundaries with the state and data brokers are the ideal safeguards against totalitarian abuse, with only some expressing cautions regarding datafication’s harm to “foreign”-appearing individuals.²⁵⁶ In a more conservative strain, upon Trump’s re-election, the libertarian Cato Institute sought to bridge its institutional position with *Project 2025*’s, proclaiming a blanket opposition to affirmative action, disparate impact doctrine, and the collection of racial and ethnic data.²⁵⁷ The convoluted basis for libertarian self-determination is not apparently conditional for race alone, but extends to disability. As for

250. BENJAMIN, *supra* note 42, at 39.

251. Short et al., *supra* note 245, at 5, 29–30.

252. *Id.* at 30. On *Techno-Authoritarianism* as an ideological formation distinct from *Libertarianism*, see *infra* Section II.B.5.

253. Estes, *supra* note 40.

254. LIBERTARIAN PARTY, *supra* note 241 (“Language that is perceived to be offensive to certain groups or individuals is not a cause for any legal action.”).

255. See ETZIONI, *supra* note 184, at 120–23 (discussing the dangers of surveillance); CATO INST., REPORT TO THE DEPARTMENT OF GOVERNMENT EFFICIENCY (DOGE): HOW TO DOWNSIZE AND REFORM THE FEDERAL GOVERNMENT 7–9 (Dec. 2024) (stating that “[t]he federal government collects too much data on the race and ethnicity of Americans”); cf. GDPR, *supra* note 175, at art. 17 (granting the right to erasure).

256. ETZIONI, *supra* note 184, at 123 (discussing discrimination against those who “looked ‘foreign’”).

257. CATO INST., *supra* note 255, at 6 (urging the end of affirmative action and banning disparate impact and “statistical measures of discrimination”).

surveillance of Americans with disabilities, a leading scholar warned against a rising form of “libertarian eugenics,” where the Trump Administration’s framing of disability as the sole product of individual choices is then used to justify drastic health policy deregulation and inhumane, population-selective narratives.²⁵⁸

Highlighting *Libertarianism* in the modern taxonomy reveals a fundamental destabilization ripe for critique, particularly within legal literature. Decades of its rhetoric, combined with techno-utopian economic arguments against regulation, challenge the traditional centrist-liberal view of the “private” as an effective boundary against authoritarianism.²⁵⁹ The fallacy that inheres in trusting technology (with only nominal intervention) to respect democracy, racial justice, and autonomy paved the way for data autocracy and the ease with which archconservatives unlawfully pursue race-silencing and erasure of racial data.²⁶⁰ Such breaks between politics and rhetoric on the one hand and legal and regulatory agenda on the other, as discerned under this taxonomy, aid stakeholders in discerning between ideological rhetoric and practice amid legal instability.

5. Techno-Authoritarians

Principles. By the dawn of the twenty-first century, an ultrawealthy and increasingly concentrated elite at the helm of global technology firms set out to shape and operationalize private and public infrastructure. Deregulatory policies originally deemed *Techno-Libertarian* eased the Trump Administration’s swift adoption of policies of authoritarianism and racialized nationalism.²⁶¹ *Techno-Authoritarians* advocate for robust use of sophisticated technological resources—particularly interoperable databasing, surveillance systems, and artificial intelligence (AI)—to advance social control at scale.

Harms. *Techno-Authoritarians* are skeptical of democratic state institutions by espousing opposition to managerial inefficiency and lack of accountability.²⁶² The *Techno-Authoritarian* philosophy of unifying form with function in governance—a tech-platform approach without market constraint or regulation—instead incentivizes oligarchic influence over the levers of technology, information, and other means of public oversight.²⁶³

Discursive Strategies. Unlike the preceding four ideological formations, *Techno-Authoritarians* elevate the superiority of privately controlled technology

258. SCH. OF L., BOS. UNIV., *The Annual Pike Lecture Featuring Professor Samuel Bagenstos*, at 58:49–1:02:11 (YouTube, Oct. 20, 2025), <https://www.youtube.com/watch?v=w5rwrqJwuyc>.

259. See *infra* Section II.B.5; Cohen, *Oligarchy, State, and Cryptopia*, *supra* note 135 (positing that technology oligarchs leverage control over infrastructure and “automated logics” to govern society, bypassing or dismantling existing democratic institutions).

260. See generally COULDRY & MEJIAS, *supra* note 30 (arguing that a new order, data colonialism, transforms human experiences and social interactions into data relations in which life is monitored, surveilled, and appropriated for profit, undermining autonomy and freedom).

261. See *supra* notes 10–13, 256, and accompanying text.

262. See generally Amy E. Stambach, *Silicon Governance: Elon Musk and the Techno-Libertarian Crisis in Public Administration*, ADMIN. THEORY & PRACTICE, Jan. 2026.

263. See generally Cohen, *supra* note 135 (defining and advancing an analytical framework of “tech oligarchs”).

to eliminate perceived “waste, fraud, and abuse,” without regard for democratic norms nor fundamental rights.²⁶⁴ In our taxonomy highlighting racial-political subjugation as means or ends alike, against the discursive strategy of *Techno-Libertarianism*, we discern the current administration’s transition into *Techno-Authoritarianism*. By summer 2025, the government awarded a nearly unfathomable amount in public contracts—more than \$900 million—to Peter Thiel’s Palantir, initially to pinpoint and apprehend allegedly unauthorized immigrants, but publicly acknowledging its intent to accelerate databasing and surveillance of Americans.²⁶⁵

Regulatory Preferences. Efforts to replace public institutions with privately controlled technologies, as well as standardless integration of all government agencies’ data on all Americans, purportedly to eliminate “waste, fraud, and abuse,” advance digital and physical surveillance. The current administration’s initial choice of Elon Musk to lead the Department of Government Efficiency (DOGE) “initiative” sought to rout decades of federal infrastructure serving the public, particularly safety nets for lower-income Americans, racial minorities, and workers.²⁶⁶ At least 300 million Americans now face the threat of wholesale theft of their Social Security data by Musk and DOGE contractors; insatiable demands for all state data, including food stamps data and beyond; disability registries; and reproductive surveillance.²⁶⁷ Whether they actually wish to capitalize on the rhetoric of ethnonationalism or espouse their controllers’ personal beliefs regarding vulnerable social groups, *Techno-Libertarians*’ extensive entanglements with the federal government contradict classic libertarian tenets of anti-statism and personal autonomy.

6. White Nationalists

Principles. Nationalist ideology has deep ties to racial hierarchy.²⁶⁸ *White Nationalists* advocate for “the primacy and dominance of the white population

264. See generally Mark Coeckelbergh, *Technofascism: AI, Big Tech, and the New Authoritarianism*, AI & SOC’Y, Jan. 2026; Alcides Eduardo dos Reis Peron, David Almstadter Mattar de Magalhães & Gabriel Fernandes Caetano, *Beyond Digital Repression: Techno-Authoritarianism in Radical Right Governments*, COGENT SOC. SCIS., July 2025.

265. See *supra* notes 10, 12, and accompanying text.

266. See Estes, *supra* note 40; *supra* notes 6, 9, 11, and accompanying text.

267. See, e.g., KHIARA M. BRIDGES, THE POVERTY OF PRIVACY RIGHTS 6 (2017) (observing some policymakers believe that “a poor mother’s privacy may justifiably be invaded when the state seeks to ensure that a . . . child will be born into a healthful environment and . . . [be] properly parent[ed] . . . once born”); AMI HAMRAIE, BUILDING ACCESS: UNIVERSAL DESIGN AND THE POLITICS OF DISABILITY 26 (2017) (“In the United States, where the overlapping demographics of people of color, women, and disabled people faced discrimination and segregation, the normate template reinforced the effects of Jim Crow laws, immigration policies, gender discrimination, and institutionalization.”); Fatima Hussein, *After Trump’s DOGE Action, 300 Million People’s Social Security Data Is at Risk, Whistleblower Says*, ASSOC. PRESS (Aug. 26, 2025, at 18:08 ET), <https://apnews.com/article/social-security-data-department-of-government-efficiency-f8b842c3eeaea5a304c690fba9b032ef> [<https://perma.cc/4WZA-PBCG>]; Frenkel & Krolik, *supra* note 12; Wise, *supra* note 187; Estes, *supra* note 40 (warning that *Techno-Libertarians* willing to apply authoritarian means are now “the state”).

268. See, e.g., SINGH, *supra* note 210, at 213 (noting W.E.B. Du Bois’s view that “in the United States, nationalism was captive to a racial pattern.”).

and its perceived culture, identity, etc., within a particular nation,²⁶⁹ however, connecting “feelings of freedom and belonging” by identifying with whiteness and “the persecution and dehumanization of others” perceived as nonwhite.²⁷⁰ Under this ideology, whiteness offers a political, economic, or social value. Although steeped in the rhetoric of patriotism and nation building, *White Nationalists*’ ideals are hostile to democracy, particularly with respect to race-conscious data.²⁷¹ As philosopher Charles Mills observed, experiences of whiteness still embed incentives to undermine the liberal social contract through claims to an “officially sanctioned reality . . . divergent from actual reality,” i.e., one of “inverted” perception that leaves adherents “unable to understand the world they themselves have made.”²⁷² While most Americans could identify conditions throughout pre-Reconstruction society as pre-democratic, *White Nationalists* mythologize or romanticize significant features of this past, untethered from truth.²⁷³

Harms. For *White Nationalists*, harm arises from interfering with autonomy, discretion, and other expressions of racial domination, which intersect with dimensions of power and identity.²⁷⁴ The resurgence of white nationalism in the last decade reflects that people of color can also be *White Nationalists*.²⁷⁵ Moreover, *White Nationalists* may publicly identify as *Colorblind Regressive*, but personally may not deny the existence of race nor condemn racial profiling by “roving bands” of immigration agents. With diverse conceptions of race, *White*

269. *White Nationalism*, OXFORD ENG. DICTIONARY, https://www.oed.com/dictionary/white-nationalism_n?tab=meaning_and_use (last visited May 11, 2026).

270. Cristina Beltrán, *To Understand Trump's Support, We Must Think in Terms of Multiracial Whiteness*, WASH. POST. (Jan. 15, 2021), <https://www.washingtonpost.com/opinions/2021/01/15/understand-trumps-support-we-must-think-terms-multiracial-whiteness>. Closely related is an even older term, white supremacy, defined as the “belief or theory that white people are superior to other peoples, and should therefore have greater power, authority, or status” and “a social system based on or perpetuating the political, economic, and cultural dominance of white people.” *White Supremacy*, OXFORD ENG. DICTIONARY, https://www.oed.com/dictionary/white-supremacy_n?tab=meaning_and_use (last visited May 11, 2026).

271. Nor must one be identified as “white” to be a White Nationalist, which more commentators recognize in contemporary hate-group leadership and rosters. See generally PAOLA RAMOS, *DEFECTORS: THE RISE OF THE LATINO FAR RIGHT AND WHAT IT MEANS FOR AMERICA* (2024).

272. MILLS, *supra* note 36, at 18; cf. K-Sue Park, *The History Wars and Property Law: Conquest and Slavery as Foundational to the Field*, 131 YALE L.J. 1062 (2022) (linking racialization and assertion of property rights to solidify colonization and a slave economy).

273. Christine Reyna, Andrea Bellovary & Kara Harris, *The Psychology of White Nationalism: Ambivalence Towards a Changing America*, 16 SOC. ISSUES & POL’Y REV. 79, 81 (2022).

274. See, e.g., LEVITSKY & ZIBLATT, *supra* note 136, at 121 (relating the close identification of abolition of slavery with the Republican Party as an “existential threat” to the Democratic Party in the 1850s); *supra* note 145 and accompanying text.

275. See RAMOS, *supra* note 271; Beltrán, *supra* note 270. In June 2025, the Trump Administration deployed “Operation At Large” in Los Angeles, in which masked federal immigration agents, bearing guns, questioned and detained Californians. *Noem v. Vasquez Perdomo*, 146 S. Ct. 1, 6 (2025) (mem.) (Sotomayor, J., dissenting from grant of application for stay). A district court enjoined the practices of stopping people based solely upon their external appearance, languages spoken, or place of employment, from which the Trump Administration appealed. *Id.* at 8–9. A six-Justice majority granted the Government’s application in an unsigned opinion over the concerns of unlawful racial profiling raised by the district court. See *id.* at 11.

Nationalists may refer to “race” only when referring to nonwhites, and thus support the *Race-Denying Colorblind Regressive* policy agenda.

Discursive Strategies. In lay discourse, *White Nationalists* strategically reject factual accounts that complicate the ends of achieving white normativity or superiority.²⁷⁶ These strategies often include disputing accounts of structural inequality or the need for racial redress unless they support an account of anti-white discrimination.²⁷⁷ The second Trump Administration deploys mass deportation tactics, targets sanctuary jurisdictions, and now moves to drastically cap refugees entering the United States, thereby furthering the express goals of *White Nationalists*.²⁷⁸ From the campaign trail and in office, President Trump has “directly and indirectly pandered” to white supremacist ideology.²⁷⁹ His actions include favorably platforming the Proud Boys, allying with white nationalist groups in the January 6, 2020 insurrection, and—with Vice President Vance—publicizing their employment of those who espouse white supremacist views within DOGE, Homeland Security, and the White House.²⁸⁰ Stoking racial resentment against Black people, Mexicans, immigrants, Asian Americans, and other non-whites became a means of rallying a base through promises to reshape the state around white grievance and nostalgia for white power.²⁸¹

276. Reyna et al., *supra* note 273, at 91–92 (describing “White Victimization”).

277. *See id.*

278. *See, e.g.,* Kimahli Powell & Jean Freedberg, *The Afrikaner Exception: Race and Strategic Dismantling of U.S. Refugee Protection Under the Trump Administration*, HARV. KENNEDY SCH.: CARR-RYAN CTR. FOR HUM. RTS. (May 19, 2025), <https://www.hks.harvard.edu/centers/carr-ryan/our-work/carr-ryan-commentary/afrikaner-exception-race-and-strategic-dismantling> [https://perma.cc/8WLB-VTLK].

279. Michael Z. Green, *Negotiating Race in the Workplace after Trump*, 35 NEGOT. J. 195, 195 (2019).

280. *See, e.g.,* Ryan Mac & Kate Conger, *Vance and Trump Call for Rehiring of DOGE Staffer Who Quit Over Racist Posts. Musk Obliges.*, N.Y. TIMES (Feb. 7, 2025), <https://www.nytimes.com/2025/02/07/us/politics/vance-doge-staffer-racist-posts.html> (reporting Trump, Vance, and Musk garnered support to rehire a DOGE staffer who publicly posted, “I was racist before it was cool” and “normalize Indian hate”); Zeeshan Aleem, *How DHS Is Using Art to Support the Idea of Ethnic Cleansing*, MS NOW (July 26, 2025, at 06:00 ET), <https://www.msnbc.com/opinion/msnbc-opinion/departments-homeland-security-painting-american-progress-gast-rcna221128> [https://perma.cc/4SJW-HCZC]; Ja’han Jones, *Trump’s DHS Posts Tip Line Propaganda Amplified by White Supremacists*, MS NOW (June 13, 2025, at 15:43 ET), <https://www.msnbc.com/top-stories/latest/trump-dhs-white-supremacist-propaganda-rcna212892> (“[T]he Department of Homeland Security this week promoted propaganda that white supremacist social media accounts claim to have generated.”). White House Deputy Chief of Staff Stephen Miller reposted the latter, having “previously promoted white supremacist views, including circulating articles from white nationalist websites to a reporter at Breitbart.” *Id.*; *see also* Ja’han Jones, *New Report Shows How Trump’s DHS Is Mainstreaming White Supremacy*, MS NOW (Sep. 2, 2025, at 15:24 ET), <https://www.msnbc.com/top-stories/latest/homeland-security-social-media-white-supremacy-rcna228582> (noting an increase in “white nationalist or anti-immigrant social media posts” since June 2025).

281. *See, e.g.,* Jones, *New Report*, *supra* note 280; Domenico Montanaro, *How the ‘Replacement’ Theory Went Mainstream on the Political Right*, NPR (May 17, 2022, at 05:00 ET), <https://www.npr.org/2022/05/17/1099223012/how-the-replacement-theory-went-mainstream-on-the-political-right> [https://perma.cc/MV5E-6BT4]. Many Republicans continue to embrace a white nationalist conspiracy known as Replacement Theory, having incorporated into party messaging that racial minorities will

In legal discourse, *White Nationalists* may adopt anti-classification or abstract liberal frameworks to argue that racial remediation and anti-subordination measures always entail anti-white discrimination or allege their deprivation of “resources.”²⁸² Thus, when President Trump claimed white South Africans suffered race-based “persecution” and “genocide” as whites to an astonished press corps, and proposed reserving 75% of future refugee admissions only for white South Africans to yield a 99.9% white Afrikaner admissions rate,²⁸³ the Trump Administration pursues a radical right-wing form of race consciousness that excites *White Nationalists*. *White Nationalists* are incentivized to align with *Race-Denying* and *Race-Sensitive Colorblind Regressives* even when the express wording and substance of their positions contradict—and vice versa.

Regulatory Preferences. For *White Nationalists*, white racial identity is central to nation-building. Many of the policies they seek advance white people as “both a demographic majority and dominance of the nation’s culture and public life.”²⁸⁴ Conversely, some *White Nationalists* may advocate for the elimination of racial categories to advance material goals of disadvantage or suppression of nonwhites.²⁸⁵

displace white Americans. *Id.* It has also been referred to as the “great replacement” theory or, alternately, “white replacement theory.” *Id.*

282. See, e.g., Montanaro, *supra* note 281; cf. Memorandum from Off. of Att’y Gen., *supra* note 189, at 2 (purporting to prohibit “protected characteristics” including race and sex from being used as “[c]riteria” for “employment, program participation, [or] resource allocation,” *inter alia* (emphasis added)); “DEI Discrimination by Federal Contractors” EO, *supra* note 8, at 16147 (purporting to define “racially discriminatory DEI activities” as “disparate treatment based on race or ethnicity in the recruitment, employment (e.g., hiring, promotions), contracting (e.g., vendor agreements), program participation, or allocation or deployment of an entity’s resources”).

283. See Ted Hesson, *Exclusive: Trump Administration Weighing Refugee Cap of 40,000 with Focus on White South Africans*, REUTERS (Aug. 15, 2025, at 07:31 ET), <https://www.reuters.com/world/africa/trump-administration-weighing-refugee-cap-40000-with-focus-white-south-africans-2025-08-15> (explaining that 30,000 of 40,000 refugees “would be devoted to Afrikaners”); Mayeni Jones, *US Has Let in 4,499 Refugees Since October - All But Three Were South African* (Apr. 10, 2026), <https://www.bbc.com/news/articles/c4g89kkvenqo> [<https://perma.cc/J5H4-47J4>] (stating that 4,496 of 4,499 refugees were Afrikaners and that “[l]ast year, Trump halted all refugee admissions, including for applicants from warzones, but allowed Afrikaners, a white minority group he said was persecuted, to seek resettlement.”); Powell & Freedberg, *supra* note 278; Farouk Chothia, *Is There a Genocide of White South Africans as Trump Claims?*, BBC NEWS (June 2, 2025), <https://www.bbc.com/news/articles/c9wg5pg1xp5o> [<https://perma.cc/Y4UC-ZEZU>] (noting President Trump confronted South African president with “widely discredited claims that genocide is being committed against white people”).

284. Jayashri Srikantiah & Shirin Sinnar, *White Nationalism as Immigration Policy*, 71 STAN. L. REV. ONLINE 197, 197 (2019). Mobilizations of the MAGA-era culture war that is “resurrecting and enforcing (at time with violence) traditional status hierarchies” through “punishing women, racial and religious minorities, and LGBTQ+ people who make dignity and equality demands that threaten white Christian political and cultural power.” JON MICHAELS & DAVID NOLL, VIGILANTE NATION 1–2, 4 (2026) (noting that “legal vigilantism was not only commonplace but also a foundational feature of American life” and “certainly . . . in antebellum times[, but] just as true during the long decades of Jim Crow”).

285. Kathryn T. Gines, *A Critique of Postracialism: Conserving Race and Complicating Blackness Beyond the Black-white Binary*, 11 DU BOIS REV. 75, 83 (2014). Some openly espouse biological differences to claim the inferiority of nonwhites, most visibly by making claims advancing eugenics throughout the nineteenth and early twentieth centuries. ROBERTS, *supra* note 43, at 37 (“European and American scientists had for over two centuries developed an understanding of races as biologically distinct groups, marked by inherited attributes of inferiority and superiority.”); see also HOWARD

Contemporary campaigns to end government collection of racial data, defund civil rights enforcement, and derecognize civil rights laws are policies that will marginalize, suppress, or optimize conditions of violence against U.S. nonwhites and advance white nationalist ideology.²⁸⁶ Thus, White Nationalists may support such policies even while affirming whiteness and racial differentiation.²⁸⁷

White Nationalists reject regulatory approaches to discourse around race and other social categories unless such interventions advance their political-economic vision of whiteness. They may join with *Libertarians* to support policies of disintermediation that reduce regulation of speech, whether public or private.²⁸⁸ Such regulatory preferences include free speech absolutism, opposing moderation, and use of coercive speech or acts.²⁸⁹ Within this more fulsome taxonomy, it is possible to detect synergies with *Techno-Libertarian* and authoritarian conduct.

C. LABOR'S PRESCRIPTIONS FROM THE NEW TAXONOMY

Workers remain at the forefront in evaluating the economic and social impact of potentially coercive laws, informational practices, and technologies. Beyond standing to challenge institutional harms in court, workers are knowledgeable participants and witnesses to how laws are interpreted, implemented, and contested.

1. Defining Harm: Beyond “Sensitive Data”

As the modernized taxonomy reflects, ideas about informational harm remain ideologically fragmented. They do not cohere under any single framework, but feature in a patchwork of doctrines and policies²⁹⁰ punctuated by gaps in knowledge. Organized workers offer a beginning, however. They subscribe to multiple and material views of harm, urging caution against embracing abstract or

WINANT, RACIAL CONDITIONS: POLITICS, THEORY, COMPARISONS 17 (1994) (summarizing views of race as an objective condition).

286. Alex Guillén & Hassan Ali Kanu, *DOJ Rolls Back Anti-Discrimination Rules*, POLITICO (Dec. 9, 2025, at 15:58 ET), <https://www.politico.com/news/2025/12/09/justice-department-discrimination-disparate-impact-00683362>

287. See *supra* notes 1–13 and accompanying text (introductory vignette demonstrating selective uses of race to eliminate knowledge, disappear, or harm).

288. Research into the impact of Section 230 of the Communications Decency Act on Black communities shows the benefits of content moderation include preventing discriminatory practices and algorithms, reducing disinformation, and removing hate speech and white supremacists. See Spencer Overton & Catherine Powell, *The Implications of Section 230 for Black Communities*, 66 WM. & MARY L. REV. 107, 152 (2024); see also S. POV. L. CTR., *Proud Boys*, <https://www.splcenter.org/resources/extremist-files/proud-boys> [<https://perma.cc/BQ6Y-5EEP>] (last visited July 16, 2026) (noting despite the Proud Boys’ statements disavowing white supremacy, leaders and rank-and-file members “regularly spout white nationalist memes and maintain affiliations with known extremists”). Kyle Chapman, who formed the Proud Boys’ paramilitary wing, spoke at a 2017 rally and denounced “the atrocities that whites and people of European descent face not only here in this country but in Western nations across the world,” and urged that “it’s time we all started talking about it and stopped worrying about political correctness and optics.” *Id.*

289. See, e.g., Wade Goodwyn, *Alt-Right, White Nationalist, Free Speech: The Far Right’s Language Explained*, NPR (June 4, 2017, at 05:00 ET), <https://www.npr.org/2017/06/04/531314097/alt-right-white-nationalist-free-speech-the-far-rights-language-explained> [<https://perma.cc/2AZF-VHN7>].

290. See Ohm, *supra* note 203, at 1161–65.

immaterial definitions of harm that may relieve institutions of material responsibility.²⁹¹ Rather than insist on a totalizing framework, organized labor focuses on sociolegal criteria for harm. The suppression or erasure of racial discourse in the workplace remains an important concern to many workers.²⁹² However, racial equality is not a priority of all unions.²⁹³ Workplace struggles train society's attention to the full array of material harms, rather than on liberal abstraction alone.²⁹⁴

The conceptual differences between privacy law and information sciences examined here, particularly within the legal literature, pose significant barriers to integrating regulatory and democratic discourse. The prominence of *Liberal Data Guardians* in global and U.S. regulatory approaches, notwithstanding the market command of *Techno-Libertarians*, offers a starting point. Privacy law scholars have long predicted that “sensitive data” would emerge as a key unifying concept, at least as to privacy law.²⁹⁵ Daniel Solove, for one, now advocates for regulation to pivot away from a topical approach toward modernizing conceptions of harm (i.e., what data “does”).²⁹⁶

Our own resort to the term “sensitive data” quickly surged after DOGE hired unvetted contractors to download information stored in 300 million Americans' Social Security accounts in January 2025 without public explanation.²⁹⁷ In response, litigation by federal workers against the Trump Administration's agencies invoked sensitive data synonymously with “personal information” or data traditionally kept private unless compelling reasons exist for their disclosure.²⁹⁸ “Sensitive data” has gained traction beyond legal circles, benefiting from the

291. See Lin, *supra* note 31, at 884.

292. See POLLACK ET AL., *supra* note 92, at 6 (reflecting workers' interests in race- and other demographically conscious employment policies).

293. SOPHIA Z. LEE, *THE WORKPLACE CONSTITUTION: FROM THE NEW DEAL TO THE NEW RIGHT* 81–96 (2014) (on labor unions' resistance to admitting nonwhite members and civil rights advocates right for “equality from within organized labor”). See generally Mark P. Thomas & Steven Tufts, *Blue Solidarity: Police Unions, Race and Authoritarian Populism in North America*, 34 *WORK, EMP. & SOC'Y* 126 (2020) (on the role of police unions in exacerbating issues relating to racism, policing, and authoritarianism).

294. Cf. Veena Dubal, *Data Laws at Work*, 134 *YALE L.J. F.* 405, 405 (2025) (describing wider recognition of material, physical, and psychological harms workers face from automated monitoring and decisionmaking). These legal doctrines continue to source harms in non-economic, “purely” dignitary injuries or “losses.” Nonetheless, for now, greater social concern appears to lie with concrete, material or economic harms. See COFONE, *supra* note 193, at 115–16 (arguing social and systemic views of harm, describing split among U.S. courts between requiring proof of “actual” consequential harm, and rule or procedural violation).

295. Paul Quinn & Gianclaudio Malgieri, *The Difficulty of Defining Sensitive Data—The Concept of Sensitive Data in the EU Data Protection Framework*, 22 *GER. L.J.* 1583, 1585–90 (2021). See generally Ohm, *supra* note 203.

296. See Daniel J. Solove, *Data is What Data Does: Regulating Based on Harm and Risk Instead of Sensitive Data*, 118 *NW. U. L. REV.* 1081, 1111 (2024).

297. See Hussein, *supra* note 267.

298. Even then, the Fourth Circuit downplayed the potential harms upon aggregation and transfer of Social Security account data at length, holding that proof of unauthorized use or intrusion by third parties would likely be required under existing privacy law and doctrines. See *Am. Fed'n of Tchrs. v. Bessent*, 152 F.4th 162, 172 (4th Cir. 2025).

ever-growing influence of the GDPR's liberal data protectionism.²⁹⁹ However, preempting autocratic abuse of racial data remains virtually absent from priorities identified in leading legal and policy discussions.³⁰⁰ Like a fabled ship in a bottle, however, the anti-discrimination norms Americans exported to the EU's complex network of social democracies may well redound to U.S. law during a constitutional crisis.

2. Grounds for Accountability

As experts on institutional function, workers may decide to challenge employers who engage in empty performances of legal compliance.³⁰¹ While companies are permitted to interpret the law's meaning day to day, workers form their own opinions about what forms of accountability are effective and what the law means. Historically, trade unions first invested in canvassing their members and related unions, pooling their resources to develop social science tools such as reports and recommendations, to identify trends and their causes across industries.³⁰²

Unions and other labor organizations are prominent in social movements, developing sophisticated multilevel frameworks to hold employers accountable for their data and informational practices. Indeed, worker-led efforts spurred a key integration of concepts of harms nationally to include:

- (1) discrimination, particularly in forms that amplify existing unequal employment practices;

299. Quinn & Malgieri, *supra* note 295, at 1585 (discussing how the GDPR's concept of sensitive data derived from heightened risks to fundamental rights and freedoms, including discrimination, from processing such data).

300. A rare exception is the following action alert from fall 2025, reflecting a conceptual integration of disability rights with race-conscious implications:

DOGE has our Social Security numbers and personal data. ICE has our Medicaid records. And now RFK Jr. wants an autism registry - an apparatus to scrape and stockpile information that could be weaponized against the human rights and dignity of autistic people. We know where this road leads.

RFK Jr.'s registry proposal echoes the logic of eugenics - catalog, control, and ultimately dehumanize. We refuse to let that happen again.

Email from Jeff Person, Founder, AbleDems to Progressive Reform Network (Sep. 16, 2025); *see also* Chan, *supra* note 6 (discussing the threat of "mass surveillance through the use of profiling technologies that erode democratic protections").

301. LAUREN EDELMAN, *WORKING LAW: COURTS, CORPORATIONS, AND SYMBOLIC CIVIL RIGHTS* 27 (2016).

302. *See* JANE MCALEVEY, *A COLLECTIVE BARGAIN: UNIONS, ORGANIZING, AND THE FIGHT FOR DEMOCRACY* 17–19, 37–38 (2020); William Foote Whyte, *On the Uses of Social Science Research*, 51 AM. SOCIO. REV. 555, 557 (1986) ("Labor and management in the U.S. did not simply call on organizational researchers to tell them what to do. They conducted their own studies and field trips."); *infra* note 303 (reporting statewide conference on organized labor and AI); *infra* note 304 (communications workers' union's national report and recommendations on AI).

- (2) social stratification, in which low-wage industries' introduction of exploitative technologies often immediately impacts "workers of color, immigrants, and women";
- (3) loss of independence;
- (4) exposure of political and social vulnerabilities;
- (5) community losses by students, patients, and other connected cohorts;
- (6) arbitrariness in coercive government functions or provision of welfare;
- (7) interference with democracy; and
- (8) misinformation.³⁰³

Broadened grounds for accountability stem from expansive lay ideations of harms as conceptually linked. As demands from institutions and economic policies, their nexus to palpable harms also resists the constraints of abstract legal frameworks and the far-right's invocation of procedural grievances to undermine race-conscious discourse. Established unions remain the most visible and effective movements setting terms for accountability over information and its representation.³⁰⁴

Worker organizing achieved wins in two union milestones. First, 11,500 screenwriters represented by the Writers Guild of America (WGA) and 160,000 actors belonging to the Screen Actors Guild–American Federation of Television and Radio Artists (SAG-AFTRA) went on strike to challenge industry practices regarding streaming services and AI, buoying a 2023 "strike summer."³⁰⁵ Commentators marveled at the breadth of this first-in-kind agreement at the cusp of film and television's embrace of AI, as WGA went on strike within six months of the launch of ChatGPT.³⁰⁶ By November 2023, the Communications Workers of America (CWA) issued its blueprint to address AI policies across

303. See, e.g., CTR. FOR LAB. AND CMTY., UNIV. OF CAL., SANTA CRUZ, MAKING TECH WORK FOR WORKERS: LESSONS FROM A STATEWIDE CONFERENCE ON LABOR, AI, AND BUILDING POWER IN CALIFORNIA 21–22 (2025); see also AJUNWA, *supra* note 37, at 85 (noting that automated hiring systems may mask deliberate discriminatory hiring practices).

304. In 2023, a tech-labor partnership between Microsoft and the AFL-CIO adopted a more collaborative approach to knowledge-sharing, incorporating "worker perspectives and expertise," and addressing public policies affecting frontline workers. *AFL-CIO and Microsoft Announce New Tech-Labor Partnership on AI and the Future of the Workforce*, MICROSOFT (Dec. 11, 2023), <https://news.microsoft.com/source/2023/12/11/afl-cio-and-microsoft-announce-new-tech-labor-partnership-on-ai-and-the-future-of-the-workforce> [<https://perma.cc/W4AS-D592>].

305. See Steven Greenhouse, *'It Feels Like It's Strike Summer': US Unions Flex Muscles Across Industries*, THE GUARDIAN (July 26, 2023, at 08:00 ET), <https://www.theguardian.com/us-news/2023/jul/26/strike-summer-us-unions-flex-muscles> [<https://perma.cc/V3NY-MTXW>]; Lois Beckett & Kari Paul, *'Bargaining For Our Very Existence': Why the Battle Over AI Is Being Fought in Hollywood*, THE GUARDIAN (July 22, 2023, at 7:00 ET) <https://www.theguardian.com/technology/2023/jul/22/sag-aftra-wga-strike-artificial-intelligence> [<https://perma.cc/NYJ3-6J9W>].

306. See, e.g., Oludolapo Makinde, *In the Age of ChatGPT, Workers Want a Say on AI in the Workplace*, FORBES (June 26, 2025, at 14:30 ET), <https://www.forbes.com/sites/oludolapomakinde/2025/06/26/in-the-age-of-chatgpt-workers-want-a-say-on-ai-in-the-workplace> [<https://perma.cc/5X7N-FSQS>].

employers and worksites,³⁰⁷ a policy vision that continues to shape state legislation today. As a proactive document, CWA's *AI Principles and Recommendations* relate democracy and racial equity, and historic labor movement responses to older, pre-AI technologies at the outset—"systemic reforms to strengthen democracy, including in our workplaces, are needed to ensure accountability for the effects of AI systems" along with the union's commitment to monitor "broader social impacts of AI and advocate for policies that protect democracy, invest in education, and uphold civil rights."³⁰⁸

Whether civil libertarian impulses within law will strengthen with the influence of labor movement commitments to equity remains to be seen. In late 2025, three trade unions and the Electronic Frontier Foundation sued the Department of State to cease its "viewpoint-based investigation and surveillance" of social media posts by noncitizens (here, visa holders) and purge records the federal government has created to date under this program.³⁰⁹ Such a coalition recognizes the importance of legal interpretative norms set by frontline position employees, now increasingly among white-collar workers in public and private institutions.

Every workplace sits upstream and downstream of the law. The above taxonomy recognizes how workers and advocates have already begun to wield law and ideology to sharpen the stakes for race-conscious data and, therefore, the viability of a democracy.

III. CHALLENGES & IMPLICATIONS FOR EXPANDED RESEARCH

Workers are engaged in de facto social bargaining despite, if not because of, hierarchies reflected in public and private employment. They remain visible within the institutions under the heaviest ideological attack amid the erasure of race consciousness and other forms of accountability. While far from uniform, their demands reflect one or more of the *Liberal Data Guardian*, *Race-Conscious Dignitarian*, or *Libertarian* frames. As a result, identifying challenges and future inquiries necessary to broaden engagement with race-conscious data will be necessary to deepen their relationship with democracy. These include asymmetries in power and informational access; ongoing surveillance; commodification; and data integrity amid growing misinformation.

A. ASYMMETRIES, SURVEILLANCE & CONTROL

The apportionment of power, including majoritarian voter power, remains a forceful critique from political and legal realists. Even with nationally significant

307. CWA COMM. ON A.I., REPORT TO THE CWA EXECUTIVE BOARD ON AI PRINCIPLES AND RECOMMENDATIONS (2023), https://www.cwa-union.org/sites/default/files/2023-12/202311_report_to_the_cwa_executive_board_on_ai_principles_and_recommendations.pdf [<https://perma.cc/HGA7-NZRF>].

308. *Id.* at 1; see also AFL-CIO, ARTIFICIAL INTELLIGENCE: PRINCIPLES TO PROTECT WORKERS 4 (2025), <https://aflcio.org/reports/workers-first-ai> [<https://perma.cc/F36N-TQVK>] (enumerating principle to "[p]rotect workers' civil rights and uphold democratic integrity").

309. Complaint at 93–94, *Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. U.S. Dep't. of State*, No. 25-cv-8566 (S.D.N.Y. Oct. 16, 2025) (challenging Exec. Order No. 14161).

bargaining wins and issue leadership, building a labor movement that is scalable regardless of geography would help reverse the decades-low rate of unionization (6%) among private employers,³¹⁰ and continue to encourage new forms of leadership and organizing around racism and sexism.³¹¹ The rapidly expanding role for labor and civil rights organizations is welcome since, among *Race-Conscious Dignitarians*, the most extensive thread of scholarship addresses criminal systems as the first spaces to involve an “increasingly powerful and voracious policing surveillance apparatus,” already used to target political critics such as Black Lives Matter activists.³¹² And for decades, scholars have raised the non-universal nature of privacy “rights” as a solution from the experiences of racial minorities and the poor.³¹³

Local codification inoculates old tech from being misinterpreted by false claims regarding law and fact, or being selectively applied when racial information would point to recognition that nonwhites are denied full citizenship. A core power struggle lies in the co-sovereignty framework of federal and state lawmaking. When federal and state claims about law diverge, the result simultaneously undermines and preserves governance norms. Sub-federal law will play a crucial role in memorializing legal norms and shaping daily expectations through employers, as the guardrail function of racial information—including the laws of disparate treatment and disparate impact—may remain embossed within local laws.

As of October 2025, California’s civil rights laws expressly encourage anti-bias audits of any technologies, as employers that wish to present a defense to charges of discrimination may point to audits and related efforts as relevant evidence.³¹⁴ An amended regulation for the California Consumer Privacy Act,

310. See Janice Fine & Benjamin Schlesinger, *Where Did the Labor Vote Go?*, BOS. REV. (Nov. 18, 2024), <https://www.bostonreview.net/articles/where-did-the-labor-vote-go> (noting that “only 6% of private-sector workers belong to unions”).

311. See, e.g., Dorian T. Warren & Cathy J. Cohen, *Organizing at the Intersection of Labor and Civil Rights: A Case Study of New Haven*, 2 U. PA. J. LAB. & EMP. L. 629, 629–30 (2000) (arguing that labor movements “can mobilize new constituencies” by addressing issues of minority groups); Tamara L. Lee & Maite Tapia, *Intersectional Organizing: Building Solidarity Through Radical Confrontation*, 62 INDUS. RELS. 78, 82 (2023) (discussing scholarship connecting success of labor organizing to inclusion of marginalized identity groups); *Unions Help Reduce Disparities and Strengthen Our Democracy*, ECON. POL’Y INST. (Apr. 23, 2021), <https://www.epi.org/publication/unions-help-reduce-disparities-and-strengthen-our-democracy> (discussing impact of labor organizing on racial economic disparities).

312. Chaz Arnett, *Black Lives Monitored*, 69 UCLA L. REV. 1384, 1387, 1395 (2023).

313. See, e.g., Anita L. Allen, *Dismantling the “Black Opticon”: Privacy, Race Equity, and Online Data-Protection Reform*, 131 YALE L.J. F. 907, 918 (2022) (noting early privacy literature’s acknowledgement that African Americans have pronounced “concerns about covert physical surveillance and discrimination by segregationists within a white power structure” (citing ALAN F. WESTIN, *PRIVACY AND FREEDOM* 68, 115 (1967))); BRIDGES, *supra* note 267, at 5 (“To be poor is to be subject to invasions of privacy that we might understand as demonstrations of the danger of government power without limits.”); Eden Osucha, *The Whiteness of Privacy: Race, Media, Law*, 24 CAMERA OBSCURA 67, 78 (2009) (arguing that differing photographic treatment of whites and nonwhites contributed to differences in ability to exercise privacy rights).

314. See CAL. CODE REGS. tit. 2, §§ 11008.1, 11009(f), 11017 (eff. Oct. 1, 2025) (incentivizing anti-bias audits where employers sued for discrimination in reliance upon AI tool, as “[r]elevant to any such

effective January 1, 2026, regulates any AI that makes a “significant decision” affecting employment, contracting, and compensation, requiring a risk assessment and prior consumer notice.³¹⁵ New York City began to implement pay data reports that adopt the federal EEO-1 Component 2 approach, requiring annual disclosures by race, gender, and occupation.³¹⁶

While these laws appear to follow a privacy and individual-consent model, large law firms understand them to be prescriptive.³¹⁷ Moving from a privacy to a “data” perspective more concertedly, post-2024 laws focus on material harms of discrimination that are not mere abstract grievances.

In race-conscious practices, personal agency and beliefs about racial information counter authoritarian abuse.³¹⁸ The hierarchical nature of the employment relationship, however, poses difficulties to the extent modern uses of information “intensify control while eroding autonomy” through the increasing pressure to abide by high-tech norms.³¹⁹

B. COMMODIFICATION

Intensifying commodification of data by technology companies, and now the federal government, drives public awareness of how “sensitive” personal data—including race, gender, and health—is extracted for profit or exploitation. Many among *Liberal Data Guardians*, *Race-Conscious Dignitarians*, and *Libertarians* (but not all) consciously address the connection between varied forms of contemporary capitalism, technology firms, and commodification of data to further control, censorship, or disassociation as user end-goals.³²⁰ U.S. labor movements have been the first to demonstrate how commodification of information erodes workers’ autonomy across workplaces, sectors, and social classes, while enhancing the control and demands for extracting ever-higher levels of work from firms and their managers.³²¹

Advocacy groups, consumers, labor, and other social movements nevertheless still prioritize opposition to limitless commodification of data. As of the 2020s,

claim” is whether defendant engaged in “anti-bias testing or similar proactive efforts to avoid unlawful discrimination, including the quality, efficacy, recency, and scope of such effort, the results of such testing or other effort, and the response to the results.”).

315. See *id.* at tit. 11, §§ 7001(e), (ddd), 7150, 7220.

316. *New York City Enacts New Laws to Require Pay Data Reporting*, A&O SHERMAN, (Jan. 12, 2026), <https://www.aoshearman.com/en/insights/new-york-city-enacts-new-laws-to-require-pay-data-reporting> [<https://perma.cc/MB4H-8ULW>]; N.Y.C. Local Law No. 174 (Dec. 4, 2025). Anonymity at the individual level remains a requirement to preserve privacy. See *id.*

317. See, e.g., Ogletree Deakins, *Bias Audits: Meeting California’s AI Regulations, and Emerging National Standards* (Oct. 30, 2025) (unpublished slide presentation and notes) (on file with author).

318. See *supra* Part I; *supra* Part II.

319. Antonio Aloisi & Valerio De Stefano, *AI at Work, Algorithmic Bosses, and the Ambivalence of Automation*, at 1, in *ARTIFICIAL INTELLIGENCE AND LABOUR LAW: A GLOBAL OVERVIEW* (Marco Biasi ed., forthcoming 2026) (manuscript at 1).

320. See ROGERS, *supra* note 135, at 19–25 (noting inherent tensions between worker organizing’s “associational power” and “capital’s legal and technological powers” (emphasis omitted)); cf. ULISES MEJIAS & NICK COULDRY, *DATA GRAB: THE NEW COLONIALISM OF BIG TECH AND HOW TO FIGHT BACK* 182 (2024) (analogizing big technology firms’ gathering of data to colonial seizures of land).

321. See Aloisi & De Stefano, *supra* note 319, at 3–4; ROGERS, *supra* note 135, at 25–28.

renowned race-conscious researchers Joy Buolamwini and Timnit Gebru, community groups, and other advocacy groups have undertaken considerable public education to resist algorithmic bias, data capitalism, and data surveillance as civil rights emergencies.³²² National groups Data for Black Lives and Demos have conceptualized policies to address the pervasive roles of race and gender inequalities stemming from discrimination, past and present, within data capitalism, urging advocacy under a rubric of transparency, regulation, structural change, and governance measures.³²³ Much like the labor movement, Data for Black Lives and Demos highlight the predominantly nonwhite composition of the workers most affected by such practices and the reification of data without social context as new tools deepen earlier racial segregation of labor markets.

Expanding alternatives to extractive, profit-driven data approaches include data cooperatives committed to responsible data stewardship and data sharing; and practices of “communal knowledge-making,” a “social view of knowledge [in which] each person must not only develop their own ideas, but share those ideas with others in a way that tries not to ‘interfere with other beings’ life pathways.”³²⁴ Preserving race-conscious data as a collective good, as both democratic guardrail and policy barometer, may well again operate in private, nonfederal spaces to sustain race consciousness.

C. DATA INTEGRITY

Data integrity refers to the factual assertions within information that can be verified as true. Data integrity is a valuable commodity commercially and socially,³²⁵ as it generates analysis that is not manipulated or distorted in producing conclusions.³²⁶ At an intrinsic level, data integrity is an embedded assumption

322. See, e.g., *supra* note 26 and accompanying text.

323. See MILNER & TRAUB, *supra* note 177, at 10, 18–27.

324. MEJIAS & COULDRY, *supra* note 320, at 183 (discussing contributions of Indigenous theorist Leanne Betasamosake Simpson of the Michi Saagiig Nishnaabeg, Alderville First Nation in Canada); see also LUCI PANGRAZIO & NEIL SELWYN, CRITICAL DATA LITERACIES: RETHINKING DATA AND EVERYDAY LIFE 143–45 (2023) (discussing “data cooperatives” as a method of using personal data “for communal good”).

325. See, e.g., Jesus Serrano, *What’s the Real Cost of Disinformation for Corporations?*, WORLD ECON. F. (July 14, 2025), <https://www.weforum.org/stories/2025/07/financial-impact-of-disinformation-on-corporations> [<https://perma.cc/KNY8-4DB5>] (“Disinformation . . . can cause massive financial and reputational damage, leading to stock price crashes, revenue losses and consumer distrust.”); Gabriel R. Sanchez & Keesha Middlemass, *Misinformation is Eroding the Public’s Confidence in Democracy*, BROOKINGS INST. (July 26, 2022), <https://www.brookings.edu/articles/misinformation-is-eroding-the-publics-confidence-in-democracy/> [<https://perma.cc/WAL4-ZV89>] (noting a Quinnipiac University study reflecting 76% of respondents believe “political instability within the country is a bigger danger to the United States than external adversaries” and concerns about the role of “fake news and sophisticated disinformation campaigns”).

326. See, e.g., Vin Gurrieri, *Trump’s Anti-DEI Tack Merits Revisiting Voluntary Bias Audits*, LAW360 (June 11, 2025, at 18:53 ET), <https://www.law360.com/employment-authority/articles/2349763/trump-s-anti-dei-tack-merits-revisiting-voluntary-bias-audits> (noting growing need to “understand what the [data audit] process is [and] what factors are really important, . . . not only the right underlying employment-level related data, but also the criteria that you’re using to test whether there is equal opportunity” to achieve “data integrity” (second alteration in original)); AJUNWA, *supra* note 37, at

in providing legitimacy to legal adjudication, policymaking, and democratic discourse. Federal and local lawmakers across ideologies, however, have misused data, history, policymaking, and assertions about the meaning of law itself.³²⁷ Presently, employers and law firm compliance practitioners who advise them are at the vanguard of data integrity.³²⁸

Conversely, misinformation and disinformation occupy the lowest rungs in an information spectrum. Misinformation is “false or out-of-context information that is presented as fact regardless of an intent to deceive.”³²⁹ Disinformation is “a type of misinformation that is intentionally false and intended to deceive or mislead,” and therefore may serve a political function.³³⁰ For example, President Trump sought to produce misinformation and disinformation by attacking the integrity of employment rate data from the Bureau of Labor Statistics that reflected poorly on his economic record, thereby hindering the ability of all to dispute economic data or debunk related claims.³³¹ CWA’s 2023 *AI Principles* specifies its members’ concern that policymakers “update protections against misinformation that could impact our political system to match current communication technologies.”³³²

Data integrity occupies a central role with respect to civil rights and racial justice amid growing misinformation and manipulation within the United States.³³³ To be sure, data integrity is not a leveler in which “garbage in, garbage out” remains acceptable simply because it appears commercially viable. For race-conscious data, informational integrity is characterized by shared, inclusive, and deliberative insight into existing social and power relations.³³⁴ Current threats to

85 (noting automated and other systems can “mask deliberately unlawful discrimination [because] humans are still responsible for choosing factors to be deployed”).

327. See *supra* Section I.B.

328. See, e.g., Gurrieri, *supra* note 326.

329. Meira Gebel, *Misinformation vs. Disinformation: What to Know About Each Form of False Information, and How to Spot Them Online*, BUS. INSIDER (Jan. 15, 2021, at 16:02 ET), <https://www.businessinsider.com/misinformation-vs-disinformation>.

330. *Id.* See generally Deen Freelon & Chris Wells, *Disinformation as Political Communication*, 37 POL. COMM’N 145 (2020) (discussing disinformation’s role in politics).

331. See Lucia Mutikani, *Former Heads of US Bureau of Labor Statistics Say Trump’s Attacks Erode Trust in Data*, REUTERS (Oct. 8, 2025, at 14:57 ET), <https://www.reuters.com/world/us/former-heads-us-bureau-labor-statistics-say-trumps-attacks-erode-trust-data-2025-10-08> [<https://perma.cc/ND7S-XQ8BJ>].

332. CWA COMM. ON A.I., *supra* note 307, at 4.

333. See, e.g., Danielle Keats Citron & Kristen E. Eichensehr, *Resilience for a Digital Age*, 2024 U. CHI. LEGAL F. 45, 49 (“[D]isinformation campaigns and dependence on social media more generally can deepen societal divisions and make it more difficult to reach agreement on how to address other problems.”); SNYDER, *supra* note 224, at 65 (“To abandon facts is to abandon freedom.”).

334. Thus, critical information studies are fundamentally concerned with “semiotic democracy,” i.e., “the ability of citizens to employ the signs and symbols ubiquitous in their environments” to pose “[q]uestions about the cultural, social, legal, and political effects of information.” Siva Vaidhyanathan, *Afterword: Critical Information Studies*, 20 CULTURAL STUD. 292, 303 (2006); see also Ngozi Okidegbe, *The Democratizing Potential of Algorithms?*, 53 CONN. L. REV. 739, 744 (2022) (“[E]xclusion of [overpoliced] communities within algorithmic governance reinforces and legitimizes the barriers that already impede their ability to challenge or to gain control over the criminal legal institutions responsible for their oversurveillance, overcriminalization, and over-incarceration.”).

silence and disappear information, having chilled many pillar institutions, do not leave us wholly without race-conscious means or responses. Americans in this age still find themselves constructed, struggling to reconstruct themselves in ways that parallel and inescapably racialize them.

CONCLUSION

Despite potentially dystopic paths ahead for U.S. democracy, this Article has surfaced how race consciousness has remained paramount in a functional democracy and in legitimating legal authority. That decontextualized claims about law not only fail to sustain democracy but are complicit in undermining rule of law reveals the profound need to reintegrate race studies, information science, and law. Organized workers, along with dissident current and former employees across traditional class and occupational lines, continue to guide society with expertise and credibility, augmenting the public's own views regarding racialized harm.

Across constituencies, this Article has advanced a new political taxonomy that relates the "old tech" of race and law with the new tech of information ("data") and systems literacy, as a potential reconceptualization that ameliorates the rapidly growing challenges of erasure, obfuscation, and disempowerment. Centering race-conscious data as a starting point for distinguishing ideologies—and their roles in upholding or undermining the rule of law—assists both lay and legal audiences as they weigh the function of data as public goods, worthy of trust or otherwise. Indeed, these uses of law remain necessary to resist abstract procedural grievance, propaganda, and other efforts to undo society's efforts to remediate racial inequality.

As its final contribution, this Article has concretely suggested how the law must pivot to remain relevant: toward connecting social knowledge of old and new "tech;" acknowledging the array of supremacist to non-subordinating conceptions of race under law; competing informational norms within a highly polarized electorate; and healthy skepticism regarding technologies and awareness of their life-altering potential, particularly in the face of political suppression and Court overreach. Through these modern iterations, race-conscious discourse will continue to find footholds to taxonomize public and private infrastructure shaped by past inequities. In a different future, U.S. law is poised to rejoin established social sciences in recognizing its relationship with race in interpersonal, legal, and institutional history. A full account of law and ideologies transparently and openly discernable in regulatory choices may, in fact, enable all to confront the deterioration of democracy here and abroad.