

Biden's Gambit: Advancing Racial Equity While Relying on a Race-Neutral Tax Code

Goldburn P. Maynard Jr.

ABSTRACT. The American Rescue Plan Act was both a major infusion of economic aid to low-income and middle-class Americans and an opportunity for the Biden Administration to keep its promise to promote racial equity. This Essay analyzes ARPA's major provisions to determine their potential impact on racial equity. It argues that the Biden Administration should do more to tackle racial wealth inequality and the structural issues in the tax code that allow those at the top of the income distribution to benefit disproportionately from tax subsidies. It also underscores the larger challenge of achieving racial equity in the face of courts, particularly conservative judges, that treat race-based policies designed to counteract racial inequities as discriminatory.

INTRODUCTION: MOVING INTO UNCHARTED TERRITORY

On January 20, 2021, as the Biden Administration formally took over the White House, a significant shift in racial policy commenced. Gone were the days of executive orders banning diversity training and establishing a 1776 Commission.¹ On his first day in office, the new President issued an executive order to advance racial equity (RE) in communities through the federal government.² The order was notable for its chosen language, which invoked *equity* rather than *equality*. In eschewing more traditional notions of racial equality, President Biden was explicitly framing his presidency within the race-conscious,

1. Combating Race and Sex Stereotyping, Exec. Order No. 13950, 85 Fed. Reg. 60,683 (Sept. 28, 2020); Establishing the President's Advisory 1776 Commission, Exec. Order No. 13958, 85 Fed. Reg. 70,951 (Nov. 5, 2020). Both were revoked by Executive Order 13985. See *infra* note 2 and accompanying text.

2. Advancing Racial Equity and Support for Underserved Communities Through the Federal Government, Exec. Order No. 13985, 86 Fed. Reg. 7009 (Jan. 25, 2021).

antisubordination camp.³ While racial equality has come to connote equal treatment and race blindness, sometimes even accommodating reverse-discrimination claims, RE is firmly race conscious. Instead of relying on *equal* treatment, RE seeks to ensure *fairness* in treatment and access to resources for all. RE speaks the language of historical disparities and systemic racism—barriers that it aims to remove. The executive order's genuine commitment to RE is an important symbolic departure from previous administrations,⁴ but it puts the Biden Administration on a collision course with federal courts advocating for colorblindness.⁵

Within the span of a week, the Biden Administration issued four executive actions to advance RE in housing and criminal justice.⁶ This flurry of activity reflected the fact that there was a lot of work to be done: a significant portion of the nation's minorities had lost faith in local law enforcement,⁷ and the COVID-19 pandemic had a disproportionately devastating impact on minority communities.⁸ It was within this context that the Administration proposed its \$1.9 trillion recovery bill, which Congress passed without any Republican votes in the Senate and signed into law as the American Rescue Plan Act (ARPA) on March 11, 2021.⁹ This legislation was notable in its approach to stimulus and recovery. Rather than focusing its investments on infrastructure, which the Biden

3. See, e.g., ROBIN WEST, *PROGRESSIVE CONSTITUTIONALISM* 55-56 (1994).

4. See, e.g., Andre M. Perry & Adrianna Pita, *What Steps Is the Biden Administration Taking on Racial Equity?*, BROOKINGS INST. (Jan. 28, 2021), <https://www.brookings.edu/podcast-episode/what-steps-is-the-biden-administration-taking-on-racial-equity> [<https://perma.cc/863P-WN32>].

5. Michael D. Shear, Stacy Cowley & Alan Rappeport, *Biden's Effort to Center Racial Equity in Policymaking Is Hitting Roadblocks*, N.Y. TIMES (June 28, 2021), <https://www.nytimes.com/2021/06/28/us/politics/bidens-effort-to-center-racial-equity-in-policymaking-is-hitting-roadblocks.html> [<https://perma.cc/W2YV-F93Y>].

6. *Fact Sheet: President Biden to Take Action to Advance Racial Equity and Support Underserved Communities*, WHITE HOUSE (Jan. 26, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/26/fact-sheet-president-biden-to-take-action-to-advance-racial-equity-and-support-underserved-communities> [<https://perma.cc/ZW74-SG7D>].

7. Laura Santhanam, *Two-Thirds of Black Americans Don't Trust the Police to Treat Them Equally. Most White Americans Do*, PBS NEWS HOUR (June 5, 2020), <https://www.pbs.org/newshour/politics/two-thirds-of-black-americans-dont-trust-the-police-to-treat-them-equally-most-white-americans-do> [<https://perma.cc/XHF4-DNHV>].

8. See, e.g., *Health Equity Considerations and Racial and Ethnic Minority Groups*, CTRS. FOR DISEASE CONTROL & PREVENTION (Nov. 30, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/community/health-equity/race-ethnicity.html> [<https://perma.cc/3XR2-BMEN>].

9. American Rescue Plan Act of 2021, Pub. L. No. 117-2, 135 Stat. 4.

Administration later set out in a separate proposal,¹⁰ the bulk of the stimulus measure focused on redistribution through the tax system.¹¹ The redistributive efforts through the tax code revived longstanding debates about spending through the tax code, and the Internal Revenue Service's (IRS's) suitability and effectiveness as an administrator of federal benefits.¹²

An underexplored dimension of the policy choice to heavily rely on the tax system is the relationship between the Administration's commitment to RE and the tax code's longstanding refusal to incorporate racism and other dimensions of social inequity into its notions of fairness. To this day, the IRS does not collect racial data on taxpayers.¹³ Rather, it exists as a colorblind agency, with neither the Form 1040 asking about race nor the agency including race or ethnicity in its published data analysis.¹⁴ Its neutrality is also mirrored by parts of the tax academy and establishment that have long resisted efforts to bring race into tax scholarship.¹⁵ This general principle of neutrality is also supported by a substantial portion of the nation that believes in colorblindness.¹⁶ Even if people care about inequality, they do not want racial classifications to be used in decision-making.¹⁷ The Administration's commitment to RE seems to contradict such race neutrality.

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10. See *The Build Back Better Framework: President Biden's Plan to Rebuild the Middle Class*, WHITE HOUSE, <https://www.whitehouse.gov/build-back-better> [<https://perma.cc/MQP8-JM2Z>]. A part of this framework was enacted as part of the Infrastructure Investment and Jobs Act, Pub. L. No. 117-2, 135 Stat. 4 (2021).
 11. Garrett Watson & Erica York, *The American Rescue Plan Act Greatly Expands Benefits Through the Tax Code in 2021*, TAX FOUND. (Mar. 12, 2021), <https://taxfoundation.org/american-rescue-plan-covid-relief> [<https://perma.cc/B257-6VKY>].
 12. *Id.*; see, e.g., Stanley S. Surrey, *Tax Incentives as a Device for Implementing Government Policy: A Comparison with Direct Government Expenditures*, 83 HARV. L. REV. 705 (1970); David A. Weisbach & Jacob Nussim, *The Integration of Tax and Spending Programs*, 113 YALE L.J. 955 (2003).
 13. See Jeremy Bearer-Friend, *Should the IRS Know Your Race? The Challenge of Colorblind Tax Data*, 73 TAX L. REV. 1, 2 (2019).
 14. *Id.*
 15. See, e.g., Erik M. Jensen, *Critical Theory and the Loneliness of the Tax Prof*, 76 N.C. L. REV. 1753, 1756 (1998) (distinguishing between traditional tax scholarship which focuses on narrow technical issues and critical tax which looks at issues of race, gender, and class); Lawrence Zelenak, *Taking Critical Tax Seriously*, 76 N.C. L. REV. 1521, 1523 (1998) (critiquing critical tax scholars for not providing workable solutions to the problems of racism and sexism in the tax code).
 16. Peter C. Myers, *The Case for Color-Blindness*, HERITAGE FOUND. (Sept. 6, 2019), <https://www.heritage.org/civil-society/report/the-case-color-blindness> [<https://perma.cc/BR4W-TTXU>].
 17. See, e.g., 2019 Pew Research Center's American Trends Panel, *Wave 43 January, Admissions Topline*, PEW RSCH. CTR. (Feb. 25, 2019), <https://www.pewresearch.org/wp-content/uploads/2019>

This Essay analyzes ARPA from the standpoint of RE. While analysis reveals that the Biden Administration made some progress on RE through ARPA, in the months since its passage, federal courts have undermined some of this progress by halting race-conscious equity programs in ARPA. This Essay argues that race consciousness is central to achieving RE. It further emphasizes that RE requires more than traditional policies that target financial need.¹⁸ Truly achieving RE requires confronting the intergenerational nature of wealth. Racial disparities in wealth can be linked to historical inequities which undermine equal opportunity.¹⁹ In order for race to not be a major determinant of life chances as RE demands, I argue that the racial wealth gap must be closed. If the Administration wants to increase the impact of its RE efforts, it must strive to alleviate not only poverty, but also structural issues like the racial wealth gap, a task made more difficult by recent court rulings.²⁰

This Essay proceeds as follows. Part I defines and describes RE as a substantive antidiscrimination concept and suggests methods for determining whether a policy promotes it. Part II analyzes several provisions of ARPA using these methods to reveal that much of the legislation's work targeted those in need and disproportionately benefited racial minorities. A few provisions also worked to reverse historic discrimination in a race-conscious manner, consistent with RE. Yet, courts halted two of the most promising ARPA programs because of the programs' reliance on racial classifications. Part III focuses on the two places where ARPA's RE policies currently fall short: (1) the need to tackle wealth inequality more forthrightly and (2) the more difficult task of using race-conscious remedies when a substantial part of the nation favors colorblindness.

/02/FT_19.02.25_Admissions_Topline.pdf [<https://perma.cc/TA3S-TNA2>] (reporting that seventy-three percent of Americans believe that race should not be a factor in college admissions); Michael Lind, *Care About Inequality in America? Try Race-Neutral Economic Reform*, TABLET (May 31, 2021), <https://www.tabletmag.com/sections/news/articles/inequality-michael-lind> [<https://perma.cc/VRD3-82YB>] (arguing that race-neutral economic reform, as opposed to diversity trainings and racial quotas, is the way tackle economic inequality).

18. See, for example, the earned-income tax credit, which allows taxpayers with incomes below a certain threshold to receive a refundable credit. I.R.C. § 32 (2018).
19. See, e.g., Kriston McIntosh, Emily Moss, Ryan Nunn & Jay Shambaugh, *Examining the Black-White Wealth Gap*, BROOKINGS (Feb. 27, 2020), <https://www.brookings.edu/blog/up-front/2020/02/27/examining-the-black-white-wealth-gap> [<https://perma.cc/9T69-FSJV>].
20. Shear et al., *supra* note 5.

I. DEFINING RACIAL EQUITY: IT IS MORE THAN JUST EQUALITY

This Part seeks to define what is meant by RE, because it directly impacts the analysis of ARPA. The Biden Administration's definition of RE overlaps with the common understanding of the phrase. RE is connected to systemic issues, such as the racial wealth gap. I then set up an RE continuum, which asks three questions to determine how much a policy promotes RE.

A. *The Definition of Racial Equity*

President Biden's Executive Order No. 13985 advancing RE required all administrative agencies to find ways to remove systemic barriers to opportunity,²¹ mandated that the Office of Management and Budget find ways to promote equity in the budget,²² and formed a working group to identify inadequacies in federal data collection and improving data collection practices.²³ The order defined equity as "the consistent and systematic fair, just, and impartial treatment of all individuals, including individuals who belong to underserved communities" and defined those communities to include disadvantaged minorities.²⁴ The Administration rooted its advancement of RE on equal opportunity, an uncontroversial American value.²⁵ As part of equal opportunity, the Administration also identified an affirmative responsibility for the government to advance not only equity, but also "civil rights, racial justice, and equal opportunity."²⁶

The Administration directly linked equity to a historical legacy of injustices that certain groups have suffered.²⁷ The executive order acknowledged how such inequity is reflected in decision-making across the government apparatus and thus requires a systemic approach to overcome it. The goal was to "provide everyone with the opportunity to reach their full potential."²⁸ This acknowledgment linked the Administration's equity efforts to normative approaches that

21. Exec. Order No. 13985, 86 Fed. Reg. 7009, 7009-10 (Jan. 25, 2021).

22. *Id.* at 7010.

23. *Id.* at 7011-12. Federal data is often not available by race, ethnicity, sexual orientation, and other important demographic variables.

24. *Id.* at 7009.

25. *Id.* at 7009.

26. *Id.*

27. *Id.*

28. *Id.*

encourage flourishing.²⁹ These approaches focus on the actual capability of individuals to achieve well-being, rather than a mere right to access. Moreover, the acknowledgement distanced the Administration from justice frameworks that advocate for civil rights without providing individuals with the resources needed to exercise those rights.³⁰

The Administration's understanding of RE is similar to the definition accepted by various scholars, social groups, and activists.³¹ This definition is centered on building "a world where race is no longer a factor in the distribution of opportunity."³² The shared concern with historic barriers that prevent human flourishing is echoed by several pro-equity organizations.³³ These groups have distinguished *equality*,³⁴ which requires equal treatment, from *equity*, which requires treating individuals differently based on need.³⁵ Racial equality was a particularly important paradigm during the civil-rights era when nonwhite people did not have equal standing or treatment under the law. But more recently, a debate has arisen about whether equality is enough and whether equity is a more important principle.³⁶ Despite civil-rights era legislation guaranteeing equal rights, substantial racial disparities in healthcare, criminal justice, and wealth

29. See, e.g., AMARTYA SEN, DEVELOPMENT AS FREEDOM 3-4 (1999); MARTHA C. NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH 5-6 (2000).

30. Our Constitution, wrote Judge Posner, "is a charter of negative rather than positive liberties The men who wrote the Bill of Rights were not concerned that Government might do too little for the people but that it might do too much to them. The Fourteenth Amendment, adopted in 1868 at the height of laissez-faire thinking, sought to protect Americans from oppression by state government, not to secure them basic governmental services." Jackson v. City of Joliet, 715 F.2d 1200, 1203 (7th Cir. 1983).

31. Aziz Z. Huq, *Racial Equity in Algorithmic Criminal Justice*, 68 DUKE L.J. 1043, 1103 (2019).

32. Ani Turner, *The Business Case for Racial Equity*, 105 NAT'L CIVIC REV. 21, 21 (2016).

33. See, e.g., *What Is Racial Equity?*, RACE FORWARD, <https://www.raceforward.org/about/what-is-racial-equity> [<https://perma.cc/6Y4K-6D55>]; *Equity vs. Equality and Other Racial Justice Definitions*, ANNIE E. CASEY FOUND. (Aug. 24, 2020), <https://www.aecf.org/blog/racial-justice-definitions> [<https://perma.cc/B3JT-6PWW>]; *Talk About Racism and Racial Equity*, NAT'L EDUC. ASS'N, <https://neaedjustice.org/social-justice-issues/racial-justice/talk-about-racism-and-racial-equity> [<https://perma.cc/R7FF-6KTK>]; *What Do We Mean by Racial Equity?*, NAT'L PUB. EDUC. SUPPORT FUND (Apr. 2018), <https://www.npesf.org/wp-content/uploads/2018/04/What-do-we-mean-by-Racial-Equity.pdf> [<https://perma.cc/8EC7-KGKT>].

34. See *id.*

35. See *id.*; see also Daisy, *Equality and Equity*, SOCIAL CHANGE UK (Mar. 29, 2019), <https://social-change.co.uk/blog/2019-03-29-equality-and-equity> [<https://perma.cc/W992-792M>].

36. See, e.g., John Patrick Leary, *Why Is "Equity" All the Rage in Washington*, NEW REPUBLIC (Oct. 29, 2021), <https://newrepublic.com/article/163913/equity-vs-equality-policy-debate> [<https://perma.cc/VTC2-D666>] (describing how progressives prefer the concept of equity over equality and describing the right's backlash to equity as a buzzword).

continue to thrive.³⁷ For example, Black women are three times more likely to die during childbirth than white women.³⁸ RE calls for more than formal rights. Some have come to recognize RE as an “economic necessity” that “creates the conditions for all to flourish.”³⁹ In a recent report, McKinsey linked RE to improving the economic well-being of individuals and companies across the economy,⁴⁰ estimating that closing the racial wealth gaps would lift GDP by eight to twelve percent.⁴¹ Achieving RE would be life-changing for millions of Americans.

B. Analyzing How Policies Promote Racial Equity

The Biden Administration’s reliance on RE seeks to apply some lessons learned from Great Society programs.⁴² Since the 1960s, the federal government’s approach to tackling racial inequality, rooted in President Johnson’s domestic agenda, has been to wage a war to eliminate poverty and racial injustice.⁴³ The 1960s civil-rights legislation aimed to close racial disparities. However, while poverty has decreased dramatically nationwide,⁴⁴ the racial wealth gap has

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37. Mabinty Quarshie, N’dea Yancey-Bragg, Anne Godlasky, Jim Sergent & Veronica Bravo, *12 Charts Show How Racial Disparities Persist Across Wealth, Health, Education and Beyond*, USA TODAY (June 18, 2020), <https://www.usatoday.com/in-depth/news/2020/06/18/12-charts-racial-disparities-persist-across-wealth-health-and-beyond/3201129001> [<https://perma.cc/86KQ-2VPG>].
38. *Id.*
39. Sarah Treuhaft, Angela Glover Blackwell & Manuel Pastor, *America’s Tomorrow: Equity Is the Superior Growth Model*, POLICYLINK 4-5 (2011), https://www.policylink.org/sites/default/files/SUMMIT_FRAMING_WEB_20120110.PDF [<https://perma.cc/DJ8P-YKBB>].
40. See Michael Chui, Sara Prince & Shelley Stewart III, *America 2021: The Opportunity to Advance Racial Equity*, MCKINSEY & CO. (Feb. 17, 2021), <https://www.mckinsey.com/featured-insights/diversity-and-inclusion/america-2021-the-opportunity-to-advance-racial-equity> [<https://perma.cc/JW9V-BJLL>].
41. See *id.*
42. See Elizabeth Hinton, “A War Within Our Own Boundaries”: Lyndon Johnson’s Great Society and the Rise of the Carceral State, 102 J. AM. HIST. 100, 100 (2015) (describing the merger of anti-poverty and anticrime programs).
43. See, e.g., Carl M. Brauer, *Kennedy, Johnson, and the War on Poverty*, 69 J. AM. HIST. 98, 115-16 (1982) (examining President Johnson’s view of the relationship between racial and economic inequality).
44. See Richard V. Burkhauser, Kevin Corinth, James Elwell & Jeff Larrimore, *Evaluating the Success of President Johnson’s War on Poverty: Revisiting the Historical Record Using an Absolute Full-Income Poverty Measure* 5 (Nat’l Bureau of Econ. Rsch., Working Paper No. 26532, 2021), <https://www.nber.org/papers/w26532> [<https://perma.cc/X4NK-7XK2>] (showing dramatic drops in the poverty rate between 1963 and 2019).

been stagnant for the past fifty years.⁴⁵ This is partly because of retrenchment and reduced aid during the 1980s and 1990s,⁴⁶ but also because these programs did not tackle the root causes of systemic discrimination that created the inequities in the first place.⁴⁷ Poverty alleviation and the provision of necessities rely on a minimalist approach that seeks to alleviate some of the worst outcomes from capitalism.⁴⁸ This safety net is especially important during periods of crisis or economic shock, when the government increases spending and investing to prevent the economy from falling apart. Indeed, this was the one the aims of ARPA.⁴⁹ But poverty alleviation is not RE per se. RE requires a more comprehensive dismantling of oppressive systems.⁵⁰

From these principles, we can create a set of questions to ask in order to determine if a policy promotes RE. This set of questions partly overlaps with recent

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45. See, e.g., Heather Long & Andrew Van Dam, *The Black-White Economic Divide Is as Wide as It Was in 1968*, WASH. POST (June 4, 2020), <https://www.washingtonpost.com/business/2020/06/04/economic-divide-black-households> [<https://perma.cc/Q4J5-B8JY>] (comparing growth in wealth of middle-class Black households to that of similarly situated white households from 1968 to 2016).
 46. See, e.g., Ravi K. Roy & Arthur T. Denzau, *The Neoliberal Shift in US Fiscal Policy from the 1980s to the 1990s: A Shared Mental Model Approach to Understanding Coalition-Driven Policy Shifts*, in NEOLIBERALISM: NATIONAL AND REGIONAL EXPERIMENTS WITH GLOBAL IDEAS 117, 118, 125 (Ravi K. Roy, Arthur T. Denzau & Thomas D. Willett eds., 2005) (discussing how President Reagan demonized the Great Society and sought to cut deficits which influenced President Clinton and the New Democrats).
 47. See, e.g., MELVIN L. OLIVER & THOMAS M. SHAPIRO, BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY 3 (1st ed. 1995) (arguing that wealth is central to tackling racial inequality in America).
 48. See Elena Pribytkova, *A Decent Social Minimum as a Matter of Justice*, in ETHICAL ISSUES IN POVERTY ALLEVIATION 43-44 (Helmut P. Gaisbauer, Gottfried Schweiger & Clemens Sedmak eds., 2016).
 49. See Press Release, The White House, President Biden Announces American Rescue Plan (Jan. 20, 2021), <https://www.whitehouse.gov/briefing-room/legislation/2021/01/20/president-biden-announces-american-rescue-plan> [<https://perma.cc/S7S9-EJHG>] (stating that the America Rescue Plan Act (ARPA) was a part of a plan to help rescue Americans from crisis and to assist them in recovery).
 50. See Richard Leong, *The Problem with That New Equity vs. Equality Cartoon You're Sharing*, MEDIUM (May 26, 2020), <https://leong-richard212.medium.com/the-problem-with-that-new-equity-vs-equality-cartoon-youre-sharing-f1ebdfc793e8> [<https://perma.cc/W2N9-A4N7>] (“Driving equity and justice isn’t about tinkering with systems that just ended up being imbalanced, it’s about dismantling oppressive systems that are working exactly as they were designed. I often tell people, we are building a world that has never existed before. To achieve justice we must be open to change that can be deeply radical and transformative.” (emphasis omitted)).

scorecards that assess public policies under an RE lens.⁵¹ The resulting RE continuum is less detailed than such scorecards, which try to distinguish policies on a scale of zero to five. And unlike those scorecards, my focus is on identifying areas in the legal system that will either help or stand in the way of promoting RE in the long term. Three questions flow from the most basic of definitions of RE:

- (1) Does the policy target individuals or groups based on need?
- (2) Is the policy race conscious either by targeting aid to a racial group, ensuring equitable delivery of benefits, or ensuring that they are disproportionately targeting at disadvantaged minorities?
- (3) Does the policy tackle root causes of racial inequality and removing barriers keeping certain racial groups disadvantaged?

By asking these questions, we can both analyze the strength and weaknesses of ARPA from an RE lens and consider policies on an RE continuum instead of looking at them as strictly RE policies or non-RE policies. Policies that meet all three of the criteria prioritize RE, while those that do not are either neutral or more likely to worsen racial inequities. ARPA included several major policies that met at least two parts of these criteria, as I discuss in Part II below.

II. THE BIDEN STIMULUS: INVESTING IN RACIAL EQUITY BY BOTH RACE-NEUTRAL AND RACE-CONSCIOUS MEANS

Having introduced the concept and goals of RE, I now turn to ARPA, analyzing some of its policies by using the RE continuum. This Part reveals that several central ARPA policies targeted individuals or groups based on need. They also disproportionately targeted racial minorities. However, court decisions have halted two race-conscious components of ARPA that met all three criteria of the RE continuum. These injunctions, while not fatal, have made the Biden Administration's long-term RE efforts more challenging.

51. See, e.g., Marlysa D. Gamblin, *Using a Racial Equity Scorecard for Policy and Programs*, BREAD FOR WORLD INST. (June 30, 2020), <https://www.bread.org/sites/default/files/downloads/racial-equity-scorecard-policies.pdf> [<https://perma.cc/4Q5T-4VM5>] (scoring public policies on a racial-equity scale from zero to five); Katie Lannan, *Racial Equity Scorecard Will Grade ARPA Spending*, EAGLE-TRIB. (Oct. 18, 2021), https://www.eagletribune.com/news/racial-equity-scorecard-will-grade-arpa-spending/article_a7f1ab2c-3043-11ec-9a03-f71952b7e217.html [<https://perma.cc/4PUL-FLV4>] (using urgency, attention to structural problems like housing instability and the racial wealth divide, innovation, targeting of funds to hardest-hit populations, accountability, and inclusive processes for decision-making to assess ARPA).

A. Several ARPA Policies Targeted Need but Fewer Tackled Systemic Discrimination

Some of the most discussed and impactful parts of ARPA focused on traditional income support and poverty-alleviation provisions in the mold of Great Society programs. This support was generous and impactful, but also temporary – as many fiscal-stimulus programs tend to be.⁵² This Section distinguishes between two distinct aspects of ARPA: its more traditional income-support policies that disproportionately benefited racial minorities, and its race-conscious RE efforts that also attempted to remove systemic barriers. Both kinds of policies are needed to tackle inequality, but the race-conscious policies have faced substantial constitutional hurdles.

In March 2021, the Urban Institute released projections of the effect that four of the policies passed under the stimulus bill would have on the poverty rate: the “(1) extension of pandemic-related unemployment insurance benefits, (2) extension of higher Supplemental Nutrition Assistance Program (SNAP) benefits, (3) \$1,400 recovery rebate payments, and (4) advance portion of the increased child tax credit.”⁵³ The Urban Institute estimated that these features of the legislation would reduce the projected poverty rate from 13.7 to 8.7 percent (or from 44 million to 28 million).⁵⁴ These were all need-based benefits targeted at either low-income individuals or the unemployed. Although tax-based aid often excludes individuals who do not work, these policies still captured a large percentage of individuals outside the workforce.⁵⁵ For example, the poverty rate for children would be cut by more than half,⁵⁶ and the rate for individuals experiencing

52. See, e.g., Robert D. Atkinson, *Timely, Targeted, Temporary and Transformative: Crafting an Innovation-Based Economic Stimulus Package*, INFO. TECH. & INNOVATION FOUND. 1 (Oct. 2008), <https://itif.org/files/TimelyTargetedTemporaryTransformative.pdf> [https://perma.cc/U6PR-RT83] (noting the temporary effects of the post-2008 financial-crisis stimulus program).

53. Laura Wheaton, Sarah Minton, Linda Giannarelli & Kelly Dwyer, *2021 Poverty Projections: Assessing Four American Rescue Plan Policies*, URB. INST. 1-2 (Mar. 11, 2021), https://www.urban.org/sites/default/files/publication/103794/2021-poverty-projections-assessing-four-american-rescue-plan-policies_o_o.pdf [https://perma.cc/3828-ACQJ].

54. *Id.* at 4.

55. For example, the earned income tax credit only reaches the working poor, but the extended unemployment-insurance benefits and higher Supplemental Nutrition Assistance Program (SNAP) benefits in ARPA reach children whether or not their parents are in the labor force. See *id.* at 5 (underscoring the strength of the four combined policies in reaching different individuals).

56. *Id.* at 7.

deep poverty would be cut by one-third.⁵⁷ These provisions have already yielded results in alleviating economic hardship.⁵⁸

While seemingly neutral, most of these provisions were also race-conscious in a broad sense. They were not explicitly targeted at any race, but by relying on means testing, they disproportionately benefited disadvantaged racial groups.⁵⁹ For example, ARPA's provisions would benefit Black and Hispanic people by reducing those groups' poverty rates by 42% and 39% respectively, while reducing those same rates for white, non-Hispanic people by just 34%.⁶⁰ In total, the four policies are projected to result in 16 million fewer people living in poverty in 2021.⁶¹ Given that ARPA is a temporary measure intended to counter the economic fallout of the COVID-19 pandemic, it is unclear whether its promising policies, especially the more generous child tax credit (CTC), will remain in place.⁶² If they do not, the gains might be quickly reversed.

Where these policies fall short is their lack of focus on historic systemic discrimination. ARPA does not tackle the central issues that lead to racial inequity in the first place. Because RE requires the consideration social hierarchy and historical injustices, these provisions of ARPA are not as impactful as others discussed below. Stronger RE provisions also look to undo decades of discrimination and set members of discriminated groups on a different course.

The direct link between wealth and RE efforts made by McKinsey is crucial to understanding the systemic hurdles that equity seeks to remove.⁶³ Wealth and income are not the same, and focusing on income can undersell the true extent of inequality in America. A useful way to think about the difference is that income is more sensitive to life's ups and downs. Thus, an individual may lose her

57. *Id.* at 5.

58. See, e.g., Nicolas Vega, *Federal Stimulus Measures Reduced Poverty in 2020*, *Census Bureau Reports*, CNBC (Sept. 15, 2021, 2:22 PM EDT), <https://www.cnbc.com/2021/09/15/stimulus-measures-reduced-poverty-in-2020-census-bureau-reports.html> [<https://perma.cc/8XA2-EGR9>].

59. This is because of persistent racial income inequalities. See, e.g., Rakesh Kochhar & Anthony Cilluffo, *Key Findings on the Rise in Income Inequality Within America's Racial and Ethnic Groups*, PEW RSCH. CTR. (July 12, 2018), <https://www.pewresearch.org/fact-tank/2018/07/12/key-findings-on-the-rise-in-income-inequality-within-americas-racial-and-ethnic-groups> [<https://perma.cc/U64U-FFSY>].

60. Wheaton et al., *supra* note 53, at 6-7.

61. *Id.* at 4.

62. The Biden Administration's current Build Back Better Framework would extend the child tax credit (CTC) for one year and make it permanently refundable. See Stephen Silver, *In Build Back Better Framework, Child Tax Credit Extended One Year*, NAT'L INT. (Oct. 29, 2021), <https://nationalinterest.org/blog/politics/build-back-better-framework-child-tax-credit-extended-one-year-195701> [<https://perma.cc/7E68-ZULS>].

63. Chui et al., *supra* note 40.

job (her source of income) but still have substantial investments (her source of wealth) to survive until she finds a new job. Wealth usually changes over longer periods of time and can reach across generations. Income is unequally distributed but much less so than wealth.⁶⁴ Wealth-inequality scholars Melvin L. Oliver and Thomas M. Shapiro have called the racial wealth gap a “reliable racial justice filter for policy and institutional practice.”⁶⁵

ARPA also included aid that was more impactful on the RE continuum. As such, it met the three criteria outlined above because it targeted those in need, was race conscious, and addressed systemic issues of discrimination, including: (1) education, (2) farming, (3) housing, (4) small businesses, and (5) state and local aid.⁶⁶

ARPA’s more than \$170 billion in education funding represents the largest ever single investment in schools.⁶⁷ Local education agencies will receive over \$100 billion as part of an elementary- and secondary-school emergency relief fund, which will remain available until September 30, 2023.⁶⁸ Ninety percent of this funding must be distributed in proportion to a state’s Title I schools.⁶⁹ Title

64. See, e.g., Marco Cagetti & Mariacristina De Nardi, *Wealth Inequality: Data and Models*, 12 *MACROECONOMIC DYNAMICS* 285, 286 (2008); Juliana Menasce Horowitz, Ruth Igielnik & Rakesh Kochhar, *Most Americans Say There Is Too Much Economic Inequality in the U.S., But Fewer Than Half Call It a Top Priority*, PEW RSCH. CTR. 19 (Jan. 9, 2020), <https://www.pewresearch.org/social-trends/2020/01/09/most-americans-say-there-is-too-much-economic-inequality-in-the-u-s-but-fewer-than-half-call-it-a-top-priority> [<https://perma.cc/VNY3-6AB8>] (“The wealth gap among upper-income families and middle- and lower-income families is sharper than the income gap and is growing more rapidly.”).

65. Melvin L. Oliver & Thomas M. Shapiro, *Disrupting the Racial Wealth Gap*, 18 *CONTEXTS* 16, 18 (2019). Granted, ARPA was a stimulus bill and some of the Administration’s further work on equity came in later bills, like the President’s proposed infrastructure bill. See *Fact Sheet: President Biden Announces Support for the Bipartisan Infrastructure Framework*, WHITE HOUSE (June 24, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/06/24/fact-sheet-president-biden-announces-support-for-the-bipartisan-infrastructure-framework> [<https://perma.cc/GJN4-HMQ9>].

66. See American Rescue Plan Act, Pub. L. No. 117-2, §§ 2001-2014, 1005, 3201-3208, 5003, 9901, 135 Stat. 4, 19-29, 12-13, 54-67, 85-90, 223-228.

67. Michael Griffith, *An Unparalleled Investment in U.S. Public Education: Analysis of the American Rescue Plan Act of 2021*, LEARNING POL’Y INST. (Mar. 11, 2021), <https://learningpolicyinstitute.org/blog/covid-analysis-american-rescue-plan-act-2021> [<https://perma.cc/W822-JRHL>]; American Rescue Plan Act §§ 2001-2014.

68. American Rescue Plan Act § 2001(a).

69. *Id.* § 2001(d)(1); see also *Department of Education Announces American Rescue Plan Funds for All 50 States, Puerto Rico, and the District of Columbia to Help Schools Reopen*, U.S. DEP’T EDUC. (Mar. 17, 2021), <https://www.ed.gov/news/press-releases/department-education-announces-american-rescue-plan-funds-all-50-states-puerto-rico-and-district-columbia-help-schools>

I, Part A of the Elementary and Secondary Education Act of 1965 provides financial assistance to agencies and schools with high percentages of low-income students.⁷⁰ The purpose of the Act is to improve the educational opportunities of poor students and to obligate those districts receiving Title I funds to comply with various federal nondiscrimination statutes.⁷¹ This is in effect a targeting measure, since Title I school students are those most in need and are disproportionately racial minorities.⁷² Title I schools tend to be those that have been hurt the most by a historical legacy of discrimination.⁷³ ARPA also includes equity safeguards to ensure that the funds are used to increase services to students instead of filling budget gaps.⁷⁴ Still, this Title I targeting is by no means perfect. Indeed, it shares some of the same overinclusiveness problems discussed in regard to ARPA poverty-alleviation policies. For example, education-law scholar Derek W. Black has underscored how the Title I formulas can advantage large school districts and benefit small states, despite those two characteristics not correlating with higher levels of student poverty.⁷⁵

ARPA also included almost \$40 billion in aid for institutions of higher education.⁷⁶ Institutions are required to spend at least half of their allocations on emergency financial-aid grants to students.⁷⁷ Approximately \$200 million will

reopen [<https://perma.cc/9AZ7-H85T>] (announcing the amount of American Rescue Plan funds going to each state to help reopen schools).

70. 20 U.S.C. §§ 6311-6339 (2018).

71. Julia Hanna, *The Elementary and Secondary Education Act: 40 Years Later*, HARV. GRADUATE SCH. EDUC. (Aug. 18, 2005), <https://www.gse.harvard.edu/news/05/08/elementary-and-secondary-education-act-40-years-later> [<https://perma.cc/K6UD-ZYJW>].

72. See *Children in Title I Schools by Race and Ethnicity in the United States*, ANNIE E. CASEY FOUND., <https://datacenter.kidscount.org/data/tables/8418-children-in-title-i-schools-by-race-and-ethnicity> [<https://perma.cc/KV5M-5G7A>] (showing that in the 2018-2019 school year, Title I school students classified as “American Indian or Alaskan Native,” “Asian or Pacific Islander,” “Black,” “Hispanic,” and “[t]wo or more races” outnumbered “White” students approximately two-to-one).

73. The statute was used as part of the congressional strategy of withholding aid to force progress by states and districts on civil rights. See Hanna, *supra* note 71.

74. See American Rescue Plan Act of 2021, Pub. L. No. 117-2, § 2004, 135 Stat. 4, 24-27 (prohibiting states from disproportionately cutting funding to high-need local educational agencies as a condition of receiving ARPA educational funds).

75. Derek W. Black, *The Congressional Failure to Enforce Equal Protection Through the Elementary and Secondary Education Act*, 90 B.U. L. REV. 313, 317-18 (2010).

76. American Rescue Plan Act § 2003.

77. *Id.* § 2003(7). ARPA’s higher-education aid provisions largely use the terms and conditions from section 314 of the Coronavirus Response and Relief Supplemental Appropriations Act of 2021, Pub. L. No. 116-260, 134 Stat. 1909, 1932-36 (2021). See also Press Release, U.S. Dep’t Educ., U.S. Department of Education Makes Available \$36 Billion in American Rescue Plan Funds to Support Students and Institutions (May 11, 2021), <https://www.ed.gov/news/press->

be allocated to higher-education institutions based on exceptional need.⁷⁸ Achieving the Dream, an institution that represents community colleges noted that this aid benefits communities that have been disproportionately affected by the pandemic.⁷⁹ Finally, the bill also targets racial minorities more directly by providing more than \$2.6 billion to Historically Black Colleges and Universities (HBCUs), approximately \$190 million to Tribal Colleges and Universities, and more than \$6 billion to Hispanic-Serving Institutions, and other minority-serving institutions.⁸⁰ This could potentially allow those institutions to provide critical services, including extensive academic support and enhanced academic facilities, to students suffering the lingering effects of racial discrimination. HBCUs and other minority-serving institutions are underfunded partly because of funding formulas and discriminatory policies.⁸¹ Though not guaranteed, these potentially heightened outcomes could change the course of the lives of these students. This is an investment in the future of these institutions, some of which face difficult financial prospects.⁸²

ARPA also sought to address the impact of systemic discrimination on minority farmers.⁸³ This discrimination was perpetrated by the U.S. Department of Agriculture (USDA) for decades and resulted in a large settlement for Black farmers, in what was the largest civil-rights class action in U.S. history.⁸⁴ ARPA

releases/us-department-education-makes-available-36-billion-american-rescue-plan-funds-support-students-and-institutions [https://perma.cc/5N2Q-48M4] (discussing ARPA grants to students with exceptional financial need).

78. American Rescue Plan Act § 2003; Coronavirus Response and Relief Supplemental Appropriations Act § 314(a)(3); see also *American Rescue Plan Act of 2021: Simulated Distribution of Higher Education Emergency Relief Funds*, AM. COUNCIL ON EDUC., <https://www.acenet.edu/Policy-Advocacy/Pages/HEA-ED/ARP-Higher-Education-Relief-Fund.aspx> [https://perma.cc/F7UY-LAPG] (calculating that approximately \$200 million will be allocated for institutions with exceptional need).
79. *Statement on American Rescue Plan Act of 2021 Passage*, ACHIEVING THE DREAM (Mar. 11, 2021), <https://www.achievingthedream.org/news/18432/statement-on-american-rescue-plan-act-of-2021-passage> [https://perma.cc/2K3V-49YL].
80. See Press Release, *supra* note 77.
81. Khristopher J. Brooks, *Black Colleges Were Denied State Funding for Decades. Now They're Fighting Back*, CBS NEWS (June 17, 2021, 12:25 PM), <https://www.cbsnews.com/news/hbcu-coppin-state-tennessee-state-federal-funding-howard-kamala-harris> [https://perma.cc/HQ92-76BN]; Ailsa Chang, Jason Fuller & Sarah Handel, "Theft at a Scale that Is Unprecedented": Behind the Underfunding of HBCUs, NPR (May 13, 2021), <https://www.npr.org/2021/05/13/996617532/behind-the-underfunding-of-hbcus> [https://perma.cc/T99G-3T3E].
82. See *id.*
83. See American Rescue Plan Act § 1005, 135 Stat. 4, 12-13.
84. See *Pigford v. Glickman*, 185 F.R.D. 82, 95-99 (D.D.C. 1999) (accepting proposed consent decree as fair, adequate, and reasonable); Proposed Consent Decree, *Pigford*, 185 F.R.D. 82

promised to finally compensate the descendants of victims of this discrimination.⁸⁵ To that end, ARPA provided debt relief to socially disadvantaged farmers or ranchers (SDFR), including Black/African Americans, American Indians or Alaskan Natives, Hispanics or Latinos, and Asian Americans or Pacific Islanders.⁸⁶ The Department could pay as much as 120% of each farmer's or rancher's debt on loans it made or guaranteed.⁸⁷ Any socially disadvantaged borrower with direct or guaranteed farm loans as well as Farm Storage Facility Loans qualified for the aid.⁸⁸ In addition, \$1.01 billion was dedicated for grants and loans to improve land access for socially disadvantaged farmers, ranchers, and forest landowners, in addition to scholarships, outreach, financial training, and other technical assistance.⁸⁹ This section of ARPA was an attempt to change historical problems in farming and bring relief.

In addition to addressing discrimination against minority farmers, ARPA also provided substantial housing assistance for those in need.⁹⁰ It included \$21.55 billion in Emergency Rental Assistance;⁹¹ \$5 billion to support communities' efforts to provide homeless assistance and supportive services;⁹² and \$9.961 billion in funding through the Department of the Treasury to states, territories, tribes, and tribally designated housing entities to provide direct assistance to homeowners.⁹³ These funds were targeted. At least 60% of the amounts in the Homeowner Assistance Fund must be used to assist homeowners below the median income in their area or in the United States.⁹⁴ Again, while this assistance would need to be paired with changes in discriminatory rules to work toward RE, the support services and housing solutions could truly set the minorities in

(No. 97-1978); Jasmin Melvin, *Black Farmers Win \$1.25 Billion in Discrimination Suit*, REUTERS (Feb. 18, 2010), <https://www.reuters.com/article/us-usa-farmers-pigford/black-farmers-win-1-25-billion-in-discrimination-suit-idUSTRE61H5XD20100218> [<https://perma.cc/9MNC-7T4N>].

85. See Lily Zaballos, *Buried in the American Rescue Plan Act Is a Landmark Agricultural Bill for Black Farmers*, HUNTER COLL. N.Y.C. FOOD POL'Y CTR. (Apr. 21, 2021), <https://www.nycfoodpolicy.org/emergency-relief-for-farmers-of-color-act> [<https://perma.cc/5CGP-MYQL>].

86. American Rescue Plan Act § 1005; see Zach Ducheneaux, *American Rescue Plan Socially Disadvantaged Farmer Debt Payments*, U.S. DEP'T AGRIC. (Mar. 26, 2021), <https://www.farmers.gov/connect/blog/loans-and-grants/american-rescue-plan-socially-disadvantaged-farmer-debt-payments> [<https://perma.cc/236Y-8DXF>].

87. American Rescue Plan Act § 1005(a)(2).

88. Ducheneaux, *supra* note 86.

89. American Rescue Plan Act § 1006.

90. *Id.* §§ 3201-3208.

91. *Id.* § 3201(a)(1).

92. *Id.* § 3205.

93. *Id.* § 3206.

94. *Id.* § 3206(c)(2).

those communities on a new course. After all, most Americans' single biggest asset is their home,⁹⁵ and homeownership has long been seen as central to closing the racial wealth gap.⁹⁶ The guardrails and reporting requirements included in ARPA should help to ensure equitable delivery.⁹⁷

Aid for restaurants similarly took the historical inequities of socially disadvantaged groups into account. ARPA established an over \$25 billion Restaurant Revitalization Fund for 2021 to be administered by the Small Business Administration (SBA).⁹⁸ Importantly, \$5 billion of this fund was allocated to restaurants whose gross receipts in 2019 were less than \$500,000, and the first twenty-one days of the program prioritized small businesses owned by women, veterans, or socioeconomically disadvantaged individuals.⁹⁹ This was important because ARPA sought to ameliorate one of the problems with inequitable distribution of aid: often those from disadvantaged backgrounds have less access to resources and connections to apply for aid in times of need.¹⁰⁰ The application for aid is itself a hurdle, and in a race for funds, those with lesser resources face a significant disadvantage.¹⁰¹ The twenty-one days of priority aid could have saved minority-owned businesses and prevented job losses by giving them the time to apply.

ARPA also provided more than \$300 billion to state, local, territorial, and tribal governments to mitigate the effects and disparities caused by the pandemic.¹⁰² Cities and local governments might be better able to target such aid

95. See, e.g., Odeta Kushi, *Homeownership Remains Strongly Linked to Wealth-Building*, FIRST AM. (Nov. 5, 2020), <https://blog.firstam.com/economics/homeownership-remains-strongly-linked-to-wealth-building> [<https://perma.cc/FH5E-DVVL>].

96. See, e.g., Jenny Schuetz, *Rethinking Homeownership Incentives to Improve Household Financial Security and Shrink the Racial Wealth Gap*, BROOKINGS INST. (Dec. 9, 2020), <https://www.brookings.edu/research/rethinking-homeownership-incentives-to-improve-household-financial-security-and-shrink-the-racial-wealth-gap> [<https://perma.cc/F58J-QVXL>].

97. Coronavirus State and Local Fiscal Recovery Funds, 86 Fed. Reg. 26,786, 26,814-15 (May 17, 2021) (to be codified at 31 C.F.R. pt. 35).

98. American Rescue Plan Act § 5003(b)(2)(A), (c).

99. *Id.* § 5003(b)(2)(B)(i)(I), (c)(3)(A).

100. See, e.g., Brad Whitehead & Joseph Parilla, *How Should Local Leaders Use Their American Rescue Plan Funding?*, BROOKINGS INST. (Mar. 23, 2021), <https://www.brookings.edu/blog/the-avenue/2021/03/23/how-should-local-leaders-use-their-american-rescue-plan-funding> [<https://perma.cc/2Z2W-SF5P>].

101. *Id.*

102. American Rescue Plan Act § 9901.

and to counter some of the disparities in housing in their jurisdictions.¹⁰³ Yet, some of the benefits to minorities depend on how states and cities distribute the aid and the assistance they provide for disadvantaged groups to access programs and services. Obstacles such as “lack of awareness, lack of connectivity, and outright discrimination” have prevented racial minorities from receiving aid in the past.¹⁰⁴ If funds are passed on only to the savviest or well-connected citizens, then disparities will be exacerbated. ARPA’s aid package for state and local governments is very flexible and available until 2024.¹⁰⁵ This apparent flexibility could have led to experimentation by states and local governments, but unfettered, it could also result in money being distributed inequitably. To prevent this inequitable distribution of aid, the Treasury has since stepped in to provide guidance.¹⁰⁶ The Treasury has developed rules for these state and local recovery funds that emphasize spending on low-income communities and make such areas presumptively eligible for investments to rectify disparities.¹⁰⁷ To date, states and localities have proposed plans for how to spend the funds in an equitable manner.¹⁰⁸ To the extent that this aid dissemination includes investments in these communities, the impact of ARPA could also be long-lasting and life changing.

B. Constitutional Challenges to ARPA’s Racial-Equity Efforts

The RE investments that the Biden Administration made in ARPA gave those fighting for RE some hope.¹⁰⁹ However, federal courts quickly dashed

103. See Alyoscia D’Onofrio, *Different, But How? Better Aid in the City*, HUMANITARIAN PRAC. NETWORK (Mar. 2018), <https://odihpn.org/magazine/different-better-aid-city> [<https://perma.cc/UJF2-QJ5R>] (recognizing cities as an important place for humanitarian interventions).

104. Whitehead & Parilla, *supra* note 100.

105. Mark Muro, Eli Byerly-Duke & Joseph Parilla, *The American Rescue Plan’s Secret Ingredient? Flexible State and Local Aid.*, BROOKINGS INST. (Apr. 2, 2021), <https://www.brookings.edu/blog/the-avenue/2021/04/02/the-american-rescue-plans-secret-ingredient-flexible-state-and-local-aid> [<https://perma.cc/D9Y8-JRKB>].

106. *Coronavirus State Local and Fiscal Recovery Funds*, U.S. DEP’T TREASURY (May 10, 2021), <https://home.treasury.gov/policy-issues/coronavirus/assistance-for-state-local-and-tribal-governments/state-and-local-fiscal-recovery-funds> [<https://perma.cc/8XXY-D6JY>] (noting the “substantial flexibility” state and local governments have in meeting local needs and implementing an interim rule giving states further guidance).

107. *Coronavirus State and Local Fiscal Recovery Funds*, 31 C.F.R. pt. 35 (2021).

108. See, e.g., *Use of Local Fiscal Recovery Funds*, CNTY. MARIN (Aug. 31, 2021), <https://www.marincounty.org/-/media/files/departments/ad/management-and-budget/budget/county-of-marin-arpa-covid-19-recovery-plan83121.pdf> [<https://perma.cc/UA4C-E95P>].

109. See, e.g., Stephanie Chan, *Staying Focused on Racial Equity: Philanthropy’s Role in Implementation of American Rescue Act Dollars*, FUNDERS TOGETHER (Mar. 16, 2021), <https://www>

away some of their optimism. Almost immediately after ARPA became law, an organized group led by senior Trump Administration officials filed suits against ARPA's

RE programs on behalf of white plaintiffs.¹¹⁰ This Section briefly summarizes the constitutional hurdles that ARPA's RE efforts faced. It shows that legal jurisprudence today treats efforts to dismantle systemic racism the same as attempts to impose racial segregation. In a series of rulings, which will almost certainly be upheld by the Supreme Court, federal judges signaled that they would strip most RE efforts of their power.

1. Courts Strike Down Most Race-Based Programs

Over the past few decades, courts have tightened the reins on the use of any racial classifications, regardless of purpose. Whether they are pernicious or meant to ameliorate discrimination, such policies are treated with suspicion. At one time, it appeared that race-conscious policies were legal so long as they targeted historic discrimination.¹¹¹ But the requirements for using racial classifications have become more stringent as we have moved further away from the eras when slavery and segregation were legal. Indeed, today's judges have signaled that the government must act in a racially neutral and colorblind manner.¹¹² Colorblindness, which was once used to dismantle white supremacy,¹¹³ is now used by judges to undermine and strike down programs that attempt to end social hierarchies.¹¹⁴

.funderstogether.org/staying_focused_on_racial_equity_philanthropy_s_role_in_implementation_of_american_rescue_act_dollars [https://perma.cc/97FB-94AW].

110. Greg Walters, *Stephen Miller Is Waging War on Biden for Discriminating Against White People*, VICE (May 24, 2021, 8:34 AM), <https://www.vice.com/en/article/3aqdan/stephen-miller-war-on-biden-for-discriminating-against-white-people> [https://perma.cc/QHS3-ZZTM].

111. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (striking down the use of specific race-based quotas but permitting the use of race as one factor in admissions policies to compensate victims of past discrimination).

112. See, e.g., Ian Haney-Lopez, *Blind Spot: How Reactionary Colorblindness Has Infected Our Courts—and Our Politics*, BERKELEY L. (Mar. 29, 2011), <https://www.law.berkeley.edu/article/blind-spot-how-reactionary-colorblindness-has-infected-our-courts-and-our-politics> [https://perma.cc/9A5Q-TJM8].

113. See *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

114. See, e.g., *Shelby Cnty. v. Holder*, 570 U.S. 529 (2013); *Schuette v. Coal. to Def. Affirmative Action*, 572 U.S. 291 (2014).

According to the Supreme Court's holding in *Adarand Constructors, Inc. v. Peña*,¹¹⁵ government policies that classify people by race are presumptively invalid under the Fifth and Fourteenth Amendments.¹¹⁶ To overcome that presumption, the government must show that favoring one race over another is necessary to achieve a compelling state interest.¹¹⁷ Even when the government can show that it has a compelling interest, the remedy must be narrowly tailored to advance it.¹¹⁸ This is a very demanding standard, which few programs survive.¹¹⁹ The Court sometimes allows remedial policies to justify preferential treatment based on race,¹²⁰ but only where several requirements are met. First, the policy must target a specific episode of past discrimination: it cannot rest on "a generalized assertion that there has been past discrimination in an entire industry."¹²¹ Second, there must be evidence of intentional discrimination in the past.¹²² Finally, the government must have contributed to the past discrimination it seeks to remedy.¹²³ As such, only if the government "show[s] that it had essentially become a 'passive participant' in a system of racial exclusion practiced by elements of [a] local . . . industry," can it act to undo the discrimination.¹²⁴

If the government cannot show that it actively or passively participated in this past discrimination, race-based remedial measures violate equal-protection principles. While addressing historic discrimination in general terms was once allowed, over time courts began to require more detailed explanations, along with substantial data to show that programs increase diversity.¹²⁵ As we have moved further away from the enactment of civil-rights laws, courts have become increasingly impatient with race-conscious government efforts to tackle racism.

115. 515 U.S. 200 (1995) (applying equal-protection principles to federal policies that discriminate on the basis of race).

116. *Id.* at 234-35; U.S. CONST. amends. V, XIV.

117. *Adarand*, 515 U.S. at 235.

118. *Id.*

119. *See, e.g.*, *Parents Involved v. Seattle Sch. Dist.*, 551 U.S. 701, 733-35 (2007).

120. However, the standard is high. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493-94 (1989); *Adarand*, 515 U.S. at 237.

121. *J.A. Croson Co.*, 488 U.S. at 498.

122. *Id.* at 503 (requiring an "inference of discriminatory exclusion"). Statistical disparities are not sufficient, although they may be used as evidence to establish intentional discrimination. *See Aiken v. City of Memphis*, 37 F.3d 1155, 1163 (6th Cir. 1994); *United Black Firefighters Ass'n v. City of Akron*, 976 F.2d 999, 1011 (6th Cir. 1992).

123. *J.A. Croson Co.*, 488 U.S. at 492.

124. *Id.*

125. *See, e.g.*, *Parents Involved v. Seattle Sch. Dist.*, 551 U.S. 701, 702-03 (2007) (upholding the use of race-conscious objectives but striking down programs by Seattle Public School and Jefferson County Schools).

There is a sense in which the judges expect racism to be “fixed” by a certain time.¹²⁶ The government must prove that it discriminated against the specific groups for which it seeks to grant preferential treatment.

Even if the evidentiary hurdles are overcome, the program must be narrowly tailored. That is, the program must be neither overinclusive nor underinclusive.¹²⁷ This requirement is a moving target in the sense that all programs are overinclusive and underinclusive, since no program will perfectly target an intended group. It is rather a question of the degree to which a program is overinclusive or underinclusive that is important, and the line is difficult to draw. The government sometimes discovers what exactly a court expects once a program is struck down, leaving them to either give up on the program or enact it again. Even if the government can make it past legislative hurdles, legislators sometimes give up once district- and appeals-court judges have struck down their programs.¹²⁸ Some jurisdictions do not have the political will or resources to try again. Most importantly, the race-neutral alternatives do not tend to work as well as the race-conscious ones.¹²⁹

2. Court Rulings Undermining Racial Equity in ARPA

Against this backdrop, courts have halted two programs from ARPA that promote RE: the loan-forgiveness program to disadvantaged farmers and the restaurant-aid priority for minority businesses. This was no accident. Organized conservative efforts, similar to those that have chipped away at affirmative

126. Justice O'Connor revealed a similar sentiment in *Grutter* when she suggested a twenty-five-year limit on race-conscious affirmative-action programs. *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003). Eighteen years later, we are not much further along.

127. Ian Ayres, *Narrow Tailoring*, 43 UCLA L. REV. 1781, 1786 (1996).

128. See, e.g., Derek W. Black, *Voluntary Desegregation, Resegregation, and the Hope for Equal Educational Opportunity*, AM. BAR ASSOC. (Oct. 1, 2011), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/human_rights_vol38_2011/fall2011/voluntary_desegregation_resegregation_and_the_hope_for_equal_educational_opportunity [<https://perma.cc/PX4X-K6MN>] (discussing how the Court's stringent narrow-tailoring analysis made it difficult to devise plans that would pass constitutional muster).

129. Louisville, which discontinued its usage of race after the *Parents Involved* decision, has seen its schools resegregate along racial lines after it implemented a new race-neutral school-assignment policy. See Mandy McLaren & Olivia Krauth, *Segregated Again: Why Louisville's Once Diverse Elementary Classrooms Are Disappearing*, COURIER J. (Oct. 29, 2021, 6:01 AM EDT), <https://www.courier-journal.com/in-depth/news/education/2021/02/10/why-louisvilles-once-diverse-elementary-classrooms-are-disappearing/6069040002> [<https://perma.cc/5MW7-2XGN>].

action, immediately sprang into action after the passage of the ARPA.¹³⁰ Republican-appointed judges issued preliminary injunctions, reasoning that the programs were likely unconstitutional on equal-protection grounds.

In *Miller v. Vilsack*, five Texas farmers filed a lawsuit against the USDA alleging that its loan-forgiveness payments violate the Fifth and Fourteenth Amendments.¹³¹ Specifically, the plaintiffs in *Miller* argued that section 1005 of ARPA violates the equal-protection rights promised under the Constitution because the statutory provision limits loan forgiveness to borrowers who qualify as an SDFR, a designation based on race.¹³²

On July 1, 2021, Judge O'Connor, an appointee of President George W. Bush, certified two classes of farmers and ranchers for that lawsuit.¹³³ As a result, the lawsuit will proceed as a class action against the USDA.¹³⁴ In the same order, Judge O'Connor issued a preliminary injunction in favor of the plaintiffs that prevents the USDA from distributing debt-relief payments to any SDFRs under section 1005 of the ARPA.¹³⁵ The injunction applies to debt-relief payments to all SDFRs nationwide, comporting with the fact that preliminary injunctions are intended to preserve the status quo. Recently, a group of Black farmers filed a motion to intervene in the case alleging that the debt relief is crucial to the survival of their business.¹³⁶

While there is an opportunity for a judge to lift this injunction before the case is fully resolved, two similar nationwide injunctions were recently issued by

130. See, e.g., Jerry Lambe, *Stephen Miller's Legal Group Invokes MLK in Lawsuit Accusing Biden Admin of Discriminating Against White Farmers*, LAW & CRIME (Apr. 28, 2021, 1:22 PM), <https://lawandcrime.com/lawsuit/stephen-millers-legal-group-invokes-mlk-in-lawsuit-accusing-biden-admin-of-discriminating-against-white-farmers> [https://perma.cc/ZB6S-XABT] (describing a legal challenge brought by America First Legal, a group created by former Trump aides Stephen Miller and Mark Meadows).

131. *Miller v. Vilsack*, No. 4:21-cv-00595-O (N.D. Tex. July 1, 2021) (order granting a preliminary injunction for plaintiffs).

132. See Brief in Support of Plaintiffs' Motion for Preliminary Injunction at 3-4, *Miller*, No. 4:21-cv-00595-O (N.D. Tex. June 2, 2021), <https://www.bloomberglaw.com/product/blaw/document/X7ABJIV1JAF91PR4JFHF51O7E6N/download?imagename=1> [https://perma.cc/R7ZR-76G7].

133. *Miller*, No. 4:21-cv-00595-O, at 1 (order granting a preliminary injunction for plaintiffs).

134. *Id.* at 23-24.

135. *Id.* at 1.

136. See Ximena Bustillo & Josh Gerstein, *Black Farmer Group Petitions to Intervene in Texas Debt Relief Lawsuit*, POLITICO (Oct. 12, 2021, 3:51 PM EDT), <https://www.politico.com/news/2021/10/12/black-farmer-group-texas-debt-relief-lawsuit-515827> [https://perma.cc/5JF9-8GYM].

federal judges in different jurisdictions.¹³⁷ If these injunctions stand, it seems unlikely that the debt-relief payments under section 1005 will be issued in the coming months or even years.

Courts have held that even if remedying past discrimination was a compelling interest, the debt-relief program was not narrowly tailored to serve the interest of remedying past discrimination.¹³⁸ The government's evidence did not demonstrate specific instances of intentional discrimination against SDFRs who hold qualifying USDA loans.¹³⁹ And any SDFRs who may have experienced racial discrimination but did not hold qualifying loans were not eligible for the relief, rendering section 1005 underinclusive.¹⁴⁰

Similarly, within days of the SBA announcing that it would begin issuing the priority restaurant aid, conservative groups challenged the constitutionality of the measure. For example, a pair of white restaurant owners sued the SBA, claiming that the government did not have the right "to deny Americans access to federal assistance based on their ethnicity and gender."¹⁴¹ On May 28, Judge O'Connor, the same judge who ruled on the aid for farmers, issued an injunction preventing the SBA from distributing outstanding funds to applicants in the priority category who had been approved for their grants but had not received the money yet.¹⁴² The order was meant protect those who were not in the priority

137. See *Holman v. Vilsack*, No. 21-1085-STA, slip op. at 14 (W.D. Tenn. July 8, 2021) (order granting preliminary injunction); *Wynn v. Vilsack*, No. 3:21-cv-514-MMH-JRK, slip op. at 18 (M.D. Fla. June 23, 2021) (order granting preliminary injunction).

138. See, e.g., *Miller*, No. 4:21-cv-00595-O, at 15-16; *Holman*, No. 21-1085-STA, slip op. at 8-10 (order granting preliminary injunction).

139. *Holman*, No. 21-1085-STA-jay, slip op. at 7 ("Also, although Defendants have asserted that the majority of funding in pandemic relief efforts did not reach minority farmers, they have not provided evidence of 'specific episodes' of present intentional discrimination by Defendants.").

140. *Id.* at 9 ("The *Wynn* court also commented on the dearth of evidence of prior discrimination by the USDA in farm loans toward Asians, Native Hawaiians, and Pacific Islanders, groups which are included in Section 1005, thus leading to an inference that Section 1005 is overinclusive as well as being underinclusive.").

141. See Bethany Blankley, *Groups Sue SBA, Allege America Rescue Plan Act Institutes Racial, Gender Discrimination*, LIVINGSTON PAR. NEWS (May 26, 2021), https://www.livingstonparishnews.com/breaking_news/groups-sue-sba-allege-america-rescue-plan-act-institutes-racial-gender-discrimination/article_3b9d6926-bdc4-11eb-bdae-db526do8b8a6.html [https://perma.cc/9K7D-Q6NC]; *Blessed Cajuns LLC v. Guzman*, No. 4:21-cv-00677-O, slip op. at 11 (N.D. Tex. May 28, 2021) (granting a preliminary injunction in favor of restaurant owners against the SBA).

142. *Blessed Cajuns LLC*, slip op. at 1.

category, a group made up largely of white individuals, from irreparable harm.¹⁴³ The right-wing advocacy group America First Legal—run by former Trump advisor Stephen Miller and Trump White House Chief of Staff Mark Meadows¹⁴⁴—filed this lawsuit on behalf of white restaurant owners in Texas and Pennsylvania.¹⁴⁵

The Wisconsin Institute for Law and Liberty, another conservative advocacy group, filed a separate lawsuit on behalf of Antonio Vitolo, the owner of Jake’s Bar and Grill, a restaurant in Harriman, Tennessee.¹⁴⁶ Vitolo filed a notice of appeal asking the district court to enjoin the law’s race and sex preferences until his appeal was decided.¹⁴⁷ The district court denied that motion and the motion for a preliminary injunction.¹⁴⁸ The district court also declined to issue a restraining order because Vitolo was unlikely to succeed on the merits of his claim.¹⁴⁹

A federal appeals court ruled in favor of a Tennessee bar and restaurant owner, granting an injunction against the SBA, who prioritized COVID-19 relief funds based upon the restaurant owner’s race and sex.¹⁵⁰ Two of the three judges on the panel, appointed by Presidents Reagan and George W. Bush, voted to overturn the district-court ruling and impose the injunction, reasoning that “[u]nder a regulation that predates the pandemic, the agency presumes certain applicants are socially disadvantaged based solely on their race or ethnicity.”¹⁵¹

The dissenting opinion, from Sixth Circuit Judge Donald, an Obama appointee, underscored the majority’s failure to acknowledge the history of systemic discrimination in the United States: “The majority’s reasoning suggests

143. *Id.* at 10 (“Plaintiffs are experiencing race and sex discrimination at the hand of government officials . . .”).

144. *About*, AM. FIRST LEGAL, <https://www.aflegal.org/about> [<https://perma.cc/55WZ-XGRH>].

145. See Dayna Evans, *White Bar Owner Responsible for SBA Halting Funds to Minority-Owned Businesses Received \$600K in Relief*, EATER PHILA. (June 15, 2021, 3:31 PM EDT), <https://philly.eater.com/2021/6/15/22535443/penn-hotel-sports-bar-hershey-eric-nyman-sba-restaurant-fund-stephen-miller-lawsuit> [<https://perma.cc/B3XD-K75B>]; Stacy Cowley, *Judges Halt Race and Gender Priority for Restaurant Relief Grants*, N.Y. TIMES (June 14, 2021), <https://www.nytimes.com/2021/06/14/business/restaurant-relief-fund-covid-sba.html> [<https://perma.cc/H629-KLED>].

146. *Vitolo v. Guzman*, No. 3:21-cv-176, slip op. at 3 (E.D. Tenn. May 19, 2021) (motion denying temporary restraining order).

147. *Vitolo v. Guzman*, 999 F.3d 353, 358 (6th Cir. 2021).

148. *Id.*

149. *Vitolo v. Guzman*, No. 3:21-cv-176, slip op. at 2 (E.D. Tenn. May 25, 2021) (motion denying preliminary injunction).

150. *Vitolo*, 999 F.3d at 356.

151. *Id.* at 356–57.

we live in a world in which centuries of intentional discrimination and oppression of racial minorities have been eradicated. The majority's reasoning suggests we live in a world in which the COVID-19 pandemic did not exacerbate the disparities enabled by those centuries of discrimination."¹⁵² The current culture war over Critical Race Theory suggests that Judge Donald is correct.¹⁵³ There is a group of Americans, including many conservative judges, who reject the notion of systemic racism altogether.¹⁵⁴

The court rulings were not completely unexpected, but they were a blow to those who finally saw some forward momentum on RE. These rulings could of course be overturned, but given today's judicial landscape, that is unlikely. However, the Biden Administration and Congress have other tools at their disposal, such as removing discriminatory rules that do not depend on race-based classifications.¹⁵⁵ With courts standing in the way, RE must be promoted in a neutral, indirect way that ignores systemic discrimination. This potentially weakens two parts of the RE analysis. That is, even if racial classifications are not always necessary, it is doubtful that RE can be achieved without them ever being used. It is also an open question whether one can tackle the root causes of racial inequities

152. *Id.* at 366 (Donald, J., dissenting).

153. See Valerie Strauss, *The Culture War over Critical Race Theory Looks Like the One Waged 50 Years Ago over Sex Education*, WASH. POST (July 25, 2021, 7:00 AM EDT), <https://www.washingtonpost.com/education/2021/07/25/critical-race-theory-sex-education-culture-wars> [<https://perma.cc/57LY-VH3T>].

154. See, e.g., Clea Simon, *Facing the Denial of American Racism*, HARV. GAZETTE (June 5, 2020), <https://news.harvard.edu/gazette/story/2020/06/facing-the-denial-of-american-racism> [<https://perma.cc/G8E3-8T27>] (discussing the phenomenon of racism denial); Harvey C. Mansfield, *The 'Systemic Racism' Dodge*, WALL ST. J. (Sept. 18, 2020, 2:42 PM ET), <https://www.wsj.com/articles/the-systemic-racism-dodge-11600454532> [<https://perma.cc/DLB6-VZKC>] (rejecting the concept of systemic racism); Erin Burnett Out Front, *'I Don't Believe That: Trump Denies Systemic Racism in US*, CNN (Sept. 1, 2020), <https://www.cnn.com/videos/politics/2020/09/01/trump-systemic-racism-ebof-vpx.cnn> [<https://perma.cc/S3LY-ULYC>] (video showing President Trump denying systemic racism exists); Jazmine Ulloa, *Sonia Sotomayor Is the Lone Voice on Systemic Racism on the Most Conservative Supreme Court in Decades*, BOS. GLOBE (June 28, 2020), <https://www.bostonglobe.com/2020/06/28/nation/her-daca-dissent-sonia-sotomayor-shows-shes-voice-one-systemic-racism-most-conservative-supreme-court-decades> [<https://perma.cc/LCD7-44CE>] (underscoring Justice Sotomayor as the only voice on the Court speaking out against systemic racism).

155. *Fact Sheet: Biden-Harris Administration Announces New Actions to Build Black Wealth and Narrow the Racial Wealth Gap*, WHITE HOUSE (June 1, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/06/01/fact-sheet-biden-harris-administration-announces-new-actions-to-build-black-wealth-and-narrow-the-racial-wealth-gap> [<https://perma.cc/4TVE-AG8F>] (describing the Administration's efforts to narrow the racial wealth gap including addressing inequity in home appraisals and increasing federal contracting with small disadvantaged businesses).

through indirect means, since using proxies of racial classifications is also unconstitutional.¹⁵⁶

III. RACIAL EQUITY STILL FEELS FAR AWAY

Having analyzed several provisions in ARPA under the RE continuum, it is now possible to underscore some of the challenges that the Biden Administration (and likely future equity-promoting administrations) will encounter not only in its continued implementation of ARPA in coming years, but more importantly, in any of its efforts to promote RE. ARPA was most successful in its targeting of those in need. Where it fell short was in its tackling of systemic racism and its colorblindness. The former is something that the Administration and Congress can do more about (despite constitutional hurdles), while the latter remains a contentious issue, with the Supreme Court apparently favoring a colorblind approach.

A. Tackling Systemic Economic Issues

As discussed above, several parts of ARPA's generous aid to those in need are unlikely to tackle the deeply embedded systemic issues that cause racial inequity in the first place. Here, the Biden Administration has opportunities to improve in its RE promotion going forward. ARPA relied heavily on the tax system to distribute aid.¹⁵⁷ This has advantages and drawbacks for RE. Whereas government policies generally cannot classify based on race, they can make distinctions based on income and favor those with low or high incomes.¹⁵⁸ Indeed, our income-tax system does this frequently.¹⁵⁹ This permitted distinction based on income allows the government to aid the poor and disadvantaged through the tax system and give billions in benefits to the wealthy.¹⁶⁰ From an equity perspective,

156. See, e.g., Junis L. Baldon, *Getting Real About Race and Class: An Evaluation of the Constitutionality of Class-Based, Socioeconomic Affirmative Action Without Grutter*, 24 U. MIA. BUS. L. REV. 19, 20 (2016) (arguing that socioeconomic affirmative action is vulnerable to constitutional challenge because it can be seen as a proxy for race).

157. Watson & York, *supra* note 11.

158. Distinctions based on income would only trigger rational-basis review, which is a much lower bar. See, e.g., *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 51 (1973) (allowing expenditure disparities in school funding despite a long history of financial inequity in San Antonio).

159. See, for example, the earned-income tax credit, *supra* note 18. See also the estate tax, which levies a tax on the transfers of taxable estates of wealthy taxpayers. *Id.* § 2001.

160. See, e.g., Andrew D. Pike, *No Wealthy Parent Left Behind: An Analysis of Tax Subsidies for Higher Education*, 56 AM. U. L. REV. 1229 (2007); Chuck Marr, Chye-Ching Huang, Arloc Sherman

the tax system is a promising vehicle for equity delivery because there is a large overlap between those on the lower end of the income distribution and those who have endured the harshest results from inequitable policies.¹⁶¹ As the statistics on the earned-income tax credit (EITC) and the child tax credit (CTC) have shown, the tax system can deliver aid efficiently.¹⁶² ARPA has helped the poor. But the income-tax system has its limits. It is at best an incomplete proxy that does not capture race, sex, or the ways in which the wealthy avoid paying taxes.

Regardless of its role as a proxy for disadvantage, the income-tax system results in a retreat into colorblindness that is against the very spirit of equity, which looks to historical injustices and seeks particularistic solutions. That is not to say that there is not a place in the policy realm for these tax-based programs, but rather that ultimately, they do not make the structural changes called for by more impactful RE policies. While ARPA targeted need, it did not change the tax subsidies that tend to offer few benefits to the poor and disproportionately benefit the rich.¹⁶³ Through its provisions of subsidies for homeownership, retirement accounts, and retirement property, the tax system actively helps those with higher incomes build wealth, further widening the racial wealth gap.¹⁶⁴ RE cannot be achieved if the tax system continues to subsidize disproportionately those at the top. Provisions like the joint-income tax return (with its marriage penalty

& Brandon DeBot, *EITC and Child Tax Credit Promote Work, Reduce Poverty, and Support Children's Development, Research Finds*, CTR. ON BUDGET & POL'Y PRIORITIES (Oct. 1, 2015), <https://www.cbpp.org/sites/default/files/atoms/files/6-26-12tax.pdf> [<https://perma.cc/PC6R-986L>].

161. See, e.g., Valerie Wilson, *Racial Disparities in Income and Poverty Remain Largely Unchanged Amid Strong Income Growth in 2019*, ECON. POL'Y INST. (Sept. 16, 2020, 10:49 AM), <https://www.epi.org/blog/racial-disparities-in-income-and-poverty-remain-largely-unchanged-amid-strong-income-growth-in-2019> [<https://perma.cc/E5SK-4FLZ>].
162. See, e.g., Tax Pol'y Ctr., *How Does the Earned Income Tax Credit Affect Poor Families?*, URB. INST. & BROOKINGS INST. (May 2020), <https://www.taxpolicycenter.org/briefing-book/how-does-earned-income-tax-credit-affect-poor-families> [<https://perma.cc/Q9KM-HP7U>] ("The EITC is the single most effective means tested federal antipoverty program for working-age households – providing additional income and boosting employment for low-income workers."); Greg Iacurci, *Child Tax Credit Lifted 3 Million Kids From Poverty in July*, CNBC (Aug. 25, 2021, 3:24 PM EDT), <https://www.cnn.com/2021/08/25/child-tax-credit-lifted-3-million-kids-from-poverty-in-july.html> [<https://perma.cc/W2D8-QBQS>].
163. Emanuel Nieves, Joanna Ain & David Newville, *From Upside Down to Right-Side Up: Turning the Tax Code into an Engine for Economic and Racial Equality*, PROSPERITY NOW 5 (July 2020), https://prosperitynow.org/sites/default/files/resources/RISU_2020_Full_Report-7.13.2020.pdf [<https://perma.cc/6K3M-TL3R>].
164. See, e.g., Goldburn P. Maynard Jr., *Addressing Wealth Disparities: Reimagining Wealth Taxation as a Tool for Building Wealth*, 92 DENV. U. L. REV. 145, 148-49, 153-54 (2014).

and bonus) and preferences for capital gains have led white wealth to grow while leaving Black families further and further behind.¹⁶⁵

We could imagine efforts in the tax system that are more equity based. For example, a wealth tax or enhanced estate tax would attempt to do something about inherited wealth inequality that hampers the life chances of millions of Americans.¹⁶⁶ As discussed above, wealth is key to fixing other inequities because of its intergenerational role in affecting many life decisions.¹⁶⁷ ARPA did not address the pandemic-related increase in the racial wealth gap,¹⁶⁸ in which Black households had fewer emergency savings to fall back on during the pandemic and saw bigger disruptions in their education, retirement planning, and home-ownership during the pandemic than white households.¹⁶⁹ However, it still provided some much needed help.

The tax system is not designed to allow for race-based solutions, and reforming it along those lines would likely be unconstitutional.¹⁷⁰ Conversely, it is quite difficult to show that the tax system is discriminatory based on race. Potential plaintiffs would have to show that there was discriminatory intent on the part of the legislators who designed the tax system.¹⁷¹ Given that the IRS does not even collect statistics on race, which would be needed to track how the tax system disadvantages Black individuals, this would be almost impossible to do.¹⁷² So while the disparate effect of tax provisions on racial minorities can be shown generally, they cannot be shown with the specificity necessary to challenge the

165. “Current exclusions, as we’ve seen, privilege white taxpayers with existing wealth at the expense of black taxpayers without it.” DOROTHY A. BROWN, *THE WHITENESS OF WEALTH* 206 (2021).

166. See, e.g., EMMANUEL SAEZ & GABRIEL ZUCMAN, *THE TRIUMPH OF INJUSTICE: HOW THE RICH DODGE TAXES AND HOW TO MAKE THEM PAY* 145-53, 173-76 (2019).

167. See, e.g., Liz Mineo, *Racial Wealth Gap May Be a Key to Other Inequities*, *HARV. GAZETTE* (June 3, 2021), <https://news.harvard.edu/gazette/story/2021/06/racial-wealth-gap-may-be-a-key-to-other-inequities> [<https://perma.cc/L3AK-G6GN>].

168. Rhitu Chatterjee, *How the Pandemic Is Widening the Racial Wealth Gap*, *NPR* (Sept. 18, 2020), <https://www.npr.org/sections/health-shots/2020/09/18/912731744/how-the-pandemic-is-widening-the-racial-wealth-gap> [<https://perma.cc/GJ2S-89ZQ>].

169. See, e.g., Christian E. Weller & Richard Figueroa, *Wealth Matters: The Black-White Wealth Gap Before and During the Pandemic*, *CTR. FOR AM. PROGRESS* (July 28, 2021), <https://cf.american-progress.org/wp-content/uploads/2021/07/BlackWhiteWealthGap-brief.pdf> [<https://perma.cc/78VW-6KNE>].

170. BROWN, *supra* note 165, at 217; *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979); *Washington v. Davis*, 426 U.S. 229, 248 (1976).

171. See, e.g., *Davis*, 426 U.S. 229 (establishing that laws that have a racially discriminatory effect but were not adopted to advance a racially discriminatory purpose are valid under the Constitution).

172. See *Bearer-Friend*, *supra* note 13, at 2.

tax system's discriminatory policies and effects. The disadvantaged taxpayer has no recourse when the tax system treats them inequitably.

The tax system is broadly overinclusive and underinclusive in its redistribution and transfers.¹⁷³ After all, income is just an approximation of what we actually want to tax (e.g., privilege, ability to pay, and the like).¹⁷⁴ There are high-wealth individuals who have minimal tax liabilities because they do not report high income annually.¹⁷⁵ A \$1,400 stimulus check, while helpful, is still small compared to the thousands the rich save each year through the mortgage-interest deduction or tax-free retirement accounts. Unsurprisingly, many have called for more effective targeting of wealth in our tax system.¹⁷⁶

The problems with the tax system are not impossible or even difficult to design around. Tax scholars have proposed a variety of clever and effective proposals that would result in a more equitable tax system, thereby reversing at least some historical inequity.¹⁷⁷ For instance, Dorothy Brown has made a sensible set

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173. See, e.g., Lily L. Batchelder, *Taxing Privilege More Effectively: Replacing the Estate Tax with an Inheritance Tax*, BROOKINGS INST. (June 1, 2007), <https://www.brookings.edu/wp-content/uploads/2016/06/200706batchelder.pdf> [<https://perma.cc/9AFL-HYJN>]; Jack Landry & Stephen Nuñez, *Assessing Non-Filer Rates & Poverty Impacts for the American Rescue Plan Act's Expanded CTC*, JAIN FAMILY INST. (Sep. 8, 2021), https://www.jainfamilyinstitute.org/assets/jfi_microsimulation_expanded-ctc-impacts.pdf [<https://perma.cc/GXS4-X897>] (noting that because the CTC is administered through the tax system, eligible households who do not file taxes may not receive payments).
174. See, e.g., Daniel N. Shaviro, *Commentary: Inequality, Wealth, and Endowment*, 53 TAX L. REV. 397, 398-99 (2000) (“[N]either ‘wealth’ nor ‘income’ nor ‘consumption’ plausibly can be what we really want to tax. Rather, the defense of any of these bases must lie in its capacity to provide a crude proxy for something else that is relevant to distributive justice but cannot be directly observed. What is this other underlying thing? While unlikely to be the subject of universal agreement, it has something to do with inequality. After all, to the extent benefit taxation is unfeasible, there presumably would be no objection to raising all government revenues through a uniform head tax but for the idea that those who are better-off should bear greater burdens. Inequality therefore plays an important role in a variety of views of distributive justice, although under any it rests at least one turtle from the bottom.”).
175. Chuck Marr, Samantha Jacoby & Kathleen Bryant, *Substantial Income of Wealthy Households Escapes Annual Taxation or Enjoys Special Tax Breaks*, CTR. ON BUDGET & POL’Y PRIORITIES (Nov. 13, 2019), <https://www.cbpp.org/sites/default/files/atoms/files/11-13-19tax.pdf> [<https://perma.cc/R36T-GWDY>].
176. Catherine Clifford, *Top Economists Stiglitz and Piketty: The US Needs a Wealth Tax on Millionaires and Billionaires*, CNBC (Sep. 17, 2021), <https://www.cnbc.com/2020/09/17/economists-stiglitz-and-piketty-us-needs-a-wealth-tax.html> [<https://perma.cc/4U5J-E5Z4>].
177. See, e.g., Maynard, *supra* note 164, at 175-77 (proposing tax credits for wealth building accounts); Ari Glogower, *Taxing Inequality*, 93 N.Y.U. L. REV. 1421, 1467-76 (2018) (proposing a redefined wealth tax as part of a new combined tax on income and wealth); Joseph M. Dodge, *Replacing the Estate Tax with a Reimagined Accessions Tax*, 60 HASTINGS L.J. 997, 1014-33 (2008) (proposing an accessions tax).

of proposals that would set the tax system on a course toward promoting RE: (1) publishing data by race (2) removing tax preferences, which tend to benefit wealthy white individuals, and (3) establishing a reparations tax credit that compensates individuals for historic discrimination.¹⁷⁸ Because the race-based option is unavailable, Brown proposes a second-best option that would also reduce the racial wealth gap: creating a “wealth-based refundable tax credit for individual taxpayers whose wealth is below the median.”¹⁷⁹ ARPA did good work by directing more money toward those at the bottom of the income distribution. But it did not remove the tax preferences that disproportionately benefit the wealthy. Tackling the racial wealth gap would more directly target the intergenerational inequities RE seeks to remove, while increasing economic well-being across the economy.¹⁸⁰

Brown’s proposal is one of many. In past work, I have proposed a refundable credit that would go into wealth-building accounts for minorities.¹⁸¹ Along with income-support policies and more wealth taxation, the tax system should also support the building of wealth. A similar idea has been proposed by economists in the form of baby bonds.¹⁸² There are also several congressional proposals to tax wealth more effectively. For example, Congress has debated changes that would shore up the estate tax, increase taxes on capital gains, and tax capital gains at death.¹⁸³ All of these would do more to level down wealth at the top and move us closer to a more equitable system.

While ARPA provided aid, it did not fundamentally change the current inequality-reproducing system for racial minorities. Such solutions are often complicated means-based benefits¹⁸⁴ or tax-centered solutions. These efforts are laudable in that they tend to have a disparate impact on disadvantaged minorities.¹⁸⁵ However, because income is a useful but ultimately incomplete proxy for

178. BROWN, *supra* note 165, at 202.

179. *Id.* at 220.

180. Chui et al., *supra* note 40.

181. Maynard, *supra* note 164, at 175-77164.

182. Darrick Hamilton & William Darity Jr., *Can ‘Baby Bonds’ Eliminate the Racial Wealth Gap in Putative Post-Racial America?*, 37 REV. BLACK POL. ECON. 207 (2010).

183. See, e.g., Rob Garver, *Wealthy Americans Scramble as Biden Targets Protected Assets for Taxation*, VOICE AM. NEWS (July 3, 2021, 6:09 AM), https://www.voanews.com/a/usa_us-politics_wealthy-americans-scramble-biden-targets-protected-assets-taxation/6207729.html [<https://perma.cc/PSA7-RGJK>].

184. See, e.g., Jacob Goldin, *Tax Benefit Complexity and Take-Up: Lessons from the Earned Income Tax Credit*, 72 TAX L. REV. 59 (2018).

185. See, e.g., Chuck Marr & Yixuan Huang, *Women of Color Especially Benefit from Working Family Tax Credits*, CTR. ON BUDGET & POL’Y PRIORITIES (Sept. 9, 2019), <https://www.cbpp.org/sites/default/files/atoms/files/9-9-19tax.pdf> [<https://perma.cc/6MEF-K8MQ>] (showing that

inequality, these tax-based solutions rarely tackle the more long-lasting nature of racial wealth inequities. In addition, the tax system itself has historically promoted inequality. A reimaged tax system could be a tool for RE. But as it currently stands, it does very little to tackle the ingrained barriers to success for disadvantaged groups.

B. Confronting the Empty Promise of Colorblindness

Perhaps more troubling than some of ARPA's internal limitations is the judicial response suggesting that impactful RE policies are unconstitutional. Courts force other branches of government to opt for second-best solutions for RE. The executive and legislative branches can target those in need, and they can try to tackle systemic issues without explicitly using race, but this robs RE of some of its intent and power. Policies and programs that would tackle inequities directly are out of reach, which only strengthens the inequitable status quo.

The court rulings on race-based classifications are important for understanding the challenge of achieving RE because they underscore the fact that RE is not an agreed-upon American value. For a large percentage of citizens, legislators, and judges, colorblindness still holds sway and any policy that disproportionately benefits any race is seen as racist.¹⁸⁶ Colorblindness, which was once used as a tool to dismantle racial hierarchy,¹⁸⁷ is now seen as a tool to protect white "victims" from RE efforts.¹⁸⁸ This points to larger political disagreements around whether everyone should be treated exactly the same or whether groups should be treated differently based on historic discrimination. Neither ARPA nor any other economic legislation can remedy this divide.

While I do not argue that race consciousness is necessary for every economic-assistance program, it is necessary for some. This consideration plays into the larger debate about whether we should tackle inequality through targeted or

over twenty percent of Latina, Black, and Native American women receive earned income tax credit benefits).

186. Terry Eastland, *Our Constitution Is Colorblind*, CTR. FOR EQUAL OPPORTUNITY (Feb. 27, 2019), <https://www.ceousa.org/2019/02/27/our-constitution-is-colorblind> [https://perma.cc/8X5K-JEPX] (discussing a Pew Research Center survey that found seventy-three percent of Americans say that colleges and universities should not consider race in admissions).

187. See *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). See also, for example, Justice Harlan's dissent in *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting), which argued, "[o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law."

188. Theodore R. Johnson, *How Conservatives Turned the 'Color-Blind Constitution' Against Racial Progress*, ATLANTIC (Nov. 19, 2019), <https://www.theatlantic.com/ideas/archive/2019/11/colorblind-constitution/602221> [https://perma.cc/2V6L-LASP].

universal programs. Here I agree with Sam Bagenstos's argument that we need both targeted and universal programs to tackle inequality.¹⁸⁹ Courts have made using race-conscious solutions increasingly difficult. For example, before the *Shelby County v. Holder*¹⁹⁰ decision, federal law considered the discriminatory history of certain voting precincts and required them to have their voting rules approved by the government.¹⁹¹ The Supreme Court invalidated this requirement, which has resulted in increased voting requirements and voter suppression, both which disproportionately harm racial minorities.¹⁹² Class-based affirmative action has been found to be inferior to race-based efforts in achieving diversity and equity.¹⁹³ The judicial reaction to ARPA is part of a larger effort to promote colorblind constitutionalism that dovetails with scholars who argue for universalist solutions because they attract more political support.¹⁹⁴

At this time, it is impossible to answer the question of whether RE can ever be achieved under these limiting conditions. What does seem apparent is that failure to tackle systemic issues directly puts us on a longer course toward RE. Recently, economic historians have shown that there has been complete stagnation in the racial wealth gap since the 1980s and predicted that the gap will take hundreds of years to close with current policies.¹⁹⁵ Shortening that horizon will require direct challenges to current constitutional understandings coupled with bold policy action, like reparations.

189. Samuel R. Bagenstos, *Universalism and Civil Rights (with Notes on Voting Rights After Shelby)*, 123 YALE L.J. 2838, 2843 (2014).

190. 570 U.S. 529 (2013).

191. *Id.* at 529.

192. See, e.g., P.R. Lockhart, *How Shelby County v. Holder Upended Voting Rights in America*, VOX (June 25, 2019, 7:49 PM), <https://www.vox.com/policy-and-politics/2019/6/25/18701277/shelby-county-v-holder-anniversary-voting-rights-suppression-congress> [<https://perma.cc/3G23-BKTS>].

193. Khiara M. Bridges, *The Deserving Poor, the Undeserving Poor, and Class-Based Affirmative Action*, 66 EMORY L.J. 1049 (2017).

194. See, e.g., Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747 (2011); Michelle A. Travis, *Toward Positive Equality: Taking the Disparate Impact Out of Disparate Impact Theory*, 16 LEWIS & CLARK L. REV. 527, 552-59 (2012).

195. Ellora Derenoncourt, Chi Hyun Kim, Moritz Kuhn & Moritz Schularick, *The Racial Wealth Gap, 1860-2020* (Aug. 29, 2021) (unpublished manuscript), https://www.dropbox.com/s/nzo52vwrmpoit9b/DKKS_2021.pdf?dl=0 [<https://perma.cc/9265-L9R8>] (showing that even under ideal conditions, racial wealth convergence is a distant scenario given vastly different starting conditions under slavery).

CONCLUSION

ARPA and the response by courts have shown us that high hurdles remain to achieving RE. This is not only a matter of one election or even getting the executive and legislative branches to pass laws. Today, many courts equate efforts to promote RE with efforts to promote racial segregation. The odds of having all three branches in perfect alignment are slim. ARPA also illustrates weaknesses in our current understanding of the Constitution as limiting the government's ability to redress historic wrongs. The status quo limitations are so strong that it is hard to imagine any large pro-equality advancements in the foreseeable future.

At our current pace, achieving RE will be a centuries-long project.¹⁹⁶ This is discouraging, but highlights the importance of continuing the fight for wealth taxation and other levies on capital. It also underscores the smallness of the tax system when tackling a problem as embedded as RE. There are many decisions, regulations, and laws that have embedded racism structurally and systematically. The tax system serves as an efficient compensator of harm, but this is not always what the victims of harm want. Instead of after-the-fact compensation for discrimination, victims of inequities often prefer to have the discrimination eliminated.¹⁹⁷ That is the purpose of RE. The tax system can play an important role in promoting RE, even if it is not the leading one.

And yet, there is hope. The Biden Administration is engaging in equity efforts that do not raise constitutional issues. The Administration's commitment to ending private prisons and eliminating discrimination in federal housing is ongoing. States, cities, and localities still have substantial abilities to distribute aid equitably under ARPA for several years.¹⁹⁸ While it will take more work to accomplish, there is more momentum than ever for important RE work like

196. Dedrick Asante-Muhammad, Chuck Collins, Josh Hoxie & Emanuel Nieves, *The Ever-Growing Gap: Without Change, African-American and Latino Families Won't Match White Wealth for Centuries*, INST. FOR POL'Y STUD. (Aug. 2016), https://ips-dc.org/wp-content/uploads/2016/08/The-Ever-Growing-Gap-CFED_IPS-Final-2.pdf [<https://perma.cc/E73X-MLVY>].

197. See, e.g., Tomer Blumkin & Yoram Margalioth, *On the Limits of Redistributive Taxation: Establishing a Case for Equity-Informed Legal Rules*, 25 VA. TAX REV. 1, 15 (2005) (noting how anti-discrimination policy might be one of the cases where the tax and transfer policy is inadequate).

198. See, e.g., 10 *Priorities for Advancing Racial Equity Through the American Rescue Plan: A Guide for City and County Policymakers*, POLICYLINK (2021), <https://www.policylink.org/resources-tools/american-rescue-plan-10-priorities> [<https://perma.cc/HM4U-RH7D>].

ending sentencing disparities that hurt Black and Hispanic people,¹⁹⁹ paying reparations for victims of slavery and segregation,²⁰⁰ and ending housing discrimination.²⁰¹ This still leaves us with hope as none of these problems are inherent or inevitable. We can still turn them around.

Assistant Professor of Business Law and Ethics, Indiana University Kelley School of Business. Thank you to the members of my department and the participants of the 2021 Junior Tax Conference for providing valuable feedback at different stages of this project. Finally, thank you to the editors of the Yale Law Journal Forum who were extremely patient and helpful in improving this piece substantially.

199. See, e.g., Stef W. Kight, *House Passes Bill Ending Disparities in Crack Cocaine Sentences*, AXIOS (Sept. 29, 2021), <https://www.axios.com/equal-act-pass-house-cocaine-crack-powder-sentencing-7d1111of-89a3-4cda-8ca7-6f4d8804932f.html> [<https://perma.cc/A55L-RTAZ>].

200. See, e.g., Kevin Freking, *Biden Backs Studying Reparations as Congress Considers Bill*, ASSOC. PRESS (Feb. 17, 2021), <https://apnews.com/article/biden-study-reparations-congress-e3c045ece4doe0eae393a18a09a4a37e> [<https://perma.cc/KZ92-8QC6>].

201. See, e.g., Katy O'Donnell, *Biden Pressed to Go 'Big And Bold' in Rooting out Housing Discrimination*, POLITICO (June 15, 2021, 12:45 PM), <https://www.politico.com/news/2021/06/15/biden-housing-discrimination-494523> [<https://perma.cc/G68B-C3NH>].