RACIAL TERRITORIALITY

Elise C. Boddie*

Law treats race as a characteristic of individuals. Applying insights from social science, this Article argues that places can also have a racial identity and meaning based on socially engrained racial biases regarding the people who inhabit, frequent, or are associated with particular places and racialized cultural norms of spatial belonging and exclusion. This racial meaning has consequences that constitutional law often overlooks. One consequence is "racial territoriality," a distinctive form of discrimination in which people of color are excluded from public spaces that are identified as "white" and treated as being only for white people. This Article conceptualizes a definition of racial territoriality and demonstrates the weaknesses of constitutional doctrine as it applies to racially territorial behavior. Based upon the historic use of spatial separation to subjugate people of color and interdisciplinary research about the social significance of space, the Article advances a new claim that law should take the racial identifiability and cultural meaning of spaces into account when judging intentional racial discrimination. It proposes two approaches to the problem of racial territoriality—one that courts can comfortably integrate into existing equal protection doctrine and a second, more rigorous legislative remedy. Both options contemplate that law specifically—and state actors generally—take more explicit account of the exclusion of people of color from territorialized "white" space. The Article uses several examples to explore this new framework and its practical application. Ultimately, the Article seeks to illuminate the importance of space and racial geography in antidiscrimination discourse. Its goal is to situate spatial belonging as a central theme in the continuing conversation about structural racial disadvantage and to focus attention on racially exclusionary norms that are reinforced by spatial allocations of power.

---

* Associate Professor of Law, New York Law School. B.A., Yale College, 1990; J.D. Harvard Law School, 1996; M.P.P., John F. Kennedy School of Government, Harvard University, 1996; law clerk to Judge Robert L. Carter, S.D.N.Y., 1996–97. I am deeply grateful to the following people who have reviewed earlier versions of this Article: Michelle Adams, Devon Carbado, Elizabeth Chambliss, Tai-Heng Cheng, Joshua Civin, Stephen Ellmann, Nicholas Espiritu, Sheila Foster, Gerald E. Frug, Doni Gewirtzman, Myriam Gilles, Rachel Godsil, Risa Goluboff, James Grimmelmann, Lani Guinier, Angela Harris, Trina Jones, Gerald Korngold, Robin Lenhardt, Carlin Meyer, Frank Munger, Sadiq Reza, Rebecca Roiphe, Addie Rolnick, Joseph Singer, Asmara Tekle-Johnson; participants in the Advanced Critical Race Studies workshop at UCLA, the New York City Area Scholarship Group, the Lutie Lytle Workshop, and the New York Law School Faculty Workshop. I am also grateful to New York Law School for its generous research support and to the editorial staff of the *UCLA Law Review* for their excellent assistance. I thank my husband, Maitland Stewart, and the rest of my family for their encouragement. This Article is dedicated to the memory of my father, Arthur W. Boddie, Jr.

INTRODUCTION

In the days following the devastating aftermath of Hurricane Katrina, hundreds of people in New Orleans, Louisiana, attempted to seek refuge in the predominantly white neighboring town of Gretna, just across the Mississippi River.[1] However, when the mostly black crowd tried to cross a bridge leading into the town, the Gretna police blockaded it and turned them away, sealing one of the last escape routes out of New Orleans.[2] In closing the bridge, certain Gretna officials reportedly commented that "[Gretna's] West Bank was not going to become New Orleans and there would be no Superdomes in their city,"[3] a reference to New Orleans's use of its local football stadium to house residents

1. Gretna, which has a population of approximately 17,500, is two-thirds white. Nicholas Riccardi, *Katrina's Aftermath: After Blocking the Bridge, Gretna Circles the Wagons*, L.A. TIMES, Sept. 16, 2005, at A1. It has been described as a "feisty blue-collar city." *Id.* Gretna and New Orleans reportedly have had a "troubled" relationship. *Id.*

2. *See id.*; Eugene Kane, *In My Opinion: Katrina Exposed Prejudice That Can't Be Ignored*, MILWAUKEE J. SENTINEL, Sept. 18, 2005, at B3; Aaron Sharockman, *Neighboring Town Denied Evacuees*, ST. PETERSBURG TIMES, Sept. 17. 2005, at 1A.

3. Sharockman, *supra* note 2, at 1A.

who had been unable to escape the storm. Some evacuees interpreted the spatial reference as a form of racial code, meaning that "[i]f you [were] poor and black, you [were] not crossing the Mississippi River, and you were not getting out of New Orleans."[4] Although later media reports downplayed the role of race in the incident,[5] many accused Gretna officials of engaging in a "Jim Crow style of justice," suggesting that the refusal to allow the evacuees into the town was itself a form of racial discrimination.[6] The evacuees later sued the city of Gretna on various constitutional grounds, but the racial harm that had pervaded earlier accounts of the incident—that the evacuees had been prevented from crossing the bridge into Gretna because of race—disappeared from the legal narrative.[7] Many voiced their suspicions that race had motivated the decision to close the bridge, but their concerns did not translate into a claim for racial discrimination.

---

4. *Id.*

5. *See*, *e.g.*, Clarence Page, Editorial, *A Bridge Too Far*, BALT. SUN, Sept. 23, 2005, at 13A.

6. *See*, *e.g.*, Kane, *supra* note 2. Evacuees reported that the police fired warning shots over their heads and used dogs to turn them back, inviting comparisons with clashes between segregationists and civil rights marchers during the 1960s. *See* Robert E. Pierre & Ann Gerhart, *News of Pandemonium May Have Slowed Aid*, WASH. POST, Oct. 5, 2005, at A8. Indeed, following the incident, one hundred civil rights activists from New Orleans and around the country marched across the bridge in protest. Ann M. Simmons, *The Nation: Protesters Make a Stand on Bridge That Was Blocked*, L.A. TIMES, Nov. 8, 2005, at A10 (quoting protesters who described the blockade as an "act of racism"). U.S. Representative Cynthia McKinney later proposed legislation denying federal aid to Gretna law enforcement because of their decision to close the bridge. *See* Bruce Alpert, *So Far, Katrina Aid Does Little for Local Levees*, TIMES-PICAYUNE, Nov. 26, 2005, at 1. Gretna was not the only predominantly white area to close its borders to blacks in New Orleans after the hurricane. In St. Bernard Parish, another mostly white, working-class suburb, residents stacked large metal containers and wrecked cars to prevent anyone from the neighboring, mostly black, Ninth Ward from crossing over. *See* Lee Hancock, *Is It Black and White?*, DALLAS MORNING NEWS, Dec. 4, 2005, at 1A. The media reported that the parish sheriff, who was "fearful of looters," issued a "shoot-to-kill order to his deputies." *Id.* In Plaquemines Parish, the sheriff authorized shrimpers "to help repel busloads of New Orleans evacuees [who were] trying to reach a U.S. naval reserve air station in the white suburb of Belle Chase." *Id.* In one underreported story, residents of a white enclave in Algiers Point opened fire on blacks who had entered their neighborhood. A.C. Thompson, *Katrina's Hidden Race War*, NATION, Dec. 17, 2008, *available at* http://www.thenation.com/doc/20090105/thompson. This "militia" blocked the roads with lumber and downed trees, began stockpiling "handguns, assault rifles, shotguns, and at least one Uzi" and patrolled the streets looking for "anyone who simply 'didn't belong.'" *Id.*

7. Several different complaints were filed, alleging violations of the First Amendment right of peaceful assembly; Fourteenth and Fifth Amendment rights to due process; the Fourteenth Amendment Equal Protection Clause, on the grounds that the police had discriminated against pedestrian traffic; Fourth Amendment rights against unreasonable searches and seizures; Eighth Amendment rights barring excessive force; and the Article IV Privileges and Immunities Clause protecting the right to travel freely. *See* Ballet v. City of Gretna, No. 06-10859, 2009 WL 1789413, at *1 (E.D. La. June 18, 2009); Alexander v. City of Gretna, No. 06-5405, 2008 WL 5111152, at *1 n.4 (E.D. La. Dec. 3, 2008); Dickerson v. City of Gretna, No. 05-6667, 2007 WL 1098787 (E.D. La. Apr. 11, 2007) (amended order). Plaintiffs further argued that the bridge blockade had burdened their rights of interstate and intrastate travel under Article I, Section 8 of the Constitution because they had intended to leave the state and because the Gretna bridge was an interstate highway. *See* Supplemental Memorandum in Support of Motion to Dismiss, Cantwell v. City of Gretna, No. 06-9243 (E.D. La. Oct. 16, 2007), 2007 WL 4516295.

How might race fit into a legal analysis of what happened on the bridge? Under prevailing equal protection standards, the evacuees would be required to prove that they were purposefully barred from crossing the bridge "because of" their race.[8] Both the race of the evacuees and the race of Gretna officials are essential to the narrative of discriminatory intent, the presumption being that racial animus or dislike is directed against another individual because of her different racial background.[9]

Yet, it is not evident from a conventional reading of the facts that the race of the evacuees drove the decision to shut down the bridge. Although the confrontation was racially charged in that it involved a clash primarily between blacks and whites, there is no direct evidence that race was responsible for the outcome in the way that constitutional law typically understands equal protection cases.[10] Neither the media reports nor the various complaints that were filed indicate that any of the Gretna officials even mentioned the evacuees' race.[11] In fact, several media accounts reported that a black police officer had participated in the closing of the bridge and that some black Gretna residents approved of the City's decision.[12] Nor was there any smoking gun evidence that the purpose of the closing was to keep blacks from crossing over.[13] In the chaotic aftermath of the hurricane, Gretna officials argued that the town's resources were already stretched to the limit—that they lacked food and water and could not accommodate the evacuees because they were duty-bound to protect their own residents first.[14] They further claimed that the decision to erect the blockade was

8. *See* McCleskey v. Kemp, 481 U.S. 279, 279–80 (1987); Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 253 (1977).

9. Although the Supreme Court has recognized that a claim for intentional discrimination may still be cognizable even if the decisionmaker is the same race as the complainant, *see*, *e.g.*, Castaneda v. Partida, 430 U.S. 482, 499 (1977) ("[I]t would be unwise to presume as a matter of law that human beings of one definable group will not discriminate against other members of their group."), a number of courts have held that the inference of intentional discrimination is weaker where the complainant and the decisionmaker share the same protected status. *See*, *e.g.*, Elrod v. Sears, Roebuck & Co., 939 F.2d 1466, 1471 (11th Cir. 1991) (noting that age discrimination is less likely when many of the decisionmakers are older than the complainant); Taylor v. Proctor & Gamble Dover Wipes, 184 F. Supp. 2d 402, 413 (D. Del. 2002) ("Courts have held that an inference of discrimination is less plausible when the decision-maker is a member of the same protected class as the plaintiff."); Kidd v. Greyhound Lines, Inc., No. 3:04CV277, 2005 WL 3988832, at *4 (E.D. Va. 2005) (noting that racial discrimination is less likely where both complainant and decisionmaker are African American).

10. *See infra* Part I.

11. *See supra* notes 1–7.

12. *See* Tim Jones, *Town Defends Closing Bridge to Safety*, CHI. TRIB., Oct. 10, 2005, at 11 (quoting a black Gretna resident who, citing the need to protect property interests, approved of the decision to close the bridge).

13. *See supra* notes 1–6.

14. Indeed, Gretna officials pointed out that they had organized bus caravans to take evacuees to a nearby location for food and water. *See* Jones, *supra* note 12; Riccardi, *supra* note 1.

a matter of public safety, based on a fear that the evacuees would "loot and pillage" the town.[15] Absent more explicit evidence that race was a motivating factor—that the police had allowed white evacuees to cross, but not blacks, for example—it would be difficult to prove that the decision was racially motivated.[16] This high standard of proof and the availability of purportedly race-neutral explanations for the City's behavior make it difficult to bring a successful constitutional claim for intentional racial discrimination based on equal protection.

However, one racial factor stands out as having elicited significant attention in popular commentary, while having carried no weight in the evacuees' subsequent legal narrative about their case:[17] the "colorlined space"[18] of Gretna and New Orleans. The fact that the evacuees were coming from the poorer, largely black city of New Orleans and seeking to cross into the predominantly white, blue collar town of Gretna gets lost in the analysis. Plaintiffs' failure or inability to frame a claim around this racial dimension of their story reveals both a weakness in equal protection doctrine and a gap between popular and constitutional understandings of the racial harm that occurred on the bridge. Although constitutional law demands a "sensitive inquiry" into direct and circumstantial evidence that race was a motivating factor,[19] it treats race as a characteristic only of *individuals*.[20] As a practical matter, this means that law tends either to downplay or to overlook the racial identifiability and associated cultural meaning[21] of the subject *space* in which the contested activity occurred.[22] Because the "race" of each place[23] is not considered in the evidentiary rubric of a racial discrimination claim, it recedes into the background of the constitutional inquiry—and often disappears altogether.

This Article argues that antidiscrimination law should place significant emphasis on the "whiteness" of a subject space in judging racial discrimination

15. The chief of police later stated that the evacuees would have "looted, burned, and pillaged" the city had they been permitted to cross over. Kane, *supra* note 2. The reference to "looting" has racial connotations that are discussed later in the Article. *See infra* Part III.A.2.

16. *See infra* Part I.

17. *See supra* note 7.

18. *See* Anthony Paul Farley, *The Poetics of Colorlined Space*, *in* CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY 100–04 (Francisco Valdes et al. eds., 2002) (using the term "colorlined space").

19. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977).

20. Law assumes that racial discrimination "is a matter of individuals, not systems." *See* Farley, *supra* note 18, at 2.

21. *See* Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning With Unconscious Racism*, 39 STAN. L. REV. 317, 355–81 (1987).

22. *See infra* Part I.

23. It is also possible to argue that New Orleans's class identity helped to instigate the outcome. For a discussion of how the class identity of New Orleans is racialized, see *infra* Part IV.A.

claims that involve the spatial exclusion of people of color. Applying insights from social science and recent studies that document the pervasiveness of implicit racial bias,[24] I contend that law should analyze incidents like the one in Gretna as an act of racial territoriality.[25] This Article draws on various disciplines—history, geography, social psychology, and anthropology—to conceptualize a new claim for racial territoriality. Racial territoriality occurs when the state excludes people of color from—or marginalizes them within—racialized white spaces that have a racially exclusive history, practice, and/or reputation. Although my proposed framework of racial territoriality could encompass conduct that is patently discriminatory, this Article's particular focus is on subtler forms of racial exclusion. Its particular contribution is to conceptualize the racial attributes of geographic space and to frame the harms associated with exclusion from racialized space. Under this proposed framework, law would heavily consider the meaning and import of Gretna's racial geography in a claim of racial discrimination, just as it would consider the race of the evacuees and the town officials themselves under existing equal protection and antidiscrimination standards. This framework proposes to shift the emphasis away from law's customary, one-dimensional focus on the racial dynamic between individuals to a multidimensional inquiry that also embraces spatial context.

I propose two possible approaches for incorporating claims for racial territoriality into antidiscrimination law: one easy option that courts could comfortably integrate into the existing equal protection framework; and a second alternative that provides the broad outlines of a potential legislative remedy. Under the more modest approach, courts would take the racial meaning of the subject space into account as circumstantial evidence of racial intent in a discrimination claim. Courts would evaluate the whiteness of a public space by considering demographic data, patterns of current racial separateness and prior segregation, and reputational evidence regarding how both public and private actors have treated people of color in the space.[26] These factors are well within the judicial competence of courts as they are analogous to criteria that have been

24. *See generally* Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. REV. 465 (2010) (discussing extensive peer-reviewed studies that document the pervasiveness and magnitude of implicit bias); Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of "Affirmative Action"*, 94 CALIF. L. REV. 1063 (2006) (discussing studies) [hereinafter Kang & Banaji, *Fair Measures*]; Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489 (2005) (discussing studies) [hereinafter Kang, *Trojan Horses*].

25. *See* ROBERT DAVID SACK, HUMAN TERRITORIALITY: ITS THEORY AND HISTORY 19 (1986) (defining territoriality as a spatial strategy "to affect, influence, and control people, phenomena, and relationships"); *infra* Part IV.

26. *See infra* Part IV.A.

used in other areas of constitutional law to assess the social meaning of various kinds of state action.[27]

The second approach is farther reaching. It proposes the adoption of state laws that would treat the exclusion of people of color from white-identified space as prima facie evidence of unlawful behavior.[28] Such a law could require a court to establish whether people of color were excluded from or marginalized within "territorialized" or racially exclusionary white space by state actors.[29] If so, the court could find that there was discriminatory purpose absent proof by the governmental entity of a compelling justification for its actions and evidence that such actions were carried out in a narrowly tailored way. This modified version of strict scrutiny tracks the equal protection standard that applies where the state uses racial criteria to distribute governmental benefits and burdens[30]—the key difference here being that my proposed test also incorporates the race of the subject space.

The virtue of the first approach is that it contemplates only minor adjustments to existing doctrine and, therefore, might appeal to more moderate judges. The second approach would be more effective in exposing racial territoriality by making it harder for state actors to exclude people of color from white-identified spaces. But this second option also adopts a more expansive interpretation of racial discrimination and, accordingly, lends itself more readily to a legislative—rather than a judicial—remedy. The benefit of a legislative approach is that it creates greater opportunities for a public conversation about spatial belonging and the role of racially territorial conduct in perpetuating systemic racial disadvantage.[31]

There are several rationales for my proposed framework of racial territoriality. First, a primary vehicle for racial discrimination against people of color historically has been exclusion from white space.[32] Based on the historical

27. *See infra* Part IV.B.

28. This test employs a burden-shifting framework that is a familiar tool of antidiscrimination doctrine. *See*, *e.g.*, Batson v. Kentucky, 476 U.S. 79, 93–98 (1986) (describing standards for establishing a prima facie case to shift the burden in a case alleging purposeful discrimination in jury selection).

29. *See infra* Part IV.A.

30. *See*, *e.g.*, Grutter v. Bollinger, 539 U.S. 306, 326–27 (2003); Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 227 (1995); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493–98 (1989). However, I argue for a different understanding of the substantive guarantees of the Equal Protection Clause. *See infra* Part IV.

31. *See generally* Thomas B. Stoddard, *Bleeding Heart: Reflections on Using the Law to Make Social Change*, 72 N.Y.U. L. REV. 967 (1997) (discussing the virtues of legislative remedies for advancing norm-shifting cultural changes over judicial remedies that rely on static changes in rules).

32. David Delaney writes:

> It is hard to understate the central significance of geographical themes—space, place, and mobility—to the social and political history of race relations and antiblack racism in the United States. Consequently, we cannot underestimate the importance of the historical geography of race to

importance of spatial subjugation and social science evidence about the significance of space, I argue that racial geography continues to be an important clue for decoding deliberate or unconscious racial discrimination and bias. Although the country has achieved marked progress with respect to race and the treatment of individuals, the ongoing spatial isolation and marginalization of people of color as a group remains a significant problem.[33] These practices are deeply engrained in our social understanding of racial discrimination, but constitutional law has mostly ignored this context, except in cases involving overt discrimination, or where the state explicitly uses racial classifications to draw, reinforce, or create physical or jurisdictional boundaries.[34] Thus, rather than focusing simply on the race of persons as required under conventional legal doctrine, this Article tacks in a different direction by proposing that law also examine space. It argues that the racial meaning of a particular space should be part of the robust inquiry that law undertakes in determining the role of race in state action.

Second, I argue that a focus on racial geography expands our understanding of the racial harm that occurred on the Gretna bridge. Within this framework, the Gretna incident can be understood not simply as intentional discrimination

---

> United States history more generally. It's obvious, for example, that segregation, integration, and separation are spatial processes; that ghettos and exclusionary suburbs are spatial entities; that access, exclusion, confinement, sanctuary, forced or forcibly limited mobility are spatial experiences.

DAVID DELANEY, RACE, PLACE & THE LAW: 1836–1948, at 9 (1998). The story of black resistance is also profoundly spatial. For example, blacks vigorously contested the denial of civil rights to travel freely and enter public spaces through sit-ins, marches, and other actions that operated on a spatial plane. *See*, *e.g.*, WILLIAM H. CHAFE, CIVILITIES AND CIVIL RIGHTS: GREENSBORO, NORTH CAROLINA, AND THE BLACK STRUGGLE FOR FREEDOM (1981) (describing sit-ins to protest racial segregation in Greensboro, North Carolina).

33. *See*, *e.g.*, Xavier de Souza Briggs, *More* Pluribus*, Less* Unum*? The Changing Geography of Race and Opportunity*, *in* THE GEOGRAPHY OF OPPORTUNITY: RACE AND HOUSING CHOICE IN METROPOLITAN AMERICA 24–25 (Xavier de Souza Briggs ed., 2005) (discussing the persistence of residential segregation); DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS 110 (1993) (discussing the persistence of residential segregation). *See generally* Camille Zubrinsky Charles, *Can We Live Together? Racial Preferences and Neighborhood Outcomes*, *in* THE GEOGRAPHY OF OPPORTUNITY: RACE AND HOUSING CHOICE IN METROPOLITAN AMERICA, *supra*, at 45 (discussing the role of racial preferences in the persistence of residential segregation). Racial profiling is another example of the spatial marginalization of people of color. *See* Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333 (1998) (describing the historical roots of spatial constraints on black mobility). *See generally* Andrew E. Taslitz, *Stories of Fourth Amendment Disrespect: From Elian to the Internment*, 70 FORDHAM L. REV. 2257, 2272 (2002) (discussing national problems of racial profiling and "how minority communities have modernly been plagued by significant restrictions on privacy and locomotion"). Devon Carbado powerfully describes the dehumanizing impact of racial profiling through the lens of Fourth Amendment doctrine and how it reinforces racial inequality. *See* Devon W. Carbado, *(E)racing the Fourth Amendment*, 100 MICH. L. REV. 946, 964, 967–68 (2002).

34. *See*, *e.g.*, Hills v. Gautreaux, 425 U.S. 284, 306 (1976) (affirming a metropolitan housing remedy based on the Court's finding that the federal agency purposely segregated white and black public housing tenants across municipal boundaries); Buchanan v. Warley, 245 U.S. 60 (1917).

against the evacuees, but as a racially territorial defense of Gretna's white space. This framework underscores that the effect of the Gretna officials' actions extends beyond the evacuees as individuals and involves a broader social harm involving the institutional preservation of space that is both white-identified and racially exclusionary.[35] In so doing, this Article advances a more multifaceted narrative and paradigm that moves beyond "the centrality of individual animus" and instead "insists on a richer picture of personal psychology, social relations, and institutional life"[36] through the medium of geographic space. This framework emphasizes the historical significance of white space to the preservation of racial hierarchy.[37]

The third reason for advancing racial territoriality rests on the premise that spatial context helps to structure the social meaning and consequences of race itself.[38] Because at the time of the hurricane, New Orleans was predominantly black and Gretna was mostly white, the officials on the bridge likely assumed that the black evacuees were not from Gretna. The racial meaning of the two places allowed the police to sort who did and did not "belong" on the bridge according to their racialized spatial grouping[39] and in a way that reinforced cultural norms of white privilege and power.[40] In sum, the race of the evacuees and the Gretna officials is only one part of the constitutional story. To the extent

35. For a discussion of the significance of white space, see *infra* Parts III & IV.D.

36. Rachel F. Moran, *The Elusive Nature of Discrimination*, 55 STAN. L. REV. 2365, 2390 (2003); *see also* Lani Guinier & Martha Minow, *Preface to Responses: Dynamism, Not Just Diversity*, 30 HARV. J.L. & GENDER 269, 271 (2007) (describing the usefulness of interdisciplinary approaches for "highlight[ing] what may [otherwise] seem invisible through the lens of antidiscrimination norms").

37. *See, e.g.*, John O. Calmore, *Racialized Space and the Culture of Segregation: "Hewing a Stone of Hope From a Mountain of Despair"*, 143 U. PA. L. REV. 1233, 1235 (1995) [hereinafter Calmore, *Racialized Space*]; John O. Calmore, *Spatial Equality and the* Kerner Commission Report*: A Back-to-the-Future Essay*, 71 N.C. L. REV. 1487, 1518 (1993); John O. Calmore, *Fair Housing vs. Fair Housing: The Problems With Providing Increased Housing Opportunities Through Spatial Deconcentration*, 14 CLEARINGHOUSE REV. 7, 16, 18 (1980) [hereinafter Calmore, *Fair Housing*]; Martha R. Mahoney, *Segregation, Whiteness, and Transformation*, 143 U. PA. L. REV. 1659, 1684 (1995); john a. powell, *Dreaming of a Self Beyond Whiteness and Isolation*, 18 WASH. U. J.L. & POL'Y 13, 32 (2005).

38. Bruce Haynes describes this phenomenon in the context of Runyon Heights, a black suburban enclave in Yonkers, New York: "The case of Runyon Heights also details how the creation of racially defined residential space after the turn of the century helped racialize American society in general and provided the foundation for racially segregated educational, social, and religious institutional life." BRUCE D. HAYNES, RED LINES, BLACK SPACES: THE POLITICS OF RACE AND SPACE IN A BLACK MIDDLE-CLASS SUBURB, at xviii (2001).

39. *See* powell, *supra* note 37, at 17–18 ("In the context then of whiteness and race, we can say that the primary function of boundaries is to both create racial identities and then regulate and sort these identities in . . . racialized space.").

40. John Gaventa observes that power has diverse meanings. I refer here to power in a "more pervasive [form], embodied in a web of relationships and discourses which affect everyone, but which no single actor holds." John Gaventa, *Finding the Spaces for Change: A Power Analysis*, INST. DEV. STUD. BULL., Nov. 2006, at 23–24.

that antidiscrimination law focuses singularly on the individuals and neglects spatial context, it misses an important element of racial harm.

This Article proceeds in four parts. Part I examines the limits of the intent doctrine in equal protection jurisprudence as it applies to racially territorial conduct. It argues that law will not be able to fully remedy racial discrimination unless it accounts for spatial context. Part II examines the use of space as a tool for promoting racial hierarchy through a brief history of race and space with a particular focus on African Americans. It lays the foundation for the Article's core argument that constraints on the freedom to move in, about, and through space have historically marginalized people of color, denying them equality and liberty and the full measure of their humanity.[41] Part III explores the social science behind racial territoriality, including recent social cognition studies that document the pervasiveness of implicit racial bias. It points to the expansive understanding of space in geography and anthropology to support the argument for explicit spatial analysis in antidiscrimination law. Building on the historical examples in Part II, it demonstrates that racial territoriality is a distinctive form of discrimination whose particular harms reflect the institutional power of space, both as an expression of and framework for human interaction. It describes racial territoriality as a set of racialized interactions between individuals and their spatial context that may be actuated by racial animus or unconscious bias. This bias in turn leads to the exclusion of people of color from space that is socially and culturally white. Part IV proposes a judicial remedy and possible legislative response, explains how they might apply to the incident on the Gretna bridge, and then revisits bedrock equal protection cases to illustrate how they might come out differently under my framework.[42] This Part also briefly explores

41. *See* Michelle Adams, *Separate and [Un]Equal: Housing Choice, Mobility, and Equalization in the Federally Subsidized Housing Program*, 71 TUL. L. REV. 413 (1996) (emphasizing the importance of housing choice and mobility).

42. Some scholars have applied a spatial frame to race and law, although not in the specific way I do here. *See, e.g.*, DELANEY, *supra* note 32; Calmore, *Racialized Space*, *supra* note 37; Calmore, *Fair Housing*, *supra* note 37; Richard T. Ford, *Law's Territory (A History of Jurisdiction)*, 97 MICH. L. REV. 843 (1999); Richard Thompson Ford, *Geography and Sovereignty: Jurisdictional Formation and Racial Segregation*, 49 STAN. L. REV. 1365 (1997); Richard Thompson Ford, *Beyond Borders: A Partial Response to Richard Briffault*, 48 STAN. L. REV. 1173 (1996); Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841 (1994); Richard T. Ford, *Urban Space and the Color Line: The Consequences of Demarcation and Disorientation in the Postmodern Metropolis*, 9 HARV. BLACKLETTER L.J. 117 (1992); Reginald Oh, *Re-Mapping Equal Protection Jurisprudence: A Legal Geography of Race and Affirmative Action*, 53 AM. U. L. REV. 1305 (2004) (suggesting the importance of a spatial geographic narrative in affirmative action cases); powell, *supra* note 37; David D. Troutt, *Katrina's Window: Localism, Resegregation, and Equitable Regionalism*, 55 BUFF. L. REV. 1109 (2008) (describing the role of space in producing race in New Orleans). For a more general discussion of territoriality in the context of race, see generally BLACK GEOGRAPHIES AND THE POLITICS OF PLACE (Katherine McKittrick & Clyde Woods eds., 2007). *See also* Timothy Zick, *Constitutional Displacement*, 86 WASH. U. L. REV. 515,

popular responses that could begin to reshape social thinking and cultural norms about race and space. I conclude with a quick note on "reverse racial territoriality."[43]

I. THE PROBLEM WITH LAW

The preservation of white space figures prominently in social and historical accounts of racial subjugation but is largely absent from our constitutional understanding of racial discrimination. The lack of spatial awareness in equal protection doctrine relates to weaknesses in the constitutional definition and interpretation of discrimination itself. The requirement that plaintiffs prove discriminatory intent to establish an equal protection claim[44] and cramped judicial interpretations of intent have significantly narrowed the practical scope and significance of constitutional law for redressing persistent racial inequality.

518, 524–26, 541–44 (2009) (discussing the law's use of territory to exclude or marginalize groups generally).

43. This Article proceeds largely through the experience of black communities in the context of white space, but the examples of racial territoriality span far beyond this context. There is no way to capture the breadth of this spatial experience in the limited space I have here. Moreover, the examples of racial territoriality extend far beyond African American communities. The pervasive segregation of Mexican Americans, *see*, *e.g.*, Westminster Sch. Dist. v. Mendez, 161 F.2d 774 (9th Cir. 1947) and Steven W. Bender, *Knocked Down Again: An East L.A. Story on the Geography of Color and Colors*, 12 HARV. LATINO L. REV. 109 (2009) (describing the racialization of East Los Angeles and the spatial marginalization of Mexican Americans); the internment of Japanese Americans during World War II, *see* Korematsu v. United States., 323 U.S. 214 (1944) and Hirabayashi v. United States, 320 U.S. 81 (1943); and the forced removal from their homelands and subsequent confinement of Native Americans to reservations over several generations, *see* Ezra Rosser, *This Land Is My Land, This Land Is Your Land: Markets and Institutions for Economic Development of Native American Land*, 47 ARIZ. L. REV. 245, 251 (2005) ("'[T]he Indian has always and everywhere been compelled to surrender every desirable place he has occupied to the white man.'") (quoting Editorial, *The Wards of the Nation*, N.Y. TIMES, May 31, 1875), are just a few of the many spatial examples that could be explored, each warranting its own, independent examination. Thus, it is important to understand that my historical narrative is artificially abbreviated and that the framework of racial territoriality has possibility far beyond the context of black-white spatial interactions. For example, critics of a recent Arizona law that expands the authority of the police to stop those suspected of unlawful immigration have charged that the law in effect enables racially territorial conduct against Latinos. *See* Randal C. Archibold, *Arizona Law Is Stoking Unease Among Latinos*, N.Y. TIMES, May 28, 2010 at A11, A13 (describing pretextual traffic stops of Latinos and the use of spatial criteria—namely whether the "subject's appearance look[s] like it is 'out of place' or as though the subject has just traveled"—as a proxy for immigration status); *see also* First Amended Complaint at ¶¶ 30–48, Melendres v. Arpaio, 589 F. Supp. 2d 1025 (D. Ariz.) (No. CV 07-02513-PHX-MHM), 2008 WL 2782585 (describing the spatial targeting and marginalization of "persons who appear to be Latino" by the police during immigration "sweeps").

44. Washington v. Davis, 426 U.S. 229, 239–48 (1976).

A. Space and the Intent Doctrine

Legal scholars have extensively explored the problems with the intent standard.[45] As a preliminary matter, a showing of disparate, adverse impact—in which people of color are disproportionately burdened by an otherwise facially neutral practice—is not enough on its own to establish racially discriminatory intent.[46] Although impact is "not irrelevant"[47] and may be an "important starting point"[48] in an intent analysis, it is not dispositive. Neither is it sufficient to show a specific awareness that a disproportionate adverse impact is likely to occur.[49] Courts have consistently held that discriminatory purpose implies more than "awareness of consequences."[50] Rather, the decisionmaker must have "selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."[51] Thus, law narrowly conceptualizes discriminatory intent "as resulting from hostile animus towards and accompanying negative beliefs about an individual because of his or her membership in a particular [racial] group."[52] To the extent that courts have shown themselves to be either reluctant or unwilling to detect the subtle cues that factor into individual racial motivation,[53] it comes as no surprise that they also have routinely failed to take into account the racial meaning of space and

45. *See* Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995); *see, e.g.*, Lawrence, *supra* note 21. *But see* Sheila Foster, *Intent and Incoherence*, 72 TUL. L. REV. 1065, 1084 (1998) (arguing that equal protection jurisprudence should recognize "that different levels of consciousness can satisfy the discriminatory intent standard"); Michael Selmi, *Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric*, 86 GEO. L.J. 279, 338 (1997) (arguing that the problem is the Supreme Court's "limited vision of discrimination" rather than antidiscrimination doctrine itself).

46. *See* McCleskey v. Kemp, 481 U.S. 279 (1987) (holding that disparate impact is insufficient on its own for an equal protection claim); *Davis*, 426 U.S. at 242 ("Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution.").

47. *See* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265 (1977) (quoting *Davis*, 426 U.S at 242).

48. *Id.* at 266.

49. *See* Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 271 (1979).

50. *Id.* at 279.

51. *Id.*

52. *See* Krieger, *supra* note 45, at 1177. A "discriminatory motive" refers to a "conscious behavioral intention to create social distance by denying outgroup members certain benefits and opportunities." *Id.*; *see also* Sheila R. Foster, *Causation in Antidiscrimination Law: Beyond Intent Versus Impact*, 41 HOUS. L. REV. 1469, 1472 ("The prohibition against discrimination is a prohibition against making decisions or taking actions on account of, or *because of*, a status characteristic singled out for protection by our civil rights laws or constitutional traditions (which generally include race, gender, nationality, religion, disability, and age).").

53. The Supreme Court has concluded, however, that claimants need not demonstrate that "the challenged action rested solely on racially discriminatory purposes," or even that racial discrimination was a "dominant or primary" purpose. *Arlington Heights*, 429 U.S. at 265 (internal quotes omitted).

the role space itself plays in catalyzing the exclusion and marginalization of people of color.

The reasons for the equal protection doctrine's limited interpretation of intent stem from courts' constrained understanding of racial discrimination.[54] As Michael Selmi has observed, the Supreme Court has readily struck down laws that create formal racial barriers but often falls short in discerning less obvious forms of discrimination.[55] In *Washington v. Davis*, the Supreme Court concluded that disparate impact alone would not suffice for purposes of establishing an equal protection violation, reflecting the Court's view that conscious racial animus—rather than disparate racial effects—should be the focus of a constitutional claim for discrimination.[56] Charles Lawrence has written that the Court's approach in *Davis* reflected its desire to protect "innocent" whites from judicial interference—innocence here referring to whites who had not purposefully set out to harm people of color but who nonetheless would be affected by a remedy that was aimed at alleviating practices having a disproportionate adverse impact on them.[57] The Court neglected to account for the role historical racial discrimination played in perpetuating ongoing, systemic racial disadvantage, as well as how whites might have continued to benefit from practices that had an inordinate negative impact on other racial groups.[58]

The Supreme Court's decision in *Davis* dovetailed with another development that helps to explain the lack of spatial awareness in equal protection law—an emerging, formalist understanding that norms of "anticlassification," rather than "antisubordination," should govern racial discrimination cases.[59] In more concrete terms, this meant that the Court tended to understand the distribution of benefits and burdens according to racial labels as the source of the

54. *See* Selmi, *supra* note 45; *see also* Olatunde C.A. Johnson, *Disparity Rules*, 107 COLUM. L. REV. 374, 374 (2007) (discussing possible responses to "the failure of constitutional and statutory standards to discourage actions that produce racial disparity").

55. *See* Selmi, *supra* note 45.

56. Washington v. Davis, 426 U.S. 229, 242 (1976).

57. *See* Lawrence, *supra* note 21, at 320.

58. Cheryl Harris describes this phenomenon in terms of "white privilege":

> White privilege accorded as a legal right was rejected, but de facto white privilege not mandated by law remained unaddressed. In failing to clearly expose the real inequities produced by segregation, the status quo of substantive disadvantage was ratified as an accepted and acceptable base line—a neutral state operating to the disadvantage of Blacks long after de jure segregation had ceased to do so. In accepting substantial inequality as a neutral base line, a new form of whiteness as property was condoned. Material inequities between Blacks and whites—the product of systematic past and current, formal and informal, mechanisms of racial subordination—became the norm.

Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709, 1752–53 (1993).

59. Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over* Brown, 117 HARV. L. REV. 1470 (2004).

relevant harm, rather than state activity that "enforce[d] the inferior social status of historically oppressed groups."[60] For the Court, the practice of defining people by race subverted the core purpose of the Equal Protection Clause, which was to ensure, where appropriate, the treatment of people as individuals, rather than as members of a racial group.[61] Given its generally restrained interpretation of equal protection doctrine, it is unsurprising that the Supreme Court has long overlooked the racialization of space in the evidentiary rubric of intentional discrimination claims. And yet, as Reva Siegel has observed, "[a]ntisubordination values are not foreign to the modern equal protection tradition, but a founding part of it, deeply tempered by other values, including the need to have a Constitution that speaks to all."[62] A richer and more layered constitutional narrative treats antisubordination as a primary goal of equal protection doctrine.[63] The framework of racial territoriality fits squarely within this more robust constitutional vision and rejects the sterile, formalistic, and ahistorical understanding that has dominated constitutional inquiry.

1. *Village of Arlington Heights*

Village of Arlington Heights v. Metropolitan Housing Development Corp.[64] is a primary example of law's failure to incorporate racialized space as a potential factor in intentional discrimination claims. There, the Supreme Court considered whether a village's refusal to rezone a property to accommodate racially integrated multifamily housing was racially discriminatory under the Equal Protection Clause. The failure to rezone would have adversely affected blacks residing in the metropolitan area, who were disproportionately eligible for low-income housing.[65] Consistent with *Washington v. Davis*, the Court held that disparate impact—although relevant—was insufficient on its own to establish an

60. *Id.* at 1472–73.

61. *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist., 551 U.S. 701, 743 (2007) ("[T]he Equal Protection Clause 'protect[s] *persons*, not *groups*.'" (quoting Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 227 (1995))).

62. Siegel, *supra* note 59, at 1477.

63. Richard Chused's article about gendered spaces is instructive and offers useful insights that parallel many of my observations here. Chused uses stories from the temperance movement to describe how women infiltrated male spaces where alcohol was sold or dispensed to reshape political discourse. *See* Richard H. Chused, *Gendered Space*, 42 FLA. L. REV. 125, 125–35 (1990) [hereinafter Chused, *Gendered Space*]. This Article's argument—that law overlooks the racial identifiability of spaces and should be more sensitive to spatial context—tracks Chused's key contention that law has acquiesced in the construction of gendered spaces and should play a more expansive role in dismantling them. *Id.* at 155–61; *see also* Richard H. Chused, *Courts and Temperance "Ladies"*, 21 YALE J.L. & FEMINISM 339 (2010) (further discussing gendered space in the context of the temperance movement).

64. 429 U.S. 252 (1977).

65. *Id.* at 259.

equal protection claim; discriminatory intent was the touchstone of a constitutional violation.[66] The Court then set forth a non-exhaustive[67] list of the kinds of circumstantial evidence that might be used to prove intent, focusing specifically on the "historical background" of the challenged decision.[68] Plaintiffs could rely on evidence of a sudden, unexplained departure by local officials from substantive practices or procedures that would otherwise benefit blacks.[69] The legislative or administrative history accompanying the decision, including contemporary statements by decisionmakers, could also reveal that race was a motivating factor.[70] The Court rejected the intentional discrimination claim, finding that plaintiffs had failed to prove "that discriminatory purpose was a motivating factor in the Village's decision."[71]

However, in setting forth the list of relevant factors, the Court disregarded the racial identifiability of the village itself, even as circumstantial proof of discriminatory intent. Despite evidence that the population of persons of color had increased significantly in the surrounding metropolitan area,[72] the village was virtually entirely white: Only twenty-seven of its over 64,000 residents were black.[73] Indeed, evidence in the record indicated that it was the *most* racially isolated municipality of its size in the region.[74] That Arlington Heights had managed to remain so overwhelmingly white was remarkable, but the Supreme Court did not find it relevant at all to the equal protection inquiry, and indeed mentioned it only in passing.[75] Thus, although the *Arlington Heights* standard allows the possibility that claims for intentional discrimination can be established through less direct evidentiary methods, the racial geography or racial identifiability of the subject space—and its associated racial meaning—is missing from this rubric. In the absence of comparator evidence that whites were treated differently than persons of color or smoking gun proof of overt racial hostility, this standard

66. *Id.* at 265.
67. *Id.* at 268.
68. *Id.* at 267.
69. *Id.*
70. *Id.* at 268.
71. *Id.* at 270.
72. *See* Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights, 517 F.2d 409, 414 (7th Cir. 1975) (observing the increase in the black population in the surrounding metropolitan area from 14 to 18 percent).
73. *See Arlington Heights*, 429 U.S. at 255.
74. *Metro. Hous. Dev. Corp.*, 517 F.2d at 414 n.1. Although Arlington Heights at the time was the most residentially segregated area of its population size, its racial demographics apparently reflected the rest of northwest Cook County. The Seventh Circuit Court of Appeals observed that the region's population had increased by 219,000 from 1960 to 1970—but only increased by 170 blacks. *Id.* at 414.
75. *See Arlington Heights*, 429 U.S. at 255.

virtually ensures that incidents like the one at the Gretna bridge will continue to fly below the radar of equal protection doctrine.

2. *City of Memphis v. Greene*

City of Memphis v. Greene[76] also illustrates law's failure to account for the racial meaning of space as a factor in a discriminatory intent claim. *Greene* is particularly useful here because of its similarity to the incident at the Gretna bridge. *Greene* also involved racial territoriality in that black residents were prohibited from moving through a space that was predominantly white, a factor that the Supreme Court treated as irrelevant to the underlying claim of intent.[77]

Greene concerned the city of Memphis's decision to close a two-lane city street that joined an all-white residential community, Hein Park, and a predominantly black neighborhood to the north.[78] Hein Park residents complained of "traffic pollution"—in particular, "undesirable" traffic apparently originating from the black neighborhood[79]—that reportedly endangered the safety of children in the neighborhood and resulted in "noise, litter, [and] interruption of community living."[80] The residents initially asked the City to close four streets leading into the subdivision,[81] but the City denied the request after receiving objections from various city agencies.[82] A subsequent study revealed that the traffic problem could be alleviated if the City closed off the thoroughfare at the junction between Hein Park and the black neighborhood.[83] The closure was accomplished by deeding a strip of land to the northernmost Hein Park property owners located on the street and by erecting a physical barrier on the land that coincided with the precise point of black-white neighborhood separation.[84] Privatizating

76. 451 U.S. 100 (1981).

77. *See id.* at 129 ("We merely hold that the impact of the [street closure] on nonresidents of Hein Park is a routine burden of citizenship [that] does not reflect a violation of the Thirteenth Amendment."). Michael Selmi discusses *Greene* as an example of the Supreme Court's failure to meaningfully apply its own test for identifying racial discrimination. *See* Selmi, *supra* note 45, at 306–09. Charles Lawrence also explores *Greene* in the context of his "cultural meaning" test. *See* Lawrence, *supra* note 21, at 363–64. These analyses provide a useful backdrop for exploring the framework of racial territoriality, but neither approaches the case in the way I propose here. *See also* Sheri Josephs, Comment, City of Memphis v. Greene*: A Giant Step Backwards in the Area of Civil Rights*, 48 BROOK. L. REV. 621 (1982) (criticizing the Court's "refus[al] to characterize the erection of a street barrier between white and black neighborhoods as an impermissible 'badge of slavery' under the Thirteenth Amendment").

78. *See Greene*, 451 U.S. at 102–03.

79. *See id.* at 104, 109; Brief for Respondents Owens, Cross, and Burse, *Greene*, 451 U.S. 100 (No. 79-1176), 1980 WL 339375, at *2 [hereinafter Owens Brief].

80. *Greene*, 451 U.S. at 104.

81. *Id.* at 103.

82. *Id.*

83. *Id.* at 103–04.

84. *See id.* at 139 (Marshall, J., dissenting); Owens Brief, *supra* note 79, at *4.

the street also meant for all practical purposes that black pedestrian traffic from the north could be barred from the white neighborhood.[85]

The spatial meaning of this physical barrier was not lost on the black residents. One thousand residents petitioned the City to deny the application to close the street.[86] When the City blocked the street, two civic associations and several named plaintiffs filed a class action suit requesting an injunction.[87] Plaintiffs alleged that the erection of the barrier violated their rights to access their property on the same terms as whites under a federal civil rights statute, 23 U.S.C. § 1982. They also claimed that the spatial closure was a "badge and incident" of slavery under the Thirteenth Amendment and constituted intentional racial discrimination in violation of the Equal Protection Clause.[88] Although not framed in so many words, plaintiffs had in effect asserted a claim for racial territoriality.

The district court dismissed the complaint on the grounds that plaintiffs had "failed to allege any injury to the plaintiffs' own property or any disparate racial effect"[89] and further noted that "plaintiffs ha[d] no constitutional property rights in continued access" to the closed street.[90] The court of appeals reversed, upholding both plaintiffs' section 1982 and Thirteenth Amendment claims. The court was persuaded that the following facts were sufficient to establish a constitutional claim: First, that the black community had been adversely affected by the closure, while the white community had "benefited";[91] second, that the "barrier [had been] erected precisely at the point of separation of these neighborhoods and would undoubtedly have the effect of limiting contact between them"; third, that the barrier was not undertaken as part of any overall city plan but was erected specifically to benefit the white neighborhood; and finally, that there was a disproportionate negative impact on the property values of the black residents "with a corresponding increase in the property values in Hein Park."[92] Significantly, the appellate court concluded that the street closing could be a "badge of slavery" irrespective of whether it had actually denied equal treatment to blacks.[93] The indignity that the barrier imposed on

85. *Greene*, 451 U.S. at 139 (Marshall, J., dissenting).

86. *See* Selmi, *supra* note 45, at 306.

87. Greene v. City of Memphis, 535 F.2d 976, 977 (6th Cir. 1976); *see also Greene*, 451 U.S. at 104–05 (majority opinion).

88. *Greene*, 451 U.S. at 108–09 n.8, n.11.

89. *Id.* at 105.

90. *Id.* at 106 n.8.

91. Greene v. City of Memphis, 610 F.2d 395, 404 (6th Cir. 1979).

92. *Greene*, 451 U.S. at 109 n.14.

93. *Id.* at 108–09. The Court declined to "establish any legal guidelines for the determination of when conduct may amount to a badge of slavery." *Id.* at 109 n.14.

the black residents was central to the court's finding. It observed that the street's closure could "only be seen as one more of the many humiliations which society has historically visited upon blacks."[94]

The Supreme Court rejected both the section 1982 and the Thirteenth and Fourteenth Amendment claims.[95] As to their section 1982 claim, the Court concluded that plaintiffs had failed to show a cognizable injury. It refused to credit plaintiffs' argument that the barrier depreciated the property value of the black residents' homes or that it severely limited access to their property.[96] While acknowledging that the closure had a disparate racial impact, the Court dismissed the asserted injury as a "routine burden of citizenship," involving nothing more than a "slight inconvenience" of having to use one street instead of another.[97] Without a discriminatory motive, such an inconvenience could not be "equated to an actual restraint on the liberty of black citizens that [was] in any sense comparable to the odious practice [that] the Thirteenth Amendment [had been] designed to eradicate."[98] Concluding that the inconvenience suffered by the mostly black drivers was a "function of where they live[d]" rather than their race—thereby dismissing the importance of Memphis's racial geography—the Court rejected the claim that the street closure evidenced discriminatory intent.[99]

Justice Marshall wrote a vigorous dissent. Marshall did not use the precise terminology of racial territoriality, but his argument that neither "the Constitution [nor] federal law permits a city to carve out racial enclaves" echoes this framing of the problem.[100] He emphasized Memphis's racialized identity, noting in part its protracted resistance to desegregation.

> The majority treats this case as involving nothing more than a dispute over a city's race-neutral decision to place a barrier across a road. My own examination of the record suggests, however, that far more is at stake here than a simple street closing. The picture that emerges from a more careful review of the record is one of a white community, disgruntled over sharing its street with Negroes, taking legal measures to keep out "undesirable traffic," and of a city, heedless of the harm to its Negro citizens, acquiescing in the plan.[101]

94. *Id.* at 109–10 & n.14.
95. *Id.* at 119.
96. *Id.* at 123.
97. *Id.* at 119, 123.
98. *Id.* at 128.
99. *Id.* at 128–29.
100. *Id.* at 136 (Marshall, J., dissenting).
101. *Id.* Indeed, it is possible that the majority overlooked several factors that would have supported even a more conventional understanding of racial discrimination. For example, the City had never before

This spatial account of the street's closing focuses on different facts than those relied upon by the Supreme Court majority. Both the court of appeals and Justice Marshall's dissent treated the racial identifiability and apparent racial meaning of the respective neighborhoods as relevant factors for assessing the cognizability of plaintiffs' claim, particularly Hein Park's history and reputation as an "exclusive residential neighborhood for white citizens."[102] While the majority made light of the plaintiffs' claimed injury, the plaintiffs themselves plainly perceived the closure as a racially harmful act that appeared designed "to maintain separation of historically segregated neighborhoods along racial lines"[103] and that "served as a warning to blacks to stay out of the subdivision."[104] Expert testimony "linked the street closing to historic patterns of segregation and discrimination in Memphis."[105] A petition submitted to the Memphis City Council by a black civic association asserted that the "closing symbolize[d] in unmistakable terms a white neighborhood shutting its door on its adjacent Black and integrated communities."[106] The plaintiffs' complaint itself "alleged that the affluent white residents of Hein Park, with the support and acquiescence of City officials, had sought to preserve the all-white nature of the subdivision and to protect it from incursions by black residents into the area."[107] The black residents north of Hein Park, therefore, had concluded that racial territoriality (though again not identified in so many words), and not simply individual racial animus alone, constituted the relevant racial harm.[108] Had the justices appreciated the

---

closed a public street to address traffic congestion, and it had departed from standard planning procedures and practices, providing the black residents of the neighborhood to the north with very little notice and refusing standard information requests. Moreover, the City failed to pursue more moderate alternatives for alleviating the claimed traffic hazards, opting instead for the more drastic measure of shutting off a public thoroughfare. *See* Owens Brief, *supra* note 79, at *16. The district court also disregarded a statement by a Hein Park resident who died before trial that the "well-to-do white people living in Hein Park do not want black people or the few of us who refuse to run away living north of Jackson [sic] to drive on . . . what they think is their street." *Id.* at *4 n.8.

102. *Greene*, 451 U.S. at 137 (Marshall, J., dissenting); *see also* Greene v. City of Memphis, 610 F.2d 395, 396 (6th Cir. 1979).

103. *See* Owens Brief, *supra* note 79, at *3.

104. *Id.* at *9; *see also Greene*, 610 F.2d at 404.

105. *See* Owens Brief, *supra* note 79, at *6.

106. *Id.* at *3–4.

107. *Id.* at *6.

108. Indeed, amici who supported the plaintiffs appreciated the spatial significance of the decision before the Court:

> Amici see the case before the Court as one that presents issues that are crucial to the racial and ethnic fabric of this country, and that in essence, will go a long way toward determining the physical boundaries that will exist between Blacks and whites in the cities and suburbs of our nation. The sanctioning by this Court of the closing of West Drive may very well signal to white communities all over the country that municipal zoning power is available to physically exclude "undesirable elements," definable in racial terms, and thereby create a virtually all white "oasis" in the midst of a rapidly deteriorating nether world.

spatial significance of the barrier, they would have reached a different result. In Part IV, I discuss the difference the analytical framework of racial territoriality would have made to the outcome in the case.

B. Why Space Matters

The framework of racial territoriality seeks to place space at the center of the legal conversation about racial disadvantage.[109] It emphasizes that the ability to choose space and to move unimpeded through and across the local spaces of everyday life[110] are basic components of freedom, social belonging, status, and dignity.[111] Being excluded from space or marginalized within a particular space is stigmatizing[112] and degrading.[113] Racial territoriality demeans the individual by prohibiting the full expression of the self because those who suffer it experience the world as outsiders, barred from full participation in society.[114] In this respect,

---

Brief Amici Curiae of the Affirmative Action Coordinating Ctr., et al., City of Memphis v. Greene, 451 U.S. 100 (1981) (No. 79-1176), 1980 WL 339376, at *2–3.

109. This Article is situated within Critical Race Theory's project of "reconceptualiz[ing] the role of institutions, both private and public, in perpetuating inequality." Moran, *supra* note 36, at 2385.

110. The issue of mobility also implicates Fourth Amendment guarantees against unlawful police detentions. A full exploration of Fourth Amendment jurisprudence is beyond the scope of this Article, but it has shown some sensitivity to spatial context. *See, e.g.*, Sheri Lynn Johnson, *Race and the Decision to Detain a Suspect*, 93 YALE L.J. 214, 226–30 (1983) (discussing cases involving detention of suspects in "high crime" areas). In several cases, for example, state courts have suppressed evidence obtained through detentions that were based entirely on perceptions of "racial incongruity" between the defendant and the surrounding neighborhood. *Id.* Police stops of whites in minority neighborhoods were held to violate the Fourth Amendment on the grounds that racial incongruity alone was an insufficient basis for reasonable suspicion. *Id.* (describing cases). In *Kolender v. Lawson*, 461 U.S. 352, 461 (1983), the Court struck down a statute that permitted the police to stop any person walking on the street to ask for identification. The case involved a "law-abiding black citizen" who apparently enjoyed strolling through white neighborhoods—or at least those neighborhoods that were traditionally considered white and thus racially territorialized. *See* Johnson, *supra*, at 214.

111. Zick, *supra* note 42, at 538; *see* Taslitz, *supra* note 33, at 2257 (discussing the emotional power, humiliation, and rage associated with racial profiling in law enforcement).

112. For a comprehensive exploration of stigmatic association and meaning in the context of race, see R.A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 N.Y.U. L. REV. 803 (2004). *See also* Lawrence, *supra* note 21. This idea of racial harm is grounded in an "antisubordination" understanding that "it is wrong for the state to engage in practices that enforce the inferior social status of historically oppressed groups." Siegel, *supra* note 59, at 1472–73.

113. *See* A.K. Sandoval-Strausz, *Travelers, Strangers, and Jim Crow: Law, Public Accommodations, and Civil Rights in America*, 23 LAW & HIST. REV. 53, 53–54 (2005) (quoting Martin Luther King, Jr., 1963 Letter from Birmingham Jail (recounting the frustrations and humiliation he felt when trying to explain segregation to his six-year-old daughter)).

114. For this reason, choice of space and mobility were signature features of the civil rights movement—from Rosa Parks's refusal to move to the back of the bus to freedom rides that used movement and space to assert rights to equal citizenship and meaningful freedom. Indeed many "freedom songs" from the civil rights movement explicitly focused on the importance of unencumbered movement as a key civil right. *See, e.g.*, *I Won't Be Moved and Long Walk to D.C.*, *in* FREEDOM SONGS: MUSIC FROM THE CIVIL RIGHTS MOVEMENT (TimeLife 2009). Some of the most potent symbols of black freedom are associated

racial territoriality can be understood as a dual problem of equality and liberty. It relies on spatial separation to perpetuate racial hierarchy at the same time that it infringes one of the most basic individual freedoms of mobility and movement.[115] The failure to consider the racial dimensions of space also obscures the role of space in producing race[116] and the extent to which race itself is an expression of spatial power.[117] Spatial exclusion is so central to the historical experience of African Americans,[118] for example, that blackness itself becomes infused with spatial meaning, as the Gretna incident illustrates.[119] Law cannot meaningfully guard against racial discrimination unless it also accounts for the role that racialized space plays in such discrimination.

The problem with *Arlington Heights* and *Greene*, therefore, is that they read racial geography out of the equal protection framework, making it more difficult in situations like Gretna to identify racial intent. In theory, racial animus could be inferred from direct evidence of racial hostility—such as the use of racial epithets by Gretna officials or the police, if such evidence existed—or circumstantial evidence that whites were permitted to cross the bridge but that blacks were not. Proof that Gretna officials departed from past practices would also be relevant to such a claim. Yet the extraordinary events of Hurricane Katrina and its aftermath make this an impracticable standard. Relatively few whites remained in New Orleans after the hurricane, and New Orleans was a predominantly black city to begin with, making comparator evidence of disparate racial treatment hard to establish.[120] Because the circumstances of the attempted bridge crossing also were unique, the evacuees would have a tougher time showing that

---

with movement—the North Star and the Underground Railroad—both of which were used to guide, both literally and metaphorically, escaped slaves to northern territory. *See* KENNETH L. KARST, BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION 4 (1989).

115. *See generally* Mitchell F. Crusto, *Enslaved Constitution: Obstructing the Freedom to Travel*, 70 U. PITT. L. REV. 233 (2008). Racially territorial behavior might implicate the right to travel. Courts have long recognized a general "right to travel" but have varied on the scope and nature of the right. *See* Saenz v. Roe, 526 U.S. 489, 500 (1999) (discussing different components).

116. *See* Calmore, *Racialized Space*, *supra* note 37, at 1235.

117. *See* IAN F. HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE 84 (2004) ("Segregation laws increased the stability of racial categories by fixing mutable racial lines in terms of relatively immutable geographic boundaries."); I. Bennett Capers, *Policing, Race, and Place*, 44 HARV. C.R.-C.L. L. REV. 43, 45 (2009) (describing the role of space in "race-making"); Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1 (1994).

118. *See infra* Part II.

119. *See infra* Part IV; *see also* Troutt, *supra* note 42; Mary Jo Wiggins, *Race, Class, and Suburbia: The Modern Black Suburb as a 'Race-Making Situation'*, 35 U. MICH. J.L. REFORM 749 (2002) (describing the role of space in producing racial identity).

120. *See* Peter Whoriskey, *Katrina Hit Blacks Harder Than Whites, Study Finds*, WASH. POST (May 9, 2007), http://www.washingtonpost.com/wp-dyn/content/article/2007/05/09/AR2007050902556.html.

the Gretna officials deviated from previous practices that were used in comparable situations.

This is not to suggest that law does not provide any recourse to the New Orleans evacuees. Other federal constitutional claims might be available, as well as claims based on state statutes or state constitutional law. The Gretna plaintiffs, for instance, sued local police officials for violating their right to be free from unreasonable searches and seizures, their rights to peaceful assembly, the constitutional prohibition against cruel and unusual punishment, and their rights to interstate and intrastate travel under substantive due process.[121] In their equal protection claim, they alleged that local officials on the bridge had irrationally discriminated against pedestrian, versus vehicular, traffic.[122]

But it matters for several reasons that law misses the racial cues in the Gretna story. One is practical. The gap in the law means that aggrieved persons will have to depend for relief on other doctrinal constructs that may require shoehorning facts into awkward legal narratives.[123] Another concerns the broader social impact of the raceless legal narrative. It insulates racialized space from law's normative reach[124] and limits the conversation about racial geography within legal culture and society at large.[125] It suggests that racially

---

121. *See supra* note 7.

122. Ballet v. City of Gretna, No. 06-10859, 2009 WL 1789413, at *4 (E.D. La. June 18, 2009).

123. *See supra* note 7. Joseph Singer describes the centrality of narrative in shaping how we perceive circumstances or events:

> How one tells the story may affect how one understands the relative importance of competing considerations, facts and values, as well as the morality, justice, fairness, and ultimate justifiability of alternative courses of action. Lawyers understand that the construction of narrative is part of the way we reason morally. Narrative is part of the way we understand and judge relationships, actions, causes, and effects; it is a large part of the way we assign responsibility.

See Joseph William Singer, *Normative Methods for Lawyers*, 56 UCLA L. REV. 899, 942 (2009).

124. Kimberlé Crenshaw elaborates on the power of law to set and condition various social norms. She writes that law:

> embodies and reinforces ideological assumptions about human relations that people accept as natural or even immutable. People act out their lives, mediate conflicts, and even perceive themselves with reference to the law. By accepting the bounds of law and ordering their lives according to its categories and relations, people think that they are confirming reality—the way things must be.

Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1352 (1988).

125. *See* Deseriee A. Kennedy, *Consumer Discrimination: The Limitations of Federal Civil Rights Protection*, 66 MO. L. REV. 275 (2001) (discussing this problem in the context of law's failure to address consumer discrimination against blacks); *see also* KARST, *supra* note 114, at 4, 136–38 ("The very act of filing a lawsuit implicitly affirms that the plaintiffs and defendants shared membership in a community. Any claim of right is an appeal to a community's norms, 'a claim grounded in human association.'") (quoting Frank I. Michelman, *Justification (and Justifiability) of Law in a Contradictory World*, *in* NOMOS XVIII: JUSTIFICATION 92 (J. Pennock & J. Chapman eds., 1986). This vision of law regards statutes and judicial rulings as an exogenous variable that "acts upon" the collective "legal consciousness" about what is legally permissible, which then shapes social understandings about what constitutes socially acceptable

territorial behavior is socially acceptable, so long as it does not involve disparate treatment of individuals based on race. In so doing, it helps to ensure that racialized spatial restrictions on people of color continue to fly below law's radar.

Finally, law's singular focus on individuals and the corresponding failure to grasp the significance of territorial behavior in racialized spaces neglects an important aspect of racial harm. In the Gretna example, the racial associations of Gretna and New Orleans play an integral part in constraining the movement of the black evacuees across the bridge. The race of the persons who are excluded is central to understanding each incident, but so is the corresponding cultural whiteness of Gretna and blackness of New Orleans. Under the framework of racial territoriality, the black evacuees are barred from crossing the bridge because Gretna is predominantly white. As discussed in Part III, the town's racial identifiability triggers latent racial biases and assumptions among local officials about who does and does not "belong," leading them to exercise proprietary racial power over the town's space and to chase the evacuees back to New Orleans.[126] The exclusion and marginalization of the evacuees from the white space operates in tandem with their spatial confinement to the black space. Because they belong to one space but not another, their dignity as individuals is spatially contingent. Race, therefore, is properly interpreted and understood partly in relation to its spatial meaning.

These problems manifest themselves even where plaintiffs might succeed on a conventional claim for intentional discrimination. Consider this additional example:

During "Black Bike Week," the town of Myrtle Beach, South Carolina shut down part of a major thoroughfare in order to prevent the black bikers who were participating in the festival from freely cruising the streets.[127] However, during the mostly white "Harley Week," the town did not restrict the flow of traffic.[128] The town later conceded that the different traffic pattern for the black bikers was not related to public safety and that it had implemented the particular traffic plan only during Black Bike Week.[129] The mayor also admitted that the City

behavior. *See* Austin Sarat & Thomas R. Kearns, *Forms of Legal Scholarship and Everyday Life*, *in* LAW IN EVERYDAY LIFE 21–61 (Austin Sarat & Thomas R. Kearns eds., 1993). However, an extensive body of work also regards law as being shaped from the ground up. *See generally id. See also, e.g.*, DAVID M. ENGEL & FRANK W. MUNGER, RIGHTS OF INCLUSION: LAW AND IDENTITY IN THE LIFE STORIES OF AMERICANS WITH DISABILITIES (2003); PATRICIA EWICK & SUSAN S. SILBEY, THE COMMON PLACE OF LAW: STORIES FROM EVERYDAY LIFE (1998).

126. I am grateful to Lani Guinier for helping me reframe this point.

127. *See* NAACP v. City of Myrtle Beach, No. 4:03-1732-25TLW, 2006 WL 2038257, at *1 (D.S.C. July 20, 2006).

128. *Id.*

129. *Id.* at *4–5.

welcomed white tourists but wanted to "discourage" black tourists.[130] In the off-season, Myrtle Beach was just over 80 percent white. Black Bike Week is typically the only time of year that African Americans outnumber whites in the City.[131]

The Myrtle Beach case offers a classic example of a racial intent claim—one traffic pattern applies to blacks, another to whites. Here the comparator evidence is easy to establish: Two biker groups distinguished only by race are treated differently without any justification, leaving an invidious racial motive as the only possible explanation. The mayor's comments offer smoking gun evidence that the different traffic pattern was designed to make it harder for blacks to maneuver through the town and to discourage them from visiting. Thus, in equal protection terms, it is apparent that the different treatment was because of race, rather than merely in spite of it.[132]

This is a relatively easy equal protection case. Yet the legal framework—with its emphasis on the race of individuals—obscures the spatial element of the racial harm. The problem is not simply that the town discriminated against the black bikers as individuals but that it sought to do so by limiting their mobility through white space. The legal conversation is structured around the town's different treatment of the white bikers because equal protection doctrine conceptualizes the harm this way.[133] In more traditional terms, what matters is that the black bikers, though comparably situated, were not treated the same as the white bikers. However, law overlooks the dignity harms that result not simply from the differential treatment but also from the exclusion from territorialized white space.

These dignity harms reveal themselves more starkly in unsuccessful cases involving (I would argue) a more typical set of facts. What if, for instance, Harley Week did not exist and there was only Black Bike Week, eliminating evidence that similarly situated whites had been treated differently?[134] Or if the

130. *Id.* at *5.
131. *Id.* at *1.
132. *See* Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 271 (1979).
133. *See supra* Part I.A.
134. Evidence that similarly situated persons of different racial backgrounds were treated differently is often difficult to identify. Sheila Foster explores the weaknesses in antidiscrimination doctrine that make both intentional racial discrimination claims and adverse impact claims difficult to prove. The first is the problem of "unconscious stereotypes and cognitive biases" that influence legal decisionmakers and distort their judgments about whether discrimination is responsible for negative racial outcomes. The second concerns the "normative assumptions about the existence, operation, and prevalence of status discrimination in our society" that permeate the evidentiary framework in antidiscrimination law. *See* Foster, *supra* note 52, at 1475–78; *see also* Stephen E. Haydon, *A Measure of Our Progress: Testing for Race Discrimination in Public Accommodations*, 44 UCLA L. REV. 1207, 1229–32 (1997) (citing cases in which plaintiffs' claims were dismissed for lack of evidence that similarly situated whites were treated more favorably).

mayor had been savvier and had not stated that the City welcomed whites but wanted to discourage blacks from visiting? In either case, the viability of the constitutional claim becomes much less certain. Equal protection doctrine is less inclined to recognize any racial harm even though the City's decision to limit the black bikers to a particular course of traffic might be just as racially motivated. Without the treatment of white bikers to provide a racial baseline, constitutional claims become much more difficult to prove. As in the Gretna example, spotting racial intent requires a sensitive and demanding inquiry into all the facts to determine whether race was a factor in the decision. Except for descriptive purposes, however, law neglects to consider the racial import of the colorlined space[135] of Myrtle Beach. In these cases, plaintiffs are likely to lose under conventional interpretations of equal protection doctrine. But they also miss the chance to advance a more comprehensive understanding of the operative racial harm. Racial territoriality bridges this gap.

II. A SHORT SPATIAL HISTORY OF RACE

The premise of racial territoriality is that the existing constitutional focus on the race of individuals discounts the profoundly spatial nature of racial subordination in the United States. This Part demonstrates that this country's racial hierarchy has depended to a significant degree on the maintenance of racially distinct spatial territories across neighborhoods and a vast swath of other private and public institutional spaces.[136] The spatial separation of whites, the exclusion of people of color from white-identified spaces, and the vigilant enforcement of racial boundaries have been integral to this effort.[137] The power of the state has been deployed to "protect" white space and to "contain" nonwhite space, while regulating the movement of people of color within and across various racial borders in service of these objectives.[138] A full appreciation of racial territoriality, therefore, requires an appreciation of historical context.[139] This Part describes the history of antiblack spatial practices to make the connections between race and

135. *See* Farley, *supra* note 18.

136. The policing of the national border also reflects efforts to maintain racial boundaries. *See* powell, *supra* note 37, at 17 (describing the racial project at work in nation-making).

137. This history refers literally to physical space and boundaries, but, as I discuss in Part III, *infra*, the preservation of whiteness also includes the projection of collective racial biases onto space. *See also* powell, *supra* note 37, at 15–23.

138. *Id.* at 17.

139. *See* Moran, *supra* note 36, at 2382 (describing how critical race theorists use history as a "way to contextualize the current experience of race and to comprehend the perennial intransigence of racism"); Selmi, *supra* note 45, at 304–05 (discussing the importance of historical background in antidiscrimination doctrine).

space more explicit. It lays the foundation for my legal argument that the exclusion of people of color from racialized white public spaces[140] should raise an inference of intentional racial discrimination.[141]

A. Slavery

Racial territoriality was integral to slavery. Not only was the racial geography explicit in the division of the nation into slave and free states, but plantations had their own spatial codes of race, color, and power that helped to define a social hierarchy among slaves. Indeed, the plantation itself was spatially organized to maintain the racial power and dominance of white owners and their supportive cast. The different social positions of slaves in the house and field were based in part upon their spatially differentiated status,[142] and spatial transgressions were severely punished.[143] Among the many different forms of oppression imposed by slavery, the inability of slaves to choose any manner of space was fundamental. Local practices varied,[144] but the spaces that slaves occupied were generally micromanaged to an extreme degree—from where they lived and worked to where (and whether) they traveled.[145] Slaves were permitted off the plantation only with the express permission of their masters.[146] Limitations on mobility were not necessarily confined to the South. During the period of slavery in the North, some states imposed physical restrictions on slaves and free blacks in order to limit the threat of rebellion.[147]

140. Although this Article's proposed framework focuses on spatial restrictions by public actors, this Part also includes a historical description of such limitations in the context of private spaces. I suggest that the public-private distinction is particularly artificial in the racial context where private customs and practices have been supported and fueled by state activity. Thus, the evidentiary framework I advance here would include racially territorial conduct by private actors, although any constitutional remedy would be limited to state action.

141. I recognize that this Part does not begin to capture the full breadth of the African American experience. I include it here only to provide a broad historical overview of the longstanding and varied dimensions of black spatial marginalization in the United States.

142. *See* DELANEY, *supra* note 32, at 34.

143. MICHAEL J. KLARMAN, UNFINISHED BUSINESS: RACIAL EQUALITY IN AMERICAN HISTORY 135 (2007).

144. *Id.* at 32. *But see* ANNETTE GORDON-REED, THE HEMINGSES OF MONTICELLO: AN AMERICAN FAMILY 30 (2008) (cautioning against inferences that house slaves were necessarily more privileged than field slaves).

145. *See generally* A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR: RACE & THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD (1978); KLARMAN, *supra* note 143, at 11–12 (describing spatial control over slaves); *see also* Civil Rights Cases, 109 U.S. 3, 22 (1883) (describing the spatial element of slavery); DELANEY, *supra* note 32, at 34 (same).

146. KLARMAN, *supra* note 143, at 11, 12.

147. *Id.* at 14.

Law was integral to maintaining this spatial system.[148] The complete authority of whites over blacks—including their corresponding power to exclude, marginalize, and confine slaves and even free blacks within prescribed spaces—was premised on property rights and backed by the power of the state.[149] Any black "servant who was found wandering out of the town or place to which he belonged, without a written pass . . . was made liable to be seized by any one" and "delivered up to his master."[150] Even free blacks within slave states were not truly free, as they also were subject to being "stopped, seized, or taken up . . . ."[151] This threat persisted due to the racialized presumption that all blacks were subordinate to whites, whether they were slaves or not.[152] The legal authority to limit where free blacks traveled and what places they went again illustrates how space was used to implement the racial order.[153]

B. Segregation in the South and North

Racial territoriality did not end with the formal demise of slavery but merely assumed another form. Southern whites cultivated a system of forced physical separation coupled with a virulent ideology of black inferiority.[154] Together, they created and reinforced social and cultural norms of racial separateness. Black Codes and anti-vagrancy laws that were intended to perpetuate slavery[155] "saddled [blacks] with 'onerous disabilities and burdens . . . and curtailed their rights . . . to such an extent that their freedom was of little value . . . ."[156]

148. *See* Taslitz, *supra* note 33, at 2269 (describing "[r]acially motivated searches and seizures" visited upon the slave community and abolitionist whites).

149. *See* KLARMAN, *supra* note 143, at 11, 12.

150. Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 414 (1856); *see* Capers, *supra* note 117, at 68 n.170 (describing slave patrols).

151. *Dred Scott*, 60 U.S. at 414.

152. *Id.*

153. *See* Taslitz, *supra* note 33, at 2269 (discussing how the "humiliation that [the] denial of Fourth Amendment–like rights imposed on slaves was central to the Southern white sense of honor and of black dishonor" and further "defined and sustained America's 'peculiar institution' [of slavery]"). It would be a mistake, however, to assume that limitations on blacks' physical freedom were universally applied. In cities, slaves were generally permitted to move around more freely. *See* KLARMAN, *supra* note 143, at 13. Yet even this relative freedom was a function of the racial hierarchy and was subject to revocation by the white power structure. *Id.*

154. *See* GRACE ELIZABETH HALE, MAKING WHITENESS: THE CULTURE OF SEGREGATION IN THE SOUTH, 1890–1940, at 21 (1998); *see also* Lani Guinier, *From Racial Liberalism to Racial Literacy:* Brown v. Board of Education *and the Interest-Divergence Dilemma*, 91 J. AM. HIST. 92, 96, 102–09 (2004) (observing that the "psychology of segregation did not affect blacks alone" but also convinced working-class whites that their interests lay in "white solidarity").

155. *See* Douglas L. Colbert, *Liberating the Thirteenth Amendment*, 30 HARV. C.R.-C.L. L. REV. 1, 11–12 (1995).

156. Jones v. Alfred H. Mayer, Co., 392 U.S. 409, 426 (1968) (quoting Slaughter-House Cases, 83 U.S. 3 (16 Wall.) 36, 70 (1873)).

"[L]awless acts of brutality [were] directed against [blacks] who traveled to areas where they were not wanted."[157] The clear purpose of these laws was to prevent blacks from moving uninhibited from place to place. Manifested in extreme limitations on their mobility, blacks once again were deprived of the ability to choose many varieties of space.

Segregation further limited black mobility and spatialized racial power in public and private spaces. The Supreme Court in *Plessy v. Ferguson*[158] notoriously upheld the constitutionality of state laws that mandated "separate but equal" rail facilities for "colored" persons and whites.[159] The Court had already concluded that "full and equal enjoyment of common carriers" did not preclude separate facilities, provided that they were at least superficially equal.[160] In the early twentieth century, municipal ordinances that "mapp[ed] 'white blocks' and 'colored blocks'" were passed to "penalize [both blacks and whites] for residing in the territory assigned to the other."[161] The Federal Housing Administration required residential segregation as a condition for guaranteeing private mortgages, a practice that private industry soon modeled and aggressively pursued.[162] Every level of government was implicated in the widespread effort to enforce the spatial separation of blacks from whites.[163] Aided by private industry and racially restrictive covenants,[164] these governmental policies produced racially distinct urban "hyperghettoes" that were vigorously policed to prevent African Americans from venturing into white neighborhoods.[165]

Segregation was not just confined to the South. Northern officials sanctioned the de facto separation between whites and blacks—most notably perhaps in the context of schools[166] and housing[167] but also across various public and

157. *Id.* at 429.

158. 163 U.S. 537 (1896).

159. *Id.* at 542, 550–51; *see also id.* at 552 (Harlan, J., dissenting) (employing "separate but equal" language to describe the Louisiana statute).

160. *Id.* at 546 (majority opinion).

161. *See* DELANEY, *supra* note 32, at 11 (describing a municipal segregation ordinance in Louisville, Kentucky). Zoning ordinances that required racial segregation were eventually declared unconstitutional in *Buchanan v. Warley*, 245 U.S. 60 (1917), although they continued with some force for decades thereafter. *See generally* BERYL SATTER, FAMILY PROPERTIES: RACE, REAL ESTATE, AND THE EXPLOITATION OF BLACK URBAN AMERICA (2009).

162. *See* KENNETH T. JACKSON, CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES 195–218 (1985).

163. *Id.*

164. *See* Shelley v. Kraemer, 334 U.S. 1 (1948) (finding judicial enforcement of racially restrictive covenants unconstitutional).

165. *See* HAYNES, *supra* note 38, at 13; *see also* REYNOLDS FARLEY ET AL., DETROIT DIVIDED 154–61 (2000) (describing vigorous efforts by Dearborn, a suburb of Detroit, to exclude blacks, including mob violence and leaflets that were distributed by city employees proclaiming, "Keep Negroes Out of Dearborn; Protect Your Home and Mine!").

166. *See* Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 202 (1973).

private spaces. Of course, racial separation in the North often lacked the explicit, formal imprimatur of state laws, but the state and its legal apparatus were also implicated in the use of space as a construct of racial power; the resulting outcomes in many ways were no less severe.[168] In both the South and the North, spatial separation extended far beyond neighborhoods and jurisdictional territories.[169] Blacks and whites were required to remain separate across a seemingly limitless range of institutions—schools,[170] buses,[171] railways,[172] parks,[173] hospitals,[174] private and public housing,[175] bars and cocktail lounges,[176] golf courses,[177] boxing arenas,[178] pools,[179] restaurants,[180] movie theaters,[181] even snack bars,[182] bathrooms,[183] elevators,[184] vending machines,[185] telephone booths,[186] and

167. *See generally* QUINTARD TAYLOR, THE FORGING OF A BLACK COMMUNITY: SEATTLE'S CENTRAL DISTRICT FROM 1870 THROUGH THE CIVIL RIGHTS ERA (1994) (describing housing segregation in Seattle).

168. *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist., 551 U.S. 701, 807–13 (2007) (Breyer, J. dissenting) (describing racial separation in Seattle).

169. *See generally* FARLEY ET AL., *supra* note 165, at 35 (describing the "imaginary dividing lines" that separated blacks and whites in Detroit's Belle Isle park); TAYLOR, *supra* note 167, at 168 (describing "whites only" signs in Seattle's recreational areas, motels, theaters, and restaurants); Irving Babow, *Restrictive Practices in Public Accommodations in a Northern Community*, 24 PHYLON 5, 7 (1963) (describing "institutionalized patterns of evasion or tricks of the trade" used in northern places of public accommodation "to make discrimination difficult to prove"); Elizabeth Dale, *"Social Equality Does Not Exist Among Themselves, Nor Among Us": Baylies vs. Curry and Civil Rights in Chicago, 1888*, 102 AM. HIST. REV. 311 (1997) (describing segregation in Chicago).

170. Brown v. Bd. of Educ., 347 U.S. 483, 486–88 (1954).

171. Gayle v. Browder, 352 U.S. 903, 903 (1956).

172. *E.g.*, Morgan v. Virginia, 328 U.S. 373, 374 (1946); Chiles v. Chesapeake & Ohio Ry. Co., 218 U.S. 71, 72 (1910); Plessy v. Ferguson, 163 U.S. 537, 538–39 (1896).

173. Watson v. City of Memphis, 373 U.S. 526, 526 (1963); New Orleans City Park Improvement Ass'n v. Detiege, 358 U.S. 54, 54 (1958).

174. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 393 (Marshall, J., dissenting).

175. *See* Holder v. Hall, 512 U.S. 874, 877–78 (1994).

176. United States v. Cantrell, 307 F. Supp. 259, 259 (E.D. La. 1969).

177. Holmes v. City of Atlanta, 350 U.S. 879, 879 (1955).

178. *See* Robert R. Weyeneth, *The Architecture of Racial Segregation: The Challenges of Preserving the Problematical Past*, PUB. HISTORIAN, Fall 2005, at 13.

179. Palmer v. Thompson, 403 U.S. 217, 218 (1971).

180. *See* Adickes v. S.H. Kress & Co., 398 U.S. 144, 146–47 (1970).

181. *See* Daniel v. Paul, 395 U.S. 298, 307 n.10 (1969).

182. *Id.* at 300–01, 303–04.

183. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 393 (1978) (Marshall, J., concurring in part and dissenting in part).

184. *See* Elizabeth F. Emens, *Intimate Discrimination: The State's Role in the Accidents of Sex and Love*, 122 HARV. L. REV. 1307 (2009).

185. Edward Rothstein, *Four Men, a Counter, and Soon, Revolution*, N.Y. TIMES, Feb. 1, 2010, at C1.

186. *See* STATES' LAWS ON RACE AND COLOR 372 (Pauli Murray ed., 1951); Weyeneth, *supra* note 178, at 15.

cemeteries.[187] In some localities prostitution was segregated, with prostitutes working different street corners depending on their race.[188] The system of segregation in some states was so complete that there were few places—private or public—where blacks and whites could intermingle. As revealed in the following passage concerning segregation on railroad dining cars, the law managed spatial separation between whites and "colored" persons to an extreme degree:

> [E]qual but separate accommodations shall be provided for white and colored passengers by partitioning diners and the allotment of space . . . as follows (1) That one of the two tables at Station No. 1 located to the left side of the aisle facing the buffet, seating four persons, shall be reserved exclusively for colored passengers, and the other tables . . . shall be reserved exclusively for white passengers. (2) Before starting each meal, draw the partition curtain separating the table in Station No. 1 . . . from the table on that side of the aisle in Station No. 2, the curtain to remain so drawn for the duration of the meal.[189]

The widespread practice of separating blacks and whites in railroad dining facilities during segregation reached the Supreme Court in *Henderson v. United States*.[190] The case reveals the extraordinary lengths taken to maintain and promote racial territoriality. In 1941, the Southern Railway set aside two of its eleven tables for blacks behind a curtain but would seat whites in the space if no blacks were occupying the tables.[191] Blacks who arrived while whites were dining at the "black tables" were required to wait until they were "completely empty" while whites continued to be seated at the available "white tables."[192] The railroad revamped the policy after a complaint was filed to the Interstate Commerce Commission.[193] The complaint sought to prohibit stewards from seating whites at the black tables if a black person had otherwise requested service.[194] Although the Commission upheld the new rule, the district court reversed on the grounds that blacks were not afforded the same opportunity as

187. *See* Rachel D. Godsil, *Race Nuisance: The Politics of Law in the Jim Crow Era*, 105 MICH. L. REV. 505, 522–25 (2006).

188. Zick, *supra* note 42, at 542.

189. Brief for the NAACP as Amicus Curiae Supporting Appellant, Henderson v. United States, 339 U.S. 816 (1950) (No. 25), 1949 WL 50335 (quoting Transportation Department Circular No. 142 by R.K. McClain, Assistant Vice President of S. Ry. Co. to Passenger Conductors and Dining Car Stewards (July 3, 1941)).

190. 339 U.S. 816 (1950).

191. *See* MICHAEL J. KLARMAN, *BROWN V. BOARD OF EDUCATION* AND THE CIVIL RIGHTS MOVEMENT 49 (2007).

192. *Id.*

193. *See id.*

194. *See id.*

whites to sit at "any table."[195] The policy was revised again, with the railroad this time reserving a table "exclusively" for blacks behind a wood partition.[196]

On appeal, the Commission upheld the policy on the theory that the demand by blacks for service was less than the percentage of seats allocated for their use. The Supreme Court reversed, concluding that the scope of the demand for seats was irrelevant to the guarantee of equal protection for all persons.[197] Blacks were to be afforded dining car service on the same terms as whites. Writing for a unanimous Court, Justice Burton observed that the wood partition that separated the black table "highlighted 'the artificiality of a difference in treatment which serves only to call attention to the racial classification of passengers.'"[198]

All this litigation over a table. *Henderson* demonstrates two points that are important for understanding racial territoriality. First, the case illustrates how even the most insignificant of spaces can become racialized. Second, it reveals how physical separation can both reflect and reinforce cultural norms of racial power. Racial biases were grafted onto the seating charts of the railroad in ways that gave the tables themselves a distinctive racial meaning. It took two appearances before the Commission, the district court, and ultimately the Supreme Court to revamp the black and white table system and to vindicate Henderson's claim that he had been denied equal rights.

As in the above example, Jim Crow architecture promoted and reinforced racial territoriality through the use of exclusive, duplicative, and temporally separate racial spaces.[199] These included not only whole institutions or buildings but also the microspaces within them—as blacks were forced to use separate entrances,[200] exits, stairways, and windows.[201] Fixed and temporary partitions were also used to demarcate white and black spaces.[202] In South Carolina, for example, liquor stores roped off separate lines for blacks and whites with the caveat that "[n]o conversation was permitted across [the] barrier unless a white man initiated it."[203] The University of Oklahoma permitted blacks to enroll at the institution but imposed spatial separation within the building as a strategy for evading the legal requirement of desegregation. This meant that blacks and whites were required to remain apart in the cafeteria and library and even within

195. *Id.*
196. *Id.*
197. *Id.*
198. *Id.* at 50.
199. Weyeneth, *supra* note 178, at 13.
200. *See* Kennedy, *supra* note 125, at 282.
201. Weyeneth, *supra* note 178, at 18–19.
202. *Id.* at 19–23.
203. *Id.* at 21.

the classroom itself[204]—with G.W. McLaurin, the plaintiff in *McLaurin v. Oklahoma State Regents*,[205] the landmark prequel to *Brown v. Board of Education*,[206] degradingly confined to a seat within a section that had been roped off especially for him. This separation remained in effect until the Supreme Court emphatically declared the unconstitutionality of the arrangement.[207] These racially territorial systems—both explicitly and implicitly backed by law until the high court's intervention—reflected, but also produced, racial power and reinforced the authority of whites over blacks. Again, the use of seemingly minor spaces to enforce this racial order illustrates the broad reach of racial territoriality.

Another technique was to reserve spaces for blacks to use on particular days or during particular times. For example, Saturday in some parts of the rural South was the day blacks were permitted in town.[208] Businesses designated specific times for black patrons so that whites would not have to confront blacks while shopping or visiting.[209] In southern and northern "sundown towns," blacks were allowed to work or shop during the day but were warned not to remain after dark under the threat of physical violence.[210] Racial territoriality was integral to effectuating and maintaining this racial hierarchy.

The architecture of segregation produced a spatial repertoire of routine behaviors that shaped and continually recreated white and black spaces.[211] A set of spatial discourses emerged that projected racial separation onto the public and private landscape. As a matter of sheer survival, blacks often developed an acute ability to decode the spatial customs and practices in the spaces they occupied in order not to encroach on racial territories. The racial identifiability of a particular space signaled whether it was a space of belonging or deliberate exclusion. Because the dimensions of segregation changed across neighboring jurisdictions, blacks traveling to different areas were required to reinterpret their spatial surroundings and adjust their behavior accordingly in order to avoid social or legal sanction or worse: life-threatening violence.[212]

---

204. *See* KLARMAN, *supra* note 191, at 43.

205. 339 U.S. 637 (1950).

206. 347 U.S. 483 (1954).

207. *McLaurin*, 339 U.S. at 642.

208. Weyeneth, *supra* note 178, at 18.

209. *Id.*

210. Weyeneth cites one South Carolina sign that read "Nigger, Don't Let the Sun Set on You in Orange City." Weyeneth, *supra* note 178, at 18. For an excellent discussion of sundown towns, see JAMES W. LOEWEN, SUNDOWN TOWNS: A HIDDEN DIMENSION OF AMERICAN RACISM (2005).

211. Weyeneth, *supra* note 178, at 13 ("The architecture of racial segregation represented an effort to design places that shaped the behavior of individuals and, thereby, managed contact between whites and blacks in general.").

212. Thus, blacks faced particular spatial challenges when crossing into Jim Crow localities. For example, when traveling across the Potomac River from Washington, D.C., which did not segregate its

> Journeying beyond the familiar terrain of one's hometown, African Americans had to learn quickly how to navigate and survive . . . . Where to get a meal, or just a drink of water? Where to find a toilet? What stores to patronize? One learned the lay of the land through friendly advice, tense encounters with whites, and simply watching to see what other African Americans were doing. Were they sitting on that bench or was the park off-limits? Were they making calls from that phone booth, or was it for whites only?[213]

In sum, it is difficult to overstate the centrality of "spatial processes" to the experiences of African Americans in the United States.[214] The redlining of inner cities;[215] the destruction of black neighborhoods through urban renewal programs;[216] the racially exclusionary practices of suburbs;[217] the placement of segregated public housing;[218] and the persistence of racially segregated schools,[219] among other examples of discrimination by private and public actors, reveal that racial territoriality has long been engrained in the life experiences of black Americans and, accordingly, is deeply intertwined with the meaning of race itself. Through racial territoriality, whites erected a spatial system that both literally and figuratively sought to put blacks "in their place." These spatial

---

public transportation, to Virginia, which did, blacks who happened to be riding in "white" cars upon entering Virginia were required by state law to get up and move. *See* Weyeneth, *supra* note 178, at 23.

213. *Id.* at 25 (citing to JOHN HOWARD GRIFFIN, BLACK LIKE ME (2003) (describing in detail the challenges of traveling in the Jim Crow South during the late 1950s)); *see also* Walter Dellinger, *A Supreme Court Conversation: Everything Conservatives Should Abhor*, SLATE (June 29, 2007, 11:17 AM), http://www.slate.com/id/2168856 (describing complexity of travel through the South for blacks during de jure segregation). *Ebony Magazine* reportedly published a travel guide for blacks when traveling cross-country. The guide instructed black travelers where to eat, stay, purchase gas, which cities not to stop in, and "what cities or sections of cities were hospitable to blacks . . . ." Paula D. McClain, *Foreword* to LEGACY OF THE 1964 CIVIL RIGHTS ACT ix (Bernard Grofman ed., 2000).

214. *See* DELANEY, *supra* note 32, at 9 (describing the central role that spatial processes have played in the African American experience).

215. *See* JACKSON, *supra* note 162, at 195–218.

216. *See* Audrey G. McFarlane, *Rebuilding the Public-Private City: Regulatory Taking's Anti-Subordination Insights for Eminent Domain Redevelopment*, 42 IND. L. REV. 97, 100 (2009) (describing the "massive disruptions [to black] communit[ies] resulting from poorly conceived and poorly executed redevelopment schemes during the urban renewal era . . . .").

217. *See*, *e.g.*, Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926 (2d Cir. 1988) (discussing a Fair Housing Act claim challenging the town's refusal to amend an ordinance that limited multifamily housing projects to minority neighborhoods).

218. *See* Hills v. Gautreaux, 425 U.S. 284, 286 (1976) (describing purposeful segregation of family public housing in Chicago "to avoid the placement of black families in white neighborhoods") (internal quotations omitted).

219. *See*, *e.g.* GARY ORFIELD & CHUNGMEI LEE, CIVIL RIGHTS PROJECT, HISTORIC REVERSALS, ACCELERATING RESEGREGATION AND THE NEED FOR NEW INTEGRATION STRATEGIES (2007), *available at* http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/historic-reversals-accelerating-resegregation-and-the-need-for-new-integration-strategies-1/orfield-historic-reversals-accelerating.pdf (describing segregation of public schools).

practices persist, as space is still used to promote and maintain racial hierarchy: availability of choice for whites and confinement, isolation, and exclusion for blacks. As David Delaney writes: "Much has changed through the generations, but highly racialized landscapes, spaces, and places remain central to U.S. social life and continue to shape social and self consciousness." The incident at Gretna offers yet another example of how these affirmative restrictions on black movement and spatial choice have persisted across time and across a broad variety of spaces.

III. SOCIAL SCIENCE EVIDENCE SUPPORTING RACIAL TERRITORIALITY

The framework of racial territoriality emphasizes that space refers to more than neutral coordinates on a map[220] on which persons, places, or things are located[221] but encompasses social perceptions, experiences, and constructions that are mapped onto physical geography.[222] Space, place, and territory have multiple, overlapping meanings but are used synonymously here. This Article's particular emphasis is on public spaces, including the daily spaces in which people live, visit, or (as in the case of the Gretna bridge) travel. Racial territoriality, therefore, covers more than simply governmental spaces that are defined by jurisdictional boundaries.[223]

The previous Parts described the centrality of space to racial subjugation and discrimination throughout this country's history and the failure of constitutional doctrine to take racialized space into account in evaluating claims for intentional racial discrimination. This Part discusses how my proposed framework is informed by social science.[224]

---

220. *See* Hari M. Osofsky, *The Geography of Justice Wormholes: Dilemmas From Property and Criminal Law*, 53 VILL. L. REV. 117, 123 (2008).

221. *Id.*

222. *See* YI-FU TUAN, SPACE AND PLACE: THE PERSPECTIVE OF EXPERIENCE (1977); Helen Couclelis, *Location, Place, Region, and Space in* GEOGRAPHY'S INNER WORLDS: PERVASIVE THEMES IN CONTEMPORARY AMERICAN GEOGRAPHY 215 (Ronald F. Abler et al. eds., 1992); Michael R. Curry, *On Space and Spatial Practice in Contemporary Geography*, *in* CONCEPTS IN HUMAN GEOGRAPHY (Carville Earle et al. eds., 1996); Phil Hubbard et al., *Introduction* to KEY THINKERS ON SPACE AND PLACE 5, 6 (Phil Hubbard et al. eds., 2004) (describing "place" as "relational and contingent . . . fluid and uncertain (rather than [a] fixed territorial unit[ ]"); Osofsky, *supra* note 220, at 123 (posing the question whether space is "simply a physical location or is it a social construct?"); *see also* TIM CRESSWELL, PLACE: A SHORT INTRODUCTION 7 (2004) ("[T]he most straightforward and common definition of place [is] a meaningful location.").

223. Native American reservations are a quintessential example of racially territorialized jurisdictions. *See* John R. Bielski, Comment, *Judicial Denial of Sovereignty for Alaskan Natives: An End to the Self-Determination Era*, 73 TEMP. L. REV. 1279, 1283 (2000).

224. In arguing that law should take into account the racial meaning of space, I recognize that these racial territories are in many ways a product of law itself. For example, the jurisdictional boundary between Gretna and New Orleans and the legal duty of the Gretna police to defend Gretna's residents against the

A. The Meaning of Space

Social geographers and cultural anthropologists offer insights that are critical for understanding the importance of space to antidiscrimination doctrine. Racial territoriality rests on two premises. The first is that space itself has social, cultural, and—in particular—racial, meaning. The second premise is that this racial meaning helps to instigate territorial behavior in which one racial group seeks to exclude another racial group from what it perceives to be its own space. Understanding this demands a broader frame of reference than the typical constitutional law focus on individuals. It first requires us to dispel the notion that geographic space is nothing more than a backdrop to social life and to realize instead that it is a factor in the production and interpretation of social and cultural life itself.

1. Space as a Social Construct

The idea that space has social meaning is generally attributed to Henri Lefebvre.[225] Lefebvre contested the "physicalist views" of space that dominated social thought beginning in the mid-nineteenth century.[226] These early views conceptualized space as "inert" matter[227] that functioned as a vessel for social relationships rather than helping to structure them. For Lefebvre, space represented

---

perceived encroachment by New Orleans evacuees are both assumed here to be neutral "background" facts but are actually a function of law itself. *See* Lolis Eric Elie, *Parish Line May Define Controversy*, TIMES-PICAYUNE, July 26, 2006, at 1 (discussing the jurisdictional questions that arose from the Gretna police efforts to block the evacuees from crossing the Crescent City Connection into Gretna). For an extensive discussion of how law masks "the spatial contingencies of social life," see NICHOLAS K. BLOMLEY, LAW, SPACE, AND THE GEOGRAPHIES OF POWER 3–65 (1994); *cf.* powell, *supra* note 37, at 15 (discussing how much work goes into protests about "who properly belongs inside and outside of these boundaries [rather than] the boundaries themselves").

225. *See, e.g.*, STUART ELDEN, UNDERSTANDING HENRI LEFEBVRE: THEORY AND THE POSSIBLE 156 (2004). *See generally* HENRI LEFEBVRE, THE PRODUCTION OF SPACE (Donald Nicholson-Smith trans., 1991). Lefebvre's specific concern—the reorientation of Marxist philosophy along a spatial trajectory—is beyond the scope of this Article. For at least a century, theoreticians and scholars debated the relative merits of a spatial paradigm. For an extensive discussion of the efforts to reassert a spatial praxis, see EDWARD W. SOJA, POSTMODERN GEOGRAPHIES: THE REASSERTION OF SPACE IN CRITICAL SOCIAL THEORY (1989). Soja chronicles Lefebvre's contributions and the evolution of the different schools of intellectual thought associated with the reemergence of space in critical social theory. *Id.* at 10–75. Michel Foucault is also credited for his exploration of the relationship between space and power and "'the physical divide of segregation and exclusion' that inscribes into bricks and mortar a distancing of the Other from the Same . . . ." Chris Philo, *Michel Foucault*, *in* KEY THINKERS ON SPACE AND PLACE, *supra* note 222, at 121, 126.

226. *See* SOJA, *supra* note 225, at 80 n.3.

227. *Id.* at 37.

dialectic interaction,[228] a form of "social morphology . . . [that] is to lived experience what form itself is to the living organism, and just as intimately bound up with function and structure."[229] Lefebvre stressed that space can be "decoded" to reveal "spatial practices."[230] These practices "secrete"[231] or "appropriate"[232] society's space through interactions between subjects and their surroundings.[233] This is accomplished through the evolution of implicit spatial "conventions" and "connotative discourses" that structure how people within certain spaces are supposed to act,[234] leading to predictable spatial activities and responses. The routine interactions between people and their surroundings "create systems of a higher order that take on a life of their own."[235] Through this process, space develops social and cultural meaning that incites racially territorial behavior. Racial territoriality can be understood as a "connotative discourse" that structures human interactions in space.[236]

228. LEFEBVRE, *supra* note 225, at 80–92; *see also* SOJA, *supra* note 225, at 7 ("[I]nterpretive geography . . . recognizes spatiality as simultaneously . . . a social product (or outcome) and a shaping force (or medium) in social life . . . .").

229. LEFEBVRE, *supra* note 225, at 94.

230. *Id.* at 16–18.

231. *Id.* at 38.

232. *Id.* at 31.

233. *Id.* at 18, 38.

234. *Id.* at 56.

235. *Id.* at 127–28. For an account of how the spatial layout of a residential environment affects crime, see generally OSCAR NEWMAN, DEFENSIBLE SPACE 51–77 (1972).

236. Human geographers readily acknowledge that social factors help drive territorial behavior, but explicit discussions of race are curiously absent from most of this research. David Delaney is a notable exception. *See generally* DELANEY, *supra* note 32. Notwithstanding Delaney's contributions, the absence of "plural voices" in geography has been the subject of some criticism. *See* DOREEN MASSEY, SPACE, PLACE, AND GENDER 214–24 (1994) (critiquing the absence of plural voices and perspectives in spatial analysis); DAVID SIBLEY, GEOGRAPHIES OF EXCLUSION: SOCIETY AND DIFFERENCE IN THE WEST, at x (1995) (critiquing "Marxist analysis in human geography" as being "insensitive to difference"). In his extensive treatment of territoriality, discussed in Part III.B, *infra*, Ralph Taylor confines his discussion of race to a couple brief examples. *See* RALPH B. TAYLOR, HUMAN TERRITORIAL FUNCTIONING: AN EMPIRICAL, EVOLUTIONARY PERSPECTIVE ON INDIVIDUAL AND SMALL GROUP TERRITORIAL COGNITIONS, BEHAVIORS, AND CONSEQUENCES 94–96 (1988). In particular, he mentions a sociological study of a Chicago park used by different racial and ethnic groups in the 1960s. He does not use the phrase racial territoriality to describe the spatial relations among the various groups but observes that the park's territory was racially divided—with blacks, whites, Mexicans, Italians, and Greeks each confined to certain specified areas. Taylor's limited discussion does not indicate how these spatial groupings resulted. *See also id.* at 82 (discussing territorial behavior in the context of "racial turnover" in an otherwise white neighborhood). Cultural anthropologists, however, have usefully examined the relationship between space, race, and place. *See, e.g.*, Setha M. Low & Denise Lawrence-Zúñiga, *Locating Culture*, *in* THE ANTHROPOLOGY OF SPACE AND PLACE: LOCATING CULTURE 34–36, 387–407 (Setha M. Low & Lawrence-Zúñiga eds., 2003) (discussing the rise of gated communities in relation to perceptions of race and crime).

2. How Racial Bias Maps Onto Space

Previously, I explored racial territoriality in historical context. History shows that people of color have long been spatially marginalized. And yet the historical examples described above involved clear instances of racial animus, both created and reinforced by extensive legal systems that *required* the spatial separation of blacks and whites across an infinite variety of racial territories. How are my more recent examples analogous racial territories, particularly given the absence of de jure segregation or overtly discriminatory policies and in view of clear long-term improvements in racial attitudes?[237]

Behavior is not easy to explain. In the Gretna example, police may have turned back the evacuees based on racial hostility or because they were trying to protect the town's limited resources in the aftermath of the hurricane.[238] Gretna officials asserted that they blockaded the city because they lacked sufficient staffing, food, and water to accommodate additional evacuees and feared for public safety after a group of looters reportedly set fire to a local mall.[239] On this view, the police would have prevented anyone from crossing into Gretna—even whites.[240]

This Part draws on social geographic understandings of space and recent social cognition research to diagnose the Gretna officials' racially territorial conduct and to advance a possible explanation for their behavior. Racial territoriality is the product of conscious and implicit[241] racial biases against people of color that project onto physical, geographic space.[242] These biases are triggered by spatial conditions, including not only whether people of color are present but also their status within the space and how they are treated and/or represented.[243]

---

237. *See* Moran, *supra* note 36, at 2390 n.119 (citing studies that document improved racial attitudes).

238. *See Police Chief Defends Bridge Blockade—Race Was Not a Factor, He Says: 'We Were Unprepared' for Evacuees*, GRAND RAPIDS PRESS, Sept. 17, 2005, at A11.

239. Some evacuees had crossed into Gretna earlier and had been taken by bus caravans that were organized by Gretna officials to Metairie for food and water. *See* Riccardi, *supra* note 1. Gretna and New Orleans reportedly have had a "troubled" relationship, *id.*, and did not communicate before, during, or after the storm. *See* Sharockman, *supra* note 2.

240. Metairie—the "first suburb" of New Orleans—is located on the south shore of Lake Pontchartrain and is physically separated from New Orleans by a drainage canal. *See Metairie History*, METAIRIE.COM, http://www.metairie.com/history/metairie.php (last visited Nov. 11, 2010). Gretna lies on the west bank of the Mississippi River. At the time of the hurricane, the bridge to Gretna was one of the last escape routes out of New Orleans. *See* Bruce Hamilton, *Evacuees Recount Gunfire at Bridge Blockade*, TIMES-PICAYUNE, Feb. 26, 2006, at 1; *see also* Sharockman, *supra* note 2, at 1A.

241. I use the terms implicit and unconscious interchangeably to refer to collective information that is stored in the mind but is not accessible through conscious thought and operates without intention or mental awareness. *See* Kang, *Trojan Horses*, *supra* note 24, at 1505–06.

242. *See, e.g.*, Krieger, *supra* note 45; Lawrence, *supra* note 21.

243. I am grateful to Lani Guinier for helping me refine this point.

To better understand how status affects racial perceptions of a space, consider the following example. Assume that a private country club has only white members but an all-black service staff. Here, a focus simply on the race of the people who occupy the club grounds reveals little about the club's overall racial meaning. The club may be literally racially mixed in the sense that blacks and whites can be found in the same building, but "the club" is still identifiably white because the people with power and privilege are white. Moreover, the status of the black staff and the white members maps onto the spaces that each racial group frequents within the club. For example, let us assume that the black staff only uses a service entrance in the rear of the club and that the front entrance is reserved for members only (all white). The front door in this hypothetical therefore is "white" space that represents access and power, and the back door is "black," subservient space. Let us now assume that the club has a new black member. When she arrives at the front door, she is turned away and directed to the back entrance on the assumption that she is part of the staff, leaving her feeling angry and humiliated. In this hypothetical, the race of the members and the staff, their status within the club, and the racialized meaning of the front and back entrances all converge to deny the new member front-door access. Significantly, even the black staff might harbor racial assumptions about who belongs at the front and back door. This is an example of racial territoriality and how status can complicate the racial meaning of space.

It is important to recognize that racialized spaces represent more than a physical set of boundaries or associations: They correlate with and reinforce cultural norms about spatial belonging and power. These norms have a dynamic and symbiotic relationship with racially territorial conduct. They reflect widespread conscious and implicit racial biases that lead racial groups to attempt to control other racial groups within the subject space and/or to exclude them altogether. But these norms and racial territoriality can also be mutually reinforcing if territorial conduct physically prevents or otherwise discourages blacks from accessing white spaces. To return to my previous hypothetical—until blacks are an identifiable presence as members of the club, they will continue to have trouble getting in the front door. And as long as blacks are mistreated in the club, they are less likely to decide to become members. The same logic holds for blacks and their relationship with Gretna.

This explanation for racial territoriality relies in significant part on recent social cognition research that establishes the pervasiveness, depth, and behavioral consequences of implicit racial bias. To be precise, this research does not specifically measure whether such bias maps onto physical space. Yet, it powerfully demonstrates that even the subtlest racial cues can trigger negative

social reactions,[244] and it indicates that such reactions tend to occur across various spatial domains.[245] More simply, this research reveals that latent racial bias is deeply embedded in our culture, so much so that it very plausibly triggers racial assumptions that some people belong in some spaces and that racial others do not.

Linda Hamilton Krieger introduced social cognition theory as the basis for an alternative legal standard to intentional employment discrimination.[246] The theory challenged assumptions—which are also deeply engrained in equal protection doctrine—that individuals are rational actors who are necessarily aware of their own racial bias.[247] Therefore, it is useful for explaining racial territoriality in a more contemporary and complex framework. Krieger argues that intent rests on several critical but flawed theoretical assumptions that decisionmakers are self-aware and possess a "transparency of mind" that enables them to accurately detect why they have made a particular decision.[248] Racial prejudice is assumed to "corrupt[ ] decision making at the moment of decision" rather than to "distort[] the decisionmaker's perceptual or inferential processes . . . ."[249] Finally, decisionmaking is presumed to operate in a dichotomous framework: If individuals do not act based on objective or rational factors, then there is a greater likelihood that they are motivated by invidious racial prejudice.[250]

Social cognition theory provides a more accurate model for differentiating racially discriminatory behavior. According to this theory, people perceive, process, and retain information about particular objects by grouping them into categories. The categorization process begins when we perceive some people as similar and others as different. From these categories we may create a mental prototype or schema about the "typical" person who fits within them. A schema is an "'informal, private, unarticulated theory about the nature of events, objects or situations which we face.'"[251] A schema operates in the background of our conscious attitudes and thinking. As a result, we are predisposed to make certain racial assumptions without even knowing it. This categorization process is more

244. *See* Kang, *Trojan Horses*, *supra* note 24, at 1500–39.

245. *See* Kristin A. Lane et al., *Understanding and Using the Implicit Association Test (IV): What We Know (So Far) About the Method*, *in* IMPLICIT MEASURES OF ATTITUDES 59, 65 (Bernd Wittenbrink & Norbert Schwarz eds., 2007) (describing different contexts in which the Implicit Association Test has been used).

246. *See* Krieger, *supra* note 45, at 1177–86.

247. *Id.*

248. *Id.* at 1167.

249. *Id.* at 1182.

250. *Id.*

251. *Id.* at 1190 (quoting David E. Rumelhart, *Schemata and the Cognitive System*, in 1 HANDBOOK OF SOCIAL COGNITION 161, 166 (Robert S. Wyer, Jr. & Thomas K. Srull eds., 1984).

cognitively efficient because it helps sort and comprehend vast amounts of information that would otherwise overwhelm cognitive functions.[252] But the process has a major downside: It encourages the formation of racial stereotypes and actions based on such stereotypes in ways that people are not necessarily aware.

Recent studies using the Implicit Association Test (IAT) extensively document the power and pervasiveness of these racial schemas. The purpose of the IAT is to identify hidden or unconscious biases by measuring the tightness of an association between two concepts.[253] A typical experiment takes four categories—for example, "black" and "white" and "good" and "bad"—and shows the participants a series of words or images that are associated with the good and bad categories. "Bad" for example is paired with "horrible," "evil," and "mean"; and "good" is matched with "joy," "wonderful," and "pleasure."[254] Participants are then shown a series of words or images on a computer screen and are asked to sort them into a category or a combination of categories as quickly as possible by pressing a particular key.[255] On one side of the computer screen the participant might be shown the words "white or good" with "black or bad" appearing on the other side of the screen. There is only one correct answer. Thus, if the computer flashes a black face, the participant should choose the key associated with the "black or bad" category. If the computer flashes the word "pleasure," the participant would choose the key associated with "white or good." The computer runs a series of screens that alternate associations so that "black" at times is matched with "good" and "white" is matched with "bad." The degree of implicit bias is measured by the quickness of the response time in pairing the associated stimuli with a particular category compared to the response time in pairing the same stimuli with the second category. The theory is that the time it takes to mentally compute these relationships reveals the strength of the participant's associations.[256] A response that is faster when white faces and "good" words are paired than when black faces and "good" words are paired reveals a stronger automatic preference for whites over blacks.[257] The response is faster because the association is "easier" and makes cognitive sense.

Several features of the IAT results are striking. The first is that the test commonly reveals a disconnect between self-reported attitudes and beliefs and implicit associations.[258] Participants consistently demonstrate implicit preference

252. *Id.* at 1188.

253. *See* Kang & Lane, *supra* note 24; Kang, *Trojan Horses*, *supra* note 24, at 1509–10.

254. The IAT test can be taken by visiting the website http://www.implicit.harvard.edu (last visited on Nov. 11, 2010).

255. Kang, *Trojan Horses*, *supra* note 24, at 1510.

256. *See id.* at 1509–10; *see also* Lane et al., *supra* note 245, at 59, 65–66.

257. *See* PROJECT IMPLICIT, http://implicit.harvard.edu/ (last visited Nov. 11, 2010).

258. *See* Kang, *Trojan Horses*, *supra* note 24, at 1508; *see also* Lane et al., *supra* note 245.

for whites, despite expressing different preferences when questioned directly.[259] As Jerry Kang has observed, the tests suggest "we may honestly lack introspective access to the racial meanings" that are embedded in our brain, notwithstanding "our explicit normative and political commitments."[260] Moreover, these "[r]acial schemas . . . are chronically accessible" and highly sensitive to even the most fleeting visual and physical cues, including racial images that are imagined.[261] Even more troubling, a significant body of evidence persuasively demonstrates that racial schemas have behavioral consequences and that implicit bias can be used to predict discriminatory behavior against the targets of such bias.[262]

The science of implicit cognition can be used to explain how unconscious bias maps onto space and leads to racially exclusionary behavior. Consider again the incident on the Gretna bridge. New Orleans is a majority-black city. The Gretna officials had been primed by news stories about looting in New Orleans in the aftermath of Hurricane Katrina.[263] Gretna already had a distrustful relationship with New Orleans; its residents were wary of the city's reputation as a "murder capital."[264] Both race and space matter here. Under the cloak of the evacuees' spatial association with New Orleans, they were reflexively branded as "rioters" and "looters"[265] rather than people merely trying to escape the devastation in the city. For Gretna, New Orleans equaled trouble; and, therefore, anyone coming from New Orleans was a "troublemaker." Applying only a racial lens to individuals in the story produces an incomplete picture. Multiple racial schemas were activated, not only by the blacks and whites on the bridge, but by the racialized images of New Orleans and people from New Orleans that operated in the realm of unconscious associations. This implicit bias—buttressed by social and cultural norms of racial separation and fear—clouded the Gretna officials' perception of the evacuees; indeed, the bias was so engrained and strong that it caused the officials to refuse people from New Orleans refuge in the midst of a human crisis. The subliminal processing of the evacuees on the bridge would likely have gone something like the following: "Blacks live in New Orleans. There is a lot of crime in New Orleans, and there have been reports of looting.

259. *See* Lane et al., *supra* note 245, at 66. These biases also operate in favor of other "culturally valued" groups and to the disadvantage of less favored groups, for example young vs. old; able-bodied vs. disabled; straight vs. gay. *Id.*

260. *See* Kang, *Trojan Horses*, *supra* note 24, at 1508.

261. *Id.* at 1503–05.

262. *Id.* at 1514–28; Lane et al., *supra* note 245, at 78–81 (describing the breadth of studies on behavioral outcomes).

263. *See* Pierre & Gerhart, *supra* note 6, at A8 (describing the belief of local, state, and federal officials "that exaggerations of mayhem by officials and rumors repeated uncritically in the news media helped slow the response to the disaster and tarnish the image of many of its victims").

264. *See* Riccardi, *supra* note 1, at A1.

265. *See* Kane, *supra* note 2.

Blacks who live in New Orleans are looters. Therefore, any blacks coming over the bridge will loot us." Indeed, even some black residents of Gretna praised the police department's decision.[266] The evacuees' racial identity combined with their geographic or spatial identities formed a narrative in the minds of Gretna officials that led them to shut down the bridge. The racial meaning of the associated spaces thus shaped the outcome. From this perspective, it is less likely that whites coming over the bridge would be assumed to be looters and, therefore, it is less likely that whites would be turned away.

B. The Mechanics of Territoriality

The previous Subpart offered a thicker conception of geographic space. Space here is more than an "inert"[267] series of coordinates on a map, but rather functions like an institution or "organizational structure[ ]"[268] that both reflects and produces social—and, more particularly, racial—interactions.[269] Racial animus motivates some of these spatial interactions.[270] Others can be attributed to "unconsidered, background assumptions" that people of color are "supposed" to be in certain places but not in others.[271] These conscious and unconscious biases both are effectuated by and reinforce social and cultural norms as well as public systems of power and authority that are backed by law.[272] Racialized space, bias—either purposeful or unconscious—and limitations on movement are the principal ingredients of racial territoriality.

The theory that space might be used for social control may be foreign to constitutional law, but it has fairly deep roots in geography and other social science disciplines. Michel Foucault, for example, is often credited with conceptualizing the relationship between space, architecture, and social power.[273]

---

266. *See* Jones, *supra* note 12.

267. *See* LEFEBVRE, *supra* note 225.

268. *See* Ian F. Haney López, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 YALE L.J. 1717, 1724–25, 1761–69 (2000) (contrasting the theory of "individual behavior within organized settings" to rational choice theories of intentional discrimination and theories that emphasize strict forms of institutional racism).

269. *See* SACK, *supra* note 25.

270. *But see* IAN AYRES, PERVASIVE PREJUDICE?: UNCONVENTIONAL EVIDENCE OF RACE AND GENDER DISCRIMINATION (2001) (critiquing the notion of animus as a monolithic concept that refers simply to dislike of a particular racial group). *See also* Moran, *supra* note 36, at 2386–87 (discussing Ayres's work).

271. *See* López, *supra* note 268, at 1806–07.

272. *See infra* notes 275–298 and accompanying text.

273. *See* Low & Lawrence-Zúñiga, *supra* note 236, at 30–31 (discussing Foucault's use of Jeremy Bentham's 1787 Panopticon as an architectural model of social control); *see also* Paul Rabinow, *Ordonnance, Discipline, Regulation: Reflections on Urbanism*, *in* THE ANTHROPOLOGY OF SPACE AND PLACE, *supra* note 236, at 353–61 (elaborating on Foucault's contributions).

Geographers and cultural anthropologists have applied this spatial concept across vastly different domains to explain how space is deployed to assert control and power over different social groups.[274] Antidiscrimination law, therefore, has a very deep well from which to draw support for the proposition that racialized space stimulates exclusionary and proprietary behavior.

The relationship between racialized space and racial territoriality, however, requires an understanding of how space relates to territoriality more generally. Social geographers treat space as the foundation of territory,[275] although definitions of territory vary widely.[276] For purposes of this Article, territory is a space that is controlled to some degree by people.[277] I incorporate Robert Sack's definition of human territoriality "as the attempt by an individual or group to affect, influence, or control people, phenomena, and relationships, by delimiting and asserting control over a geographic area."[278]

The first stage of human territoriality involves the classification of a particular space[279] according to its social significance to the individual or group.[280] The premise of racial territoriality is that people classify spaces based on racialized perceptions, attitudes, and cultural norms.[281] Sentiments about a space also shape the reaction to perceived intrusions on that space. Ralph Taylor identifies "territorial cognitions" that influence spatial attitudes and the images a person may hold about a particular place.[282] They include how much responsibility one feels for a particular space, including the level of concern for its "appearance and upkeep"; the degree of privacy that one expects for the space; and "the kinds of persons" one anticipates meeting there.[283] Thus, the exercise of territoriality—its scope and intensity—is place-specific but also depends on the nature of the social encounter.[284] Spaces that are particularly important to an individual or group are more likely to trigger heightened territorial responses. The intensity of the

274. *See generally* Low & Lawrence-Zúñiga, *supra* note 236 (examining the function of space in contexts ranging from urban planning and redevelopment to the creation of "gendered" spaces in the home in West Africa to "excluded spaces" in aboriginal space in Australia). The role of space in creating and reproducing gender relations is another fertile area for exploration. *See, e.g.*, MASSEY, *supra* note 236, at 11, 185–211, 233–38; *see also* Chused, *Gendered Space*, *supra* note 63, at 126–35 (discussing the importance of "gendered spaces" to the allocation of power between men and women).

275. *See* SACK, *supra* note 25, at 25.

276. *See* TAYLOR, *supra* note 236, at 85–88.

277. *See* SACK, *supra* note 25.

278. *Id.* at 19 (emphasis omitted).

279. *Id.* at 21.

280. *See* TAYLOR, *supra* note 236, at 10.

281. *See* DELANEY, *supra* note 32.

282. *See* TAYLOR, *supra* note 236, at 94.

283. *Id.*

284. *Id.* at 86–88.

perceived threat varies with its centrality—its personal or social significance.[285] Space or territory that is more central will be guarded more carefully than peripheral space that is less important to the individual or group.[286]

The second stage of territorial conduct involves the active defense of space by "[c]reating, maintaining, or highlighting boundaries;"[287] and then seeking to control "access to the area and to things within it, or to things outside of it by restraining those within."[288] Boundaries may be maintained by "signalling [sic] use or ownership through signs, markers, and labels; or communicating warnings of varying levels of indirectness and subtlety to potential intruders . . . ."[289] However, the point of territoriality is not so much the defense of the area itself but controlling the people in the area and their interactions.[290] Space, in this sense, reflects social power—since only those with power can co-opt space for purposes of territorial behavior—but it also helps to reinforce social hierarchies.[291] The Gretna officials, for example, had the power to prevent the evacuees from crossing the bridge, which further entrenched the racial separateness between residents of Gretna and New Orleans.

As a result of these processes, encounters with people who are "unexpected" or who are perceived not to belong heighten the intensity of the territorial response—the spatial inclination to exclude, isolate, or marginalize. For those who encounter only the same kinds of people over and over again, it would be natural to expect a certain cognitive dissonance when they come across someone different. It might affect their "environmental mood"[292] or sense of comfort. Thus, the nature and degree of the territorial response will vary not only with perceptions about the space but also with expectations about who one should find in it. Race intensifies this experience. If space has a particular racial salience—if it is identifiably or culturally white or *intentionally* white—then the presence of people of color may alter the spatial dynamics. Racial territoriality

285. *See* SIBLEY, *supra* note 236, at 3–4 (describing how feelings about those who are "different" and who do not "belong" affect spatial perceptions).

286. A person is likely to react more territorially to intrusions in privately owned spaces than in public spaces. The space of the home, for example, is highly central to an individual because it is a key element of a person's daily life. Any incursion on that space will tend to be more personally upsetting and will likely provoke a more aggressive reaction.

287. *See* TAYLOR, *supra* note 236, at 84.

288. *See* SACK, *supra* note 25, at 22.

289. *See* TAYLOR, *supra* note 236, at 84–85.

290. *See* SACK, *supra* note 25, at 19.

291. *See* SOJA, *supra* note 225, at 19 ("Space is fundamental in any form of communal life; space is fundamental in any exercise of power.") (quoting Interview by Paul Rainbow With Michel Foucault (1984)).

292. *See* WINIFRED GALLAGHER, THE POWER OF PLACE: HOW OUR SURROUNDINGS SHAPE OUR THOUGHTS, EMOTIONS, AND ACTIONS 127–38 (1993) (describing how our surroundings affect our mood and sense of well-being).

ensues when persons of color enter spaces in which they are unwelcome or are perceived to be out of place.

How do these insights help us to appreciate the Gretna incident as a form of "intentional" racial discrimination? Racial territoriality rests on the premise "that human spatial relationships are not neutral"[293] or random[294] but rather are socially and culturally constructed and based on "influence and power."[295] The bridge leading to Gretna in the aftermath of Hurricane Katrina was highly central because it was the only way into the city for outsiders.[296] This in turn would have intensified the officials' reaction to the Katrina evacuees. Their perception of Gretna as white space shaped their assumptions about who was rightfully entitled to be on the bridge. The vision of a black crowd crossing a bridge leading to a white town would contradict expectations about who belongs on the bridge, leading the police to barricade it and to turn the evacuees away.[297] The "racial intent to discriminate" is activated by racialized assumptions about who belongs where and is carried out through territorial behavior that limits access to the subject space in a way that conforms to these assumptions. Racial territoriality itself is actualized through public structures of legal authority and power. These legal systems interact with racial bias and space to produce racial territoriality.[298]

The same analysis applies to the Myrtle Beach example in which black motorcyclists were prevented from freely cruising the streets of Myrtle Beach. The streets of Myrtle Beach are white spaces. They represent spaces that are inhabited, frequented by, or associated with whites and are public spaces over which whites seek to exercise some form of control. Once the space is racially identified, racial boundaries are set and conveyed by warning "intruders" that

---

293. *See* SACK, *supra* note 25, at 26.

294. *Id.* at 26 ("People do not just interact in space and move through space like billiard balls. . . . Human spatial relations are the results of influence and power. Territoriality is the primary spatial form power takes.").

295. *Id.* at 5 ("Territoriality is a primary geographical expression of social power. It is the means by which space and society are interrelated.").

296. *See supra* notes 1–6.

297. Blacks experienced racial territoriality elsewhere in the New Orleans vicinity in the aftermath of Hurricane Katrina. A group of fifteen to thirty residents of a "white enclave" in the Algiers Point neighborhood, which had been left relatively unscathed, reportedly amassed "handguns, assault rifles, shotguns and at least one Uzi and began patrolling the streets in pickup trucks and SUVs [in search of those who] 'didn't belong.'" Thompson, *supra* note 6. At least eleven blacks reportedly were targeted by these white "militias" and shot. *Id.*

298. We might think of this as a racialized system of "inter-institutional arrangements and interactions"—the "institutions" referring not only to space but to the panoply of legal rights and powers that shape the authority of individual actors to exclude blacks. *See* john a. powell, *Structural Racism: Building Upon the Insights of John Calmore*, 86 N.C. L. REV. 791, 796–97 (2008).

they have crossed into a territory that is off limits. Blacks are rebuffed or marginalized when they venture into white territory.[299]

IV. APPLYING THE FRAMEWORK

The framework I propose here draws from legal scholarship on institutional and structural discrimination.[300] Individual spaces or territories, I contend, function like institutions in that they help to structure particular social interactions.[301] Because racial territoriality operates across myriad spaces, however, it also has components that resonate with structural accounts of discrimination.[302] The accumulation of daily incidents across a broad spatial spectrum—triggered by "unconscious or subtle biases"[303]—creates and recreates a racialized environmental feedback loop that, although often invisible to law, is acutely experienced by people of color. Racial territoriality involves more than discrimination against individuals and the inability to travel from one place to another; it is an expression of institutional power that is mediated through racial geography.

The premise of racial territoriality is that spaces are claimed or defended because of their conscious or unconscious racial associations. These associations lead space to become racialized—it is treated as "belonging"[304] to certain racial groups and not to others. Even public spaces are treated as racial exclusion zones, backed by a form of racialized proprietary power.[305] Race is relevant, therefore, along multiple axes—the race of the individuals in each narrative as well as the culturally normative racial dimensions of the respective places with which each is associated. The framework of racial territoriality argues that these elements

299. Although racial territoriality is most obvious when it results in the outright exclusion of people of color from white space, territorial behavior might also manifest in more subtle ways, including unwelcoming attitudes and social ostracization.

300. *See* Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91, 99–104 (2003); López, *supra* note 268, at 1724, 1768–85; Susan Sturm, *Race, Gender, and the Law in the Twenty-First Century Workplace: Some Preliminary Observations*, 1 U. PA. J. LAB. & EMP. L. 639 (1998).

301. In this respect, it is much like Ian Haney López's theory of "new institutionalism," which examines "individual behavior within organized settings." *See* López, *supra* note 268, at 1724–25.

302. *See* powell, *supra* note 298, at 796.

303. *See* Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CALIF. L. REV. 1, 5 (2006).

304. I am referring to "belonging" here in the sense of an assumed association or affiliation with a community that has exclusionary effects. *But see* Denise C. Morgan & Rebecca E. Zietlow, *The New Parity Debate: Congress and Rights of Belonging*, 73 U. CIN. L. REV. 1347, 1348 (2005) (using "belonging" to refer to a more inclusive vision).

305. This racial ownership is similar to the idea expressed by Cheryl Harris that whiteness is a "form of property." *See* Harris, *supra* note 58.

interact to produce racialized constraints on the freedom of people of color to choose, occupy, and move about space.[306] This Article demonstrates that the Gretna bridge incident was more than a confrontation between blacks and whites; it was a confrontation between different racial groups that was informed and shaped by their racialized spatial surroundings. As a matter of common sense, this may not seem like much of a revelation, but the evidentiary framework of equal protection claims often overlooks racial geography in its effort to "smoke out" discriminatory intent.

The idea that equal protection doctrine should consider space in examining claims of racial intent has analogues in other areas of constitutional law. Indeed, it is already possible to conceptualize certain constitutional rights as spatially contingent:[307] The scope of our right to free speech can depend on whether we are in a "traditional public forum," such as a street[308] or park,[309] in a school,[310] or in close proximity to someone's home.[311] The scope of our Fourth Amendment rights not to be subjected to unreasonable searches and seizures are similarly determined in part by location—whether we are at home[312] or in a public place[313] and whether one feels "free to leave" a confined space.[314]

306. The project of defining racial territoriality is based on a recognition that "[a]ntidiscrimination doctrine does not itself provide determinate results [and that] [t]o give rights meaning, people must specify the world; they must create a picture of 'what is' that grounds their normative interpretation." *See* Crenshaw, *supra* note 124, at 1353.

307. Law more generally is often concerned with individual rights relative to certain aspects of space. *See* DELANEY, *supra* note 32, at 13–14 (describing the relationship between law and space).

308. *See, e.g.*, Kovacs v. Cooper, 336 U.S. 77 (1949) (taking surrounding space into account to determine the permissibility of sound trucks); Schneider v. State, 308 U.S. 147 (1939) (concluding that "the streets are natural and proper places for the dissemination of information and opinion").

309. *See, e.g.*, Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969) (acknowledging citizens' right to use streets and parks for communication); Hague v. CIO, 307 U.S. 496 (1939) (observing the importance of streets, parks, and "public places" for exercising free speech and freedom of assembly).

310. *See, e.g.*, Grayned v. City of Rockford, 408 U.S. 104 (1972) (suggesting greater limits on expressive activity that takes place in close proximity to a school).

311. *See, e.g.*, Frisby v. Shultz, 487 U.S. 474 (1988) (limiting picketing in front of the home based on a recognition of the importance of the "privacy of the home"). In *Young v. American Mini-Theatres, Inc.*, 427 U.S. 50 (1976), the Supreme Court addressed the significance of space in upholding the constitutionality of a local ordinance that regulated the location of adult theaters. The Court found that *where* certain adult films were exhibited mattered because of the demonstrated blighting effect on the surrounding area.

312. *See, e.g.*, Kyllo v. United States, 533 U.S. 27, 31 (2001) (emphasizing the importance of freedom from state intrusion in the home); Wilson v. Layne, 526 U.S. 603, 610 (1999) (same); *see also* Neil M. Richards, *Intellectual Privacy*, 87 TEX. L. REV. 387, 412–16 (2008) (discussing the "important and underappreciated" relationship between "freedom of thought" and "spatial privacy" in the context of the First Amendment).

313. *See, e.g.*, Florida v. Rodriguez, 469 U.S. 1, 5–6 (1984) (concluding that police questioning did not rise to the level of "seizure" in airport); *cf.* Florida v. Bostick, 501 U.S. 429, 434 (1991) (noting that the fact that police questioning took place on a bus is relevant to a Fourth Amendment inquiry).

Understood against this doctrinal backdrop, the proposed framework of racial territoriality is relatively unremarkable.[315]

This Part explains how racial territoriality would fit within a constitutional framework. A claim for racial territoriality rests on an initial showing that a person of color was excluded from or marginalized within a territorialized white space. Such a showing could be used as circumstantial evidence of intent or, alternatively, could be used to create a rebuttable presumption of intentional discrimination. I explore the mechanics of both approaches and how they could operate in practice, but first I will turn to how a court might interpret a space's racial meaning.

A. Decoding Racial Meaning

In his seminal article, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, Charles Lawrence argued that the equal protection doctrine failed to acknowledge the role that unconscious racial attitudes play in motivating discriminatory behavior.[316] He proposed that purportedly discriminatory acts could be evaluated by focusing on their "cultural meaning," which he asserted was "the best available analogue for and evidence of the collective unconscious."[317] Specifically, he proposed that courts evaluate the "racial significance" of "symbolic message[s]" associated with governmental conduct.[318] Such evidence would focus on "the historical and social context in which the decision

---

314. *Bostick*, 501 U.S. at 435–36. Other constitutional decisions indicate the Court's sensitivity to spatial context. In *Lawrence v. Texas*, 539 U.S. 558 (2003), for example, the Court struck down an anti-sodomy law in part because it criminalized consensual intimate conduct within the privacy of the home. *See also* Griswold v. Connecticut, 381 U.S. 479 (1965) (emphasizing that a state law barring contraceptive use unconstitutionally infringed on marital privacy in the home).

315. Timothy Zick observes the relevance of space to rights and liberties:

> In ways not always fully appreciated, constitutional liberty and spatiality are inextricably linked. . . . [S]patiality remains a powerful regulatory tool. Geographic and territorial borders determine membership in polities, such that mere physical presence within a territory gives rise to certain rights and privileges. Expulsion or removal extinguishes these claims. Spatial restrictions on ingress or egress affect locomotion, mobility, and migration. Restrictions on the places or territories in which a person may reside, work, or recreate affect fundamental interests in choice of community, pursuit of livelihood, and the basic dignity associated with freedom of movement. Spatial restrictions also affect liberties we do not routinely associate with place or geography, including access to judicial process, equality, and rights of association and expression. In many respects, there is no more fundamental liberty than the freedom to choose one's own place. The loss of that freedom can result in severe forms of not only personal, but constitutional displacement.

See Zick, *supra* note 42, at 517.

316. *See* Lawrence, *supra* note 21.

317. *Id.* at 355–56.

318. *Id.* at 356.

was made and effectuated."[319] If there was a "preponderance of the evidence that a significant proportion of the population" regarded the state action in racial terms, then the court could "presume that socially shared, unconscious racial attitudes" had influenced the contested activity.[320] Lawrence's objective—of unmasking how race operates in subtle, socially coded ways—squares with the goals of my proposed framework. It is useful, therefore, to think about how courts might use a variation of Lawrence's test to assess the racial meaning of space. In my framework, the critical component of Lawrence's "cultural meaning" test for purposes of racial territoriality is the assessment of the challenged spatial action against its historical and social context. Relevant factors would include racial data about the people who live in, occupy, or frequent the space. Demographics here are important but not dispositive. A space may be populated primarily by whites, but not necessarily be racialized in the sense of being regarded as exclusionary. Spaces become racialized when they are inhabited, occupied, or frequented principally by one race and are claimed or treated as spaces that are only for individuals from that racial group.[321]

Evidence concerning the space's reputation—how people of color have been treated either as residents or as visitors—would be considered. For example, how often are people of color stopped by the police when traveling through the area? How are they treated when they patronize local stores and businesses? How extensive is residential segregation in the community and to what extent do whites and people of color interact in social, civic, and other kinds of activities? Is there a pattern or history of discrimination in the community? Have other discrimination lawsuits been filed? In other words, is this an identifiably white area that has been demonstrably inhospitable to people of color? Courts would weigh these factors along with the racial identifiability of the subject space as circumstantial evidence of discriminatory intent. Proof of the decisionmakers' implicit racial bias might also be used to assess a discrimination claim.[322]

In the Gretna example, understanding the symbiotic relationship between race and space requires revisiting what we know about what happened on the bridge. In various media accounts, the police claimed a "race-neutral" motive—that they were trying to prevent "looting" and were acting based on a legitimate concern for the public safety of Gretna residents.[323] But the purported neutrality

319. *Id.*

320. *Id.*

321. Territorial behavior could also be class-based. *See* Antonio Regalado, *Walls Around Rio's Slums Protect Trees but Don't Inspire Much Hugging*, WALL ST. J., June 15, 2009, at A1 (describing a state-sponsored effort to wall off poor residents in Rio de Janeiro, an effort that some human rights officials have referred to as "geographic discrimination").

322. *See* Kang & Banaji, *Fair Measures*, *supra* note 24, at 1090–91.

323. *See supra* notes 1–6.

of this defense requires some unpacking. On closer scrutiny we can see the racialized inference that Gretna officials drew between the evacuees and New Orleans.

The point here is that racially identifiable space triggers racial associations that incite a sense of belonging and proprietary power. Space takes on social and cultural meaning[324] that in turn stimulates territorial reactions.[325] Thus, the racialized associations with New Orleans itself helped to construct the image of the evacuees as (poor, black) "looters."[326] Prior to the incident on the bridge, New Orleans was stereotyped by Gretna officials as a site of black poverty and crime.[327] This racial stigma[328] was then mapped onto the Katrina evacuees,[329] creating perceptions that they were a racial horde encroaching on the white space of Gretna, rather than people merely seeking safety and dry land. Coming from a black space that had been stamped as "dangerous," the black evacuees—at least in the eyes of Gretna officials—became presumptively dangerous themselves. Race, therefore, surfaces in the town officials' class-loaded efforts to keep a particular kind of black person out of Gretna—the poor who come from the dangerous black city. The evacuees' racial profile is partially constructed based on their presumed geographical association with (poor, black) New Orleans. Race is doing double duty here.

Importantly, this framework acknowledges that the racial identity of space—how it is perceived by those who inhabit, occupy, or claim it and those who do not—is contingent and subject to competing interpretations. For example, despite the prevailing image of New Orleans as identifiably black,[330] closer examination might reveal a more complex and nuanced interpretation of the city's racial geography. Different New Orleans neighborhoods, for example, might convey different racial meaning and have different racial associations.[331] In short, the city's racial image is not necessarily uniform; it is both internally and

324. *See* Lenhardt, *supra* note 112, at 809 (defining "racial stigma as a problem of negative social meaning"); Troutt, *supra* note 42, at 1113 (observing how cities have been "'raced' by suburban development patterns as a synonym for costly black failure and legitimate white fear").

325. *See* Capers, *supra* note 117.

326. *See* JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR 13 (2007) (referring to the "imagined crime wave" in New Orleans after Katrina).

327. *See supra* notes 1–6.

328. *See* Lenhardt, *supra* note 112.

329. *See supra* notes 1–6.

330. *See*, *e.g.*, Dan Baum, *Letter From New Orleans: The Lost Year*, NEW YORKER, Aug. 21, 2006, *available at* http://www.newyorker.com/archive/2006/08/21/060821fa_fact2 (quoting former New Orleans Mayor Ray Nagin as saying during his reelection campaign, "It's time for us to rebuild a New Orleans, the one that should be a chocolate New Orleans").

331. *See* Hancock, *supra* note 6 (describing New Orleans's Garden District and Magazine Street corridors as predominantly white).

externally managed according to the circumstances, and, therefore, its identity is context-dependent. The same is true of Gretna, which during the national fallout from the bridge incident carefully calibrated its racial image before media outlets. For instance, Gretna's whiteness was destabilized by references to the "black police officer" who reportedly participated in shutting the bridge and to a local black elected official and certain black residents who endorsed the official decision.[332] Just as the racial identity of persons can be managed or calibrated,[333] so can the racial meaning of spaces. Claims for racial territoriality, therefore, would be predicated on proof that the proffered racial image is dominant.

The involvement of people of color in the challenged action would be part of the menu of factors used to gauge the racial meaning of the contested space, and may be a mitigating factor in a racial territoriality claim. But, to be clear, under my proposed framework, such action need not be carried out by a white person. Indeed, it is not at all surprising that a person of color would be deployed to protect white space or even that she would choose to protect white space—as apparently was the case with the black police officer who helped to close the Gretna bridge to the evacuees.[334] Social cognition research acknowledges that racial minorities in certain circumstances also experience unconscious bias against blacks.[335] Race, in other words, is more than a social and physical construct; it also has a psychic dimension.[336] For this reason, it is not the conscious bias of the individual alone that matters. Nor, as Lani Guinier has observed, is racial bias simply an individual pathology. It is an environmental

---

332. *See* Jones, *supra* note 12. The whiteness of a space could mask other social identities, such as ethnicity, class, and/or religion.

333. *See* Richard Brooks, *Incorporating Race*, 106 COLUM. L. REV. 2023, 2033 n.39 (2006) (observing that personal racial identity can be a matter of choice, in effect that one's self-identity can be "manage[d]" by choosing to "emphasize or deemphasize certain racial attributes"). Cheryl Harris eloquently captures how racial identity can be managed through spatial context in a story about her grandmother's "passing" for white in the segregated South:

> Her fair skin, straight hair, and aquiline features had not spared her from the life of sharecropping into which she had been born in anywhere/nowhere Mississippi . . . . But in the burgeoning landscape of urban America, anonymity was possible for a Black person with "white" features. She was transgressing boundaries, crossing borders, spinning on margins, traveling between dualities of Manichean space, rigidly bifurcated into light/dark, good/bad, white/Black. No longer immediately identifiable as "Lula's daughter," she could thus enter the white world, albeit on a false passport, not merely passing, but *trespassing* . . . . No one at her job ever asked if she was Black; the question was unthinkable. By virtue of the employment practices of the "fine establishment" in which she worked, she could not have been. Catering to the upper-middle class, understated tastes required that Blacks not be allowed.

See Harris, *supra* note 58, at 1710–11.

334. *See* Jones, *supra* note 12.

335. *See* Kang, *Trojan Horses*, *supra* note 24, at 1534.

336. *See* powell, *supra* note 37 (observing the psychic dimensions of race).

hazard. Like "passive smoke," it is in the air that we all breathe.[337] Thus, the racial meaning of the bridge and its associated spaces, New Orleans and Gretna, is as salient as the race of the person who barricaded the bridge. Within this framework it is easy to understand how even a black person might perceive a space as culturally—and normatively—white and how she might act on that racial association. This is especially the case for blacks who might have a personal interest in the outcome, such as a police officer who is employed by the town of Gretna itself or black residents who could espouse the same racialized spatial fears of New Orleans.

B. Judicial and Legislative Remedies

This Subpart proposes two alternative remedies. The first could be easily integrated into the existing equal protection framework. At a minimum, constitutional law could take the racial meaning of space into account as circumstantial evidence of intent under the *Arlington Heights* test. The example below, *Bennett v. City of Eastpointe*, illustrates how this would work in practice.

The second approach is similar to the first in that it would also consider the racial meaning of space. But it differs in that it would treat the state's exclusion of people of color from "white-identified" space as prima facie evidence of unlawful behavior. It would achieve this by asking first whether they were excluded from or marginalized within territorialized or racially exclusionary white space by state actors. If so, it would find that there was discriminatory purpose absent proof by the state of a compelling justification for its actions and evidence that they were carried out in a narrowly tailored way. The virtue of the first approach is that it would involve only minor adjustments to current constitutional law and, therefore, might appeal to more moderate judges. The second approach would be more effective in exposing racial territoriality by making it harder for state actors to exclude people of color from white-identified spaces and by shifting the burden to them to justify their conduct. But it also contemplates a more expansive interpretation of racial discrimination and, accordingly, lends itself more readily to a legislative, rather than a judicial, remedy.

337. *See* Lani Guinier, Op-Ed., *Race and Reality in a Front-Porch Encounter*, CHRON. HIGHER EDUC., July 30, 2009, *available at* http://chronicle.com/article/RaceReality-in-a/47509 (unpacking the racial layers of an encounter between black Harvard professor Skip Gates and a white Cambridge, Massachusetts police officer on Gates's front porch).

1. What Judges Can Do: *Bennett v. City of Eastpointe*

The city of Eastpointe is a suburb adjacent to Detroit.[338] It is 92 percent white.[339] Detroit is nearly 82 percent black.[340] Eight Mile Road, which divides the two jurisdictions, "is commonly known as a racial dividing line."[341] In several incidents, plaintiffs—young black males who were riding their bicycles through the city of Eastpointe—were stopped by police officers on suspicion of stealing the bikes. In one incident, a police officer pulled his patrol car into an intersection to block the youths just as they crossed Eight Mile Road, instructing them that they "should have receipts for their bikes when they come over 'Eight Mile' into Eastpointe."[342] After the police "ordered the youths to place their hands on the hood of the police car," the police released the youths and then followed them in the police cruiser until they returned across the border into Detroit.[343]

In this case, the black youth asserted an equal protection claim against the police for selective enforcement.[344] A selective enforcement claim requires plaintiffs to "establish that the challenged police action 'had a discriminatory effect and that it was motivated by a discriminatory purpose.'"[345] A showing of discriminatory effect may include statistical evidence that "similarly situated individuals of another race were treated differently."[346] As in a standard equal protection claim, discriminatory purpose requires proof "that an official chose to prosecute or engage in some other action at least in part because of, not merely in spite of, its adverse effects upon an identifiable group."[347] Plaintiffs alleging selective enforcement, therefore, face the same uphill doctrinal battle in proving racial intent.

The district court granted summary judgment in favor of the police officers, but the court of appeals reversed in an opinion that is remarkable for its appreciation of racial territoriality.[348] Unlike *Arlington Heights*, *Greene*, or *NAACP v. Myrtle Beach*, the opinion takes explicit account of the racialized spaces of the white suburb and the predominantly black space of Detroit in assessing the

338. Bennett v. City of Eastpointe, 410 F.3d 810, 815 (6th Cir. 2005).
339. *Id.*
340. *Id.*
341. *Id.* at 815–16.
342. *Id.* at 831.
343. *Id.* at 831–32.
344. Selective enforcement claims are brought under the Equal Protection Clause rather than the Fourth Amendment. *See* Whren v. United States, 517 U.S. 806, 813 (1996).
345. *Bennett*, 410 F.3d at 818 (quoting Wayte v. United States, 470 U.S. 598, 608 (1985)).
346. *Id.*
347. *Id.* (internal quotation marks omitted).
348. *Id.* at 831.

officers' racial intent. For example, the opinion cites as evidence of racial motive one officer's statement that the youths "should have receipts for their bike when coming into Eastpointe" and the fact that they trailed the youth "until they crossed over Eight Mile back into Detroit."[349]

A less sensitive examination of the facts might have missed the meaning of the explicit reference to the racial boundary between the two jurisdictions. To the appellate court, however, it conveyed a particular racial purpose—that the youth would be treated by the police officers as presumptively suspect once they ventured into the white territory of Eastpointe. The officers' suspicion of black youth in a white space translated into the racially discriminatory requirement that the youth would be required to prove ownership of their bicycles once they crossed the Detroit border. The court also perceived intent to discriminate when the police followed the youth in their cruiser until they returned to Detroit,[350] interpreting the police action as a form of white racial territoriality that signaled that blacks were not welcome.[351] In sum, the court focused on the spatial meaning of the officers' actions—that they were using the white space of Eastpointe and the black space of Detroit to effect a racial hierarchy. By denying the youth the freedom to move unencumbered through Eastpointe, the officers conveyed the clear message that their place was in Detroit, that they did not belong in Eastpointe, and that the officers would use their institutional authority to preserve the white space of the suburb.

This example indicates that the test for racial territoriality is within the competence of courts. Before being overturned by the Supreme Court, the Sixth Circuit Court of Appeals in *Greene v. Memphis*[352] also employed a very similar test—interpreting the City's decision to construct a wall between the white and black communities in Memphis[353] as intentional racial discrimination.[354] Indeed, in defending his cultural meaning test, Charles Lawrence observed that courts are often asked to "interpret the meaning of social phenomena."[355] As he noted, this is particularly true with respect to constitutional law.[356] In Establishment Clause cases, for example, courts are asked to determine the religious meaning of a governmental practice.[357] In substantive due process cases, courts have

349. *Id.* at 831–32.
350. *Id.*
351. The court also relied on evidence of prior, similar litigation against the police. *Id.*
352. 610 F.2d 395 (6th Cir. 1979).
353. *See* Lawrence, *supra* note 21, at 363–64 (discussing the cultural meaning test as applied to *Greene*).
354. *See supra* Part I.
355. *See* Lawrence, *supra* note 21, at 359.
356. *Id.*
357. *See id.*

interpreted the "concept of family" by reference to history and cultural tradition.[358] The tests for determining "reasonable expectation of privacy" in Fourth Amendment law and detecting gender stereotypes in sex discrimination cases also require sensitivity to cultural meaning.[359] Finally, in *Brown v. Board of Education*,[360] the Supreme Court invoked racial stigma and the feelings of inferiority generated by forced racial separation in striking down segregation in public schools.[361] Courts are similarly equipped to detect the racial meaning of a particular space.

2. Revisiting *Arlington Heights* and *Memphis v. Greene* Through a Legislative Approach

Although courts are clearly capable of detecting racial meaning, some readers might be understandably skeptical of an approach that depends only on courts to redress racially territorial conduct.[362] This Article began with the observation that the Gretna problem reveals a gap between popular and constitutional understandings of race and space. Perhaps, therefore, it makes sense to begin with popular strategies for shifting social and cultural thinking about race and space in ways that promote or incentivize non-territorial responses. This Subpart sketches the outlines of a potential legislative remedy and thoughts about other possible responses that could be adopted at the state level. Because this approach requires sensitivity to the racial dynamics of local space, I suggest that state and/or local legislation—rather than a federal statute—is the most appropriate medium for intervention.

A state legislature might enact a law providing as follows: A finding that a person of color has been excluded from or marginalized within a territorialized white space would trigger strict scrutiny, shifting the burden to the state to demonstrate that the exclusion satisfied a compelling interest and that the decision was executed in a manner that was narrowly tailored to its goal. This burden-shifting mechanism is similar to the framework employed generally in antidiscrimination law.[363] The test itself is a familiar one for courts, as it tracks

358. *Id.*

359. *Id.*

360. 347 U.S. 483 (1954).

361. Lawrence, *supra* note 21, at 359. *But see* Guinier, *supra* note 154, at 96 (critiquing the "Court's lopsided psychological framing" of stigmatic harm in *Brown* and arguing the risks and difficulties of a court-centered approach to social change).

362. *See* Guinier, *supra* note 154 (expressing deep misgivings about approaches that singularly rely on litigation to achieve lasting and meaningful social change).

363. *See* Batson v. Kentucky, 476 U.S. 76, 97 (1986) (discussing burden-shifting framework). Title VII, for example, relies on a burden-shifting framework, although the ultimate burden of persuasion lies with the plaintiff. *See* 42 U.S.C. § 2000e (2006); *see also* Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S.

the federal constitutional standard that applies where there is evidence that race was a factor in state decisionmaking.[364] Here, the burden would be on the state to demonstrate that it was not acting territorially.

Thus, the mechanics of the claim would work as follows: The evacuees would have the initial burden of establishing the racial meaning of the decision to barricade the bridge, taking into account the historical and social-spatial context of New Orleans and Gretna. Once this step had been satisfied, Gretna officials would be required to demonstrate that they had closed the bridge for compelling public safety reasons that were unrelated to a general fear of blacks from New Orleans. The officials' statement that they closed the bridge because the evacuees would have "looted, burned, and pillaged"[365] Gretna would be closely examined. What evidence did they have that the evacuees were a threat to public safety? The history of Gretna's wariness and suspicion of New Orleans and New Orleans residents would be relevant.

If Gretna could not demonstrate a compelling interest, then plaintiffs would successfully establish racially discriminatory intent and their claim for racial territoriality. On the other hand, if the City satisfied this burden, it would be required to show that its decision to exclude the evacuees was carried out in the least restrictive way. Thus, if Gretna could show that it was legitimately motivated by public safety concerns, it would then have to demonstrate that it had little choice but to barricade the bridge.

Under this statutory standard, the issue raised in *Arlington Heights*—whether the municipality discriminated in its refusal to rezone—would likely have been resolved differently. A court would have probed the racial meaning of the village's space—its demographics, past racial history, and reputation, including evidence (that was considered by the lower court) that the village was the most racially isolated of its size.[366] If it had concluded that the village was territorialized white space, the burden would have shifted to the Village to show that its refusal to rezone was based on a compelling interest and was necessary to that interest. Similarly, a court presented with the same claim in *Memphis v. Greene* would examine—as the Sixth Circuit did—the street closure against the backdrop of the protracted history of racial segregation and racial separateness

248 (1981); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Title VIII (the Fair Housing Act) also employs a burden-shifting mechanism. *See* Huntington Branch, NAACP. v. Town of Huntington, 844 F.2d 926 (2d Cir. 1988), *aff'd*, 488 U.S. 15 (1988) (per curiam) (providing an example of the mechanics of a Title VIII claim); Thompson v. U.S. Dep't of Hous. & Urban Dev., 348 F. Supp. 2d 398, 417–18 (D. Md. 2005) (providing an example of the mechanics of a Title VIII claim).

364. *See*, *e.g.*, Johnson v. California, 543 U.S. 499 (2005).

365. *See* Jones, *supra* note 12.

366. *See supra* Part I.A.2.

in Memphis.[367] The City would have to satisfy the more rigorous test that its interest in eliminating "undesirable" traffic was both compelling and narrowly tailored.

A legislative remedy encourages state and local actors to be attentive to racially territorial behavior, which itself might suggest deeper racial divides within a community. Such involvement might lead to a closer examination of other racial problems and more rigorous community investment in resolving them. Explicit attention to racial territoriality, therefore, could help diagnose and address other local racial schisms. State or local legislatures might hold hearings about the social hazards of racial territoriality, which would also help to educate the broader public. They could also adopt initiatives that require or incentivize shared community space. For example, the Louisiana state legislature might use state funding to encourage ongoing collaboration and interaction between Gretna and New Orleans residents—the theory being that sustained contact between residents of the two communities might reduce racially territorial behavior by citizens and local officials.[368] The state might further threaten to suspend funding to Gretna if its officials persisted in such conduct.

A legislative focus has its own virtues.[369] Such an approach might create greater opportunities for a public conversation about spatial belonging and the role of racially territorial conduct in perpetuating systemic racial disadvantage.[370] Public engagement and debate might lay the foundation for a federal and state judiciary more receptive to discrimination claims that rest on allegations of racially territorial behavior. The clear disadvantage of this approach, of course, is that it depends on the political will of elected officials, who are unlikely to embrace mandates that are (for all the reasons I have already discussed) likely to be socially unpopular, at least initially. This approach, therefore, necessarily contemplates a long, messy engagement at multiple levels by many different actors and a more rigorous process of community education in order

367. For example, in *Thompson* v. *United States Department of Housing & Urban Development*, African American residents of a predominantly black public housing project in Baltimore City challenged the decision by local officials to place a fence around the perimeter of the project as racially discriminatory. 348 F. Supp. 2d 398, 428 (D. Md. 2005). As in *Memphis v. Greene*, the fence physically separated the project from an adjoining white community and limited pedestrian access in and out of the area. *Thompson*, 348 F. Supp. 2d at 430–31. Baltimore City, like Memphis, also has a history of government-enforced segregation. *See id.* at 405–07. The district court concluded that the fence had not been erected "because of" the race of the black project residents, nor did it result from an "acquiescence to the racially discriminatory desires that were harbored by certain members of the [white] community," but rather was due to a "legitimate" fear of rising crime in the area. *Id.* at 429–31.

368. *See* Kang & Banaji, *Fair Measures*, *supra* note 24, at 1102–05 (describing the benefits of interracial contact for reducing implicit bias).

369. *See infra* Part I.

370. *Id.*

to generate heightened social awareness of the problem and its racial implications. On the other hand, such an effort might lead to more organic community-based responses to racially territorial behavior that are more sustainable in the longer term.[371]

C. Returning to Gretna: What Litigation Might Look Like

Recall the facts of the Gretna incident. In the aftermath of Hurricane Katrina, a mostly African American group attempted to cross a bridge leading out of the devastated city of New Orleans. As they crossed, Gretna officials barricaded the bridge and turned back the evacuees. Popular commentary about the incident described it as an act of racial discrimination, as did many of those on the bridge who experienced it. Plaintiffs' subsequent legal complaint against the city of Gretna, however, omitted any reference to race, likely because of weaknesses in constitutional doctrine that fail to capture the racial significance of space and to appreciate the dynamics of racial territoriality.[372]

This Article has explored what an intentional racial discrimination claim might look like within the rubric of racial territoriality and the mechanics of how it might operate, either through the lens of conventional equal protection doctrine or through a more expansive legislative approach that could be implemented at the state or local level. Under either approach, a claim for racial territoriality would rest on an initial showing that a person of color was excluded from or marginalized within a territorialized white space. This would require plaintiffs to prove by a preponderance of the evidence that the Gretna bridge at the time of the incident was inhabited, frequented, claimed, and/or treated as a space only for whites.

The racial demographics of Gretna would be relevant to plaintiffs' case, but again, would not be dispositive. As I have already discussed, even Gretna blacks

---

371. Legal scholars have suggested that the most durable change comes not through the judicial arena alone but through the interplay of courts and popular shifts in thinking that are effectuated through social movements. *See, e.g.*, Joel K. Goldstein, *Constitutional Dialogue and the Civil Rights Act of 1964*, 49 ST. LOUIS U. L.J. 1095 (2005) (discussing the interplay between the Supreme Court and Congress in the creation of the 1964 Civil Rights Act); Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in* Heller, 122 HARV. L. REV. 191 (2008) (describing how shifts in popular understanding of the Second Amendment shaped the Court's interpretation of the right to bear arms); *see also* GERALD ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991) (arguing the limits of judicial power); Guinier, *supra* note 154, at 97 n.11 (expressing skepticism about the efficacy of changes in rules for shifting social and cultural norms); Stoddard, *supra* note 31 (expressing skepticism about the efficacy of changes in rules for shifting social and cultural norms); *cf.* Gaventa, *supra* note 40, at 30 (discussing conditions for sustainable change and suggesting that broader social mobilization around a policy objective is more effective than an isolated "victory in [a] visible [power] arena").

372. *See supra* notes 1–7 and accompanying text.

might have adopted, however subconsciously, racially territorial attitudes that would lead them to exclude New Orleans blacks from the bridge's "white space" in the aftermath of the hurricane. Other evidence might include Gretna's historical treatment of people of color; whether it has a record of racial harassment by police and other public officials; the degree of residential segregation in the community and general evidence about the nature and scope of cross-racial interaction. A court might look to the degree of political participation by blacks in Gretna and whether any blacks hold elected office. It could also examine community assumptions about blacks from New Orleans. Statements by public officials and private citizens that African Americans from New Orleans would have "looted and pillaged" Gretna would be closely examined. Those who made the decision to close the bridge might be required to take a test measuring their degree of implicit racial bias against African Americans.

In its defense, the City might seek to destabilize common assumptions about its racial meaning and that of New Orleans. It might point to the size of Gretna's black population—approximately 35 percent—to show that Gretna is multiracial and that its racial identity is far from uniform. If it had such evidence, it could show that it has welcomed African Americans; that it is racially integrated; and that blacks have long occupied multiple positions of power and authority in the town. In short, it could demonstrate that the town's racial meaning is positive and inclusive, rather than racially exclusionary. Success at this first stage would be predicated on proof that the racial meaning proffered by the plaintiffs or the City is dominant. If the City prevailed at the initial stage, the plaintiffs would lose, and the case would end. If the plaintiffs prevailed, the litigation would proceed to the next phase.

During the next phase, the operation of the presumptions and burdens of proof would depend on the applicable framework. The factual record might be used as circumstantial evidence on the ultimate question of racial intent, along with the other *Arlington Heights* factors (legislative and administrative history of the challenged decision).[373] Or the plaintiffs' initial showing would create a rebuttable presumption of intentional discrimination. Under the latter approach, once the plaintiffs' showing is made and the presumption established, the burden would shift to Gretna to demonstrate that it had a compelling public interest (presumably here, public safety) and that it had no choice but to barricade the bridge and turn the evacuees away due to the City's lack of resources at the time of the hurricane. Plaintiffs might provide evidence here that the City's asserted interest in public safety was pretextual—for example, that it allowed evacuees from neighboring white suburbs to cross the bridge without incident. Or

373. *See supra* Part I.A.1.

plaintiffs might show that the City could have pursued its public safety objective using a different approach that did not require completely shutting down the bridge—by permitting an intermittent flow of pedestrian traffic from New Orleans into the town, for example. If plaintiffs' evidence is more credible than the City's, then the City will have failed to carry its burden, and plaintiffs win. Plaintiffs lose if the City otherwise satisfies its burden. Whatever the outcome, the proposed litigation scenario for the Gretna incident shows that racial territoriality is a litigable issue and that courts could consider it under a familiar and clear framework.

D. A Note on "Reverse Racial Territoriality"

This Subpart briefly discusses possible responses to claims for "reverse racial territoriality." I anticipate that such claims might be brought by whites asserting exclusion from racially identifiable black spaces,[374] much like whites who allege reverse discrimination in cases involving consideration of race in ways that favor people of color.[375] I acknowledge that such a claim is theoretically possible. Yet this acknowledgement comes with an important caveat—that racial territoriality takes place in spaces that have a particular racially exclusionary meaning. The emphasis on racial *meaning* and not simple racial *identifiability* is significant and rests on a key premise of this Article:[376] that black space and white space have different social resonance and power; although they are both racially identifiable, their meaning is not the same. As this Article has indicated, white space did not simply *happen* but rather was often the product of conscious racial efforts to exclude people of color.[377] Against this context, "reverse" racial territoriality takes on a distinctive cast. The intentional creation of black spaces can be understood as a response to a long and continuing pattern of black exclusion from and second-class status within identifiably white spaces. The racial power

374. For example, whites in recent years have moved to Harlem, a historically black community, in record numbers. Reactions by black residents to the increased white presence have been mixed. *See* Sam Roberts, *In Harlem, Blacks Are No Longer a Majority*, N.Y. TIMES, Jan. 6, 2010, at A16.

375. Indeed, much of the Supreme Court's equal protection jurisprudence for the last two decades has focused on these kinds of cases. *See*, *e.g.*, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist., 551 U.S. 701 (2007) (striking down a policy that assigned students by race in K–12 public schools); Grutter v. Bollinger, 539 U.S. 982 (2003) (upholding a law school admissions policy that relied on limited consideration of race); Gratz v. Bollinger, 539 U.S. 244 (2003) (striking down a college admissions policy that relied too heavily on racial considerations); Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995) (concluding that strict scrutiny applies to a federal affirmative action program in contracting); Shaw v. Reno, 509 U.S. 630 (1993) (concluding that a white voter could challenge a majority-minority legislative district on equal protection grounds); Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (considering the constitutionality of an affirmative action policy in university admissions).

376. I am grateful to Devon Carbado for his insights on this point.

377. *See supra* Part II.

of territorial behavior in white space, therefore, is qualitatively different than racial territoriality in black space for the simple reason that blacks historically have had fewer spaces to choose from.[378]

Return to the Gretna story and a hypothesized claim of reverse racial territoriality in which blacks from New Orleans prevent Gretna residents from crossing into the city in the wake of Hurricane Katrina. The claim would be that blacks engaged in racially territorial behavior by seeking to keep whites out of their city. The hypothetical is both provocative and deceptive—provocative because it assumes an equivalence of black spatial choice, power to exclude, and the power to exact consequences that are comparable to white racial territoriality; and deceptive because the assumption is so thoroughly unrealistic.[379] The very act of hypothesizing reverse racial territoriality on the Gretna bridge is somewhat like asking the following: Whether "in the land of make believe—where blacks have the bulk of institutional power, resources, and access and are backed by an extensive history of spatial dominance, should it be presumptively unlawful for blacks to exclude whites from identifiably black spaces?" The answer is, *of course*, if we were in the land of make believe. But we are not.[380] History and spatial context matter.[381]

---

378. *See* Audrey G. McFarlane, *The New Inner City: Class Transformation, Concentrated Affluence and the Obligations of the Police Power*, 8 U. PA. J. CONST. L. 1, 20 n.79 (2006) (citing studies of white economic behavior and willingness to pay a premium to live in a predominantly white neighborhood); *see also* SHERYLL CASHIN, THE FAILURES OF INTEGRATION: HOW RACE AND CLASS ARE UNDERMINING THE AMERICAN DREAM 83–124 (2004) (discussing the "institutionalized separatism" between white communities and communities of color, which is reinforced by private and public actors alike). Although class explains some of this separation, it is not the sole factor. Even higher-income black communities have difficulty attracting certain kinds of investment relative to white communities. *Id.* at 153–60.

379. Indeed, the racial geography of New Orleans itself reveals the uneven social status of blacks and whites.

> [T]he human suffering caused by Katrina was hierarchically distributed: the privileged residents of New Orleans, a largely white population, lived higher above sea level, on drier and less polluted lands, and were able to escape the hurricane by using readily available transportation (cars, airlifts); the economically underprivileged residents of New Orleans, largely black and living in areas with insufficient socio-economic services and low-income housing suffered the brunt of the effects.

Katherine McKittrick & Clyde Woods, *No One Knows the Mysteries at the Bottom of the Ocean*, *in* BLACK GEOGRAPHIES AND THE POLITICS OF PLACE, *supra* note 42, at 1, 2 (citation omitted).

380. *See* Chused, *Gendered Space*, *supra* note 63, at 155–57 & n.148 (contending that law should recognize power differences between "spaces created and used by women for their own benefit" and male spaces that are used to reinforce male power and dominance).

381. It would be wrong, of course, to assume that black spaces are necessarily the opposite of white spaces in all respects. Black space also has elements of choice and power, albeit to a different degree and of a different kind than white space. Black institutions, such as black churches, for example, can be engines of political and community power and economic growth and development. *See* Guinier, *supra* note 154 (arguing that black spaces may in fact be beneficial for some blacks); *see also* Michele M. Simms Parris, 1 U. PA. J. CONST. L. 127, 134 (1998) (describing black churches as "organizational sites for social and political activities [and] centers for economic development and growth"). It also would be a mistake to assume that

Consider an important subtext of the Gretna story—that the evacuees who tried to cross into Gretna had neither the means to escape the initial storm, nor anywhere to go in its aftermath.[382] They did not have a choice of space. Indeed, their *lack* of choice was itself a product of accumulated disempowerment resulting from confinement and isolation in under-resourced black spaces:

> In its effects on human geographies, and especially black geographies, Hurricane Katrina reconfigured an already racialized space. While it altered the physicality and demography of New Orleans and other areas, the storm also brought into clear focus, at least momentarily, a legacy of uneven geographies, of those locations long occupied by . . . the wretched of the earth: the geographies of the homeless, the jobless, the incarcerated, the invisible labourers, the underdeveloped, the criminalized, the refugee, the kicked about, the impoverished, the abandoned, the unescaped.[383]

In short, the New Orleans that was left in the wake of Hurricane Katrina was poor, black, and dispossessed. The very notion of whites from Gretna fleeing to it, rather than from it, is unfathomable.[384]

CONCLUSION

The Gretna incident teaches us that law has yet to come to terms with the spatial dimensions of racial discrimination, despite significant historical and social science evidence that space is integral to the construction and maintenance of racial power and disadvantage. Gretna further reveals that space both produces and is produced by race—that race and space are mutually operative and synergistic. My proposed framework of racial territoriality brings this connection into sharp focus. It argues that law misses something important when it fails to take the racial meaning of space into account and concludes with a concrete, workable alternative for extending law's reach. By moving beyond

---

"black space" is uniformly "welcoming" of all black people. My reference to black space glosses over intra-racial differences within the black community, such as those based on gender, color, and/or sexual orientation. Space, therefore, can have multiple social valences within various racial communities. *Cf.* Devon W. Carbado, *Black Rights, Gay Rights, Civil Rights*, 47 UCLA L. REV. 1467 (2000) (discussing how blackness is often defined in ways that privilege heterosexuality and marginalize black gays and lesbians); Devon W. Carbado & Mitu Gulati, *The Fifth Black Woman*, 11 J. CONTEMP. LEGAL ISSUES 701 (2001) (contending that courts "essentialize race in ways that fail to account for gender-specific, intra-racial differences); Trina Jones, *Shades of Brown: The Law of Skin Color*, 49 DUKE L.J. 1487 (2000) (arguing the historical and contemporary significance of skin color).

382. *See supra* note 6 (describing other white communities that barred New Orleans evacuees).

383. *See* McKittrick & Woods, *supra* note 379, at 2 (citation omitted).

384. *Id.* at 1 ("[A]s Katrina wreaked its havoc on [New Orleans], . . . some of the 50,000 people who remained there did so voluntarily—but in effect most of those left behind were abandoned and left to fend for themselves.").

individual actors to focus on spatial context, racial territoriality deepens and enriches our understanding of the social complexities of race.