

Structural properties in the diffusion of the solar photovoltaic in Italy: individual people/householder vs firms

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REGULATORY SILENCE AND INSTITUTIONAL RACISM

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in Coglianesse, C. & Walters, D. (Eds.), *Regulation in a Turbulent Era* (Edward Elgar, 2025, forthcoming)

Abstract

Race has historically received limited attention in regulatory studies, with regulators often remaining silent on systemic inequities. This silence is frequently rooted in the mistaken belief that color-blind policies and economic rationales can deliver fair and objective regulations. However, such approaches overlook the structural disadvantages faced by marginalized communities, thereby exacerbating systemic racial inequalities. These disparities are especially pronounced in turbulent times and in crucial areas such as access to safe housing, a clean environment, and healthcare. This essay discusses the complex interplay between race and regulation, focusing on how regulatory frameworks intersect with institutional racism. It introduces key examples, including the Grenfell Tower fire, to shed light on how regulation has historically perpetuated inequities. Finally, it outlines new pathways for leveraging regulation as a tool to address systemic inequalities and advance racial equity.

Introduction

June 14, 2017, 12.54 am: most residents of the 24-story Grenfell Tower in London were asleep when the first fire alarm sounded.² The fire service arrived within minutes, and for the first hour, residents were instructed to “stay in place and move to a safer room where there is no or less smoke, close doors and keep them closed.”³ However, the fire spread rapidly to other parts of the tower, engulfing the building due to its highly flammable cladding.⁴ When the evacuation orders came in, about 100 residents were already trapped by the fire and unable to leave their apartments. It was not until November 2017 that the identities of all 72 deaths and 70 physically injured were confirmed by the authorities.⁵ Among them were 53 adults, 18 children and a stillborn baby, mostly immigrants and women. The legal representatives of the victims underlined in the Grenfell Tower fire public inquiry that this incident “was inextricable linked with race,” as the

¹ Full Professor of Administrative Law, Tilburg Law School and Professor of Public Law, Innovation, and Sustainability at Luiss Guido Carli, Rome. I thank the Dutch Science Organization (NWO) for the funding provided (Vidi Project ‘Administrative Vulnerability in the Digital Automated State’).

² From First 999 Call at 12.54am to Last Survivor Leaving the Tower – Grenfell Minute by Minute, *Sky News* (Sept. 5, 2024), <https://news.sky.com/story/what-happened-in-the-grenfell-tower-fire-a-timeline-of-the-tragedy-13208589>.

³ Francis Long, Arnab Majumdar & Holly Carter, *Understanding Levels of Compliance with Emergency Responder Instructions for Members of the Public Involved in Emergencies: Evidence from the Grenfell Tower Fire*, 84 INT’L J. DISASTER RISK REDUCTION 103374 (2023).

⁴ The Grenfell cladding consisted of polyethylene filler and combustible insulation. Following the Grenfell Tower this and other types of combustible claddings have been banned by UK regulation, see Angus Law & Neal Butterworth, *Prescription in English Fire Regulation: Treatment, Cure or Placebo?*, 172 PROC. INST. OF CIV. ENG’RS - FORENSIC ENG’G 61, 61–68 (2019).

⁵ Gordon MacLeod, *The Grenfell Tower Atrocity: Exposing Urban Worlds of Inequality, Injustice, and an Impaired Democracy*, 22 CITY 460 (2018).

majority of the people who died “were people of color.”⁶ The public inquiry revealed a history of neglect and inadequate maintenance by the local council, which viewed the Grenfell tower—named after a colonial leader—as undeserving of further investment.⁷

The Grenfell tower was not an isolated incident. In the United Kingdom and many other Western countries, minority ethnic communities disproportionately face hazardous living conditions, often stemming from their unavoidable reliance on social housing due to longstanding systemic inequities.⁸ Furthermore, these groups are overrepresented in high-rise social housing that is more at risk of having flammable cladding; they experience greater housing disadvantage and are more exposed to poor-quality accommodation and discriminatory landlord-tenant relationships.⁹ Yet, this set of housing inequities—and more specifically, the Grenfell tower fire—is not the result of individual, intentional acts of racism or racist regulation as such. Fire safety regulations in the United Kingdom—or in other Western countries—rarely discriminate explicitly on the grounds of race.¹⁰ The same can be said for modern social housing regulations. Instead, these regulations are largely silent on matters of race, a silence that disproportionately impacts marginalized groups and perpetuates institutional or structural racism.

In the Macpherson report, institutional racism was defined as “the processes, attitudes and behaviors which amount to discrimination through unwitting prejudice, ignorance, thoughtlessness and racist stereotyping which disadvantage minority ethnic people.”¹¹ Institutional racism is “not something that a few people or institutions choose to practice. Instead, it has been a feature of the social, economic and political systems in which we all exist.”¹² Regulatory silence on race perpetuates institutional racism by failing to acknowledge differences in people’s socioeconomic experiences, educate regulatory actors for such disparities, and neglecting to adopt

⁶ BBC, *Grenfell Tower inquiry: Fire ‘inextricably linked with race*, BBC (July 7, 2020), available at <https://www.bbc.com/news/uk-53320082>

⁷ Imran Khan & Partners, *Closing Overarching Submissions on behalf of Core Participants, Grenfell Tower Fire Public Inquiry*, October 10, 2022, available at <https://www.grenfelltowerinquiry.org.uk/> (last accessed on December 30, 2024).

⁸Id.

⁹ Nick Clare, Nigel de Noronha & Shaun French, *What the Grenfell Report Gets Wrong – Structural Racism Is Evident in Access to Safe Social Housing*, THE CONVERSATION (Sept. 11, 2024), <https://theconversation.com/what-the-grenfell-report-gets-wrong-structural-racism-is-evident-in-access-to-safe-social-housing-238377>.

¹⁰ In the European Union, the debate on race has primarily been framed through the lens of anti-discrimination scholarship and shaped by the dominant perspectives and policies on equality promoted by EU institutions. See, for example, MARK BELL, *RACISM AND EQUALITY IN THE EUROPEAN UNION* (2008); ANNA LAWSON, *EUROPEAN UNION NON-DISCRIMINATION LAW AND INTERSECTIONALITY: INVESTIGATING THE TRIANGLE OF RACIAL, GENDER AND DISABILITY DISCRIMINATION* (2016); Thomson M. & Crul M., *The Second Generation in Europe and the United States: How Is the Transatlantic Debate Relevant for Further Research on the European Second Generation?*, 33 J. ETHNIC & MIGRATION STUD. 1025 (2007)

¹¹ Sir William Macpherson, *The Stephen Lawrence Inquiry: Report of an Inquiry by Sir William Macpherson of Cluny* (1999), <https://www.gov.uk/government/publications/the-stephen-lawrence-inquiry> (the MacPherson report was the result of the inquiry into the murder of Stephen Lawrence, a Black teenager killed in a racially motivated attack).

¹² Aspen Institute Staff, *11 Terms You Should Know to Better Understand Structural Racism*, Aspen Institute (July 11, 2016), <https://www.aspeninstitute.org/blog-posts/structural-racism-definition/>.

measures to compensate for systemic disadvantages.¹³ When regulators remain silent on issues of race, they may knowingly or unknowingly overlook the legacy of past discriminatory practices, which remain visible in racial disparities in wealth, homeownership, labor conditions, and access to credit, education, and health.¹⁴ Furthermore, this silence is particularly problematic in today's increasingly polarized and turbulent time in which populist politicians appeal to racial and ethnic resentment.¹⁵ Amid growing polarization, the rise of political representatives who disseminate fear and hatred against ethnic minorities, and the proliferation of populist and "us versus them" narratives in both the EU and the United States, it has become increasingly important to draw attention to the role of regulation in either perpetuating or mitigating institutional racism.¹⁶ According to the European Union Agency for Fundamental Rights, "almost half of Black people living in the EU face racism and discrimination in their daily life, a rise since 2016."¹⁷ This included discrimination when looking for a job, racial profiling by law enforcement authorities, and increased likelihood of leaving school early due to racism encountered within the educational system.¹⁸

This essay understands race as a social and historical construct that, at its most basic level, can be defined as "a concept that signifies and symbolizes sociopolitical conflicts and interests [with] reference to different types of human bodies."¹⁹ Race categorizes individuals according to their supposedly biologically different human characteristics (*e.g.*, skin color) or "any relatively large division of persons that could be distinguished from others on the basis of inherited physical characteristics such as skin pigmentation, blood groups, hair texture and the like."²⁰ This essay does not engage critically with the concept of race. Rather, it emphasizes the need to break the regulatory silence on race by exploring the interaction between regulation and institutional racism in environmental protection, housing, and other power inequalities.

¹³ On racial literacy, see Lani Guinier, *From Racial Liberalism to Racial Literacy: Brown v. Board of Education and the Interest-Divergence Dilemma*, 91 J. AM. HIST. 92, 92–118 (2004).

¹⁴ Until the 1960s, racist housing regulation (redlining) was legal in the United States, see MICHELE DICKERSON, HOMEOWNERSHIP AND AMERICA'S FINANCIAL UNDERCLASS: FLAWED PREMISES, BROKEN PROMISES, NEW PRESCRIPTIONS 191 (2014). Catherine Lee & John D. Skrentny, *Race Categorization and the Regulation of Business and Science*, 44 LAW & SOC'Y REV. 617 (2010). Nissa Finney, James Nazroo, Laia Becares, Dharmi Kapadia & Nathalie Shlomo, *Introduction: The Need for Evidence for Equality*, in RACISM AND ETHNIC INEQUALITY IN A TIME OF CRISIS 1 (eds., Nissa Finney, James Nazroo, Laia Becares, Dharmi Kapadia, and Nathalie Shlomo, 2023). On racial injustice and the use of AI in healthcare, see Khiara M. Bridges, *Race in the Machine: Racial Disparities in Health and Medical AI*, 110 VA. L. REV. 243 (April 2024) (discussing the need to reform the informed consent process to ensure that patients of color are aware that their health is being managed by AI which likely encodes historical racial biases).

¹⁵ Alan Abramowitz & Jennifer McCoy, United States: Racial Resentment, Negative Partisanship, and Polarization in Trump's America, 681 *Annals Am. Acad. Pol. & Soc. Sci.* 137, 137–56 (2019).

¹⁶ See ERIC M. USLANER, NATIONAL IDENTITY AND PARTISAN POLARIZATION 71 (2022).

¹⁷ European Union Agency for Fundamental Rights, Being Black in the EU, (October 25, 2023), available at <https://fra.europa.eu/en/news/2023/black-people-eu-face-ever-more-racism>

¹⁸ *Id.*

¹⁹ Howard Winant, *Race and Race Theory*, 26 ANNU. REV. SOCIOLOGY 169, 172 (2000)

²⁰ A.S. REBER, THE PENGUIN DICTIONARY OF PSYCHOLOGY 606 (1985)

1. Environmental Racism: Louisiana Cancer Alley and Flint

In the United States, between 1955 and 1966, commercial hazardous waste facilities in the USA were disproportionately situated in impoverished and predominantly non-white communities.²¹ Decades later, this situation has not been fully addressed and low-income areas inhabited by marginalized communities both in the United States and other countries continue to be affected by the so-called environmental racism, that is, “environmental policies, practices, or initiatives that disproportionately affect communities owing to their color, include different institutional practices that affect disproportionately the health outcomes and living conditions of people and communities differentially owing to their race and color.”²²

In Louisiana’s Cancer Alley, an area along the Mississippi River spanning from Baton Rouge to New Orleans, the predominantly Black and low-income residents face an exponentially increased risk of developing cancer due to the vicinity of petrochemical industry and its toxic waste facilities.²³ Another example of environmental racism and regulatory silence can be found in the United States in Flint, Michigan, where the mismanagement of the city’s water utility by state administrators resulted in the tragic spike in lead contamination, creating one of the worst lead poisoning crises in the country.²⁴ The water crisis started when city officials switched Flint’s water source from the Flint River, even though that it was known for having multiple problems, such as untreated waste and toxic chemical pollution. City officials attempted to justify the change by pointing to cost savings. Problems were soon reported, and lead contamination was established. The crisis in Flint extended beyond water contamination—it became a public health emergency

²¹ Jon C. Dubin, *From Junkyards to Gentrification: Explicating a Right to Protective Zoning in Low-Income Communities of Color*, 77 MINN. L. REV. 739 (1992). In 1983, the U.S. General Accounting Office published a study establishing that three out of four off-site commercial hazardous waste landfills in eight states in the South were located in predominantly Black communities even though Black residents made up 20% of the region's population, see U.S. GOVT ACCOUNTABILITY OFFICE, RCED-83-168, SITING OF HAZARDOUS WASTE LANDFILLS AND THEIR CORRELATION WITH RACIAL AND ECONOMIC STATUS OF SURROUNDING COMMUNITIES (Jun. 1, 1983) <https://www.gao.gov/products/rced-83-168>, archived at <https://perma.cc/8NQ7-2E5V>. In recent decades, there has been greater citizen awareness regarding the need to protect communities from hazardous materials, see Leora Friedman, *Recommending Judicial Reconstruction of Title VI to Curb Environmental Racism: A Recklessness-Based Theory of Discriminatory Intent*, 32 GEO. ENV’T. REV. 421, 422-23 (2020).

²² Bruno Takahashi, Ella A. Adams & Johanna Nissen, *The Flint Water Crisis: Local Reporting, Community Attachment, and Environmental Justice*, 25 LOCAL ENV’T 365, 365–80 (2020); TANYA MARIA GOLASH-BOZA, RACE AND RACISM: A CRITICAL APPROACH 159 (2nd ed. 2017); Olugbenga Okunade, *The Flint Water Crisis and the Perpetuation of Environmental Racism in Flint, Michigan*, 28 J. OF AFRICAN AM. STUD. 233 (2024).

²³ Idna G. Castellon, *CANCER ALLEY AND THE FIGHT AGAINST ENVIRONMENTAL RACISM*, 32 VILL. ENV’T. L.J. 15 (2021).

²⁴ Nicholas J. Schroeck, *The Flint Water Crisis and Legionella: Harm to Public Health from Failure to Warn*, 18 J.L. SOC’Y 155 (2018).

that was ignored for an extended period, leaving residents to address the problem on their own.²⁵ The Michigan Civil Rights Commission found that “historical, structural, and systemic racism played a significant role in the continuation of the crisis.”²⁶ This incident was part of a larger growing policy battle at the local level over the privatization and mismanagement of crucial urban infrastructure, including water utilities.²⁷

Environmental racism occurs when regulators fail to act to seriously address environmental concerns that disproportionately affect ethnic minorities, trusting private actors to comply with regulations despite the existence of complaints by local Black communities, underestimating the harms of small increments of pollution levels, and allowing science to be used by the industry as a shield against social and redistributive concerns.²⁸ An environmental practice can be viewed as an example of environmental racism when “the predictable distributional impact of that [practice] contributes to the structure of racial subordination and domination.”²⁹ The Louisiana Cancer Alley and Flint exemplify how environmental racism disproportionately subjects marginalized groups to subordination and climate vulnerability. This position of inequality is exacerbated by preexisting health conditions, poor living conditions, unequal access to a clean environment and basic environmental resources, and unequal wealth and power disparities.³⁰ In turbulent times, climate change debates tend to exacerbate environmental racism, underplaying its effects in general and the need for regulatory measures to counter pollution and exposure to other environmental hazards.

2. Wealth Disparities: Housing and Finance

Racial disparities in wealth and opportunity persist even when controlling for education levels or income.³¹ In the United States, a persistent 20:1 wealth gap between Black and White Americans reflects a long history of discriminatory laws and policies that entrenched racial disparities within society.³² In the United States, there is a long history of financial exclusion and banking segregation

²⁵ Peter J. Hammer, *The Flint Water Crisis, KWA and Strategic-Structural Racism*, 18 J.L. SOC'Y 1 (Fall 2018).

²⁶ Layla Chaaoui, *What the Water Crisis in Flint Shows about Racism in Public Health*, HARV. POL. REV. (August 1, 2024), available at <https://harvardpolitics.com/flint-crisis-racism/>

²⁷ M. Emmamian et al., *Can Regulation Promote Environmental Justice?*, REGREV (Nov. 9, 2019) available at <https://www.theregreview.org/2019/11/09/saturday-seminar-does-regulation-promote-prevent-environmental-justice/>; K. Sabeel Rahman, *Infrastructural Regulation and the New Utilities*, 35 YALE J. ON REG. 911 (2018).

²⁸ Tseming Yang, *Old and New Environmental Racism*, 2024 UTAH L. REV. 109 (2024).

²⁹ Gerald Torres, *Introduction: Understanding Environmental Racism*, 63 U. COLO. L. REV. 839, 840 (1992).

³⁰ See Maryum Jordan, *Reflections on Fighting Environmental Racism in St. John the Baptist Parish, Louisiana*, 57 HARV. C.R.-C.L. L. REV. 439 (Fall 2022).

³¹ Darrick Hamilton & William Darity, Jr., *The Political Economy of Education, Financial Literacy, and the Wealth Gap*, 99 FED. RES. BANK ST. LOUIS REV. 59 (2017); see also PATRICK SHARKEY, STUCK IN PLACE: URBAN NEIGHBORHOODS AND THE END OF PROGRESS TOWARD RACIAL EQUALITY (2013).

³² Freeman at 1081.

of Black communities which persist to this day. For example, White banks historically refused to lend to Black families, or did so at a higher interest rate.³³ As a result, Black business owners had to develop their economic activities with less capital and fewer Black families could afford to own a home. Regulation long ignored the particularities of Black capitalism, which was characterized by risky loans, higher costs, and more limited access to finance. Discrimination against credit card applicants and consumers, thus exacerbating systemic economic inequalities and undermining the ability of lower and middle-class families to maintain financial stability.³⁴ Institutional racism has been documented across various regulated fields related to financial wealth on both sides of the Atlantic. For example, in the United Kingdom, ethnic minorities face disproportionately high levels of financial exclusion.³⁵ This is evident in areas such as access to a bank account, difficulties in meeting loan repayments, limited participation in pension schemes, and restricted access to home contents insurance. In Spain, there is evidence of financial discrimination based on factors such as ethnic origin and nationality, resulting in the financial desertification (bank branch closure) of certain neighborhoods and a growing number of unbanked individuals.³⁶ In the Netherlands, there is also empirical evidence of banking discrimination in mortgage-loan applications on the grounds of race.³⁷ A general study on access to financial services across several European countries further revealed an alarming level of discrimination based on ethnicity.³⁸

Unequal financial wealth is broadly connected to home ownership. Historically, in the United States, private contracts and zoning law were used to limit the sale of houses to Black families, prohibit Asian immigrants from purchasing land, mandate racially segregated residential patterns, and impose zoning rules which undermined the quality and value of residential areas.³⁹ The historical imposition of lower-grade zoning on Black neighborhoods allowed the establishment of commercial and industrial activities that produced greater nuisance such as

³³ MEHRSA BARADARAN, *THE COLOR OF MONEY: BLACK BANKS AND THE RACIAL WEALTH GAP* (2017); Ross Levine, Alexey Levkov & Yona Rubinstein, *Bank Deregulation and Racial Inequality in America*, RISK (2012); James T. Lindley, Edward B. Selby & John D. Jackson, *Racial Discrimination in the Provision of Financial Services*, 74 AM. ECON. REV. 735 (1984).

³⁴ Andrea Freeman, *Racism in the Credit Card Industry*, 95 N.C. L. REV. 1071 (May 2017).

³⁵ Roberta Adami, *Financial Exclusion in the UK: Evidence on Ethnicity*, 23 SOC. POL'Y & SOC'Y 529, 529–47 (2024).

³⁶ Beatriz Fernández-Olit, C. Ruza, M. de la Cuesta-González, *et al.*, *Banks and Financial Discrimination: What Can Be Learnt from the Spanish Experience?*, 42 J. CONSUM. POL'Y 303 (2019).

³⁷ Manuel B. Aalbers, *Place-Based and Race-Based Exclusion from Mortgage Loans: Evidence from Three Cities in the Netherlands*, 29 J. URB. AFF. 1 (2007).

³⁸ Stefan Matthias, *Ethnic Discrimination in Europe: Field Evidence from the Finance Industry*, 13 PLOS (e0191959, 1–7). CATALIN-GABRIEL STANESCU & ASRESS ADIMI GIKAY, EDS., *DISCRIMINATION, VULNERABLE CONSUMERS, AND FINANCIAL INCLUSION FAIR ACCESS TO FINANCIAL SERVICES AND THE LAW* (2021).

³⁹ Jon C. Dubin, *From Junkyards to Gentrification: Explicating a Right to Protective Zoning in Low-Income Communities of Color*, 77 MINN L. REV. 739, 740–2 (1993). *See also* James A. Kushner, *Apartheid in America: An Historical and Legal Analysis of Contemporary Racial Residential Segregation in the United States*, 22 HOW. L.J. 547, 561, 562 & n.34 (1979); A. Mechele Dickerson, *Systemic Racism and Housing*, 70 EMORY L.J. 1535 (2021).

pollution, thus exposing their residents to environmental hazards.⁴⁰ While these practices have long been invalidated by courts, marginalized groups continued to experience their effects. In the 1980s, a 14-month journalistic investigation revealed that in 47 cities in the United States, “virtually every predominantly white-occupied housing project was superior in condition, location, services and amenities to developments that house mostly Blacks and Hispanics.”⁴¹ More recently, higher-grade zoning has also proven to be detrimental to Black communities, pricing out and displacing existing low-income residents through gentrification.⁴²

In turbulent times, housing affordability has become a double-edged sword. On the one hand, the staggering prices of houses have been captured by populist politicians who use them to promote polarization and hatred against immigrants viewed as culprits for housing scarcity.⁴³ On the other, as housing affordability crisis has intensified over the last decade in cities across Europe and the United States, the burden has disproportionately fallen on Black renters.⁴⁴

3. Regulatory Silence and Institutional Racism

Regulatory silence regarding institutional racism exists on both sides of the Atlantic, despite Europe’s general reluctance to engage with the US discourse on racial inequities due to differing historical contexts.⁴⁵ The EU Agency for Fundamental Rights has found that “significant proportions of people in the European Union experience discrimination, inequality and social exclusion on a regular basis... based on their...ethnic or minority background, skin color.”⁴⁶ Regulatory blindness to racial inequities takes, nonetheless, a different and possibly more complex shape than the one described in U.S. legal scholarship. First, within the EU, the debate on race has primarily been framed through the lens of anti-discrimination scholarship and the dominant

⁴⁰ Yale Rabin, *Expulsive Zoning: The Inequitable Legacy of Euclid*, in ZONING AND THE AMERICAN DREAM 101, 101 (Charles M. Haar & Jerold S. Kayden eds., 1989). When some of these areas are improved in environmental terms, “environmental gentrification” may take place, see Sarah Fox, *Environmental Gentrification*, 90 U. COLO. L. REV. 803 (2019).

⁴¹ Craig Flournoy & George Rodrigue, *Separate and Unequal Illegal Segregation Pervades Nation's Subsidized Housing*, DALLAS MORNING NEWS (Feb. 10, 1985).

⁴² See Jackelyn Hwang & Lei Ding, *Unequal Displacement: Gentrification, Racial Stratification, and Residential Destinations in Philadelphia*, 126 AM. J. SOC. 354 (2020). On how fair housing measures can minimize the harms of gentrification, see Olatunde C. Johnson, *Unjust Cities? Gentrification, Integration, and the Fair Housing Act*, 53 U. RICH. L. REV. 835 (2019).

⁴³ Lily Katz, *Majority of U.S. Homeowners and Renters Say Housing Affordability Affects Their Pick for President*, REDFIN (Mar. 11, 2024), <https://www.redfin.com/news/housing-affordability-election-2024/>; David Adler & Ben Ansell, *Housing and Populism*, 43 W. EUR. POL. 344, 344–65 (2020); Ben Ansell & Asli Cansunar, *The Political Consequences of Housing (Un)Affordability*, 31 J. EUR. SOC. POL'Y 597, 597–613 (2021).

⁴⁴ Matthew M. Brooks, *Persistent Disparities in Affordable Rental Housing among America's Ethnoracial Groups*, 113 SOC. SCI. RES. 102828 (2023).

⁴⁵ Livia Gershon, *Racism and American Exceptionalism*, JSTOR DAILY (February 26, 2016), available at <https://daily.jstor.org/american-exceptionalism/>

⁴⁶ FRA, SECOND EUROPEAN UNION MINORITIES AND DISCRIMINATION SURVEY (EU-MIDIS II) MUSLIMS – SELECTED FINDINGS (2017), available at https://fra.europa.eu/sites/default/files/fra_uploads/fra-2017-eu-minorities-survey-muslims-selected-findings_en.pdf.

perspectives and policies on equality promoted by EU institutions.⁴⁷ This perspective emphasizes the prohibition of direct and indirect discrimination, but often overlooks institutional racism and historical inequities. Second, a significant body of research in the EU on racial inequities has focused on the intersection of religion and race, delving particularly into the discrimination faced by Muslim individuals or with names perceived as “Arabic.”⁴⁸ Consequently, contrary to what has been described in U.S. literature, the role of phenotypes and their impact on an individual’s life and ability to exercise rights has, until recently, been understudied and rarely discussed in the context of regulation.⁴⁹ Third, there is potentially less available data on race and institutional racism in Europe. Race reporting is not common and ethnicity is legally classified as personal data, making racial categorization infrequent and often considered illegal. However, this does not negate the reality that race is often implicitly assumed on the grounds of the surname or nationality, and used by both public and private actors to discriminate against citizens. In 2022, the Dutch government publicly acknowledged that this occurred in the 2021 Childcare benefits scandal, in the context of which thousands of families were wrongfully accused of welfare fraud by the Dutch Tax and Customs Administration.⁵⁰ The French Defender of Rights, an independent constitutional authority, also acknowledged in 2020 the existence of similar structural racism in many areas of French society, disproportionately affecting immigrants of color.⁵¹

Regulatory silence can exacerbate institutional racism in different ways. First, when regulators do not speak on matters of race, their silence allows deregulatory, outsourcing, and privatization policies to prioritize other values such as economic interests over the safety of residents, their access to affordable and safe housing, and their ability to exercise fundamental

⁴⁷ See, e.g., MARK BELL, RACISM AND EQUALITY IN THE EUROPEAN UNION (2008); ANNA LAWSON, EUROPEAN UNION NON-DISCRIMINATION LAW AND INTERSECTIONALITY: INVESTIGATING THE TRIANGLE OF RACIAL, GENDER AND DISABILITY DISCRIMINATION (2016); TIMO MAKKONEN, EQUAL IN LAW, UNEQUAL IN FACT: RACIAL AND ETHNIC DISCRIMINATION AND THE LEGAL RESPONSE THERETO IN EUROPE (2012); Thomson M. & Crul M., *The Second Generation in Europe and the United States: How Is the Transatlantic Debate Relevant for Further Research on the European Second Generation?*, 33 J. ETHNIC & MIGRATION STUD. 1025 (2007)

⁴⁸ Nancy Foner, *Is Islam in Western Europe Like Race in the United States?*, 30 SOCIOLOGICAL FORUM 885 (2015).

⁴⁹ Javier G. Polavieja, Bram Lancee, Maria Ramos, Susanne Veit & Ruta Yemane, *In Your Face: A Comparative Field Experiment on Racial Discrimination in Europe*, 21 SOCIO-ECON. REV. 1551.

⁵⁰ Hanneke Felten et al., *Wat werkt in de aanpak van institutioneel racisme* [What works in addressing institutional racism], KENNISPLATFORM INTEGRATIE & SAMENLEVING (2021), available at https://www.kis.nl/sites/default/files/2022-06/wat_werkt_in_de_aanpak_van_institutioneel_racisme-def.pdf; European Commission, Institutional Racism in the Netherlands, European Commission (May 2, 2021), available at https://migrant-integration.ec.europa.eu/library-document/institutional-racism-netherlands_en (“It has been proven that someone with a Dutch name is more likely to pass the first round of a selection process than someone with, for example, an Arabic-sounding name. Study after study shows that, so it is clear that this is institutional racism”).

⁵¹ Défenseur des droits, *Rapport: Discriminations et origines: l'urgence d'agir* [Report—Discrimination and Origins: The Urgent Need for Action], Défenseur des droits (2020), available at https://www.defenseurdesdroits.fr/sites/default/files/2023-10/ddd_rapport_discriminations-origine_2020_synthese_20200615.pdf

socioeconomic rights.⁵² This has been visible in the sectors of housing, prison and school privatization, and the outsourcing of social welfare assistance.⁵³ In the case of the Grenfell tower fire, the victims were failed by decades of outsourcing and deregulation, poor management of buildings, prioritization of cost saving over safety.⁵⁴ “The [Grenfell] fire was fed by the broken housing system [and] the racism that perpetuates inferior infrastructure and safety standards for people of color.”⁵⁵ Deregulation and privatization shift resources from redistributive wealth policies which could mitigate the legacy of racial injustice to the hands of private contractors.⁵⁶

Second, institutional racism, like other forms of structural inequality, operate largely by allowing “the concentration of economic, social, and political power through softened legal constraints on the one hand, and imbalanced background legal rules on the other.”⁵⁷ This essay illustrated this element with two examples: first, environmental racism, where powerful industries have been allowed to place a disproportionate environmental burden on low-income and Black populations, which has not been countered by sufficient regulatory measures; second, the existence of blind spots regarding wealth imbalance regarding access to housing and finance due to historical inequities. Regulatory structures that discriminate subtly or indirectly certain groups may do so without an intent to harm, but merely due to a lack of knowledge or sensitivity.⁵⁸ However, when established constellations of power and inequality are left unnoticed, they are seen as natural, and

⁵² On land use deregulation and its impact on low-income populations and racial segregation, see Richard C. Schragger, *The Perils of Land Use Deregulation*, 170 U. PA. L. REV. 125 (2021); On financial deregulation, the racial wealth gap, and how neoliberalist policies have constrained the ability of regulators to direct public resources toward eradicating unequal access to housing, healthcare, education, and infrastructure, see Cary Martin Shelby, *Racism as a Threat to Financial Stability*, 118 NW. U. L. REV. 755 (2023). On the privatization of prisons and the exacerbation of historical racial inequalities, see Laura I. Appleman, *Cashing in on Convicts: Privatization, Punishment, and the People*, 2018 UTAH L. REV. 579 (2018) (“privatized corrections has well-established roots traceable to slavery, Jim Crow, and current racially-based inequities.”)

⁵³ David A. Super, *Privatization, Policy Paralysis, and the Poor*, 96 CAL. L. REV. 393 (April 2008). For a comparative perspective on outsourcing in social welfare, see Sofia Ranchordás & Ymre Schuurmans, *Outsourcing the Welfare State: The Role of Private Actors in Welfare Fraud Investigations*, 7 EUR. J. COMP. L. & GOVERNANCE 5, 5–42 (2020).

⁵⁴ For example, in 1985, Margaret Thatcher’s government had reduced over 300 pages of existing building regulations to 27 pages in an effort to cut red tape, assisting the industry to meet new regulations with a guidance document which did not require cladding on buildings to be fireproof. See William Wallis, Joshua Oliver & Jim Pickard, *Incompetence, Dishonesty and Greed: Key Findings of Grenfell Report*, *Financial Times* (Sept. 4, 2024), <https://www.ft.com/content/2ac45a44-661d-4e3b-829f-c91a4957066e>.

⁵⁵ David Madden, Editorial: A Catastrophic Event, 21 *City* 1, 1–5 (2017); See also Daniela Nadj, *Deregulation, the Absence of the Law and the Grenfell Tower Fire*, 5 QMHRR 1 (2019); JOHN PRESTON, GRENFELL TOWER: PREPAREDNESS, RACE AND DISASTER CAPITALISM 38 (2019).

⁵⁶ Jon Michaels, *Deforming Welfare: How the Dominant Narratives of Devolution and Privatization Subverted Federal Welfare Reform*, 34 SETON HALL L. REV. 573 (2003). See also Daniela Nadj, *Deregulation, the Absence of the Law and the Grenfell Tower Fire*, 5 QMHRR 1 (2019); JOHN PRESTON, GRENFELL TOWER: PREPAREDNESS, RACE AND DISASTER CAPITALISM 38 (2019).

⁵⁷ K. Sabeel Rahman, *Constructing and Contesting Structural Inequality*, 5 CRITICAL ANALYSIS L. 99, 101 (2018).

⁵⁸ Victoria J. Haneman, *Contemplating Homeownership Tax Subsidies and Structural Racism*, 54 WAKE FOREST L. REV. 363, 368 (2019).

become accepted templates for regulatory practices.⁵⁹ This creates a self-reinforcing cycle that is difficult to break, particularly when historical data—laden with these biases—is used to train AI models, thereby perpetuating existing socioeconomic inequities.⁶⁰

Third, existing regulatory policy methods (*e.g.*, cost-benefit analysis) assess the impact of regulation on stakeholders primarily through quantification and objective metrics which fail to encompass the legacy of historical discrimination and the different experiences of non-White communities.⁶¹ Traditional approaches to cost-benefit analysis (CBA), designed to be neutral towards non-quantifiable factors, can obscure the unequal distribution of costs and benefits of regulation across different groups.⁶² An example of this failure to counter institutional racism in regulatory policy is CBA’s reliance on the concept of willingness to pay and the principle of compensation. Daniel Farber, criticizing this approach, has proposed instead to shift the focus of this methodology to issues of unequal exposure and vulnerability to remedy the plight of disadvantaged communities.⁶³ This perspective shifts the focus to the historical power imbalances that are sustained by the absence of institutional compensatory mechanisms and the lack of adequate research on race and regulation.

More recently, race has gained greater visibility in regulatory policy through the introduction of racial equity impact assessments in some parts of the United States, including District of Columbia, King County (Washington), Seattle, Iowa and Connecticut (minority impact assessment), St. Paul (Minnesota).⁶⁴ This type of assessment assists regulators and communities make decisions about proposed bills by inquiring how they will impact “Black, Indigenous, and other residents of color.”⁶⁵ Racial equity impact assessments include a background investigation on current racial inequities, relevant history and racial trauma, media perspectives on the topic, and civic participation in order to establish whether the bill will amplify the voices of Black, Indigenous, and other residents of color.⁶⁶ Initially developed to address racial disparities in the

⁵⁹ Ian F. Haney Lopez, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 YALE L.J. 1717, 1724 (2000).

⁶⁰ Sandra G. Mayson, *Bias In, Bias Out*, 128 YALE L.J. 2218 (2019); VIRGINIA EUBANKS, *AUTOMATING INEQUALITY: HOW HIGH-TECH TOOLS PROFILE, POLICE, AND PUNISH THE POOR* (2017).

⁶¹ For an analysis of the different political rationales underpinning cost-benefit analysis, see Jonathan S. Gould, *Cost-Benefit Analysis in Polarized Times*, 75 ADMIN. L. REV. 695 (Fall 2023).

⁶² *Id.* at 705.

⁶³ Daniel A. Farber, *Inequality and Regulation: Designing Rules to Address Race, Poverty, and Environmental Justice*, 3 AM. J. L. & EQUALITY 2 (2023).

⁶⁴ Council Office of Racial Equity, Racial Equity Impact Assessments, available at <https://www.dcraciaequity.org/racial-equity-impact-assessments>

⁶⁵ For a list of recent racial equity impact assessments in the District of Columbia, see Council Office of Racial Equity, *2023-2025 Council Period 25*, available at <https://www.dcraciaequity.org/reia-database> (last accessed on January 2, 2025).

⁶⁶ Council Office of Racial Equity, Racial Equity Impact Assessments, available at <https://www.dcraciaequity.org/racial-equity-impact-assessments> (last accessed on January 2, 2025).

criminal justice system, these assessments predict the potential racial effects of new legislation. Currently, racial impact statements are primarily informational and do not require further action if they predict disproportionate impacts on minorities. During the Biden Administration, several racial equity measures were included in the Executive Order 13985 with the aim of addressing systemic racism and persistent poverty among certain racial groups.⁶⁷ In the United Kingdom, an equality impact assessment, defined as “an evidence-based approach designed to help organizations ensure that their policies, practices, events and decision-making processes are fair and do not present barriers to participation or disadvantage any protected groups from participation” is required for various types of new policies under the Equality Act 2010 (e.g., strategic decision-making, funding policies).⁶⁸

Finally, regulation remains silent regarding institutional racism due to the lack of racial literacy and the availability of means to reform institutional constraints.⁶⁹ When regulators have sought to address issues related to race (e.g., mandating the registration of race-related information), they have often done so in unscientific and reductive ways, failing to recognize that race is a socially constructed classification rooted in colonial histories, devoid of biological basis. Developing racial literacy is therefore critical for addressing existing racial inequities. This could include novel ways of gathering information on experienced racial inequities, including citizen science. Additionally, regulators could also critically examine power dynamics—both in relation to specific racial groups and within those groups—to uncover how these dynamics perpetuate inequities.

Conclusion

Race has received limited attention in regulatory studies. While contemporary laws and regulations seldom permit explicit racial discrimination, institutional racism persists due to entrenched power inequities. Regulators have been mostly silent about these inequities, often under the mistaken belief that color-blind policies and economic rationales could deliver fair and objective regulations for all regulatees.⁷⁰ The result instead has been regulation that overlooks the

⁶⁷ Executive Order on Advancing Racial Equity and Support for Underserved Communities through the Federal Government, January 20, 2021, White House, available at <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-advancing-racial-equity-and-support-for-underserved-communities-through-the-federal-government/>.

⁶⁸ UK Research and Innovation, Using Equality Impact Assessments, UKRI (September 25, 2024), available at <https://www.ukri.org/what-we-do/supporting-healthy-research-and-innovation-culture/equality-diversity-and-inclusion/esrc/esrc-equality-impact-assessments/> (last accessed on January 2, 2025).

⁶⁹ Kendrick B. Roberson, *Insidious Racism and Institutional Constraints: Evidence from National and Local Case Studies in the United States*, 11 HUMANIT. & SOC. SCI. COMM. 905 (2024).

⁷⁰ Paola Coletti & Claudio M. Radaelli, *Economic rationales, learning, and regulatory policy instruments*, 91 PUB. ADMIN. 1056 (2013)

complex interplay between race and regulation. This essay emphasized the importance of addressing historical racial inequities across regulation.

In turbulent times, regulators—particularly, those shielded from political influence—can play a crucial role in promoting racial justice, addressing structural inequalities, and leveraging regulatory instruments and tools to empower rather than to disempower ethnic minorities. The first step in this direction is to expose and challenge the underlying and accumulated regulations, policies, and practices that have, over the decades, subordinated ethnic minorities, enabling environmental racism, financial exclusion, housing insecurity, and unequal access to health and education.⁷¹

⁷¹ Sabeel Rahman FN28 at 103.