ments. A lengthy analysis of current constitutional doctrine, therefore, might be dated before the ink dries. Whatever ends constitutional doctrine seeks to serve, however, it cannot serve those ends if it is steeped in faulty assumptions about the way the world works, especially the workings of the human mind.

**Private Bias and Equal Protection**

Courts have long invoked the Equal Protection Clause of the Fourteenth Amendment, which prohibits the states from denying any person the equal protection of the laws, to invalidate racially discriminatory laws, and to prohibit racially discriminatory state action. In the most straightforward case, when a state explicitly classifies a group of people by race, the classification is “suspect” and subject to “strict scrutiny” under the Equal Protection Clause. Under strict scrutiny, a racial classification is constitutionally valid only if it is necessary to further a “compelling” state interest.

*Palmore v. Sidoti* is a leading case illustrating the application of strict scrutiny doctrine to evaluate a race-based claim of equal protection. In *Palmore*, a Florida court in 1980 granted custody of a three-year-old girl to her White mother upon her parents’ divorce. The following year, the father sought custody of the child by petitioning to modify the prior judgment on the basis of changed conditions, including the fact that his former wife was living with, and subsequently married, a Black man, Clarence Palmore, Jr. Even though the Florida court admittedly had no reason to doubt the mother’s devotion to her daughter, the adequacy of housing facilities, or the respectability of her new spouse, it ordered custody of the child transferred to her father. The primary rationale for the court’s order was that the
If a child would suffer social stigmatization if she remained in an interracial household with her mother.

Applying strict scrutiny, the Supreme Court found that the Florida court’s order to transfer custody violated the Equal Protection Clause. In reversing the judgment, the Supreme Court noted the persistence of racial prejudice in America, acknowledging the “risk that a child living with a stepparent of a different race may be subject to a variety of pressures and stresses not present if the child were living with parents of the same racial or ethnic origin.” Nevertheless, in a unanimous and strongly worded opinion, the Court held that “[t]he effects of racial prejudice, however real, cannot justify a racial classification removing an infant child from the custody of its natural mother.” While recognizing that “private biases may be outside the reach of the law,” the Court stressed that “the law cannot, directly or indirectly, give [these biases] effect.”

The Court’s unusual interference with a state custody decision in *Palmore*, including its determination that the state’s parens patriae interest in the welfare of children was not compelling, reveal the strength of its resolve to prohibit the use of racial classifications that give effect to private bias in courts of law.

Someone representing the interests of a Black person who was shot by a race-conscious defender could seek to keep the defendant from raising race-based defenses by arguing that such defenses violate the equal protection clause. To advance the equal protection argument under *Palmore*, one must first clear two more technical hurdles—namely, the litigant must demonstrate the requisite state action and the existence of a racially restrictive category—and then he or she must prove that enforcement of the category (i.e., permitting the race-conscious
defendant to assert his race-based defense) would “give effect to private bias.” Private bias does not always advertise its existence, however. We must sometimes reach beyond the obvious to root it out.

THE REASONABLE RACIST

The Reasonable Racist presents the simplest case. In arguing that he should be exonerated on the ground that racist responses are typical—and thus reasonable—the Reasonable Racist openly admits his racial bias. Thus, to hear the Reasonable Racist’s claim, the judge would have to employ a racial classification that gives effect to racial bias. Under *Palmore*, a judge who employs such a classification—even for a very good reason—infringes the Equal Protection Clause of the Fourteenth Amendment.

THE INTELLIGENT BAYESIAN

Unlike the Reasonable Racist, the Intelligent Bayesian does not admit to personal bias. Since he claims that his racial fears rest on a valid factual basis, he may contend that a court that permits him to stress or merely discretely allude to the racial factor in proving his reasonableness would not be employing an impermissible racial classification that “gives effect to private bias” in violation of *Palmore*.

We can reject this argument under either of two rationales. First, we can question the Bayesian’s objectivity in selectively rejecting or ignoring evidence that conflicts with a cultural stereotype. Recall the studies showing that once an individual internalizes a tacitly transmitted cultural stereotype, he unconsciously interprets experiences to be consistent with the underlying stereotype, selectively assimilating facts that validate the
stereotype while disregarding those that do not. To the extent that the Bayesian aggressively assimilates negative statistical information about Blacks, while remaining oblivious to contradictory or positive statistical information, he undermines his claim of objectivity. Countenancing the Bayesian’s argument under these circumstances would give effect to private bias.

Second, even conceding the possibility of a genuinely bias-free Bayesian, allowing him to emphasize the racial factor would give effect to racial bias in the jury box. Recall that there is compelling empirical evidence that racial bias routinely infects jury deliberations, suggesting that the men and women charged with evaluating the reasonableness of the defendant’s actions are anything but bias-free Bayesians. Although the racial identity of the Black victim will inevitably become clear in the course of the trial, playing on this factor may exacerbate the (often unconscious) bias that it taps in a White jury.

**THE INVOLUNTARY NEGROPHOBE**

At first blush, the claim of the Negrophobe may seem an easy case in view of *Palmore*, for a phobia about Blacks may be a paradigmatic expression of private bias. The Negrophobe, however, may convincingly disclaim having consciously harbored any racist sentiments before the assault that induced her disorder. In fact, the hallmark of the Involuntary Negrophobe’s self-characterization is the absence of racial animus prior to the catalyzing incident. The judge presiding over the Ruth Jandrucko hearing, for example, ruled that Ms. Jandrucko showed no apparent racial prejudice before her assault and hence was not exercising a “private racial prejudice” in her pathological paranoia of Blacks. The racial factor, contends the Negrophobe, is merely coincidental. It is something her psyche randomly
seized upon and involuntarily associates with the trauma of the earlier assault.

But the characterization of the Negrophobe’s pathological paranoia as a case of involuntary bias may be too glib. Recall the “visceral, desperate fear of all strange Black and brown men” that Professor di Leonardo felt in the weeks following her rape by a Black man. These emotions apparently did not stem from any conscious racial animus: di Leonardo recounts that after her rape she “ended up, with no small sense of irony, lecturing cops, co-workers, relatives, and friends alike” on the falsity of the stereotype about black men and interracial rape. Yet, in spite of her unflagging personal and professional commitment to the fight against racial prejudice, she developed an uncontrollable fear not, significantly, of all strange men, but of “all strange black and brown men.” Thus, at the same time that we accept the Negrophobe’s claim that she was not consciously biased before the catalyzing event, we may wonder whether unconscious bias fueled the peculiar phobia developed after the event.

The problem with the Negrophobe’s argument is its suggestion that “private bias” must manifest self-conscious racial prejudice to be unconstitutional. This approach rests on an impoverished understanding of the nature of the evil—invidious racial discrimination—that the Equal Protection Clause seeks to eradicate.

Beyond “conscious bias.” A key insight of modern psychology is that our minds are often not conscious of what directs them. Especially stereotypes, as I show in chapter 6, operate largely in the realm of the unconscious. Accordingly, to successfully eliminate governmental action that gives effect to racial bias, equal protection doctrine must accommodate the increasingly incontrovertible insights of modern psychology into unconscious discrimination.
We need only consider how often we act on unconsidered assumptions about the world to understand the prevalence of unconscious motivation. A student who traverses a hallway between two classrooms while intently perusing the sports page of her hometown newspaper “assumes” that the floor will be there to receive each successive footfall. Her failure to forsake the box scores for an unobstructed view of the familiar floor beneath her is deeply rooted in this assumption, and the possibility that the floor might not be there does not “occur” to her, that is, is not present in her conscious mental processes. Assumptions of this kind, called “tacit assumptions,” are psychological states that shape and direct an individual’s behavior without being present in her consciousness.\textsuperscript{14}

Especially instructive insight regarding the operation of tacit assumptions comes from experiments roughly measuring the relative strength of an animal’s “assumptions”:

If a rat is trained for months to run through a particular maze, the sudden interposition of a barrier in one of the channels will have a very disruptive effect on its behavior. For some time after encountering the barrier, it will be likely to engage in random and apparently pointless behavior, running in circles, scratching itself, etc. The degree to which the barrier operates disruptively reflects the strength of the “assumption” made by the rat that it would not be there. If the maze has been frequently changed, and the rat has only recently become accustomed to its present form, the introduction of a barrier will act less disruptively. In such a case, after a relatively short period of random behavior, the rat will begin to act purposively, will retrace its steps, seek other outlets, etc. In this situation the “assumption” that the channel would not be obstructed has not been deeply etched into the
rat’s nervous system; it behaves as if it “half-expected” some such impediment.\textsuperscript{15}

In the terms of the maze analogy, racial stereotypes are channels laid out by our cultural belief system. We first traverse these culturally embedded channels in response to either explicit lessons or “tacit understandings.”\textsuperscript{16} Tacit understandings instill stereotypes in ways that escape conscious detection, causing us to traverse the channels largely unconsciously. For instance, although local and national news anchors do not openly announce that Blacks are “prone to violence” on the nightly news, the relentless and selective representation of Black violence in the mass media tacitly transmits the same message. Because stereotypes saturate our society, and because our culture often rewards individuals for exaggerating the differences between themselves and members of other racial groups,\textsuperscript{17} we travel these channels repeatedly. If an individual has never known a Black professional or has a mental medley of Black images primarily composed of the comedian, criminal, musician, or athlete stereotypes, no unexpected barriers have materialized to force a detour in his development of negative attitudes toward Blacks. Moreover, even if this individual encounters Blacks who do not conform to the cultural stereotype, he will often reject or ignore such counterevidence rather than retrace his steps to explore other ways of thinking about Blacks.\textsuperscript{18} In time, these stereotypes become deeply etched in the individual’s psyche, conditioning and directing his behavior without his awareness. (Chapter 6 gives a detailed account of the cognitive underpinnings of unconscious bias.)

*The relationship between unconscious bias and assault-induced Negrophobia.* Once we recognize that racially discriminatory
behavior is directly and inevitably rooted in unconscious discrimination fostered by our society’s tacit assumptions and biases, the rationale for denying the Negrophobe’s claim becomes clear. Regardless of how racially liberal Ms. Jandrucko, Professor di Leonardo, and our hypothetical Negrophobe consciously believe themselves to have been before their respective assaults, they undoubtedly harbored some unconscious bias that ripened into Negrophobia after the assaults. Virtually every person in our society consciously or unconsciously compiles a mental library of Black stereotypes over the course of his or her life. The belief that Blacks are prone to commit violent assaults is among the most powerful and frightening myths in this library. Consequently, being assaulted by a Black person cannot help but resonate with preexisting stereotypes in profound and unpredictable ways. The resonance may vary in intensity and duration, ranging from a mild and ephemeral hypersensitivity to a severe and lasting phobia. But whatever the magnitude of this resonance in any particular case, the possibility of any race-based reaction at all depends entirely on the preexistence of racial bias, conscious or unconscious.

An alternative explanation for the Negrophobe’s assault-induced fear of all Blacks essentially asserts that the Negrophobe “just happens” to strongly associate one of the assailant’s prominent traits (skin color) with the attack. According to this argument, any one of the assailant’s physical traits—his hair color, height, or facial hair, for instance—is equally likely to precipitate a phobic response in a victim. Thus, the Negrophobe’s response stems not from racial bias, but from an arbitrary linkage in her subconscious between the assault and the attacker’s skin color.

Were race-based phobias the products of random and nondiscriminatory mental connections, we would expect a wide range of