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Good Faith Discrimination

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GOOD FAITH DISCRIMINATION

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ABSTRACT

The Supreme Court's current doctrinal rules governing racial discrimination and affirmative action are unsatisfying. They often seem artificial, internally inconsistent, and even conceptually incoherent. Despite a long and continuing history of racial discrimination in the United States, many of the problems with the Supreme Court's racial jurisprudence stem from the Court's willingness to view the current distribution of societal resources as establishing a colorblind, race-neutral baseline that can be used to make equality determinations. As a result, the current rules are as likely to facilitate racial discrimination as to prevent it, or to remedy the lingering effects of past discrimination.

Because the Equal Protection Clause contains few judicially manageable standards for distinguishing between constitutional imperatives and legislative policy preferences, the Supreme Court should normally defer to the representative branches for the formulation of prudent racial policies. However, the Supreme Court's insulation from immediate political pressure may give the Court greater relative institutional competence than the representative branches in making one type of determination that is relevant to enforcement of the Equal Protection Clause. Utilizing its power of judicial review, the Court could disqualify from constitutional cognizance non-remedial equality arguments that were not being asserted with good faith sincerity.

A subjective standard of good faith could be used to reject arguments that were consciously motivated by a desire to sacrifice the interests of one race in order to benefit the interests of another. In addition, an objective standard of good faith could be used to reject arguments whose unconscious racial motivations were revealed by contemporary theories of cognitive dissonance and implicit bias. Although race remains too salient a social category for the concept of colorblind, race neutrality to have much meaning in contemporary United States culture, constitutional recognition of only good faith racial motivations might be able to compensate for the ongoing subtle forms of structural discrimination that are embedded in the current distribution of resources.

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INTRODUCTION

The issue is presented perhaps most clearly in *Schuette v. Coalition to Defend Affirmative Action*.[1] Justice Sotomayor wrote an impassioned dissent, arguing that a Michigan voter initiative amending the state constitution to ban affirmative action was itself unconstitutional—comprising merely the most recent incarnation of a long and oppressive tradition of discrimination against racial minorities in the United States.[2] Objecting to that characterization, Chief Justice Roberts concurred with the majority's decision to uphold the constitutionality of the Michigan ban and defended the honor of Michigan voters—insisting that they were simply expressing a good faith policy disagreement about the desirability of racial affirmative action.[3] Both sides of the affirmative action debate commonly claim to be promoting racial equality, and both often accuse the other of harboring a secret commitment to discriminatory racial preferences. However, because their starting assumptions are so dramatically different, one cannot help but wonder about the sincerity of those on both sides of the debate. And that, in turn, suggests a better standard for determining the constitutionality of racial discrimination than the standard currently used by the Supreme Court. Perhaps the constitutionality of racial claims should simply rest on the good faith of those who are asserting them.

The current constitutional doctrine governing racial discrimination is notoriously unsatisfying. The Supreme Court's equal protection decisions often seem artificial, internally inconsistent, and even conceptually incoherent. That is because they rest on a

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[1] 134 S. Ct. 1623 (2014).
[2] *Id.* at 1651–56 (Sotomayor, J., dissenting).
[3] *Id.* at 1638–39 (Roberts, C.J., concurring).

model of colorblind race neutrality that is simply implausible in a culture where the influence of race remains as pervasive as it has always been in the United States. However, once freed from the unhelpful rhetoric of race neutrality, equality jurisprudence can focus on the more meaningful question of when the culture's inevitable uses of race—whether explicit, tacit, or unconscious—should be viewed as constitutionally permissible. Rather than applying the Court's current doctrinal framework, my belief is that this question can best be answered by asking whether the proponents and opponents of the racial claims at issue are sincere in their stated commitment to equality.

If the competing arguments in a racial discrimination or affirmative action case are sincere, they should both be deemed constitutionally legitimate. A reviewing court should then simply defer to the political process for resolution of the competing good faith claims. Similarly, if both arguments entail insincere efforts to camouflage raw racial preferences with a bad faith overlay of mere equality rhetoric, a reviewing court should again defer. Although bad faith arguments are constitutionally suspect, the lack of any judicially manageable standard for distinguishing among them suggests that a court should allow the political process to resolve the competing claims to racial spoils. However, when one side is sincere and the other is proceeding in bad faith, an occasion arises for judicial intervention in the name of the equality principle. The Equal Protection Clause does not authorize those who seek to subvert the concept of equality to do so by exploiting those who seek to promote it. Accordingly, one credible function of judicial review can be to protect those who play by the rules from those who wish to cheat.

Sometimes the good faith inquiry will be relatively easy to conduct under a subjective standard, as when a political branch asserts a pretextual concern for property values in order to justify its desire to maintain a regime of racially segregated housing.[4] In such cases, there should be some doctrinal way to recognize that insincerity alone can make such measures unconstitutional. Prior false starts notwithstanding,[5] the Supreme Court's structural insulation from direct political pressure can make a non-ideological Court institutionally more competent than the political branches in identifying and responding to subordinating acts of racial insincerity.

Other times the good faith inquiry will be more difficult, as when Michigan voters chose to ban affirmative action in order to end perceived racial preferences.[6] Such inquiries can be complicated by contemporary theories of cognitive psychology. One insight of cognitive dissonance theory is that, in order to avoid psychological discomfort, even self-interested racial preferences will sometimes be experienced as genuine efforts to promote racial equality. In addition, implicit bias studies have found

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[4] *See* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 264–71 (1977); Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights, 373 F. Supp. 208, 211 (N.D. Ill. 1974) (concern with property values precluded municipal zoning decision that maintained residential segregation from constituting racial classification).

[5] *See Vill. of Arlington Heights*, 429 U.S. at 264–71.

[6] Schuette v. Coal. to Defend Affirmative Action, 134 S. Ct. 1623, 1624 (2014).

that most of us are commonly influenced by racial biases of which we are consciously unaware.[7] The fact that some acts of racial discrimination can be understood, by those who commit them, as sincere efforts to promote racial equality poses a challenge to the utility of inquiries into subjective good faith motivation. In such cases, an objective standard of good faith can be utilized in an illuminating manner if the reviewing court is careful to apply the same sincerity standard to both sides of the racial dispute at issue.

Under the Supreme Court's current doctrinal analysis, only proponents of race-conscious remedies are typically questioned about the sincerity of their equality claims. Opponents are simply assumed to be sincere when they argue in favor of colorblind race neutrality. However, if the sincerity of opponents is actually examined under an objective standard of good faith—rather than simply being assumed—it may turn out that the operative motive in such cases is really to retain a disproportionate share of resources that would otherwise be redistributed to racial minorities for remedial purposes. By resisting the temptation to accept the existing distribution of resources as establishing the equality baseline in those cases, the actual motive behind efforts to maintain the current distribution of resources can be recognized as evidence of bad faith racial discrimination.

Part I of this Article discusses problems with the Supreme Court's current racial jurisprudence. Part I.A describes the governing doctrinal rules. Part I.B explains how those rules can operate in ways that seem artificial, inconsistent, and even incoherent. Part II argues that a standard of good faith sincerity is likely to be better than the Supreme Court's current doctrinal jurisprudence in promoting racial equality. Part II.A describes the proposed good faith standard. Part II.B describes how a subjective standard can be applied to easy cases, and an objective standard can be applied to hard cases involving cognitive dissonance and implicit bias complications. The Article concludes that no legal standard can force a culture to honor equality claims that it wishes to resist, but the candor offered by a transparent good faith sincerity standard may prompt a culture to align its actual racial practices more closely with its rhetorical equality norms.

I. CURRENT DOCTRINE

The Supreme Court's current doctrinal rules governing racial discrimination are largely unsatisfying because they do not do much to prevent contemporary forms of racial discrimination. Rather, they rest on a tacit—but typically dispositive—assumption that the current distribution of societal resources establishes the baseline standard for assessing the presence or absence of constitutionally mandated colorblind race neutrality. As a result, antidiscrimination laws can actually end up perpetuating existing racial inequalities—ironically in the name of promoting racial equality itself.

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[7] Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945, 966 (2006).

Unfortunately, the Court's specific doctrinal rules seem designed more to suppress than illuminate this realization. That, in turn, has the effect of legitimating outcomes that often seem artificial, inconsistent, and even incoherent.

A. Rules

The Supreme Court has adopted a number of doctrinal rules to implement the equality principle that is explicitly applied to states in the Equal Protection Clause of the Fourteenth Amendment,[8] and implicitly applied to the federal government in the Due Process Clause of the Fifth Amendment.[9] The Court has interpreted this equality principle as applying to de jure discrimination by governmental officials, but not to de facto discrimination by private actors.[10] The Court's equality jurisprudence typically requires deference to political resolution of equal protection claims in non-suspect classification cases that do not involve fundamental interests. The Court applies a minimal scrutiny, rational basis standard of review in such cases, and that standard can generally be satisfied by even an attenuated, post-hoc, hypothetical connection between some legitimate governmental interest and the means chosen by the political branch to advance that interest.[11]

When a political branch utilizes a suspect classification such as race to advance its governmental interest, the Court applies a strict scrutiny standard of review.[12] In the equal protection context, strict scrutiny is not automatically fatal.[13] However, as a practical matter, strict scrutiny almost always results in the invalidation of the racial classification at issue.[14] Accordingly, two primary questions must be addressed in resolving equal protection race claims. First, the reviewing court must determine whether the

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[8] U.S. CONST. amend. XIV, § 1 (applying the Equal Protection Clause to states).

[9] U.S. CONST. amend. V; Bolling v. Sharpe, 347 U.S. 497, 499–500 (1954) (finding an implicit equality principle made applicable to the federal government by the Fifth Amendment Due Process Clause).

[10] *See* Keyes v. Sch. Dist. No. 1, Denver, Colo., 413 U.S. 189, 208–09, 212 (1973) (adopting an expansive interpretation of de jure segregation but reaffirming a prohibition on the use of race-conscious remedies to eliminate de facto segregation); *see also* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 17–18 (1971) (same).

[11] *See, e.g.*, FCC v. Beach Commc'ns, 508 U.S. 307, 313–14 (1993) (requiring judicial deference for any "reasonably conceivable state of facts" providing a rational basis and "plausible reasons" for Congress's action).

[12] See Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 201–02 (1995).

[13] *See id.* at 237 (stating that strict scrutiny is not fatal in fact).

[14] The only two cases in which a racial classification has survived strict equal-protection scrutiny are the now-discredited World War II Japanese American exclusion case of *Korematsu v. United States*, 323 U.S. 214, 215–20 (1944), which upheld a World War II exclusion order that led to the internment of Japanese-American citizens; and the now-tenuous affirmative action case of *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003), which upheld the University of Michigan Law School's affirmative action plan as a narrowly tailored means of advancing a compelling interest in student diversity.

political branch has, in fact, used a racial classification to advance its objective. Second, if a racial classification has been used, the court must determine whether the stringent demands of strict scrutiny have been satisfied.[15]

The express use of race as the basis for a governmental action is sufficient to establish the existence of a racial classification that triggers strict scrutiny.[16] However, even facially neutral actions that do not make any explicit reference to race can sometimes constitute racial classifications.[17] In making this determination, it is not sufficient that the actions of a political branch have a mere racially disparate impact. Although such discriminatory effects can establish unlawful discrimination under statutes such as the Civil Rights Act of 1964,[18] for equal protection purposes, a racial classification exists only when the political branch engages in intentional discrimination.[19] The intentional discrimination standard is satisfied when the actuating intent of the political branch is to take an action "because of" its racial effect.[20] However, it is not satisfied when the political branch takes an action "in spite of" an incidental racially disparate impact of which the political branch is merely aware.[21]

Because racial classifications are constitutionally suspect, they will violate the Equal Protection Clause unless they are shown to survive strict scrutiny. In applying the strict scrutiny standard, a reviewing court evaluates the ends/means analysis that the political branch conducted in deciding to use a racial classification. The racial classification will survive strict scrutiny only if the end being pursued by the political branch can be termed compelling, and the use of race is shown to be a narrowly tailored effort to advance that compelling interest.[22] The narrow tailoring prong of this two-part test is often said to require an absence of any race neutral alternative means of advancing the compelling governmental interest at stake.[23]

Strict scrutiny has now invalidated the use of most express racial classifications that, in the past, were used to engage in invidious forms of racial discrimination.[24] As

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[15] *See Grutter*, 539 U.S. at 328; *Korematsu*, 323 U.S. at 216.

[16] *See* Loving v. Virginia, 388 U.S. 1, 6, 11–12 (1967) (applying strict scrutiny to racial classifications and invalidating Virginia's miscegenation statute); *cf. Korematsu*, 323 U.S. at 216 (applying strict scrutiny to racial classification, but upholding the Japanese-American exclusion order).

[17] *See* Schuette v. Coal. to Defend Affirmative Action, 134 S. Ct. 1623, 1640, 1648 (2014).

[18] *See* Griggs v. Duke Power Co., 401 U.S. 424, 429–32 (1971) (applying a disparate impact standard under Title VII).

[19] *See* Washington v. Davis, 426 U.S. 229, 238–48 (1976) (adopting an intentional discrimination standard under the Equal Protection Clause).

[20] Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979).

[21] *See id.* at 278–79 (requiring actuating intent).

[22] *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 326–27 (2003) (describing the strict scrutiny standard).

[23] *See, e.g.*, Palmore v. Sidoti, 466 U.S. 429, 432–33 (1984) (requiring that racial classification be necessary to advance a compelling interest).

[24] *Id.* at 433 (that although racial prejudices may exist, the Constitution cannot sanction state support holding of such biases through law).

a result, contemporary race cases often involve allegations that some facially neutral action nevertheless entails a subtle form of racial discrimination that produces a racially disparate impact. The outcome in these cases tends to turn on application of the Supreme Court's intentional discrimination standard in determining whether a racial classification is present.[25] Other contemporary race cases often raise reverse discrimination challenges by whites to affirmative action programs that make explicit use of race in order to benefit racial minorities.[26] The outcome in these cases tends to turn on application of the strict scrutiny standards. In determining whether to apply strict scrutiny, the Supreme Court has declined to draw any distinction between benign and invidious racial classifications, subjecting both to the same strict scrutiny standard of review.[27]

In applying strict scrutiny to racial affirmative action programs, the Supreme Court has recognized the need for student diversity in the context of higher education as a compelling governmental interest.[28] It has rejected that interest as compelling in the context of primary or secondary education.[29] Earlier cases suggested that a governmental interest in providing a remedy for particularized acts of prior discrimination could also constitute a compelling governmental interest, but a majority of the Justices currently sitting on the Supreme Court has never expressly so held.[30] However, it is also true that the Court has never held that such a remedial interest could not constitute a compelling governmental interest. To the extent earlier cases suggested that remedies for past discrimination could justify the use of racial affirmative action, the Court has stressed that such remedies must be directed at particularized acts of prior discrimination, and could not be mere efforts to remedy general societal discrimination.[31] That

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[25] *See, e.g.*, Washington v. Davis, 426 U.S. 229, 245–48 (upholding the use of a verbal skills exam in hiring Washington, D.C. police officers, despite an adverse, racially disparate impact on black applicants).

[26] *See* Ricci v. Stefano, 557 U.S. 557 (2009) (examining a challenge to the City of New Haven's promotion policy brought by white firefighters).

[27] *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995) (applying strict scrutiny to benign and invidious racial classifications).

[28] *See* Grutter v. Bollinger, 539 U.S. 306, 327–33 (2003) (finding educational diversity a compelling interest).

[29] *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 722–25 (2007) (limiting compelling interest in diversity to higher education).

[30] *Cf. id.* at 720–21 (discussing a compelling interest in remedying past discrimination).

[31] This position was articulated by Justice Powell in *Regents of the University of California v. Bakke*, 438 U.S. 265, 307–10 (1978), and reasserted by Justice Powell in *Wygant v. Jackson Board of Education*, 476 U.S. 267, 274–79 (1986) (plurality opinion). Led by Justice O'Connor, this view has since been adopted by a majority of the full Supreme Court. *See Grutter*, 539 U.S. at 323–25, 330 (citing *Bakke* as rejecting interest in remedying societal discrimination and rejecting racial balancing as "patently unconstitutional"); *see also* Metro Broad., Inc. v. FCC, 497 U.S. 547, 612–14 (1990) (O'Connor, J., dissenting); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 494–96 (1989) (plurality opinion) (rejecting societal discrimination); Johnson v. Transp. Agency, 480 U.S. 616, 647–53 (1987) (O'Connor, J., concurring) (same);

is because the Equal Protection Clause protects individual, rather than group rights.[32] Accordingly, the Court has prohibited the use of racial stereotypes.[33] It has also rejected the use of racial quotas to achieve racial proportionality—for either diversity or remedial purposes—terming such efforts "patently unconstitutional."[34]

B. Problems

As this Section explains, the Supreme Court's current doctrinal rules do not do a good job of preventing racial discrimination. Many of the Court's decisions seem strained and artificial. For example, the Court's distinction between de facto and de jure discrimination in applying the Equal Protection Clause sometimes seems like an artificial effort to legitimize racial discrimination.[35] Moreover, in circumstances where the facially neutral actions of a political branch produce a racially disparate impact, the governing intentional discrimination standard can fail to capture subtle or structural forms of racial discrimination in ways that also make the Court's holdings seem artificial. The Court's efforts to distinguish intentional discrimination from incidental disparate impact seem equally artificial, as does the Court's refusal to distinguish between benign and invidious discrimination in selecting the applicable standard of review.

Other Supreme Court decisions seem inconsistent. In applying strict scrutiny, it is unclear what does and does not constitute a compelling governmental interest, and the Supreme Court's application of that standard sometimes produces results that are difficult to reconcile.[36] In addition, the Court has been inconsistent in deciding whether the narrow tailoring requirement does or does not restrict the use of race to cases in which there is no race neutral alternative,[37] thereby creating additional confusion about the operative standard of review that raises separation of powers concerns. This is particularly problematic in circumstances where the supposed race neutral alternatives alluded to by the Court are more abstract than real.

Some of the Supreme Court's decisions are so internally inconsistent that they pose coherence problems. The Court's prohibition on the use of quotas to promote racial balance ultimately seems incoherent,[38] as does its refusal to permit remedies for general

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Wygant, 476 U.S. at 288 (O'Connor, J., concurring) (same). Most recently, Chief Justice Roberts reiterated this view in *Parents Involved*, 551 U.S. at 732–33 (plurality opinion) (same).

[32] *See Grutter*, 539 U.S. at 323 (asserting that the Equal Protection Clause safeguards individual rights rather than group rights).

[33] *See infra* notes 142–45 and accompanying text (discussing racial stereotyping).

[34] *See Grutter*, 539 U.S. at 330, 334 (deeming racial balance "patently unconstitutional"); *see also* Fisher v. Univ. of Tex., 133 S. Ct. 2411, 2419 (2013) (same); *Parents Involved*, 551 U.S. at 723, 729, 732, 740 (same).

[35] *See* Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 208, 217–20 (Justice Powell lamenting the Court's insistence of distinguishing between de facto and de jure discrimination.).

[36] *See* Girardeau Spann, *Affirmative Inaction*, 50 HOW. L.J. 611, 664–65 (2007).

[37] *See id.* at 614.

[38] *See* Grutter v. Bollinger, 539 U.S. 306, 330 (2003) (holding that the pursuit of racial balance would be unconstitutional if achieved through quotas).

societal discrimination,[39] and to recognize the concept of group rights.[40] In some cases, the Court has even relied on the same racial stereotypes that it purports to be prohibiting. Moreover, the divergent manner in which the Court applies its intentional discrimination standard to claims of white and minority victims seems itself to be racially discriminatory.

1. Artificiality

The Supreme Court has recognized a state action limitation on the scope of the Fifth and Fourteenth Amendment equality principles.[41] As a result, the equal protection guarantee prohibits de jure racial discrimination by government officials but not de facto discrimination by private actors.[42] However, common government involvement in underlying acts that might initially appear to be private makes the distinction between de facto and de jure discrimination quite elusive. In fact, it sometimes appears as if the Supreme Court is manipulating the two categories in ways that end up legitimating racial discrimination. For example, the Court's refusal to extend the southern school desegregation mandate to schools in the north and west resulted from the Court's reliance on the distinction.[43] In *Milliken v. Bradley*,[44] the Court held that the race-conscious pupil assignment strategy that had been used to desegregate southern schools was largely unavailable in the North and West.[45] Unlike southern school segregation, which had been caused by de jure Jim Crow laws and state constitutional provisions, school segregation in the North and West had typically been caused by de facto residential segregation rather than by official laws.[46] As a result, the Equal Protection Clause did not permit the race-conscious, inter-district busing of students between minority inner-city schools and white suburban schools that was necessary for the schools to be integrated.[47] However, as the *Milliken* dissenters emphasized, there was a sufficient amount of official action underlying the creation, maintenance, and funding of northern and western school districts to justify any finding of de jure discrimination that might be needed to permit race-conscious desegregation remedies.[48] Despite the Court's

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[39] *See supra* note 31 and accompanying text.

[40] *See supra* note 2.

[41] *See* The Civil Rights Cases, 190 U.S. 3, 8–19 (1883) (recognizing the "state action" requirement).

[42] *See id.*

[43] *See* Milliken v. Bradley, 418 U.S. 717, 800 (1974) (Marshall, J., dissenting).

[44] *Id.* at 717.

[45] *Id.* at 752–53, 785.

[46] *See, e.g.*, *id.* at 724 (referencing the district court's finding of a pattern of residential segregation).

[47] *See id.* at 732–36, 744–47 (refusing to allow inter-district judicial remedies for de facto school segregation, thereby permitting suburban schools to remain predominantly white and inner-city schools to remain overwhelmingly minority).

[48] *See id.* at 761–62 (Douglas, J., dissenting) (emphasizing the artificiality of the de

rhetoric about local control,[49] it appears the Supreme Court was simply invoking the de facto label in order to enable white suburban parents to ensure that their children would not have to go to school with minority students in inner-city schools. Moreover, as Justice Breyer pointed out in his dissent in *Parents Involved in Community Schools v. Seattle School District No. 1*,[50] it is simply meaningless to label a school district de facto when it has a history of prior de jure discrimination whose effects are still emerging, or when it has escaped a finding of de jure discrimination simply by settling a segregation lawsuit rather than litigating it to conclusion.[51] But the artificiality of some Supreme Court decisions extends beyond the state action issue.

The modern Supreme Court initially interpreted the concept of racial equality as prohibiting actions that produced a racially disparate impact, unless there was some nonracial explanation for the racially correlated consequences of the act.[52] Accordingly, in *Griggs v. Duke Power Co.*,[53] the Court read the antidiscrimination provision of Title VII of the Civil Rights Act of 1964 as adopting a discriminatory effects principle to implement the statute's antidiscrimination provision.[54] If an employment practice such as a standardized test requirement had a disproportionately adverse effect on racial minorities, that practice violated Title VII unless its job-relatedness could be established.[55] A showing of job-relatedness was needed to ensure that the employment practice did not simply perpetuate the effects of prior structural discrimination, such as the history of inferior education provided to racial minorities.[56] Curiously, however, when interpreting the concept of equality in the context of the Equal Protection Clause, the Court rejected the *Griggs* discriminatory effects standard in favor of a constitutional standard that prohibited only discriminatory intent.[57]

In *Washington v. Davis*,[58] the Court held that a verbal skills exam used to select police officers in the District of Columbia did not constitute a suspect racial classification under the Equal Protection Clause.[59] That was true despite the exam's racially disproportionate disqualification of black applicants, and despite the fact that the exam had not been validated to establish its job-relatedness.[60] The Court's decision deviated

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facto/de jure distinction); *id.* at 767–81 (White, J., dissenting) (same); *id.* at 783–98, 805–08 (Marshall, J., dissenting) (same).

[49] *See id.* at 741–44 (discussing local control).

[50] 551 U.S. 701, 803 (Breyer, J., dissenting).

[51] *See id.* at 806, 819–22 (questioning the distinction between de facto and de jure discrimination).

[52] *See* Griggs v. Duke Power Co., 401 U.S. 424, 429–32 (1971).

[53] *Id.* at 424.

[54] *Id.* at 429–31.

[55] *Id.* at 431.

[56] *Id.* at 429–36 (finding disparate impact sufficient to establish Title VII violation).

[57] *See* Washington v. Davis, 426 U.S. 229 (1976).

[58] *Id.*

[59] *Id.* at 246, 250–52.

[60] *Id.* at 233, 235.

from most lower court decisions, which had applied the *Griggs* disparate impact standard to equal protection cases.[61] Nevertheless, the Supreme Court attempted to distinguish *Griggs* by noting that, in the equal protection context, a disparate impact standard could encompass a wide range of discrimination claims, and that Congress should be the branch to authorize such a broad prohibition on racial discrimination.[62]

At a time when stark racial disparities continue to exist in the allocation of virtually all significant societal resources,[63] the *Washington v. Davis* Court's substitution of an intentional discrimination standard for the *Griggs* disparate impact standard seems artificial. For example, in *City of Richmond v. J.A. Croson Co*.,[64] the Court found insufficient historical evidence of intentional race-based discrimination in the construction trades of Richmond, Virginia—the capital of the old Confederacy—even though only 0.67% of municipal construction contracts had been awarded to racial minorities in a city whose population was 50% black.[65] Moreover, the constitutional concept of equality under the *Washington v. Davis* standard now *permits* racial discrimination that is *prohibited* by the statutory concept of equality under *Griggs*. In fact, the very same discriminatory acts by a state employer could violate Title VII but not even constitute a racial classification under the Equal Protection Clause.

Griggs was rooted in the belief that actions having racially discriminatory effects produce harms associated with structural discrimination even if the motives behind those actions are not intentionally invidious.[66] Accordingly, it seems strange for the current Court simply to disregard those effects, and to limit the category of constitutionally cognizable racial classifications to that subset of discriminatory harm that happens to be accompanied by invidious motives. It is like interpreting the criminal law to permit all forms of homicide except that subset of homicides that happens to constitute premeditated murder. In addition, the *Washington v. Davis* Court's suggestion that a political branch rather than the Supreme Court should determine the appropriate scope of the equality principle seems strange coming from that branch of government that normally sees itself as preventing racial discrimination by the political branches.[67]

More recently, the Supreme Court has actually threatened to invalidate the disparate impact provisions of Title VII and other antidiscrimination statutes as violating the equal protection rights of whites. In *Ricci v. DeStefano*,[68] the Court invalidated a

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[61] *See, e.g.*, *id.* at 236 (referencing the Court of Appeals' reliance in *Griggs*).

[62] *Id.* at 238–48 (requiring intentional discrimination for constitutional violation).

[63] *See infra* note 137 and accompanying text (discussing current distribution of resources).

[64] 488 U.S. 469 (1989).

[65] *Id.* at 479–80, 501–06 (1989) (rejecting statistical evidence of historical discrimination in Richmond construction trades); *id.* at 528 (Marshall, J., dissenting) (emphasizing that Richmond was the capital of the Confederacy); *id.* at 561 (Blackmun, J., dissenting).

[66] *See* Griggs v. Duke Power Co., 401 U.S. 424, 429–33 (discussing structural discrimination).

[67] *See* Washington v. Davis, 426 U.S. 229, 248 (declaring that an extension of the rule should await legislative prescription).

[68] 557 U.S. 557 (2009).

decision by the New Haven fire department to reject the racially disparate results of a firefighter promotion exam that had not been validated for job-relatedness.[69] Borrowing from the intentional discrimination precedents of its equal protection jurisprudence, the Court held that there was not a "strong basis in evidence" to believe that use of the exam would violate Title VII.[70] That was because the Court thought the City could probably establish job-relatedness even in the absence of formal validation of the exam.[71]

The Court's holding in *Ricci* effectively reversed the presumption of discrimination that *Griggs* had drawn from the existence of racially disparate impact in Title VII cases and essentially required plaintiffs to negate a default presumption of job-relatedness by establishing what amounts to intentional discrimination. The Court apparently viewed this as a saving construction because it suggested that if Title VII did indeed require the firefighter promotion exam to be rejected because of its disparate impact, Title VII would itself be unconstitutional.[72] The Court reasoned that such race-conscious remedial action under Title VII would constitute intentional discrimination against whites in violation of the Equal Protection Clause.[73] The Court has also given indications that it may be ready to reject or invalidate the disparate impact provisions of other federal statutes, such as the Fair Housing Act.[74] If the Court does indeed hold that disparate impact statutes violate the equal protection rights of whites, it will have eliminated the existing discrepancy between the constitutional and statutory concepts of equality, but it will have done so at the cost of simply ignoring entire categories of actual racial discrimination.

The *Washington v. Davis* Court's insistence on distinguishing between intentional discrimination and mere disparate impact also seems artificial. As Justice Stevens emphasized in his *Washington v. Davis* concurring opinion, the distinction can be elusive because people typically intend the foreseeable consequences of their actions.[75] As a result, the Supreme Court in *Personnel Administrator v. Feeney*[76] adopted a distinction between actuating "because of" intent that did constitute intentional discrimination and incidental "in spite of" intent that did not.[77] The problem is that mixed and undisclosed

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[69] *Id.* at 592–93.

[70] *Id.* at 585.

[71] *Id.* at 587–89.

[72] *Id.* at 583–84.

[73] *Id.* at 563, 582–93 (rejecting a disparate impact claim and borrowing the "strong basis in evidence" standard from equal protection cases).

[74] *See* Mt. Holly v. Mt. Holly Gardens Citizens in Action, 134 S. Ct. 636 (2013) (certiorari dismissed after settlement of case presenting issue of disparate impact under Fair Housing Act); Magner v. Gallagher, 132 S. Ct. 1306 (2012) (same). A petition for certiorari has now been granted in yet a third case raising this issue. *See* Inclusive Cmtys. Project v. Texas Dept. of Hous. and Cmty. Affairs, 747 F.3d 275 (5th Cir. 2014), *cert. granted*, Texas Dept. of Hous. and Cmty. Affairs v. Inclusive Cmtys. Projects, Inc., 135 S. Ct. 46 (2014).

[75] *See* Washington v. Davis, 426 U.S. 229, 252–54 (Stevens, J., concurring).

[76] 442 U.S. 256 (1979).

[77] *Id.* at 278–80 (distinguishing between actuating and incidental intent).

motives can often make the proffered distinction untenable, especially with respect to action taken by collegial bodies such as legislatures or executive agencies.

In *Feeney*, the Court held that an employment preference for veterans did not constitute intentional gender discrimination despite its adverse disparate impact on women job applicants.[78] That was because the legislature was motivated by a desire to reward veterans for their military service, and not by a desire to discriminate against women—whom the legislature admittedly knew would be disadvantaged by the preference.[79] However, the *Feeney* characterization simply ignores the legislature's decision to provide an employment subsidy to a traditionally male category of people who provide a valuable service to society, rather than traditionally female categories such as nurses or kindergarten teachers who also provide valuable services. If one asks *why* the legislature had a preference for soldiers over nurses and kindergarten teachers, it is easy to imagine that the answer might well be "because of" gender, rather than "in spite of" it.

Similarly, in *Village of Arlington Heights v. Metropolitan Housing Development Corporation*,[80] the Supreme Court held that the denial of a rezoning permit for the construction of racially integrated, low-and moderate-income housing in a white, upper-income Chicago suburb did not constitute intentional discrimination.[81] The Court accepted the official assertion that the rezoning denial was motivated by a desire to protect property values and was not motivated by a desire to exclude racial minorities from the community.[82] But once again, if one asks *why* it is that property values would be threatened by granting the rezoning permit, it is easy to imagine that the answer might well be "because of" race, rather than "in spite of" it.

An additional way in which the Supreme Court's intentional discrimination standard seems artificial is in its refusal to distinguish between benign and invidious discrimination in deciding upon the application of strict scrutiny. Prior cases applied a more deferential intermediate scrutiny standard of review to benign racial affirmative action and had reserved the strict scrutiny standard for racial classifications that entailed invidious discrimination.[83] However, the Court expressly overruled those prior decisions in *Adarand Constructors v. Pena*.[84] It held that strict scrutiny applied to

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[78] *Id.* at 280–81.

[79] *See id.* at 278.

[80] 429 U.S. 252 (1976).

[81] *Id.* at 270–71.

[82] *See id.* at 264–71 (finding no intentional discrimination); *see also* Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights, 373 F. Supp. 208, 211 (N.D. Ill. 1974), *rev'd*, 517 F.2d 409 (7th Cir. 1975), *rev'd*, 429 U.S. 252 (1977) (finding motive to maintain property values).

[83] *See* Metro Broad., Inc. v. FCC, 497 U.S. 547, 563–66 (1990) (applying intermediate scrutiny to benign racial classification); *cf.* Fullilove v. Klutznick, 448 U.S. 448, 492 (1980) (finding that benign racial classification satisfied both strict and intermediate scrutiny); *id.* at 517–21 (Marshall, J., concurring) (finding that benign racial classification satisfied intermediate scrutiny).

[84] 515 U.S. 200 (1995).

all racial classifications, whether benign or invidious, because the Equal Protection Clause gave whites as well as minorities the personal right to be free from racial discrimination.[85] The artificiality of the Court's decision to equate benign with invidious racial classifications is captured by the dissent of Justice Stevens, in which he accuses the majority of being unable to tell the difference between a "No Trespassing" sign and a welcome mat.[86] Ironically, the Supreme Court that disregarded disparate impact in order to focus on discriminatory intent ultimately refused to inquire into the nature of that very same intent in deciding what standard of review to apply. As a result, laws that seek to remedy past racial discrimination in things like employment, education, and voting are now subject to the same strict scrutiny standard as laws that bar racial minorities from jobs, schools, and the voting booth.

The applicable standard of review matters because it is likely to be dispositive. Although dicta in *Adarand* stated that strict scrutiny was not necessarily "fatal in fact,"[87] only one racial classification has ever survived strict equal protection scrutiny since the infamous *Korematsu v. United States*[88] decision that led to the World War II internment of Japanese-American citizens.[89] In *Grutter v. Bollinger*,[90] Justice O'Connor wrote a 5–4 majority opinion, upholding under strict scrutiny, an affirmative action plan adopted by the University of Michigan Law School to increase student diversity.[91] However, now that Justice Alito has replaced Justice O'Connor on the Supreme Court, it is unlikely that *Grutter* would be decided the same way today.[92] And it is even more unlikely that the current Court will extend *Grutter*'s non-fatal reading of strict scrutiny to other cases in the future.

2. Inconsistency

The Supreme Court has been inconsistent in its application of the strict scrutiny standard that it applies to racial classifications with respect to both the compelling governmental interest and the narrow tailoring prongs. With respect to the compelling interest prong, the Court has vacillated concerning which interests can be considered compelling, and it has been inconsistent in the way that it has applied the interest that it has most recently identified as compelling. With respect to the narrow tailoring prong, the Court has been inconsistent in its application of the least-restrictive-alternative requirement in a way that seems to create separation of powers concerns.

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[85] *See id.* at 223–27 (applying strict scrutiny to benign and invidious racial classifications).

[86] *See id.* at 245 (Stevens, J., dissenting).

[87] *Id.* at 237.

[88] 323 U.S. 214 (1944).

[89] 515 U.S. 200, 237 (1995).

[90] 539 U.S. 306, 343–44 (2003).

[91] *Id.*

[92] *Cf.* Fisher v. Univ. of Tex., 133 S. Ct. 2411, 2417, 2421 (2013) (The Supreme Court remanded for a more stringent application of strict scrutiny rather than overrule *Grutter*.).

Justice Powell's controlling opinion in *Regents of the University of California v. Bakke*,[93] which involved a racial affirmative action plan for medical students, has played a prominent role in setting the terms of the debate for subsequent Supreme Court affirmative action decisions. Among the governmental interests that Justice Powell identified as compelling in *Bakke* were the goal of providing appropriate remedies for particularized acts of past discrimination and the goal of promoting prospective diversity in the context of higher education.[94] In *City of Richmond v. J.A. Croson Co.*,[95] a case involving a minority construction set-aside, Justice O'Connor's opinion for the Court reaffirmed the remedial interest as compelling. However, her opinions in subsequent affirmative action cases indicate that she viewed *Croson* as establishing that the remedial interest was the *only* compelling interest that a governmental entity could assert. She did *not* view the governmental interest in diversity as compelling.[96] Lower courts also adopted this interpretation of Justice O'Connor's *Croson* opinion.[97] But things were about to change.

In *Metro Broadcasting v. FCC*,[98] an affirmative action case concerning preferences given to racial minority applicants for broadcast licenses, the Court upheld the preferences as advancing the governmental interest in broadcast diversity.[99] Justice Brennan's majority opinion applied intermediate scrutiny and distinguished *Croson* on the ground that Section 5 of the Fourteenth Amendment gave Congress a special power to adopt the FCC program that was not possessed by state or local governmental bodies.[100] However, five years later in *Adarand*, Justice O'Connor's opinion for the Court overruled *Metro Broadcasting*.[101] Nevertheless, when Justice O'Connor later voted to uphold the Michigan Law School student affirmative action plan in *Grutter*, her opinion for the Court held that the governmental interest in promoting educational diversity *was*, in fact, a compelling governmental interest for strict scrutiny purposes.[102]

The affirmative action cases the Supreme Court has decided from *Grutter* to the present have focused on the diversity interest rather than the remedial interest in assessing the constitutionality of racial affirmative action.[103] However, some current

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[93] 438 U.S. 265, 306–20 (1978).

[94] *See id.* at 307–10, 311–15 (identifying compelling governmental interests).

[95] 488 U.S. 469, 488–89 (1989).

[96] *See* Metro Broad., Inc. v. FCC, 497 U.S. 547, 610–14 (1995) (O'Connor, J., dissenting); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 288 (1986) (O'Connor, J., concurring).

[97] *See, e.g.*, Hopwood v. Texas, 78 F.3d 932, 941–48 (5th Cir. 1996), *cert. denied*, 518 U.S. 1033 (1996) (rejecting Justice Powell's identification of diversity as compelling interest).

[98] 497 U.S. 547 (1990).

[99] *Id.* at 600–01.

[100] *See id.* at 563–66 (recognizing governmental interest in broadcast diversity under intermediate scrutiny).

[101] *See* Adarand Constructors v. Pena, 515 U.S. 200, 223–27.

[102] *See* Grutter v. Bollinger, 539 U.S. 306, 324–25, 327–33, 343–44 (2003).

[103] *See* Fisher v. Univ. of Tex., 133 S. Ct. 2411 (2013); Gratz v. Bollinger, 539 U.S. 244

Justices—perhaps even a majority—may be prepared to overrule *Grutter* and once again hold that educational diversity is not a compelling governmental interest. In *Fisher v. University of Texas*,[104] a case involving an affirmative action plan adopted to increase student diversity, Justices Scalia and Thomas expressed their willingness to overrule this aspect of *Grutter*.[105] In *Parents Involved in Community Schools v. Seattle School District No. 1*,[106] Chief Justice Roberts wrote a majority opinion—joined by Justices Scalia, Kennedy, Thomas, and Alito—that limited recognition of the compelling interest in educational diversity to the context of higher education, and refused to apply it to a program seeking to promote racial diversity in elementary and secondary schools.[107] In *Fisher*, however, when Justice Kennedy had a chance to overrule *Grutter* in his majority opinion for the Court, he sidestepped the issue and simply stated that he was taking *Grutter* as a given in remanding the Texas affirmative action plan on other grounds.[108]

Parents Involved also shows that even when the Supreme Court has identified a governmental interest as compelling, it can apply that interest in inconsistent ways.[109] The Court's decision to recognize educational diversity as compelling in the context of higher education but not in the context of primary or secondary education seems strange. Chief Justice Roberts noted that the purpose of diversity is to expose students to ideas and perspectives that they might not otherwise encounter in a homogeneous environment.[110] That interest seems to clearly be advanced during the class discussions and out-of-class interactions that students have in the context of higher education. But as Justice Breyer pointed out in his dissent, the benefits of diversity are likely to be even greater when younger students are exposed to a broader array of ideas and perspectives during their formative years.[111] Because the preservation of racial integration is what was at the core of the diversity plan at issue in *Parents Involved*, Justice Breyer emphasized that the compelling nature of diversity in primary and secondary education was precisely what was at stake in the desegregation requirement of *Brown v. Board*

(2003); *Grutter*, 539 U.S. at 306; *cf.* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist., 551 U.S. 701, 720–25 (2007) (focusing on diversity, but also considering remedial interest).

[104] 133 S. Ct. 2411 (2013).

[105] *See id.* at 2422 (Scalia, J., concurring) (suggesting that he would have voted to overrule *Grutter* if the plaintiff had so requested); *id.* (Thomas, J., concurring) (stating that he would overrule *Grutter*).

[106] 551 U.S. 701 (2007).

[107] *See id.* at 720–25.

[108] *See Fisher*, 133 S. Ct. at 2417 (taking *Grutter* as given). Justice Kennedy did dissent in *Grutter* itself, but his dissent appears to be based on narrow tailoring grounds. *See Grutter*, 539 U.S. at 387–89 (Kennedy, J., dissenting).

[109] *See Parents Involved*, 551 U.S. at 782–83 (Kennedy, J., concurring) (arguing that the majority opinion is "inconsistent in both its approach and its implications").

[110] *See id.* at 724–25.

[111] *See id.* at 838–45 (Breyer, J., dissenting) (arguing that diversity is a compelling state interest in primary and secondary schools).

of Education[112]—a case that itself involved primary and secondary education.[113] Chief Justice Roberts, however, invoked *Brown* as the basis for rejecting the diversity claim.[114] For him, the race-conscious primary and secondary education diversity program was unconstitutional precisely because it departed from *Brown*'s prohibition on assigning students to schools based on their race.[115]

The Court's application of the narrow tailoring prong of the strict scrutiny standard exhibits an inconsistency of its own. A common articulation of the narrow tailoring requirement insists that a compelling interest be pursued through means that are the least restrictive of racial equality rights.[116] That means that a racial classification can be used only if no race-neutral alternative will be adequate to secure the compelling interest.[117] However, in *Grutter*, the Court rejected the claim that narrow tailoring required "exhaustion of every conceivable race-neutral alternative."[118] Instead, Justice O'Connor stated that narrow tailoring required only "serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks."[119] In *Fisher*, Justice Kennedy's majority opinion attempted to reconcile those divergent articulations of the narrow tailoring requirement. But Justice Kennedy ended up simply pretending that the problem did not exist. He simultaneously reasserted that "[n]arrow tailoring does not require exhaustion of every *conceivable* race-neutral alternative"[120] *and* that a "reviewing court must ultimately be satisfied that no workable race-neutral alternatives would produce the educational benefits of diversity."[121]

The Court's inconsistent articulations of the narrow tailoring requirement are important because of their effect on the operative standard of review. Notwithstanding the Court's decision in *Grutter*—a case that would probably not be decided the same way today—strict scrutiny is effectively fatal scrutiny in the equal protection context. Normally, that would limit the Court's discretion in a way that made it harder for the

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[112] 349 U.S. 294 (1954).

[113] *See Parents Involved*, 551 U.S. at 841–43 (Breyer, J., dissenting) (arguing that *Brown* supports diversity as a compelling state interest).

[114] *See id.* at 742–43, 746–48 (plurality opinion) (arguing that *Brown* does not allow racial classifications for any reason).

[115] *See id.* at 742–48. Justice Kennedy, who provided the fifth vote for the result in *Parents Involved*, adopted a less-extreme view, arguing that a race conscious pupil assignment might be permitted in some circumstances in order to prevent de facto resegregation. *See id.* at 787–90 (Kennedy, J., concurring in part and concurring in judgment).

[116] *See* Grutter v. Bollinger, 539 U.S. 306, 333 (2003) (requiring a state to narrowly tailor racial distinctions to accomplish a compelling state interest).

[117] *See, e.g.*, *Parents Involved*, 551 U.S. at 735 (requiring an absence of race-neutral alternatives); *cf.* Palmore v. Sidoti, 466 U.S. 429, 432–33 (1984) (requiring that racial classification be necessary to advance a compelling interest).

[118] *See Grutter*, 539 U.S. at 339.

[119] *See id.*

[120] *See* Fisher v. Univ. of Tex., 133 S. Ct. 2411, 2420 (2013) (citation omitted).

[121] *Id.*

Court to uphold racial classifications that it liked and invalidate classifications of which it disapproved on policy grounds. But not always. The Court's divergent outcomes in *Grutter* and *Gratz v. Bollinger*[122] illustrate the problem. *Grutter* upheld a University of Michigan Law School affirmative action program adopted to promote student diversity,[123] and the same day, *Gratz* invalidated a University of Michigan undergraduate affirmative action program adopted to promote student diversity.[124] Although the two programs seemed equivalent in all pertinent respects, the Court nevertheless reached different outcomes in the two cases because Justices O'Connor and Breyer seemed to think that the undergraduate program gave too much weight to race in its diversity calculation.[125] Once racial diversity is recognized as a legitimate factor in educational admissions, the amount of weight given to that factor would seem to be a policy determination that should be made by a politically accountable branch of government. But an ambiguous, narrow tailoring requirement that gives the Supreme Court the discretionary power to supplant racial policy determinations made by the political branches raises separation of powers problems. Although the Supreme Court may possess the institutional competence to interpret the Constitution, the bare phrase "equal protection" in the Fourteenth Amendment does not give the Court sufficient guidance to justify supplanting a racial policy determination made by a political branch.

When the Court gives itself enough discretion to enter the legislative policymaking realm, it creates the risk that its policy pronouncements will be more abstract than real. That is precisely what happened in *Parents Involved*, where the Court's decision rested on hypothetical race neutral alternatives that simply did not exist.[126] Justice Breyer's dissent went to great pains to stress that the majority's rhetoric about the school district's failure to exhaust race neutral alternatives before adopting a race conscious plan to prevent resegregation was belied by the actual facts of the case.[127] Not only had the school tried an array of race neutral alternatives, which had proved ineffective, but the majority was unable to suggest a race neutral alternative that the school had not already tried.[128] Accordingly, when the current Supreme Court rejects a racial classification for failure to use a race neutral alternative, it may well be doing so in a context where no such alternative actually exists.[129] Moreover, even if a race neutral alternative does exist,

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[122] 539 U.S. 244, 245 (2003).

[123] *See Grutter*, 539 U.S. at 322–44.

[124] *See Gratz*, 539 U.S. at 268–75.

[125] *See id.* at 279–80 (O'Connor, J., concurring) (holding that the undergraduate program must have individualized consideration).

[126] *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 735 (2007) (requiring consideration of workable "race-neutral alternatives") (citation omitted).

[127] *See id.* at 850–52 (Breyer, J., dissenting) (documenting exhaustion of race-neutral alternatives).

[128] *See id.*

[129] *See, e.g.*, Fisher v. Univ. of Tex., 133 S. Ct. 2411, 2416–17, 2419–22 (remanding despite the failure of a race neutral plan to produce the desired student diversity).

such as the hypothetical alternatives suggested by Justice Kennedy,[130] it is unclear why those alternatives would not themselves violate the *Washington v. Davis* prohibition on intentional discrimination.

3. Incoherence

Sometimes the Supreme Court's racial discrimination jurisprudence actually seems incoherent. That is true with respect to the Court's rules about racial balance, societal discrimination, and group rights. In addition, the Court's stated aversion to racial stereotypes is sometimes belied by its own reliance on those very same stereotypes. Moreover, the manner in which the Court applies the intentional discrimination standard varies with the race of the victim in a way that is itself racially discriminatory. All of this rests on a deep incoherence in the Supreme Court's underlying conception of colorblind race neutrality.

The Supreme Court has been emphatic in its condemnation of affirmative action plans that use racial quotas to promote racial balance or proportionality. It has repeatedly held that the pursuit of racial balance is "patently unconstitutional."[131] That holding not only departed from the Court's earlier unanimous *authorization* to use racial balance as a starting point in formulating school desegregation remedies,[132] but the very notion that the pursuit of racial balance could somehow be unconstitutional seems incoherent. In her *Croson* majority opinion, Justice O'Connor stated that, "[t]he dream of a Nation of equal citizens in a society where race is irrelevant to personal opportunity and achievement would be lost in a mosaic of shifting preferences based on inherently unmeasurable claims of past wrongs."[133] In that sentence, the Court identified the aspirational goal of its racial jurisprudence to be the achievement of a colorblind society in which race was irrelevant to the distribution of resources. But in the same breath, the Court then held that race-conscious remedial efforts seeking to advance that goal were unconstitutional. Here is the problem. In a colorblind, race-neutral society that was free from discrimination, societal resources would be allocated in a way that was racially proportional. Unless one believes that some races are inherently inferior to others, the absence of racial balance constitutes clear evidence that there is racial discrimination lurking somewhere in the interstices of the culture. But if the Equal Protection Clause prohibits direct efforts to remedy that discrimination and achieve that racial balance as "patently unconstitutional," then the Constitution ends up prohibiting the very equality that it aspires to achieve.

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[130] *See Parents Involved*, 551 U.S. at 787–90 (Kennedy, J., concurring) (suggesting constitutionally permissible race conscious strategies to promote diversity).

[131] *See* Grutter v. Bollinger, 539 U.S. 306, 330 (2003); *see also Fisher,* 133 S. Ct. at 2419; *Parents Involved*, 551 U.S. at 723, 732, 740.

[132] *See* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16, 25 (1971) (authorizing the pursuit of racial balance in desegregation plans).

[133] City of Richmond v. J.A. Croson Co., 488 U.S. 469, 505–06 (1989).

That same incoherence is revealed in the Court's equally emphatic insistence that race-conscious remedies cannot be used to address the continuing problems of subtle and structural discrimination against racial minorities that the Supreme Court terms "societal discrimination."[134] The Court limits the constitutionally permissible use of race conscious remedies to particularized acts of past discrimination that were committed by the governmental entity seeking to utilize a race-conscious remedy.[135] And efforts to remedy the continuing effects of general societal discrimination against racial minorities are themselves deemed unconstitutional, because they violate the equal protection rights of whites.[136] No one doubts that subtle and structural forms of general societal discrimination against racial minorities continue to exist in United States culture—discrimination that manifests itself in things like housing segregation, inferior education, lower wages, lower wealth, poorer health care, less personal safety, and higher incarceration rates.[137] In August 2014, the *New York Times* reported:

> Across a broad range of economic and demographic indicators, the data paint a largely depressing picture. Five decades past the era of legal segregation, a chasm remains between black and white Americans—and in some important respects it's as wide as ever.

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[134] *See, e.g.*, *Grutter*, 539 U.S. at 353 (Thomas, J., concurring) (holding that the Court rejects "an interest in remedying general societal discrimination").

[135] *Cf. id.* at 334 (holding that a race-conscious admissions plan must be narrowly tailored).

[136] That position was initially articulated by Justice Powell in *Regents of the University of California v. Bakke*, 438 U.S. 265, 307–10 (1978), and reasserted by Justice Powell in *Wygant v. Jackson Board of Education*, 476 U.S. 267, 274–78 (1986) (plurality opinion). Lead by Justice O'Connor, the view has since been adopted by a majority of the full Supreme Court. *See Grutter*, 539 U.S. at 323–25 (citing *Bakke* as rejecting an interest in remedying societal discrimination); *id.* at 330 (rejecting racial balancing as "patently unconstitutional"); *see also* Metro Broad., Inc. v. FCC, 497 U.S. 547, 612–14 (1990) (O'Connor, J., dissenting) (remedying societal discrimination is not compelling); *Croson*, 488 U.S. at 494–96 (plurality opinion) (rejecting societal discrimination); Johnson v. Transp. Agency, 480 U.S. 616, 647–53 (1987) (O'Connor, J., concurring) (requiring remedial action); *Wygant*, 476 U.S. at 288 (O'Connor, J., concurring) (rejecting societal discrimination). Most recently, Chief Justice Roberts reiterated the view in *Parents Involved*, 551 U.S. at 731–32 (plurality opinion) ("[r]emedying past societal discrimination does not justify race-conscious government action.").

[137] *See* JENNIFER HOCHSCHILD ET AL., CREATING A NEW RACIAL ORDER: HOW IMMIGRATION, MULTIRACIALISM, GENOMICS, AND THE YOUNG CAN REMAKE RACE IN AMERICA 35–41, 73–75, 116–23, 139–63, 175–81 (2012) (documenting racial minority disadvantages); Kimberlé Williams Crenshaw, *Twenty Years of Critical Race Theory: Looking Back to Move Forward*, 43 CONN. L. REV. 1253, 1336–46 (2011) (same); Neil Irwin et al., *America's Racial Divide, Charted*, N.Y. TIMES (Aug. 19, 2014), http://www.nytimes.com/2014/08/20/upshot/americas-racial-divide-charted.html?emc=eta1&_r=0&abt=0002&abg=0 (same); *see also* Gratz v. Bollinger, 539 U.S. 244, 299–301 (2003) (Ginsburg, J., dissenting). The implicit bias studies discussed in Part II.B.2 also undoubtedly contribute to these statistical disparities.

> The unemployment gap is virtually unchanged over the last 40 years. The income and wealth gaps have actually widened. So has the gap in educational attainment.[138]

Nevertheless, the position of the Supreme Court appears to be that the benefits that such structural discrimination accords whites are so pervasive, and so firmly entrenched, that race conscious efforts to reduce those benefits would violate the constitutional rights of whites who secured them through race-conscious discrimination. Stated differently, the Equal Protection Clause of the Constitution freezes the *unequal* benefits that whites have secured through a history of prior discrimination. And this is true even when political branches of government controlled by the white majority voluntarily choose to adopt such race-conscious remedies in order to reduce their own racial advantage.

The way that the Supreme Court can end up adopting such a seemingly paradoxical position is by mediating the internal contradiction with yet another doctrinal move that ultimately seems incoherent. According to the Court, the reason the Constitution prohibits the white majority's efforts to reduce its own racial advantage by adopting race-conscious remedies for general societal discrimination, is that equal protection rights are individual personal rights rather than group rights.[139] As a result, the white majority cannot reduce its own group racial advantage because doing so would violate the rights of white individuals who wish to retain that advantage.[140] However, the Court's argument suffers from an effort to distinguish between individual and group rights that simply makes no sense in the context of racial discrimination. The *only* reason that white individuals possess cultural advantages over racial minorities, in the context of racial discrimination, is because of their membership in the white racial group that created those cultural advantages. Individual merit and other personal characteristics are simply inapposite to the racial advantages that have been secured through a history of prior racial discrimination. Accordingly, the white majority's decision to curtail some of its own racial advantage cannot violate any individual equal protection rights because no such rights ever existed. The only rights that were ever pertinent were the group rights derived from membership in the white race.[141] Even if the concept of

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[138] Irwin et al., *supra* note 137.

[139] *See* Adarand Constructors v. Pena, 515 U.S. 200, 224–25 (1995) (citing *Bakke*, 438 U.S. at 299 (plurality opinion) (holding that equal protection rights are to the individual rather than group rights); *see also Grutter*, 539 U.S. at 323–26 (same).

[140] *See, e.g.*, *Croson*, 488 U.S. at 493 (holding that equal protection rights are individual).

[141] There has been a longstanding debate concerning whether the Equal Protection Clause is properly understood as protecting individual rights or group rights. *Compare* Paul Brest, *The Supreme Court, 1975 Term—Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 48–52 (1976) (arguing that discrimination, and consequently discrimination remedies, should be viewed as individual phenomena), *and* Michael J. Perry, *The Principle of Equal Protection*, 32 HASTINGS L.J. 1133, 1145–48 (1981) ("[T]he group-centered conception creates [tension] with our individual-centered constitutional jurisprudence"), *with* Owen M.

individual rights did make sense in the context of racial discrimination, it is difficult to see why that should disable the white majority from providing remedial benefits to racial minorities. We commonly group individuals together in order to advance social objectives that are *not* constitutionally compelled—such as deciding who should pay how much income tax or deciding what LSAT scores should entitle one to law school admission. It therefore seems perverse to prohibit such groupings of individuals when the goal is to pursue an equality objective that *is* constitutionally compelled.

The Supreme Court's racial discrimination decisions have also engaged in the very type of racial stereotyping that the Court has condemned as unconstitutional. In its *Shaw v. Reno*[142] line of redistricting cases decided after the 1990 Census, the Supreme Court recognized an equal protection cause of action for white voters who objected to being placed in new majority-minority voting districts as a result of redistricting efforts to comply with the prohibition on minority vote dilution contained in the Voting Rights Act of 1965.[143] The Court held that when race was the "predominant factor" motivating a redrawn voting district, voters were stigmatized and stereotyped in violation of their equal protection rights, in the same way they would be if they were assigned to particular schools because of their race.[144] The assumption that voters would share particular political preferences because of their race violated the personal equal protection rights of voters to be treated as individuals rather than mere members of a racial group.[145] However, by recognizing a new cause of action for white voters who objected to being placed in majority-minority voting districts, the Court was engaged in precisely the same form of racial stereotyping that the Court claimed to be deriding.

In order to have standing to challenge their placement in a majority-minority voting district, white plaintiffs needed to allege some sort of injury from being placed in those districts.[146] But the only injury they suffered was their fear that the minority officials likely to be elected in those districts would not adequately represent the interests of white voters. And that injury, of course, rests wholly on the same stereotypes about

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Fiss, *Groups and the Equal Protection Clause*, 5 J. PHIL. & PUB. AFF. 107, 147–77 (1976) (arguing that discrimination, and consequently discrimination remedies, should be viewed as group phenomena).

[142] 509 U.S. 630 (1993).

[143] *See id.* at 639–52.

[144] *See id.* at 641–42, 649 (permitting white challenge to redistricting plan that increased minority voting strength); *see also* Miller v. Johnson, 515 U.S. 900, 909 (1995) (granting standing to whites who challenged redistricting of the voter district in which they resided, where challenged redistricting increased minority voting strength); *cf.* United States v. Hays, 515 U.S. 737, 744–47 (1995) (denying standing to whites who challenged redistricting of voting district in which they did not reside). The Court's aversion to racial stereotyping was recently reaffirmed in *Schuette v. Coalition to Defend Affirmative Action*, 134 S. Ct. 1623, 1634–35 (2014) (plurality opinion).

[145] *See Hays*, 509 U.S. at 744 (objecting to racial stereotyping); *see also Miller*, 515 U.S. at 911–12, 920, 927–28 (same); *Shaw*, 509 U.S. at 643–44, 647–49 (same).

[146] *See supra* note 144.

racial cohesion and shared political interests that the Court viewed as violating the Equal Protection Clause in *Shaw*.[147] Interestingly, the Court now seems to have backed off its *Shaw* cause of action, holding that race *can* be used as a proxy for political affiliation in the redistricting process because minorities often vote for Democrats.[148] But in so doing, the Supreme Court seems to have *explicitly* endorsed the racial stereotyping practice of which it claims to disapprove. One might argue that merit based decisions, such as those involving school admissions, are distinguishable from districting decisions that have nothing to do with merit. This, however, would not explain the Court's decisions in cases such as *Parents Involved*, where the Court invalidated student diversity programs that had nothing to do with merit. Moreover, even merit based decisions are likely to be infected by the racial stereotypes and implicit biases that are discussed in Part II.B.2.

Some of the decisions that the Supreme Court issues in the name of racial equality are themselves racially discriminatory. As Professor Farber has noted, the Court applies the intentional discrimination standard more stringently when racial minorities claim to be the victims of discrimination than when whites claim to be the victims.[149] When racial minorities are adversely affected by a practice having a racially disparate impact—such as the verbal skills exam used in *Washington v. Davis*—that practice does *not* trigger strict scrutiny because it was adopted *despite* its discriminatory effect, and not *because of* any intent to harm racial minorities.[150] However, when whites are adversely affected by a practice having a racially disparate impact—such as the affirmative action preference for minority contractors in *Adarand*—that practice *does* trigger strict scrutiny even though the practice was adopted *despite* its discriminatory effect, and not *because of* any intent to harm whites.[151] It is true that practices adversely affecting racial minorities now tend to be facially neutral, whereas affirmative action plans that adversely affect whites tend to be race-conscious. However, that difference seems largely irrelevant once one concedes that a known racially disparate impact is consciously being disregarded. The conscious disregard of that discriminatory effect should either count or not count equally in both cases, but it does not. The Supreme Court is simply more sensitive to harms suffered by whites than to harms suffered by racial minorities.

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[147] *See Miller*, 515 U.S. at 929–32 (Stevens, J., dissenting) (highlighting internal inconsistency in the majority's treatment of racial stereotypes).

[148] *See* Easley v. Cromartie, 532 U.S. 234, 257–58 (2001) (permitting use of race in redistricting as a proxy for political affiliation).

[149] *See* DANIEL A. FARBER ET AL., CASES AND MATERIALS ON CONSTITUTIONAL LAW: THEMES FOR THE CONSTITUTION'S THIRD CENTURY 354–58 (5th ed. 2013) (describing racially-correlated discrepancy in the Supreme Court's treatment of racial discrimination claims).

[150] *See* Washington v. Davis, 426 U.S. 229, 238–48 (1976) (not applying strict scrutiny to verbal skills exams).

[151] *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 223–27 (1995) (applying strict scrutiny to minority construction workers set aside).

The Supreme Court's recent decision in *Schuette v. Coalition to Defend Affirmative Action*,[152] upholding the Michigan anti-affirmative action voter initiative, provides another illustration of how the Court's holdings can be racially discriminatory. In Justice Kennedy's plurality opinion, he stressed the need to defer to Michigan voters concerning the desirability of affirmative action because the Constitution committed such racial policy determinations to the democratic process.[153] Given Justice Kennedy's specific allusion to the fact that voters might also choose to adopt racial preferences,[154] one might conclude that *Schuette* had the effect of leaving decisions about affirmative action up to the voters—thereby getting the Court out of the business of invalidating, under the largely standardless Equal Protection Clause, affirmative action programs that are adopted by the political process. But that conclusion would be wrong. As has been noted, no racial affirmative action program has survived strict scrutiny except for *Grutter*, and *Grutter* would probably not be decided the same way today.[155] And neither Justice Kennedy, nor any other member of the current Court's conservative voting bloc, has ever voted to uphold the constitutionality of a racial affirmative action plan.[156] Instead, *Schuette* seems to have adopted a one-way ratchet approach to affirmative action, pursuant to which the Supreme Court defers to the preferences of the political process when the political process chooses to reject affirmative action, but invalidates the preferences of the political process when the political process chooses to adopt affirmative action.[157] Strikingly, this is the opposite of the one-way ratchet that the Supreme Court initially developed during the Civil Rights Movement, which required deference to acts of a political process that sought to *protect* racial minorities, but invalidated acts that sought to *discriminate* against racial minorities in order to benefit whites.[158] Once again, the Court has proceeded in a way that is doctrinally inconsistent, but is de facto consistent with the principle of rejecting racial minority interests. That is why the Court's current racial jurisprudence does not do a good job of preventing racial discrimination.

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[152] 134 S. Ct. 1623 (2014).

[153] *See id.* at 1635–37 (plurality opinion) (deferring to the political process with respect to the desirability of affirmative action). That view was also shared by Justice Breyer. *See id.* at 1649–51 (Breyer, J., concurring) (same).

[154] *See id.* at 1635 (plurality opinion) ("Perhaps, when enacting policies as an exercise of democratic self-government, voters will determine that race-based preferences should be adopted.").

[155] *See supra* notes 87–90 and accompanying text.

[156] *See, e.g.*, GIRARDEAU A. SPANN, THE LAW OF AFFIRMATIVE ACTION: TWENTY-FIVE YEARS OF SUPREME COURT DECISIONS ON RACE AND REMEDIES 159–61, 267–70 (2000).

[157] *See, e.g.*, City of Richmond v. J.A. Croson Co., 488 U.S. 469, 494–98 (1989) (invalidating an affirmative action plan adopted by democratic process).

[158] *See* Katzenbach v. Morgan, 384 U.S. 641, 648–50 (1966) (adopting the one-way ratchet theory in upholding the Voting Rights Act of 1965). *But see* City of Boerne v. Flores, 521 U.S. 507, 527–29 (1997) (rejecting the one-way ratchet theory in invalidating provisions of the Religious Freedom Restoration Act).

Overall, the Supreme Court has been erratic in its decisions to override or defer to the racial policy preferences of the political branches, with deference ultimately turning on the degree to which those policy preferences correspond to the racial policy preferences of the Court. Because the Supreme Court is politically insulated, rather than politically accountable, the use of judicial policy preferences as a basis for judicial review is inconsistent with the constitutional separation of political and judicial powers. Moreover, the Court's own racial policy preferences appear to flow from a tacit assumption that the current distribution of societal resources is race neutral and color-blind. However, the pervasive white advantage embedded in the current distribution[159] makes that assumption so obviously untenable that one cannot help but wonder why the Court refuses to look behind it. Nobody elected the Supreme Court to formulate racial policy for the United States, but we still tend to act as if it were a mere coincidence that most contemporary race cases are decided by a 5–4 split decisions—where the votes of the Justices correlate strongly with the political views of the presidents who nominated them. The concept of equality is so elusive, that the Equal Protection Clause of the Constitution has remarkably little to say about which racial policy preferences are desirable and which are not. As a result, it is difficult to see why the countermajoritarian Supreme Court should exercise dispositive power over the nation's racial policies through the exercise of judicial review. However, the Constitution *may* have something dispositive to say about the *sincerity* of the equality claims that are asserted in its name. And that, in turn, may serve as a basis for legitimate judicial review.

II. GOOD FAITH

It is not surprising that the Supreme Court's racial jurisprudence is unsatisfying. The Equal Protection Clause itself contains few judicially manageable standards for distinguishing between permissible and impermissible uses of race, which helps explain why the Court's decisions can seem artificial, inconsistent and incoherent. Moreover, the institutional capacity of the Supreme Court to withstand majoritarian pressures to oppress unpopular racial minorities is called into question by the Court's own historical complicity in practices such as slavery, segregation, and the World War II internment of Japanese-American citizens—something that, although universally condemned, has nevertheless presaged the current racial profiling and detention of Arab Muslims in the war on terror.[160] Even the Court's famous desegregation decision in *Brown v. Board*

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[159] *See supra* note 137 and accompanying text (discussing current distribution of resources).

[160] *See, e.g.*, Korematsu v. United States, 323 U.S. 214 (1944) (upholding the constitutionality of an executive exclusion order that led to the forced relocation of certain Japanese-American citizens to internment camps during World War II); Plessy v. Ferguson 163 U.S. 537, 548, 551–52 (1896) (segregation); Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 451–52 (1857) (slavery). Commentators have noted the similarity between post-September 11 racial profiling and the treatment of Japanese-American citizens during World War II. *See* Liam Braber, Note, Korematsu*'s Ghost: A Post-September 11th Analysis of Race and National Security*, 47 VILL.

of Education[161] was ultimately read by the Court to protect de facto segregation and to invalidate efforts to prevent resegregation.[162] Accordingly, reliance on Supreme Court judicial review may simply not be a dependable way to protect racial minority rights.

All of this suggests that the pursuit of racial equality in the United States might be better advanced by getting the Supreme Court out of the business of enforcing the Equal Protection Clause in race cases. In declining to intervene in a political gerrymandering case, Justice Scalia stated that the Constitution does not provide "a judicially enforceable limit on the political considerations that the states and Congress may take into account when districting."[163] The same may be true of race cases, and it might make more sense for the Court simply to defer to the racial policies formulated by the representative branches of government. Those policies are frequently more progressive than the Court's own racial policies, but they often end up getting invalidated by the Court.[164] This is an argument that I have advanced in the past.[165] However, there may be one role that the Supreme Court *can* usefully play in the enforcement of the Equal Protection Clause. The Court may be institutionally more competent than the

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L. REV. 451 (2002); *Plight of the Tempest-Tost: Indefinite Detention of Deportable Aliens*, 115 HARV. L. REV. 1915, 1930–39 (2002); *see also* Jerry Kang, *Thinking Through Internment: 12/7 and 9/11*, 9 ASIAN AM. L.J. 195, 197–200 (2002) (discussing how to apply lessons from the Japanese internment to racial profiling post-September 11); Harold Hongju Koh, *The Spirit of the Laws*, 43 HARV. INT'L L.J. 23, 33–39 (2002) (arguing that the September 11 attacks have begun to warp the balance between national security and civil liberties, as did World War II); Lori Sachs, Comment, *September 11, 2001: The Constitution During Crisis: A New Perspective*, 29 FORDHAM URB. L.J. 1715, 1728–43 (2002) (discussing the role of the Supreme Court in World War II); Huong Vu, Note, *Us Against Them: The Path to National Security is Paved by Racism*, 50 DRAKE L. REV. 661, 665–76, 691–93 (2002) (arguing that the U.S. Government and mainstream society have been willing to scapegoat racial minorities after national tragedies); Michael J. Whidden, Note, *Unequal Justice: Arabs in America and United States Antiterrorism Legislation,* 69 FORDHAM L. REV. 2825, 2825–30, 2836–41 (2002) (arguing that modern terrorism legislation repeats the American habit of targeting and stigmatizing immigrant groups and racial minorities).

[161] 347 U.S. 483, 493–95 (1954) (rejecting the separate-but-equal doctrine, and declaring official school segregation unconstitutional).

[162] *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 742–43, 746–48 (2007) (plurality opinion) (invalidating efforts to prevent de facto resegregation).

[163] Vieth v. Jubelirer, 541 U.S. 267, 305 (2004) (plurality opinion) (holding political gerrymandering claim to be a nonjusticiable political question).

[164] *See, e.g.*, Shelby Cnty. v. Holder, 133 S. Ct. 2612, 2627–31 (2013) (invalidating preclearance formula of the Voting Rights Act used to prevent dilution of minority votes); *Parents Involved*, 551 U.S. at 745–48 (invalidating efforts to prevent school resegregation); Gratz v. Bollinger, 539 U.S. 244, 275 (2003) (invalidating an undergraduate affirmative action plan adopted to increase student diversity); *cf.* Fisher v. Univ. of Tex., 133 S. Ct. 2411, 2419–22 (2013) (remanding college affirmative action plan for more stringent application of strict scrutiny).

[165] *See, e.g.*, Girardeau A. Spann, *Constitutional Hypocrisy*, 27 CONST. COMMENT. 557, 557–58 (2011) (disfavoring judicial review).

political branches to review the good faith sincerity of asserted equality arguments. Indeed, the Supreme Court now seems largely to treat racial gerrymandering cases as nonjusticiable political question cases.[166] But when the Court *has* intervened to invalidate racial gerrymanders, it has done so precisely because it found the lack of good faith sincerity—taking the form of an impermissible racial motivation—to be the primary factor behind the districting process.[167]

The Supreme Court's current racial jurisprudence is sufficiently complex that it is possible for actions that adversely affect racial minorities to survive judicial review even though they have the intent and effect of sacrificing minority interests in order to advance the interests of the white majority. The intricacies of the Court's intentional discrimination standard generate enough artificiality to permit even transparent discriminatory motives to escape formal legal recognition under the Equal Protection Clause. But a doctrinally more elegant standard that inquired directly into the good faith sincerity of an action having a racially disparate impact would enable such actions to be invalidated. It is true that the Court's current intentional discrimination standard *could* be applied in a way that invalidated pretextual efforts to camouflage invidious racial intent. But the problem is that the intentional discrimination standard has *not* been so applied. Instead, as Part I of this Article illustrates, the doctrinal rules surrounding the current intentional discrimination standard are able to produce artificial results precisely because they rely on a concept of fictitious legal intent rather than a more plausible conception of common-sense racial discounting. This has enabled the structural forms of white racial advantage that permeate the culture to become embodied in the Court's current antidiscrimination law. But properly conceived, the direct application of a good faith sincerity standard would provide the culture's subtle forms of invidious racial discrimination fewer places to hide.

The concept of good faith that I have in mind would rest not so much on formal evidentiary findings as on commonly shared understandings of actual cultural dynamics. Analogous to the role that equity plays in compensating for deficiencies inherent in the rule of law, a good faith discrimination standard could produce results in race cases that were more satisfying than the results produced by the Court's current doctrinal rules. If not abused, the Supreme Court's insulation from ordinary politics would give the Court a relative institutional advantage in piercing the veil of rhetorical disingenuities that is typically offered to justify actions taken by the representative branches of government during the give and take of negotiations in the pluralist political process.

A good faith discrimination standard could be applied to both conventional discrimination claims asserted by adversely affected racial minorities, and to more recent anti-affirmative action claims asserted by adversely affected whites. Because

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[166] *See* Easley v. Cromartie, 532 U.S. 234, 257–58 (2001) (permitting use of race in redistricting as a proxy for political affiliation).

[167] *See* Miller v. Johnson, 515 U.S. 900, 916 (1995) (adopting "predominant factor" test for unconstitutional racial gerrymanders).

those claims are virtually always rooted in arguments that purport to advance the principle of racial equality, the Court could try to assess whether those equality claims were sincerely held or were merely pretextual. In easy cases, the Court could resolve those claims by invoking a subjective standard of good faith. In harder cases, the Court could utilize an objective standard of good faith in order to determine whether recent experimental insights concerning cognitive dissonance and implicit bias warrant deference to the racially disparate impact at issue. Hopefully, such a good faith focus would begin to overcome some of the artificiality surrounding the Court's current racial jurisprudence.

A. Concept

The Supreme Court's equal protection jurisprudence has the effect of perpetuating the problem of racial discrimination in the United States, rather than reducing it. The concept of good faith discrimination that I have in mind is intended to reverse that effect. The good faith discrimination standard would be satisfied whenever an action having a racially disparate impact could realistically be understood to flow from a sincere commitment to the principle of racial equality. Bad faith discrimination would exist when a racially disparate effect could realistically be understood to flow from an aversion or indifference to the equality principle. Bad faith discrimination would be characterized most strongly by its recognizable willingness to discount the interests of one racial group in order to advance the interests of another. For the sake of simplicity, I have focused on divergent interests between the white majority and racial minorities without disaggregating the potentially divergent interests that can exist within those groups. However, the concepts of good and bad faith discrimination could apply with equal force to any conflicting interests that existed among racial subgroups as well. My claim is that Supreme Court efforts to enforce the Equal Protection Clause through judicial review should defer to racial policies adopted by the political branches of government despite their good faith discriminatory effects, but the Supreme Court should sometimes intervene to invalidate a racially disparate impact that results from bad faith discrimination.

Those who favor or oppose actions having a racially disparate impact virtually always frame their arguments as permitted or compelled by the Equal Protection Clause. The good faith standard should therefore be applied to the motives of those asserting the equality argument, or to those on whose behalf the argument is asserted. If an opponent of affirmative action argues that racial preferences are unconstitutional, the good faith standard should be applied to the opponent's motivation. If a state attorney general argues that a referendum banning affirmative action is not unconstitutional, the good faith standard should be applied to the motivation of the voters who adopted the ban.

Under a subjective theory, I think that the sincerity of those asserting equality arguments should be dispositive for constitutional purposes. When proponents and

opponents of an action having a racially disparate impact are both motivated by a sincere good faith belief that the action advances the aspirational goal of racial equality, the Supreme Court should defer to the resolution of the competing equality claims that is reached by the political branches charged with resolution of the dispute. In such cases the absence of a judicially manageable doctrinal standard for favoring one equality argument over the other indicates that there is no role for the Supreme Court to play. It is one of those questions that is "in [its] nature political," which the Constitution delegates to the representative branches for resolution under *Marbury v. Madison*.[168] Accordingly, the constitutional separation of judicial and political powers deprives the Court of jurisdiction to supplant political formulations of racial policy. Under the *Marbury* model of judicial review, courts are supposed to protect individual rights, but not to formulate legislative or executive policy.[169]

Similarly—but perhaps less obviously—when proponents and opponents of an action having a racially disparate impact are both motivated by a bad faith desire to discount the interests of one race in order to advance the interests of another, the Supreme Court should still defer to political branch resolution of the competing claims. Once again, the absence of any judicially manageable standard makes the issue a political question concerning the prudence of the particular racial policy at issue. Although mutual bad faith discrimination probably does violate the equality principle, equal protection enforcement in such cases should be viewed as committed to the representative branches rather than the courts.

In mismatch cases—where one of the contending equality arguments is asserted in good faith but the other is actually a bad faith pretextual argument—the Supreme Court *should* intervene, and should do so in favor of the good faith argument. For example, if an opponent of affirmative action genuinely believed that affirmative action discriminated against whites in violation of the equality principle while a proponent of affirmative action merely feigned an equality argument in order to secure racial spoils, the Court should reject the proponent's insincere equality argument and rule in favor of the sincere opponent. Affirmative action arguments—like anti-affirmative action arguments—should be deemed legitimate only if they are sincere. That means that arguments for or against affirmative action should prevail only when there are sincere supporters of those arguments who are willing to advance them. The goal of preventing pretextual equality claims from supplanting sincere equality claims *does* provide a judicially manageable standard that can serve as the basis for Supreme Court review. And separation of powers concerns *do* permit a reviewing court to ensure that the Equal Protection Clause is not successfully utilized to override legitimate claims of

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[168] 5 U.S. (1 Cranch) 137, 170 (1803) ("The province of the court is, [s]olely, to decide on the rights of individuals, not to enquire how the executive, or executive officers, perform duties in which they have a di[s]cretion. Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.").

[169] *See* RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 72–80 (6th ed. 2009) (discussing the *Marbury* model of adjudication); *see also* Girardeau A. Spann, *Expository Justice*, 131 U. PA. L. REV. 585, 589–92 (1983) (same).

racial equality in a way that would undermine the very purpose for which the clause was adopted.

The good faith sincerity standard applies in both the context of invidious discrimination and the context of benign affirmative action. Allegations of invidious discrimination and defenses to those allegations should be resolved through inquiries into the sincerity with which the competing arguments are asserted, as should competing arguments supporting and challenging the constitutionality of affirmative action. In fact, for purposes of good faith sincerity review, there is no qualitative difference between affirmative action and discrimination. In each context, *both* racial groups claim that their interests are being sacrificed in order to advance the interests of the other racial group. In this sense, current usage of the term "affirmative action" as entailing some sort of racial preference is actually a misnomer. Legitimate forms of affirmative action are remedial rather than preferential. When Vice President Lyndon Johnson coined the term in 1963, "affirmative action" consisted of affirmative efforts to identify and remedy ubiquitous forms of invidious structural discrimination that were so deeply entrenched in United States culture as to seem natural and inevitable.[170] Once again,[171] unless one thinks that one race is inherently inferior to another, a racially disparate allocation of societal resources will be evidence that racial discrimination continues to exist somewhere in the system. Permissible "affirmative action" then becomes simply a remedial effort to adjust and compensate for that discrimination.

It follows that affirmative action should be deemed consistent with the equality principle if it entails a sincere effort to promote equality by providing a remedy for the ongoing effects of past discrimination, including a present absence of diversity. However, both supporters and opponents of affirmative action should be seen as advocating merely another form of invidious discrimination when motivated by a desire to secure spoils at the expense of another race. Similarly, the constitutionality of so-called race-neutral alternatives to affirmative action should be assessed under the same good faith sincerity standard—as should any insistence on facial race neutrality that might end up being largely irrelevant to the sincerity of one's equality claims. To the extent that current usage views affirmative action as synonymous with mere minority racial preferences, the remedial aspect of affirmative action that is essential to a good faith analysis is marginalized and treated as largely beside the point.

The good faith sincerity concept that I am advocating as a basis for judicial enforcement of the Equal Protection Clause should not seem strange. It is analogous to the role that equity has traditionally played in mitigating the harshness of legal formalism in the application of rule of law principles.[172] Professor Horwitz has described

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[170] *See* Middleton v. City of Flint, 92 F.3d 396, 404 n.6 (6th Cir. 1996) (discussing the evolution of the term "affirmative action"); Nicholas Lemann, *Taking Affirmative Action Apart*, N.Y. TIMES, June 11, 1995, § 6, at 36 (same).

[171] *See supra* notes 133–34 and accompanying text.

[172] *See generally* JOHN NORTON POMEROY, POMEROY'S EQUITY JURISPRUDENCE (3d ed. 1905).

the manner in which the common law was transformed from an eighteenth century mechanism that promoted justice and fairness in particular cases, into a nineteenth century instrumental device that supplanted such equitable concerns with supposed utilitarian considerations that were designed to protect developing commercial interests. Once the transformation was complete, the new priority accorded commercial interests was then frozen into the common law by the invention of legal formalism. The formalist commitment to abstract rule of law principles had the effect of rendering doctrinally irrelevant any artificiality and harshness entailed in privileging instrumental commercial interests over previously recognized considerations of justice and fairness.[173] To the extent that such harshness and artificiality is mitigated today, it is through the infusion of equitable principles into rule of law adjudication. But equitable remedies remain disfavored, being relegated to injuries that the formalist rules deem to be irreparable.[174]

A good faith sincerity standard can mitigate the harshness and artificiality of the Supreme Court's racial discrimination rules in much the same way that equity can mitigate the harshness and artificiality of the common law. Analogous to the eighteenth century common law courts, the Warren Court displayed sensitivity to justice and fairness concerns in adjudicating claims for racial equality that were asserted by minorities during the civil rights movement. However, subsequent Supreme Courts became increasingly receptive to the competing claims of civil rights opponents, who sought to maintain the traditional regime of white privilege. Reminiscent of the nineteenth century instrumental protection of commercial interests, the Rehnquist and Roberts Courts adopted a supposedly utilitarian model of racial jurisprudence that resisted modifications to the racial status quo. They then relied on the formalist legal categories analyzed in Part I to solidify their doctrinal retrenchment. My hope is that a new racial jurisprudence based on good faith sincerity will operate as an equitable form of mitigation that reduces the current discounting of racial minority interests. But unlike equity, which has been relegated to a second-class supplement to rule of law, I believe that a good faith sincerity standard should become the primary mechanism for equal protection enforcement in race cases.

The interplay between political and judicial enforcement that I envision was, for a time, actually adopted by the Supreme Court. Section 5 of the Fourteenth Amendment specifically grants Congress the power to enforce the provisions of the Fourteenth Amendment, including the Equal Protection Clause.[175] In the process of upholding the Section 5 power of Congress to invalidate an English language literacy requirement that disenfranchised Puerto Rican voters in New York, the Warren Court adopted

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[173] *See* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780–1860 259–66 (1977) (discussing the role of formalism in supplanting equitable considerations).

[174] *Cf.* DOUGLAS LAYCOCK, THE DEATH OF THE IRREPARABLE INJURY RULE 8–9 (1991) (identifying the traditional irreparable injury rule, but suggesting that courts commonly circumvent it in order to promote justice).

[175] U.S. CONST. amend XIV, § 5.

what came to be known as the one-way ratchet interpretation of Section 5.[176] Although Congress did not have the power to contract the scope of the Equal Protection Clause by authorizing a practice that the Court viewed as an equal protection violation, Congress did have the power to expand the operative scope of the equal protection guarantee by enacting legislation that it thought would advance the goals of the Equal Protection Clause. This was true even if the Court did not think that the actions against which Congress was legislating actually violated the Equal Protection Clause.[177]

Stated differently, the Warren Court deferred to political enforcement of the Equal Protection Clause when it thought that Congress was engaged in a good faith effort to advance the goals of the equality principle, but it retained the power of judicial invalidation where it thought that Congress was engaged in bad faith racial discrimination. Unfortunately, the Rehnquist Court later abandoned this view. It first rejected any distinction between benign and invidious discrimination in selecting an applicable standard of review in race cases.[178] That made it difficult to identify a category of good faith discrimination that could be deemed constitutionally permissible. And then the Court simply rejected the one-way ratchet theory outright, holding that the Section 5 enforcement powers of Congress were limited to adopting remedial legislation for practices that the Court itself found to violate the Fourteenth Amendment.[179] The Roberts Court now seems to have rejected any notion of deference to good faith political enforcement whatsoever. The Court's remand of the Texas affirmative action plan in *Fisher* seems to have been based precisely on the Court's unwillingness to defer to the school's good faith in determining what remedial actions were necessary to secure an adequate level of student diversity.[180] And as has been noted, the Roberts Court's *Schuette* decision appears to have completely reversed the one-way ratchet.[181] The Court now defers to the political process when the interests of racial minorities are adversely affected, but overrides the political process when the interests of racial minorities are being protected.[182] Accordingly, the need for a more receptive attitude toward the role of good faith sincerity in race cases now seems acute.

A good faith sincerity standard is hardly a model of precision. But its inherent ambiguity has not precluded its ubiquitous adoption as a governing standard in other areas of the law. That is because the standard serves as an intersubjective shortcut to

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[176] *See* Katzenbach v. Morgan, 384 U.S. 641, 648–50 (1966) (adopting the one-way ratchet theory in upholding the Voting Rights Act of 1965).

[177] *See id.*

[178] *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 223–27 (1995).

[179] *See* City of Boerne v. Flores, 521 U.S. 507, 527–29 (1997) (rejecting the one-way ratchet theory in invalidating provisions of the Religious Freedom Restoration Act).

[180] *See* Fisher v. Univ. of Tex., 133 S. Ct. 2411, 2419–22 (2013). The Court of Appeals affirmed its original decision on remand, 758 F.3d 633 (5th Cir. 2014), and denied rehearing en banc, 771 F.3d 274 (5th Cir. 2014) (denying rehearing en banc).

[181] *See* Schuette v. Coal. to Defend Affirmative Actions, 133 S. Ct. 1633 (2013).

[182] *See supra* notes 157–58 and accompanying text.

the sorts of justice and fairness concerns that cannot be captured directly by three-part tests and syllogistic reasoning. Accordingly, the concept of good faith serves as a convenient way to sneak equity in through the backdoor of a legal system that purports to be more concerned with abstract rules than the fairness of particular outcomes. It permits the legal system to react to social realities that are understood but, for whatever reason, cannot be recognized expressly within the governing doctrinal framework. The subtle, yet persistent, influence of racial factors on the formulation of social policy seems to constitute such an ineffable reality.

Despite its imprecision, the concept of good faith does provide a judicially manageable standard that can serve as a basis for judicial review. Perhaps most prominently, the law of contracts infuses a non-disclaimable obligation of good faith into the performance of all contracts under both the *Second Restatement* and the *Uniform Commercial Code*.[183] The good faith obligation has both subjective and objective components, which can usefully be applied by analogy to equal protection claims. The subjective component of good faith requires honesty in fact,[184] which would presumably preclude someone from arguing that an action was intended to advance the goal of racial equality when it was actually intended to undermine that goal. The objective component of good faith requires the observance of reasonable standards of fair dealing in a pertinent specialized community,[185] which presumably would preclude someone in a particular social context from disregarding generally accepted equality norms about which that person either knew or should have known.

Not surprisingly, efforts have been made to articulate more precise definitions of the general good faith obligation, and not surprisingly, those efforts have tended to be only marginally helpful.[186] However the concept of good faith that I have in mind subsists more on what Professor Lawrence has famously called the "cultural meaning" of discrimination than on articulated criteria.[187] Once freed from the artificial constraints of current equal protection doctrine, I believe that a reviewing court will be able to use its general understanding of racial dynamics in contemporary United States culture to detect the presence or absence of good faith sincerity in many of the equal protection arguments with which it is presented. If a court is not ideologically disposed

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[183] *See* RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981); U.C.C. §§ 1-304, 1-302(b) (1977).

[184] *See* RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. a (1981); U.C.C. § 1-201(20) (1977).

[185] *See* RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. a (1981); U.C.C. § 1-201(20) (1977); *cf.* U.C.C. § 2-103(1)(b) (1977).

[186] *See, e.g.*, Steven J. Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 HARV. L. REV. 369 (1980); E. Allan Farnsworth, *Good Faith Performance and Commercial Reasonableness under the Uniform Commercial Code*, 30 U. CHI. L. REV. 666 (1963); Robert S. Summers, *"Good Faith" in General Contract Law and the Sales Provisions of the Uniform Commercial Code*, 54 VA. L. REV. 195 (1968).

[187] *See* Charles R. Lawrence, III, *The Id, The Ego, and Equal Protection: Reckoning With Unconscious Racism*, 39 STAN. L. REV. 317, 324 (1987).

to ignoring the racial realities that surround it, the court may be able to do a good job of implementing a good faith sincerity standard. Note that I am not suggesting that such a standard can prevent an ideologically inclined court from implementing any discriminatory preferences that it may possess. The Supreme Court is not above the practice of doctrinal pretext.[188] Instead, I am hoping that a direct doctrinal focus on good faith sincerity will cause a court to remember that it should not *want* to implement such ideological preferences.

The nature of the political process is such that no one expects good faith or sincerity in the arguments that legislative and executive officials make to advance their parochial agendas. For example, opponents of the Affordable Care Act do not argue that they are politically opposed to President Obama's economic and social agenda, and that they hope its demise will increase political support for the Republican Party. Rather, they argue that Obamacare exceeds the scope of the commerce power, and that individual mandate payments that uninsured individuals must make to the IRS constitute a penalty rather than a tax.[189] The recent outbreak of voter ID laws in several states is not justified as an effort to disenfranchise young, old, and minority voters who tend to be more liberal than conservative. Rather it is justified by the need to prevent a danger of voter fraud so illusory as to be virtually nonexistent.[190] In the famously disputed 2000 Presidential election between George W. Bush and Al Gore, the two disputing political parties did not argue that they wanted Florida votes to be counted in a way that would allow their respective candidates to win. Instead, they argued about whether or not the Equal Protection Clause required an ongoing state recount to be halted for lack of an adequate standard to govern the counting of hanging chads.[191] Everyone knows that the stated legal arguments in such cases are both politically motivated and instrumentally invoked. However, that knowledge is largely irrelevant under the governing doctrinal standards. The actual motives underlying the proffered arguments are simply inapposite. But however one feels about deference to political posturing in other contexts, sincerity should matter in the context of equal protection race claims.

A good faith sincerity standard provides an appropriate basis for judicial review in race cases, because the Supreme Court is institutionally competent to enforce such a standard. Unlike current doctrinal tests, which necessarily implicate the Court in the activity of racial policymaking, a good faith standard asks the Court merely to make a determination for which it does possess greater relative institutional competence than the political branches. It is precisely because of the Court's structural insulation from everyday politics that it is better able to detect and respond to any bad faith lack of sincerity in the arguments that the Court considers. Sincerity may play no meaningful

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[188] *See, e.g.*, Whren v. United States, 517 U.S. 806 (1996) (unanimous decision holding that the Fourth Amendment does not prohibit the police from engaging in pretextual motor vehicle stops to search for drugs).

[189] *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012).

[190] *See* Crawford v. Marion Cnty. Election Bd., 553 U.S. 181 (2008).

[191] *See* Bush v. Gore, 531 U.S. 98 (2000).

role in a pluralist political process, but it is crucial to a judicial process charged with neutralizing the excesses of a political culture that repeatedly invokes insincere claims to justify the racial oppression on which it has historically subsisted.

At times, even the Supreme Court itself recognizes the importance of good faith sincerity. The Court has rejected any distinction between benign and invidious discrimination in determining when to apply strict scrutiny to racial classifications.[192] However, once strict scrutiny has been triggered, the Court at least nominally engages in the sort of sincerity analysis that I am proposing.[193] The purpose of strict scrutiny is to distinguish presumptively invidious racial classifications from those that constitute truly benign efforts to remedy the "unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country."[194] Although the Court has said that "more than good motives should be required when government seeks to allocate its resources by way of an explicit racial classification system,"[195] once strict scrutiny has been applied, the ultimate test of constitutional legitimacy appears to be *precisely* whether the government is proceeding in good faith when it makes use of a racial classification. Unfortunately, the baggage weighing down the Court's current doctrinal rules seems to have placed genuine good faith judicial inquiries out of reach. But it is just that defect that I would like to remedy.

B. Application

Application of a good faith sincerity standard to equal protection claims in race cases can yield results that are more satisfying than the results produced by the Supreme Court's current doctrinal rules. In some cases, application of the standard will be relatively easy, utilizing a subjective model of good faith sincerity. In other cases, application of the standard will be more complicated, utilizing an objective model of good faith sincerity to accommodate recent insights of cognitive psychology. Proper application of the good faith standard will guard against the temptation to treat the existing distribution of societal resources as establishing a so-called colorblind neutral baseline that defines the concept of equality. And a properly functioning Supreme Court would also apply a good faith sincerity standard to the arguments that the Court itself makes in resolving equal protection claims, thereby enhancing its credibility as a reliable arbiter of racial disputes.

1. Subjective Standard

A subjective standard of good faith would seek to ascertain whether an argument purporting to be race neutral, or to advance the cause of racial equality, was actually

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[192] Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 223–27 (1995).

[193] *Id.* at 228–30.

[194] *See id.* at 225–26, 237.

[195] *See id.* at 226 (quoting Drew Days, *Fullilove*, 96 YALE L.J. 453, 485 (1987)).

intended to have its purported effect, or rather was intended to discount the interests of one race in order to advance the interests of another. Sometimes the answer to that question will be unclear. But often the answer will be readily apparent—even though the current Court's formalist doctrinal rules might fail to detect motivations that seem obvious to a more realistic observer.

For example, in *Village of Arlington Heights v. Metropolitan Housing Development Corporation*,[196] the Supreme Court upheld a zoning restriction that prevented the construction of a housing development that would have produced racial integration in a de facto segregated Chicago white suburb.[197] The Court accepted the argument that the zoning restriction was intended to preserve a "buffer" zone that would protect property values rather than to maintain residential segregation.[198] But it did so as if de facto segregation was not itself one of the things that caused property values to increase.[199] Application of the *Washington v. Davis* intentional discrimination standard, therefore, formally blinded the Court to what must have been obvious to everyone else. The interests of the racial minorities who wished to live in Arlington Heights were being discounted in order to advance the interests of the current white residents who wished to keep racial minorities out of their community.[200]

The dynamic causing residential segregation is so powerful and pervasive in the United States that it should be recognized as the default explanation for residential zoning restrictions that have a racially disparate impact. As Ta-Nehisi Coates has documented, the long history of residential segregation in the United States has been both persistent and intentionally oppressive. "Two hundred fifty years of slavery. Ninety years of Jim Crow. Sixty years of separate but equal. Thirty-five years of racist housing policy. Until we reckon with our compounding moral debts, America will never be whole."[201] Against that backdrop, those wishing to satisfy a subjective standard of good faith sincerity, and to rebut the inference of bad faith discrimination, would have to offer a convincing account of why discriminatory intent was not a motivating factor. That showing would be difficult to make in the context of de facto residential segregation, where racial motivations are typically significant, if not dispositive. At the very least, a standard of subjective good faith would shift the starting doctrinal presumption from one of rhetorical race neutrality to one that actually reflected racial realism.

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[196] 429 U.S. 252 (1977).

[197] *Id.* at 252, 260.

[198] *See id.* at 264–71 (finding no intentional discrimination); Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights, 373 F. Supp. 208, 211 (N.D. Ill. 1974) (finding motive to maintain property values); *see also supra* notes 80–82 and accompanying text.

[199] *See Vill. of Arlington Heights*, 429 U.S. at 264–71.

[200] If the residents of Arlington Heights were sincerely interested in preserving property values, independent of any racial overtones, they would not be guilty of subjective bad faith. However, they would still have to satisfy the standard of objective good faith that is discussed in Part II.B.2.

[201] Ta-Nehisi Coates, *The Case for Reparations*, THE ATLANTIC (June 2014), http://www.theatlantic.com/features/archive/2014/05/the-case-for-reparations/361631/.

It is also possible for racial minorities to seek the advancement of their own interests by discounting the interests of whites. That is what Justice O'Connor feared when she invalidated a minority set-aside for municipal construction contractors in *City of Richmond v. J.A. Croson Co*.[202] She noted that five of the nine members of the Richmond, Virginia city council that had voted to adopt the plan were black.[203] This created a representation-reinforcement danger that the black city council majority had discounted the interests of the white minority in order to advance the racial interests of blacks.[204] If that were the case, then the affirmative action program would indeed violate the subjective good faith sincerity standard that I am proposing.

The problem with Justice O'Connor's reasoning in *Croson* is that it disregards the fact that intent always emanates from a context. The context surrounding adoption of the Richmond set-aside plan actually ends up supporting an inference of good faith sincerity, rather than bad faith racial discounting. Although five of the nine members of the city council were black, Justice O'Connor failed to disclose that the vote to adopt the plan was 6–3.[205] This means that at least one white Council member voted for the plan.[206] More significantly, the plan was not only adopted by a city that had a long and infamous history of discrimination against blacks, but only 0.67% of contemporary municipal construction contracts had been awarded to minority contractors even though the population of Richmond was 50% black.[207] In this context, the Richmond set-aside plan seems much more like a good faith effort to reduce the lingering effects of past discrimination than a minority effort to exploit the interests of whites. And, once again, the Supreme Court's fixation on proof of its artificial conception of intentional discrimination caused the Court to disregard the good faith remedial intent that almost certainly motivated the plan. Instead, the Court accepted a bad faith equality argument that was offered by white challengers seeking to maintain their existing advantage over minority contractors.

White challenges to racial affirmative action plans typically assert that the plans violate the Equal Protection Clause by creating discriminatory preferences for racial minorities over whites.[208] The degree to which such challenges can survive the proposed good faith standard will generally turn on whether the plans are or are not remedial. Once again, because the existing distribution of societal resources tends to favor whites rather than racial minorities, the starting assumption should be that such plans

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[202] 488 U.S. 469 (1989).

[203] *Id.* at 495–96 (discussing the black majority on Richmond's city council).

[204] *See id.*

[205] *Id.* at 481.

[206] *See id.* at 554–55 (Marshall, J., dissenting) (discussing Richmond's city council vote); *see also* J.A. Croson Co. v. City of Richmond, 822 F.2d 1355, 1362–64 (4th Cir. 1987) (Sprouse, J., dissenting) (same).

[207] *See Croson*, 488 U.S. at 479–80 (0.67% minority contractors).

[208] *See, e.g.*, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 270 (1977) (White applicant argued that including race in admissions decisions is a violation of the Equal Protection Clause.).

are intended to compensate for existing minority disadvantages or to correct for an existing lack of diversity. That means that most affirmative action plans adopted by white majoritarian institutions are likely to be valid under a good faith standard. The issue could be more complicated in context where there was already a racially proportionate allocation of resources. But under the current distribution, the good faith validity of most affirmative action should be relatively easy to establish. That is why the Supreme Court has been forced to offer strained arguments to justify its invalidation of some affirmative action programs that should have been easy to uphold.

In *Croson* itself, Justice O'Connor sidestepped a federal precedent upholding a similar minority construction set-aside by holding that municipalities possessed less power than Congress to adopt affirmative action programs.[209] She did this even though she plainly did not believe the argument she was asserting. She rejected her own argument six years later in *Adarand Constructors v. Pena*,[210] where she held that the same constitutional standard applied to congressional and non-congressional affirmative action programs alike.[211] Justice O'Connor then rested her problem with the minority construction set-aside at issue in *Adarand* on an argument so strained as to be striking. The *Adarand* construction preference for contractors who were socially and economically disadvantaged did not itself pose any constitutional problem. Rather, the statutes creating the preference posed an equal protection problem because they contained a *rebuttable* presumption that women and racial minorities were socially and economically disadvantaged.[212] Such an observation seems so self-evidently correct that rejecting its use as a starting assumption for constitutional analysis is hardly consistent with the sincere, good faith pursuit of racial equality.

The recent proliferation of voter ID laws, restrictions on same-day registration, cutbacks on early voting, and other restrictive voting laws also seem to pose a fairly easy case for invalidation under a subjective good faith discrimination standard. Those laws are said to guard against voter fraud, but the complete absence of any credible history of pertinent voter fraud makes the offered justification seem simply pretextual. In actuality, such laws are typically adopted as a means of suppressing liberal voter turnout, and one of the things that makes the laws effective for that purpose is their disproportionate effect on racial minority voters. The fact that these laws also target other groups who tend to be liberal voters—such as young people, old people, and indigents—does not eliminate good faith racial concerns.[213] Under current law,

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[209] *See Croson*, 488 U.S. at 486–93 (distinguishing between congressional and non-congressional power).

[210] 515 U.S. 200 (1995).

[211] *See id.* at 223–27 (applying strict scrutiny to congressional and non-congressional affirmative action programs).

[212] *See id.* at 205–10 (rejecting such a presumption).

[213] *See, e.g.*, Justin Levitt, *A Comprehensive Investigation of Voter Impersonation Finds 31 Credible Incidents Out of One Billion Ballots Cast*, WASH. POST (Aug. 6, 2014), http://www.washingtonpost.com/blogs/wonkblog/wp/2014/08/06/a-comprehensive-investigation-of-voter-impersonation-finds-31-credible-incidents-out-of-one-billion-ballots-cast/ (noting that

invidious racial discounting need not be the sole motivating factor in order to require invalidation under the Equal Protection Clause.[214] And proffering a mixed motives defense would remain similarly unavailing under the good faith standard that I am proposing. I *am*, however, suggesting that the current *Washington v. Davis* and *Feeney* distinction between actuating and incidental intent has outlived any usefulness that it may ever have had.[215] Although the discriminatory objectives motivating voter ID laws and other restrictive voting laws seem apparent, the Supreme Court's current intentional discrimination standard is so artificial that challenges to restrictive voting laws sometimes decline even to assert racial discrimination claims despite the existence of fairly obvious racial motivations.[216]

Recent profiling laws that require the stop, detention, or arrest of people who appear to be undocumented aliens also present relatively easy cases for invalidation under a good faith discrimination standard. The Supreme Court rejected a facial challenge to one such law in a case whose posture did not directly present the issue of racial discrimination.[217] However, the racial motivation of a law burdening Latinos in order to identify illegal immigrants is so close to the surface that it is difficult to reject the suspicion that the law reflected the discounting of racial minority interests. It is hard to imagine that an analogous law requiring the detention of whites would be passed if the bulk of illegal immigrants came from Canada rather than Mexico.

The racial motivation behind the extremely successful effort to maintain de facto school segregation in the United States is similarly transparent. By linking student attendance to de facto residential segregation the Supreme Court has not only acquiesced in, but has actually constitutionalized, the racial discounting that such segregation

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ID laws only stop fraud at polls); Ashley Spillane, *These States Are Trying to Stop Young People from Voting*, WASH. POST (July 11, 2014), http://www.washingtonpost.com/posteverything/wp/2014/07/11/these-states-are-trying-to-stop-young-people-from-voting/ (explaining that twenty-two states seek to suppress youth voting and young people are 43% people of color); Reid Wilson, *Five Reasons Voter Identification Bills Disproportionately Impact Women*, WASH. POST (Nov. 5, 2013), http://www.washingtonpost.com/blogs/govbeat/wp/2013/11/05/five-reasons-voter-identification-bills-disproportionately-impact-women/ (explaining that voter ID laws disproportionately burden poor, seniors, students, and women).

[214] *See, e.g.*, Miller v. Johnson, 515 U.S. 900, 916 (1995) (adopting a "predominant factor" test for unconstitutional racial gerrymanders); Hunter v. Underwood, 471 U.S. 222, 231–32 (1985) ("[A]n additional purpose to discriminate against poor whites would not render nugatory the purpose to discriminate against all blacks . . . ."); Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265 (1977) ("[*Washington v.*] *Davis* does not require a plaintiff to prove that the challenged action rested solely on racially discriminatory purposes.").

[215] *See supra* notes 75–79 and accompanying text (discussing problems with distinguishing types of racial intent).

[216] *See, e.g.*, Crawford v. Marion Cnty. Election Bd., 553 U.S. 181 (2008) (upholding an Indiana voter ID law seemingly motivated by partisan political considerations that correlated with poverty and race, despite lack of voting fraud evidence).

[217] *See* Arizona v. United States, 132 S. Ct. 2492, 2507–10 (2012) (upholding a law requiring status checks for suspected undocumented aliens).

entails.[218] The opinion of Chief Justice Roberts in *Parents Involved in Community Schools v. Seattle School District No. 1* even went so far as to hold that *Brown* itself prohibited race conscious efforts to guard against the resegregation of post-*Brown* integrated schools that was occurring because of shifting residential patterns.[219]

What all of these easy-case examples have in common is a willingness on the part of the Supreme Court—and those who view the Court as setting appropriate standards for constitutional legitimacy—to overlook racial dynamics that should be readily apparent. The racial dynamics that matter for doctrinal purposes rest on legal fictions rather than the felt realities that come from actually living in the culture. The subjective standard of good faith that I am proposing is designed to overcome this artificiality by reminding us simply to pay attention to the things about race that we already know. Although the subjective standard focuses on the presence or absence of perceived good faith sincerity, the subjective standard is not designed to encompass recent insights provided by cognitive psychology. Those insights can be addressed by adding an objective standard of good faith.

2. Objective Standard

An objective standard of good faith would place less emphasis on the conscious motivations of those who take or tolerate actions having a racially disparate impact, and more emphasis on the motivation that we would ascribe to a hypothetical reasonable person who was implicated in such disparate impact under the same or similar circumstances. Cognitive dissonance theory, and recent findings about the nature of cognitive bias, have now established that racially discriminatory motivations are sometimes experienced as racially neutral. Accordingly, we can use an objective standard to determine when it is appropriate to defer to subjective self-perceptions of good faith sincerity and when it is appropriate to disregard self-perceptions in order to compensate for unconscious racial bias. This can be done most reliably by guarding against our tendency to use existing inequalities in the distribution of societal resources as the baseline that defines our conception of colorblind race neutrality.

People are not always aware of their inclinations to engage in discriminatory racial discounting, in part because cognitive dissonance reduction techniques help shield them from the implications of such knowledge.[220] Since the formulation of cognitive

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[218] *See, e.g.*, Milliken v. Bradley, 418 U.S. 717, 732–36, 744–47 (1974) (refusing to allow inter-district judicial remedies for de facto school segregation, thereby permitting suburban schools to remain predominantly white and inner-city schools to remain overwhelmingly minority); Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 208–09 (1973) (reaffirming prohibition on use of race-conscious remedies to eliminate de facto segregation).

[219] 551 U.S. 701, 709–11, 745–48 (2007) (plurality opinion) (reading *Brown* to prevent race-conscious efforts to stop resegregation).

[220] *See generally* LEON FESTINGER, A THEORY OF COGNITIVE DISSONANCE 18–24 (1957) (describing possible ways to reduce or eliminate dissonance and how the techniques work).

dissonance theory in the mid-1950s,[221] social psychologists have recognized that individuals have a need to reduce the dissonance that results from perceived inconsistencies between various combinations of their beliefs and actions.[222] Accordingly, a person who simultaneously experiences the cognition that he is a smoker, and the cognition that smoking is bad for his health, will experience psychological pressure to reduce the discomfort flowing from those two inconsistent cognitions. That cognitive dissonance can be reduced in a variety of ways that include: modifying the pertinent behavior (e.g., giving up smoking); modifying the relative importance of a dissonant cognition (e.g., deciding that smoking is not so harmful for young people who smoke for only a few years); attributing a dissonant cognition to external coercion (e.g., smoking is addictive and beyond my control); and modifying pertinent attitudes (e.g., believing studies that say smoking is not as harmful as most people think).[223] In their often unconscious efforts to reduce cognitive dissonance, people tend to follow the path of least resistance. They will modify the dissonant cognition that can be changed with the least amount of disruption.[224] In most cases, this will result in attitude change rather than the modification of behavior.[225]

In the context of race, dissonance reduction techniques can mask subjective perceptions of racial discrimination. Under the facts of *Arlington Heights*,[226] an objective observer would view the zoning restriction that prohibited the construction of integrated housing as the outgrowth of a desire to maintain a de facto segregated community. However, cognitive dissonance theory predicts that the residents of Arlington Heights would not themselves have so viewed their motivation. They would want to reduce the dissonance created by the cognition that they were racially tolerant with the cognition that they were excluding racial minorities from their community. Although they were not willing to reduce the dissonance by modifying their behavior and permitting the integrated housing to be constructed, they would be willing to use other dissonance reduction techniques. For example, they might try to reduce dissonance by attributing their zoning denial to external coercion, caused by the need to maintain property values. Or they might try to reduce the importance of their racial tolerance cognition by concluding that, under the circumstances, it was outweighed by the need to respect natural forces governing our free market economy. It is only if other dissonance reduction techniques failed to work that Arlington Heights residents would seek recourse in attitude change, and conclude that it was not so important to be racially tolerant after all.

Cases in which the Supreme Court has rejected the interests of racial minorities in order to advance the interests of the white majority are particularly noteworthy from

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221 *See* JOEL COOPER, COGNITIVE DISSONANCE: 50 YEARS OF A CLASSIC THEORY 6 (2007).
222 *See* FESTINGER, *supra* note 220, at 7–9.
223 *See id.* at 5–6, 21–22.
224 *See generally id.* at 24–27 (describing resistance to reduction of dissonance).
225 *See id.* at 28–29; *see also* COOPER, *supra* note 221, at 8–9.
226 *See supra* notes 196–99 and accompanying text.

the perspective of cognitive dissonance theory. When the Court permitted the use of a standardized test that perpetuated the underrepresentation of minority police officers in *Washington v. Davis*,[227] the Court reduced cognitive dissonance. Even though the test had not been validated for job-relatedness, the Court's holding nevertheless established that it was the test—rather than any racial discounting entailed in the decision to use the test—that was the cause of the racially disparate impact that ensued. When the Court *required* the use of a non-validated promotion test that perpetuated the underrepresentation of minority firefighter officers in *Ricci v. DeStefano*,[228] the Court held that the applicable law mandated the resulting racially disparate impact. In both cases, any cognitive dissonance that might otherwise have flowed from perpetuating the underrepresentation of minority police officers and firefighters was no longer attributable to those who hired and promoted them. Rather, it was a result of the external coercion produced by the standardized tests, and by antidiscrimination law itself. Accordingly, the process of Supreme Court adjudication now appears in a new light. The Court emerges as an institution that can actually facilitate the practice of racial discounting. It can do so by serving as a cognitive dissonance reduction device for those who would engage in the practice.

Another reason why people may be subjectively unaware of their inclinations to engage in discriminatory racial discounting is that significant amounts of racial prejudice are simply unconscious.[229] Since 1995, use of the Implicit Association Test to study cognitive bias has revealed that individuals possess striking levels of bias concerning social categories such as race, gender, and sexual orientation of which the individuals themselves are unaware.[230] The Race Implicit Association Test uses differential response latencies to measure the ease with which individuals are able to pair pictures of white and black faces with pleasant and unpleasant words.[231] People who are faster and more accurate at pairing white faces with pleasant words and black faces with unpleasant words than at pairing black faces with pleasant words and white faces with unpleasant words are said to have a preference for whites over blacks.[232] People who are faster and more accurate at the opposite pairings are said to have a preference for blacks over whites.[233] And people who show no differential response latencies are said to have no racial preference.[234] Differential response latencies are thought to reflect years of acculturation that have taught people to internalize the belief that some

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[227] 426 U.S. 229 (1976) (upholding the use of standardized tests for selection of D.C. police officers despite a racially disparate impact).

[228] 557 U.S. 557 (2009) (requiring the use of standardized tests for promotion of New Haven firefighters despite a racially disparate impact).

[229] *See* MAHZARIN R. BANAJI & ANTHONY G. GREENWALD, BLINDSPOT: HIDDEN BIASES OF GOOD PEOPLE 108 (2013).

[230] *See id.* at 32, 46–47.

[231] *Id.* at 41–44.

[232] *Id.* at 46.

[233] *See id.*

[234] *See id.* at 45.

pairings are more natural than others.[235] It turns out that 75% of the people who have taken the Race Implicit Association Test show a preference for whites over blacks.[236] The acculturation process is so effective that this white preference is displayed by racial minorities, as well as by whites.[237] The Implicit Association Test is now available for anyone to take on the Internet, and those who take it are often surprised to learn that their racial attitudes are not as neutral as they had previously supposed them to be.[238]

One might wonder whether differential response latencies on an Implicit Association Test really correlate with racially discriminatory behavior. The answer is that they do.[239] A 2009 meta-analysis of 184 studies looking for a correlation between Implicit Association Test preferences and various measures of racial discrimination found a correlation coefficient of .24.[240] That established a "moderate correlation" between racial preferences and discriminatory behavior,[241] which means that those with high white preferences are more likely than average to engage in discriminatory acts against blacks (62%) than those with low white preferences (38%) (the difference equals the .24 correlation coefficient).[242] The types of discriminatory behavior, with which the Implicit Association Test preferences correlated, included favoring white applicants over equally qualified black applicants in simulated hiring situations; physicians prescribing optimal care for white emergency room patients and sub-optimal care for black patients; and perceiving black faces to be more angry than comparable white faces.[243]

That latter result is particularly troubling given another Implicit Association Test finding. When a Weapons Implicit Association Test was taken by 80,000 individuals, 70% of those who took the Test displayed a stronger connection between blacks and weapons than between blacks and innocuous items such as cell phones and wallets.[244] The fear is that implicit cognitive racial bias of this sort can produce tragic results, as it may have when four New York City police officers infamously shot and killed Amadou Diallo in 1999.[245] The unarmed black Diallo reached for his wallet to show the police his identification, but the heavily armed white officers shot him repeatedly in a hail of forty-one bullets—mistakenly concluding that he was reaching for a gun.[246] The phenomenon of white police officers and security patrollers mistakenly killing unarmed black men has continued to the present time. This is illustrated by more recent

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[235] *Id.* at 39–40.
[236] *Id.* at 47.
[237] *See id.* at 105, 109–10.
[238] *See id.* at 42, 46.
[239] *Id.* at 49.
[240] *Id.* at 49–50.
[241] *Id.* at 50.
[242] *Id.* at 51.
[243] *Id.* at 49.
[244] *Id.* at 103–05.
[245] *Id.* at 106.
[246] *Id.*

deaths including those of Trayvon Martin in Sanford, Florida; Michael Brown in Ferguson, Missouri; Eric Garner in Staten Island, New York; and John Crawford III in a Beavercreek, Ohio, Wal-Mart.[247]

The fact that the cognitive dissonance and implicit bias associated with racial discounting can escape conscious awareness poses problems for the application of a good faith discrimination standard. Although ubiquitous, such dissonance and bias will often not be subjectively experienced as insincere or racially discriminatory. As a result, a subjective standard of good faith will not provide a reliable basis for invalidating such racial discounting. Indeed, it is precisely this type of subtle, yet pervasive, discrimination that slips through the cracks of the Supreme Court's current doctrinal rules requiring particularized intentional discrimination, and disregarding general societal discrimination.[248] And it is this doctrinal deficiency that I hope to remedy through the use of a good faith sincerity standard for equal protection enforcement. Accordingly, an objective theory of good faith will be required to identify and respond to the types of discriminatory racial discounting, of which the practitioners are themselves subjectively unaware. By asking whether a reasonable person under the circumstances would or should have guarded against the dangers of cognitive dissonance and implicit bias, an objective standard can help advance the goal of racial equality.

Those who are aware of cognitive dissonance and implicit bias problems, but choose simply to ignore them when fashioning their equality arguments will, of course, violate the subjective good faith standard. More sophisticated players who affirmatively choose not to inquire into cognitive dissonance and implicit bias problems, for fear that the ensuing knowledge might undercut the equality arguments that they wish to make, also violate the good faith standard. Their strategy is like an executive's "contrived ignorance" in maintaining deniability with respect to a subordinate's misconduct—something that is generally sufficient to establish criminal intent, but might not always be viewed as unethical.[249] This sort of head-in-the-sand ostrich morality might also be viewed as subjective bad faith. But even if it is not, it should be viewed as violating the objective standard of good faith, for the same reason that the objective standard is violated by those with no knowledge of cognitive complications.

Those who offer equality arguments with no knowledge of the cognitive dissonance and implicit bias influences under which they might be operating may not be guilty of subjective bad faith, but they should nevertheless be deemed to have violated the objective standard of good faith. They may not have known about these cognitive

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[247] *See* Gene Demby, *What Does It Mean To Prevent 'The Next Michael Brown'?*, NPR CODE SWITCH BLOG (Sept. 3, 2014, 2:57 PM), http://www.npr.org/blogs/codeswitch/2014/09/03/344653185/what-does-it-mean-to-prevent-the-next-michael-brown; Marc H. Morial, Editorial, *Stop the War on Young Black Men in America*, CHI. DEFENDER, Aug. 27, 2014, *available at* 2014 WLNR 25873158.

[248] *See supra* notes 134–35 and accompanying text (discussing subtle and pervasive structural discrimination).

[249] *See* David Luban, Essay, *Contrived Ignorance*, 87 GEO. L.J. 957 (1999) (discussing implications of willful blindness in criminal and ethical contexts).

threats to the equality principle, but they *should* have known about them. Under current law, we impute knowledge of the Supreme Court's esoteric equal protection jurisprudence to those who are subjectively unaware of the doctrinal intricacies entailed in the de facto/de jure distinction,[250] the *Washington v. Davis*/*Feeney* distinction,[251] and the divergent roles that diversity plays in primary, secondary, and higher education.[252] We should likewise impute knowledge of cognitive dissonance and implicit bias insights to those who claim the expertise to formulate arguments about the intricacies of the Equal Protection Clause. This not only enables equality determinations to be made at a more meaningful level of analysis, but it also creates an incentive for individuals to pay attention to the unconscious factors that may be motivating their decisions to take actions that have a racially disparate impact.

Objective good faith inquiries can also serve as a check on judicial excesses. A court's adjudication of racial discrimination claims ultimately rests on nothing more than the arguments about racial equality that the court either accepts or rejects. As a result, the legitimacy of a court's racial decisions can also be judged under an objective standard of good faith sincerity. Aspirations of judicial independence notwithstanding, a court's own ideological and unconscious biases can remain unrecognized when the court invokes doctrinal tests that are as complex and opaque as those mandated by the Supreme Court's current racial jurisprudence. But a court's own biases emerge more readily when the court is called on to apply a doctrinal standard as simple and transparent as good faith sincerity in explaining why it has accepted or rejected the arguments with which it has been presented. The lack of doctrinal complexity simply clears out the underbrush in which illegitimate biases might otherwise successfully hide.

As I stated in the first sentence of this Article, the pertinent issue is presented perhaps most clearly in the *Schuette* decision upholding the Michigan Proposal 2 voter initiative that amended the state constitution to ban affirmative action. If the Michigan voters were motivated by a sincere desire to advance the goal of colorblind racial equality, they may have satisfied a subjective standard of good faith. That seems to be what Chief Justice Roberts was arguing in his concurrence, with his matter-of-fact assertion that the debate before the Court simply reflected a good faith difference of opinion about the costs and benefits of racial affirmative action.[253] This attachment to a subjective understanding of equal protection is reminiscent of his *Parents Involved* aphorism that "[T]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[254] Justice Scalia's *Schuette* concurrence in the judgment went even further down the subjective path, declaring that Proposition 2 *could not*

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[250] *See supra* notes 41–198 and accompanying text.

[251] *See supra* notes 75–79 and accompanying text.

[252] *See supra* notes 93–94, 103–30 and accompanying text.

[253] *See* Schuette v. Coal. to Defend Affirmative Action, 134 S. Ct. 1623, 1639 (2014) (Roberts, C.J., concurring) ("People can disagree in good faith on this issue, but it similarly does more harm than good to question the openness and candor of those on either side of the debate.").

[254] Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 748 (2007).

violate the Equal Protection Clause because its prohibition on racial preferences simply required what the Equal Protection Clause itself demands.[255] Justice Scalia was thereby using this understanding of the Equal Protection Clause as a dissonance reduction mechanism. However, Justice Scalia did not address the observation that requiring the same treatment of groups that are differently situated to begin with will simply perpetuate the consequences of past discrimination.

Once one views the adoption of Proposal 2 in the context of past discrimination, an objective standard of good faith could produce a different constitutional analysis. In effect, that is what Justice Sotomayor was arguing in dissent, when she viewed Proposal 2 as unconstitutional precisely because it constituted the current incarnation of a long tradition of racial discrimination in the United States.[256] Justice Sotomayor sought to expose what she viewed as the reductionism inherent in the Roberts and Scalia view, by stating that "[T]he way to stop discrimination on the basis of race is to speak openly and candidly on the subject of race, and to apply the Constitution with eyes open to the unfortunate effects of centuries of racial discrimination."[257]

Perhaps fearing that Justice Sotomayor was mocking his *Parents Involved* aphorism, Chief Justice Roberts dismissively marginalized her concerns in a terse concurring opinion whose tone seemed more condescending than engaging.[258] By acquiescing in this marginalization, the *Schuette* majority seems to have taken the most interesting equality issue off the table. It simply assumed, without analysis that Proposal 2 was not *itself* an act of racial discrimination. It could do so, however, only by accepting the current distribution of societal resources as a race neutral, colorblind baseline, against which the affirmative action barred by Proposal 2 could be deemed racially preferential. But because we should all understand that the current distribution is far from neutral, an objective standard of good faith would produce a different analysis.[259]

3. Baseline Inequality

The current distribution of societal benefits and burdens in the United States is racially correlated. Because that distribution was produced by a long history of racial discrimination, good faith affirmative action can be characterized as remedial rather than preferential in nature. In fact, all actions having a racially disparate impact can be viewed as ultimately resting on some form of societal discrimination that continues to exist somewhere in the system. Unless one believes that racial minorities are inherently inferior to whites, the persistence of subtle and pervasive forms of discrimination

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[255] *See Schuette*, 134 S. Ct. at 1639, 1648 (Scalia, J., concurring).

[256] *See id.* at 1651–56 (Sotomayor, J., dissenting).

[257] *Id.* at 1676.

[258] *See id.* at 1638–39 (Roberts, C.J., concurring).

[259] Justice Breyer viewed Proposal 2 as prohibiting racial preferences, but reserved the right to reach a different conclusion if Proposal 2 were deemed to prohibit affirmative action that was remedial rather than preferential. *See id.* at 1648–49 (Breyer, J., concurring).

offers the most plausible explanation for why so many of our societal actions have a racially disparate impact.[260]

Professor Ian Haney López has argued that a well-funded, right-wing plutocracy has successfully used tacit "dog whistle" race-baiting techniques to increase its concentration of wealth in the United States. By "convincing" whites that broad redistributive programs are actually programs that benefit racial minorities at the expense of whites, the plutocrats were able to utilize white hostility to racial minorities as a means of getting whites to vote against their own economic interests. This was accomplished by characterizing the existing distribution of resources as neutral and colorblind, thereby branding any effort to deviate from the existing distribution racially discriminatory. But far from being on an "arc of history bend[ing] toward justice," Professor López argues that we are at a point in our cultural evolution where the only way to combat this post-racial misconception of racial equality is by emphasizing the role that systemic racial discrimination has played in the creation and perpetuation of the existing, discriminatory distribution.[261]

Under an objective standard of good faith, those making equality arguments could not simply ignore the current unequal distribution of resources. Instead, they would have to frame their arguments in a way that showed why the equality principle was advanced despite the current racially correlated distribution. Although the Supreme Court and the public often resist the idea that structural discrimination merits a remedial response, the impact of cognitive dissonance and implicit bias insights suggest that it is only by addressing the problem of structural discrimination head on that we can hope to make meaningful progress toward the realization of racial equality.

Viewed in this light, Michigan's Proposal 2 in *Schuette* does not seem to survive scrutiny under an objective standard of good faith. It seems more like an invidious effort to invalidate compensatory remedies for the existing racial distribution than a good faith effort to achieve racial equality. As Justice Sotomayor argued, Proposal 2 simply seems like yet another effort to perpetuate the long history of racial discounting under which we have traditionally sacrificed minority interests in order to advance the interests of whites. Viewed against the baseline of the current distribution, Proposal 2 does not *ban* invidious racial preferences. Rather it *becomes* an invidious racial preference.

In addition, when viewed through the lens of objective good faith sincerity, the affirmative action programs that Proposal 2 supposedly targets—such as the diversity programs at issue in *Grutter*, *Gratz*, *Parents Involved*, and *Fisher*—should not even fall within the scope of the Proposal 2 prohibition. As efforts to promote diversity by compensating for the existing unequal distribution of educational resources, such programs entail neither "discrimination" nor racial "preferences." Rather, they entail remedial

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[260] *See supra* notes 135–37 and accompanying text (discussing racially correlated distribution of resources).

[261] *See* IAN HANLEY LÓPEZ, DOG WHISTLE POLITICS: HOW CODED RACIAL APPEALS HAVE REINVENTED RACISM & WRECKED THE MIDDLE CLASS ix-xiv, 194-209, 218-31 (2014).

efforts to combat our lingering propensity to engage in structural forms of societal discrimination that reflect our implicit biases.

Representation-reinforcement theories of judicial review seek to compensate for the underrepresentation of minorities in the political process by approximating outcomes that would be produced in a properly functioning political society. Similarly, the remedial efforts that are outlawed by Proposal 2 seek merely to compensate for the underrepresentation of minorities in the distribution of resources, in order to approximate the distribution that would exist in a colorblind, race neutral society. It is difficult to see how such remedial efforts could—with good faith sincerity—be deemed to violate the Equal Protection Clause of the Constitution.

The reason so many Supreme Court race cases seem wrong is that they constitutionalize the current distribution of resources in a way that provides legal cover for the racial discounting that continues to be so deeply embedded in United States culture. By treating the current distribution as if it were legitimate, and rejecting affirmative action redistributions as if they were discriminatory rather than remedial, the Court itself ignores the good faith discrimination standard. Under an objective standard of good faith the Court could privilege neither the current distribution nor any proffered redistribution. Rather, *all* distributions of resources would be treated as racial distributions—because all distributions *are* racial distributions. The United States has *never* managed to achieve race neutrality in its allocation of societal resources. As a result, those arguing on all sides of the affirmative action debate would have the same burden of showing that racial allocations they favored were justified by the equality principle. The current distribution would no longer get a free ride simply because it happened to be ensconced in the status quo. The concept of colorblind race neutrality might continue to be treated as an aspirational objective, but it could never be invoked to describe the current distribution. Merely asserting such a claim would reveal that the argument it was offered to support was not an argument that was being made in good faith.

It follows that the Supreme Court should apply the same standard to Proposal 2–type bans on affirmative action as it applies to the adoption of affirmative action. It should require sincerely held, equality based justifications for both types of actions. Under its current doctrinal rules, the Court has permitted selective indifference to minority interests in rejecting affirmative action claims, while prohibiting selective indifference to white interests in rejecting minority discrimination claims.[262] But a good faith, discrimination standard would require identical treatment for both types of claims. Moreover, the inevitable influence of race in the distribution of resources means that there can be nothing wrong with race consciousness *per se*. An adequate reason for rejecting affirmative action *cannot* simply be a reluctance to use racial classifications, because race consciousness is equally implicated in both the adoption and the rejection

[262] *See supra* notes 149–51 and accompanying text (discussing inconsistent treatment of selective racial indifference under the current intentional discrimination standard).

of affirmative action. Once again, when race is as salient as it is in the United States, there can be no such thing as race neutrality. We can only hope that race will be used in good faith, rather than as a bad faith smoke screen for continued racial discounting.

If you are inclined to resist the conclusion that the culture remains racially biased rather than racially neutral, consider the sorts of things that you would have to believe in order to support that view. You would have to believe that the dramatic racial discrepancies in the distribution of nearly all significant societal resources is simply a statistical aberration that deviates from the racially proportional allocation that the laws of probability would normally predict. You would have to believe that whites and minorities would be equally welcome to live in particular inner-city or suburban neighborhoods. You would have to believe that when we decide which schools are to receive the best teachers, books and facilities, those resources are just as likely to end up in minority schools as in white schools.

You would have to believe that when we decide where to site a toxic waste dump, it is just as likely to end up next to a white community as a minority community. You would have to believe that in a natural disaster, the government would be just as likely to send a limited supply of food, water, and medicine to a minority community as to a white community. You would have to believe that when you got sick and needed a doctor, the care you received would be just as good in a minority hospital as in a white hospital. You would have to believe that when you decided that you wanted to be rich, you would have just as good a chance of achieving your goal if you were a racial minority as if you were white. You would have to believe that when your children decided to get married and have children of their own, you would be indifferent about the race of people they selected as their spouses. You would have to believe that, if given the choice prior to your birth, you would be indifferent about the race that you would turn out to be.

You would have to believe that Supreme Court voting blocs in a long series of split decisions that upheld the interests of the white majority and rejected the interests of racial minorities just happened to be ideologically aligned. You would have to believe that when you compare contemporary and historic maps of the United States, the striking overlap between slave states and red states is simply a coincidence.[263] You would have to believe that even though we have always discriminated against racial minorities in the past, we have all of a sudden stopped doing so in the present. You would have to believe that the people who discount the interests of racial minorities today would not have been the same people who owned slaves, adopted Jim Crow laws, disenfranchised minority voters, and insisted on segregated schools in the past. You would have to believe that those college students who thought that they would be entitled to $1 million in damages per year if they were suddenly transformed from white to black

[263] *See Slave States and Red States—With Map*, DAILY KOS (Nov. 5, 2004, 2:20 PM), http://www.dailykos.com/story/2004/11/05/70624/-Slave-States-and-Red-States-With-Map (showing maps).

were simply mistaken about the racial dynamics of the society in which they lived.[264] You would have to believe a plethora of things that one could not easily believe if one lived in contemporary United States culture.

The fact that the culture discounts the interests of racial minorities in allocating societal resources does not mean that all remedial redistribution efforts are necessarily constitutional. There are coherent arguments that can be made against the race conscious allocation of resources. For example, some might argue that even though racial discrimination continues to exist, overall utility is reduced when the costs of racial remedies to the society as a whole outweigh the benefits to racial minorities. It may be that redistribution will harm adversely affected whites more than it will benefit racial minorities because whites can make better use of the resources that would be redistributed. The endowment effect could also cause those who currently possess resources to value them more highly than those who do not yet possess them. In addition, redistribution might harm the interests of racial minorities because it could produce resentment and stigmas that would reduce minority self-esteem and the esteem in which minorities are held by whites.

Utilitarian opposition could also be rooted in the belief that even if discrimination continues to exist, race-conscious remedies are bad because they benefit middle-class minorities and ignore lower-class minorities in a way that is camouflaged by the belief that the problem of racial discrimination is being addressed. Such utilitarian arguments may ultimately be persuasive, or they may end up merely serving as new vehicles for racial discounting. But what is important for present purposes is that the Supreme Court should evaluate them under a good faith standard of judicial review. If an argument fails to satisfy subjective and objective standards of good faith—given the context in which the argument is made, and the cognitive dissonance and implicit bias considerations that it might implicate—the Court should reject the arguments. If, however, the argument is made in good faith, the Court should simply permit the political branches to determine its merit.

The good faith sincerity standard that I am proposing could modify existing doctrine in significant ways. It could collapse the *Washington v. Davis* distinction between discriminatory intent and disparate impact. Once it was realized that people normally intend what they can foresee, disregarding predictable racial discounting would not satisfy a subjective standard of good faith. Moreover, once legal doctrine officially recognized the influence of cognitive dissonance and implicit bias insights, even the failure to look affirmatively for evidence of likely racial discounting would entail conscious ignorance of racial discounting that failed to satisfy an objective standard of good faith. Because the operative disparate impact standard that ensued would rest upon the subtle, pervasive, and structural causes of the present racial distribution of resources, reliance on a good faith standard would tacitly overrule the Supreme Court's prohibition on remedies for general societal discrimination. It would follow that the

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[264] *See* ANDREW HACKER, TWO NATIONS: BLACK & WHITE, SEPARATE, HOSTILE, UNEQUAL 31–32 (1992).

current Court's hostility to quotas and proportionality would become misguided relics of an artificial concept of equality that had thankfully been rendered obsolete. The whole point of the good faith Equal Protection Clause would be to guarantee precisely that sort of racial balance in the allocation of resources. We could then abandon the quest for supposedly race neutral resource allocation algorithms that end up serving only to maintain the charade that we now live in a postracial culture.

A good faith discrimination standard might even make sense of the otherwise intractable political structure doctrine that was marginalized but not overruled in *Schuette*, by utilizing the doctrine to distinguish between those political structures that were intended to facilitate racial discounting and those that were not. A good faith standard could also relieve us of the need to pretend that the affirmative action programs at issue in *Grutter* and *Gratz* were actually distinguishable, or that the diversity differences between *Grutter* and *Parents Involved* reflect anything other than changes in Supreme Court personnel. And it would certainly save us from the need to acquiesce in *Schuette*'s insistence that we defer to the political process when it protects the interests of the white majority, but not when it seeks to protect minorities from an ongoing history of racial oppression. The ideology of white supremacy that motivated the racial discounting of the past has now been formally placed behind us. But there remains the danger that white supremacy is simply something we no longer talk about out loud. And such silence, of course, should not be mistaken for an actual good faith commitment to the principle of racial equality.

CONCLUSION

The Supreme Court's racial jurisprudence does not do a good job of preventing racial discrimination. In fact, the constitutional doctrine governing discrimination and affirmative action claims is more likely to facilitate the discounting of racial minority interest for the benefit of the white majority than it is to prevent or remedy ongoing discrimination against racial minorities. The Court's current doctrinal rules are artificial, internally inconsistent, and conceptually incoherent. They often end up masking the subtle, pervasive, and structural ways in which racial minorities are disadvantaged by the very practices that the Supreme Court finds to be permitted or even compelled by the Equal Protection Clause. Under the Court's rules, societal resources remain allocated in racially correlated ways that produce de facto segregated communities, racially identifiable schools, and a range of other social and economic disadvantages for racial minorities. The forces producing those resource allocations are often as transparently racial as the motivations behind the new spate of restrictive election laws that invoke phantom voting fraud to justify actions that disenfranchise minority voters. But the Court's current doctrinal rules are so firmly rooted in formalism rather than realism that they often treat such obvious racial motivations as doctrinally irrelevant.

There is a better way to deal with the problem of racial discrimination. Rather than adhering to its current racial jurisprudence, the Supreme Court should normally limit its intervention in race cases by deferring to the representative branches in the

formulation of racial policy and the resolution of racial policy disputes. The Court should use judicial review to intervene in the political process only where it appears that an action producing a racially disparate impact rests on an asserted equality argument that is not sincerely held in good faith. For reasons of relative institutional competence, the Court is not well-suited to formulate racial policy for the nation. However, its insulation from direct political influence may give it an advantage over the political branches in detecting and exposing disingenuous claims of racial equality. A subjective standard of good faith can be used to disqualify arguments that are consciously intended to impede rather than advance the equality principle. In addition, an objective standard of good faith can be used to disqualify arguments that should be viewed as impeding rather than advancing the equality principle in light of contemporary cognitive dissonance and implicit bias insights. The objective standard can be used to correct for our tendency to treat the current, racially skewed distribution of resources as if it were a baseline for colorblind race neutrality. Recognizing that the current distribution reflects the continuing inertia of past racial discrimination, an objective standard can compensate for the racial discounting that permeates the Supreme Court's current doctrinal rules.

Nothing as simple as a doctrinal standard can make a culture honor equality claims that it would prefer to disregard. However, a transparent standard that directly focused attention on good faith sincerity might remind a culture that it was not living up to the aspirational norms that it set for itself in adopting an Equal Protection Clause. In a culture where race is as salient a social category as it has always been in the United States, there can be no such thing as colorblind race neutrality. Although the immediacy of underlying racial considerations can vary from one context to another, the influence of race will always be at least unconsciously present. That means that all societal actions are in some sense racially discriminatory. But even though we cannot escape the pull of racial discrimination, we can endeavor to ensure that the discriminatory forces to which we submit are only the forces of good faith discrimination.

The Supreme Court has not historically been good at distinguishing between good faith and bad faith equality arguments. Indeed, some of the current Court's most troublesome discrimination and affirmative action decisions seem to rest on what can best be understood as bad faith arguments about the nature of racial equality. However, if the Court were to hold itself to a doctrinal standard that recognized as legitimate only those equality arguments that resisted the discounting of racial minority interests, the benefits could be manifold. Not only would the cause of racial equality in the United States be advanced, but the Court could end up serving as a moral exemplar for the rest of us. If the Supreme Court were more honest in explaining why it does what it does, rather than offering disingenuous doctrinal explanations to camouflage its own ideological preferences, maybe we would all internalize a preference for making sincere arguments rather than arguments that were merely expedient. The Court's example might convince us that we would all be better off living in a culture where the only arguments that were considered legitimate were the arguments that we actually believed.