How the Diversity Rationale Lays the Groundwork for New Discrimination: Examining the Trajectory of Equal Protection Doctrine

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ABSTRACT

This Article advocates differentiating between two distinct categories of equal protection cases. The first—what I have termed indicator cases—are instances where courts consider whether there are sufficient factual indications to demonstrate the existence of a prima facie equal protection violation. The second—violation cases—are instances where courts consider, having already determined the existence of an equal protection violation, whether there is a good enough justification for a prima facie equal protection violation. Unfortunately, the Supreme Court has not differentiated between these two different types of cases. This has led to a string of decisions where the Supreme Court has erroneously looked for justifications for non-existent Equal Protection Clause violations, when in fact it should have been looking for indications to determine whether there actually had been an Equal Protection Clause violation. But even more troubling are some of the suggestions on the horizon; for example, the diversity rationale adopted by the Court as sufficient to survive strict scrutiny could serve to justify discriminatory police tactics such as racial profiling. By clearly outlining the above distinction and its analytic ramifications, this Article hopes to undermine such arguments built on the diversity rationale as wholly unfounded.

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INTRODUCTION

It is not surprising that the so-called “diversity rationale” has become the central focus of current Equal Protection doctrine and debate. Prior to the Supreme Court’s plurality decision in Regents of the University of California v. Bakke, the only interest considered sufficiently tailored and compelling to satisfy strict scrutiny was the fear of military invasion. Indeed, for over thirty years, strict scrutiny appeared to be strict in theory but fatal in fact; therefore, the first signs of the Court’s willingness to consider diversity as a sufficiently compelling interest understandably have spawned significant attention and litigation. To some, the diversity rationale has held out hope

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3 See Korematsu v. United States, 323 U.S. 214 (1944); ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 9.3.3.1 (2d ed. 2002).

4 See CHEMERINSKY, supra note 3, § 9.1.

5 See The Year of Bakke: Excerpts from Published Commentary, CHRON. OF HIGHER EDUC., July 3, 1978, at 36 (reprinting media and legal commentary on the Bakke decision); Conflicting Reactions to the Bakke Decision, CHRON. OF HIGHER EDUC., July 3, 1978, at 12 (reprinting reactions from various legal and academic commentators to the Bakke decision); see also Synnott, supra note 1 (discussing the reactions to the Bakke decision and the decisions that followed).
for race-based remedies to a wide range of social, economic, and political inequalities; to others, it stands as the greatest threat to principles of colorblindness.

These two perspectives on the diversity rationale clamored for air-time after the Court’s landmark decision in *Parents Involved in Community Schools v. Seattle School District No. 1*. The Court’s primary holding was to limit the line of cases regarding the use of diversity in education—including, most notably, *Bakke* and *Grutter v. Bollinger*—concluding that race was not a legitimate consideration in the elementary school assignment plans that were before the Court.8

Some critics decried the landmark ruling, fearing that, in limiting the permissibility of race as a consideration, the Supreme Court’s decision would further hinder equal access to equal education.9 For example, Charles Ogletree, penning an editorial in the *Boston Globe*, summarized his dismay in the ruling by noting that the Court’s decision “removed a successful tool for combating the racial segregation that is a ubiquitous feature of the nation’s public schools.”10 Eugene Robinson used even more inflammatory rhetoric in his *Washington Post* editorial, exclaiming that “[i]f we as a society—black, white, brown, yellow, red—are going to work toward fairness, inclusion, equality and, yes, integration, we’re going to have to do it by working around those dour men in black robes on Capitol Hill. They have decided to stand in the schoolhouse door.”11

Predictably, others lauded the Court’s decision for foreclosing a perceived loophole in the Equal Protection Clause’s “colorblindness principle,” limiting the use of the diversity rationale in creating school assignment schemes.12 For example, George Will lamented that *Brown’s* promise—a colorblind society—has been traduced by the “diversity” exception to the Equal Protection Clause. That exception allows white majorities to feel noble while treating blacks and certain other minorities as seasoning—a sort of human oregano—to be sprinkled across a student body to make the majority’s educational experience more flavorful.13

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8 See discussion infra Part X.
10 Ogletree, supra note 9.
11 Robinson, supra note 9.
13 Id.
In other words, in *Parents Involved*, the Court took the first step in mitigating the damage caused by the diversity rationale.

General perspectives on the use of diversity in formulating educational policy also informed the way many commentators depicted Justice Kennedy’s concurrence. For some, Kennedy’s decisive concurrence—which noted that the majority opinion “impl[ied] an all-too-unyielding insistence that race cannot be a factor”—advanced a “middle ground” which held out “hope” for the future. Similarly, Charles Ogletree depicted the decision as “fractured,” stating that Kennedy “refuse[d] to embrace the four-person plurality view that race cannot be considered in seeking to achieve educational equality.” On this account, Kennedy, in line with the scathing dissent of Justice Breyer, contained at least “some small, and welcome, affirmation of the principles [the Supreme Court] articulated 53 years ago in *Brown v. Board of Education*.” And to those who applauded the majority decision, Kennedy’s reluctance to join wholeheartedly was glossed over in an attempt to emphasize the existence of a majority unified in limiting the role of the diversity rationale.

Thus, initial reactions to *Parents Involved* generally portrayed the opinion as follows: the majority advanced colorblindness, at the expense of the potential remedial effects of diversity, while the dissent championed educational equality at the expense of colorblind policies. In between these two extremes stands Justice Kennedy’s concurrence—or so the common thinking goes—which articulated some sort of middle ground that incorporated elements of these two hard-line positions.

But lurking behind the various partisan portrayals of the *Parents Involved* decision is a new line of argumentation that has surreptitiously emerged in debates over the future of the Equal Protection Clause. This Article refers to this type of argument as the “a fortiori argument” and it employs the diversity rationale in a way that is somewhat counter-intuitive. Consider the following paradigmatic example:

Similarly, racial profiling policies and guidelines that permit law enforcement officers to consider race, among other factors, when

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15 *Id.* at 2791.
18 *Id.*
20 For a more in-depth discussion of *a fortiori* arguments, see *infra* Part IX.
they possess "trustworthy information, relevant to the locality or time frame, that links persons of a particular race or ethnicity to an identified criminal incident, scheme, or organization" also pass muster under the Equal Protection Clause. If student body diversity in university law schools is a compelling governmental interest, then surely crime control also qualifies as such.\(^{21}\)

Thus, the argument functions by considering what government interests are more compelling than diversity. If diversity is compelling, then a fortiori other interests, previously considered insufficient to pass constitutional muster, should be re-evaluated in light of the Court's decisions regarding diversity.\(^{22}\) These arguments find the diversity rationale useful because, in the past, interests deemed sufficiently compelling were those considered as critical as the national security interest invoked in Korematsu;\(^{23}\) the diversity rationale has lowered the bar for what qualifies as a compelling government interest.

Such arguments turn the diversity rationale on its head. Instead of promoting improved equality in educational opportunities, the diversity rationale—as the first step in the a fortiori argument—serves as the analytical leverage necessary to justify radical racial inequalities, such as racial profiling.\(^{24}\) Put differently, while some support the diversity rationale because they believe it can level the racial playing field, a fortiori arguments use the diversity rationale for the exact opposite purpose.\(^{25}\)

This Article suggests that a fortiori arguments are based upon an analytical mistake plaguing current equal protection doctrine. And it is the primary purpose of this Article to expose the origins of this analytical mistake by demonstrating that much of the current Supreme Court doctrine has confused two types of equal protection cases. The first category of cases—indicator cases—involves circumstances where the Court must look at various indications—such as racial classifications, lack of narrow tailoring and lack of substantial enough purposes—to determine whether they believe there has been an Equal Protection Clause violation. The second category of cases—violation cases—involves circumstances where the Court already has evidence of a prima facie Equal Protection Clause violation, and must then examine whether the purposes are substantial enough to justify the prima facie violation. As argued below, the confusing of these two types of Equal Protection Clause cases has led to


\(^{23}\) Korematsu v. United States, 323 U.S. 214 (1944).

\(^{24}\) See Smith, supra note 21.

\(^{25}\) See id.; see also discussion infra Part IX.
peculiar outcomes in affirmative action cases, giving rise to the hotly contested
diversity rationale.\textsuperscript{26}

Differentiating between these categories will allow us to better appreciate the
importance of Justice Kennedy's concurrence in \textit{Parents Involved}. Indeed, while
some of the initial portrayals of Kennedy's concurrence simply see it as a compromise
position between the more extreme alternatives, this is far from the case. A closer
analysis of Kennedy's concurrence, in light of our analytic framework, will demon-
strate that Kennedy has recast the diversity rationale, removing it from the list of
compelling government interests. In doing so, Kennedy's concurrence pulls out the
analytic rug from under \textit{a fortiori} arguments.

To this end, Part I will revisit how strict scrutiny became the mechanism to test
for potential Equal Protection Clause violations and Part II will consider why the strict
scrutiny mechanism has been used to protect racial classifications. Part III will exam-
ine the underlying process-based theory that continues to drive the Supreme Court's
equal protection jurisprudence. Part IV will consider how intent became the gravamen
of equal protection violations; in doing so, this Article aims to unpack what "invidious
discriminatory intent" might mean and how the intent criterion gave rise to two funda-
mentally distinct categories of equal protection cases. With this distinction in hand,
Part V will look at the Supreme Court's application of the intent criterion to cases of
"benign classifications," reconciling some of the alleged contradictory conclusions
reached by the Court in some of its landmark equal protection cases. Part VI considers
the purpose of the narrow tailoring mechanism and how it might differ depending on
what type of equal protection case is before the Court. Part VII summarizes the fore-
going argument, noting the problematic aspects of Equal Protection Clause doctrine.
Part VIII uncovers the problematic application of strict scrutiny in the recent affirm-
ative action cases, stemming from the Court's failure to differentiate between the
varying types of equal protection cases outlined in this Article. Part IX exposes the
error of \textit{a fortiori} arguments, which capitalize on the confusion between indication
and violation cases. Finally, Part X re-examines Kennedy's concurrence in \textit{Parents
Involved}, which provides the analytic groundwork to sidestep \textit{a fortiori} arguments.
Indeed, because current doctrinal confusions are so embedded in our understanding of
the Equal Protection Clause, avoiding the consequences of \textit{a fortiori} arguments may
require recasting the diversity rationale's place under the Equal Protection Clause.

\textsuperscript{26} Jed Rubenfeld has noted a parallel distinction by highlighting what appear to be the two
different purposes of strict scrutiny as articulated by the Court. See Jed Rubenfeld, \textit{Affirmative
Action}, 107 YALE L.J. 427 (1997); see also Jed Rubenfeld, \textit{Anti Anti-Discrimination}, 111
YALE L.J. 1141, 1174 (2002). However, Rubenfeld does not differentiate between these two
types of cases primarily because he does not believe that violation cases are a coherent articu-
lation of the doctrine. See infra notes 122–29 and accompanying text; see also Kim Forde-
Mazrui, \textit{The Constitutional Implications of Race-Neutral Affirmative Action}, 88 GEO. L.J.
2331, 2354–64 (2000) (discussing the application of strict scrutiny to racial classifications
intended to benefit racial minorities).
I. THE PLACE OF STRICT SCRUTINY

It goes without saying that the text of the Equal Protection Clause is notoriously ambiguous: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." In addition, the absence of congressional direction in operationalizing the Equal Protection Clause has forced the Supreme Court to "devise[] standards for determining the validity of state legislation or other official action that is challenged as denying equal protection." Thus, in the Slaughter-House Cases, the Supreme Court articulated what it took to be the general purpose of the Equal Protection Clause: "The existence of laws in the States where the newly emancipated negroes resided, which discriminated with gross injustice and hardship against them as a class, was the evil to be remedied by this clause, and by it such laws are forbidden." But this general description of the purpose only gets us so far. How exactly courts should operationalize the Equal Protection Clause into workable criteria has been the question the Supreme Court has tried to answer since the Equal Protection Clause's ratification.

With the landmark, and infamous, case Korematsu v. United States, the Court chose a mechanism of applying strict scrutiny to particular cases in order to determine whether or not there had been an Equal Protection Clause violation:

[All legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can.]

More recently, the Court has described the purpose of strict scrutiny "to 'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool."

Together, the Slaughter-House Cases and Korematsu characterize scrutiny as a mechanism to examine whether racial classifications are being used legitimately—that is, in a way that does not violate the Equal Protection Clause. But this description simply begs the question, why should racial classifications be the subject of strict scrutiny?

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27 U.S. CONST. amend. XIV, § 1.
30 See, e.g., id.
33 See supra notes 29–31 and accompanying text; see also infra pp. 37–38.
II. WHY PROTECT RACIAL CLASSIFICATIONS?

In many ways, the story of suspect classifications begins with age-old concerns regarding the "countermajoritarian difficulty." At its core, the countermajoritarian difficulty is meant to engage "the problem of justifying the exercise of judicial review by unelected and ostensibly unaccountable judges in what we otherwise deem to be a political democracy." In the context of the Fourteenth Amendment, one answer has been to construe the Equal Protection Clause as a democracy-enhancing principle, one that focuses on the way in which judicial review can explore and rectify the potential pitfalls of an unbridled democratic system. Thus, one concern regarding democracy left unchecked is the potential that certain minority groups will simply not be represented in the democratic process. Moreover, the majority might impose severe harms and restrictions on a particular minority group given the potential for festering animus towards that group. Indeed, this concern is as old as the Constitution itself.

Construing the Equal Protection Clause as an answer to the countermajoritarian difficulty starts with footnote four in United States v. Carolene Products. According


35 Friedman, Countermajoritarian Part Five, supra note 34, at 155.

36 This was most famously the aim of JOHN HART ELY, DEMOCRACY AND DISTRUST 135–79 (1980).

37 See id.

38 See id.


40 304 U.S. 144, 152 n.4 (1938). This is not to say that such reasoning is correct, only that it is the route most typically traveled. Indeed, the Court has repeatedly referenced footnote four in many of its equal protection cases. See, e.g., Adarand Constructors, Inc., v. Pena, 515 U.S. 200, 218 (1995); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 495 (1989);
to the Court, “discrete and insular minorities may be a special condition.”41 Therefore, legislation directed at such minorities should be scrutinized to insure that it does not “curtail the operation of those political processes ordinarily to be relied upon to protect minorities.”42 In *Carolene Products*, the Court also gave some examples of “discrete and insular minorities”: religious, national, and racial minorities.43

By sorting out particular minorities as worthy of protection, the Court emphasized the potential problem of unbridled democracy and offered a potential solution.44 Using the Equal Protection Clause to subject certain legislation to “more exacting judicial scrutiny”45 could fend off majoritarian legislative initiatives intended to politically debilitate minorities from getting a fair shake in the political arena.

But this is all quite vague. The Court’s first foray into a scrutiny-based approach to the countermajoritarian difficulty left two questions unanswered. First, what were the criteria for inclusion into the category of “discrete and insular minorities”? And second, what would the contours of a scrutiny doctrine look like? It is into this vacuum that the now well-rehearsed suspect classification and strict scrutiny doctrines have been introduced.

III. SUSPECT CLASSIFICATIONS AND STRICT SCRUTINY: THE PROCESS-BASED UNDERSTANDING

On the canonical story recounted thus far, the doctrinal innovation of strict scrutiny links up directly with footnote four in *Carolene Products*.46 The Court has

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41 *Carolene Products*, 304 U.S. at 152 n.4.
42 *Id.*
43 *Id.*
44 *Id.; see also* Ackerman, *supra* note 40, at 715.
45 *Carolene Products*, 304 U.S. at 152 n.4.
46 I refer here to the process-based understanding of the Equal Protection Clause as “canonical” not because it is a universally accepted framework to understand the Equal Protection Clause. To the contrary, scholars and judges continue to debate the merit of other interpretive paradigms as applied to the Equal Protection Clause. Most notably, there has been ample debate over the coherence of originalism as applied to the Equal Protection Clause. *See*, e.g., Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 14 (1971); Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947 (1995). *See generally* ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1990) (discussing the increased politicization of the Court the “theories of how Judges should conduct themselves”). In this Article, I do not attempt to resolve this debate, but simply to note some of originalism’s most formidable critics. *See* Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980);
described strict scrutiny as a tool "to 'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool." Thus, strict scrutiny is used to investigate whether legislation employing a suspect classification does in fact violate the Equal Protection Clause. In doing so, it unmasks invidious legislation or regulations as enactments of the majority intended to harm a discrete and insular minority. But who qualifies as a discrete and insular minority? On this canonical account, groups likely to fall victim to majoritarian politics are included; and it is these groups that are deemed protected groups whose classifications are considered suspect.

It is thus unsurprising that at the core of the Supreme Court's case law determining which classifications are suspect we find the following "traditional indicia of suspectness": "the class is ... saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." Thus, either past history or current political demographics give us good reason to believe that certain protected classes have not been appropriately represented.


Instead, when I describe the canonical account of the Equal Protection Clause as process-based, I mean to express my own view that the dominant account that has animated the Supreme Court's majority decisions regarding the Equal Protection Clause are best described as grounded in a process-based theory. Of course, individual justices have expressed their own affinities for originalism. See Melissa L. Saunders, *Equal Protection, Class Legislation, and Colorblindness*, 96 MICH. L. REV. 245, 328 n.365 (1997) (recounting the affinities for originalism of various Supreme Court justices). But here I try to present the dominant theory that explains the Court's decisions. It is of this fact I hope, among other arguments, to convince the reader in this Article. In turn, the conclusions of this Article—the confusions of equal protection categories highlighted in this Article—are built off of this process-based theory. In this way, the conclusions of this Article are predicated on my view that, for the most part, a process-based theory has animated the Court's equal protection decisions. For now, I leave it up to the reader to determine whether the reliance on a process-based theory is a good or bad development. See Michael A. Helfand, *The Usual Suspect Classifications: Alienage, Immutability, and the Process-Based Paradigm* (unpublished manuscript, on file with author).

48 See id.
49 See id.
in the political arena; in turn, animus and not deliberation may serve as the motivation driving a particular suspect classification employed in a given piece of legislation.\footnote{Korematsu v. United States, 323 U.S. 214, 216 (1944) ("[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can.")} In applying these indicators, the Court has concluded that racial classifications are subject to "the most rigid of scrutiny."\footnote{Id.} Because of our experience with past discrimination against particular racial groups and our knowledge about the current political power of particular racial groups, we have reason to believe, by default, that the use of a racial classification indicates that the ordinance or statute in question does not provide equal protection of the laws: "[A] core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race. Classifying persons according to their race is more likely to reflect racial prejudice than legitimate public concerns; the race, not the person, dictates the category."\footnote{Palmore v. Sidoti, 466 U.S. 429, 432 (1984) (citations omitted).} In contrast, other classifications, such as height or age, are not subject to rigid scrutiny because neither their history nor their current political strength gives us reason to presume that their use indicates an Equal Protection violation.\footnote{This is, of course, a somewhat simplistic picture of the way in which the law constructs suspect classifications. Our discussion ignores other complicating factors, most notably the immutability factor. See, e.g., Frontiero, 411 U.S. at 686–87. Immutability remains a confused area of the law with even the Supreme Court itself equivocating on whether it ought to be considered in the construction of suspect classifications. Mass. Bd. of Ret., 427 U.S. 307 (ignoring immutability as a factor in determining whether age could be a suspect classification); San Antonio Indep. Sch. Dist., 411 U.S. 1 (same as applied to the indigent). Indeed, on one occasion, the Court explicitly rejected immutability as a consideration for creating new suspect classifications. See City of Cleburne, 473 U.S. at 443 n.10 (concluding that the developmentally disabled do not constitute a suspect classification and citing Ely’s critique of immutability). Because of this confusion, many scholars have struggled to apply immutability to new potential suspect classifications. See, e.g., Samuel A. Marcosson, Constructive Immutability, 3 U.PA. J. CONST. L. 646, 653 (2001) ("This in turn raises the immediate question: what constitutes a ‘substantial’ cost or difficulty, sufficient to render the characteristic substantially immutable?"); Marc R. Shapiro, Comment, Treading the Supreme Court’s Murky Immutability Waters, 38 GONZ. L. REV. 409, 412 (2002) ("Given immutability’s problematic nature, the Court should explicitly adopt the ‘effective immutability’ approach of Judge William Norris in Watkins."). This type of analysis, in turn, leads to peculiar questions about the potential immutability of all sorts of human characteristics. See, e.g., Antonio J. Califa, Declaring English the Official Language: Prejudice Spoken Here, 24 HARV. C.R.-C.L. L. REV. 293, 334 n.262 (1989) (arguing that the obstacles to learning a new language justify the conclusion that foreign language speakers ought to constitute a protected class); Elizabeth Kristen, Comment, Addressing the Problem of Weight Discrimination in Employment, 90 CAL. L. REV. 57, 71 (2002) ("I assume that to be fat is not necessarily unhealthy and that weight is either immutable or so difficult or dangerous to permanently change as to be practically immutable.").}
In other words, there are not sufficient indicators to warrant scrutinizing the statute or regulation in question.

IV. THE NEW INDICATOR: INTENT

In the 1971 case *Griggs v. Duke Power Co.*, the Supreme Court considered an equal protection claim of job applicants who were required either to have a high school diploma or to pass an intelligence test in order to be placed or transferred to any department other than the labor department.\(^5^5\) According to the petitioners, because these requirements had a disparate impact on African-American applicants, they violated Title VII.\(^5^6\) The Court agreed with the petitioners and held that job requirements having a disparate impact on the employment opportunities for a protected racial class violate Title VII.\(^5^7\) Initially, it seemed as if *Griggs* would provide the grounds for interpreting the Equal Protection Clause broadly as the Court appeared poised to employ the same disparate impact rationale already used to interpret Title VII.\(^5^8\)

However, with the Court's decision in *Washington v. Davis*, the *Griggs* "disproportionate impact" holding was limited to Title VII as the Court ruled that, under the Equal Protection Clause, "our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact."\(^5^9\) Indeed, "[d]isproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution. Standing alone, it does not trigger the rule that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations."\(^6^0\)

Moreover, many scholars have struggled to understand what role immutability plays in the construction of racial classifications given that, as per past Supreme Court precedent, it is neither a necessary nor sufficient criterion for suspect classification status. See, e.g., Janet E. Halley, *The Politics of the Closet: Towards Equal Protection for Gay, Lesbian, and Bisexual Identity*, 36 UCLA L. Rev. 915, 965 (1989); Cass R. Sunstein, *Homosexuality and the Constitution*, 70 Ind. L.J. 1, 9 (1994); Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 Yale L.J. 1063, 1073 n.51 (1979). For this reason, Laurence Tribe has argued that underlying the facade of the procedural understanding of the Equal Protection Clause lies a substantive account that in actuality serves as the driving force behind the Court's jurisprudence. Id. at 1063.

I hope to address these issues in a future project. See Helfand, supra note 46. Suffice it to say for our current purposes that the thrust of Supreme Court decisions applies a process-based paradigm and it is my own contention that immutability's role under current doctrine, while requiring clarification, does in fact further the overall integrity of the process-based paradigm.

\(^{5^5}\) 401 U.S. 424, 426 (1971).
\(^{5^6}\) Id. at 425–26.
\(^{5^7}\) Id. at 436.
\(^{5^8}\) Id. at 435–36.
\(^{6^0}\) Id. at 242 (citation omitted).
The *Washington v. Davis* decision, however, did not mean that in order to trigger strict scrutiny a party had to demonstrate invidious discriminatory intent against a racial class.\(^{61}\) The intent requirement was simply advanced as sufficient to trigger strict scrutiny.\(^{62}\) However, if a statute or regulation employed either an explicit or implicit racial classification,\(^{63}\) then strict scrutiny would be triggered because the use of a classification could serve, on its own, as a sufficient indication of an Equal Protection Clause violation to warrant strict scrutiny.\(^{64}\) As a result, post-*Washington v. Davis*, there appear to be two mechanisms for triggering strict scrutiny: first, the use of an explicit or implicit racial classification; and second, findings of discriminatory intent.\(^{65}\)

Still, the question remains: why should discriminatory intent trigger strict scrutiny? Is crafting a statute that impacts a protected racial class, with invidious discriminatory intent, not an Equal Protection Clause violation in and of itself? Indeed, "[t]he central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race."\(^{66}\) And, as already noted, "the purpose of strict scrutiny is to 'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool."\(^{67}\) With *Washington v. Davis* analysis, what remains to be smoked out once a court already knows there has been invidious intent used in drafting a particular statute?\(^{68}\)

The answer appears in some of the Court's own formulation of a parallel purpose of strict scrutiny. In *Adarand Constructors, Inc., v. Pena*, the Court restated one of

\(^{61}\) *Id.*

\(^{62}\) *Cf. id.* at 241.

\(^{63}\) See Pers. Adm't of Mass. v. Feeney, 442 U.S. 256, 274 (1979) (treating both "covert and overt" classifications in the same manner); *see also* Sylvia Dev. Corp. v. Calvert Co., 48 F.3d 810, 820 (4th Cir. 1995) ("Whether a statute or administrative action employs a classification explicitly or implicitly, the equal protection analysis of that state action consists of the same two components.").

\(^{64}\) City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440 (1985) ("[W]hen a statute classifies by race, alienage, or national origin[, t]hese factors are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy . . . . For these reasons and because such discrimination is unlikely to be soon rectified by legislative means, these laws are subjected to strict scrutiny and will be sustained only if they are suitably tailored to serve a compelling state interest.").

\(^{65}\) *See* Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265 (1977) ("[D]iscriminatory intent . . . is required to show violation of the Equal Protection Clause."); Loving v. Virginia, 388 U.S. 1, 12 (1967) ("There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause.").

\(^{66}\) *Davis*, 426 U.S. at 239.


\(^{68}\) This question has already been posed by Rubenfeld. *See* Rubenfeld, *Affirmative Action*, *supra* note 26, at 436–37.
the primary principles animating the application of the Equal Protection Clause: “[W]henever the government treats any person unequally because of his or her race, that person has suffered an injury that falls squarely within the language and spirit of the Constitution’s guarantee of equal protection.” However, as the Court explained, the mere fact that the government conduct in question runs afoul of the Constitution’s guarantee of equal protection does not end the inquiry: “It says nothing about the ultimate validity of any particular law; that determination is the job of the court applying strict scrutiny... The application of strict scrutiny... determines whether a compelling governmental interest justifies the infliction of that injury.”

As Jed Rubenfeld has noted, this characterization of strict scrutiny stands in contrast to the “smoking-out” characterization articulated by the Court in *Croson*. In fact, alternative conceptualization of strict scrutiny gives rise to a second category of equal protection cases. In this second category, once there has been a showing of invidious discriminatory intent, there has indeed been a *prima facie* Equal Protection Clause violation. However, the Court then engages in strict scrutiny in order to determine whether there is a legitimate enough government reason for the *prima facie* violation. If there is such a legitimate enough reason, then that reason justifies the *prima facie* violation. The Court has pointed to this alternative mechanism by

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70 Id. at 230.
72 *Croson*, 488 U.S. at 493.
74 A number of lower courts have applied this second characterization of strict scrutiny, explaining that the compelling interest inquiry is still relevant even after a finding of discriminatory intent. See, e.g., *Hampton Co. Nat'l Sur. v. Tunica Co.*, 543 F.3d 221, 228 (5th Cir. 2008) (stating that in order to advance an equal protection claim, the plaintiff must allege both the lack of compelling government interest and the existence of discriminatory intent); *Valeria v. Davis*, 320 F.3d 1014, 1020 (9th Cir. 2003) (“Discriminatory intent, by itself, triggers strict scrutiny under a conventional equal protection analysis.”); *Houston Prof'l Towing Ass'n v. City of Houston*, No. H-05-0323, 2005 U.S. Dist. LEXIS 46598 (S.D. Tex. Aug. 31, 2005) (citing *Adarand* for the proposition that “if a plaintiff demonstrates both discriminatory impact and discriminatory intent, a court will use heightened scrutiny to determine whether the act is narrowly tailored to further a compelling government interest”); *Valdez v. Graham*, 474 F. Supp. 149, 156 (M.D. Fla. 1979) (“[I]f, indeed, a purpose or intent to discriminate is found, the law or state action may still be valid if that purpose or intent passes muster under the ‘rational relation’ or ‘compelling state interests’ tests.”); *Cicero v. Olgiati*, 426 F. Supp. 1210, 1213 (S.D.N.Y. 1976) (“[I]f racially discriminatory intent is established, however, the defendants must show that the statute is justified by a ‘compelling state interest.’”).
75 *Arlington Heights*, 429 U.S. at 260 (describing the lower court opinion as concluding that “the denial of the... proposal had racially discriminatory effects and could be tolerated only if it served compelling interests”).
describing the purpose of strict scrutiny as a tool to determine whether "the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool." It was also on this analysis that the Court upheld the internment camps in *Korematsu*:

Compulsory exclusion of large groups of citizens from their homes, except under circumstances of direst emergency and peril, is inconsistent with our basic governmental institutions. But when under conditions of modern warfare our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger.

Thus, not only are there two ways to trigger strict scrutiny, but the strict scrutiny mechanism on each account is slightly different. If a statute or regulation employs, either implicitly or explicitly, a racial classification, then strict scrutiny is triggered to see if there has actually been an Equal Protection Clause violation; in such circumstances, the racial classification indicates a high likelihood that there has been an Equal Protection Clause violation. On the other hand, if a court can demonstrate that invidious intent motivated a particular statute or regulation, then the Court uses strict scrutiny to determine whether there is a good enough reason to justify the prima facie Equal Protection Clause violation. The Court, having already found a prima facie violation, now considers whether there is good enough reason to justify that violation.

To be sure, sometimes these two separate mechanisms converge in the same case, making it difficult to separate clearly the two strands of equal protection

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76 *Croson*, 488 U.S. at 493 (emphasis added).
79 See, e.g., *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985) ("[W]hen a statute classifies by race, alienage, or national origin[, t]hese factors are so seldom relevant to the achievement of any legitimate state interest that . . . these laws are subjected to strict scrutiny and will be sustained only if they are suitably tailored to serve a compelling state interest."); *Loving*, 388 U.S. at 12 ("[R]estricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause.").
80 See, e.g., *Korematsu*, 323 U.S. at 216 ("Pressing public necessity may sometimes justify the existence of such racially-based restrictions.").
81 It is interesting to note that in *Church of Lukumi Babalu Aye v. City of Hialeah*, a post-*Employment Division* free exercise case, the Court appears to have employed strict scrutiny for two distinct purposes: first, to determine the existence of a prima facie violation, and second, to justify the prima facie violation. 508 U.S. 520 (1993). Thus, the Court first used strict scrutiny to determine whether the city ordinances intentionally targeted the Church's
A court may begin by examining a particular statute simply because it employs a racial classification. Although it may not be apparent on the face of the statute, analysis of the surrounding facts may quickly make it obvious that invidious discriminatory intent drove the drafting of the statute. This appears to be a consequence of the Court's decision in Washington v. Davis, which emphasizes that "an invidious discriminatory purpose may often be inferred from the totality of the relevant facts . . . ." Having found invidious discriminatory intent, a court would then consider whether there is a good enough reason to justify the prima facie Equal Protection Clause violation.

Understanding the function of the intent requirement in Washington v. Davis also helps us understand the content of the intent that can trigger strict scrutiny. The intent cannot simply be the intent to use a racial classification; such intent would not constitute a prima facie violation of the Equal Protection Clause.

Santerian practice of animal sacrifice. In doing so, the Court questioned whether the city council's ordinances were narrowly tailored to achieve its stated purposes. Id. at 540 (citing Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977); Feeney, 422 U.S. 256).

After concluding that, based upon a wide range of evidence, the city council had indeed intentionally targeted the religious practice of animal sacrifice, the Court then examined whether "a law restrictive of religious practice must advance 'interests of the highest order' and must be narrowly tailored in pursuit of those interests." Id. at 546 (quoting McDaniel v. Paty, 435 U.S. 518, 628 (1978)). In other words, after the Court had already scrutinized the ordinances to determine that they were motivated by discriminatory intent, it then further scrutinized the ordinances to see if there were interests in play that could justify the discriminatory intent.

In this way, the Court recognized that strict scrutiny analysis comes in two stages: first, the court considers whether a prima facie violation exists; and second, the court must determine whether such a prima facie violation can be justified. This is the implication of the Court's decision in Church of Lukumi Babalu Aye as the Court drew on its own line of equal protection cases in order to establish the appropriate methodology in the free exercise context. Lukumi, albeit a free exercise case, serves as a useful blueprint of how strict scrutiny serves a dual function.

Indeed, Professor Owen Fiss, in his description of, what he terms, the "anti-discrimination" principle, notes that the "[anti-discrimination] account of the [equal protection] inquiry into purpose suggests two steps: first, identifying the state purpose and second, determining whether the purpose is legitimate." Owen M. Fiss, Groups and the Equal Protection Clause, 5 Phil. & Pub. Aff. 107, 112 (1976). In the same way, our analysis envisions the possibility of a court first determining whether there is an impermissible intent driving the relevant statute and upon finding that there is, considering whether there is reason enough to justify such intent.
Instead, the intent must be "invidious." The Court has used the term "invidious" in the equal protection context since 1885, employing the term in a pair of cases: *Barbier v. Connolly* and *Soon Hing v. Crowley*. In both cases, the Court dealt with ordinances promulgated by the City and County of San Francisco prohibiting washing and ironing in public laundries from 10 p.m. to 6 a.m. And in both cases the Court concluded that there was no equal protection violation because there was no exercise of invidious discriminatory intent.

But, in context, the definition of the term, as applied to intent, has been clarified by subsequent Supreme Court decisions, most notably *Personnel Administrator of Massachusetts v. Feeney*. In *Feeney*, the Court considered Helen Feeney’s claim that the Massachusetts veteran’s preference statute violated the Equal Protection Clause. Feeney argued that she had been unable to secure a civil service position, despite her high scores on a number of competitive civil service examinations, because, pursuant to the veterans’ preference statute, lower-scoring veterans would be awarded the desired civil service positions. And, because veterans were typically male, the functional impact of the veterans’ preference statute was to preclude primarily women from securing civil service positions, a violation, according to Feeney, of the Equal Protection Clause.

The Supreme Court rejected Feeney’s claim. According to the Court, “The dispositive question [was] whether the appellee has shown that a gender-based discriminatory purpose ha[d], at least in some measure, shaped the Massachusetts veterans’ preference legislation.” In analyzing this issue, the Court focused on the ultimate meaning of “invidious gender-based discrimination.”

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90 *Cf.* *Arlington Heights*, 429 U.S. at 266 (“Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.”); *Davis*, 426 U.S. at 242 (“[A]n invidious discriminatory purpose may often be inferred from the totality of the relevant facts.”). For a lengthy attempt at a definition of invidious discrimination, see Marguerite A. Driessen, *Toward A More Realistic Standard For Proving Discriminatory Intent*, 12 TEMP. POL. & CIV. RTS. L. REV. 19, 22 (2002) (“[I]nvidious discrimination is an action that creates circumstances that would tend to cause ill will or envy.”). See generally Pamela S. Karlan, Note, *Discriminatory Purpose and Mens Rea: The Tortured Argument of Invidious Intent*, 93 YALE L.J. 111 (1983).

91 113 U.S. 27 (1885).

92 *Barbier*, 113 U.S. at 28; *Soon Hing*, 113 U.S. at 705.

93 *Barbier*, 113 U.S. at 30; *Soon Hing*, 113 U.S. at 708; *see also* *Yick Wo v. Hopkins*, 118 U.S. 356, 367 (1886).


95 *Id.*

96 *Id.* at 264.

97 *Id.* at 272.

98 *Id.* at 276.

99 *Id.*

100 *Id.* at 274–75.
whether a party could demonstrate invidious discriminatory intent simply by showing that the relevant governing body was aware of the consequences of their actions: "The appellee’s ultimate argument rests upon the presumption, common to the criminal and civil law, that a person intends the natural and foreseeable consequences of his voluntary actions." In rejecting this argument, the Court explained what was necessary to constitute invidious discriminatory intent:

"Discriminatory purpose," however, implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part "because of," not merely "in spite of," its adverse effects upon an identifiable group.\(^{102}\)

Thus, it is not enough for a decision maker simply to be aware that particular legislation will have disproportional impact on a particular group. That would fall within the confines of disparate impact, which is insufficient to satisfy the intent inquiry.\(^{103}\) Instead, a decision maker is considered to have employed invidious discriminatory intent where his purpose was to adversely affect a particular group and not where he simply was aware of such a consequence.\(^{104}\) Thus, "in Feeney, the Court asked plaintiffs to prove that legislators adopting a policy that would foreseeably injure women or minorities had acted with the express purpose of injuring women or minorities . . . ."\(^{105}\) In this way, invidious intent is aimed at harming a particular

\(^{101}\) Id. at 278.

\(^{102}\) Id. at 279 (citations omitted).

\(^{103}\) Id.

\(^{104}\) Id.

\(^{105}\) Reva Siegel, Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action, 49 STAN. L. REV. 1111, 1135 (1997) (describing this standard as a "a legislative state of mind akin to malice"); see also Murad Hussain, Note, Defending the Faithful: Speaking the Language of Group Harm in Free Exercise Challenges to Counterterrorism Profiling, 117 YALE L.J. 920, 944 (2007) ("Personnel Administrator v. Feeney further defined 'discriminatory purpose' as the specific intent to adversely affect a particular group.").

A similar line of analysis appears to have driven the Court’s decision in Loving v. Virginia, 388 U.S. 1 (1967). There, the Court began its analysis by emphasizing that "the Equal Protection Clause requires the consideration of whether the classifications drawn by any statute constitute an arbitrary and invidious discrimination. The clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States." Id. at 10. In turn, the Court found Virginia’s anti-interracial marriage statute violative of the Equal Protection Clause because it found that such invidious discrimination motivated the statute: "There is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification." Id. at 11. The Court then sought to explain exactly how it determined the existence of invidious discrimination: "There can be
group. And it is this type of intent that represents a *prima facie* violation of the Equal Protection Clause: "[W]e have . . . held many times that 'invidious' distinctions cannot be enacted without a violation of the Equal Protection Clause." Thus, an individual is said to have acted with invidious discriminatory intent when he or she advances a particular political agenda—for our purposes, captured in some sort of political policy or statute—that seeks to visit harm or to restrict members of particular racial classes *because of* their membership in that particular class. This is because decision makers might intend to enact legislation that will harm a particular group without exercising invidious intent. They may simply, to use the facts of *Feeney*, intend for fewer women to secure civil service jobs; but their motivation was to achieve some other sort of purpose, like providing more jobs to veterans.

There is another important conclusion that can be drawn from *Feeney*'s analysis. Invidious discriminatory intent is separate and apart from the purpose of the proposed policy or legislation. Thus, there may be many motivations for the exercise of invidious discriminatory intent. A decision maker may in fact enact a particular policy or piece of legislation *because of* its adverse impact on a particular group. However, noting that a decision maker did employ invidious discriminatory intent does not explain what motivated him to do so. Indeed, the invidious intent inquiry is separate from the examination of the motivation behind the exercise of that intent. Drawing again on the facts of *Feeney*, a decision maker might have enacted the veterans' preference statute *because* it would prevent women from securing certain civil service positions. But, knowing that the decision maker employed invidious intent does not explain what motivated him to do so.

Noting the difference between the intent behind a statute and the motivation behind the exercise of the intent helps us understand how there could be reasons that

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106 *Feeney*, 442 U.S. at 279.
108 *See, e.g.*, City of Mobile v. Bolden, 446 U.S. 55 (1980) (analyzing whether an invidious discriminatory intent had motivated racially based voting restrictions); *Loving*, 388 U.S. 1 (analyzing whether invidious intent had motivated racially based marriage restrictions).
109 *See Feeney*, 442 U.S. 256.
110 *Id.*
111 *Id.* at 279.
112 *See Feeney*, 442 U.S. 256.
justify a *prima facie* violation of the Equal Protection Clause stemming from invidious discriminatory intent. Indeed, *Korematsu*, although not explicitly, appears to be such a case.\(^ {113}\) The Court began its inquiry in *Korematsu* by stating:

>[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can.\(^ {114}\)

The military order before the Court in *Korematsu* forced individuals of Japanese descent into internment camps.\(^ {115}\) Thus, it was a restriction on the civil rights of a racial group in violation of the Equal Protection Clause.\(^ {116}\) Although not explicit in *Korematsu*, the military order was promulgated with invidious discriminatory intent as Congress sought to impose a restriction on a racial group intended to harm or restrict that particular racial group.\(^ {117}\) However, while there may have been a *prima facie* violation of the Equal Protection Clause, that does not mean, by necessity, that such a violation cannot be justified. In fact, the Court found that the interests of national security, the motivation behind the exercise of the invidious intent, did justify the *prima facie* violation and therefore the military order passed constitutional muster.\(^ {118}\) Such a conclusion amounted to finding a good enough reason to justify the invidious discriminatory intent behind the order.\(^ {119}\) However, had “racial antagonism” been the motivation behind the exercise of invidious discriminatory intent—the other option considered by the opening paragraph of the Court’s discussion—then the invidious discriminatory intent would not have been justified and the military order would have been struck down.\(^ {120}\)

In sum, we might reformulate the two categories of equal protection analysis as follows. The primary holding, and intuition, of *Washington v. Davis* is that to trigger strict scrutiny, you need to present more than mere disparate impact.\(^ {121}\) Instead, you

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\(^{113}\) *Korematsu v. United States*, 323 U.S. 214, 216 (1944).

\(^{114}\) *Id.*

\(^{115}\) *Id.* at 215.

\(^{116}\) *See Korematsu*, 323 U.S. 214.

\(^{117}\) *Id.*

\(^{118}\) *Id.* at 215, 223, 225.

\(^{119}\) *Id.* at 223–25.

\(^{120}\) Another way of describing this same reasoning is that initially we may find the existence of invidious discriminatory intent. However, once the government produces a sufficient reason for the discrimination in question, the intent is no longer considered invidious. I choose not to phrase the analysis in this way simply for the sake of simplicity. This alternative, however, would also fit with the overall equal protection scheme presented in this Article.

\(^{121}\) 426 U.S. 229, 239 (1976) (“[O]ur cases have not embraced the proposition that a law
must either (1) point to an implicit or explicit racial classification that indicates—based on a history of discrimination—a strong likelihood that the statute in question violates the Equal Protection Clause as it is motivated by invidious discriminatory intent; or (2) demonstrate that invidious discriminatory intent served as the motivation for the statute in question, which proves a \textit{prima facie} Equal Protection Clause violation.\footnote{See, e.g., Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 272 (1979) ("Certain classifications, however, in themselves supply a reason to infer antipathy. Race is the paradigm. A racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification. This rule applies as well to a classification that is ostensibly neutral but is an obvious pretext for racial discrimination." (internal citations omitted)).}

\section*{V. STIGMATIC HARM AND BENIGN CLASSIFICATIONS}

Our foregoing analysis brings us to the Supreme Court's decisions regarding affirmative action programs as potential Equal Protection Clause violations. In \textit{City of Richmond v. J. A. Croson Co.}, the Court addressed the City of Richmond's plan, which required prime contractors to subcontract at least thirty percent of the dollar amount of contracts to Minority Business Enterprises.\footnote{488 U.S. 469, 477 (1989).} One such contractor brought suit, claiming that the plan violated his rights under the Equal Protection Clause.\footnote{Id. at 495.} Ruling in favor of the respondent,\footnote{Id. at 511.} the Court found that the plan did trigger strict scrutiny\footnote{Id. at 493–94 (citations omitted).} and, in turn, violated the Equal Protection Clause,\footnote{See id. at 498.} even though the racial classification appeared to benefit a protected racial group.\footnote{Id. at 511.}

In justifying the application of strict scrutiny to the Richmond plan, the Supreme Court explained:

\begin{quote}
Classifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility. We thus reaffirm the view expressed by the plurality in \textit{Wygant} that the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefitted by a particular classification.\footnote{Id. at 511.}
\end{quote}
The existence of stigmatic harm serves to explain, in part, why the racial classification in the Richmond plan triggered strict scrutiny.\textsuperscript{130} The text of the plan, on its face, used a racial classification.\textsuperscript{131} This racial classification harms a protected racial class, even if those who drafted it did not intend the harm.\textsuperscript{132} As a result, because courts are faced with a racial classification that harms the relevant protected class, they must use strict scrutiny to see if there is indeed an Equal Protection Clause violation.\textsuperscript{133}

This argument fits \textit{City of Richmond v. J.A. Croson Co.} into the first category of strict scrutiny applications. Courts use strict scrutiny because they have an indication, the racial classification, that there may be an Equal Protection Clause violation: "Classifying persons according to their race is more likely to reflect racial prejudice than legitimate public concerns; the race, not the person, dictates the category."\textsuperscript{134} As a result, because the Court was working within the \textit{indication} category of strict scrutiny and not the \textit{violation} category of strict scrutiny, the Court did not need to examine whether the potential discriminatory effects of the racial classification were intentional; the Court already had the necessary indicator that the Richmond plan might violate the Equal Protection Clause.\textsuperscript{135} This is why the Richmond plan, according to the Court, triggered strict scrutiny.\textsuperscript{136}

Differentiating between strict scrutiny as triggered by an indication of an Equal Protection Clause violation (racial classification employed by a statute) and strict scrutiny as triggered by a \textit{prima facie} Equal Protection Clause violation (the use of intentional invidious discrimination to motivate a statute) has led to undue criticism of current Equal Protection Clause doctrine. For example, Jed Rubenfeld has attacked recent Equal Protection Clause decisions, writing:

The five Justices who decided \textit{Adarand} have no intention of overturning \textit{Washington v. Davis}, which holds that inadvertent racial harms are not enough to trigger strict scrutiny. I think \textit{Davis} is correct, so I am not arguing that the Court should overrule that case. But so long as the five Justices remain committed to it, we cannot take seriously their repeated proclamations that strict scrutiny for affirmative action is necessary and proper because affirmative action inadvertently harms minorities.\textsuperscript{137}

\begin{flushleft}
\textsuperscript{130} Id. at 493.  \\
\textsuperscript{131} Id. at 477–78.  \\
\textsuperscript{132} Id. at 493.  \\
\textsuperscript{133} Id.  \\
\textsuperscript{134} Palmore v. Sidoti, 466 U.S. 429, 432 (1984).  \\
\textsuperscript{135} See \textit{Croson}, 488 U.S. at 494.  \\
\textsuperscript{136} Id. at 493.  \\
\textsuperscript{137} Rubenfeld, \textit{Anti Anti-Discrimination}, supra note 26, at 1174; see also Rubenfeld, \textit{Affirmative Action}, supra note 26.
\end{flushleft}
But this critique misses the different ways to trigger strict scrutiny and the unifying rationale behind the alternative triggers.\(^{138}\) The Supreme Court has ruled that disparate impact is not enough to trigger strict scrutiny.\(^{139}\) Instead, in order to trigger strict scrutiny you need to show the Court something more.\(^{140}\) The alternatives for something more are either some racial classification employed by the statute or regulation, or actual invidious discriminatory intent in the creation of the statute or regulation.\(^{141}\) A racial classification is enough of an indication that there may have been an Equal

\(^{138}\) To be sure, Rubenfeld explicitly considers the possibility that the purpose of strict scrutiny is to determine whether the costs of the racial classification are outweighed by the benefits of the racial classification. In this way, the core distinction between indicator and violation cases is already made by Rubenfeld. However, Rubenfeld dismisses the possibility of violation cases for the following reason:

Offsetting state benefits cannot “justify” a law violating an individual’s equal protection rights. That is what it means to have an equal protection right; the right is not subject to any ordinary cost-benefit calculus. Treating an ethnic group as a menial class may serve any number of compelling state interests. Most peoples since the dawn of time have thought as much. Racial subjugation might even, conceivably, produce the greatest happiness for the greatest number. But the Fourteenth Amendment blocks every state action directed to this end, whatever interests it might serve.

Rubenfeld, *Affirmative Action*, supra note 26, at 441. This argument appears grounded in a particular conception of rights as trumps, *see* Ronald Dworkin, *Rights as Trumps*, in *THEORIES OF RIGHTS* 153–67 (Jeremy Waldron ed., 1984), or rights as side constraints, *see* ROBERT NOZICK, *ANARCHY, STATE AND UTOPIA* 30–33 (1974), where built into the very concept of rights is, by definition, their inability to be trumped by social concerns. On such an account, equal protection rights could not be justified by reference to compelling government interests; if they were, then we could no longer call equal protection rights, rights.

However, there is another well-established view on the nature of rights—what is sometimes termed the interest-based theory of rights. *See* JOSEPH RAZ, *THE MORALITY OF FREEDOM* 166 (1986). As Jeremy Waldron has noted, the interest-based account of rights leaves open the strong possibility that rights can be trumped under particular circumstances. *See* Jeremy Waldron, *Rights in Conflict*, 99 ETHICS 503, 518–19 (1989). It is therefore possible, and I would argue correct, to conclude that current equal protection doctrine has adopted the interest-based account of rights. In turn, it is possible—contrary to Rubenfeld’s conclusions—that some equal protection cases correctly employ strict scrutiny to determine whether *prima facie* equal protection violations can be *justified* based upon compelling government interests. Of course, this is not to say that such rights can be trumped easily. The whole point of strict scrutiny, on such an account, is to prevent justifying such violations based upon insufficient government interests. In sum, while Rubenfeld’s approach clearly has paved the way for impressive analysis of the divergent purposes of strict scrutiny, his dismissal of the violation category seems premature. *See* Kim Forde-Mazrui, *supra* note 26, 138 (discussing the concerns created by racial classifications and the functions of strict scrutiny).


\(^{140}\) *Id.* at 242.

\(^{141}\) *Id.* at 244–45.
Protection Clause violation that the Court does not require demonstration of invidious discriminatory intent.\textsuperscript{142} The rationale for not requiring intent when there is a racial classification is that in U.S. history, the existence of such racial classifications usually meant that African-Americans were not receiving equal protection of the laws.

Rubenfeld conflates the two categories by arguing from one to the other.\textsuperscript{143} He believes that the intent requirement in \textit{Washington v. Davis} means that there can be no trigger of strict scrutiny without invidious discriminatory intent.\textsuperscript{144} But that is not the case. You can trigger strict scrutiny simply by employing a racial classification, which is why the Court has struck down statutes that use such classifications in order to promote affirmative action projects.\textsuperscript{145}

VI. WHY NARROW TAILORING?

To be sure, Rubenfeld, in conflating the two triggers for strict scrutiny, is in good company.\textsuperscript{146} Indeed, in the ever-evolving Equal Protection Clause doctrine, the Supreme Court seems to have missed this same point, a problem that becomes clear upon examining the Court’s conclusion that “[t]o withstand our strict scrutiny analysis, [a party] must demonstrate that [its] use of race in its... program employs ‘narrowly tailored measures that further compelling governmental interests.’”\textsuperscript{147}

The Court has always remained somewhat vague on the purpose of narrow tailoring. Narrow tailoring was first applied in the equal protection context in \textit{Fullilove v. Klutznick}.\textsuperscript{148} There, in his dissent, Justice Stevens outlined the reason for employing the narrow tailoring mechanism, a reason adopted by the Supreme Court in subsequent majority decisions: “Racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification.”\textsuperscript{149} The Court’s majority subsequently incorporated Justice Stevens’ explanation of strict scrutiny, further explaining that “[u]nder strict scrutiny the means chosen to accomplish the State’s asserted purpose must be specifically and narrowly framed to accomplish that purpose.”\textsuperscript{150} In further adopting and explaining Justice Stevens’ analysis, the Supreme Court wrote, in a footnote, that

\begin{itemize}
  \item[\textsuperscript{143}] See Rubenfeld, \textit{Anti Anti-Discrimination}, supra note 26, at 1174–76.
  \item[\textsuperscript{144}] See id. at 1174.
  \item[\textsuperscript{145}] See, e.g., Croson, 488 U.S. 469 (holding that Richmond’s plan to distribute a certain set percentage of construction work to minority owned businesses violated the Equal Protection Clause).
  \item[\textsuperscript{146}] See Rubenfeld, \textit{Anti Anti-Discrimination}, supra note 26, at 1174.
  \item[\textsuperscript{148}] 448 U.S. 448, 480 (1980).
  \item[\textsuperscript{149}] Id. at 537 (Stevens, J., dissenting).
\end{itemize}
[t]he term "narrowly tailored," so frequently used in our cases, has acquired a secondary meaning. More specifically, as commentators have indicated, the term may be used to require consideration of whether lawful alternative and less restrictive means could have been used. Or, as Professor Ely has noted, the classification at issue must "fit" with greater precision than any alternative means.\textsuperscript{151}

The initial intuition behind "narrowly tailoring" was to examine whether the state had to use the racial classification in order to accomplish its goal.\textsuperscript{152} But what would it mean if there were alternative means, which avoided the racial classification, to accomplish the same goal?

In answering this question, we must first note that, by itself, the fact that a state used a racial classification to pursue a particular goal when it could have used another means of achieving the same goal does not amount to a violation of the Equal Protection Clause: "Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause."\textsuperscript{153} Thus, failing narrow tailoring does not demonstrate a violation of the Equal Protection Clause. Instead, it appears that, like racial classifications, failing narrow tailoring indicates that there has been an Equal Protection Clause violation; the lack of "fit" makes us think the alleged goal of the racial classification is pretextual.\textsuperscript{154} When a court finds a racial classification, applies strict scrutiny, and finds that the racial classification was not necessary for the alleged governmental purpose, the court has two indicators that there has been an Equal Protection Clause violation: the racial classification and the lack of narrow tailoring. Together, the two indicators present enough evidence for the court to conclude that there has been an Equal Protection Clause violation.

This analysis, however, changes under the second category of strict scrutiny outlined above where we already know there has been a \textit{prima facie} Equal Protection Clause violation. Again, such is the case when a party demonstrates, in accordance with \textit{Washington v. Davis}, that a state has used invidious discriminatory intent in crafting a particular statute or regulation.\textsuperscript{155} Once there is evidence of a \textit{prima facie} violation, narrow tailoring cannot serve as an indicator; we do not need an indication

\textsuperscript{151} \textit{Id.} at 280 n.6 (citing John Hart Ely, \textit{The Constitutionality of Reverse Racial Discrimination}, 41 U. CHI. L. REV. 723, 727 n.26 (1974)).

\textsuperscript{152} See, e.g., \textit{Fullilove}, 488 U.S. at 480.


\textsuperscript{155} See 426 U.S. 229, 239 (1976).
of a prima facie violation when we know there has been a prima facie violation. Instead, once there is evidence of invidious discriminatory intent, we use strict scrutiny to see if there is an important enough reason to justify the prima facie violation.\textsuperscript{156} If there does exist a goal that is sufficiently important to justify the violation, then we use narrow tailoring to see if we truly needed the prima facie violation to achieve this sufficiently important goal: "the purpose of strict scrutiny is to 'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool.'\textsuperscript{157} Were the statute to fail narrow tailoring, it would mean that the goal cannot justify the violation because we could achieve the goal through other means.\textsuperscript{158} In such circumstances, failing narrow tailoring serves to demonstrate the existence of an Equal Protection Clause violation and that such a violation does not have a justification.\textsuperscript{159} Therefore, in order to overcome the prima facie violation, the state must demonstrate that invidious discrimination both "serve[s] a compelling governmental interest, and [is] narrowly tailored to further that interest."\textsuperscript{160} Presumably, this is what the Court thought was accomplished in Korematsu; the invidious discrimination achieved national security and there was no way to achieve national security other than through invidious discrimination.\textsuperscript{161} In this way, the two uses of narrow tailoring naturally follow from the two roles of strict scrutiny.

There is at least one important consequence of our analysis. When dealing with equal protection cases where a statute or regulation employs a classification either implicitly or explicitly, we use narrow tailoring as an indication that there has been an Equal Protection Clause violation.\textsuperscript{162} The actual goal itself, however, appears to be irrelevant. Thus, it would seem that we do not care if the goal is "important enough" because we are not trying to justify a prima facie Equal Protection Clause violation. We are simply trying to see if we have enough indicators of invidious discriminatory intent. If the racial classification is not necessary for the goal, then we have an indication that the goal may be pretextual, giving more credence to concluding that the true purpose of the racial classification is intentional racial discrimination. But, again, the quality or importance of the alleged goal for using the racial classification should not matter; it only appears to matter whether the racial classification was necessary for achieving the goal.\textsuperscript{163}

\textsuperscript{156} See Croson, 488 U.S. at 493.
\textsuperscript{157} Id. (emphasis added).
\textsuperscript{158} See id. at 507.
\textsuperscript{159} See id. at 493.
\textsuperscript{160} Adarand Constructors v. Pena, 515 U.S. 200, 235 (1995); see also Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 274 (1986) ("There are two prongs to this examination. First, any racial classification 'must be justified by a compelling governmental interest.' Second, the means chosen by the State to effectuate its purpose must be 'narrowly tailored to the achievement of that goal.'" (citations omitted)).
\textsuperscript{162} See Croson, 488 U.S. at 493.
\textsuperscript{163} See id. at 508–10 (finding that the Richmond plan was not narrowly tailored to rectify discrimination because of other race-neutral alternatives at the City’s disposal).
And yet, the Court has stated that "any racial classification 'must be justified by a compelling governmental interest.'" This remains true in our indicator category where we ostensibly should be looking only to see if the reasons for the classification fit with the interest at stake. It seems most reasonable, then, to conclude that when the Court applies the "compelling government interest" requirement to indicator cases, it should do so in a way that fits with the overall structure of such cases. Thus, if there is no compelling government interest justifying the racial classification, it indicates a higher likelihood that there has been an equal protection violation. Indeed, because there are very few circumstances under which it makes legitimate sense to employ a racial classification, the lack of a compelling reason could be viewed, when within the indicator category, as an indication of a likely equal protection violation.

In contrast, the "compelling government interest" requirement applied to violation cases—where we have already found a prima facie Equal Protection Clause violation—functions more conventionally. As already explained, the rationale justifying the prima facie equal protection violation must be compelling—or important enough—if it is indeed going to justify the prima facie violation. It is, therefore, in these cases where the "compelling government interest" truly serves as a justification, explaining that we should tolerate the prima facie equal protection violation because a compelling government interest is at stake.

VII. A Recapitulation

To recapitulate, this Article claims that there are two types of potential Equal Protection Clause cases.

The first category—what this Article has termed indicator cases—encompasses cases where a court encounters a racial classification employed by either a statute or regulation. The court takes this racial classification as an indication that there is likely to have been some sort of Equal Protection Clause violation. In order to examine this hypothesis, the court asks the individual or entity why they have used the racial classification. The court then considers whether the alleged permissible use of the racial classification fits with the actual use of the classification, examining whether the racial classification was necessary for achieving the stated goal. In addition, the court examines the alleged goal to see how important the goal is. If the goal is not particularly important, the court is skeptical of the use of a racial classification. Together, the

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165 See Palmore, 466 U.S. at 432.
166 See, e.g., Korematsu, 323 U.S. 214 (finding that the government's interest in protecting national security was compelling enough to justify racially-based legal restrictions).
167 See supra notes 151–57 and accompanying text.
use of a racial classification that is not both narrowly tailored and in service of a compelling government interest gives the court good reason to believe the relevant text violates the Equal Protection Clause. To be sure, they do not know with certainty that there has been a violation; a violation of the Equal Protection Clause requires invidious intent, and no evidence has necessarily been presented regarding the intent in drafting the text. But with these indicators in hand, the Court believes it has good enough reason to strike down the legislation or regulation as a likely violation of the Equal Protection Clause.

The second category, which follows the Adarand paradigm, encompasses cases where a court knows that there has been a prima facie violation of the Equal Protection Clause. This is the case when the court encounters evidence that individuals or entities have exercised invidious discriminatory intent in the crafting of the relevant legislation or regulation. Under such circumstances, the court then uses strict scrutiny to see if there is a good enough reason for the prima facie Equal Protection Clause violation. Thus, if the violation is narrowly tailored to accomplish a sufficiently important goal, like national security in Korematsu, then we tolerate the use of invidious discriminatory intent. In this category, the violation category, we use the compelling government interest requirement to justify the prima facie violation. Then, we use the narrow tailoring requirement to see if we truly needed invidious discriminatory intent to achieve the compelling government interest. Thus, strict scrutiny is a mechanism to justify a potential violation, not to check to see if there are indications of a violation. Put differently, in the violation category, the court already knows the facts that it is looking for in an indication category case.

VIII. AFFIRMATIVE ACTION CASES: WHERE ARE THE INDICATORS?

This brings us to the purpose of our analysis: an examination of the Court's rulings in affirmative action cases. But before looking at the actual cases, it is important to note the following. Affirmative action cases, by their nature, fit into the indicator category; affirmative action programs single out a minority group or groups for benefit. Thus, either implicitly or explicitly, they use racial classifications. And, as already explained, in dealing with cases of racial classifications, the Court's task is to find indicators of an Equal Protection Clause violation.

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169 See, e.g., Bakke, 438 U.S. at 274 (addressing a university's admissions policy that explicitly considered race).

170 See supra notes 53–54 and accompanying text.
A. Racial Classifications in Affirmative Action Cases

Of course, the first indicator is the racial classification itself. Thus, the programs in *Bakke*, *Grutter*, *Gratz*, *Croson*, and *Adarand* all used some sort of racial classification. The implicit argument made by the Court is that these racial classifications give us an indication that there may be an Equal Protection Clause violation. Indeed, the indication is so strong that it triggers strict scrutiny.

But have courts applied the rationale behind indicator cases in applying strict scrutiny to affirmative action cases? This Article argues that they have not. As explained above, racial classifications are treated differently than other classifications because of both the history and relative power of racial classes. Because of these factors, when we typically see a racial classification, we believe it to be very likely that there has been an underlying Equal Protection Clause violation. However, this does not appear to be the case for racial classifications used to benefit a racial class. Indeed, the historical use of such classifications would appear to undermine any claim that such classifications employed in affirmative action cases indicate that there may be an underlying Equal Protection Clause violation.

For all intents and purposes, the Supreme Court dealt with this argument in *Bakke*. Allan Bakke had brought suit against University of California, Davis, (U.C. Davis) Medical School for employing an admissions process that held spots for minority applicants. Bakke claimed that the policy violated the Equal Protection Clause as he incurred loss as a result of his race. The California Supreme Court found in favor of Bakke and U.C. Davis Medical School appealed to the Supreme Court.

Among the Supreme Court's many holdings was that simply because the harm was incurred by somebody white did not mean that the Court should not use the strict scrutiny standard when evaluating a racial classification. The Court emphasized...
its dedication to equality: "The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal."\(^{187}\) The Court further attacked the notion that they should apply a different standard of review because the classification’s purpose was benign:

Petitioner urges us to adopt for the first time a more restrictive view of the Equal Protection Clause and hold that discrimination against members of the white “majority” cannot be suspect if its purpose can be characterized as “benign.” The clock of our liberties, however, cannot be turned back to 1868. It is far too late to argue that the guarantee of equal protection to all persons permits the recognition of special wards entitled to a degree of protection greater than that accorded others. “The Fourteenth Amendment is not directed solely against discrimination due to a ‘two-class theory’—that is, based upon differences between ‘white’ and Negro.”\(^{188}\)

But none of this is truly accurate. We do treat different claims differently; equal protection does mean one thing when applied to an African-American, and another when applied to somebody old, and maybe even another thing when applied to a woman.\(^{189}\) We treat different claims from individuals from different classes differently. This was the choice the Court made when it decided that the best way to operationalize the Equal Protection Clause was to use protected racial classifications as an indicator that there may be an Equal Protection Clause violation.\(^{190}\) The Court’s rhetoric in \textit{Bakke} simply overlooks these facts and accuses the petitioner of trying to impose a two-tiered ward system.\(^{191}\)

To be sure, the Court has not ignored this counter-argument. In addressing this problem head on, the Court argued as follows:

Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what

\(^{187}\) \textit{Id.} at 289–90.

\(^{188}\) \textit{Id.} at 294–95 (citations omitted).

\(^{189}\) Rubenfeld, \textit{Anti Anti-Discrimination}, supra note 26, at 1172–73 (“Surprising as it may be, the present majority of the Supreme Court essentially uses the Constitution’s phrase ‘the equal protection of the laws’ to force states to deny blacks (and other racial minorities) a legal right enjoyed by many other minority groups.”).

\(^{190}\) See United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938) (suggesting the Equal Protection Clause applies with particular veracity when “discrete and insular minorities” are concerned).

\(^{191}\) See \textit{Bakke}, 438 U.S. at 288 n.26 (noting that white students were prohibited from competing for admission places reserved for minorities).
classifications are “benign” or “remedial” and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics. Indeed, the purpose of strict scrutiny is to “smoke out” illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool. The test also ensures that the means chosen “fit” this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.¹⁹²

Unfortunately, the Court’s argument moves a bit too quickly. The Court’s concern is that there is no way to determine whether a classification is benign or remedial.¹⁹³ As a result, it simply takes the existence of a racial classification as an automatic trigger of strict scrutiny and then assumes that the narrow tailoring and compelling government interest criteria will help differentiate between likely and unlikely violations of the Equal Protection Clause.¹⁹⁴

But is it true that there is no way to determine whether a particular racial classification is benign or remedial? The answer would appear to be no. As the Court explained in Washington v. Davis, investigating the intent behind a particular racial classification can tell us quite a lot about the potential for an Equal Protection Clause violation.¹⁹⁵ In fact, as intent is a necessary criterion for an Equal Protection Clause violation, it is curious that the Court does not look to intent as part of its indicator analysis.¹⁹⁶ Moreover, Washington v. Davis and its line of cases have gone far in explaining how we might go about determining the intent behind a particular racial classification;¹⁹⁷ thus, claims that the task is too complicated are misplaced.

Singling out racial classifications for strict scrutiny only makes sense because the history of such classifications makes it likely that some invidious discriminatory intent was at work. Consequently, we allow racial classifications to trigger strict scrutiny because the use of a racial classification serves as a strong indicator about intent. However, it does not make sense to construe the use of a racial classification as indicating a high probability of an Equal Protection Clause violation when there are even more indications that no invidious discriminatory intent was at work in the crafting of the legislation or regulation. Thus, in the affirmative action context, the rationale behind using racial classification as an indicator of invidious discriminatory intent stands at loggerheads with stronger and more direct indicators that there was no exercise of invidious discriminatory intent.

¹⁹³ Id.
¹⁹⁴ Id.
¹⁹⁶ For a discussion of the significance of a “racially discriminatory purpose,” see id. at 240.
¹⁹⁷ See id. at 253 (Stevens, J., concurring) (“Frequently the most probative evidence of intent will be objective evidence of what actually happened . . . .”).
B. Stigmatic Harm in Affirmative Action Cases

Some readers may not like the argument presented above. In response, they may note that the existence of stigmatic harm is what is motivating the Court's triggering of strict scrutiny in affirmative action cases. To consider this response, we must re-examine the text of the Court's presentation of the stigmatic harm argument:

Classifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility. We thus reaffirm the view expressed by the plurality in Wygant that the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefitted by a particular classification.\(^{198}\)

On this argument, stigmatic harm explains why the racial classifications should trigger strict scrutiny.\(^{199}\) Because there is a racial classification, and a racial classification by its nature imposes harm on a protected racial class, we must trigger strict scrutiny to ensure that there is a remedial purpose for using the racial classification.\(^{200}\)

But this argument misses the mark. When dealing with a case of a racial classification, we trigger strict scrutiny because of the indicators we have of a possible Equal Protection Clause violation.\(^{201}\) However, as previously argued, the racial classification in affirmative action cases does not provide sufficient indication of such a violation in light of the obvious—and legally deducible—intent employed in the crafting of the statute.\(^{202}\) The fact that the racial classification, by its nature, imposes harm on a protected racial class does not indicate much.\(^{203}\) Indeed, the fact that a statute simply imposes harm on a protected racial class never triggers strict scrutiny; that is why disparate impact does not trigger strict scrutiny as we have no indication that there is a connection between the harm experienced by the protected racial class and the motivation behind the crafting of the statute.\(^{204}\) Again, this is why Washington v. Davis required intent in cases of disparate impact.\(^{205}\) Thus, the only way for harm, on its own, to trigger strict scrutiny is when there is also evidence of intent. But, as already noted, there is often no evidence of invidious discriminatory intent in affirmative

\(^{198}\) Croson, 488 U.S. at 493–94 (citations omitted).

\(^{199}\) Id.

\(^{200}\) Id. at 493–95.

\(^{201}\) See discussion supra Part III.


\(^{204}\) See id.

\(^{205}\) Id.
action cases; to the contrary, there is evidence that there was no invidious discriminatory intent in the crafting of the statute or policy.206

There is one last argument for using the racial classification in affirmative action cases as an indicator of invidious discriminatory intent. For the purposes of Equal Protection Clause analysis, the Court has simply created a knee-jerk response to any racial classification, whether explicit or implicit.207 Indeed, it does so even when there appears to be good reasons not to. On such an account, the use of racial classifications in U.S. history is so abominable that we simply must investigate under the most rigid scrutiny any use of such classifications.208 As argued below, not even this argument can get the Court off the hook.

C. Compelling Government Interest in Affirmative Action Cases

Let us assume for now that we have rejected the argument above and triggered strict scrutiny because of a racial classification even if the classification was used in an affirmative action program. Let us also assume that we are dealing with a case where the racial classification was necessary to achieve the alleged goal of the classification; in other words, let us assume that the narrow tailoring requirement is satisfied.209 The Court then moves on to examine whether there is a compelling government interest in using the racial classification.210

Let us again take the Supreme Court's analysis of the rationale advanced by U.C. Davis Medical School for holding spots for racial minorities in Bakke.211 The first two reasons for granting preference to applicants from racial minorities were "(I) 'reducing the historic deficit of traditionally disfavored minorities in medical schools and in the medical profession' [and] (ii) countering the effects of societal discrimination."212 The Court took its task to be deciding "if any [] of these purposes is substantial enough to support the use of a suspect classification."213

In dispensing with the first two rationales presented by U.C. Davis Medical School, Justice Powell noted, "We have never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other

206 See, e.g., Gratz, 539 U.S. 244; Grutter, 539 U.S. 306 (noting that the purpose for crafting these admission policies was to increase diversity of students).
207 See discussion supra Part VIII.B (discussing the Court's reaction to stigmatic harm in affirmative action cases).
208 See discussion supra Part III.
209 To be sure, many of the affirmative action cases fail because the Court finds that the racial classification is not narrowly tailored to achieve the alleged goal. See, e.g., Gratz, 539 U.S. 244 (holding that the university's admission policy violated the Equal Protection Clause because it was not narrowly tailored to meet the school's diversity interest).
210 See id.; Grutter, 539 U.S. at 327–33.
212 Id. at 305–06 (citation omitted).
213 Id. at 306.
innocent individuals in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations.”

Moreover, even if such findings had been made, U.C. Davis would still have to demonstrate that “the governmental interest in preferring members of the injured groups at the expense of others is substantial, since the legal rights of the victims must be vindicated.”

Doing so would typically be done with reference to the necessary “extent of the injury” which would “have been judicially, legislatively, or administratively defined.”

In sum, “[w]ithout such findings of constitutional or statutory violations, it cannot be said that the government has any greater interest in helping one individual than in refraining from harming another. Thus, the government has no compelling justification for inflicting such harm.”

Furthermore, seeking to ameliorate societal discrimination could not serve as a basis for the medical school’s policy because it “imposes disadvantages upon persons like respondent, who bear no responsibility for whatever harm the beneficiaries of the special admissions program are thought to have suffered.” Indeed, “[t]o hold otherwise would be to convert a remedy heretofore reserved for violations of legal rights into a privilege that all institutions throughout the Nation could grant at their pleasure to whatever groups are perceived as victims of societal discrimination.”

According to Justice Powell, “That is a step we have never approved.”

Justice Powell’s analysis, however, ignores the purpose of the compelling government interest criterion. Powell argues that the interests advanced by U.C. Davis harm applicants who were not members of a racial minority, like Allan Bakke. But such an argument is irrelevant once we realize that we are only looking for a compelling government interest in order to bolster our concern that the racial classification indicates the use of invidious discriminatory intent. Indeed, the reason we triggered strict scrutiny was because, historically, the use of racial classifications typically were in the service of racial discrimination. Thus, strict scrutiny is a mechanism to find more indications of discrimination against the protected racial class. Findings like those of Justice Powell, which highlight the harm to other individuals, may be problematic and pose independent policy and legal arguments. They do not, however, serve as indicators of invidious discrimination and are therefore irrelevant to Equal Protection Clause analysis. When U.C. Davis Medical School uses a racial classification to further the remedying of societal discrimination, at best, the racial classification only further demonstrates the lack of invidious discrimination.

\[214\] Id. at 307.

\[215\] Id.

\[216\] Id. at 308.

\[217\] Id. at 308–09.

\[218\] Id. at 310.

\[219\] Id.

\[220\] Id.

\[221\] Id. at 319–20.

\[222\] See id. at 310.

\[223\] See id.
missed the purpose of its examination of the rationales for the racial classification, simply looking to see if any of the purposes advanced by U.C. Davis Medical School were "substantial enough," instead of recognizing that the substantial enough criterion is meant to serve as an indicator. Consequently, the Bakke Court took the purpose of the "substantial enough" criteria from violation cases, construing the various rationales advanced by U.C. Davis Medical School to be justifying the use of the racial classification. But, as we have explained, Bakke is an indicator case as the racial classification indicated the possibility of an equal protection violation; in Bakke, there was absolutely no demonstration of a prima facie violation based upon invidious discriminatory intent. Thus, there was no reason to consider whether the various rationales behind the medical school's admission policy were substantial enough to justify the policy, because there was no prima facie violation to justify. By mixing the task of the "substantial enough" criterion in violation cases with the task of the "substantial enough" criterion in indicator cases, the Court wrongly struck down societal discrimination as a legitimate purpose for the racial classification.

IX. DIVERSITY AS THE NEW DISCRIMINATION: A FORTIORI ARGUMENTS

The Bakke Court did find one purpose advanced by the U.C. Davis Medical School that was "substantial enough" to potentially allow the racial classification to survive strict scrutiny: diversity. In contrast to its treatment of the other rationales for the racial classification, a plurality of the Court was persuaded by the goal of diversity advanced by the medical school justifying its use of a suspect racial classification, deeming it constitutional.

The Supreme Court grounded the goal of diversity in the First Amendment, noting the importance for a university to promote a "robust exchange of ideas" through its selection process. In detailing its conclusion that diversity did indeed lead to an improved exchange of ideas, the Court explained that

[a]n otherwise qualified medical student with a particular background—whether it be ethnic, geographic, culturally advantaged or disadvantaged—may bring to a professional school of medicine experiences, outlooks, and ideas that enrich the training of its student body and better equip its graduates to render with understanding their vital service to humanity.
More specifically, "a black student can usually bring something that a white person cannot offer. The quality of the educational experience of all ... students ... depends in part on these differences in the background and outlook that students bring with them."232

The analysis in Bakke has served as the starting point for subsequent Supreme Court decisions regarding affirmative action in higher education.233 While the outcomes have differed, the kernel remains unchanged; thus in Grutter, the Court began by noting that "Justice Powell approved the university's use of race to further only one interest: 'the attainment of a diverse student body.'"234

At first glance, this appears to be a development that benefits the African-American community. Although the Court may be applying the "substantial enough" or "compelling government interest" standard from violation cases instead of from indicator cases, the fact that diversity survives is a recognition of African-American culture and its value to American society. Such a result, we might think, bodes well for programs, whether public or private, that seek to use racial classifications to advance the cause of the African-American community.

Nothing could be further from the truth. And the reason stems directly from our analysis thus far. First, by mixing up the indication and violation categories,235 the Court has used diversity to justify a racial classification. However, the plausibility of diversity justifying a racial classification stems from the particulars of the circumstances of the cases; it just makes sense to allow diversity to justify an admissions policy that helps African-Americans. Put another way, the Court can adopt diversity as justifying a racial classification because it really only needs to function as an indication. Thus, the bar for a reason that justifies is lowered. Let's consider another case.

Imagine if in Korematsu the government had somehow advanced diversity as the rationale behind internment camps; the details of the connection are not important now, but assume that narrow tailoring had been satisfied. The Court, presumably, would not have found diversity "substantial enough" to justify internment camps. For internment camps, you need a reason like national security,236 and even national security strikes many of us as dubious. In Bakke, the Court, in looking for important purposes of the racial classification, took—and erroneously so on our account—its task to be the same as the task in Korematsu: to justify a prima facie Equal Protection Clause violation.237 But because we were not talking about a classification that

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232 Id. at 323.
234 Grutter, 539 U.S. at 324 (citing Bakke, 438 U.S. at 311); see also Gratz, 539 U.S. at 270–71.
235 For a discussion of the distinctions that should be drawn between indication and violation cases, see supra Part IV.
237 Bakke, 438 U.S. 265.
harmed a racial minority in *Bakke*, the Court was willing to use diversity to justify the classification.238

And here is the problem. Once we are willing to use diversity as a justification, then the bar for what suffices as a justification has been lowered. We now may very well be willing—even in cases when we truly need a justification of a *prima facie* Equal Protection Clause violation—to employ purposes that should not be sufficient. Indeed, at least one commentator has suggested as much already, making one of the paradigmatic "*a fortiori* arguments" that we already cited above:

Similarly, racial profiling policies and guidelines that permit law enforcement officers to consider race, among other factors, when they possess "trustworthy information, relevant to the locality or time frame, that links persons of a particular race or ethnicity to an identified criminal incident, scheme, or organization" also pass muster under the Equal Protection Clause. *If student body diversity in university law schools is a compelling governmental interest, then surely crime control also qualifies as such.*239

The argument here, simply put, is if diversity works, then of course crime control works. But this is a dubious argument. Diversity works because it did not have to do too much; it simply had to serve as an *indicator* that no invidious discriminatory intent was at work. Crime control actually has to justify what is a full-blown *prima facie* Equal Protection Clause violation;240 racial profiling employs a racial classification and is motivated by invidious discriminatory intent. While this may on some account be justified, an argument regarding its justification must be made under strict scrutiny analysis.241

The fear is that in cases where racial profiling passes Fourth Amendment requirements, diversity may give it the leverage necessary to pass Equal Protection requirements. While we may think that crime control should be able to justify a *prima facie* Equal Protection Clause violation, we should not think so because diversity worked. And using diversity as leverage in racial profiling is only step one. There may be other marginally beneficial reasons—reasons only slightly more convincing than

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238 *Id.* at 311–13.
239 Smith, *supra* note 21 (emphasis added) (citation omitted).
241 *See* Harcourt, *supra* note 240, at 1279–80 (discussing how racial profiling may pass strict scrutiny).
diversity—that will now satisfy the "substantial enough" criterion because diversity already blazed the constitutional path.\(^{242}\)

X. LOOKING TO THE FUTURE: THE POTENTIAL IMPACT OF PARENTS INVOLVED

Given our foregoing analysis, what indications do we have about the Court's equal protection's jurisprudence going forward? How might the Court address potential future a fortiori arguments? The Court's recent decision in Parents Involved gives some important indications, some of which have been missed by many of the initial evaluations of the decision. Indeed, a careful analysis of Parents Involved uncovers the potential for a new majority on the Court, one that might break with the Grutter, Gratz, and Bakke line of cases and move the Court sharply not as widely thought to the right, but to the left of center.

A. The Two Dominant Views

The Court's companion decisions from 2003—Gratz and Grutter—serve as the key guideposts to understanding the new trajectory of the Court's equal protection analysis.\(^{243}\) As already intimated, the Court's majority in both Gratz and Grutter applied strict scrutiny to the relevant admissions plans in order to determine whether or not the admissions plans violated the Equal Protection Clause.\(^{244}\) Therefore, the Court examined the plans to see if they were narrowly tailored to further compelling government interests.\(^{245}\)

In both cases, the Court followed the plurality in Bakke, affirming diversity as a compelling government interest.\(^{246}\) What differentiated Gratz from Grutter was the majority's application of narrow tailoring to each case.\(^{247}\) According to the Court, "To be narrowly tailored, a race-conscious admissions program cannot use a quota

\(^{242}\) For a discussion of some of these potential "marginally beneficial" reasons, including safety and crime prevention, see id. at 1280–81; Smith, supra note 21, at 234.

\(^{243}\) For a critical analysis of the Gratz-Grutter strict scrutiny paradigm, see Ian Ayres & Sydney Foster, Don't Tell, Don't Ask: Narrow Tailoring After Grutter and Gratz, 85 TEX. L. REV. 517 (2007) (arguing that the Court's deference to vague affirmative actions plans on one hand and intense scrutiny of detailed plans on the other is misplaced).


\(^{245}\) Gratz, 539 U.S. at 270; Grutter, 539 U.S. at 326, 339.

\(^{246}\) Gratz, 539 U.S. at 270–71; Grutter, 539 U.S. at 325.

\(^{247}\) See Ayres & Foster, supra note 243, at 542–43 (stating that Gratz's narrow tailoring was based on "individualized consideration" alone whereas Grutter established a four-part test for narrow tailoring, of which individualized consideration was one part).
system—it cannot ‘insulat[e] each category of applicants with certain desired qualifications from competition with all other applicants.’\textsuperscript{248} In \textit{Gratz}, the Court concluded, “We find that the University’s policy, which automatically distributes 20 points, or one-fifth of the points needed to guarantee admission, to every single ‘underrepresented minority’ applicant solely because of race, is not narrowly tailored to achieve the interest in educational diversity that respondents claim justifies their program.”\textsuperscript{249} In contrast, the Court concluded in \textit{Grutter} that the admissions plan was narrowly tailored, arguing

[t]hat a race-conscious admissions program does not operate as a quota does not, by itself, satisfy the requirement of individualized consideration. When using race as a “plus” factor in university admissions, a university’s admissions program must remain flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes an applicant’s race or ethnicity the defining feature of his or her application. The importance of this individualized consideration in the context of a race-conscious admissions program is paramount.\textsuperscript{250}

In turn, the admissions plan in \textit{Grutter} was narrowly tailored “[b]ecause the . . . [s]chool consider[ed] ‘all pertinent elements of diversity . . . ’”\textsuperscript{251} In other words, an admissions plan that engaged in individualized consideration of each applicant, including the race of each applicant, was narrowly tailored to achieve diversity because it ensured that applicants were, in fact, diverse; however, admissions plans that simply.tacked on points for being part of a particular minority were not narrowly tailored because they did not, in fact, embody a system designed to produce truly diverse student bodies.\textsuperscript{252} Or at least, so the argument goes.

The majority opinion in \textit{Parents Involved}, for the most part, followed the \textit{Gratz-Grutter} analysis.\textsuperscript{253} The majority subjected the school assignment plans in question to strict scrutiny and then examined whether the plans were narrowly tailored to achieve a compelling government interest.\textsuperscript{254} In turn, the Court took its first shot at

\textsuperscript{248} \textit{Grutter}, 539 U.S. at 334 (alteration in original) (quoting Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 315 (1978)).
\textsuperscript{249} \textit{Gratz}, 539 U.S. at 270.
\textsuperscript{250} \textit{Grutter}, 539 U.S. at 336–37.
\textsuperscript{251} \textit{Id.} at 341.
\textsuperscript{254} \textit{Id.} at 2751–61.
the assignment plan by noting that they were not covered by *Grutter* because *Grutter* only articulated a compelling interest of diversity for higher education, a holding that did not apply to the elementary school assignment plans before the Court.\(^{255}\) Moreover, the Court held that the assignment plans in question were not narrowly tailored because school assignments were not individualized in a manner consistent with *Grutter, Gratz*, and *Bakke*.\(^{256}\) These reasons, among others, led the Court to conclude that the assignment plans could not survive strict scrutiny as they were neither narrowly tailored nor did they achieve a compelling interest.\(^{257}\)

Justice Breyer's dissent, joined by Justices Stevens, Souter, and Ginsburg, attacked the majority opinion, using arguments similar to those advanced by the dissent in *Gratz*.\(^{258}\) At its core, the dissenting view advanced the principle "that the government may voluntarily adopt race-conscious measures to improve conditions of race even when it is not under a constitutional obligation to do so."\(^{259}\) Indeed, the dissent argued that in cases where school assignment plans are used to remedy both *de jure* and *de facto* discrimination, a "contextual approach to scrutiny is altogether fitting."\(^{260}\) Justice Breyer, in explaining the reasons behind and limited use of a less than strict scrutiny standard, argued for applying such a standard to the school assignments before the Court:

>This context is *not* a context that involves the use of race to decide who will receive goods or services that are normally distributed on the basis of merit and which are in short supply. It is not one in which race-conscious limits stigmatize or exclude; the limits at issue do not pit the races against each other or otherwise significantly exacerbate racial tensions. They do not impose burdens unfairly upon members of one race alone but instead seek benefits for members of all races alike. The context here is one of racial limits that seek, not to keep the races apart, but to bring them together.\(^{261}\)

This is an all too brief recapitulation of the two dominant views in the Court's recent decision in *Parents Involved*.\(^{262}\) This Article does not focus on either of

\(^{255}\) Id. at 2753–54.

\(^{256}\) Id. at 2755–61.

\(^{257}\) Id. at 2760.


\(^{259}\) *Parents Involved*, 127 S. Ct. at 2814 (Breyer, J., dissenting).

\(^{260}\) Id. at 2819.

\(^{261}\) Id. at 2818.

these views; it is Justice Kennedy's view that holds out the potential to radically alter our current equal protection scheme and defang the lurking *a fortiori* arguments outlined thus far.263

**B. Kennedy's Concurrence: Who Needs the Diversity Rationale Anyway?**

Justice Kennedy's concurrence has received important attention, especially because of his insistence that the majority opinion "impl[ies] an all-too-unyielding insistence that race cannot be a factor in instances when, in my view, it may be taken into account."264 Initially, it seems as if Kennedy is simply headed towards re-articulating the position of the Court in both *Gratz* and *Grutter*, but hoping to emphasize some of *Grutter*'s willingness to allow certain types of plans to pass strict scrutiny.265 In keeping with such an approach, Kennedy emphasized that the central problem of the school assignment plans before the Court was the lack of narrow tailoring, accusing the school assignment plans of simply "employ[ing] the crude racial categories of 'white' and 'non-white' as the basis for its assignment decisions."266 Indeed, in keeping with his dissent in *Grutter*,267 Kennedy argues that strict scrutiny was the right standard for the instant case and that the assignment plans did not satisfy it.268

But Kennedy goes on to make an incredible argument—an argument not lost upon the dissent269—cited in full below:

School boards may pursue the goal of bringing together students of diverse backgrounds and races through other means, including strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race. These mechanisms are race conscious but do not lead to different treatment based on a classification that tells each student he or she is to be defined by race, so it is unlikely any of them would demand strict scrutiny to be found permissible. See *Bush v. Vera*, 517 U.S. 952, 958 (1996) . . . (plurality opinion) ("Strict scrutiny does not apply merely because redistricting is performed with consciousness of

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263 See supra notes 20–26 and accompanying text (discussing the harm caused by *a fortiori* arguments regarding the diversity rationale).

264 *Parents Involved*, 127 S. Ct. at 2791 (Kennedy, J., concurring).

265 *Id.* at 2792–93.

266 *Id.* at 2790–91.


268 *Parents Involved*, 127 S. Ct. at 2789–91 (Kennedy, J., concurring).

269 See *id.* at 2819–20 (Breyer, J., dissenting).
Electoral district lines are 'facially race neutral' so a more searching inquiry is necessary before strict scrutiny can be found applicable in redistricting cases than in cases of 'classifications based explicitly on race'" (quoting Adarand, 515 U.S. at 213 ...)). Executive and legislative branches, which for generations now have considered these types of policies and procedures, should be permitted to employ them with candor and with confidence that a constitutional violation does not occur whenever a decision maker considers the impact a given approach might have on students of different races. Assigning to each student a personal designation according to a crude system of individual racial classifications is quite a different matter; and the legal analysis changes accordingly.\(^{270}\)

Here, Kennedy seeks to differentiate between school policies that are "race-conscious" and policies that employ "crude systems of individual racial classifications."\(^{271}\) This distinction comes close to mirroring the distinction that differentiated Gratz from Grutter; the admissions policy in Gratz was struck down because it also gave a "crude" plus of twenty points for applicants from racial minorities.\(^{272}\) Grutter, on the other hand, involved a more individualized "race-conscious" scheme which allowed it to pass strict scrutiny.\(^{273}\)

But, upon careful analysis, it is clear that this is not the distinction Kennedy is presenting. According to Kennedy, race-conscious policies that do not go so far as to employ crude racial classifications should not be subjected to strict scrutiny at all: "[I]t is unlikely any of them would demand strict scrutiny to be found permissible . . . ."\(^{274}\) This stands in stark contrast to, for example, Grutter where the Court concluded that the fact that Michigan's admissions policy was not "crude" enabled the plan to survive strict scrutiny. Here, Kennedy suggests that the fact that certain race-conscious policies were not "crude" would enable them to avoid strict scrutiny. Thus, Kennedy advances a distinction not embraced by either the majority or the minority. On the one hand, the majority would require any race-conscious policy to survive strict scrutiny in order to be held constitutional.\(^{275}\) On the other hand, the minority would allow remedial

\(^{270}\) Id. at 2792 (Kennedy J., concurring) (first emphasis added).

\(^{271}\) Id.

\(^{272}\) Id. at 2790–91 (describing "white" and "non-white" classifications as "crude"); Gratz v. Bollinger, 539 U.S. 244, 271–72 (2003).


\(^{274}\) Parents Involved, 127 S. Ct. at 2792 (Kennedy, J., concurring).

\(^{275}\) Id. at 2751–52 ("It is well established that when the government distributes burdens or benefits on the basis of individual racial classifications, the action is reviewed under strict scrutiny . . . . [R]acial classifications are simply too pernicious to permit any but the most exact connection between justification and classification." (citations omitted)).
race-conscious policies to avoid strict scrutiny in keeping with their construction of Brown's legacy.\textsuperscript{276} Kennedy has chosen to import the distinction of Gratz and Grutter, but instead of using the distinction to determine which policies are narrowly tailored, he uses a similar distinction to determine which policies require strict scrutiny.\textsuperscript{277} Thus, a race-conscious policy, regardless of whether it is remedial or not, may not require strict scrutiny, pushing Kennedy's position even beyond the position advanced by the dissent.\textsuperscript{278}

In order to advance this proposition, Kennedy cites to a single case, Bush v. Vera,\textsuperscript{279} a case that addresses not school assignment policies, but rather racial redistricting. Indeed, as Pamela Karlan has demonstrated, the Court's racial redistricting jurisprudence represents an exception to the standard Equal Protection analysis employed by the Court in other cases.\textsuperscript{280} The exceptional nature of the Court's racial redistricting jurisprudence lies primarily in the intent necessary to trigger strict scrutiny. In contrast to the general rule, strict scrutiny is triggered in the racial redistricting context only when "race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district."\textsuperscript{281} In turn, "[t]o make this showing, a plaintiff must prove that the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests, to racial considerations."\textsuperscript{282} In Bush v. Vera—again, the case cited

\textsuperscript{276} Id. at 2817–20 (Breyer, J., dissenting).
\textsuperscript{277} Id. at 2792 (Kennedy, J., concurring).
\textsuperscript{279} 517 U.S. 952 (1996).
\textsuperscript{281} Miller v. Johnson, 515 U.S. 900, 916 (1995) (emphasis added). This carve out for racial redistricting began with the Court's decision in Shaw v. Reno, 509 U.S. 630, 646, 648 (1993) (noting that "race consciousness does not lead inevitably to impermissible race discrimination" and concluding that redistricting will trigger strict scrutiny "[w]hen a district obviously is created solely to effectuate the perceived common interests of one racial group . . ."(emphasis added)). See Karlan, supra note 280, at 1576 ("[I]n Shaw v. Reno, there were hints that the Court was tweaking conventional equal protection doctrine. It modified both what triggers strict scrutiny and what counts as a compelling state interest in important and potentially far-ranging ways. Those modifications have been amplified in its later decisions.").
\textsuperscript{282} Miller, 515 U.S. at 916 (emphases added).
by Kennedy in his concurrence—the Court distilled this standard by focusing the race-conscious inquiry in racial redistricting cases on whether, in the deliberations over a particular redistricting measure, "race predominated." Thus, put into our own terminology, demonstrating that race motivated a particular redistricting does not, on its own, trigger strict scrutiny because it is not a sufficient indicator of a potential equal protection violation. The reason is because redistricting invariably—at least according to the Court—entails considering race. Redistricting cases, according to the Court’s current thinking, are indicator cases; we are looking for indications of a prima facie equal protection violation—but we do not have sufficient indicators to trigger strict scrutiny when legislators simply consider race as one factor among others. Indeed, the reason underlying the Court’s refusal to allow mere race-consciousness to trigger strict scrutiny in the racial redistricting context is because, in such a context, being race-conscious indicates very little: “The redistricting decisions recognize that awareness of race cannot be removed entirely from the [redistricting] process; as long as race does not subordinate other considerations, taking it into account does not trigger strict scrutiny.”

Again, this standard has been explicitly rejected by the Court outside of the racial redistricting context. In standard equal protection cases, the Court has concluded that once race becomes a “a motivating factor in the [legislative or administrative] decision, judicial deference is no longer justified.”

In other words, the Court refuses to grant deference to a legislative or administrative decision once it has been determined that race was a factor in the final determination. This, of course, makes sense. In standard equal protection cases, the mere consideration of race—even if race does not predominate—makes us deeply suspicious that there has been an equal protection violation. In most circumstances, when race serves as a motivation, we have a sufficient trigger for strict scrutiny given the past history of discrimination against the minority group in question.

283 Vera, 517 U.S. at 963.
284 See Karlan, supra note 280, at 1598 (“The redistricting decisions recognize that awareness of race cannot be removed entirely from the process; as long as race does not subordinate other considerations, taking it into account does not trigger strict scrutiny.”).
285 Id.; Vera, 517 U.S. at 959 (sustaining the district court’s finding that the redistricting plan at issue was not subject to strict scrutiny because there were “mixed motive[s],” such as “incumbency protection,” and evidence did not show that race was the “predominant factor”).
286 Karlan, supra note 280, at 1598.
288 See Karlan, supra note 280, at 1583.
289 See Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 291 (1978) (“Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination.”); Korematsu v. United States, 323 U.S. 214, 216 (1944) (“[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect.”).
In contrast, when considering racial redistricting cases, the Court grants the drawing of a new district deference until it has been determined that race was the predominant factor motivating the decision, and not just one such factor because race-consciousness is understood to be an inextricable consideration in the redistricting decision-making process.\textsuperscript{290} In sum, both redistricting and standard parallel equal protection cases are \textit{indicator} cases; the only difference between the two is that the Court has taken a contextualized approach to understanding the use of race as a motivation; accordingly, the Court does not consider the mere use of race as a motivation to indicate a \textit{prima facie} equal protection violation in redistricting cases because it perceives race as inextricably linked to the process of redistricting.

Kennedy’s concurrence appears to take this contextual approach to equal protection cases one step further. By citing \textit{Bush v. Vera} for the proposition that “race conscious” mechanisms are “unlikely [to] demand strict scrutiny to be found permissible,”\textsuperscript{291} he appears to be extending the racial redistricting logic to school assignment cases. Again, the reason a different standard is applied in racial redistricting cases is because the Court has argued race inevitably becomes a part of every redistricting decision.\textsuperscript{292} Consequently, the Court will not invalidate redistricting simply because race played a role in the decision-making process.\textsuperscript{293} This rationale applies regardless as to whether race is employed in the redistricting process as a remedial measure or otherwise.\textsuperscript{294} The point in the redistricting cases is that race is an inevitable part of the process.\textsuperscript{295}

Along similar lines, Kennedy apparently understands race to be bound up so tightly with education decisions that we must come to expect race to be a consideration in the administration of the educational system in the same way that the Court

\textsuperscript{290} See \textit{supra} notes 278–82 and accompanying text.


\textsuperscript{292} See \textit{Miller v. Johnson}, 515 U.S. 900, 916 (1995) (“Redistricting legislatures will, for example, always be aware of racial demographics; but it does not follow that race predominates in the redistricting process.”).

\textsuperscript{293} \textit{Id.}

\textsuperscript{294} See \textit{Shaw v. Reno}, 509 U.S. 630, 657 (1993) (“Racial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters . . . . It is for these reasons that race-based districting . . . demands close judicial scrutiny.”).

\textsuperscript{295} Focusing on the application of the predominant motivation standard falls in line with the view already advanced by Brian T. Fitzpatrick, \textit{Can Michigan Use Proxies for Race After the Ban on Racial Preferences?}, 13 MICH. J. RACE & L. 277, 290 (2007). On Fitzpatrick’s account, Kennedy may have intended to have courts apply the predominant motivation standard in all “racial gerrymandering” cases. \textit{Id.} In contrast, in the account advanced in this Article, Kennedy sought to import the standard applied in racial redistricting cases to school assignment and potentially affirmative action cases. And, as already noted, this link stems from the internal logic of each context.
appears to assume that race is an inextricable part of the redistricting process.\textsuperscript{296} This means that the mere fact that school decision makers are "race conscious" during the decision-making process should not trigger, on its own, strict scrutiny, even in cases where the use of race is not remedial in nature. This would appear to be because in the school assignment context, the mere use of race as a single motivating factor is not a very good indicator of a potential equal protection violation. Thus, strict scrutiny applies in the school assignment context in the same way it applies in the redistricting context: its mere use as a single motivation among many is not a very good indicator of a \textit{prima facie} equal protection violation.\textsuperscript{297}

Using our own terminology, Kennedy analyzes "race conscious" educational policies as \textit{indicator} cases. This makes sense given our own taxonomy: the question in such cases is whether the consideration of race, in the absence of evidence of invidious discriminatory intent, is a sufficient indicator to give rise to a \textit{prima facie} equal protection violation. And, following the Court's analysis in redistricting cases, Kennedy has given his own contextual spin to "race conscious" educational policies.\textsuperscript{298} Because educational decisions invariably demand the consideration of race, proof that the relevant decision makers simply used race as one consideration among others in formulating their policy is not a sufficient indicator of an underlying \textit{prima facie} equal protection violation.

This link between school administrative decisions and racial redistricting cases enables Kennedy to redefine the role of diversity for the purposes of the Equal Protection Clause. As already explained, pursuing diversity requires individualized analysis of each potential student in order to determine whether or not to accept the student and where to assign the student.\textsuperscript{299} But with the link to redistricting in hand, individualized analysis, which also employs considerations of diversity, simply amounts to race conscious school administrative decisions; schools consider diversity alongside "myriad" other considerations.\textsuperscript{300} In other words, reference to permissible diversity considerations amounts to using racial concerns as a consideration, but not the \textit{predominant} consideration. In this way, individualized decision-making procedures never, by definition, run afoul of the redistricting requirement that race never become the predominant consideration.\textsuperscript{301} Put differently, employing a permissible diversity scheme, according to Kennedy, does not trigger strict scrutiny because, like permissible

\textsuperscript{296} \textit{Parents Involved}, 127 S. Ct. at 2791 (Kennedy, J., concurring) ("[P]arts of the opinion by the Chief Justice imply an all-too-unyielding insistence that race cannot be a factor in instances when, in my view, it may be taken into account.").

\textsuperscript{297} \textit{Id.} at 2792 (arguing that certain "race conscious" mechanisms for achieving diversity would not require strict scrutiny (citing Bush v. Vera, 517 U.S. 952, 958 (1996))).

\textsuperscript{298} \textit{Id.}

\textsuperscript{299} \textit{See supra} note 248 and accompanying text.

\textsuperscript{300} \textit{Parents Involved}, 127 S. Ct. at 2802 (Breyer, J., dissenting).

\textsuperscript{301} \textit{See Ayres & Foster, supra} note 243, at 543 ("[A]ll that remains of narrow tailoring analysis is the individualized consideration requirement.").
redistricting cases, race is not the predominant consideration, and under such circumstances, there simply are not enough indicators to trigger strict scrutiny.

The diversity rationale, according to Kennedy, becomes not a compelling interest justifying the use of an impermissible racial classification, but an explanation for why we should not trigger strict scrutiny. Indeed, that diversity is no longer a justification for a prima facie equal protection violation makes perfect sense given that Kennedy has recast such cases as indicator cases through his linkage to the racial redistricting cases. In other words, the diversity rationale, according to Kennedy, serves as a contextual argument, orienting the application of equal protection doctrine from the indicator category of the case law. In cases where schools are able to use diversity as one of many considerations—what amounts to an individualized administrative scheme—then we do not have sufficient indicators of a prima facie equal protection violation. On the other hand, when schools define students by race for the purposes of an administrative decision, then race has served as the predominant motivation and such a use of race, even given the educational context, is a sufficient indicator pointing to a potential prima facie equal protection violation. In these latter cases—as was the case, according to Kennedy, in Parents Involved—the indications are sufficient to trigger strict scrutiny.

This inversion of the standard equal protection scheme—recasting the diversity rationale not as a compelling interest, but as an indication that we need not trigger strict scrutiny—also holds out a potential answer to advocates of a fortiori arguments. Recall that a fortiori arguments claim that if diversity is a compelling government interest, then so are other interests typically thought to be insufficiently important for the purposes of strict scrutiny analysis. For example, if diversity is compelling then so is effective policing, a conclusion that arms advocates of racial profiling schemes.

But Kennedy has recast the effect of the diversity rationale. While in Gratz and Grutter the diversity rationale served as a compelling government interest under strict scrutiny, the diversity rationale serves a very different purpose in Kennedy’s new scheme. Race-conscious diversity policies do not need to satisfy strict scrutiny. Instead, when a school policy is a race-conscious attempt to encourage diversity, then Kennedy’s reformulation of the diversity rationale counsels us to avoid strict scrutiny all together. In this way, the diversity rationale no longer is held to be a compelling government interest for passing strict scrutiny, but is an exception—much like in the racial redistricting cases—to the strict scrutiny mechanism. Indeed, in Kennedy’s account, because diversity need not aid in satisfying strict scrutiny, it no longer must be held to be compelling. If we can shed diversity of its compelling label, then the launching ground for a fortiori arguments has been eliminated.

302 Parents Involved, 127 S. Ct. at 2792 (Kennedy, J., concurring).
303 Id.
304 Id.
305 Id. at 2797.
To be sure, it is hard to decipher exactly where even Kennedy himself envisions his own concurrence taking the law. But Kennedy has presented a radically new vision of the diversity rationale as part of the overall Equal Protection Clause jurisprudence. And this new vision presents at least one way to combat *a fortiori* arguments.

**CONCLUSION**

It is important to conclude by noting that our discussion is not meant as an endorsement of the Court's analysis of the Equal Protection Clause—far from it. This Article has attempted to reconstruct the Supreme Court's equal protection decisions in an attempt to understand the Court's vision of the Equal Protection Clause. The Court appears to have centered equal protection analysis on invidious discriminatory intent. However, such focus has given rise to somewhat problematic reasoning, conflating various brands of equal protection analysis under the single rubric of invidious discriminatory intent. In retrospect, this endeavor has proven too burdensome, giving birth to a set of doctrines that contradict their own foundations. Thus, the Court now uses racial classifications aiming to benefit racial minorities as indicators of intent to harm minorities. And, it now threatens—through the use of *a fortiori* arguments—to justify statutory provisions that harm racial minorities by noting the constitutionality of statutory provisions that benefit racial minorities.

This Article has also outlined the way in which the Court’s most recent decision—*Parents Involved*—might foreshadow where equal protection jurisprudence is headed. While this recent decision does, in many ways, follow from its predecessors, this Article has also examined the way in which Justice Kennedy's concurrence presents a response to future *a fortiori* arguments. Implicit in Kennedy's analysis is the potential to shift certain types of equal protection cases that arise in the education context—"race conscious" cases—from the *violation* category to the *indicator* category.

While not logically necessary, it is not surprising that, in using intent as its foundation stone, the Court has crafted internally inconsistent doctrine. Creating procedures to deduce and justify what is in the hearts of men is a tall order. To require such an inquiry as a prerequisite for the finding of an Equal Protection Clause violation leaves the constitutional safety of racial minorities on precarious ground. Indeed, because the Court focuses on intent in determining whether particular racial harms are unconstitutional, it leaves racial minorities without direct protection from such racial harm. And, as we have seen, focusing on intent often leaves us blind to the global picture, enabling beneficial racial classifications to be deemed indications of invidious discriminatory intent.

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**Footnotes**

306 *Id.* at 2792 (Kennedy, J., concurring).

307 *See, e.g.*, Rubenfeld, *Affirmative Action, supra* note 26, at 432 ("The framework [of equal protection review] itself, in current form, is unsound. And it is precisely the Court's treatment of affirmative action that has made it so.").

308 *See id.* at 449.
One answer to this problem may be to conclude that the entire intent enterprise is misguided. Maybe instead the legal doctrine should be focusing on racial harm as the gravamen of Equal Protection analysis. In fact, a wide range of scholars have advocated such an approach. However, this Article leaves such arguments for another day. Suffice it to say, something seems to have gone wrong with the current intent paradigm that may require a significant reconstruction of the doctrine.

Thus, to summarize, this Article presents two categories of Equal Protection Clause cases. In one category, the Court scrutinizes racial classifications because it is all too aware of how such classifications have been used in the past. However, because it does not know if there has actually been an Equal Protection Clause violation, it uses indicators to determine whether it is sufficiently likely that invidious discriminatory intent is at work. The second category of cases requires the Court not to investigate to see if there has been an Equal Protection Clause violation, but to consider whether there are good enough reasons for a prima facie violation.

The problems we have described occur when the Court mixes and matches the purposes and criteria of these two categories. Indeed, the result has been to pick out the remedying of societal discrimination as an indicator of racial discrimination while contemplating crime control as potentially validating an already existent prima facie Equal Protection Clause violation. These ironies are a direct result of confusing the indication and violation categories. Whether the Court can resolve them under the current intent paradigm remains to be seen; indeed, it does not appear that the Court even thinks that there is a problem. But something must change if the Equal Protection Clause is to make good on its promise to remedy the ills of America’s discriminatory past.