

INFERRED CLASSIFICATIONS

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WE have become accustomed to the notion that equal protection doctrine is constrained by rigid rules. Among these are the rule that legislation containing racial classifications must be reviewed under strict scrutiny¹ and its corollary that facially neutral legislation that pro-

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¹ *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007) (plurality opinion) (“It is well established that when the government distributes burdens or benefits on the basis of individual racial classifications, that action is reviewed under strict scrutiny.”); *Johnson v. California*, 543 U.S. 499, 505 (2005) (“We have insisted on strict

duces racially disproportionate harms will not violate equal protection unless motivated by a discriminatory purpose.² These framing rules are so familiar to courts and constitutional scholars that they represent the hornbook account of how race discrimination claims are adjudicated under the Equal Protection Clause.³ And, perhaps because of their familiarity, we too often neglect to question whether they are true.

This Article will demonstrate that we need look no further than Supreme Court precedent to observe that they are not. Equal protection review begins with a determination that the challenged legislation does, or does not, contain a suspect classification. Though some scholars have provided reasons for skepticism,⁴ generally we assume that racial classifications must be explicit and are therefore easily identifiable.⁵ Even so

scrutiny in every context, even for so-called ‘benign’ racial classifications’); see also *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 222 (1995) (“[T]he Fourteenth Amendment requires strict scrutiny of all race-based action by state and local governments.”).

² *Washington v. Davis*, 426 U.S. 229, 239 (1976) (“[O]ur 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.”); see also *Pers. Admin. v. Feeney*, 442 U.S. 256, 272 (1979) (“[E]ven if a neutral law has a disproportionately adverse effect upon a racial minority, it is unconstitutional under the Equal Protection Clause only if that impact can be traced to a discriminatory purpose.”); *Arlington Heights v. Metro. Hous. Corp.*, 429 U.S. 252, 265 (1977) (“Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause.”).

³ U.S. Const. amend. XIV, § 1; see also, e.g., Louis Michael Seidman, *Constitutional Law: Equal Protection of the Laws* 37 (2003) (“[T]he formal structure of equal protection review can be stated quite simply: . . . Laws or government policies are subject to [heightened] scrutiny when they facially discriminate along suspect lines like race or gender. . . . Facially neutral laws face heightened review only when they are motivated by the desire to harm the group disadvantaged by them.”); Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 *Stan. L. Rev.* 1111, 1113 (1997) (referring to this framework as the “prevailing view” of equal protection doctrine).

⁴ See, e.g., Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 *Harv. L. Rev.* 1470, 1542–44 (2004) [hereinafter *Equality Talk*] (observing indeterminacy in the meaning of racial classification in cases involving racial census data collection and racial profiling by law enforcement where courts declined to find racial classifications); see also Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 *U. Miami L. Rev.* 9, 16–17 (2003) (noting differences between cases finding racial classifications when race is considered as one factor among many in affirmative action cases and cases finding no classification when race is considered as a factor in “adoption placements or suspect descriptions”); Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 *Harv. L. Rev.* 493, 509 (2003) (hypothesizing that “express racial classification” may “function[] as a term of art that encompasses a mix of descriptive and normative elements”).

⁵ See, e.g., *Parents Involved*, 551 U.S. at 735 (faulting the defendant school districts for having used “explicit racial classifications” without adequate consideration of “workable race-neutral alternatives” (internal quotation marks omitted)); *Adarand*, 515 U.S. at 213 (dis-

far as Supreme Court precedent is concerned, however, this assumption is false. Equal protection doctrine specifies “no determinate criteria for deciding what practices are group-based classifications.”⁶ The Supreme Court itself has sometimes inferred racial classifications where no classifications were facially present. The Court has, for example, determined that the “bizarre” shape of an electoral district may signify “an effort to classify . . . by race”⁷ and that the removal of authority from local school districts to utilize busing for racial integration purposes triggers strict scrutiny even though the legislation repealing that authority contained no explicit racial classification.⁸ Such cases demonstrate that when an especially close relationship exists between the government’s facially race neutral means and racially identifiable populations or interests, policy justifications that deny the salience of race may be unpersuasive, and strict scrutiny may apply. Inferred classifications contradict the common assumption that the facial neutrality of legislation is sufficient to ensure that the legislation will not be reviewed under heightened scrutiny unless a discriminatory purpose is found.⁹ Rather the Court’s inferred classification precedents suggest that, when designing facially neutral measures in pursuit of racially egalitarian objectives, the government must use an indirect approach if it wishes to maintain the benefit of judicial deference.

Constitutional scholars have been divided over the question whether facially neutral race conscious measures are constitutional. Some have

tinguishing between “classifications based explicitly on race,” which deserve strict scrutiny, and facially neutral legislation motivated by a racially discriminatory purpose which would “present[] . . . additional difficulties”); see also Rebecca L. Brown, *Liberty, the New Equality*, 77 N.Y.U. L. Rev. 1491, 1542 (2002) (“As long as the law does not explicitly classify, we generally do not consider any resulting inequality to be of constitutional concern.”); Primus, *supra* note 4, at 505 (observing that a “commonsense conception” that racial classifications must be “express” would find such classifications exist “only if such a requirement appeared in the plain text of the law”).

⁶ Siegel, *Equality Talk*, *supra* note 4, at 1542.

⁷ *Shaw v. Reno*, 509 U.S. 630, 646, 650 (1993).

⁸ *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 484–87 (1982).

⁹ See *supra* note 3 and accompanying text. The Supreme Court’s ordinary practice of raising the level of scrutiny only for *explicitly* classificatory measures, as opposed to measures from which a classification may be inferred, transcends its race jurisprudence. See, e.g., *Geduldig v. Aiello*, 417 U.S. 484, 496 & n.20 (1974) (holding that California’s exclusion of pregnancy-related disability from insurance coverage did not constitute sex-based classification, notwithstanding that “only women can become pregnant”). This Article focuses on race in order to consider with some detail the possible impact of inferring racial classifications on the constitutionality of formally race neutral alternatives to affirmative action.

argued that racially egalitarian facially neutral measures such as race neutral affirmative action¹⁰ are constitutional because egalitarian purposes are distinguishable from discriminatory purposes.¹¹ Others have argued that such measures are unconstitutional, or at least deserve strict scrutiny, because equal protection holds all race conscious purposes equally suspect.¹² Each of these arguments is incomplete, for each assumes that the constitutionality of facially neutral race conscious measures turns on what qualifies as a discriminatory *purpose* and that, provided they are rationally related to the fulfillment of a legitimate governmental interest, there is no question that facially neutral measures are constitutional in *form*.¹³ The Court's inferred classifications cases

¹⁰ By "race neutral affirmative action," I mean facially neutral policies adopted to achieve the types of racially egalitarian goals commonly associated with affirmative action plans that explicitly classify by race.

¹¹ See, e.g., Michelle Adams, *Is Integration a Discriminatory Purpose?*, 96 Iowa L. Rev. 837, 870 (2011) ("The Court's preference for race-neutral alternatives designed to achieve the same ends as racial-classification schemes indicates its acceptance of the underlying objectives of many affirmative-action plans and integration more generally."); R. Richard Banks, *The Benign-Invidious Asymmetry in Equal Protection Analysis*, 31 Hastings Const. L.Q. 573, 579–81 (2003) (discussing lower court decisions finding that race neutral affirmative action does not require strict scrutiny and discussing additional reasons why the contrary conclusion is unlikely); Kathleen M. Sullivan, *After Affirmative Action*, 59 Ohio St. L.J. 1039, 1047–52 (1998) (defending the constitutionality of race neutral affirmative action on the ground that such measures do not run afoul of discriminatory purpose doctrine).

¹² See, e.g., Brian T. Fitzpatrick, *Strict Scrutiny of Facially Race-Neutral State Action and the Texas Ten Percent Plan*, 53 Baylor L. Rev. 289, 292 (2001) (arguing that a "legislative motive to increase the percentage of one racial group in a state university at the expense of another" is "unconstitutional"); Kenneth L. Marcus, *The War Between Disparate Impact and Equal Protection, 2008–2009 Cato Sup. Ct. Rev.* 53, 73 (arguing that strict scrutiny should apply to facially neutral measures if "racial motivations predominated"); see also Ian Ayres, *Narrow Tailoring*, 43 UCLA L. Rev. 1781, 1791–92 (1996) (arguing that strict scrutiny should apply to race-neutral affirmative action under discriminatory purpose doctrine); Kim Forde-Mazrui, *The Constitutional Implications of Race-Neutral Affirmative Action*, 88 Geo. L.J. 2331, 2333 (2000) (considering the likelihood that race neutral affirmative action may receive strict scrutiny because, "[a]s the Supreme Court's affirmative action cases establish, the purpose to benefit racial minorities is a discriminatory purpose"); *id.* at 2348 (arguing that "when a legislature or public university intentionally seeks to admit minority students through race-neutral means" such measures "should trigger the same strict, and usually fatal, scrutiny applicable to admission policies that rely on racial classifications").

¹³ See, e.g., Sullivan, *supra* note 11, at 1048 (equating racial classifications with "racially discriminatory form" and thus questioning "what happens to the analysis of affirmative action when racially discriminatory purpose is decoupled from racially discriminatory form"). I use the term "form" here in a broader sense. The form of legislation concerns more than simply whether the legislation uses a suspect classification. It concerns any aspect of legislative design relevant to the government's pursuit of its objectives. I sometimes use the phrase "form and practical effect" to emphasize that the Court's assessment of legislative form may

demonstrate that this is not the case. The form of facially neutral legislation—and not just its underlying motivation—will sometimes determine the level of judicial scrutiny by supporting the inference of a racial classification. Indeed, inferring a racial classification may permit the Court to avoid a difficult factual inquiry into the government’s underlying purpose or an even more difficult normative choice regarding whether a particular race conscious purpose is a discriminatory purpose.

Some jurists and scholars have been so convinced that racial classifications must be explicit in order to draw strict scrutiny that they have counseled public institutions seeking to promote racially egalitarian ends to refrain from using explicit racial classifications if they wish to avoid strict scrutiny. Supreme Court precedent lends some support to this counsel. In its affirmative action precedents, the Court has structured the “narrow-tailoring constraint” of strict scrutiny to provide a strong incentive for public institutions to pursue race neutral alternatives.¹⁴ In *Grutter v. Bollinger*,¹⁵ the Court instructed that, in order for the government’s racial classifications to survive strict scrutiny, the government must demonstrate that it engaged in “serious, good faith consideration of workable race-neutral alternatives” before it may justify the use of racial classifications.¹⁶ More recently, in *Fisher v. University of Texas at Austin*,¹⁷ the Court sharpened this requirement, stating that “[t]he reviewing court must ultimately be satisfied that no workable race-neutral alternatives would produce the educational benefits of diversity” that the government had otherwise sought to pursue through explicit consideration of race.¹⁸

Although it has never ruled squarely on the constitutionality of race neutral affirmative action, the Supreme Court has often forecasted the

be influenced by its observation, or its projection, of the practical consequences of a measure’s implementation. Where the government pursues racially egalitarian ends, such as school integration, the form of legislation will be direct if the government considers only factors that correlate heavily with the racial status of students and indirect if the government considers factors bearing a looser correlation with race in combination with other factors included, at least partially, to fulfill independent, race neutral educational objectives.

¹⁴Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 *Yale L.J.* 1278, 1293 (2011). Strict scrutiny requires that racial classifications be narrowly tailored to serve a compelling interest. See, e.g., *Adarand*, 515 U.S. at 227.

¹⁵539 U.S. 306 (2003).

¹⁶*Id.* at 339–40.

¹⁷*Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013).

¹⁸*Id.* at 2420.

constitutionality of such measures. Even members of the Court who oppose affirmative action have shared this view, discussing the availability of race neutral alternatives as a reason for subjecting race-based affirmative action to strict scrutiny.¹⁹ This Article demonstrates that the Court has already suggested restrictions that should be placed on the form of race neutral affirmative action in order for such measures to avoid strict scrutiny. Rather than selecting facially neutral criteria that too neatly predict the racial composition of schools or track the racial statuses of individual students, governments should proceed by indirection if they wish to avoid strict scrutiny.

For example, in *Parents Involved in Community Schools v. Seattle School District No. 1*,²⁰ Justice Kennedy proposed that public school districts seeking to promote a racially integrated educational environment “are free to devise race-conscious measures to address the problem in a general way” that avoids the use of racial classifications.²¹ His concurring opinion provided the fifth vote necessary to invalidate the challenged student assignment plans,²² and he proposed several race neutral alternatives that he believed would be “unlikely . . . to demand strict scrutiny.”²³ The lower courts have begun to wrestle with the implications of Justice Kennedy’s concurrence.²⁴ In addition, several states and school districts have already adopted race neutral affirmative action plans either in response to judicial or political determinations that no use

¹⁹ See *infra* Subsection II.B.2.

²⁰ 551 U.S. 701 (2007).

²¹ *Id.* at 788–89 (Kennedy, J., concurring).

²² See Neil S. Siegel, *The Virtue of Judicial Statesmanship*, 86 *Tex. L. Rev.* 959, 1005 (2008) (referring to Justice Kennedy’s opinion as “the law of the land” because it is the narrowest opinion supporting the Court’s judgment).

²³ *Parents Involved*, 551 U.S. at 788–89. For a longer discussion of Justice Kennedy’s *Parents Involved* concurrence, see *infra* Subsection II.B.2.

²⁴ See, e.g., *Doe ex rel. Doe v. Lower Merion Sch. Dist.*, 665 F.3d 524, 544–45 n.32, 555–56 (3d Cir. 2011) (finding Justice Kennedy’s prediction that facially neutral race conscious pro-integration measures would be “unlikely” to require strict scrutiny dicta, but nevertheless holding that a school district’s facially neutral districting practices did not warrant strict scrutiny even though, in designing the districting plan, the district considered the racial balance of its schools); see also *N.N. ex rel. S.S. v. Madison Metro. Sch. Dist.*, 670 F. Supp. 2d 927, 937 (W.D. Wis. 2009) (finding Justice Kennedy’s concurrence to be controlling “to the extent it represents ‘the narrowest grounds’ for invalidating the two plans” (quoting *Grutter*, 539 U.S. at 325)).

of race in public education is permissible²⁵ or in an attempt to follow Justice Kennedy's opinion as a forward-looking strategy. Notably, after *Parents Involved* invalidated its prior plan, the Jefferson County, Kentucky school district adopted a student assignment plan that assigns each student to a particular school by considering certain socioeconomic characteristics of the student's residential neighborhood and without considering the racial status of any individual student.²⁶ The discussion of inferred classifications provided by this Article demonstrates that whether such a plan is constitutional turns as much on an evaluation of its form as of its purpose.

In contrast to scholars who have considered the issue solely in terms of discriminatory purpose doctrine,²⁷ this Article explores a new approach to the topic of voluntary racial remedies by recognizing that, even if racially egalitarian purposes are not discriminatory, formally race neutral efforts to promote racial equality may trigger strict scrutiny if the government's actions are functionally indistinguishable from racial classifications. The Article thus urges that courts and scholars recognize the incompleteness of equal protection's framing rules, and it offers public institutions considering race neutral alternatives to race-based affirmative action important guidance regarding the constitutionality of prospective alternatives. To that end, the Article examines specific instances in which the Supreme Court has inferred racial classifications and applied strict scrutiny to measures that contained no explicit racial classifications and without any finding of discriminatory purpose. The Article also shows that the inferred classifications cases provide a potential model for future decisions concerning the constitutionality of race neutral affirmative action, because they demonstrate how the form and practical effect of facially neutral measures may trigger the application of strict scrutiny. In short, the Article demonstrates that even facially neutral measures intended to serve benign purposes may be subject to strict scrutiny if they are found to offend constitutional equality values already understood to be threatened by the use of explicit racial classifications.²⁸

²⁵ Siegel, *supra* note 14, at 1311–12 & n.100 (detailing the adoption of “percent plans” in Texas and Florida that grant automatic admission to public universities for students performing in the top of their high school class).

²⁶ See *infra* notes 360–80 and accompanying text (discussing the revised plan).

²⁷ See *supra* notes 11–13 and accompanying text.

²⁸ I am indebted to Professor Larry Simon for his suggested formulation of the Article's contribution.

An intrusion upon equality values made salient by the Supreme Court's racial classification cases is what justifies the application of strict scrutiny in these cases, not the identification of a facial classification or a discriminatory purpose.

In Part I, the Article will discuss specific examples of the Court's inferred classification precedents. This Part will show that the Court has justified the inference of racial classifications by reasoning that the application of strict scrutiny to facially neutral practices sometimes serves equality values already associated with the application of strict scrutiny to explicit racial classifications. Inferring racial classifications has permitted the Court to subject facially neutral legislation to strict scrutiny based on an interpretation of the legislation's form and practical effect, when it may otherwise have been difficult to determine that the government was motivated by a discriminatory purpose. These cases show that the Court has inferred racial classifications to vindicate two competing theories of constitutional equality: a theory of colorblind constitutionalism concerned with dignity and expressive harms caused by race-based state action²⁹ and a representation-reinforcing theory³⁰ that recognizes the judiciary's unique role in preserving the integrity of the political process.

Part II will discuss the theory of colorblind constitutionalism reflected in the Supreme Court's affirmative action decisions and the Court's repeated counsel that public institutions may pursue racially egalitarian objectives provided they do so through race neutral means. This Part will demonstrate that the assumption that such measures would not trigger strict scrutiny relies on an overly rigid understanding of equal protection's framing rules. It will also demonstrate that the Court's various descriptions of presumptively constitutional facially neutral alternatives to race-based affirmative action reveal a preoccupation with legislative

²⁹ See Siegel, *supra* note 14, at 1281 (defining the Court's colorblindness principle as "premised on the belief that the Constitution protects individuals, not groups, and so bars all racial classifications, except as a remedy for specific wrongdoing").

³⁰ See generally John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 135–79 (1980); see also Bertrall L. Ross II, *The Representative Equality Principle: Disaggregating the Equal Protection Intent Standard*, 81 *Fordham L. Rev.* 175, 223 (2012) (discussing the continued importance of Ely's representation-reinforcing theory in understanding equal protection doctrine). Ely's representation-reinforcing theory of equal protection explains that exacting judicial review is an instrument of process perfection, invalidating laws when the people's representatives "chok[e] off the channels of political change" to benefit entrenched majorities or "systematically disadvantage[e] some minority out of simple hostility or a prejudiced refusal to recognize commonalities of interest." Ely, *supra*, at 103.

form that prefers indirect connections between race neutral distributional categories and racially egalitarian objectives. Part III will explore how we may adapt the lessons of the Court's inferred classification cases in order to provide a more complete and dynamic evaluation of the constitutionality of particular race neutral affirmative action measures.

I. INFERRING RACIAL CLASSIFICATIONS

Equal protection's familiar framing rules depict the application of strict scrutiny not as an act of judicial discretion but as a constitutional imperative, compelled by the government's use of racial classifications. Determining *when* to apply strict scrutiny is not represented as a judicial prerogative. This understanding is reinforced by the modern doctrine's commitment to an anticlassification, or colorblindness, principle,³¹ because colorblindness requires the application of strict scrutiny to all racial classifications, regardless whether the government's action is intended to harm or to benefit the interests of racial minorities.³² Colorblind constitutionalism precludes courts from selecting some racial classifications to receive strict scrutiny and others to receive more deferential review.³³ This approach appears to eliminate judicial discretion from the exercise of maximal judicial scrutiny by treating racial classifications like a kind of light switch: find racial classifications and the switch is on, requiring strict scrutiny; find none and it is off, limiting the court to the deferential stand-

³¹ See, e.g., Ian F. Haney López, "A Nation of Minorities": Race, Ethnicity, and Reactionary Colorblindness, 59 *Stan. L. Rev.* 985, 987 (2007) ("[T]he Supreme Court in the last three decades has moved ever closer to a full embrace of an anticlassification or colorblind conception of the Equal Protection Clause."). But see Siegel, *Equality Talk*, supra note 4, at 1532–46 (demonstrating that antisubordination values continue to play an important role in equality law); see also infra Section II.A (arguing that anticlassification need not require colorblindness).

³² *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 223–24 (1995); see also supra note 1 (collecting additional cases).

³³ It also forbids courts from practicing greater and lesser variants of strict scrutiny just based on the judgment that evidence of a racial classification is more obvious in some cases than in others, see, for example, *Shaw v. Reno*, 509 U.S. 630, 646 (1993) ("The difficulty of proof, of course, does not mean that a racial gerrymander, once established, should receive less scrutiny under the Equal Protection Clause than other state legislation classifying citizens by race."), or that the government's motivation for using racial classifications is sympathetic in some cases and not in others, see, for example, *Grutter v. Bollinger*, 539 U.S. 306, 393–94 (2003) (Kennedy, J., dissenting) (chastising the majority for "deferring to the law schools' choice of minority admissions programs" and warning that "[d]eference is antithetical to strict scrutiny").

ard of rationality review unless it can identify a discriminatory purpose.³⁴ A reviewing court's primary control over this switch coincides with its determination that the government's action does, or does not, classify on the basis of race. We should therefore question whether that determination truly affords courts no discretion.

In the typical case, a court looks to the face of the challenged legislation in order to determine whether the government has classified by race, and this makes some sense: If courts may not select which racial classifications will receive strict scrutiny, then surely racial classifications having constitutional significance must be explicit. Otherwise, the problem extinguished by denying courts discretion to sort between invidious and non-invidious racial classifications would be revived by permitting them discretion to determine whether a racial classification has occurred irrespective of what appears on the face of a statute. But this is precisely the discretion that courts seek to exercise when they infer racial classifications. By inferring racial classifications, a court licenses itself to apply strict scrutiny—a troubling prospect if judicial restraint precludes courts from exercising discretion over when to withdraw deference to the legislature.³⁵

Explicit racial classifications also streamline the judiciary's work and promise a degree of "administrability."³⁶ No matter how contingent or uncertain the anticipated impact of such classifications, they are easy to

³⁴ In the latter circumstance, any search for an invidious purpose must initially proceed by rationality review, though finding an invidious purpose may justify the application of heightened scrutiny. See *Washington v. Davis*, 426 U.S. 229, 239 (1976).

³⁵ Rational basis review describes the default mode of deferential review used by courts in constitutional cases, and it is often explained as an expression of judicial restraint. See Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* 219 (2004) (describing the default rule of "rational basis scrutiny" as "a rule of judicial restraint, not substantive constitutional law"); Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After Morrison and Kimel*, 110 *Yale L.J.* 441, 463 (2000) ("The doctrine of rational basis review specifies the 'judicial restraint' that courts should exercise in responding to claims of invidious discrimination."). Consistent with the colorblind constitutionalism currently practiced by the Supreme Court, judicial restraint cannot be observed if courts may raise the level of scrutiny applied in constitutional cases at will. See, e.g., *United States v. Virginia*, 518 U.S. 515, 568 (1996) (Scalia, J., dissenting) ("I have no problem with a system of abstract tests such as rational basis, intermediate, and strict scrutiny (though I think we can do better than applying strict scrutiny and intermediate scrutiny whenever we feel like it).").

³⁶ Primus, *supra* note 4, at 504–06 (discussing how the assumption that equal protection treats all "express racial classifications" identically is appealing because it satisfies an "administrative intuition").

identify because they can be read from the face of the challenged policy. Once identified, they compel the application of strict scrutiny regardless why they were implemented. The Supreme Court has recognized that cases from which explicit classifications are absent produce “additional difficulties,” owing in part to the difficulty in ascertaining whether the defendant acted with a discriminatory purpose.³⁷ The cases discussed in this Part portray a different sort of difficulty: specifically, under what circumstances may racial classifications be inferred from the form and practical effect of a challenged practice where they are not otherwise explicit? Formulated this way, the question may seem to invoke a preposterous case. But such cases are quite real, and, as this Part shows, in order for inferred classifications to be permissible the inference must be depicted as involving *no* difficulty.

A. *Ancestry: Guinn v. United States and Rice v. Cayetano*

It must be admitted at the outset: If the Supreme Court’s inferred classification cases were limited to cases in which the Court applied strict scrutiny to classifications based on ancestry, then the observation that the Court had inferred a racial classification would hold little significance.³⁸ Ancestry seems a logical proxy for race. What could be wrong with allowing ancestry to stand in for race when ancestry is the modality through which we most commonly understand racial identities to be transmitted? Of course this common sense account of racial ancestry leaves out the fact that in order for shared ancestry to indicate racial identity the purported community of ancestors must themselves have shared a racial identity.³⁹ When ancestry is used as a legal classification to establish entitlement to a civil or political status held by one’s ancestors at a particular moment in time, it cannot be viewed as interchangeable with race unless all persons possessing that status at that time were indeed all members of the same race. Certainly, however, it may in some instances be such a close (albeit imperfect) proxy for race that it supports the inference of a racial classification. For this reason, cases in-

³⁷ *Adarand*, 515 U.S. at 213.

³⁸ Some foundational cases in equal protection jurisprudence assume this equation. See, e.g., *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943) (“Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.”).

³⁹ This understanding is also flawed because it fails to account for political and social constructions of race that collect persons of diverse ancestry into one common racial identity.

volving the application of strict scrutiny to facially ancestry-based classifications provide a useful starting point for our examination of inferred racial classifications more generally.

Two cases decided under the Fifteenth Amendment⁴⁰ provide great insight. In *Guinn v. United States*,⁴¹ the Supreme Court invalidated an amendment to the Oklahoma Constitution that set a literacy requirement for voting within the state but also contained a “grandfather clause” allowing an exception for persons who themselves or whose ancestors were entitled to vote “on [or prior to] January 1, 1866.”⁴² Unlike the Equal Protection Clause of the Fourteenth Amendment, which has authorized the use of heightened scrutiny to legislation employing suspect classifications other than race,⁴³ the Fifteenth Amendment’s voting protections guard solely against denial or abridgment of the right to vote “on account of race, color, or previous condition of servitude.”⁴⁴ The Court concluded that the grandfather clause “though ostensibly race neutral, on its face ‘embod[ied] no exercise of judgment and rest[ed] upon no discernible reason’ other than to circumvent the prohibitions of the Fifteenth Amendment.”⁴⁵ Indeed, *Guinn* held that “on its face” the Oklahoma amendment was “in substance but a revitalization of conditions . . . destroyed by the self-operative force of the [Fifteenth] Amendment.”⁴⁶

The Court did not concern itself with possible imperfections or inconsistencies in the equation of ancestry with race, such as whether the statute in practical effect excluded numerous racial groups from the franchise and not just the descendants of slaves or whether the grandfather clause might include some African Americans with white ancestors within the franchise. Rather, the Court considered significant the socio-historical circumstances in which the state sought to freeze in place racial inequalities that preceded the Reconstruction amendments, and it adjudged the grandfather clause a racial classification on that basis, in-

⁴⁰ U.S. Const. amend. XV, § 1 (“The right of citizens of the United States to vote shall not be denied or abridged . . . on account of race, color, or previous condition of servitude.”).

⁴¹ 238 U.S. 347 (1915).

⁴² *Id.* at 357.

⁴³ See *Craig v. Boren*, 429 U.S. 190, 197–99 (1976) (applying heightened scrutiny to classification based on sex); *Graham v. Richardson*, 403 U.S. 365, 376 (1971) (applying strict scrutiny to classification based on alienage).

⁴⁴ U.S. Const. amend. XV, § 1.

⁴⁵ *Shaw*, 509 U.S. at 644 (alteration in original) (quoting *Guinn*, 238 U.S. at 363).

⁴⁶ *Guinn*, 238 U.S. at 364.

ferring race from the otherwise facially neutral terms of the statute and even denying that those terms were in fact race neutral.

Nearly a century later, the Court again inferred a racial classification from state voting restrictions formally based on ancestry. Its rationale, however, was quite different, for in *Rice v. Cayetano*,⁴⁷ the Court did not face an ancestral voting restriction that operated to subordinate the interests of a disadvantaged racial minority and so the antisubordination approach of *Guinn* would not have supported a finding of unconstitutionality. *Rice* concerned a constitutional challenge to the State of Hawaii's denial of voting rights to non-ancestral Hawaiians in statewide elections for trustees elected to oversee an agency, the Office of Hawaiian Affairs (OHA), operating programs "designed for the benefit" of two overlapping categories of ancestral Hawaiians: native Hawaiians who are descendants of not less than one-half part of the races that inhabited the island before 1778 and "Hawaiians" who are descendants of the peoples inhabiting the island in 1778, the year that English explorer Captain James Cook landed on the island.⁴⁸ Only "Hawaiians," the more inclusive of the two categories, were permitted to elect the OHA trustees.⁴⁹ The Supreme Court equated the state's ancestry-based classification with a racial classification because it concluded that ancestry operated as a "proxy for race."⁵⁰ The Court thus held that Hawaii's denial of OHA-related voting rights to non-ancestral Hawaiians violated the Fifteenth Amendment, because "[r]ace cannot qualify some and disqualify others from full participation in our democracy."⁵¹

⁴⁷ 528 U.S. 495 (2000).

⁴⁸ *Id.* at 498–500.

⁴⁹ *Id.* at 499.

⁵⁰ *Id.* at 514 ("Ancestry can be a proxy for race. It is that proxy here."). The Court's conclusion, while rational, was not inevitable. As Justice Breyer observed, the designation of "Hawaiian" applied to persons who were "less than one five-hundredth original Hawaiian." *Id.* at 526 (Breyer, J., concurring). In addition, some historians and archeologists have even found evidence of "cultural contact" by foreign seafarers who landed or were shipwrecked on the Hawaiian Islands prior to Cook's expedition. See, e.g., Tom Dye, Population Trends in Hawai'i Before 1778, 28 *Haw. J. Hist.* 1, 13–15 (1994); see also *Rice*, 528 U.S. at 514 (acknowledging the state's reliance on such scholarship as evidence that the ancestry-based voting restriction was not a racial classification). Moreover, the state's decision to define a section of the polity based on pre-1778 Hawaiian ancestry may have reflected a desire to preserve a sense of political community rooted in that history and to serve the interests of persons who ancestors may have lost much during the changes to Hawaiian society that followed 1778. Neither of these motivations is a necessarily racial one.

⁵¹ *Rice*, 528 U.S. at 523.

The Court assumed that the particular interests of ancestral Hawaiians justified the creation of OHA,⁵² but it did not believe that those interests could justify the state's voting restriction. Instead, the Court concluded that "[a]ll citizens, regardless of race, have an interest in selecting officials who make policies on their behalf, even if those policies will affect some groups more than others."⁵³ The state's voting restriction violated the Fifteenth Amendment because it "implicate[d] the same grave concerns as a classification specifying a particular race by name": that is, "it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities" and converts the law into an "instrument for generating . . . prejudice and hostility."⁵⁴ In sum, the Court struck down the ancestry-based classification because it offended the values of individual dignity and formally equal treatment that are essential to colorblind constitutionalism.⁵⁵

In both *Guinn* and *Rice*, the Court concluded that ancestry-based voting restrictions violated the Fifteenth Amendment because they perpetrated constitutional injuries ordinarily associated with the use of racial classifications. However, the definition of the injury at stake and the means of identifying that injury differ greatly from one case to the other. The *Guinn* Court found the challenged grandfather clause unconstitutional because, when viewed in terms of the sociohistorical context in which it was enacted and the historical pattern of racial subordination that it was designed to maintain, the clause committed a constitutional injury indistinguishable from the injury that would have resulted from a racial classification that explicitly denied African Americans the franchise. By contrast, in *Rice*, the Court concluded the ancestry-based voting restriction was "not consistent with respect based on the unique personality each of us possesses" and that, like an explicit racial classification, it demeaned individual dignity. This dichotomy between different rationales for inferring racial classifications under the Fifteenth

⁵² The Court did not dispute the legitimacy of OHA, a fact discussed by Justice Stevens in his dissent as a reason to uphold the voting restriction as equally legitimate. See *id.* at 529 (Stevens, J., dissenting).

⁵³ *Id.* at 523 (majority opinion). Thus, although OHA was born of a recognition of the unique political interests of ancestral Hawaiians, if ancestral Hawaiians wanted to influence the administration of programs intended to serve those interests they must "seek the political consensus that begins with a sense of shared purpose." *Id.* at 524.

⁵⁴ *Id.* at 517; see also *id.* (stating that the state's voting restriction "employ[ed] the same mechanisms, and cause[d] the same injuries, as laws or statutes that use race by name").

⁵⁵ *Id.*

Amendment is also reflected in the equal protection cases discussed in this Part. In each instance, the Court applies strict scrutiny to vindicate a constitutional equality value ordinarily thought to be protected by the application of strict scrutiny to explicit racial classifications. The Court's license in describing and identifying the threatened constitutional value affords it an important measure of control over whether and under what circumstances it will apply strict scrutiny.

B. Political Restructuring: Hunter v. Erickson and the First Seattle School District Decision

When thinking about the Court's support for race neutral alternatives to race-based affirmative action, as championed by Justice Kennedy in his *Parents Involved* concurrence,⁵⁶ it is important to remember that *Parents Involved* was not the first time the Court had granted certiorari on a voluntary school integration case involving the very same Seattle school district. In *Washington v. Seattle School District No. 1*,⁵⁷ the Court held unconstitutional a state-wide ballot initiative that "impose[d] substantial and unique burdens on racial minorities" by withdrawing from local school boards the authority to assign students to attend schools beyond their immediate or adjacent school zones if the assignment was made to promote racial integration.⁵⁸ The Court admitted the challenged initiative's "facial neutrality," acknowledging that neither the term "race" nor "integration" appeared among its provisions.⁵⁹ Yet the Court applied strict scrutiny, finding that the initiative "[fell] into an inherently suspect category" because "the political process . . . used to address racially conscious legislation—and only such legislation—is singled out for peculiar and disadvantageous treatment" and therefore "plainly 'rests on distinctions based on race.'"⁶⁰

To support the inference of a racial classification in *Seattle School District*, the Court looked to its prior decision in *Hunter v. Erickson*.⁶¹ In that case, the Court considered an equal protection challenge to an amendment to the city charter of Akron, Ohio, which repealed a municipi-

⁵⁶ See supra notes 20–25 and accompanying text.

⁵⁷ 458 U.S. 457 (1982).

⁵⁸ Id. at 470.

⁵⁹ Id. at 471.

⁶⁰ Id. at 485 (quoting *James v. Valtierra*, 402 U.S. 137, 141 (1971)) (internal quotation marks omitted).

⁶¹ 393 U.S. 385 (1969).

pal fair housing ordinance and forbade the city council from enacting any legislation addressing housing discrimination based on race, religion, or ancestry without prior approval of a majority of the Akron electorate.⁶² The Court admitted that “[i]t is true that the [amendment] draws no distinctions among racial and religious groups.”⁶³ Nevertheless, the Court found in the amendment an “explicitly racial classification treating *racial housing matters* differently from other racial and housing matters.”⁶⁴ “Racial housing matters” is of course not a racial classification in the sense ordinarily followed in the Court’s equal protection decisions—an explicit racial classification that singles out a particular racial group for benefit or disadvantage.⁶⁵

In *Hunter*, the Court inferred a racial classification from the charter amendment’s disadvantaging treatment of members of the Akron electorate who were presumed, because of their race, to hold political interests aligned with the passage of fair housing laws even though such laws are formally facially neutral. As the Court explained, the amendment “drew a distinction between those groups who sought the law’s protection against racial, religious, or ancestral discriminations in the sale and rental of real estate and those who sought to regulate real property transactions in the pursuit of other ends.”⁶⁶ Groups seeking “protection against racial bias” could not achieve favorable legislation simply by obtaining the approval of the city council; they must also obtain approval

⁶² Id. at 386–87. The amendment provided that any ordinance regulating the use or sale of “real property . . . on the basis of race, color, religion, national origin or ancestry must first be approved by a majority of the electors . . . before said ordinance shall be effective,” and it suspended the enforcement of any preexisting ordinance subject to a vote of approval under identical terms. Akron City Charter § 137, *quoted in Hunter*, 393 U.S. at 387.

⁶³ *Hunter*, 393 U.S. at 390; see also id. at 391 (acknowledging that “the law on its face treats Negro and white, Jew and gentile in an identical manner”).

⁶⁴ Id. at 389 (emphasis added).

⁶⁵ See, e.g., *Adarand*, 515 U.S. at 207 (identifying as racial classifications an agency’s presumption “that black, Hispanic, Asian Pacific, Subcontinent Asian, and Native Americans” are members of “socially disadvantaged” groups, qualifying government contractors to receive financial incentives to hire subcontractors controlled by such persons); *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 478 (1989) (identifying as racial classifications a minority set-aside program defining minority businesses as those with majority control or ownership by “Blacks, Spanish-speak[ers], Orientals, Indians, Eskimos, or Aleuts” (internal quotation marks omitted)).

⁶⁶ *Hunter*, 393 U.S. at 390; see also id. at 391 (stating that the amendment “disadvantages those who would benefit from laws barring racial, religious, or ancestral discriminations as against those who would bar other discriminations or who would otherwise regulate the real estate market in their favor”).

of the electorate through a referendum passed during a general or regular election.⁶⁷ The Court concluded that “although the law on its face treats Negro and white . . . in an identical manner, the reality is that the law’s impact falls on the minority,” because the referendum process required to change the law “place[d] special burdens on racial minorities within the governmental process” but would be no more than “bothersome” to a political majority.⁶⁸

Hunter affirmed the government’s authority to “distribute legislative power as it desires,” including by permitting certain types of legislation to be enacted only through direct measures, and the Court agreed that such authority may be exercised for legitimate reasons, such as “to implement a decision to go slowly” when considering such legislation “or to allow the people of Akron to participate in that decision.”⁶⁹ It deemed the charter amendment, however, unnecessary to fulfill those purposes⁷⁰ and concluded that the city had implemented an unconstitutional political structure whereby the racial nature of the interests served by the fair housing legislation dictated the rigor of the process to which that legislation would be subjected.⁷¹ As Justice Harlan explained in his concurrence, the charter amendment violated the “neutral principles” on which laws that structure political institutions are normally premised.⁷² Their ordinary objective is to “provid[e] a just framework within which the diverse political groups in our society may fairly compete.”⁷³ The Akron amendment deviated from that ordinary practice by “making it more difficult for certain racial and religious minorities to achieve legislation that is in their interest.”⁷⁴ Justice Harlan’s concurrence clarified that the char-

⁶⁷ Id. at 390.

⁶⁸ Id. at 391.

⁶⁹ Id. at 392.

⁷⁰ Id. at 392 & n.7 (noting the Akron electorate’s preexisting authority to initiate legislation—as it had done in passing the charter amendment—and to review decisions by the city council).

⁷¹ Id. at 392–93. For additional support, the Court cited the preamble of the repealed fair housing ordinance as evidence that the legislation had been intended to serve Akron’s diverse population consisting of “people of different race[s] . . . many of whom live in circumscribed and segregated areas, under sub-standard, unhealthful, unsafe, unsanitary and overcrowded conditions, because of discrimination.” Id. at 391 (quoting the repealed ordinance) (internal quotation marks omitted). By arguing that this statement depicts the “background” against which the charter amendment should be read, see id., the Court suggested a concrete basis for its ascription of a racial interest in the repealed legislation.

⁷² Id. at 394–95 (Harlan, J., concurring).

⁷³ Id. at 393.

⁷⁴ Id. at 395.

ter amendment was not invalid because, although based on “general democratic principle,” it just happened to “operate to disadvantage Negro political interests,”⁷⁵ but because it failed to provide a “just framework” for political disputes among “diverse political groups.”⁷⁶

Hunter reinforced equality values of antisubordination and minority representation in the sense that John Hart Ely proposed,⁷⁷ by holding that the systemic disadvantage of racial groups deserves strict scrutiny. The Court further recognized that one can hardly assess whether such disadvantage exists if one cannot make reasonable assumptions about the interests held in common by members of particular racial groups. The Court was convinced by the design and impact of the charter amendment that it imposed “special burdens” on the political participation of racial minorities that were as significant as forced disclosure of a candidate’s race on a ballot⁷⁸ or vote dilution.⁷⁹ To place legislation that corresponds so closely to the interests of a racially identifiable minority outside the bounds of ordinary politics is to declare the minority group’s members to be strangers to our democracy without “equal protection of the laws.”⁸⁰

One might retreat to the framing rules of equal protection to object that surely the viability of *Hunter* ended with *Washington v. Davis*,⁸¹ because *Hunter* looked to the law’s “impact” in order to identify the racial nature of the government’s action. *Davis* announced that a facially neutral law does not violate equal protection “solely because it has a racially disproportionate impact,”⁸² holding that a facially neutral law will be constitutionally suspect only if motivated by an invidious purpose, which may be “inferred from the totality of the relevant facts” including

⁷⁵ Id. at 394.

⁷⁶ Id. at 393.

⁷⁷ See supra note 30 and accompanying text.

⁷⁸ *Hunter*, 393 U.S. at 391 (citing *Anderson v. Martin*, 375 U.S. 399 (1964)).

⁷⁹ Id. at 393 (“[T]he State may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person’s vote or give any group a smaller representation than another of comparable size.” (citing *Reynolds v. Sims*, 377 U.S. 533 (1964); *Avery v. Midland Cnty.*, 390 U.S. 474 (1968)).

⁸⁰ U.S. Const. amend. XIV, § 1.

⁸¹ 426 U.S. 229 (1976).

⁸² Id. at 239. The Court recognized the plaintiffs’ equal protection claim against the District of Columbia Metropolitan Police department under the Due Process Clause of the Fifth Amendment. Id.

the law's racially disproportionate impact.⁸³ Evidence of a racially disproportionate impact is, according to *Davis*, "not irrelevant" to a determination of constitutionality, but it is also "not the sole touchstone of an invidious racial discrimination forbidden by the Constitution" and by itself "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."⁸⁴ The Court concluded that the contrary rule would deny appropriate deference to political institutions and subject laws "designed to serve neutral ends" to searching judicial scrutiny, thus "rais[ing] serious questions about, and perhaps invalidat[ing], a whole range of tax, welfare, public service, regulatory, and licensing statutes" that have racially disproportionate impacts.⁸⁵ One may argue that, if *Davis* must be read to forbid an impact basis for applying strict scrutiny to a facially neutral law, then *Davis* must also be read to foreclose the *Hunter* rationale for the inference of racial classifications due to the special burdens imposed by a law on minority interests. Such a law would become constitutionally suspect only if the disproportionate impact supported a finding of discriminatory purpose.⁸⁶ The Supreme Court addressed this issue squarely in its first voluntary integration case involving the Seattle school district.

Seattle School District was decided in the shadow of *Washington v. Davis*. The ballot initiative at issue in that case ("Initiative 350") rescinded local school boards' authority to assign students to attend schools "other than the school . . . nearest or next nearest" to a student's "place of residence."⁸⁷ The initiative set forth "a number of broad exceptions" that preserved the school boards' authority to engage in student assignment to accomplish a variety of purposes, but made no such exception for racial integration.⁸⁸ Initiative 350 was enacted shortly after the Seattle school district adopted a voluntary plan for desegregation of its public schools through the use of busing and mandatory student reassignment (the "Seattle Plan"), and it had been proposed by Seattle resi-

⁸³ *Id.* at 242; see also *Arlington Heights v. Metro. Hous. Corp.*, 429 U.S. 252, 266 (1977) (stating that "impact . . . may provide an important starting point" when assessing whether the government acted with an "invidious discriminatory purpose").

⁸⁴ *Davis*, 426 U.S. at 242.

⁸⁵ *Id.* at 248.

⁸⁶ See *id.* at 242; *Arlington Heights*, 429 U.S. at 266.

⁸⁷ Wash. Rev. Code. § 28A.26.010 (1981), quoted in *Seattle Sch. Dist.*, 458 U.S. at 462.

⁸⁸ *Seattle Sch. Dist.*, 458 U.S. at 462.

dents who opposed the Seattle Plan.⁸⁹ The Supreme Court accepted the district court's assessment that the Seattle Plan had "substantially reduced the number of racially imbalanced schools in the district and . . . the percentage of minority students in those schools which remain[ed] racially imbalanced."⁹⁰ Once again, the Court was left to infer that the challenged law was suspect and should be subjected to strict scrutiny because it repealed a policy that "inure[d] primarily to the benefit of the minority"⁹¹ and because it imposed special burdens on the future satisfaction of minority interests (for example, reinstatement of mandatory busing would require repeal of the statewide initiative).⁹² In so doing, the Court relied heavily on "the *Hunter* doctrine."⁹³

The State of Washington objected that *Hunter* had been "swept away" by *Davis* and its progeny because, in the government's view, *Hunter* "applied a simple 'disparate impact' analysis" rejected in those more recent decisions.⁹⁴ The Supreme Court disagreed. It explained that "[w]hile decisions such as *Washington v. Davis* and *Arlington Heights* considered classifications facially unrelated to race," *Hunter* "dealt in *explicitly* racial terms with legislation designed to benefit minorities 'as minorities,' not legislation intended to benefit some larger group of underprivileged citizens among whom minorities were disproportionately represented."⁹⁵ As in *Hunter*, the Court inferred a racial classification

⁸⁹ Id. at 461–62. Contrary to the accounts given by Chief Justice Roberts and Justice Kennedy in *Parents Involved*, the *Seattle School District* Court described several attempts by the school district to address racial imbalance without resorting to mandatory student reassignment, including through the use of magnet schools. Id. at 460–61; see also *Parents Involved*, 551 U.S. at 807–13 (Breyer, J., dissenting) (describing Seattle's long history of combating racial isolation in its public schools, including its formulation of the Seattle Plan, which "achieved the integration that it had sought").

⁹⁰ *Seattle Sch. Dist.*, 458 U.S. at 461 (internal quotation marks omitted).

⁹¹ Id. at 472.

⁹² Id. at 474 ("The initiative removes the authority to address a racial problem—and only a racial problem—from the existing decisionmaking body, in such a way as to burden minority interests.").

⁹³ Id. at 467 (explaining that *Hunter* gives "clearest expression" to the principles on which *Seattle School District* is decided); see also id. at 485 & n.28.

⁹⁴ Id. at 484.

⁹⁵ Id. at 485 (emphasis added). By using the term "explicitly," the Court elides what otherwise should have been obvious both before and after *Davis*: that the charter amendment in *Hunter* did not contain an *explicit* racial classification. See supra notes 61–65 and accompanying text (discussing the *Hunter* Court's finding of an explicit classification). The Court's formulation in *Seattle School District* in this sense appears to conflate the "explicitly racial nature" of a fair housing law with the ordinary meaning associated with "explicit racial classification," which would not sweep in prohibitions against discrimination on the basis of

from the special burdens that Initiative 350 forced upon matters of a racial nature, and only such matters.⁹⁶ *Seattle School District* thus reiterated *Hunter*'s concern for the irregularity of the government's treatment of racial matters and the structural burdens such treatment placed on the pursuit of racially identifiable interests. The inference of a racial classification obviated the need to rely on *Davis* and its progeny as it permitted the Court to conclude that no inquiry into the government's motivation was required in order to apply strict scrutiny.⁹⁷

Notwithstanding its reliance on *Hunter*, *Seattle School District* also made its own contributions to equal protection jurisprudence. First, the Court provided a clearer account of the representation-reinforcing theory of pluralistic democracy that made it so attentive to burdens on minority participation, advancing even on those principles articulated by Justice Harlan in his *Hunter* concurrence.⁹⁸ The Court found that the state's action "implicate[d] the judiciary's special role in safeguarding the interests of those groups that are relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."⁹⁹ The Court did not object to the relative burden placed on the satisfaction of minority interests by ordinary democratic processes, and it clarified that it did not intend to "create[] a vested constitutional right to local decisionmaking" by "forever barr[ing] the State of Washington] from developing a different policy on mandatory bus-ing" from the policy previously adopted by Seattle.¹⁰⁰ Rather, the Court objected to "the comparative burden [Initiative 350] imposes on minority participation in the political process—that is, the racial nature of the way in which it structures the process of decisionmaking,"¹⁰¹ which the Court believed impaired "the ability of racial groups to enact legislation

race. The crux of the Court's argument, however, lies elsewhere: in its discussion of racial burdens and interests. See *infra* notes 98–109 and accompanying text (describing the unique contributions of the *Seattle School District* Court to equal protection jurisprudence).

⁹⁶ *Seattle Sch. Dist.*, 458 U.S. at 485 ("[W]hen the political process or the decisionmaking mechanism used to address racially conscious legislation—and only such legislation—is singled out for peculiar and disadvantageous treatment, the governmental action plainly rests on distinctions based on race." (second and third emphases added) (internal quotation marks omitted)).

⁹⁷ *Id.* at 484–85.

⁹⁸ See *supra* notes 72–76 and accompanying text (describing Justice Harlan's concurrence in *Hunter*).

⁹⁹ *Seattle Sch. Dist.*, 458 U.S. at 486 (internal quotation marks omitted).

¹⁰⁰ *Id.* at 480 n.23 (internal quotation marks omitted).

¹⁰¹ *Id.* (first emphasis added).

specifically designed to overcome the ‘special condition’ of prejudice” and “seriously ‘curtail[ed] the operation of those political processes ordinarily to be relied upon to protect minorities.’”¹⁰² By contrast, the Court held in *Crawford v. Board of Education*,¹⁰³ decided during the same term, that the “mere repeal of race-related legislation” did “not embody a racial classification,” because it “neither says *nor implies* that persons are to be treated differently on account of their race.”¹⁰⁴ Together, *Seattle School District* and *Crawford* show that the Court’s inference of a racial classification in the former case turns not only on its identification of a racial interest but also on the subordination of that interest through alterations to the political process that undermine the value of equal participation.

Second, the *Seattle School District* Court’s confrontation with *Davis* compelled it to substantiate its identification of integrationist busing as a “racial interest” by reaching beyond the kind of assertion made in *Hunter* that “the reality is that the law’s impact falls on the minority.”¹⁰⁵ The Court began by making this point,¹⁰⁶ but it also acknowledged that public opinion regarding school integration was evolving and that “in the absence of a constitutional violation, the desirability and efficacy of school desegregation are matters to be resolved through the political process.”¹⁰⁷ The Court was not prepared to declare the government’s apparent purpose (that is, the rejection of busing as a means of promoting racial integration) to be sufficient to trigger strict scrutiny.¹⁰⁸ Instead, it was “enough that minorities *may* consider busing for integration to be ‘legislation that is in their interest.’”¹⁰⁹ Minorities who perceived that their interests could be pursued only through a segregated and uniquely onerous political process could be rationally assumed to participate less robustly in politics. Thus, the restructuring of the political process itself

¹⁰² Id. at 486 (quoting *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938)).

¹⁰³ 458 U.S. 527 (1982).

¹⁰⁴ Id. at 537–38 (emphasis added).

¹⁰⁵ *Hunter*, 393 U.S. at 391.

¹⁰⁶ *Seattle Sch. Dist.*, 458 U.S. at 472 (“[O]ur cases suggest that desegregation of the public schools, like the Akron open housing ordinance, at bottom inures primarily to the benefit of the minority . . .”).

¹⁰⁷ Id. at 473–74.

¹⁰⁸ See *infra* notes 150–55 and accompanying text (discussing *Shaw*’s reluctance to label “discriminatory” the state’s purpose to achieve statutory compliance through the creation of a majority-black district).

¹⁰⁹ *Seattle Sch. Dist.*, 458 U.S. at 474 (emphasis added) (quoting *Hunter*, 393 U.S. at 395 (Harlan, J., concurring)).

and the social meanings communicated by that restructuring were sufficient to trigger strict scrutiny because of the sociohistorical context in which that restructuring occurred and the manner in which it undermined equal participation in local politics.

C. Racial Redistricting: Shaw v. Reno

In *Shaw v. Reno*,¹¹⁰ the Supreme Court held that the plaintiffs stated a valid equal protection claim by alleging that a majority-African American voting district drawn to comply with Section 5 of the Voting Rights Act of 1965¹¹¹ was “so irrational on its face that it c[ould] be understood only as an effort to segregate voters . . . because of their race” and could not satisfy strict scrutiny.¹¹² In accordance with the 1990 census, the State of North Carolina became entitled to an additional seat in the United States House of Representatives, and the state assembly submitted a reapportionment plan carving out the new voting district to the United States Attorney General for preclearance.¹¹³ The Attorney General rejected the plan on the ground that, while it contained one majority-black district located in the northern portion of the state, the assembly could have drawn a second majority-minority district in the state’s southeastern region “to give effect to black and Native American voting strength in this area.”¹¹⁴ The assembly submitted a revised plan containing two majority-black districts, the second now located in the central northern region of the state, and the Attorney General approved that plan.¹¹⁵

Writing for the Court, Justice O’Connor began her equal protection analysis by invoking the familiar framing rules of equal protection, stating that “[n]o inquiry into legislative purpose is necessary when the racial classification appears on the face of the statute.”¹¹⁶ She explained that “[e]xpress racial classifications are immediately suspect” because, absent analysis under strict scrutiny, we simply cannot know which classifications are benign and which are invidious.¹¹⁷ She then described ra-

¹¹⁰ 509 U.S. 630 (1993).

¹¹¹ Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. § 1971-74(e) (2006)).

¹¹² *Shaw*, 509 U.S. at 658.

¹¹³ *Id.* at 633–34.

¹¹⁴ *Id.* at 635 (internal quotation marks and citation omitted).

¹¹⁵ *Id.* at 635–36.

¹¹⁶ *Id.* at 642.

¹¹⁷ *Id.* at 642–43.

cial classifications in categorically derogatory terms throughout the opinion, stating that they are “by their very nature odious to a free people,” “threaten to stigmatize individuals . . . and to incite racial hostility,”¹¹⁸ potentially “balkanize us into competing racial factions,” “reinforce the belief, held by too many for too much of our history, that individuals should be judged by the color of their skin,”¹¹⁹ and “threaten[] to carry us further from the goal of a political system in which race no longer matters.”¹²⁰

Yet all of this should have been academic. According to equal protection’s framing rules, *Shaw* should have been decided under discriminatory purpose doctrine, because it did not facially classify voters on the basis of race. As Justice O’Connor otherwise acknowledged, “[a] reapportionment statute typically does not classify persons at all; it classifies tracts of land, or addresses.”¹²¹ She continued:

[R]edistricting differs from other kinds of state decisionmaking in that the legislature always is *aware* of race when it draws district lines, just as it is aware of age, economic status, religious and political persuasion, and a variety of other demographic factors. *That sort of race consciousness does not lead inevitably to impermissible racial discrimination.*¹²²

Here Justice O’Connor appeared to support facially neutral race conscious measures, admitting in fact that some race consciousness is ordinary, if not inevitable, in the course of governing and that such race consciousness should not be casually equated with the classification of persons on the basis of race.

According to equal protection’s framing rules, *Shaw* appeared to call for the application of discriminatory purpose doctrine. Indeed, if the mere consideration of race does not mean that the district’s lines reflect a racial classification, then the redistricting plan must be formally race neutral and strict scrutiny must not apply unless the state assembly acted with an unconstitutional motive. The *Shaw* Court, however, did not

¹¹⁸ Id. at 643 (internal quotation marks and citation omitted).

¹¹⁹ Id. at 657.

¹²⁰ Id.

¹²¹ Id. at 646; see also Heather K. Gerken, Understanding the Right to an Undiluted Vote, 114 Harv. L. Rev. 1663, 1695–96 (2001) (arguing that the North Carolina plan is actually race neutral because one “cannot look at a district line and immediately conclude that the government has employed a racial classification”).

¹²² *Shaw*, 509 U.S. at 646 (second emphasis added).

reach the question whether the state assembly's motivation—the creation of a majority-black district to satisfy Section 5 preclearance under the Voting Rights Act—constituted a discriminatory purpose.¹²³ Instead, the Court inferred a potential racial classification from the plaintiffs' allegations by concluding that “a reapportionment plan may be so highly irregular that, on its face, it rationally cannot be understood as anything other than an effort to segregate voters on the basis of race.”¹²⁴ When the Court says “on its face,” this sounds as if the Court has identified an explicit classification. In truth, it is referring to nothing other than the “bizarre” physical shape of the challenged district,¹²⁵ which it found to have ignored “traditional districting principles” of geographical “compactness, contiguity, and respect for political subdivisions.”¹²⁶

Citing the Court's decisions in *Arlington Heights v. Metropolitan Housing Corp.*¹²⁷ and *Personnel Administrator of Massachusetts v. Feeney*,¹²⁸ Justice O'Connor reasoned that strict scrutiny applies “not only to legislation that contains explicit racial distinctions, but also to those ‘rare’ statutes that, although race neutral, are, on their face, ‘unexplainable on grounds other than race.’”¹²⁹ In this passage from *Arlington Heights*, the Court was actually explaining how it may be possible, in

¹²³ Id. at 649 (“[W]e express no view as to whether ‘the intentional creation of majority-minority districts, without more,’ always gives rise to an equal protection claim.”). In avoiding the purpose inquiry, the Court sidestepped the district court's basis for dismissing the complaint: that it failed to support a vote dilution claim by demonstrating that the plan was “‘adopted with the purpose and effect of discriminating against white voters . . . on account of their race.’” Id. at 638 (quoting *Shaw v. Barr*, 808 F. Supp. 461, 472 (E.D.N.C. 1992)). The Court concluded that the vote dilution framework established by *United Jewish Organizations of Williamsburgh, Inc. v. Carey*, 430 U.S. 144 (1977), did not apply to an “analytically distinct claim that a reapportionment plan rationally cannot be understood as anything other than an effort to segregate citizens into separate voting districts on the basis of race without sufficient justification.” *Shaw*, 509 U.S. at 652.

¹²⁴ *Shaw*, 509 U.S. at 646–47 (internal quotation marks and alteration omitted).

¹²⁵ Id. at 644; see also id. at 635–36 (describing the district as “160 miles long and, for much of its length, no wider than the I–85 corridor,” “wind[ing] in snakelike fashion . . . until it gobbles in enough enclaves of black neighborhoods” (internal quotation marks omitted)).

¹²⁶ Id. at 647; see also id. at 644 (“Appellants contend that redistricting legislation that is so bizarre on its face that it is unexplainable on grounds other than race demands the same close scrutiny that we give other state laws that classify citizens by race.” (citation omitted)(internal quotation marks omitted)).

¹²⁷ 429 U.S. 252 (1977).

¹²⁸ 442 U.S. 256 (1979).

¹²⁹ *Shaw*, 509 U.S. at 643 (quoting *Arlington Heights*, 429 U.S. at 266); see also id. at 643–44 (presuming invalid “‘a classification that is ostensibly neutral but is an obvious pretext for racial discrimination’” (quoting *Feeney*, 442 U.S. at 272)).

rare cases presenting a “clear pattern” that “emerges from the effect of the state action,” to infer a discriminatory purpose “even when the governing legislation appears neutral on its face.”¹³⁰ By contrast, in *Shaw*, the Court repeatedly asserts that it is simply treating redistricting legislation “so bizarre on its face that it is ‘unexplainable on grounds other than race’” just as it would “other state laws that classify citizens by race.”¹³¹ This makes the Court’s rationale in *Shaw* puzzling: The Court declines to determine whether the allegations supported the conclusion that the state assembly acted with a discriminatory purpose, and yet it relies on language from prior decisions regarding the identification of discriminatory purposes in order to skip the question of purpose and to find—in its place—that the allegations depicted a racial classification.

If one insists that the Court is here performing discriminatory purpose analysis, then, as Professor Pamela Karlan has opined, it must be considered a “creative extension” of that doctrine.¹³² *Feeney* made it substantially more difficult to prove a discriminatory purpose by stating that it requires that the government must have enacted the challenged measure “‘because of,’ not merely ‘in spite of,’ its adverse effects” upon members of the plaintiff’s class.¹³³ The *Shaw* Court did not make any determination that the plaintiffs’ allegations supported malice, as *Feeney* appears to require.¹³⁴ In fact, Justice O’Connor specifically disclaimed

¹³⁰ 429 U.S. at 266 (emphasis added). The full passage from *Arlington Heights* reads as follows:

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. The impact of the official action—whether it “bears more heavily on one race than another”—may provide an important starting point. Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face. The evidentiary inquiry is then relatively easy. But such cases are rare. Absent a pattern as stark as that in *Gomillion [v. Lightfoot]* or *Yick Wo [v. Hopkins]*, impact alone is not determinative, and the Court must look to other evidence.

Id. (footnotes and citations omitted).

¹³¹ 509 U.S. at 644 (emphasis added); see also id. at 646 (“The difficulty of proof, [in the ordinary racial gerrymandering case, not *Shaw*] of course, does not mean that a racial gerrymander, once established, should receive less scrutiny under the Equal Protection Clause than other state legislation classifying citizens by race.” (emphasis added)).

¹³² Pamela S. Karlan, *Easing the Spring: Strict Scrutiny and Affirmative Action After the Redistricting Cases*, 43 *Wm. & Mary L. Rev.* 1569, 1582 (2002) (referring to *Shaw*’s reasoning as a “creative extension of *Feeney*”).

¹³³ *Feeney*, 442 U.S. at 279.

¹³⁴ See Siegel, *Equality Talk*, supra note 4, at 1536–37 n.227 (stating that *Feeney* “define[s] discriminatory purpose as involving a mental state akin to malice”); see also Ian

the need to make any inquiry into the state assembly's true motives or to decide whether a motive to comply with the Voting Rights Act by drawing a majority-minority district is in fact a constitutionally illicit motive. Justice O'Connor interpreted *Gomillion v. Lightfoot*¹³⁵ to hold that "district lines obviously drawn for the purpose of separating voters by race require careful scrutiny . . . regardless of the motivations underlying their adoption."¹³⁶ Following the example set by *City of Richmond v. J.A. Croson Co.*,¹³⁷ the Court argued that it was not necessary to determine whether the state's purpose was discriminatory or "benign" because "the very reason that the Equal Protection Clause demands strict scrutiny of all racial classifications is because without it, a court cannot determine whether or not the discrimination truly is 'benign.'"¹³⁸ Thus, the Court held that, if the plaintiffs sustained their allegations of racial gerrymander, the district court would be required to "determine whether the . . . [a]ssembly's reapportionment plan satisfies strict scrutiny," whether or not the court concluded that the state acted with an unconstitutional motive.¹³⁹

The Court's rejection of any motive inquiry in *Shaw* has led Professor Ian Haney-Lopez to point out the irony that, if *Shaw* represents a "new intent test," it is one that "abandon[s] any concern with intentions, whether labeled purposes or motives" and is instead "solely concerned with the express use of a racial classification."¹⁴⁰ *Feeney* itself admitted the possibility that suspect classification analysis might apply to facially neutral measures, for already there the Court acknowledged the possibil-

Haney-Lopez, *Intentional Blindness*, 87 N.Y.U. L. Rev. 1779, 1826 (2012) (characterizing *Feeney* as having "la[id] solid groundwork for the embrace of malicious intent" as the constitutional standard).

¹³⁵ 364 U.S. 339 (1960).

¹³⁶ *Shaw*, 509 U.S. at 645.

¹³⁷ 488 U.S. 469 (1989).

¹³⁸ *Shaw*, 509 U.S. at 653 (emphasis added); see also *Croson*, 488 U.S. at 493 ("Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics.").

¹³⁹ *Shaw*, 509 U.S. at 653.

¹⁴⁰ See Haney-Lopez, *supra* note 134, at 1869; see also *id.* at 1868 (explaining that "the new 'classificatory intent' would be read directly from conduct"). This Article argues that what is critical in the Court's repeated references to a "purpose to separate voters by race" and an "effort to segregate voters by race" is the assumption that the redistricting plan operated to segregate voters by race and would have been perceived by voters and political representatives, on the basis of its form and practical effect, to classify voters by race.

ity of “covert” classifications, which it distinguished from facially neutral legislation enacted for a discriminatory purpose.¹⁴¹ Even though its malice standard has made the existence of a discriminatory purpose difficult to prove,¹⁴² *Feeney* also shows the Court seeking to preserve for future cases the authority to discern suspect classifications by looking beyond the bare text of a challenged measure. *Shaw* is just such a case.

Professors Richard Pildes and Richard Niemi brought great insight to the scholarly literature regarding *Shaw* when they observed that the *Shaw* Court is primarily concerned with expressive harms, and not invidious purposes.¹⁴³ With its emphasis on the expressive harms purportedly caused by racial gerrymandering, the *Shaw* Court set out on a “quest . . . not for the intent or purpose behind legislation . . . not what policymakers might subjectively have had in mind or desired,” but for the “social message their action convey[ed].”¹⁴⁴ According to Pildes and Niemi, expressive harms concern “the interpretive dimension of public action” because such harms are “violations of public understandings and norms” on which we otherwise rely to support institutional practices.¹⁴⁵ Pildes and Niemi argue that “*Shaw* . . . becomes intelligible only if one recognizes that it rests on just this concern for expressive harms.”¹⁴⁶ Rather than requiring the plaintiffs to set forth allegations of concrete injury to their own voting strength, the Court in effect interpreted North Carolina’s redistricting plan to communicate social meanings of racial stereotyping and stigmatization with potential negative consequences for the operation of democratic institutions.

There is no doubt that the inference of racial classifications will sometimes require the consideration of questions that may otherwise constitute part of a court’s inquiry into the legitimacy of the government’s purposes.¹⁴⁷ The Court’s totality of the circumstances approach

¹⁴¹ 442 U.S. at 274.

¹⁴² See Haney-Lopez, *supra* note 134, at 1834–35 (attributing the origins of malice doctrine to *Feeney* and stating that “[m]alice doctrine protected the state as a defendant by making intent almost impossible to prove”).

¹⁴³ Richard H. Pildes & Richard G. Niemi, Expressive Harms, “Bizarre Districts,” and Voting Rights: Evaluating Election-District Appearances After *Shaw v. Reno*, 92 Mich. L. Rev. 483, 506–10 (1993).

¹⁴⁴ *Id.* at 508.

¹⁴⁵ *Id.* at 507.

¹⁴⁶ *Id.* at 508.

¹⁴⁷ See, e.g., *Feeney*, 442 U.S. at 281 (Stevens, J., concurring) (opining that “the question whether [a classification “not overtly based on gender”] is covertly gender based is the same as the question whether its adverse effects reflect invidious gender-based discrimination”

of identifying discriminatory purposes, as set forth in *Arlington Heights*, makes evidence of racially disparate impact and procedural irregularity relevant to such a finding.¹⁴⁸ This Article does not deny the obvious overlap between discriminatory purpose inquiry and the inference of a racial classification, but it does deny that they are in fact the same inquiry.¹⁴⁹ The present analysis of *Shaw* demonstrates that avoiding an inquiry into the government's motivations may carry with it certain normative and instrumental advantages for the Court. Normatively, the *Shaw* Court was not prepared to declare that the district court had erred when it ruled that "[t]he purposes of favoring minority voters and complying with the Voting Rights Act are not discriminatory in the constitutional sense."¹⁵⁰ The Court agreed that some race consciousness was indeed permissible but did not specify when the government's consideration of race may become impermissible. By inferring a racial classification, the Court was able to avoid the difficult question of what degree or type of race consciousness is necessary to sustain a constitutional violation, reserving that issue for a future case.¹⁵¹ As a matter of

and proposing that "[h]owever the question is phrased," it may "largely" be answered by the same statistical proof).

¹⁴⁸ See supra notes 81–85 and accompanying text (discussing the totality of the circumstances approach as it was adopted in *Davis*); see also *Arlington Heights*, 429 U.S. at 266–68 (setting forth several factors that may support a finding of discriminatory purpose, including the impact of the legislation and "procedural" and "substantive" departures from the government's ordinary decisionmaking practices).

¹⁴⁹ Indeed, at times the Court has taken special care to avoid, and even to disclaim, that discriminatory purpose provides the true justification for the application of heightened scrutiny. See, e.g., supra notes 94–97 and accompanying text (discussing the Court's argument distinguishing *Hunter* and *Seattle School District* from *Washington v. Davis*); supra notes 134–39 (discussing the *Shaw* Court's position that it was not necessary to determine whether the state's purpose was benign, because the application of strict scrutiny to racial classifications sorts benign from discriminatory purposes).

¹⁵⁰ *Shaw*, 509 U.S. at 638. Richard Primus makes a related point, arguing that "normative discomfort with government action" may motivate a court to treat a racial reporting requirement as "an express racial classification." Primus, supra note 4, at 511. Here, the argument is that the Court's normative quandary regarding whether certain racial purposes are indeed discriminatory motivated the Court to rely instead on the formal aspect of suspect classification doctrine.

¹⁵¹ See *Miller v. Johnson*, 515 U.S. 900, 915–16 (1995) (establishing that racial redistricting plaintiffs are not "confined in their proof to evidence regarding the district's geometry" and may meet their burden by showing "that race was the predominant factor motivating the legislature's decision"). And the Court continued to hold that mere race consciousness is not sufficient to show a constitutional violation. See, e.g., *Bush v. Vera*, 517 U.S. 952, 958 (1996) (reiterating that "[s]trict scrutiny does not apply merely because redistricting is per-

doctrinal development, *Shaw* may have been a transitional step, but neither its substance nor its approach has been overruled.

Instrumentally, the Court's inference of a racial classification disguises certain difficulties that may have arisen had the Court engaged in a "sensitive inquiry" into the government's true motivation.¹⁵² Although Justice O'Connor's explanation sounds as if the conclusion that race dictated the district's shape was compelled by the facts of *Shaw*, the inference of a racial classification in fact reflects a choice by the Court to exercise judicial power. There may be constitutionally unassailable reasons for the government to draw a racially identifiable district. As the Court recognized, "when members of a racial group live together in one community, a reapportionment plan that concentrates members of the group in one district and excludes them from others may reflect wholly legitimate purposes."¹⁵³ The absence of evidence that the plan was drawn "because of," not merely "in spite of," its adverse effects" upon white voters, would have rendered the application of discriminatory purpose doctrine to invalidate the district an uncomfortable fit to say the least.¹⁵⁴ Moreover, the impetus to draw the challenged district where it was drawn, in the manner in which it was drawn, may have been at least as political as it was racial.¹⁵⁵ What makes the district "rationally" capable

formed with consciousness of race" or "to all cases of intentional creation of majority-minority districts").

¹⁵² *Arlington Heights*, 426 U.S. at 266.

¹⁵³ *Shaw*, 509 U.S. at 646.

¹⁵⁴ *Feeney*, 442 U.S. at 279. *Arlington Heights* requires the court to make findings with respect to "circumstantial and direct evidence of intent," including any disparate impact that may be supported by statistical evidence, the "historical background of the decision," and procedural and substantive departures from ordinary decisionmaking, before determining that the government acted with a discriminatory purpose. 429 U.S. at 266-67.

¹⁵⁵ As detailed above, the Attorney General objected to the state's original reapportionment plan because he believed that an additional majority-minority district could be drawn in the southeastern portion of the state to include blacks and Native Americans who were concentrated there. See *supra* notes 114-15 and accompanying text. Instead of heeding that recommendation, the assembly created a majority-black district in the northern region of the state. Following the Attorney General's recommendation would have permitted the assembly to construct a majority-minority district that was "no more irregular than [those] found elsewhere in the proposed plan." *Shaw*, 509 U.S. at 635 (alteration in original) (internal quotation marks omitted). However, it also would have endangered the seats of incumbent Democratic congressmen serving from districts already located in that region. "[T]he Democratically controlled General Assembly rejected plans offered by both Republicans and nonpartisan groups," see *Shaw v. Barr*, 808 F. Supp. 461, 464 n.3 (E.D.N.C. 1992), as well as the plan offered by the Attorney General. In fact, the Republican Party of North Carolina launched an unsuccessful gerrymandering suit against the plan challenged in *Shaw*, alleging

only of a racial explanation, by the Court's lights, is the very specter of a history of racial injustice that gives race the ability to defeat other plausible explanations.

In this regard, *Guinn* provides a far more credible model of the modality of the *Shaw* decision than the discriminatory purpose precedents.¹⁵⁶ However, *Guinn* is based on a very different understanding of constitutional harm. In *Guinn*, as in the vote dilution precedents that the Court eschews in *Shaw*,¹⁵⁷ denial of equal exercise of the franchise is the constitutionally cognizable harm vindicated by the Court. By contrast, because it considered the plaintiffs' claim to be "analytically distinct" from vote dilution,¹⁵⁸ the *Shaw* Court devoted considerable attention to explaining its expressive theory of constitutional harm. Justice O'Connor declares in *Shaw* that, in reapportionment, "appearances do matter."¹⁵⁹ When a reapportionment plan includes "in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries," that plan "bears an uncomfortable resemblance to political apartheid" and "reinforces the perception that members of the same racial group . . . think alike, share

that it was "motivated essentially by an intent to protect Democratic incumbents." *Id.* Accordingly, the assembly's intention to create a majority-minority district was a direct consequence of the Attorney General's objections to the original reapportionment plan. The decision, however, to place the plan in the northern region of the state, requiring that the assembly violate established norms of compactness and contiguity in order to achieve majority-minority status, was motivated by partisan competition between political parties. When the case returned to the Supreme Court following further proceedings, the Court affirmed the district court's decision to apply strict scrutiny as consistent with the "predominant factor" test of *Miller v. Johnson*, 515 U.S. at 915–16, because the government had conceded its "overriding purpose" to comply with the Attorney General's demands and "to create two congressional districts with effective black voting majorities." *Shaw v. Hunt (Shaw II)*, 517 U.S. 899, 906 (1996) (internal quotation marks omitted). After *Shaw II* invalidated the plan, the state assembly enacted a new plan that also was challenged as a racial gerrymander. *Hunt v. Cromartie*, 526 U.S. 541 (1999). The Court admitted that "[t]he task of assessing a jurisdiction's motivation . . . is not a simple matter" but "an inherently complex endeavor." *Id.* at 546. The Court reversed summary judgment for the plaintiffs, finding that the evidence presented a genuine issue regarding whether the assembly's motivation when designing the new plan was partisan (that is, whether its motivation was to retain a strong Democratic district) and not racial. *Id.* at 549–52.

¹⁵⁶ See *Shaw*, 509 U.S. at 644 (citing *Guinn* in support and explaining that the grandfather clause challenged in that case was unconstitutional because "on its face, it could not be explained on grounds other than race").

¹⁵⁷ *Id.* at 651–52 (rejecting the district court's reliance on the Court's vote dilution precedents, which would have required a showing of loss of voting strength).

¹⁵⁸ *Id.* at 652.

¹⁵⁹ *Id.* at 647.

the same political interests, and will prefer the same candidates at the polls,” regardless what other differences may distinguish them.¹⁶⁰ Justice O’Connor’s metaphor of “political apartheid” may strike the reader as ironic, because it is not the residential segregation of racial minorities that signifies apartheid as she understands it; rather it is the government’s use of “impermissible racial stereotypes”¹⁶¹ to shape political community in a manner designed to increase the voting strength of racial minorities.¹⁶²

The *Shaw* Court’s emphasis on the expressive harms associated with racial classifications would return in *Adarand Constructors, Inc. v. Peña*¹⁶³ to assume a central role in the Court’s constitutional equality jurisprudence.¹⁶⁴ Moreover, by developing the significance of expressive harms for equal protection beyond redistricting to more general areas of application such as affirmative action and school desegregation,¹⁶⁵ the Court has shown that Pildes and Niemi underestimated the significance of dignitary burdens in assessing the constitutional salience of expressive harms when they opined that harms are “social rather than individual.”¹⁶⁶ Even in *Shaw*, the Court voiced concern about harms to individuals caused by racial classifications. The Court warned that such classifications “threaten to stigmatize individuals by reason of their membership in a racial group and to incite racial hostility,” repeating the colorblind equality values previously articulated in *Crosby*.¹⁶⁷ After *Shaw*, expressive harms are constitutionally significant primarily because of the burdens that they place upon individual dignity and liber-

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² Indeed, by Justice O’Connor’s lights, spatial concentration—that is, the drawing of districts that are geographically compact and contiguous—suggests a legitimacy to the voting district regardless of its racial composition. A district might be equally racially imbalanced and yet constitutional if it complies with traditional redistricting principles. See *id.* at 646 (“[W]hen members of a racial group live together in one community, a reapportionment plan that concentrates members of that group . . . may reflect wholly legitimate purposes . . . to provide for compact districts of contiguous territory or to maintain the integrity of political subdivisions.”).

¹⁶³ 515 U.S. 200 (1995).

¹⁶⁴ See *infra* Section II.A.

¹⁶⁵ See *infra* Section II.A.

¹⁶⁶ Pildes & Niemi, *supra* note 143, at 507 (“Expressive harms are therefore, in general, social rather than individual. Their primary effect is not as much the tangible burdens they impose on particular individuals, but the way in which they undermine collective understandings.”).

¹⁶⁷ *Shaw*, 509 U.S. at 643 (citing *Crosby*, 488 U.S. at 493 (plurality opinion)).

ty.¹⁶⁸ *Shaw* thus advances colorblindness by arguing that, when the government classifies on the basis of race, individual and social harms may be inextricable and that individual dignity interests may require protection, even in the absence of tangible burdens on individual claimants, because the injury to these interests is intertwined with the damage done to public institutions.

According to *Shaw*, a racial understanding of political community forecloses other bases for community and solidarity in a pluralist democracy. The harm is partially to the collective value of political cohesion, and partially to individual dignity through stereotyping and stigmatization. The value of political cohesion is itself bifurcated: In part, it concerns political culture, the avoidance of fragmentation and balkanization;¹⁶⁹ and in part, it concerns the structural integrity of the political system, as the Court viewed the expressive content of racial redistricting to communicate to political representatives that their “primary obligation is to represent only the members of that group [for whom the district was drawn], rather than their constituency as a whole.”¹⁷⁰ In this sense, *Shaw* understands racial redistricting to threaten to sever the “communion of interests”¹⁷¹ between voters and their representatives by signaling to representatives that some constituencies are preferred over others, though its primary threat is to individual dignity and a vision of political culture devoid of racial balkanization. Thus, racial redistricting *may* provide a mechanism for interests shared among members of a minority group to secure sufficient electoral power to compel the government to be responsive to their interests. But it also “may exacerbate the very patterns of racial bloc voting that majority-minority districting is sometimes said to counteract.”¹⁷²

¹⁶⁸ See, e.g., *Adarand*, 515 U.S. at 230 (relying on *Shaw* to support the proposition that “any individual suffers an injury when he or she is disadvantaged by the government because of his or her race, whatever that race may be” and that equal protection is “a personal right”); see also *Rice*, 528 U.S. at 517 (making in tandem the point that, like racial classifications, ancestry-based classifications “demean[] the dignity and worth of a person” and that their use “is corruptive of the whole legal order democratic elections seek to preserve”).

¹⁶⁹ *Shaw*, 509 U.S. at 657.

¹⁷⁰ *Id.* at 648.

¹⁷¹ The Federalist No. 57, at 352 (James Madison) (Clinton Rossiter ed., 1961); see also Brown, *supra* note 5, at 1497 (explaining that “[i]f representatives should pass laws out of either hostility or indifference to the interests of those on whom they inflict burdens, then they have severed the communion of interests and have occasioned a constitutional failure of the representative process”).

¹⁷² *Shaw*, 509 U.S. at 648.

In a sense, *Hunter* and *Seattle School District* foreshadowed one of the themes of *Shaw*: that racial classifications may sometimes be inferred from the irregularity of the government's action. In *Hunter*, the Court found the government to have materially deviated from its ordinary practices because the charter amendment treated racial fair housing measures differently than other housing measures or than measures concerning "housing discrimination on sexual or political grounds."¹⁷³ In *Shaw*, the Court was persuaded that the "bizarre" shape of the proposed voting district, which deviated from "traditional districting principles" respecting geographical compactness and contiguity, signified the racial nature of the district's design.¹⁷⁴

Yet, while the concern for process irregularity aligns these cases, in another sense, they are diametrically opposed. A central premise of *Hunter* and *Seattle School District* is that political interests may be racial in nature, a premise which the *Shaw* Court emphatically denied. *Shaw* rejected the notion that persons "who may have little in common with one another but the color of their skin . . . share the same political interests" regardless of differences such as socioeconomic status, education or geographical community.¹⁷⁵ According to *Shaw*, a political system based on such "impermissible racial stereotypes" threatens "political apartheid"¹⁷⁶ and harm to individual dignity. By contrast, *Hunter* and *Seattle School District* reflect the Court's concern for the structural harms imposed on minority voters who wish to pursue interests important to members of their status group. *Seattle School District* also expressed the specific concern that minority voters may be alienated from the political process if the interests of their racial group are singled out for special disadvantage, while *Shaw* argued that districts drawn to serve racial interests would alienate elected representatives from constituencies who did not fall within that racial group. Thus, these cases show that the practice of inferring racial classifications is adaptable to the ideology of the Court at any particular moment in time and requires only that the Court infers such classifications in order to vindicate constitutional equality values otherwise associated with application of strict scrutiny to explicit racial classifications.

¹⁷³ *Hunter*, 393 U.S. at 390–91.

¹⁷⁴ *Shaw*, 509 U.S. at 646–47.

¹⁷⁵ *Id.* at 647 (emphasis added).

¹⁷⁶ *Id.*

D. Lessons Learned from the Inferred Classification Cases

The inferred classification cases tell us something far more interesting about equal protection doctrine than that all efforts to justify strict scrutiny based on the practical effects of the government's action actually turn on judicial intuitions about underlying discriminatory purposes. Such intuitions may play a role in these cases, but in fact something more fundamental is occurring. These cases reveal that whenever the Court has characterized the central issue in an equal protection challenge as one of racial classification or racially disproportionate impact or discriminatory purpose, it has made a choice about whether and, if so, how to justify the application of strict scrutiny.

Judicial restraint appears to counsel formalism in the exercise of heightened judicial scrutiny.¹⁷⁷ According to this logic, racial classification is the most attractive justification for the application of strict scrutiny in race-based equal protection cases because, when the Court applies heightened scrutiny to a facial classification, it is not invading the zone of legitimate discretion afforded by the Constitution to political institutions. Rather, the Court has been required by the form of the government's action to raise the level of judicial scrutiny. At the opposite end of the spectrum, *Washington v. Davis* explained why, for the same formalist reasons, discriminatory impact alone cannot justify heightened scrutiny. If it could, courts could raise the level of scrutiny on a discretionary basis whenever the racial impact appeared too severe, resulting presumably in an unconstitutional usurpation of powers reserved for the legislature and the states. Discriminatory purpose inquiry requires the factually intensive examination of evidence that is typically circumstantial and the drawing of normative distinctions between permissible and impermissible purposes. Judicial restraint further counsels caution in the identification of discriminatory purposes in deference to the legitimate motivations of political institutions.¹⁷⁸

The inferred classification cases show that the Supreme Court's rejection of discriminatory effects as a sufficient justification for heightened scrutiny may be softened when, in conjunction with an examination of

¹⁷⁷ See supra note 35 and accompanying text.

¹⁷⁸ See, e.g., *McCleskey v. Kemp*, 481 U.S. 279, 298–99 (1987) (declining to “infer a discriminatory purpose” motivating Georgia’s capital punishment law because “legislatures necessarily have wide discretion in the choice of criminal laws and penalties, and . . . there were legitimate reasons for the Georgia Legislature to adopt and maintain capital punishment”).

the legislation's form, those effects are considered evidence of a discriminatory classification. This is because discriminatory classifications provide a basis for the application of strict scrutiny that appears consistent with judicial restraint. These cases reveal that, when the Court infers a racial classification based on the form and practical effect of facially neutral legislation, it elides the fundamental nature of the choice it has made to apply heightened scrutiny. That is, it has chosen to apply strict scrutiny in order to defend a constitutional equality value threatened by the state's action, and the observation of that threat has simply merged with the inference of a racial classification. Perhaps this problem would seem less significant if the Court always came to infer racial classifications in just the same way. But it does not. While there are notable similarities between the inferred classification cases, there are also important differences that track the evolution in the Court's thinking about equal protection and the constitutional equality values that underlie its guarantee.

The political restructuring cases embody values of antistatization and political participation associated with the theory of representation reinforcement. *Shaw* embodies more conservative notions of individual dignity and antibalkanization associated with colorblind constitutionalism.¹⁷⁹ Together they show that, when the Court infers a racial classification, it determines that a formally race neutral state action threatens constitutional equality values typically understood to be threatened by the use of explicit racial classifications. These cases are not limited by a particular type or cluster of values, and individual justices may be motivated to protect some values in cases where the existence of a classification is ambiguous, but not in others. Rather, they demonstrate the Court's willingness to infer racial classifications in very different circumstances and for very different reasons, provided that the inference of a racial classification serves constitutional values otherwise associated with the application of strict scrutiny to explicit racial classifications. In each case, suspect classification doctrine, rather than discriminatory purpose doctrine, provided the modality through which these values were protected, and this distinction has consequences because it demonstrates that strict scrutiny may apply to facially neutral legislation where the

¹⁷⁹ But see generally Siegel, *supra* note 14 (arguing that "antibalkanization" is a principle capable of supplying reasons to uphold and to reject the constitutionality of racially egalitarian measures).

form of the legislation raises constitutional suspicion, even if no invidious purpose is uncovered.

This practice of inferring racial classifications in order to justify the application of strict scrutiny may foreshadow how the Court would resolve an equal protection challenge to formally race neutral affirmative action—by inferring a racial classification in the form and practical effect of a facially neutral plan rather than resolving whether its race conscious purpose is unconstitutional or whether that purpose has been proved. For example, *Shaw* frames the problem as one of constitutional line-drawing between race neutral measures that are understood to avoid expressive harms, which would deserve deferential review, and those that threaten values of individual dignity or political cohesion and so deserve strict scrutiny. The inferred classification cases counsel greater attention to the design of race neutral affirmative action in recognition of the careful attention that the Court has paid to the form and practical effect of governmental action when identifying “covert” classifications from otherwise formally race neutral measures. They show that a superficial account of the constitutionality of race neutral measures, based on a rigid understanding of equal protection’s framing rules, will not predict the circumstances under which facial neutrality will fail to afford the government’s action a presumption of constitutionality.¹⁸⁰

II. COLORBLINDNESS, AFFIRMATIVE ACTION, AND RACE NEUTRALITY

Colorblind constitutionalism requires the application of strict scrutiny to all racial classifications, regardless what purpose motivated the government’s action.¹⁸¹ This approach places particular pressure on affirmative action programs that seek to remedy racial inequalities in the alloca-

¹⁸⁰ This understanding of inferred classifications may also help us to understand why lower courts have sometimes resisted applying strict scrutiny to *explicit* racial classifications when the classifications appeared not to threaten established constitutional equality norms. See, e.g., *Brown v. City of Oneonta*, 221 F.3d 329, 337 (2d Cir. 2000) (declining to apply strict scrutiny to the police department’s use of race when questioning criminal suspects, because the suspect’s race was provided as part of a “physical description given by the victim of crime” that also led the police to question only male subjects within a particular age range); *Morales v. Daley*, 116 F. Supp. 2d 801, 814–15 (S.D. Tex. 2000) (holding that census questions requesting racial information do not require strict scrutiny because they are merely “self-classification” which, while they may raise moral or political issues, do not violate the Due Process Clause of the Fifth Amendment). For an excellent discussion of *Oneonta* and other examples of lower courts wrestling with the meaning of “racial classification,” see Primus, *supra* note 4, at 509–15.

¹⁸¹ See *supra* note 32 and accompanying text.

tion of public resources or opportunities. Direct consideration of race would seem to be the most efficient way to address such inequalities. Indirect measures that omit the use of racial classifications appear doomed to settle for less efficient alternatives,¹⁸² and yet colorblindness condemns public institutions to employ such measures if they wish to avoid strict scrutiny. Race neutral alternatives to affirmative action, therefore, present an attractive, if imperfect, option for governments pursuing racially egalitarian ends. They satisfy the anticlassification principle through their formal race blindness, and, furthermore, equal protection's framing rules suggest that deferential rational basis review should be applied to such race neutral measures when the government employs them in pursuit of nondiscriminatory purposes.¹⁸³ This Part will examine the Supreme Court's affirmative action precedents to show that the Court has long suggested that a more nuanced approach should govern the review of race neutral affirmative action, one that would, in some circumstances, support the inference of racial classifications based on the form and practical effect of formally race neutral practices.

A. *Colorblindness Discourse in the Jurisprudence of Affirmative Action*

One may embrace the anticlassification principle that is at the center of colorblindness discourse and yet reach very different conclusions regarding how that principle should be practiced. In his 1976 *Harvard Law Review* article defending the principle, Professor Paul Brest explained that the anticlassification principle "prevents and rectifies racial injustices without subordinating other important values" that political institutions may elect to pursue.¹⁸⁴ Contrary to the colorblindness approach taken by the Supreme Court in its subsequent affirmative action

¹⁸² See *Parents Involved*, 551 U.S. at 796 (Kennedy, J., concurring) (acknowledging the criticism that equal protection would produce an "inefficient result" if it compelled the government to pursue racially egalitarian objectives through "indirection and general policies"). If, however, racial inequality is merely a symptom of some other socioeconomic inequality, selecting for that socioeconomic factor may return efficiencies to the government's equality-driven policies. See generally Daria Roithmayr, *Direct Measures: An Alternative Form of Affirmative Action*, 7 *Mich. J. Race & L.* 1, 27–30 (2001).

¹⁸³ Again, the question whether all race conscious reasons are also discriminatory reasons has been the subject of intense scholarly debate, but it is not the subject of this Article. See *supra* notes 11–13 and accompanying text.

¹⁸⁴ Paul Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 *Harv. L. Rev.* 1, 5 (1976); see also *id.* at 11 ("[A] general doctrine disfavoring harmful results could not be administered by the judiciary.").

cases, Brest maintained that strict scrutiny must make room for “desirable uses of race,” including “benign” race-based decisions “designed to benefit the members of disadvantaged minorities” (for example, “voluntarily-adopted or remedially-imposed school desegregation programs”).¹⁸⁵ Brest thus understood the anticlassification principle to permit “a variable standard of judicial review” that would subject benign legislation to relaxed scrutiny.¹⁸⁶

Over a decade later, in *Croson*,¹⁸⁷ the Court applied strict scrutiny to minority set asides for public contracts. It reasoned that equal protection confers onto the individual “‘personal rights’ to be treated with equal dignity and respect” and that strict scrutiny must be applied to all racial classifications to determine whether the individual’s rights have been violated by “‘smok[ing] out’ illegitimate uses of race.”¹⁸⁸ *Croson* described strict scrutiny’s requirement that racial classifications must be narrowly tailored to fulfill a compelling interest as a mechanism for sorting between benign and invidious purposes.¹⁸⁹ This approach also necessarily puts the application of strict scrutiny before any determination that the government acted with an improper purpose and before any determination that the plaintiff suffered a constitutional injury.¹⁹⁰ One might argue that strict scrutiny should apply to racial classifications because such classifications are presumptive evidence of the government’s discriminatory motive. Neither *Croson*, however, nor any of its progeny has ever held that strict scrutiny should apply to race-based affirmative action because all race conscious governmental purposes are constitutionally suspect.¹⁹¹ Rather, the colorblindness approach dominant after *Croson* has

¹⁸⁵ Id. at 15–22; see also id. at 53–54 (“Under the approach proposed in this essay, all or most preferential employment and admissions programs would survive constitutional scrutiny.”).

¹⁸⁶ Id. at 21.

¹⁸⁷ 488 U.S. 469 (1989).

¹⁸⁸ See id. at 493.

¹⁸⁹ Id. (opining that “there is simply no way of determining what classifications are ‘benign’ or ‘remedial’ and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics” without subjecting all racial classifications to strict scrutiny).

¹⁹⁰ See id. (“Classifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings [as determined by strict scrutiny], they may in fact promote notions of racial inferiority and lead to a politics of racial hostility.”).

¹⁹¹ See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 327 (2003) (“Not every decision influenced by race is equally objectionable, and strict scrutiny is designed to provide a framework for carefully examining the importance and sincerity of the reasons advanced by the governmental decisionmaker.”).

held that all racial classifications must face strict scrutiny regardless of the purpose for which they were enacted.

Professor Jed Rubenfeld has criticized the colorblindness approach for requiring the application of strict scrutiny to affirmative action programs even absent evidence that those programs “actually served other, unconstitutional purposes.”¹⁹² Rubenfeld agreed with the Court’s assessment in *Croson* that strict scrutiny should be used to “smok[e] out ulterior, unconstitutional state purposes.”¹⁹³ He understood this view to be aligned with Ely’s representation-reinforcing interpretation of equal protection, which justifies the application of heightened scrutiny as a means for the judiciary to address “malfunction” in the political process.¹⁹⁴ He found, however, that the Court later reassigned strict scrutiny from a violation-identifying role to a “violation-justifying” role, by adopting a cost benefit test that balances the constitutional injury of race-based treatment against the compelling governmental interest such treatment is intended to fulfill.¹⁹⁵

In *Adarand Constructors, Inc. v. Peña*,¹⁹⁶ the Court applied strict scrutiny under the Fifth Amendment’s equality guarantee to a federal contracting program extending preferences to businesses owned by “socially and economically disadvantaged individuals” with a “race-based presumption of social and economic disadvantage” for members of minority groups.¹⁹⁷ The Court concluded that “whenever 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.”¹⁹⁸ The Court advanced

¹⁹² Jed Rubenfeld, *Affirmative Action*, 107 *Yale L.J.* 427, 443–44 (1997).

¹⁹³ *Id.* at 443.

¹⁹⁴ *Id.* at 436 (“Used this way, strict scrutiny serves as a test of ulterior state interests. Its function, to paraphrase John Ely, is to smoke out illegitimate purposes that cannot be a valid basis for state action under the Equal Protection Clause.”); see also Ely, *supra* note 30, at 102–03. Ely called suspect classification doctrine the “handmaiden” of motivational analysis because strict scrutiny “turns out to be a way of ‘flushing out’ unconstitutional motivation, one that lacks the proof problems of a more direct inquiry.” *Id.* at 145–46.

¹⁹⁵ Rubenfeld, *supra* note 192, at 442; *id.* at 440 (“Strict scrutiny is no longer a means of smoking out *concealed* violations of constitutional principles. It is a means of ‘justif[ying]’ a *conceded* constitutional ‘injury.’”).

¹⁹⁶ 515 U.S. 200 (1995).

¹⁹⁷ *Id.* at 235. The Court did not question whether the presumption constituted a racial classification and agreed that the broader socioeconomic category was “race neutral.” *Id.* at 212–13.

¹⁹⁸ *Id.* at 229–30; accord *Parents Involved*, 551 U.S. at 745–46; *Grutter*, 539 U.S. at 327.

two arguments in support of this view: that racial classifications deny individuals equal consideration for benefits conferred by public institutions,¹⁹⁹ and that such classifications impugn individual dignity due to the social meanings of racial inferiority and stigmatization that have historically accrued to governmental uses of race.²⁰⁰ According to this approach, the determination of a constitutional injury occurs prior to the application of strict scrutiny; it coincides with the identification of a racial classification. The Court then made clear that “[t]he application of strict scrutiny, in turn, determines whether a compelling governmental interest justifies the infliction of that injury.”²⁰¹ Rubinfeld’s analysis demonstrates that *Adarand* applied strict scrutiny to determine whether that constitutional injury can be justified. In those circumstances when it cannot, invalidation of the challenged governmental action will serve to defend the constitutional equality values of individual dignity and equal consideration that colorblindness discourse understands racial classifications to threaten.

Although this approach increases the significance of the initial determination that a racial classification is present, *Adarand* said little about how to make that determination except to note its relative simplicity. The Court explained that cases “concern[ing] only classifications based explicitly on race . . . present[] none of the additional difficulties posed by laws that, although facially race neutral, result in racially disproportionate impact and are motivated by a racially discriminatory purpose.”²⁰² As in *Croson*, the *Adarand* Court applied strict scrutiny to enforce equal protection as a “personal right,”²⁰³ but *Adarand* makes clear

¹⁹⁹ See, e.g., *Adarand*, 515 U.S. at 211 (“The injury in cases of this kind is that a ‘discriminatory classification prevents the plaintiff from competing on an equal footing.’”); *id.* at 229–30 (equating the injury with “unequal” treatment).

²⁰⁰ See *id.* at 229 (agreeing that “[e]ven though it is not the actual predicate for this legislation, a statute of this kind inevitably is perceived by many as resting on an assumption that those who are granted this special preference are less qualified in some respect that is identified purely by their race” (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 518–19 (1980), 448 U.S. at 545 (Stevens, J., dissenting))); see also *Croson*, 488 U.S. at 493 (foreshadowing this view, by stating that “[c]lassifications based on race carry a danger of stigmatic harm” and that “they may in fact promote notions of racial inferiority and lead to a politics of racial hostility”); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 298 (1978) (“[P]referential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth.”).

²⁰¹ *Adarand*, 515 U.S. at 230.

²⁰² *Id.* at 213.

²⁰³ *Id.* at 227.

that this right is against injury caused by the pernicious social meanings that racial classification are understood inevitably to express. That right entitles the claimant “to demand that any governmental actor . . . justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny.”²⁰⁴ The Court therefore understood strict scrutiny, as Justice Powell had argued in *Regents of the University of California v. Bakke*,²⁰⁵ to be an integral part of the individual’s right to equal protection and not merely an instrument of judicial review providing courts the means to determine whether that right had been breached. It flows from the individual’s perception of harm due to race-based treatment and not from the judiciary’s need to inquire into hidden illegitimate purposes.

Ultimately, the sea change that Rubinfeld observes between *Croson* and *Adarand* seems to have acquired its initial momentum in *Shaw*. Concern for “smoking out” invidious purposes plays not even a nominal role in *Shaw*, and *Adarand* merely adapts *Shaw*’s conception of constitutional injury from those “rare” cases in which race neutral legislation is “unexplainable on grounds other than race”²⁰⁶ to all cases involving racial classifications. The irony here is that *Adarand* holds the government’s affirmative action plan must be justified under strict scrutiny because all racial classifications cause constitutional injury, and it cites *Shaw* in support of that proposition;²⁰⁷ but *Shaw* inferred a racial classification because the Court perceived the threat of constitutional injury in the form of the challenged plan, even though the plan contained no explicit racial classification.²⁰⁸

The Court’s decisions since *Adarand* have continued to subject race-based affirmative action to strict scrutiny and to practice strict scrutiny as a balancing test intended to determine whether the harms imposed on

²⁰⁴ *Id.* at 224.

²⁰⁵ 438 U.S. 265, 299 (1978) (“When [state actions] touch upon an individual’s race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest. The Constitution guarantees that right to every person regardless of his background.”), *quoted in Adarand*, 515 U.S. at 224–25.

²⁰⁶ *Shaw*, 509 U.S. at 643.

²⁰⁷ *Adarand*, 515 U.S. at 230 (citing *Shaw*, 509 U.S. at 643).

²⁰⁸ *Adarand* did not need such a speculative conception of constitutional injury, for the injury found to satisfy the plaintiff’s standing requirement concerned the potential loss of future contracts. *Id.* at 211–12. By contrast, the *Shaw* plaintiffs did not claim vote dilution and argued instead that the redistricting plan “violated their constitutional right to participate in a ‘color-blind’ electoral process.” *Shaw*, 509 U.S. at 641–42.

the individual by racial classifications are justified by the government's satisfaction of a compelling interest. In *Grutter v. Bollinger*,²⁰⁹ the Court sustained a race-based student admissions policy against an equal protection challenge, because the defendant, the University of Michigan Law School, demonstrated that the policy was necessary to fulfill a compelling interest in diversity and that its procedures "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."²¹⁰

The Court expressly relied on Justice Powell's *Bakke* opinion to uphold the use of race as one factor among other race neutral factors.²¹¹ Justice Powell had identified the denial of a "right to individualized consideration" as the "principal evil" of the quota-based plan challenged in *Bakke*.²¹² Using the example of Harvard University's admissions plan, he illustrated that a constitutional alternative must be "flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight."²¹³ *Grutter* reaffirmed Justice Powell's approach in *Bakke* by echoing that, when used in a "mechanical" way, race denies the applicant the dignity of "truly individualized consideration"; but, when performed in a "flexible, nonmechanical way,"²¹⁴ the university's consideration of race may be an integral part of individualized consideration.²¹⁵

²⁰⁹ 539 U.S. 306 (2003).

²¹⁰ Id. at 337; see also id. at 341 (finding that the law school's policy did not "unduly harm nonminority applicants" because "[a]s Justice Powell recognized in *Bakke*, so long as a race-conscious admissions program uses race as a 'plus' factor in the context of individualized consideration, a rejected applicant 'will not have been foreclosed from all consideration for that seat simply because he was not the right color or had the wrong surname'"). The Court made a similar observation in *Crosby* when it distinguished the minority set aside challenged in that case from the one upheld in *Fullilove*, which "allowed for a waiver of the set-aside provision where [the minority business]'s higher price was not attributable to the effects of past discrimination." 488 U.S. at 508. The Court reasoned that "such programs are less problematic from an equal protection standpoint because they treat all candidates individually, rather than making the color of an applicant's skin the sole relevant consideration." Id.

²¹¹ *Grutter*, 539 U.S. at 340–41.

²¹² 438 U.S. at 318 n.52.

²¹³ Id. at 317.

²¹⁴ *Grutter*, 539 U.S. at 334.

²¹⁵ But see Siegel, *Equality Talk*, supra note 4, at 1540 (arguing that "[t]his entitlement to be treated as an individual has no functional significance in equal protection doctrine other

Grutter did not sanction the use of racial classifications that will have a clear and dispositive impact on a distributive outcome. Rather, it sanctioned the *indirect* use of race as one factor among many,²¹⁶ without the kind of fixed weighting system that the Court specifically held unconstitutional in *Gratz v. Bollinger*.²¹⁷ The Court did not relax the level of scrutiny applied to the plan just because it found that the plan's holistic design used race in a manner consistent with the individualized consideration of applicants. The design of the plan did, however, lead the Court to conclude that the plan survived strict scrutiny, and it appeared to provide the Court with confidence that constitutional values of equal consideration and individual dignity were adequately protected.²¹⁸

In *Fisher v. University of Texas at Austin*,²¹⁹ the Court again reaffirmed its view that strict scrutiny must be applied to all racial classifications, under the same exacting narrow tailoring standard, without regard for the purpose behind such a classification and without deference to a public institution's recognized expertise.²²⁰ The petitioner, a white student applicant denied admission by the university, challenged the university's use of race as a factor in its admissions process.²²¹ The Fifth Circuit affirmed the district court's grant of summary judgment for the university, concluding that the university was owed a degree of deference concerning the form of the challenged plan because the plan largely reflected the university's academic judgment.²²² The Court found that

than as a constraint on consideration of race . . . in university admissions and other distributive contexts").

²¹⁶ For a discussion of the significance of "indirectness" in equal protection jurisprudence, see generally Paul J. Mishkin, *The Uses of Ambivalence: Reflections on the Supreme Court and the Constitutionality of Affirmative Action*, 131 U. Pa. L. Rev. 907, 927-28 (1983).

²¹⁷ 539 U.S. at 270 (holding that "the University's policy, which automatically distributes 20 points, or one-fifth of the points needed to guarantee [undergraduate] admission, to every single 'underrepresented minority' applicant solely because of race, is not narrowly tailored to achieve the interest in educational diversity"); see also *Grutter*, 539 U.S. at 338 (noting favorably that "[t]he Law School does not . . . limit in any way the broad range of qualities and experiences" that may lead it to conclude that a particular student might make "valuable contributions to student body diversity").

²¹⁸ See, e.g., *Grutter*, 539 U.S. at 338 (noting that the plan "seriously considers each 'applicant's promise of making a notable contribution to the class'" due to the applicant's unique personal qualities).

²¹⁹ *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013).

²²⁰ *Id.* at 2419-21.

²²¹ *Id.* at 2413.

²²² The Fifth Circuit based its deference to the university on "two independent foundations": first, that the university's decisions were "a product of 'complex educational judgments in an area that lies primarily within the expertise of the university,' [and] far outside

the circuit court misapplied strict scrutiny, because under *Grutter*, only the university's judgment that diversity "is essential to its educational mission"²²³ is owed "some, but not complete, judicial deference."²²⁴ Justice Kennedy's opinion for the majority continued, stating that "[n]arrow tailoring also requires that the reviewing court verify that it is 'necessary' for a university to use race to achieve the educational benefits of diversity,"²²⁵ and no deference is owed to the university during that analysis. In remanding the case to the circuit court to apply the proper test for strict scrutiny, the Court proceeded from the premise that "judicial review must begin from the position that 'any official action that treats a person differently on account of his race or ethnic origin is inherently suspect'" and so deserves to be subjected to the "searching examination" of strict scrutiny.²²⁶ Thus, the Court instructed that "it remains at all times the University's obligation to demonstrate, and the Judiciary's obligation to determine, that admissions processes '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.'"²²⁷

the experience of the courts"; second, that the "educational autonomy [is] grounded in the First Amendment." *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213, 231 (5th Cir. 2011). The circuit court also found support for its conclusions in the language of *Grutter*, which had stated that "the narrow tailoring inquiry . . . must be calibrated to fit the distinct issues raised by the use of race to achieve student body diversity in public higher education." *Grutter*, 539 U.S. at 333–34, *quoted in Fisher*, 631 F.3d at 232; see also *Fisher*, 631 F.3d at 232 ("That is, the narrow-tailoring inquiry—like the compelling-interest inquiry—is undertaken with a degree of deference to the University's constitutionally protected, presumably expert academic judgment."). This passage in *Grutter* was written to answer Justice Kennedy's criticism in his dissent that the Court had misapplied strict scrutiny by deferring to the University of Michigan Law School when it performed its narrow tailoring analysis. See also *Grutter*, 539 U.S. at 334 ("Contrary to Justice Kennedy's assertions, we do not 'abando[n] strict scrutiny[.]' . . . Rather . . . we adhere to *Adarand*'s teaching that the very purpose of strict scrutiny is to take such 'relevant differences into account.'" (first brackets in original)). Thus, while Justice Kennedy dissented from *Grutter* because he believed that there the Court had given the university improper deference concerning its implementation of race as an admissions factor, in *Fisher*, Justice Kennedy read *Grutter* to permit no such deference and, writing for six other justices, actively rejected the notion that strict scrutiny represents a variable standard. *Fisher*, 133 S. Ct. at 2419, 2421.

²²³ *Fisher*, 133 S. Ct. at 2419 (quoting *Grutter*, 539 U.S. at 328).

²²⁴ *Id.*

²²⁵ *Id.* at 2420.

²²⁶ *Id.* at 2419 (emphasis added).

²²⁷ *Id.* at 2420 (quoting *Grutter*, 539 U.S. at 337).

Outside of the affirmative action context, the Court took up similar concerns in *Parents Involved*, when it applied strict scrutiny to voluntary race-based student assignment plans implemented by public school districts in Seattle, Washington and Jefferson County, Kentucky.²²⁸ The plans were implemented to promote integration and to avoid racial isolation by making student assignment to a school contingent on the impact of such assignment on the school's racial composition.²²⁹ The Court concluded that each school district "relie[d] upon *an individual student's race* in assigning that student to a particular school, so that the racial balance at the school falls within a predetermined range."²³⁰ By a 5–4 vote, the Court invalidated the plans based on its conclusion that racial classifications were not "necessary" because they had only "minimal effect" on pupil assignments, suggesting "that other means would be effective,"²³¹ and the districts "failed to show that they considered methods other than explicit racial classifications to achieve their stated goals."²³² Finally, a majority of Justices rejected the plans' "crude" design which the Court believed focused only on a "black/white" racial dichotomy and failed to provide each student individualized consideration.²³³

²²⁸ Neither district was operating under a desegregation decree when their plans were implemented. Seattle had never been judged to have operated a *de jure* system of segregated schools. See *Parents Involved*, 551 U.S. at 712. But see *id.* at 807–11 (Breyer, J., dissenting) (discussing political and legal challenges to Seattle's school system alleging segregation of its schools, including a 1977 law suit which Seattle settled by agreeing to a mandatory busing plan). Jefferson County adopted its plan following a judgment that it had eliminated the vestiges of its prior segregationist system and achieved unitary status. *Id.* at 715–16 (Roberts, C.J.).

²²⁹ In deciding between multiple students' requests to attend an oversubscribed school, Seattle "employ[ed] a series of 'tiebreakers,'" one of which considered the impact of individual students on the "racial composition" of the particular school. *Id.* at 711–12. The Jefferson County plan "require[d] all nonmagnet schools to maintain a minimum black enrollment of 15 percent, and a maximum black enrollment of 50 percent." *Id.* at 716.

²³⁰ *Id.* at 710 (emphasis added); see also *id.* at 711 (describing the "legal question" in the case as "whether a public school that had not operated legally segregated schools or has been found to be unitary may choose to *classify students by race* and rely upon that classification in making school assignments" (emphasis added)).

²³¹ *Id.* at 733; see also *id.* at 790 (Kennedy, J., concurring) (explaining his agreement with the plurality that "the small number of assignments affected suggests that the schools could have achieved their stated ends through different means").

²³² *Id.* at 735 (Roberts, C.J.).

²³³ See, e.g., *id.* at 723–24 (stating that, even limiting the definition of diversity to matters of race, "the plans here employ only a *limited notion of diversity*, viewing race exclusively in white/nonwhite terms in Seattle and black/'other' terms in Jefferson County" (emphasis added)); *id.* at 786 (Kennedy, J., concurring) (faulting the Seattle school board because it "failed to explain why, in a district composed of a diversity of races, with fewer than half of the stu-

In a plurality opinion authored by Chief Justice Roberts, four Justices found that the plans failed to serve a compelling interest (neither remedying past discrimination nor diversity)²³⁴ and the districts' asserted purposes were indistinguishable from an unconstitutional interest in "racial balancing."²³⁵ Chief Justice Roberts repeated the familiar colorblind rationale that racial classifications are suspect because they communicate racial inferiority and demean individual dignity.²³⁶ But the Chief Justice's opinion also went further, suggesting that all race conscious motivations might be equally unconstitutional.²³⁷ The Chief Justice would have reduced the school district's obligation to their students to a simple maxim (that is, "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race"²³⁸), and indeed the plurality opinion showed some difficulty distinguishing between racial classification and race consciousness generally.²³⁹

dents classified as 'white,' it has employed the *crude racial categories* of 'white' and 'non-white' as the basis for its assignment decisions" (emphasis added)); id. at 790 (arguing that the districts could have constitutionally pursued "a more nuanced, individual evaluation of school needs and student characteristics that might include race as a component").

²³⁴ Id. at 720–21 (Roberts, C.J.) (concluding that neither district was attempting to remedy past discrimination because neither was acting pursuant to a current judicial determination of a continuing constitutional violation); id. at 729 (arguing that, while *Grutter* upheld a policy "to admit an undefined 'meaningful number' [of students] necessary to achieve a genuinely diverse student body," the districts' plans sought "racial balance" specified as "a defined range set solely by reference to the demographics of the respective school districts").

²³⁵ See id. at 731–32 (concluding that, despite their assertions that they sought to promote racial integration and avoid racial isolation, the districts failed to distinguish their plans from racial balancing).

²³⁶ See id. at 745–46.

²³⁷ Chief Justice Roberts draws an uncomfortable parallel between the racial segregation invalidated in *Brown v. Board of Education*, 347 U.S. 483 (1954), and the challenged assignment plans. See *Parents Involved*, 551 U.S. at 747 (plurality opinion); see also id. at 748 (Thomas, J., concurring) ("[T]he dissent would give school boards a free hand to make decisions on the basis of race—an approach reminiscent of that advocated by the segregationists in *Brown*.").

²³⁸ Id. at 748 (plurality opinion).

²³⁹ In a number of places throughout the Chief Justice's opinion, "race-conscious" appears to be used as a synonym for "racial classification." See, e.g., id. at 731 ("The sweep of the mandate claimed by the district is contrary to our rulings that remedying past societal discrimination does not justify race-conscious government action."); id. at 737 (stating that "justification for race-conscious remedies" is not present in this case because the districts were not seeking to remedy de jure segregation); see also id. at 738 (calling the dissent's argument that race conscious means are constitutionally permitted to achieve "positive" racial outcomes "at best . . . a dubious inference").

The Chief Justice may not have meant to fully equate segregationist and integrationist purposes,²⁴⁰ and it is certain that a majority of Justices did not join him in doing so.²⁴¹ Notably, though he concurred in the judgment, Justice Kennedy declined to join these portions of the Chief Justice's opinion because he believed that they "imply an all-too-unyielding insistence that race cannot be a factor in instances when, in my view, it may be taken into account."²⁴² Justice Kennedy asserted that government has "a legitimate interest . . . in ensuring all people have equal opportunity regardless of their race,"²⁴³ and he argued that while the avoidance of racial isolation could serve as a compelling interest, the districts had failed to pursue that interest in a manner that satisfied strict scrutiny.²⁴⁴ Nevertheless, he agreed with the fundamental premise of colorblindness that "[t]o be forced to live under a state-mandated racial label is inconsistent with the dignity of individuals in our society,"²⁴⁵ and he objected to the "crude measures" by which the districts employed race, which he believed "threaten[ed] to reduce children to racial chits valued and traded according to one school's supply and another's demand."²⁴⁶ Justice Kennedy would have permitted the government to use racial classifications only as a "last resort,"²⁴⁷ and he suggested several ways in which the districts might have avoided racial isolation through race neutral means.²⁴⁸

²⁴⁰ Chief Justice Roberts signaled as much during oral argument in the case of *Ricci v. DeStefano*, 557 U.S. 557 (2009), when the Chief Justice stated "I thought *both the plurality and the concurrence* in *Parents Involved* accepted the fact that race conscious action such as school siting or drawing district lines is—is okay, but discriminating in particular assignments is not." Transcript of Oral Argument at 54, *Ricci*, 557 U.S. 557 (No. 07-1428) (emphasis added).

²⁴¹ See, e.g., *Parents Involved*, 551 U.S. at 798–99 (Stevens, J., dissenting) (noting the "cruel irony" of the Chief Justice's analogy); see also *id.* at 866–67 (Breyer, J., dissenting).

²⁴² *Id.* at 787 (Kennedy, J., concurring); see also *id.* ("The enduring hope is that race should not matter; the reality is that too often it does."); *id.* at 788 (expressing concern that the plurality opinion may be "open to the interpretation that the Constitution requires school districts to ignore the problem of *de facto* resegregation in schooling"); *id.* ("To the extent the plurality opinion suggests the Constitution mandates that state and local school authorities must accept the status quo of racial isolation in schools, it is, in my view, profoundly mistaken.").

²⁴³ *Id.* at 787–88.

²⁴⁴ *Id.* at 797.

²⁴⁵ *Id.*

²⁴⁶ *Id.* at 798.

²⁴⁷ *Id.* at 790 ("[I]ndividual racial classifications . . . may be considered legitimate only if they are a last resort to achieve a compelling interest.").

²⁴⁸ See *infra* notes 299–303 and accompanying text.

For Justice Kennedy, stating colorblindness as a constitutional imperative is an appropriate response to “official classification[s] by race,” but “it cannot be a universal constitutional principle”²⁴⁹ because of the practical restrictions that it would place on public institutions seeking to advance the goal of equal opportunity. To that end, Justice Kennedy argued that school districts concerned that racial isolation may “interfere with the objective of offering an equal educational opportunity . . . are free to devise race-conscious measures to address the problem.”²⁵⁰ This statement has obvious limits. Justice Kennedy’s concurrence is so intriguing because it suggests a pathway by which government may defeat the racial formalism of strict scrutiny to pursue integration and perhaps other racially egalitarian ends. The next Section will show that Justice Kennedy’s recommendation of facially neutral race conscious state action is not unique, for other members of the Court have made similar recommendations. These recommendations should not be surprising, for they are fully consistent with the framing rules of equal protection. A closer look at the Court’s support for race neutral state action will lead us to question the sufficiency of equal protection’s familiar framing rules, because those rules provide no guidance regarding what formal limitations might attach to facially neutral race conscious legislation.

B. Stating a Preference for Race Neutrality: From Croson to Parents Involved

The very same affirmative action decisions that apply strict scrutiny to formally race-based affirmative action nevertheless suggest that strict scrutiny would not constrain facially neutral attempts to pursue similarly race conscious objectives. Two lines of argument emerge from these cases in support of this conclusion. First, current doctrine requires the government to give adequate consideration to race neutral alternatives in order for its use of racial classifications to pass strict scrutiny. Second, members of the Court have expressly supported facially neutral race conscious measures as constitutional alternatives to racial classifications. These endorsements of facially neutral race conscious measures raise important questions for constitutional equality law. As mentioned above, others have raised the question whether all race conscious motivations are necessarily discriminatory and therefore contrary to the guarantee of

²⁴⁹ *Parents Involved*, 551 U.S. at 788.

²⁵⁰ *Id.*

equal protection.²⁵¹ The analysis of inferred classification cases in Part I raises a very different question, specifically whether there are any constraints on the *form* of facially neutral race conscious measures which must be observed in order to avoid the application of strict scrutiny based on the court's conclusion that such measures are structurally indistinguishable from explicit racial classifications. This Section will close by discussing race neutral alternatives to affirmative action, endorsed by members of the Court, which suggest that to avoid strict scrutiny the form of facially neutral measures must be carefully framed so as to avoid the appearance that facially neutral criteria in fact operate as proxies for race.

1. Adequate Consideration of Race Neutral Alternatives

For decades, the Court has held that in the affirmative action context the government must support its use of racial classifications by demonstrating proper consideration of race neutral alternatives. In *Croson*, the Court faulted the city for failing to demonstrate “any consideration of the use of race neutral means to increase minority business participation in city contracting.”²⁵² In *Grutter*, the Court confirmed that strict scrutiny requires the government to engage in “serious, good faith consideration of workable race neutral alternatives” before using racial classifications to pursue educational diversity.²⁵³ Writing for the majority, Justice O'Connor elaborated that “[n]arrow tailoring does not require exhaustion of every conceivable race neutral alternative” or that an institution “choose between maintaining a reputation for excellence or fulfilling a commitment to provide educational opportunities to members of all racial groups.”²⁵⁴ This formulation gave some latitude to the government to explain that it rejected particular race neutral alternatives because, in its judgment, to have done otherwise would have sacrificed important educational values.²⁵⁵ Justice O'Connor specified two such values: aca-

²⁵¹ See *supra* notes 11–13 and accompanying text.

²⁵² 488 U.S. at 507; see also *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280 n.6 (1986) (stating that narrow tailoring “may . . . require consideration of whether lawful alternative and less restrictive means could have been used”).

²⁵³ *Grutter*, 539 U.S. at 339.

²⁵⁴ *Id.*

²⁵⁵ *Id.* at 340 (acknowledging that the law school had rejected certain race neutral alternatives because “these alternatives would require a dramatic sacrifice of diversity, the academic quality of all admitted students, or both”); see also *id.* at 343 (taking the law school “at its

ademic quality of students and true diversity of the student body measured across a “broad range of qualities and experiences.”²⁵⁶ The Court concluded that it was permissible for the university to reject race neutral alternatives highlighted by the district court “such as using a lottery system or decreasing the emphasis for all applicants on undergraduate GPA and LSAT scores,” because such alternatives “would require a dramatic sacrifice of diversity, the academic quality of all admitted students, or both.”²⁵⁷ Addressing the federal government’s recommendation that the law school rely on percentage plans like those “adopted by public undergraduate institutions in Texas, Florida, and California,” the Court responded that percentage plans “may preclude the university from conducting the individualized assessments necessary to assemble a student body that is not just racially diverse, but diverse along all the qualities valued by the university.”²⁵⁸ In so doing, the Court neither confirmed nor denied that such plans are in fact race neutral.²⁵⁹ Instead, the Court accepted the university’s view that these alternatives to affirmative action were unsuitable because of the sacrifices they were likely to impose on important educational values.

In *Fisher*, the Court had no occasion to decide the constitutionality of race neutral affirmative action; that question was not before the Court.²⁶⁰ Nevertheless, like prior decisions by the Court, its ruling does address how courts should consider the availability of race neutral alternatives when performing narrow tailoring analysis, and, unlike those prior decisions, it does so in a unique context. The University of Texas’s consideration of race was designed to supplement the Texas legislature’s “Top Ten Percent Law,” which guarantees public university admission to all top-performing students graduating from public high schools, and the university’s own formerly race neutral “Personal Achievement Index” (“PAI”), a “holistic metric of a candidates potential contribution to the University” including factors such as leadership, work experience, ex-

word that it would “like nothing better” than to switch to a race neutral plan and that it “will terminate” its race-based plan “as soon as practicable”).

²⁵⁶ Id. at 338, 340.

²⁵⁷ Id. at 340 (internal quotation marks and citations omitted).

²⁵⁸ Id.

²⁵⁹ Id. (agreeing that percentage plans were an unsuitable replacement for the law school’s multi-factor approach “even assuming such plans are race-neutral”).

²⁶⁰ The question presented in *Fisher* concerned whether the Court’s precedents, including specifically *Grutter*, “permit the [university’s] use of race in undergraduate admissions decisions.” Petition for Writ of Certiorari at i, *Fisher*, 133 S. Ct. 2411 (2013) (No. 11-345).

tracurricular activities, community service, and other “special circumstances” such as growing up in a single-parent household or speaking a language other than English in the home.²⁶¹ The university added this racial component to its admissions plan after the Supreme Court held in *Grutter v. Bollinger*²⁶² that student body diversity is a compelling interest sufficient to support a finding that a public university’s use of race to admit a “critical mass” of underrepresented minority students survived strict scrutiny.²⁶³ Indeed, the petitioner conceded that the university’s adherence to the ten percent plan is itself constitutional and argued that increasing the number of students enrolled under the ten percent plan would have been a constitutional, race neutral alternative to the university’s explicit consideration of race.²⁶⁴

The Supreme Court neither denied nor confirmed that this was so. It did, however, clarify that strict scrutiny “require[s] a court to examine with care, and not defer to, a university’s ‘serious, good faith consideration of workable race neutral alternatives.’”²⁶⁵ To uphold a race-based affirmative action plan, “[t]he reviewing court must ultimately be satisfied that no workable race neutral alternatives would produce the educational benefits of diversity.”²⁶⁶ In his own dissenting opinion in *Grutter*, Justice Kennedy had chided the Court that “[d]eference is antithetical to strict scrutiny.”²⁶⁷ He accused the Court of shirking its responsibility to

²⁶¹ *Fisher*, 133 S. Ct. at 2415–16. The PAI is used in conjunction with an “Academic Index” (“AI”) that reflects each applicant’s test scores and prior academic performance. *Id.* at 2. The Top Ten Percent Law was adopted in response to the Fifth Circuit’s decision in *Hopwood v. Texas*, which applied strict scrutiny to the University of Texas Law School’s affirmative action plan and held that the law school may not use race even “as a factor” in admissions. 78 F.3d 932, 935 (5th Cir. 1996). *Hopwood* invalidated the racial component of the prior AI. The Supreme Court abrogated *Hopwood* in *Grutter v. Bollinger*, holding that the University of Michigan Law School’s use of race as an admissions factor survived strict scrutiny because it was narrowly tailored to fulfill the law school’s compelling interest in diversity. 539 U.S. 306, 343 (2003). The *Grutter* Court noted percentage plans as race neutral alternatives to race-based affirmative action, but found them to be no impediment to a determination that the law school’s plan was constitutional. *Id.* at 340–41.

²⁶² 539 U.S. 306 (2003).

²⁶³ *Fisher*, 631 F.3d at 225–26.

²⁶⁴ Transcript of Oral Argument at 23–25, *Fisher*, 133 S. Ct. 2411 (2013) (No. 11-345). Justice Ginsburg questioned whether the ten percent plan is in fact race neutral and therefore presumptively constitutional given that “the only reason that they instituted the 10 percent plan was to increase minority enrollment” and “the only way it works is if you have heavily separated schools.” *Id.* at 24.

²⁶⁵ *Fisher*, 133 S. Ct. at 2420 (quoting *Grutter*, 539 U.S. at 339–40).

²⁶⁶ *Id.* at 2421.

²⁶⁷ *Grutter*, 539 U.S. at 394 (Kennedy, J., dissenting).

apply “meaningful strict scrutiny” on the question whether Michigan Law School’s admissions policy demonstrated narrow tailoring because, by his lights, the Court had deferred to the law school’s assessment that it could not achieve its educational objectives through race neutral means.²⁶⁸ As the author of *Fisher*, Justice Kennedy interpreted *Grutter* never to have extended such deference to the law school.²⁶⁹

By reinterpreting *Grutter* in this way, Justice Kennedy nudged the standard for narrow tailoring ever closer to his preferred formulation that the Constitution “forbids the use even of narrowly drawn racial classifications except as a last resort.”²⁷⁰ Justice Kennedy had warned in *Grutter* that the Court’s “abdicat[ion of its] constitutional duty”²⁷¹ to apply “meaningful strict scrutiny” to race-based affirmative action provided a perverse incentive to public institutions to abandon the search for race neutral programs that would be “more effective in bringing about the harmony and mutual respect among all citizens that our constitutional tradition has always sought.”²⁷² His preference for the unrelenting application of “meaningful” strict scrutiny to the law school’s affirmative action program stemmed in part from his assumption that to do so would “force educational institutions to seriously explore race neutral alternatives.”²⁷³ *Fisher* may now compel such serious exploration, though universities can hardly be said to have been disinterested in pursuing such

²⁶⁸ Id. at 393–94 (Kennedy, J., dissenting) (“Were the courts to apply a searching standard to race-based admissions schemes, that would force educational institutions to seriously explore race neutral alternatives. The Court, by contrast, is willing to be satisfied by the Law School’s profession of its own good faith.”).

²⁶⁹ See, e.g., *Fisher*, 133 S. Ct. at 2420 (“The University must prove that the means chosen by the University to attain diversity are narrowly tailored to that goal. On this point, the University receives no deference. *Grutter* made clear that it is for the courts, not for university administrators, to ensure that ‘[t]he means chosen to accomplish the [government’s] asserted purpose must be specifically and narrowly framed to accomplish that purpose.’” (alterations in original) (quoting *Grutter*, 539 U.S. at 337)).

²⁷⁰ *Croson*, 488 U.S. at 519 (Kennedy, J., concurring); see also *Parents Involved*, 551 U.S. at 790 (Kennedy, J., concurring) (“[I]ndividual racial classifications . . . may be considered legitimate only if they are a last resort to achieve a compelling interest.”).

²⁷¹ *Grutter*, 539 U.S. at 395 (Kennedy, J., dissenting).

²⁷² Id. at 393–95.

²⁷³ Id. at 394.

options before this most recent decision.²⁷⁴ *Fisher* itself purports only to clarify preexisting law.²⁷⁵

What *Fisher* fails to do, however, is to explain how courts should consider an extensive history with the implementation of race neutral alternatives to affirmative action, such as the University of Texas at Austin itself had, when performing narrow tailoring analysis, if not by granting some degree of deference based on the university's experience. The university had, after *Hopwood v. Texas*,²⁷⁶ designed its admissions practices around the Texas Top Ten Percent Law. It had constructed its PAI, which at that time did not consider race, and, as Justice Kennedy writes in *Fisher*, the combination of these race neutral measures enjoyed some degree of success.²⁷⁷ What should a court make of such success when a university concludes that, to fully realize the educational benefits of diversity, it must take race into account? Should the court conclude that the university acted in good faith and gave serious consideration to race neutral alternatives or that the university failed to follow-up on its success by making adjustments to its race neutral practices that might yield some further benefit?

Furthermore, in *Grutter*, the Court had recognized that the use of race might serve the law school's interests in achieving meaningful student body diversity and in preserving the academic quality of its students.²⁷⁸ Justice Kennedy's opinion in *Fisher* expresses only the former concern. Does the Court now assume that race neutral criteria are inherently meritocratic, at least relative to explicitly race conscious criteria? If so, this is a deeply flawed assumption. The University of Texas's consideration of race, for example, provided it with the flexibility to admit minority students who did not fall within the top ten percent of their high schools' graduating classes but who graduated with honors from challenging high schools and performed well on standardized tests. In other words, the academic quality of some minority students who do not qualify for "top ten" admission may be superior to the quality of many students who do,

²⁷⁴ Siegel, *supra* note 14, at 1311–12 & n.100 (describing conservative support for efforts to pursue diversity in public universities through race neutral means).

²⁷⁵ See *Fisher*, 133 S. Ct. at 2415 (concluding merely "that the Court of Appeals did not hold the University to the demanding burden of strict scrutiny articulated in *Grutter* and *Regents of Univ. of Cal. v. Bakke*").

²⁷⁶ 78 F.3d at 935.

²⁷⁷ See *Fisher*, 133 S. Ct. at 2146 (describing how African American and Latino enrollment improved after *Hopwood* invalidated the university's prior use of race).

²⁷⁸ *Grutter*, 539 U.S. at 343.

and yet the university would lack the flexibility necessary to allow it to improve student diversity and academic quality by admitting such students if it were stuck with the blunt, race neutral instrument of the ten percent plan without a holistic approach that included consideration of race. Therefore, even as *Fisher* counsels very strongly in favor of the robust exploration of race neutral alternatives to affirmative action, the Court's continuing commitment to uphold educational values of diversity and academic quality may yet temper that counsel.

2. *Express Support of Facially Neutral Race Conscious Measures*

Justice O'Connor's majority opinions in *Croson* and *Grutter* voiced clear support for facially neutral race conscious measures. As part of her admonition in *Grutter* that race-based measures must be temporary, Justice O'Connor proposed a transition to race neutral measures. She suggested that public universities "can and should draw on the most promising aspects of . . . race-neutral alternatives" developed by "[u]niversities in California, Florida, and Washington State, where racial preferences in admissions are prohibited by state law."²⁷⁹ In *Croson*, Justice O'Connor justified the application of strict scrutiny to the challenged minority set-aside program by suggesting that "the city has at its disposal a whole array of race-neutral devices to increase the accessibility of city contracting opportunities to small entrepreneurs of all races."²⁸⁰ Justice O'Connor effectively responded to the criticism that strict scrutiny is "strict in theory, but fatal in fact"²⁸¹ by arguing that, even when strict scrutiny *is* fatal to the government's use of racial classifications, the Constitution does not preclude the government from taking action to promote racial equality through facially neutral measures.²⁸²

In the context of public contracting presented by the facts of *Croson*, Justice O'Connor proposed several race neutral alternatives: "Simplification of bidding procedures, relaxation of bonding requirements, and training and financial aid for disadvantaged entrepreneurs of all races

²⁷⁹ Id. at 342.

²⁸⁰ 488 U.S. at 509–10.

²⁸¹ Id. at 552 (Marshall, J., dissenting) (quoting *Fullilove*, 448 U.S. at 518–19 (Marshall, J., concurring)) (internal quotation marks omitted).

²⁸² Id. at 509 (supporting facially neutral race conscious alternatives "[e]ven in the absence of evidence of discrimination"). Where the government possesses evidence of racial discrimination, Justice O'Connor was confident that "[n]othing [in *Croson*] precludes a state or local entity from taking action to rectify the effects of identified discrimination." Id.

would open the public contracting market to all those who have suffered the effects of past societal discrimination or neglect.”²⁸³

Each of these proposals addresses a particular race neutral barrier to “new entrants” in the market which, Justice O’Connor believed, “may have a disproportionate effect on the opportunities open to new minority firms.”²⁸⁴ She hypothesized that the “elimination or modification” of these barriers would promote minority opportunity “without classifying individuals on the basis of race.”²⁸⁵ In his concurrence, Justice Scalia seconded Justice O’Connor’s support for race neutral alternatives, opining that “[a] State can, of course, act ‘to undo the effects of past discrimination’ in many permissible ways that do not involve classification by race.”²⁸⁶ Specifically, Justice Scalia proposed that the government “make it easier for those previously excluded by discrimination to enter the [contracting] field” by adopting a preference for “small” or “new” businesses.²⁸⁷ He argued that such programs “are not based on race” even though they “may well have racially disproportionate impact.”²⁸⁸

The Justices’ proposals are instructive. Each exploits the doctrinal distinction between governmental actions explicitly based on race and those merely producing racially disparate impacts, even when the latter are specifically aimed to increase minority opportunity or to “undo the effects of past discrimination.”²⁸⁹ None of the proposals is so well targeted to minority firms to ensure that the benefits would not be enjoyed by nonminority firms. For example, rather than proposing relaxed bonding requirements and preferences for small businesses, either Justice might have proposed that preferences be given to firms located within specific geographic boundaries or firms that hire a certain percentage of their employees of from the neighborhoods immediately surrounding a particular construction site. Patterns of residential segregation may have allowed such geographic preferences to neatly target minority businesses while simultaneously serving the additional purpose of providing economic assistance to distressed communities. Justice O’Connor and Justice Scalia avoided such proposals, leaving unclear whether they would

²⁸³ Id. at 509–10.

²⁸⁴ Id. at 510.

²⁸⁵ Id.

²⁸⁶ Id. at 526.

²⁸⁷ Id.

²⁸⁸ Id.

²⁸⁹ Id.

have found them to be race neutral. As discussed in greater detail in Part III, race neutral measures too well designed to produce specific racial outcomes may command strict scrutiny as if they contained racial classifications.

Two very strong criticisms of race neutral affirmative action measures were made by the dissenters to the Court's invalidation of the University of Michigan's undergraduate admissions plan in *Gratz*. The federal government had argued that the university could constitutionally pursue student body diversity by using a percentage plan guaranteeing admission to top performing students from public high schools.²⁹⁰ Justice Souter countered that “[w]hile there is nothing unconstitutional about such a practice, it nonetheless suffers from . . . the disadvantage of deliberate obfuscation.”²⁹¹ He charged that percentage plans “get their racially diverse results without saying directly what they are doing or why they are doing it,” and he concluded that “[e]qual protection cannot become an exercise in which the winners are the ones who hide the ball.”²⁹² Justice Ginsburg criticized the federal government's argument that percentage plans are race neutral alternatives as “disingenuous, for they ‘unquestionably were adopted with the specific purpose of increasing representation of African-Americans and Hispanics in the public higher education system’” and “depend for their effectiveness on continued racial segregation at the secondary school level.”²⁹³ She further described such plans as “creat[ing] perverse incentives” by “encourag[ing] parents to keep their children in low-performing, segregated schools.”²⁹⁴ She reiterated these concerns regarding the Texas ten percent plan again in her dissent in *Fisher*, chiding that “only an ostrich could regard the supposedly race-neutral alternatives” of the ten percent plan and “race-blind holistic review” as “race unconscious.”²⁹⁵ The percentage plan, she noted, “was adopted with racially segregated neighborhoods and schools

²⁹⁰ See, e.g., *Grutter*, 539 U.S. at 340.

²⁹¹ *Id.* at 297–98 (Souter, J., dissenting).

²⁹² *Id.* at 298.

²⁹³ *Id.* at 303–04 n.10 (Ginsburg, J., dissenting).

²⁹⁴ *Id.* at 304 n.10; see also Adams, *supra* note 11, at 874 (“[R]esidential segregation is *required* in order for percentage plans to work as intended.” (emphasis in original)); Sullivan, *supra* note 11, at 1042 (“Given de facto residential segregation in Texas . . . [the Texas Top Ten Percent Law] virtually guarantees threshold levels of minority representation among college admittees.”).

²⁹⁵ *Fisher*, 133 S. Ct. at 2433 (Ginsburg, J., dissenting).

front and center stage.”²⁹⁶ She also repeated her criticism of so-called “race blind holistic review” as ““camouflage”” intended to maintain minority enrollment.²⁹⁷ Justice Ginsburg’s criticisms reveal percentage plans and formally race neutral but racially targeted socioeconomic factors to be the very sorts of proposals omitted from Justice O’Connor’s and Justice Scalia’s opinions in *Crosby*: formally race neutral measures that use some other device—in this case, factors such as residential segregation or a student’s primary language—as a proxy for race. These criticisms underscore the fundamental question raised by this Article, which is at what point does the form, rather than the objective, of facially neutral legislation provide a basis for the application of strict scrutiny?

This question is a difficult one. Justice Kennedy’s *Parents Involved* concurrence suggests an interesting compromise. Justice Kennedy agreed with the plurality that strict scrutiny must apply to “individual racial classifications,”²⁹⁸ but he reserved the more general term “race-conscious measures” to describe conduct in which public institutions are “free” to engage.²⁹⁹ Certainly school districts are not “free” to implement racial classifications; these must receive strict scrutiny and that very fact is critical to the outcome in *Parents Involved*. Even in the absence of racial classifications, Justice Kennedy himself is quick to put limits on that freedom, as he explains:

If school authorities are concerned that the student-body compositions of certain schools interfere with the objective of offering an equal educational opportunity to all of their students, they are free to devise race-conscious measures to address the problem in a general way and without treating each student in different fashion solely on the basis of a systematic, individual typing by race.

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 gen-

²⁹⁶ *Id.* (quoting *Gratz*, 539 U.S. at 304 (Ginsburg, J., dissenting)).

²⁹⁷ *Id.*; see also Transcript of Oral Argument at 24, *Fisher*, 133 S. Ct. 2411 (2013) (No. 11-345) (Justice Ginsburg stated that “the only reason they instituted the 10 percent plan was to increase minority enrollment” and “the only way it works is if you have heavily [racially] separated schools.”).

²⁹⁸ *Parents Involved*, 551 U.S. at 720; *id.* at 784, 790 (Kennedy, J., concurring).

²⁹⁹ *Id.* at 788.

eral 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.³⁰⁰

Justice Kennedy attempts to draw a clear distinction between “race conscious” mechanisms and “classification[s] that tell[] each student he or she is to be defined by race.”³⁰¹ Racial classifications are tightly constrained by strict scrutiny and rightly so, according to Justice Kennedy, because they express to the individual that the government has defined him by his race, thus impugning his sense of dignity by fitting him with “a label that [he is] powerless to change.”³⁰² Facially neutral race conscious measures, such as “strategic site selection” and “attendance zones” conscious of neighborhood demographics, are “unlikely” to “demand strict scrutiny” because, though they *may* produce the same expressive and dignitary harms, they “present these problems to a lesser degree.”³⁰³

Justice O’Connor’s concession in *Shaw* that reapportionment, even when undertaken for racial reasons, does not classify persons on the basis of race³⁰⁴ sounds quite consonant with Justice Kennedy’s prescription in *Parents Involved* that school districts aiming to avoid racial isolation would be “unlikely” to face strict scrutiny if they implemented formally race neutral alternatives to explicit racial classification.³⁰⁵ The practices prescribed by Justice Kennedy bear meaningful resemblance to redistricting: The government ordinarily performs them with knowledge of demographic factors that include race. Like redistricting, they concern the mapping of conceptual lines onto physical space; and this can and does occur without explicit reference to race. Race consciousness, how-

³⁰⁰ Id. at 788–89 (emphasis added).

³⁰¹ Id. at 789.

³⁰² Id. at 797; see also id. at 789 (“Assigning to each student a personal designation according to a crude system of individual racial classifications is quite a different matter [from] . . . consider[ing] the impact a given approach might have on students of different races.”).

³⁰³ See id. at 789, 797.

³⁰⁴ See supra note 122 and accompanying text.

³⁰⁵ *Parents Involved*, 551 U.S. at 789 (Kennedy, J., concurring); see also infra Subsection II.B.2 (discussing Justice Kennedy’s concurrence in *Parents Involved*).

ever, does not equal unconstitutional race discrimination. In this sense, Justice O'Connor's rationale in *Shaw* lends support to Justice Kennedy's position in *Parents Involved*. There is just one problem: In *Shaw*, the Court does find a racial classification and does apply strict scrutiny, but Justice Kennedy offers his proposals as alternatives to racial classification in order to avoid strict scrutiny. Justice Kennedy never explains why his proposed alternatives would be likely to escape strict scrutiny.³⁰⁶ Perhaps he assumed that, unlike the bizarrely drawn district in *Shaw*, it would be difficult to construe alternatives such as site selection and attendance zone drawing as having been motivated solely by race or as necessarily communicating a pernicious racial message because they could also be seen to fulfill wholly race independent objectives.

Justice Kennedy's proposals may expose him to the charge that "indirection" in fact means obfuscation.³⁰⁷ He himself accepted that the renunciation of racial classifications may be "inefficient,"³⁰⁸ but he also concluded that racial classifications should be avoided even when the problems faced by the government are racial in nature, calling this a "frustrating duality of the Equal Protection Clause."³⁰⁹ His proposals are less indirect than those of Justice O'Connor and Justice Scalia; he was willing to use geographic selection to achieve racial ends, and this strategy may be successful because residential segregation makes geography a reliable racial proxy. Perhaps this is why Justice Kennedy also sounded a note of caution about the constitutionality of race neutral means. Justice Kennedy stated that the threats to individual dignity and political cohesion that he associated with racial classifications were "dangers that are *not as pressing* when the same ends are achieved by more indirect means."³¹⁰ In other words, to avoid racial classifications is merely to court these problems "*to a lesser degree*."³¹¹

³⁰⁶ See Siegel, *supra* note 22, at 1011 (criticizing Justice Kennedy for failing to explain "why '*individual classifications*' present dangers that are not as pressing when the same ends are achieved *by more indirect means*").

³⁰⁷ See *supra* note 291 and accompanying text.

³⁰⁸ See, e.g., *Parents Involved*, 551 U.S. at 796 (Kennedy, J., concurring). Justice Kennedy refers to this notion that race may be the problem and yet impermissible in the form of the solution as "a frustrating duality of the Equal Protection Clause." *Id.* at 797.

³⁰⁹ *Id.*

³¹⁰ *Id.* (emphasis added).

³¹¹ *Id.* (emphasis added).

Justice Kennedy distinguishes racial classifications from permissible race conscious measures by describing the latter as “indirect,”³¹² “general,”³¹³ *not* “systematic,”³¹⁴ and *not* forcing any “crude”³¹⁵ designation upon the individual. This language is reminiscent of the Court’s distinction in *Grutter* between racial classifications that would fail strict scrutiny and those that may succeed because their oblique use of race facilitates individualized consideration. Justice Kennedy uses these terms to differentiate permissible race conscious measures from impermissible racial classifications. But they are also terms that might be used to differentiate between permissible and impermissible facially race neutral measures, just as the Court differentiates in *Grutter* between permissible and impermissible racial classifications. Justice Kennedy’s argument implies that, if race neutral measures are only less likely than racial classifications to express dignitary harms, there must be some further distinction to be drawn between race neutral means in terms of the likelihood that they will avoid dignitary harms. Why, for example, would site selection and the drawing of attendance zones constitute permissible race neutral measures when they appear to use geography as a racial proxy? It may be, because school districts are aware of race in the ordinary course of performing these activities and race may be considered alongside numerous other non-suspect factors, such as population density, available transportation avenues, the size and shape of an attendance zone, or the convenience of a school’s location for the greatest number of students.

Justice Kennedy’s concurrence provides no guidance with respect to how the government weighs such additional factors. Yet it does advance our understanding of the constitutionality of facially neutral measures by signaling two pitfalls that such measures must negotiate. First, facially neutral measures can be rendered ineffectual by their indirection. Second, they must avoid reproducing the very expressive harms associated with racial classifications. Facially neutral measures that hew too closely to race—by making the fit between race conscious ends and facially neutral means too tight—may be more prone to reproduce the harms of racial classification. As a practical matter, such measures may be more

³¹² *Id.*

³¹³ *Id.* at 789.

³¹⁴ *Id.*

³¹⁵ *Id.* at 798.

effective at promoting racial integration, but they may also raise concerns about racial inferiority and balkanization.³¹⁶

Like the proposals for facially neutral race conscious action made by Justice O'Connor and Justice Scalia in *Croson*, Justice Kennedy's proposals are appealing because they appear to provide government some leeway to pursue racially egalitarian goals under the constraints provided by equal protection doctrine. The truth, however, is that, despite the apparent clarity of equal protection's framing rules, the distinction between permissible and impermissible race conscious measures is a hard one to draw, and the various opinions in *Croson*, *Grutter*, *Gratz*, and *Parents Involved* hardly set the matter straight. What they do show, however, is that even moderate and conservative members of the Court have refused to equate all race conscious motivations with illicit discriminatory purposes of the type that would trigger either strict scrutiny or invalidation under *Washington v. Davis* and its progeny.

The opinions examined above strongly suggest that whether facially neutral measures undertaken for racially egalitarian purposes evade strict scrutiny is at least in part a function of their form; the more indirect the measure with respect to the promotion of particular racial outcomes, the more likely it is to avoid the application of strict scrutiny even where it leads to a racially identifiable disparate impact. As explored in greater detail in the next Part, the Court's inferred classification precedents put a finer point on just how the form of a statute or governmental practice may influence the Court's decision to apply strict scrutiny. They suggest that the Court will apply strict scrutiny to facially neutral measures when it perceives that the same constitutional equality harms ordinarily associated with the use of explicit racial classifications are being perpetrated by facially neutral means. Prior definitions of constitutional injury may therefore serve as a guidepost, and, as the analysis in Part I demonstrates, the Court may select between very different constitutional equality values in order to arrive at the conclusion that facially neutral measures are functionally indistinguishable from explicit racial classifications and therefore deserve the same searching scrutiny.

³¹⁶ For a thorough and provocative discussion of antibalkanization as a constitutional value having significant influence on the Supreme Court's recent equal protection decisions, see generally Siegel, *supra* note 14.

III. RECONSIDERING RACE NEUTRALITY

The inferred classification cases discussed in Part I demonstrate that the absence of an explicit racial classification will not necessarily end the inquiry into how the form of the government's action may affect its constitutionality. The form and practical effect of facially neutral measures *do* matter even if the Court is unwilling to find an invidious purpose because they may support the inference of a racial classification. The government's purpose of course remains an important consideration when assessing the constitutionality of race neutral alternatives to overt classification—one that has been, and continues to be, discussed widely among constitutional scholars. However, obedience to equal protection's framing rules has generally led scholars to overlook the independent significance of legislative form when evaluating the constitutionality of facially neutral state action.

Recognizing that the Supreme Court has inferred racial classifications by interpreting legislative form allows us to reconsider the constitutionality of facially neutral race conscious measures by posing a new set of analytical questions. Rather than assuming that facially neutral measures will receive deferential rationality review unless shown to have been motivated by a discriminatory purpose, the analysis in this Part demonstrates that the Supreme Court may follow the model of its inferred classification precedents by applying strict scrutiny to facially neutral measures enacted without a discriminatory purpose when such measures threaten constitutional equality values ordinarily enforced by the application of strict scrutiny to racial classifications. This Part therefore cautions public institutions that formally race neutral measures adopted with racially egalitarian goals should be designed with an awareness that insufficiently indirect measures may trigger strict scrutiny.

A. Judicial Incentives to Infer Racial Classifications

The practice of inferring racial classifications provides certain instrumental and normative benefits as compared with the application of discriminatory purpose doctrine.³¹⁷ One of the benefits of inferring a racial classification is that it gives the reviewing court access to the exacting lens of strict scrutiny without ostensibly deviating from ordinary equal

³¹⁷ See *supra* notes 150–55 (discussing these benefits in relation to *Shaw*).

protection analysis.³¹⁸ The court does not engage in an illegitimate exercise of judicial power when it applies strict scrutiny to racial classifications; it is simply following the rules, and it cannot be blamed for the presence of a racial classification that only the defendant political institution could have authored. For this reason, inferred classifications must be capable of being represented as unambiguous, occurring “on the face” of legislation or apparent from the legislation’s form. Otherwise, the application of strict scrutiny to facially neutral legislation represents an unconstitutional inflation of judicial power. The ability to trace a racial classification to the form of legislation mitigates the accusation of illegitimacy, though it does not change the fact that the court has indeed made a choice to exercise heightened scrutiny.

And inferring racial classifications offers other instrumental benefits. As the Supreme Court has often commented, discriminatory purpose doctrine requires difficult fact-intensive investigation.³¹⁹ The inference of a racial classification has turned much more on what the government’s action means to a majority of the Court than on how the action arose; to find a classification requires interpretation more than investigation. Evidence of the government’s true motivation may be ambiguous without dissuading the Court from concluding that, on its face, a statute expresses a dubious racial meaning.³²⁰ Questions such as whether legislation may impugn individual dignity or result in the fracture of political community are speculative and turn on how the government’s action is interpreted within a sociohistorical context that is itself open to interpretation.³²¹ Indeed, inferring racial classifications may also have a stronger

³¹⁸ See supra Section I.D.

³¹⁹ See, e.g., *Adarand*, 515 U.S. at 213 (arguing that cases “concern[ing] only classifications based explicitly on race . . . present[] none of the additional difficulties posed by laws that, although facially race neutral, result in racially disproportionate impact and are motivated by a racially discriminatory purpose”); see also *Hunt v. Cromartie*, 526 U.S. 541, 546 (1999) (assessment of the government’s motivation is “an inherently complex endeavor”); *Arlington Heights*, 429 U.S. at 266 (purpose analysis requires a “sensitive inquiry” of circumstantial and direct evidence).

³²⁰ See, e.g., supra Section I.C (discussing *Shaw*).

³²¹ For example, in *Hunter and Seattle School District*, the Court interprets the sociohistorical context in which the challenged laws were enacted to determine that they discriminated against racial minorities by subordinating their political interests. See supra Section I.B In *Shaw*, the Court points to the context of “our country’s long and persistent history of racial discrimination in voting,” 509 U.S. at 650, and the fact that “for too much of our history, [many have held the belief] that individuals should be judged by the color of their skin,” to conclude that the majority-black district challenged in that case may promote racial stereotyping and balkanization, *id.* at 657.

deterrent effect than invalidating legislation on purpose grounds, because it provides other governmental actors with clear examples of formal policy structures to be avoided regardless what the reasons for adopting such structures may be.³²²

Normatively, inferring classifications serves several functions. First, it has allowed the Court to deflect the very question that has so occupied the minds of scholars who have considered the constitutionality of race neutral affirmative action plans: Are racially egalitarian purposes discriminatory purposes? In *Shaw*, the Court used the inference of a racial classification in exactly this way, evading the question of whether compliance with the Voting Rights Act through the creation of a majority-black voting district constitutes a discriminatory purpose.³²³ More recently, the question of whether the avoidance of racial isolation constitutes a compelling or illegitimate purpose appeared to raise problems even within a coalition of the Court's conservative members.³²⁴ Second, inferring classifications can serve a transitional function (again, as it appeared to do in *Shaw*), permitting the Court to act upon its "normative discomfort"³²⁵ with a challenged practice by applying strict scrutiny before it decides conclusively on the doctrinal framework that it will use when addressing similar cases.³²⁶ Third, it allows the Court to vindicate constitutional values that are otherwise associated with the application of strict scrutiny to explicit racial classifications. In *Shaw*, the Court held that if the "appearance" of a redistricting plan that had no explicit racial classification nevertheless rendered the plan incapable of being understood as anything other than an effort to segregate voters by race, then the plan must be subjected to strict scrutiny in order to preserve values

³²² For example, *Shaw* suggests that voting districts should obey conventional rules of compactness and contiguity, or else the racial breakdown of a district may support the conclusion that the district was drawn along racial lines. 509 U.S. at 647. *Hunter* and *Seattle School District* suggest that governments should not subject the passage of civil rights laws to unique structural disadvantage within the political system, or else the restructuring law may be interpreted as an effort to place special burdens on the political participation of racial minorities. *Hunter*, 393 U.S. at 391; *Seattle Sch. Dist.*, 458 U.S. at 474.

³²³ See supra note 150 and accompanying text.

³²⁴ See supra notes 234–44 and accompanying text (discussing disagreement between the *Parents Involved* plurality and Justice Kennedy).

³²⁵ Primus, supra note 4, at 511 (suggesting that whether circuit courts apply strict scrutiny to racial reporting requirements has reflected their "normative discomfort" with specific challenged practices).

³²⁶ See supra notes 150–55 and accompanying text (discussing the transition from *Shaw* to *Miller*).

of individual dignity and political cohesion protected under the Equal Protection Clause.³²⁷ In *Hunter* and *Seattle School District*, the Court perceived a threat to the representation-reinforcing commitments of equal protection in laws that restructured the political process by placing special burdens on minority interests.³²⁸ In the context of race neutral affirmative action, the Court might rely on its existing affirmative action precedents to apply strict scrutiny in defense of individual dignity and equal consideration if, for example, a plan relied on racial stereotypes to identify race neutral proxies for race or if it failed to provide individualized consideration of the person as a whole and their potential contributions to a public enterprise.³²⁹

Inferred classification cases reveal a great deal about the Court's commitment to particular constitutional equality values. Even for those values deemed so significant that they demand judicial protection despite the absence of an explicit racial classification, the question is not simply whether they are threatened but *how*. On the one hand, these cases suggest important constitutional limitations on the formal features of race neutral legislation. For representation-reinforcing values to deserve the protection of strict scrutiny, *Hunter* and *Seattle School District* require a restructuring of the political process and not merely of the repeal of legislation benefiting minority interests.³³⁰ For racial redistricting to receive strict scrutiny under *Shaw*, the challenged district must so deviate from conventional standards of compactness, contiguity, and respect for political subdivisions that, on its face, it signifies race; the construction of a majority-minority district standing alone would not have triggered strict scrutiny.³³¹

On the other hand, these cases also provide new territory in which to explore the reach of certain constitutional values. For example, in *Hunter* and *Seattle School District*, the Supreme Court recognized that important equality values of political cohesion and participation are threatened when the reorganization of political structures places special burdens on minority interests. The issues raised in those cases are of re-

³²⁷ See supra Section I.C.

³²⁸ See supra Section I.B.

³²⁹ See supra notes 212–48 and accompanying text (referencing several situations in which the Supreme Court has discussed the effect of racial classifications on classified individuals).

³³⁰ See supra notes 98–104 and accompanying text (explaining the impact *Hunter* and *Seattle School District* had on the use of strict scrutiny in racial classification cases).

³³¹ See supra notes 121–31 and accompanying text (discussing the Court's reasoning in *Shaw*).

newed interest in an era when state laws are being used to preclude political subdivisions of those states from instituting affirmative action programs,³³² even if the representation-reinforcing outlook of those cases is at odds with contemporary colorblindness discourse.³³³ These cases do not ensure the passage or the constitutionality of legislation aimed at satisfying minority interests. They can, therefore, be applied alongside modern equal protection cases such as *Grutter* and *Parents Involved* that require the application of strict scrutiny to laws that classify by race.

Indeed, in *BAMN v. Regents of the University of Michigan*,³³⁴ the Sixth Circuit sitting en banc recently held that Michigan's Proposal 2, which amended the state constitution specifically by outlawing race-based affirmative action,³³⁵ constituted a restructuring of the political process that required the application of strict scrutiny in accordance with *Hunter* and *Seattle School District*.³³⁶ The circuit court ruled that the amendment failed strict scrutiny because the state offered no compelling interest to justify its enactment.³³⁷ The amendment was proposed and passed following the Supreme Court's rulings in *Gratz* and *Grutter*,³³⁸ but the court apparently did not believe that it had to address the reach of *Gratz* or *Grutter* in order to reach the political restructuring issue. Thus, even according to *BAMN*, race-based affirmative action programs by political institutions within the state must satisfy strict scrutiny, but *BAMN* reaffirms that whether minorities may be constitutionally precluded from pursuing such programs also depends on whether the laws designed to preclude their efforts themselves satisfy strict scrutiny. The political restructuring cases further suggest that, as manifested in *BAMN*, the right to pursue one's political interests unencumbered by any special political

³³² The two most notable examples of this phenomenon are California's Proposition 209 and Michigan's Proposal 2, both of which are amendments to the states' constitutions enacted by popular referendum that prohibit the use of race-based affirmative action by any public institution within either state. Cal. Const. art. I, § 31(a); Mich. Const. art. I, § 26.

³³³ See supra Section II.A.

³³⁴ *BAMN v. Regents of the Univ. of Mich.*, 701 F.3d 466 (6th Cir. 2012), cert. granted sub. nom. *Schuetz v. Coal. to Defend Affirmative Action*, 133 S. Ct. 1633 (Mar. 25, 2013) (No. 11-345).

³³⁵ Mich. Const. art. I, § 26 (providing that public universities "shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting").

³³⁶ *BAMN*, 701 F.3d at 488.

³³⁷ *Id.* at 489.

³³⁸ *Id.* at 471.

disability is itself independent of the constitutionality of any specific program or policy that a minority group may seek to enact. The Supreme Court has recently granted certiorari to State of Michigan's petition for review,³³⁹ and therefore a ruling on the continuing validity of the Court's political restructuring precedents is expected to issue during its 2013 term.

The application of strict scrutiny always reflects a choice by the reviewing court. The colorblindness rationale of the Court's affirmative action cases portrays the Court as without discretion to select the level of judicial scrutiny. The inferred classification cases, by contrast, demonstrate that the application of strict scrutiny is an exercise of judicial agency because in each of these cases, the identification of a racial classification requires an interpretive choice. Recognizing the circumstances in which a court may make such a choice therefore must be considered an important part of the calculus by public institutions weighing the constitutionality of race neutral alternatives to affirmative action.

B. Amending the Counsel of Race Neutrality

The inferred classification cases suggest that a set of form-based considerations alternative to the government's motivation may guide the resolution of future cases involving race neutral affirmative action and that the Court should be expected to apply strict scrutiny to facially neutral measures that violate the same constitutional equality values ordinarily enforced through the application of strict scrutiny to explicit racial classifications. The Court's affirmative action cases further suggest that the Court would be particularly concerned to uphold constitutional values of equal consideration and individual dignity when reviewing race neutral alternatives to affirmative action.

Consider first *Shaw* in relation to the percentage-based admissions plans that have already come to the Court's attention and were again a topic of concern in *Fisher*.³⁴⁰ *Shaw* establishes that courts may infer a racial classification from the irregularity of the government's action, and

³³⁹ *Schutte v. Coal. to Defend Affirmative Action*, 133 S. Ct. 1633 (Mar. 25, 2013) (No. 11-345).

³⁴⁰ See supra notes 260–278 and accompanying text (discussing the Court's sharpening of its requirement that public institutions seriously consider race neutral alternatives in order to satisfy strict scrutiny); see also supra notes 295–97 and accompanying text (discussing Justice Ginsburg's continued skepticism regarding the putative race neutrality of percentage plans in *Fisher*).

whether the government's action is so irregular as to be constitutionally suspect is a matter of context and interpretation. The question is not simply whether the government has materially deviated from those practices ordinarily used to structure its decisions. Under *Shaw*, a court may judge those decisions suspect based on the irregular *appearance* of a legislative outcome. The redistricting plan in *Shaw* was constitutionally suspect not because state legislators failed to observe procedural niceties or even because they failed to raise substantive principles that ordinarily influence the shape of electoral districts; it was suspect because, by the Supreme Court's lights, the end-state of the legislative process communicated a pernicious racial meaning and could not be justified in terms of race neutral principles.

Percentage plans are susceptible to the same type of analysis. As Justice Ginsburg has repeatedly noted, their success in promoting racial diversity is due to their reliance on patterns of residential segregation that have contributed to the racial stratification of the public school system.³⁴¹ One could argue that the racial demographics of public schools allow them to serve as racial proxies, rendering percentage plans substantially successful at promoting racial integration and yet functionally indistinguishable from overt racial classifications.³⁴² Or one may conclude that, whatever the circumstances preceding the implementation of particular plans, they should be understood as serving both race conscious and substantively race neutral purposes. Certainly such plans are race conscious if they are intended to promote racial integration. But in other senses, they are not only formally, but also substantively race neutral. In allocating public university admission to students based on their public school performance, percentage plans use a "general" metric commonly understood to signify academic merit, and may be viewed as consistent with individualized consideration because they value student achievement. Such plans also respect existing political subdivisions³⁴³ and indeed could be seen as attempting to allocate resources fairly and efficiently between public schools, each of which has an interest in sending graduates to state universities. Percentage plans may reflect a rea-

³⁴¹ See supra notes 293–97 and accompanying text.

³⁴² See Adams, supra note 11, at 871 ("The only reason percentage plans exist is to substitute for racially explicit admission schemes—they have no other purpose."); see also supra note 12 (citing scholars arguing in favor of applying strict scrutiny to race neutral affirmative action because of its race conscious motivations).

³⁴³ Cf. *Shaw*, 509 U.S. at 646–47.

sonable effort to improve public school performance and to inspire student excellence by predictably rewarding academic achievement in a manner that appears consistent with respect for each student's individual dignity.

For these reasons, it is unlikely that the Supreme Court would conclude that a plan like the Texas Top Ten Percent Law is rationally incapable of being interpreted as anything other than a race-based admission plan. The same may not be said, however, of percentage plans that make distinctions between the graduating institutions from which students are admitted. For example, were Texas to double the percentage of students admitted from underperforming public schools in low income communities, it might justify such an amendment to its plan as an effort to improve school performance by galvanizing student commitment to academic excellence, and it might further argue that public university education is a public resource of special importance to residents of economically disadvantaged communities. These are substantively race neutral justifications. Nevertheless, if the concentration of racial minorities in underperforming schools were sufficiently high, the Court might infer a racial classification from the special solicitude given to students from those schools which could suggest that the true basis for denying students at these two types of schools equal consideration was race.

The inference of a racial classification in *Shaw* should also inform our evaluation of the race neutral prescriptions offered by Justice Kennedy in *Parents Involved*. The “drawing [of] attendance zones with general recognition of the demographics of neighborhoods”³⁴⁴ may not trigger the inference of a racial classification provided that the government adheres to established school zoning practices, such as respecting the contours of existing neighborhoods, managing the number of students that may be accommodated by school facilities, and evaluating transportation routes. If appropriate considerations were made, it seems implausible that the only rational inference to draw would be that the lines separating zones are premised on race. By contrast, we could imagine student attendance zones drawn in such a bizarre fashion, with such an irregular shape and with so little regard for conventional considerations, that they can only be understood by the accuracy with which they map onto the racial dispersion of students across a school district. Such a zoning plan might trigger the inference of a racial classification for substantially the

³⁴⁴ *Parents Involved*, 551 U.S. at 789 (Kennedy, J., concurring).

same reasons that the North Carolina reapportionment plan received strict scrutiny in *Shaw*.

The lesson cannot simply be, however, to eliminate attendance zones from Justice Kennedy's listed recommendations. Even a race neutral measure as seemingly benign as the "allocat[ion of] resources for special programs"³⁴⁵ may trigger the inference of a racial classification if the measure formally favored underperforming schools in disadvantaged communities but as a consequence a disproportionate amount of a district's resources for special programs were allocated to majority-minority schools. Resource allocation may represent an effective strategy for alleviating racial isolation as students of all races seek to attend schools with desirable programs, but if other legitimate factors such as institutional need and the merit of existing or proposed programs inadequately explain the pattern of allocation this may support the inference of a racial classification.

How the Court might weigh evidence of institutional need against the appearance that schools have been selected to receive resources based on their racial composition is an open question. Justice Kennedy apparently presumes that, if student transfer to a particular school benefits racial diversity, the formal race neutrality of the resource allocation program will render it "unlikely" to be reviewed under strict scrutiny.³⁴⁶ Yet he does not believe that "indirect means" present *no* danger of dignitary harm to students, only that such harm may be present to a "lesser degree."³⁴⁷ *Shaw* reminds us that in certain circumstances "appearances do matter,"³⁴⁸ and education is a context in which the Court has long expressed concern about the social meanings that formal consideration of race may communicate to students.³⁴⁹ The degree to which resource allocation appears independent of race both because of the race neutral criteria used *and* because of where those resources fall may therefore determine whether the Court would require the government to satisfy strict scrutiny.

The extent to which the Court may grant public institutions leeway to experiment with race neutral alternatives to affirmative action is also an

³⁴⁵ *Id.*

³⁴⁶ See *supra* notes 300–03 and accompanying text.

³⁴⁷ *Parents Involved*, 551 U.S. at 797 (Kennedy, J., concurring).

³⁴⁸ *Shaw*, 509 U.S. at 647 (addressing reapportionment).

³⁴⁹ See *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954); see also *Parents Involved*, 551 U.S. at 788–89 (Kennedy, J., concurring); *Grutter*, 539 U.S. at 332–33.

open question. *Fisher* holds that no judicial deference is given to public educational institutions regarding whether the design of race-based programs satisfies narrow tailoring, despite the fact that the unique requirements and expertise of educational institutions may render judicial oversight of their programs especially difficult. *Grutter* had previously required “serious, good faith consideration of workable race-neutral alternatives”³⁵⁰ before the Court would pronounce that race-based measures satisfied narrowly tailoring. *Fisher* defines such consideration to require a demonstration that “no workable race-neutral alternatives would produce the educational benefits of diversity.”³⁵¹ *Fisher* does not suggest that any deference should be given during narrow tailoring analysis to public institutions that have extensive experience developing or implementing race neutral measures. Though the record of their efforts may assist them to demonstrate that “no workable race-neutral alternatives” exist, it will not mitigate their duty to make such a demonstration. The Court has never considered whether deference should be given to public institutions concerning the constitutionality of race neutral measures that serve racially egalitarian ends. Deference might serve as a means to promote reliance on such measures or simply demonstrate respect for the difficulty that institutions may face in designing effective race neutral measures. *Fisher* and its predecessors, however, provide no basis to accord public institutions with any amount of deference concerning the constitutionality of formally race neutral measures that may appear by their form and practical effect to be indistinguishable from explicitly racially classificatory measures. Indeed, if the execution of strict scrutiny tolerates no deference, the decision whether to apply strict scrutiny would seem also to reject any deference to the defendant institution.

The possible implications of *Seattle School District* for the race neutral options supported by Justice Kennedy pose similar difficulties. No Justice in the *Parents Involved* majority substantively discussed the earlier *Seattle* school decision.³⁵² As Justice Breyer opines in his dissent,

³⁵⁰ *Grutter*, 539 U.S. at 339–40.

³⁵¹ *Fisher*, 133 S. Ct. at 2420.

³⁵² Chief Justice Roberts observed that *Seattle School District* did not address the question whether the Constitution permitted the school district to resort to race-based student assignments in the absence of de jure segregation. See *Parents Involved*, 551 U.S. at 721 n.10; accord *Seattle Sch. Dist.*, 458 U.S. at 472 n.15 (noting the parties “d[id] not challenge the propriety of race-conscious student assignments for the purpose of achieving integration” and so making no ruling on that issue).

“[i]t is difficult to believe that the Court that held unconstitutional a referendum that would have interfered with the implementation of [the Seattle Plan] thought that the integration plan it sought to preserve was itself an *unconstitutional* plan.”³⁵³ Indeed, it seems odd that the Court would preserve the school district’s authority to implement a more aggressively race balancing student assignment plan only, in *Parents Involved*, to strike down a more modest plan that sought only the avoidance of racial isolation.³⁵⁴ *Seattle School District* barred the State of Washington from withdrawing from school districts the authority to engage in race-based student assignment because this “reallocation of power” placed “special burdens” on minority interests in the political process,³⁵⁵ but *Parents Involved* now effectively precludes state and local governments from enacting such a policy. These decisions may be consistent. The earlier decision preserved for minority voters the opportunity to seek through a fair and neutral political process legislation understood to be in their interests, and it may be interpreted to do so even when the legislation sought could not itself survive strict scrutiny. In other words, the right to seek legislation on equal terms is not contingent on the legislation’s constitutionality. This is a reasonable distinction and a helpful one, assuming that it is one the Court meant to make in *Parents Involved*.

The alternative is that a majority of the Court no longer views equal protection as serving representation-reinforcing equality values. This may be because the Court has lost faith in the integrity of democratic processes and now repudiates any “special role” for the judiciary in safeguarding the political interests of racial minorities.³⁵⁶ Colorblind constitutionalism regards strict scrutiny as constitutive of the individual’s equality right rather than as an instrument of judicial review that is subject to the Court’s discretion to vindicate particular constitutional values in some circumstances, and perhaps not in others. This approach places on racial minorities the responsibility to “seek the political consensus that begins with a sense of shared purpose” should they wish to

³⁵³ *Parents Involved*, 551 U.S. at 857 (Breyer, J., dissenting).

³⁵⁴ *Id.* at 810–13 (comparing the plans).

³⁵⁵ *Seattle Sch. Dist.*, 458 U.S. at 474–75 n. 15.

³⁵⁶ *Id.* at 486; see also Pamela S. Karlan, Foreword: Democracy and Disdain, 126 *Harv. L. Rev.* 1, 29 (2012) (“[T]he Roberts Court has lost faith in the democratic process, and that doubt affects its decisions in ways both large and small.”).

achieve some objective through the political process.³⁵⁷ If, as a consequence of their failure to secure a majority coalition, racial minorities are precluded from pursuing lawful racially egalitarian objectives, the Court may find this to be but another “frustrating duality” of equal protection doctrine.³⁵⁸

These concerns are not merely academic. This much is clear from the *BAMN* litigation.³⁵⁹ But one need look no further than to the direct aftermath of *Parents Involved* in Jefferson County. It raises two important questions. What are the constitutional constraints on the county’s efforts to continue to pursue racial integration without classifying students by race? And may the State of Kentucky abridge the county’s authority to pursue racial integration, including by race neutral means, without denying equal protection to racial minorities within the county?

Following the Supreme Court’s ruling, the Jefferson County school board revised its student assignment plan in an effort to maintain student diversity within each school without classifying individual students by race. The revised plan set “diversity guidelines” specifying that each school (excluding magnet schools) must enroll “at least fifteen percent and no more than fifty percent of its students from identified neighborhoods with income and adult education levels below the district averages and higher than average populations of minority students.”³⁶⁰ The plan assigned students to a “resides school” based on their address, and it called for the supplementation of the diversity guidelines with additional factors concerning parental preference and student need.³⁶¹ The plan has undergone further revisions since January 2012, including adding English as a Second Language (“ESL”) students to the diversity calculation, increasing the number of attendance zones to decrease transportation time, and replacing the previous guidelines with a “diversity index” that uses updated census data to sort 570 census areas into one of three soci-

³⁵⁷ *Rice v. Cayetano*, 528 U.S. 495, 524 (2000); see also *id.* at 523 (holding that the state violated the Fifteenth Amendment by reserving special voting privileges for ancestral Hawaiians to elect trustees of matters related to their unique interests because “[a]ll citizens, regardless of race, have an interest in selecting officials who make policies on their behalf, even if those policies will affect some groups more than others”).

³⁵⁸ See *supra* note 309 and accompanying text.

³⁵⁹ See *supra* notes 334–38 and accompanying text.

³⁶⁰ *Fell v. Jefferson Cnty. Bd. of Educ.*, No. 2010-CA-001830-MR, slip op. at 10 (Ky. Ct. App. Sept. 30, 2011).

³⁶¹ *Id.* (“Decisions to assign students . . . are based upon parental preference, assignment of siblings, the student’s resides school, the needs of the student, school and program capacity and diversity guidelines in the district’s current assignment plan.”).

oeconomic categories.³⁶² The index assigns schools a weighted average based on the number of students enrolled at the school from each category.³⁶³ In all versions of the revised plan, socioeconomic criteria (that is, household income, educational level, minority population) are used to categorize neighborhoods and are not applied to individual students. Under the current plan, an individual student's race is not used to assess the impact of that student's assignment on the racial composition of a particular school. Only the student's address is used to calculate the school's compliance with the diversity index.

Arguments for and against the constitutionality of the revised plan are abundant. On the one hand, under the current plan, the county does not classify individual students on the basis of race and does not assign students to a particular school or deny requests for school transfer based on a student's race. Race neutral factors such as average neighborhood income and parental education avoid the racial classifications ruled unconstitutional in *Parents Involved* and appear to adhere to Justice Kennedy's recommendation that the county pursue racial integration through race neutral means.³⁶⁴ The county might also justify socioeconomic diversity based on its associated educational benefits (for example, preparing stu-

³⁶² Each area is defined as "category 1" (average household income below \$42,000; racial composition of less than 73% white; and average educational attainment of up to an associate's degree), "category 2" (average household income of between \$42,000 and \$62,000; racial composition between 73% and 88% white; and average educational attainment of college courses in excess of an associate's degree), or "category 3" (average household income of more than \$62,000; racial composition of more than 88% white; and average educational attainment of college courses up to a bachelor's degree and beyond). The revised diversity index requires that a school fall within the range of 1.4 to 2.5. See Student Assignment, Jefferson Cnty. Pub. Sch. Bd. of Educ. (May 29, 2012), <http://www.jefferson.kyschools.us/Board/Documents/StudentAssign.html>.

³⁶³ See supra note 362; see also Antoinette Konz, JCPS Board OKs Revised Student-Assignment Plan, *Courier-J.*, Jan. 10, 2012, at A1.

³⁶⁴ See *Parents Involved*, 551 U.S. at 789 (Kennedy, J., concurring) (arguing that schools may consider "with candor" the racial impact of race neutral measures); *Croson*, 488 U.S. at 526 (race neutral efforts to "undo the effects of past discrimination" are not subject to strict scrutiny merely because they "may well have a racially disproportionate impact"); see also supra Section I.B. The U.S. Department of Justice has issued guidance specifically endorsing the use of socioeconomic factors (such as neighborhood socioeconomic status and parental education) as race neutral criteria school districts may use in compliance with *Parents Involved*. See U.S. Department of Justice, Office of Civil Rights, *Guidance on the Voluntary Use of Race to Achieve Diversity and Avoid Racial Isolation in Elementary and Secondary Schools* (Dec. 2, 2011). The guidance includes specific recommendations, including, for example, that school districts "draw attendance zones to achieve socioeconomic diversity, recognizing that it would also help to achieve racial diversity or avoid racial isolation." *Id.* at 11.

dents for civic life in an economically diverse society) or its utility with regard to the management and fair distribution of educational resources. Finally, under the current plan, one could not say that the county drew the neighborhood boundaries in order to ensure their correlation to particular racial statuses, because the county relied upon the areas drawn by, and the data provided by, the U.S. Census Bureau.³⁶⁵

On the other hand, Jefferson County's litigation history and its consideration of racial demographics among other socioeconomic factors raise concerns about the use of neighborhoods as proxies for the race of individual students. Certainly the totality of the county's conduct might support a finding that it acted with a discriminatory purpose, but to do so one must collapse the distinction between racially invidious and egalitarian purposes. To date the Supreme Court has been unwilling to do this.³⁶⁶ The choice to allocate benefits or assignments based on neighborhood may, according to this view, lead to the conclusion that the race neutral design of the plan is nothing more than "camouflage" for a race-based purpose.³⁶⁷ Once again, however, this leaves unresolved the question whether such a purpose would be held unconstitutional.

Even without resolving the difficult question of what substantively counts as a discriminatory purpose, the Court might infer racial classifications from the overall design and practical effect of the plan. The plan considers the racial demographics of the neighborhood in which a student resides when assigning the student to a particular school, not the racial status of the student himself or herself. Nevertheless, the Court might conclude that, unlike census data collection, the plan is "racially allocative,"³⁶⁸ in that the plan distributes students across public schools through a metric that includes racial factors.³⁶⁹ The Court may further

³⁶⁵ Courts have found that the collection of racial census data does not violate equal protection. See e.g., *Morales v. Daley*, 116 F. Supp. 2d 801, 814–15 (S.D. Tex. 2000) (holding that the census collection of self-identified racial information does not violate equal protection under the Fifth Amendment); *Caulfield v. Bd. of Educ. City of N.Y.*, 583 F.2d 605, 611 (2d Cir. 1978) (upholding the collection of racial census data from public employees); see also *Primus*, supra note 4, at 505, n.44 (citing additional authority).

³⁶⁶ See supra notes 237–40 and accompanying text (discussing ambiguities in the Court's position as reflected in *Parents Involved* and in the Chief Justice's interpretations of its holding).

³⁶⁷ *Fisher*, 133 S. Ct. at 2433 (Ginsburg, J., dissenting) (quoting *Gratz*, 539 U.S. at 304).

³⁶⁸ *Primus*, supra note 4, at 510 (distinguishing between data collection practices and resource allocation practices for constitutional purposes).

³⁶⁹ In the very same sense, the district lines reviewed in *Shaw* did not signify race because they applied only to persons of a particular race; rather, the Court concluded that persons

justify the application of strict scrutiny as necessary to protect students against the dignitary harms associated with racial balancing in the *Parents Involved* decision. Indeed, even if the Court were unwilling to equate fully the use of race, among other factors, to categorize neighborhoods with the racial classification of individual students, the county's revised plan sits in a more vulnerable position than it would have had it avoided any consideration of race, because the latter suggests that the logic of the plan's design is reducible to its racial outcome. The direct consideration of race also distinguishes the county's plan from percentage plans. As Justice Ginsburg has argued, the latter produce racial diversity by relying on residential segregation;³⁷⁰ they do not, however, rely on a metric calibrated to identify residential segregation but on one calibrated to reward student performance. Were race completely absent from the design of the county's plan, the Court would face the more difficult task of assessing whether other race neutral socioeconomic factors or the inclusion of ESL students within the diversity index themselves signify race. The inferred classification cases discussed in Part I suggest that this more indirect approach to fostering racial integration would have provided a more favorable position from which to defend the constitutionality of the new plan.

Those cases also suggest that, if parents and state legislators wish to place new restraints on the county's revised integration efforts, they too should tread with caution. To do so may renew concern for the representation-reinforcing values of equal protection. The revised Jefferson County plan quickly sparked litigation in the Kentucky state courts, but not on the ground that the school board's consideration of race violated equal protection. Parents of school-age children filed an action charging that the new plan was barred by a state statute providing parents of school-age children the right to "enroll" their children in the public

within the district were classified on a racial basis and that derogatory social meanings were imposed on the state's construction of political community because of how the lines were drawn. The Court also might rely on *Adarand's* distinction between race neutral socioeconomic criteria and a race-based presumption that one meets that criteria, 515 U.S. at 212–13, to find that the revised Jefferson County plan, like the affirmative action programs in *Adarand* and *Grutter*, simply uses a racial classification as one factor in its decision, thus requiring strict scrutiny. A distinction would still exist, however, between those programs that classified individuals by race and the district's plan, forcing the members of the *Parents Involved* majority to reconsider what they meant by "individual racial classification." See supra note 298 and accompanying text.

³⁷⁰ See supra notes 293–97 and accompanying text.

school nearest their home.³⁷¹ A Kentucky appellate court agreed and ordered the county to draft a new plan complying with its interpretation of the law.³⁷² The Kentucky Supreme Court reversed, upholding the county's authority to assign students by interpreting the state law as granting a student the right to enroll in, but not the right to attend, their neighborhood school.³⁷³ Amended versions of the law have been considered on multiple occasions since Jefferson County first undertook to revise its student assignment plan to comply with the *Parents Involved* decision. Bills introduced in 2011 and 2012 were passed by the state senate but failed in the house.³⁷⁴

The conflict between the state legislature and the county school district is reminiscent of *Seattle School District*. In that case, school districts had possessed the authority to use busing as a means to promote racial integration, and that specific authority was removed by state initiative. When the Kentucky Court of Appeals decided in favor of the plaintiffs, it effectively interpreted the law to remove from Jefferson County its authority to enforce its racially integrative assignment plan. The facially neutral statute was originally enacted in response to the desegregation decree against the county,³⁷⁵ but the county came under the law's jurisdiction only when the decree was lifted in 2000.³⁷⁶ The Kentucky Supreme Court has, for the time being, resolved the conflict by interpreting the statute in such a way that it does not constrain the ability of local school boards to enforce assignment plans that conflict with parents' preferences that their children attend the nearest school. The state supreme court's ruling that the right to attend one's neighborhood school is absent from the current law may, however, provoke the legislature to amend the law to provide such a right, particularly given that similar proposals commanded significant legislative support even before the court's ruling.

Were the neighborhood policy law amended to include a right to attend one's neighborhood school, the new law certainly could be attacked

³⁷¹ Ky. Rev. Stat. Ann. § 159.070 (1996) (stating in pertinent part that "[w]ithin the appropriate school district attendance area, parents . . . shall be permitted to enroll their children in the public school nearest their home").

³⁷² *Fell*, No. 2010-CA-001830-MR, slip op. at 20–22; see also Court Hears JCPS Busing Case Today, Courier-J., Apr. 18, 2012, at B3 (reporting on oral argument).

³⁷³ *Jefferson Cnty. Bd. of Educ. v. Fell*, 391 S.W.3d 713, 729 (Ky. 2012).

³⁷⁴ *Id.* at 724–25.

³⁷⁵ *Fell*, No. 2010-CA-001830-MR, slip op. at 12.

³⁷⁶ *Id.* at 20.

on discriminatory purpose grounds. Such a challenge against the original law might have been quite strong as it would have been difficult to distinguish the state's asserted purpose to quell "public resistance"³⁷⁷ to the desegregation decree from a purpose to perpetuate de jure segregation. A future legislature, however, could assert very different reasons for amending the law, including parents' desires to obtain the convenience, communal solidarity, and presumed safety of neighborhood schooling, thereby weakening a purpose-based challenge.³⁷⁸

The revised statute may still support the inference of a racial classification because it would be designed to withdraw authority from public school districts to implement student assignment plans that inured to the benefit of racial minorities by avoiding the racial isolation of public schools.³⁷⁹ Furthermore, the law would sever the communion of interests between local government and its citizens by allowing private parties to opt out of the school district's assignment plan, for reasons that may or may not be overtly discriminatory. Regardless of what reasons an individual may have for opting out of the plan, to do so no doubt sends a message to others that, given the county's history, would likely rekindle feelings of racial stigmatization and resentment. Finally, the revised law would undermine the ordinary decision-making process of local school districts and would send residents of Jefferson County who are racial minorities to the state legislature if they wished to restore the full powers of the county school district so that it may continue its commitment to racial integration.

Like *Shaw* and *Seattle School District*, this case would require a court to interpret the social meanings associated with the state's action and to anticipate how elected officials and private citizens may respond. It would require the court to judge the irregularity of the state's withdrawal of authority from local government and to consider whether, under Jef-

³⁷⁷ *Fell*, No. 2010-CA-001830-MR, slip op. at 12.

³⁷⁸ See *McClesky v. Kemp*, 481 U.S. 279, 299 (1987) (declining to find the challenged capital punishment statute resulted from a discriminatory purpose because the state had "legitimate reasons" to adopt it); cf. *Palmer v. Thompson*, 403 U.S. 217, 225 (1971) (arguing that invalidating legislation because of the government's illicit motivation is futile because "if the law is struck down for this reason, rather than because of its facial content or effect, it would presumably be valid as soon as the legislature . . . repassed it for different reasons").

³⁷⁹ *Seattle Sch. Dist.*, 458 U.S. at 472 (1983) ("[O]ur cases suggest that desegregation of the public schools . . . inures primarily to the benefit of the minority. . .").

erson County's unique circumstances and at this stage in its history,³⁸⁰ equal protection demands strict scrutiny to avert the systemic subordination of racial minorities in the political process. These are not choices to be made by consulting rigid doctrinal rules, for they can only be made by weighing the risks of judicial intervention against the importance of the equality values perceived to be threatened.

The inferred classification cases show the Supreme Court exercising this type of discretion, wielding strict scrutiny in the defense of constitutional equality values when the form and practical effect of the government's action appeared to threaten those values in a manner indistinguishable from that of an explicit racial classification. These cases reveal strict scrutiny to be a jurisprudential choice reflecting both the limited institutional capacity of the judiciary and its role in preserving both the individual's right to equality and the polity's interest in the just operation of political processes. By acknowledging the Court's practice of inferring racial classifications, public institutions will make better informed choices when designing race neutral affirmative action measures, and courts and constitutional scholars might look beyond the rigid application of equal protection's framing rules and the limitations of colorblind constitutionalism to recapture a more dynamic engagement with our Constitution's equality values.

CONCLUSION

Though we often talk of equal protection doctrine as if it were framed by rigid rules, in truth the Supreme Court sometimes bends these rules by inferring racial classifications from facially neutral but race conscious practices. To admit the inference of racial classifications is to paint a more transparent picture of the Court's practices, one that contributes new insight into the viability of particular prescriptions for facially neutral race conscious state action. In particular, race neutral affirmative action raises difficult constitutional questions regarding the government's purpose *and* the law's form. When we recognize that the need to resolve similar questions has sometimes convinced the Court to infer a racial classification from the law's form and practical effect, we

³⁸⁰ See, e.g., *Hampton v. Jefferson Cnty. Bd. of Educ.*, 102 F. Supp. 2d 358, 377 (W.D. Ky. 2000) (the intervenors whose petition vacated the desegregation decree were parents of African American students who sought admission to a magnet school that, pursuant to the decree, was under a racial quota).

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gain an improved understanding of the constitutional values that animate equal protection jurisprudence and of the circumstances in which the Court's commitment to those values may convince it to apply strict scrutiny though no explicit racial classification demands it do so.

