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DIVERSITY BY FACIALLY NEUTRAL MEANS

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The decision in Students for Fair Admissions v. President & Fellows of Harvard College (SFFA)*, invalidating the use of race in college admissions, reignites a pressing and critical question. Is the deliberate use of facially neutral means to achieve racial diversity constitutionally permissible? The problem is that current equal protection doctrine suggests conflicting answers to this question. On one hand, cases addressing the use of explicit racial classifications state clearly that the use of race is impermissible if diversity could be achieved by facially neutral means. These statements suggest that universities and others may adopt such means. On the other hand, when state actors adopt facially neutral policies that have a disparate negative impact on the basis of race or sex, these policies are impermissible if enacted specifically because they will have this effect. This part of the doctrine suggests that state actors may not adopt facially neutral means of achieving racial diversity if they do so in order to achieve this result.*

This Article resolves that enduring puzzle. It does so by explaining that equal protection doctrine contains two distinct commitments: a prohibition on race-based differential treatment and a prohibition on governmental actors intending to harm. The claim that the combination of these commitments—the intent to select on the basis of race—is also forbidden rests on a mistake. Because these two doctrinal threads stem from different normative foundations, they cannot be combined. In addition, while intentions do matter within equal protection doctrine, that observation is overstated. It is only the intent to harm that is constitutionally relevant. Facially neutral policies aimed at increasing racial diversity lack an intent to harm and are therefore permissible.

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INTRODUCTION 1902
I. THE PROBLEM 1909
A. A Question with Three Possible Answers 1909
B. Prior Scholarship 1920
II. THE SOLUTION: TWO DISTINCT THREADS 1927
A. Race-Based Differential Treatment 1929
B. Intent to Harm 1934
III. ELABORATION OF THE THEORY 1946
A. Objective Harm and Racial Isolation 1947
B. Race-Consciousness and Implicit Bias 1950
CONCLUSION 1953

Justice Kagan: So suppose that . . . there's a 10 percent plan or something like that, and part of the justification is socioeconomic diversity and another part of the justification is we'll also get more racial diversity in this manner. . . . Is that permissible?

Mr. Strawbridge: Well, like I said, it—it's a different analysis when the . . . mechanism that's chosen is not a racial classification itself, but I do think that this Court's precedents—

Justice Kagan: Well, I guess the question is why—why is that true. A lot of our constitutional doctrine suggests that it's not a different analysis. In other words, one way you can offend the Constitution is by using an impermissible classification. Another way you can offend the Constitution is by devising a proxy mechanism with the purpose of . . . achieving the same results that the impermissible classification would.

Mr. Strawbridge: Right.[1]

INTRODUCTION

The Supreme Court's decision in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College* (*SFFA*),[2] striking down the use of race-based classifications in university admissions, sets up an

[1] Transcript of Oral Argument at 13–14, Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141 (2023) (No. 21-707).
[2] 143 S. Ct. 2141 (2023).

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important question.[3] May universities adopt "facially neutral"[4] selection policies that will predictably increase racial diversity if they do so *because* these policies are likely to have this result?[5] Such policies might include admissions guarantees by a state university to the top ten percent of each high school senior class in the state, as Justice Kagan noted in the oral argument of the University of North Carolina case,[6] or "plus" factors for students who are first-generation college students, who attend under-resourced schools, or whose families are poor or are the descendants of enslaved people,[7] among others.

It may seem like the answer is an obvious "yes," as Mr. Strawbridge, the lawyer for Students for Fair Admissions, initially suggested.[8] After all, in the affirmative action cases that predate the current decision, narrow tailoring was assessed by reference to whether race-neutral means

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[3] The use of race in admissions was invalidated because the interests allegedly served by student body diversity are too difficult to measure and because the means adopted to achieve these ends are inapt. Id. at 2166–67. Additionally, in the Court's view, the policies at issue rely on racial stereotypes and harm those not preferred by the policies. Id. at 2168–70. Chief Justice Roberts's opinion for the Court does not, however, explicitly overrule *Grutter v. Bollinger*, 539 U.S. 306 (2003), and explicitly leaves open the question of whether the consideration of race is also impermissible in the context of admissions at the military academies. *SFFA*, 143 S. Ct. at 2166 n.4 ("This opinion also does not address the issue, in light of the potentially distinct interests that military academies may present.").

[4] The term "facially neutral" refers to a law or policy that does not explicitly classify on protected grounds.

[5] The Court in *SFFA* considered both a constitutional claim and a statutory claim but viewed the prohibition on race discrimination contained in Title VI of the Civil Rights Act of 1964 as equivalent to the constitutional requirements of equal protection. For this reason, the result of the constitutional analysis will also have implications for non-state actors. See *SFFA*, 143 S. Ct. at 2156 n.2 (explaining that the Court would "evaluate Harvard's admissions program under the standards of the Equal Protection Clause" because "discrimination that violates the Equal Protection Clause of the Fourteenth Amendment committed by an institution that accepts federal funds also constitutes a violation of Title VI" (quoting Gratz v. Bollinger, 539 U.S. 244, 276 n.23 (2003))).

[6] See Transcript of Oral Argument at 13–14, *SFFA*, 143 S. Ct. 2141 (No. 21-707).

[7] See id. at 13, 43–45.

[8] Id. at 13. Mr. Strawbridge seems to equivocate in his answer to Justice Kagan's question. He initially seems to say that such policies would be permissible but ultimately does say that if the university adopted the policy at least in part *because* it would increase diversity and would not have adopted it without this reason, then the facially neutral policy would be impermissible. Id. at 16 ("[I]f the only reason to do it is through the narrow lens of race and there is no other race-neutral justification for it that the government can come forward and demonstrate that would have led it to adopt that policy anyway, I think . . . that's the only scenario where it would create problems under the Court's precedent.").

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of achieving diversity were available.[9] Indeed, the Justices who dissented in those previous cases did so in part on the grounds that such alternatives were present, in their view.[10] If the explicit use of race is not narrowly tailored to achieve the educational benefits of diversity when workable race-neutral means exist to achieve the same result, surely the deliberate use of such race-neutral means is constitutionally permissible.[11]

And yet, scholars have long wondered about the constitutional permissibility of such policies.[12] To see the argument for this position,

[9] See, e.g., Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 280 n.6 (1986); Grutter v. Bollinger, 539 U.S. 306, 340 (2003) ("We are satisfied that the Law School adequately considered race-neutral alternatives currently capable of producing a critical mass without forcing the Law School to abandon the academic selectivity that is the cornerstone of its educational mission."); id. at 342 ("Universities in other States can and should draw on the most promising aspects of these race-neutral alternatives as they develop.").

[10] See, e.g., Fisher v. Univ. of Tex. at Austin (*Fisher II*), 579 U.S. 365, 426–27 (2016) (Alito, J., dissenting) (noting that if the University of Texas at Austin adopted race-neutral policies it could achieve diversity "without injecting race into the process"); *Grutter*, 539 U.S. at 394–95 (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. . . . Other programs do exist which will be more effective in bringing about the harmony and mutual respect among all citizens that our constitutional tradition has always sought. They, and not the program under review here, should be the model, even if the Court defaults by not demanding it."); *Gratz*, 539 U.S. at 297 (Souter, J., dissenting) ("Drawing on admissions systems used at public universities in California, Florida, and Texas, the United States contends that Michigan could get student diversity in satisfaction of its compelling interest by guaranteeing admission to a fixed percentage of the top students from each high school in Michigan. . . . [T]here is nothing unconstitutional about such a practice . . . .").

[11] Judge Heytens makes precisely this argument in response to the claim that the deliberate use of race-neutral polices to increase racial diversity transforms the policy into one that is race-based. See Coal. for TJ v. Fairfax Cnty. Sch. Bd., 68 F.4th 864, 891 (4th Cir. 2023) (Heytens, J., concurring) (emphasizing that "it would be quite the judicial bait-and-switch to say such race-neutral efforts are also presumptively unconstitutional" after spending "decades telling school officials they must consider race-neutral methods for ensuring a diverse student body before turning to race-conscious ones"), *cert. denied*, No. 23-170, 2024 WL 674659 (U.S. Feb. 20, 2024).

[12] See, e.g., Brian T. Fitzpatrick, Can Michigan Universities Use Proxies for Race After the Ban on Racial Preferences?, 13 Mich. J. Race & L. 277, 283 (2007) (arguing that "antidiscrimination laws have been [and should be] interpreted to prohibit not only facial classifications, but also neutral classifications that were adopted to serve as proxies for the facially-prohibited one"); Richard A. Primus, Equal Protection and Disparate Impact: Round Three, 117 Harv. L. Rev. 493, 496 (2003) (exploring the possibility that disparate impact liability mandated by Title VII may violate the constitutional guarantee of equal protection because that statute was adopted with the purpose of redressing racial inequality); Kim Forde-Mazrui, The Constitutional Implications of Race-Neutral Affirmative Action, 88 Geo. L.J. 2331, 2364–65, 2377 (2000) (arguing that race-neutral affirmative action may be unconstitutional if motivated by the same purposes as affirmative action that relies on racial

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imagine a hypothetical case in which a university admissions program made minority race a minus rather than a plus. After being sued for race discrimination, the university stops using race explicitly in its admissions process. Instead, suppose it adopts a policy disfavoring people from particular zip codes. Further, suppose the university does so because race correlates with zip code, so the university can achieve the same result as it had by explicitly disfavoring people of particular races. If the deliberate use of zip codes to exclude Black students would be impermissible, then should the deliberate use of class rank to include Black students be treated similarly? It is precisely this logic that Justice Kagan referred to in her question to Mr. Strawbridge.

The argument for treating these hypothetical cases the same seems plausible for two reasons. First, when facially neutral policies disadvantage women or racial minorities, the Court evaluates these policies by reference to the reasons for which they were adopted. If the state chose the facially neutral policy "*because of*" its effect, then the policy is treated as if it contains an explicit classification.[13] Second, when explicit classifications are used, the Court has treated the fact that the policy was well-motivated as legally insignificant, and has treated a benefit on the basis of race in the same manner as a burden.[14] For example, the explicit use of race in higher education admissions must pass strict scrutiny even when the policy is adopted for benign or even laudable reasons.[15] Moreover, in *SFFA*, Chief Justice Roberts emphasized that

classification). See generally Larry Alexander & Kevin Cole, Discrimination by Proxy, 14 Const. Comment. 453 (1997) (assuming that the deliberate use of a facially neutral trait to select for people with a protected trait violates the anti-discrimination principle and arguing that equal protection doctrine is internally conflicted).

[13] Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979) (emphasis added) (requiring a showing that a defendant discriminated "'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group" in order to impose liability). The *Feeney* Court upheld Massachusetts's preference for veterans in civil service positions, despite the fact that the policy disproportionately excluded women, because the policy was not adopted *in order to* exclude women. Id. at 275. The clear implication of this holding is that had the policy been adopted *in order to* exclude women, it would be impermissible.

[14] The Chief Justice emphasizes this fact in *SFFA*. See *SFFA*, 143 S. Ct. 2141, 2175 (2023) (critiquing the dissent by asserting that "[w]hile the dissent would certainly not permit university programs that discriminated *against* black and Latino applicants, it is perfectly willing to let the programs here continue").

[15] See id. at 2166; Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 298–99 (1978) (holding that whether a racial classification is used for benign purposes or invidious ones is not relevant and instead that classifications that "touch upon an individual's race or ethnic background" all require the application of strict scrutiny).

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university admissions is a "zero-sum" enterprise, and so, in his view, giving a plus to some applicants necessarily functions as a minus to others.[16] According to the combined logic of these two features of the doctrine, the deliberate use of class rank to select for minority applicants would seem to be constitutionally impermissible.

The Court's opinion in *SFFA* itself does not directly address the question of whether universities may use race-neutral means to achieve diversity.[17] However, Justice Kavanaugh, concurring, indicated that he would find it constitutional for a university to do so: "[G]overnments and universities still 'can, of course, act to undo the effects of past discrimination in many permissible ways that do not involve classification by race.' "[18] And Justice Gorsuch noted that "Harvard could nearly replicate the current racial composition of its student body without resorting to race-based practices if it: (1) provided socioeconomically disadvantaged applicants just *half* of the tip it gives recruited athletes; and (2) eliminated tips for the children of donors, alumni, and faculty."[19] The implication of this comment is that it would be permissible for Harvard to do so, even if it is motivated to adopt these policies to replicate the current racial composition of the class. Lastly, Justice Thomas, concurring, used language that suggests that he too would find the use of race-neutral policies to achieve a diverse student body permissible. He wrote: "Race-neutral policies may thus achieve the same benefits of racial harmony and equality without any of the burdens and strife generated by affirmative action policies."[20] That said, none of these statements specifically address whether race-neutral policies *deliberately* adopted to achieve racial diversity would be constitutional.[21]

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[16] *SFFA*, 143 S. Ct. at 2169 ("A benefit provided to some applicants but not to others necessarily advantages the former group at the expense of the latter.").

[17] In another case, the Chief Justice has suggested that he would find such motivation suspect. See, for example, Chief Justice Roberts's comment in *Parents Involved*, where he opined that "[r]acial balancing is not transformed from 'patently unconstitutional' to a compelling state interest simply by relabeling it 'racial diversity,' " which suggests that he might find intending to select for people on the basis of race to also be a patently unconstitutional motivation. Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 732 (2007).

[18] *SFFA*, 143 S. Ct. at 2225 (Kavanaugh, J., concurring) (quoting City of Richmond v. J.A. Croson Co., 488 U.S. 469, 526 (1989) (Scalia, J., concurring)).

[19] Id. at 2215 (Gorsuch, J., concurring).

[20] Id. at 2206 (Thomas, J., concurring).

[21] What Justice Thomas would say about such a case is especially uncertain, as other parts of his concurring opinion suggest that he finds questionable the very idea that racial diversity is important in higher education. See id. at 2207.

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The argument that they are not constitutional has recently gained traction. For example, it has already appeared in debates about the admissions criteria for public magnet schools.[22] In *Coalition for TJ v. Fairfax County School Board*, a change from one facially neutral admissions policy to another at the Thomas Jefferson High School for Science and Technology ("TJ") was challenged on the grounds that the change was motivated by a desire to "racially balance" the school.[23] While one could interpret that claim as alleging that the School Board intended to exclude Asian students, which would be prohibited, it could also be understood as a claim that the School Board impermissibly changed its policy in order to include more Black and Latinx students. In its petition for certiorari, the petitioners fused these questions and treated these claims as equivalent.[24] To date, this argument has not succeeded,[25] but it has not been repudiated, either.[26] And, while the Supreme Court declined to grant certiorari in this case, its reasons for doing so are unknown.[27] Perhaps the Court approved of the reasoning of the U.S. Court

[22] For a recent analysis, see Sonja Starr, The Magnet School Wars and the Future of Colorblindness, 76 Stan. L. Rev. 161, 163–64 (2024).

[23] See Coal. for TJ v. Fairfax Cnty. Sch. Bd., 68 F.4th 864, 871–72, 875–76 (4th Cir. 2023). Judge Rushing, dissenting, argued that a "school board's motivation to racially balance its schools, even using the means of a facially neutral policy, must be tested under exacting judicial scrutiny." Id. at 893 (Rushing, J., dissenting).

[24] See Petition for Writ of Certiorari at 13, *Coal. for TJ*, No. 23-170 (U.S. Aug. 21, 2023) (styling their first reason for granting the petition in these terms: "The Use of Facially Race-Neutral Admissions Criteria to Achieve Racial Balance Presents an Unsettled Question of National Importance").

[25] The majority opinion in *Coalition for TJ* does not specifically address this issue. See generally *Coal. for TJ*, 68 F.4th 864. In *Christa McAuliffe Intermediate School PTO, Inc. v. de Blasio*, the plaintiffs unsuccessfully argued that "where the government shifts to a policy that treats applicants differently based on a factor that is designed to operate as a proxy for race, it becomes suspect." 627 F. Supp. 3d 253, 263–65 (S.D.N.Y. 2022).

[26] See, for example, *Lewis v. Ascension Parish School Board*, 662 F.3d 343, 352 (5th Cir. 2011) (per curiam), in which the Fifth Circuit reversed the lower court's summary judgment and remanded the case in light of the existence of genuine issues of material fact regarding whether a racially discriminatory purpose and effect were present. Then-Chief Judge Jones, concurring, asserted that geographic boundaries used in student assignment are not racially neutral if adopted for the purpose of achieving racial balance in the schools. Id. at 354 (Jones, C.J., concurring) ("Streets . . . may well be racial proxies because the district or its agents apparently knew and used the racial composition of the people living on those streets to pursue racial balancing."). Following remand to the district court, the Fifth Circuit upheld the finding of no constitutional violation without reaching the question of whether discriminatory intent was present. Lewis v. Ascension Parish Sch. Bd., 806 F.3d 344, 358, 363 (5th Cir. 2015).

[27] Coal. for TJ v. Fairfax Cnty. Sch. Bd., No. 23-170, 2024 WL 674659, at *1 (U.S. Feb. 20, 2024). Justice Alito, joined by Justice Thomas, dissented from the denial of certiorari but did

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of Appeals for the Fourth Circuit that the use of facially neutral policies to increase diversity is permissible, or perhaps the Court was simply not yet ready to take this issue on.

This unresolved question comes with high stakes. If the Court decides that facially neutral policies adopted to increase racial diversity in public magnet schools are unconstitutional, many policies, both within the education context and beyond it, would also be at risk. For example, suppose a universal pre-kindergarten program is adopted in order to reduce racial disparities in educational achievement. Or suppose a city adopts a government-funded doula program in order to reduce the racial disparity in maternal death rates.[28] If the intention to affect which racial group is most benefited by a policy constitutes an impermissible intent, these programs would be subject to strict scrutiny. While such policies could be adopted for alternative reasons, unrelated to the race of likely beneficiaries, if they would not have been adopted for these alternative reasons alone, then the constitutional problem remains.[29]

Moreover, the implications of invalidating facially neutral policies enacted to improve racial diversity or reduce racial disparities likely apply beyond the constitutional context. Because the Court in *SFFA* treats the requirements of Title VI of the Civil Rights Act of 1964 as equivalent to the requirements of equal protection, prohibitions on the deliberate adoption of facially neutral means of achieving diversity could also extend to non-state actors receiving federal funds.[30]

This Article thus addresses a pressing and critical question. To restate it in terms of the two hypothetical policies mentioned earlier, we need to know: What, if anything, distinguishes the use of class rank to include minority students from the use of zip codes to exclude them? In the

so for reasons unrelated to the question regarding what intentions are prohibited under equal protection doctrine. Id. at *1, 5 (Alito, J., dissenting from the denial of certiorari).

[28] See, e.g., Zeina Mohammed, Black Women Are More Likely to Die During Pregnancy. A Local Doula Program Aims to Change That, Bos. Globe (Dec. 30, 2022, 5:14 PM), https://www.bostonglobe.com/2022/12/30/metro/mass-general-brighams-doula-program-aims-close-racial-disparities-childbirth/; Working Together to Reduce Black Maternal Mortality, Ctrs. for Disease Control & Prevention, https://www.cdc.gov/womens-health/features/maternal-mortality.html [https://perma.cc/4TR9-VV7E] (last updated Apr. 8, 2024).

[29] Where a constitutionally impermissible reason is a motivating reason for facially neutral state action, the burden shifts to the state to show that the same decision would have been reached absent the impermissible motivation. If the state is unable to do so, the facially neutral policy is subject to heightened review. See Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265–66, 270 n.21 (1977).

[30] See supra note 5.

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following Parts, I provide a novel answer to that enduring puzzle. The answer, which I call the "Distinct Threads" approach, rests on the claim that though equal protection doctrine prohibits race-based differential treatment and prohibits actions taken with impermissible intent, these two proscriptions rest on different foundations and cannot be combined. In addition, I argue that the focus on impermissible intent is poorly understood. What the doctrine prohibits is only actions that are motivated by the harm they cause to individuals or groups. Facially neutral policies that are deliberately adopted in order to increase racial diversity neither involve race-based differential treatment, nor are they motivated by the desire to cause harm. As a result, these actions are permissible.

The argument for this solution proceeds as follows. Part I lays out the question this Article investigates and describes the three conceptually available answers. In addition, Part I describes how other scholars have analyzed the question and explains why their answers are unsatisfactory. Part II describes my proposed solution. It argues for the claim that the prohibitions contained within equal protection doctrine cannot be combined and diagnoses why the prohibition on invidious intent has been misunderstood. Part III elaborates this account, explaining why harm must be assessed objectively and describing how current doctrine supports the view that racial isolation is a harm. In addition, Part III discusses the implications of this account for our understanding of the term "race conscious" and for how courts ought to evaluate implicit bias. A brief conclusion follows.

I. THE PROBLEM

A. A Question with Three Possible Answers

The question this Article addresses can be made concrete by considering two stylized hypothetical cases briefly described in the Introduction. Let's call the hypothetical cases *Class Rank* and *Zip Codes*.

> *Class Rank*: A state university adopts the policy of admitting the top ten percent of the graduating class of each high school in the state and does so specifically because, at least in part, this policy is likely to increase the racial diversity of the admitted class.
>
> *Zip Codes*: A state university adopts the policy of disfavoring people from particular zip codes and does so specifically because, at least in

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part, this policy is likely to decrease the racial diversity of the admitted class.

These two examples are similar in several ways. In each, the policy at issue is facially neutral, meaning that it does not explicitly deploy a legally protected trait, like race. At the same time, each policy is adopted deliberately because of the effect it will have on the racial composition of the class. Moreover, in each case, this effect is likely to occur because of the correlation that exists in the world between race and residence.

Of course, there are differences between the two policies as well. For example, one can imagine other reasons why a state university might adopt a policy like *Class Rank*. This policy might have been adopted because it would increase the representation of students from areas of the state that otherwise send few students to the university or because it would increase the economic diversity of the admitted students, among other reasons.[31] By contrast, it is harder to imagine reasons other than racial exclusion that a university might have to adopt *Zip Codes* as one of its admissions policies.

Yet, while there are other reasons why a university *could have* adopted *Class Rank*, the hypothetical supposes that increasing the racial diversity of the class was the university's aim, at least in part. Considering these two examples thus allows us to focus on the question this Article explores: Does a facially neutral law which is deliberately adopted because the facially neutral trait correlates with race violate equal protection?

The juxtaposition of these two policies presents a puzzle for two reasons. First, it is puzzling because different aspects of existing doctrine appear to point to different answers. On the one hand, the fact that the Court has been saying for some time that the explicit use of race in the college admissions process fails strict scrutiny when racially neutral means exist to achieve the same result implies that universities may deliberately use these facially neutral means for that purpose.[32] Indeed, as Judge Heytens noted in the case addressing the change in the admissions policy at Thomas Jefferson High School mentioned earlier, "it would be

[31] Some scholars argue that programs that are not explicitly race-based are permissible when they are enacted for reasons unrelated to race. See Forde-Mazrui, supra note 12, at 2381 (arguing that race-based affirmative action is pursued in order to achieve other, non-race-related objectives, and that if race-neutral policies are pursued for these non-suspect reasons, they will not give rise to strict scrutiny).

[32] See *Fisher II*, 579 U.S. 365, 426–27 (2016) (Alito, J., dissenting); Grutter v. Bollinger, 539 U.S. 306, 340–42 (2003); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 280 n.6 (1986).

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quite the judicial bait-and-switch to say such race-neutral efforts are also presumptively unconstitutional" after spending "decades telling school officials they must consider race-neutral methods for ensuring a diverse student body before turning to race-conscious ones."[33] The way that narrow tailoring is assessed in cases that explicitly involve race-based differential treatment thus provides the imprimatur of the Court to the deliberate use of facially neutral means to achieve racial diversity in both universities and other schools.[34] These parts of existing doctrine point to the result that *Class Rank* would be permissible while *Zip Codes*, presumably, would not.

On the other hand, equal protection doctrine makes the intention of governmental actors relevant specifically in contexts in which facially neutral laws or policies are challenged.[35] In such cases, the Court focuses on the reasons that motivate the state actor to adopt the policy at issue. If the facially neutral policy is adopted "'because of,' not merely 'in spite of'" its effect on a group defined by a protected trait,[36] the law or policy violates equal protection. If we apply this reasoning to the two hypothetical cases we are considering, then *both Class Rank* and *Zip Codes* would be impermissible because, in both cases, the facially neutral policy is adopted with the aim of having an effect on the racial composition of the admitted class.

There is a second puzzle that the juxtaposition of *Class Rank* and *Zip Codes* reveals as well. If the logic and language of prior cases evaluating the use of race in school admissions would yield the result that *Class Rank* is constitutionally permissible, one has to wonder why *Zip Codes* is, nonetheless, impermissible. Focusing on what differentiates the two cases reveals an underlying ambiguity within the doctrine about *what* intentions in particular are constitutionally problematic. The doctrine is muddled,

[33] Coal. for TJ v. Fairfax Cnty. Sch. Bd., 68 F.4th 864, 891 (4th Cir. 2023) (Heytens, J., concurring).

[34] See Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 735 (2007).

[35] See, e.g., Hunter v. Underwood, 471 U.S. 222, 231–33 (1985) (striking down an Alabama statutory provision, enacted with racial animus, that denied suffrage to people convicted of certain crimes); Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 258–59, 265 (1977) (stressing that "[p]roof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause" when evaluating the facially neutral denial of a zoning variance).

[36] Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979); see also Washington v. Davis, 426 U.S. 229, 239 (1976) (noting that a law with a racially disparate impact does not violate the Equal Protection Clause, absent a racially discriminatory purpose).

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speaking at times of "intention[],"[37] "purpose,"[38] and "motive,"[39] terms which the Court may be using interchangeably, or which may be used to refer to different ideas.[40] If *Class Rank* is permissible but *Zip Codes* is not, perhaps this is because some intentions are permissible while others are not.[41] If so, which ones and why? Consideration of the two cases together helps us to understand that we need more clarity about what the

[37] See, e.g., Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 228–29 (1995) ("Justice Stevens chides us for our 'supposed inability to differentiate between "invidious" and "benign" discrimination,' because it is in his view sufficient that 'people understand the difference between good intentions and bad.' But, as we have just explained, the point of strict scrutiny is to differentiate between permissible and impermissible governmental use[s] of race. And Justice Stevens himself has already explained . . . why 'good intentions' alone are not enough to sustain a supposedly 'benign' racial classification . . . ." (citation omitted) (quoting id. at 245 (Stevens, J., dissenting))); *Parents Involved*, 551 U.S. at 758 (Thomas, J., concurring) ("The constitutional problems with government race-based decisionmaking are not diminished in the slightest by the presence or absence of an intent to oppress any race or by the real or asserted well-meaning motives for the race-based decisionmaking.").

[38] See, e.g., *Feeney*, 442 U.S. at 276 ("The dispositive question, then, is whether the appellee has shown that a gender-based discriminatory purpose has, at least in some measure, shaped the Massachusetts veterans' preference legislation."); Batson v. Kentucky, 476 U.S. 79, 93 (1986) ("[O]ur cases concerning selection of the venire reflect the general equal protection principle that the 'invidious quality' of governmental action claimed to be racially discriminatory 'must ultimately be traced to a racially discriminatory purpose.'" (quoting *Davis*, 426 U.S. at 240)).

[39] See, e.g., City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (explaining that strict scrutiny "also ensures that the means chosen 'fit' th[e] compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype."); UAW v. Johnson Controls, Inc., 499 U.S. 187, 199 (1991) ("[T]he absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect.").

[40] See Richard H. Fallon, Jr., Constitutionally Forbidden Legislative Intent, 130 Harv. L. Rev. 523, 525, 536 (2016) (demonstrating the Supreme Court's conception of forbidden legislative intent is complicated and contradictory and that, as a normative matter, it should be of limited significance). In addition, Edwin Baker demonstrated some time ago that often what courts mean by intent vacillates between a focus on the subjective mental state of officials and the objective meaning of their actions. See C. Edwin Baker, Outcome Equality or Equality of Respect: The Substantive Content of Equal Protection, 131 U. Pa. L. Rev. 933, 972–84 (1983).

[41] There is, of course, another possibility, which is that all motivations are constitutionally irrelevant. Richard Fallon argues for this position. See Fallon, supra note 40, at 536. This position would draw on the moral position that intentions (understood as reasons for action or motivations) are irrelevant to the moral permissibility of actions, at least in most cases. See generally Judith Jarvis Thomson, Physician-Assisted Suicide: Two Moral Arguments, 109 Ethics 497 (1999) (arguing that it is irrelevant to the moral permissibility of physician-assisted suicide whether the attending doctor intends to alleviate suffering or to kill the patient); T.M. Scanlon, Moral Dimensions: Permissibility, Meaning, Blame (2008) (rejecting the relevance of intentions to moral permissibility generally).

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term "intentions" refers to and which such intentions are "invidious"[42] and which are not.

Conceptually, there are three possible answers to the question presented by the juxtaposition of *Class Rank* and *Zip Codes*. First, one could conclude that both policies are permissible on the grounds that all that matters to equal protection doctrine are the objective features of the governmental action, such as whether the law or policy involves race-based differential treatment. This approach makes the intentions of the governmental actors irrelevant. I call this view the "Single Thread" approach because the only relevant consideration is whether a law or policy treats people differently on the basis of a prohibited trait.

Second, one could find that neither *Class Rank* nor *Zip Codes* are permissible. On this view, the doctrine both contains a prohibition on race-based differential treatment and forbids action taken with impermissible intentions. These two threads are then combined, leading to the view that the intention to select people on the basis of race is also prohibited. Because this view requires combining the two parts of equal protection doctrine, I call this view the "Interwoven Threads" approach.

Third, one could find that *Class Rank* is permissible, but *Zip Codes* is not. On this view, equal protection doctrine also contains both a prohibition on race-based differential treatment and a prohibition on actions taken with impermissible intention. However, on this view, these two doctrinal threads are distinct and cannot be combined. Moreover, the intention that is constitutionally relevant is limited to the intent to harm, which is present in *Zip Codes* but absent in *Class Rank*. In order to capture the noteworthy feature of this view, I call it the "Distinct Threads" approach.

Each of these positions is a conceptual possibility. In what follows, I briefly canvass the pros and cons of each approach and then turn to the argument *for* the Distinct Threads approach, as the main aim of this Article is to provide its theoretical justification.

I evaluate the three conceptual possibilities in light of two criteria: how well the account fits existing equal protection doctrine (fit) and its

[42] See, e.g., Yick Wo v. Hopkins, 118 U.S. 356, 367 (1886) ("This provision was held to be purely a police regulation . . . in the application of which there was no invidious discrimination against any one within the prescribed limits . . . ."); Loving v. Virginia, 388 U.S. 1, 8 (1967); *Davis*, 426 U.S. at 240.

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normative appeal (justification).[43] To be plausible, an approach must fit current equal protection doctrine reasonably well. None of the answers will fit all of the doctrine, as the fact that different parts of the doctrine point to different results for *Class Rank* is precisely what generates the puzzle in the first instance. Thus, some revisions of existing doctrine will be required. Still, an approach that requires that we throw out large chunks of existing case law will be judged as less plausible for this reason. The degree of fit will matter in adjudicating among the options.

Second, to the extent that one of the approaches yields results that seem especially morally troubling, or which are hard to imagine a court (including the current Supreme Court) endorsing, they will be judged as less plausible.

One might wonder why I adopt this interpretive methodology rather than one that looks to the original public meaning of the Equal Protection Clause, given that such an originalist theory of constitutional interpretation is likely endorsed by the majority of the Justices currently on the Court.[44] I do so because the Court in *SFFA* itself uses precisely this interpretive methodology. The Court in *SFFA* relies on equal protection doctrine, rather than historical evidence of the Clause's original meaning, as the main source of constitutional meaning when interpreting the Equal Protection Clause. In addition, when interpreting this doctrine, the Court relies directly on normative concepts.

Historical evidence plays a very small role in *SFFA*. For example, after a discussion encompassing but a single paragraph,[45] the Court turns to the

[43] In this respect, my approach is broadly Dworkinian. Ronald Dworkin directed judges and others to evaluate possible answers to legal questions by reference to the twin demands of fit and justification. See Ronald Dworkin, Law's Empire 50–53 (1986) (arguing that law is in essence an interpretive practice and that to interpret, one must provide an account that fits the material reasonably well); id. at 52–53 ("If the raw data do not discriminate between these competing interpretations, each interpreter's choice must reflect his view of which interpretation proposes the most value for the practice—which one shows it in the better light, all things considered.").

[44] Erwin Chemerinsky, Chemerinsky: Originalism Has Taken Over the Supreme Court, ABA J. (Sept. 6, 2022, 8:00 AM), https://www.abajournal.com/columns/article/chemerinsky-originalism-has-taken-over-the-supreme-court [https://perma.cc/58RV-G9DM] ("Some of the justices—Clarence Thomas, Neil Gorsuch and Amy Coney Barrett—are self-avowed originalists. All of the conservatives often write their opinions in originalist language and sign on to expressly originalist decisions.").

[45] This historical discussion takes only one paragraph. See *SFFA*, 143 S. Ct. 2141, 2159 (2023). However, Justice Thomas's concurrence admittedly engages more with historical evidence. See, e.g., id. at 2181 (Thomas, J., concurring) (citing a Fourteenth Amendment ratification-era Senator who advocated for an amendment to make all citizens "equally

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cases interpreting this constitutional provision as the relevant sources for its meaning.[46] This case law discussion covers twelve paragraphs and runs through the major cases familiar to lawyers and law students.[47]

The Court in *SFFA* also interprets equal protection doctrine in explicitly normative terms. For example, the Court characterizes *Plessy v. Ferguson*'s separate but equal doctrine as the "*inherent folly* . . . of trying to derive equality from inequality."[48] It then goes on to describe the correction that followed in these terms: "By 1950, the *inevitable truth* of the Fourteenth Amendment had thus begun to reemerge: Separate cannot be equal."[49] Following *Brown v. Board of Education*, there were many cases that "vindicate the Constitution's pledge of racial equality," the authority for which is described as grounded in the moral concept of fairness: "Laws dividing parks and golf courses; neighborhoods and businesses; buses and trains; schools and juries were undone, all by a transformative promise 'stemming from our American ideal *of fairness* . . . .' "[50] Finally, in summing up the foundation of the doctrine's prohibition on race-based differential treatment, the Court supports its observation that "acceptance of race-based state action has been rare" with a passage from *Rice v. Cayetano* that rests squarely on the moral idea of equality: "Distinctions between citizens solely because of their ancestry are *by their very nature* odious to a free people whose institutions

responsible to justice" without regard to their "caste"); id. at 2184 (emphasizing that early equal protection doctrine adjudicating racial justice issues took a colorblind approach to the Fourteenth Amendment).

[46] Chief Justice Roberts's discussion begins with *Strauder v. West Virginia*, 100 U.S. 303, 307–09 (1880), and continues through *Yick Wo*, 118 U.S. at 368–69, 373–74; *Truax v. Raich*, 239 U.S. 33, 36 (1915); *Plessy v. Ferguson*, 163 U.S. 537 (1896) (cited as anti-canon); *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 349–50 (1938); *McLaurin v. Oklahoma State Regents for Higher Education*, 339 U.S. 637, 640–42 (1950); *Brown v. Board of Education*, 347 U.S. 483, 494–95 (1954), and cases applying *Brown* in other domains, including *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954); *Loving*, 388 U.S. at 8; *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984); *Davis*, 426 U.S. at 239; *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964); *Regents of the University of California v. Bakke*, 438 U.S. 265, 289–90 (1978); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995); *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003); *Fisher v. University of Texas at Austin* (*Fisher I*), 570 U.S. 297, 311–12 (2013); *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 720 (2007); Shaw v. Hunt (*Shaw II*), 517 U.S. 899, 909–10 (1996); *Johnson v. California*, 543 U.S. 499, 512–13 (2005); *Rice v. Cayetano*, 528 U.S. 495, 517 (2000). See *SFFA*, 143 S. Ct. at 2159–63.

[47] *SFFA*, 143 S. Ct. at 2159–63.

[48] Id. at 2149 (emphasis added).

[49] Id. (emphasis added).

[50] Id. at 2161 (emphasis added) (citing *Bolling*, 347 U.S. at 499).

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are founded upon the *doctrine of equality*.'"[51] In each of these passages, the Court turns to moral concepts including fairness and equality and derives their meaning from its view of what these moral notions inherently, inevitably, or by their nature require.

The claim that the current Court interprets equal protection by looking at how well an interpretation fits and justifies existing doctrine clearly cannot be established by reference to one opinion, even one as important as *SFFA*. To vindicate it more fully would require an article-length treatment itself. For now, I hope that the argument presented above will suffice to show that my approach is within the mainstream of current ways of extracting meaning from the Equal Protection Clause and could plausibly be adopted by the current Court.

With this interpretive methodology in hand, I turn now to a brief overview of how each of the three conceptually possible ways of addressing the juxtaposition of *Class Rank* and *Zip Codes* would fare.

First, consider the Single Thread approach. On this view, equal protection doctrine prohibits state actors from treating people differently on the basis of race or some other legally protected trait. What makes this approach a single thread approach is that according to this view, equal protection contains no other relevant principle. As a result, the intentions of state actors who enact laws or policies are irrelevant. As both *Class Rank* and *Zip Codes* are facially neutral policies, neither treats people differently on the basis of race, and so neither policy violates the prohibition on race-based differential treatment. The fact that both are adopted in order to select students on the basis of race is irrelevant on this approach, because intentions are not relevant to whether a law or policy violates equal protection.

Consider how Single Thread does in terms of fit and justification. A court applying this approach would need to reject important portions of equal protection doctrine that appear to make the intentions of the state actor relevant when facially neutral laws or policies are at issue.[52] In addition, application of the Single Thread approach would require a court to find that *Zip Codes* is constitutionally permissible, a result that many are likely to find both implausible and untenable. In terms of both fit and justification, then, Single Thread has significant drawbacks.

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[51] Id. at 2162 (emphasis added) (quoting *Rice*, 528 U.S. at 517).

[52] See, e.g., *Davis*, 426 U.S. at 240, 246; Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 276–78 (1979).

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Second, consider the Interwoven Threads approach. On this view, equal protection doctrine prohibits race-based differential treatment and makes the intentions of the state actor relevant. Combining these threads leads to the result that both *Class Rank* and *Zip Codes* are impermissible, as both are adopted with the aim of selecting applicants on the basis of race.

Interwoven Threads fits the doctrine better than does the Single Thread approach, but it has some significant problems. On the one hand, it matches the fact that the doctrine makes both race-based differential treatment and intention relevant. But on the other, it would require that a court disaffirm the many endorsements and encouragements that various Justices have previously given to the use of race-neutral means of achieving diversity.[53] This is a drawback. That said, these statements emerge in the opinions of dissenting Justices in most of the cases in which they appear.[54] There is a single exception. In Justice Kennedy's concurring opinion in *Parents Involved in Community Schools v. Seattle School District No. 1*, he concurs in the judgment only precisely to emphasize that he believes state actors are constitutionally permitted to adopt facially neutral means of achieving diversity.[55] As Justice Kennedy provided the fifth vote for the decision of the Court, the divergence between his concurrence and the majority is important.

In addition, the decision in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.* (*Inclusive Communities*), holding that the Fair Housing Act ("FHA") imposes disparate impact liability,[56] cuts against the Interwoven Threads approach. If equal protection prohibits state actors from adopting policies because of their racial impact, the doctrine would seem to forbid the very thing that the imposition of disparate impact liability would require.[57]

[53] See supra notes 9–11 and accompanying text.

[54] See supra note 10.

[55] 551 U.S. 701, 788 (2007) (Kennedy, J., concurring in part and concurring in the judgment) (explaining his refusal to join the plurality opinion in full by noting that "[t]o 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" and emphasizing that "it is permissible to consider the racial makeup of schools and to adopt general policies to encourage a diverse student body, one aspect of which is its racial composition").

[56] 576 U.S. 519, 545–46 (2015).

[57] See Ricci v. DeStefano, 557 U.S. 557, 594–96 (2009) (Scalia, J., concurring) ("[T]he war between disparate impact and equal protection will be waged sooner or later, and it behooves us to begin thinking about how—and on what terms—to make peace between them.").

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Statutes that hold employers and others liable for policies that produce a disparate impact on racial minorities without adequate justification compel these actors to take the racial impact of their actions into account. For this reason, the Supreme Court's 2015 holding that the Fair Housing Act imposes disparate impact liability is in tension with the approach of Interwoven Threads.[58]

Interwoven Threads also has significant drawbacks in the dimension of justification. This approach would require that a court hold that *Class Rank* and many other seemingly laudable policies are impermissible. Universities would be prohibited from adopting any and all facially neutral policies if their aim in doing so is, at least in part, to increase the racial diversity of the class. In addition, state actors would be prohibited from adopting other facially neutral policies if their aim in adopting these policies is to reduce racial disparities in educational achievement, health, maternal mortality, and other domains. Indeed, the consequences could be far-reaching. For example, suppose that a state legislature adopts a universal pre-kindergarten program in order to provide pre-kindergarten to more of the state's minority children, as mentioned earlier. Under Interwoven Threads, the intention to provide this benefit to minority students, in particular, would render the universal pre-kindergarten program unconstitutional. Or suppose a city adopts a government-funded doula program in order to reduce the racial disparity in maternal death rates.[59] Interwoven Threads would similarly invalidate this doula program. I find these results untenable as an interpretation of the demands of equal protection, especially when we understand that constitutional command as rooted in a morally defensible vision. From a predictive perspective, I also find it unlikely that the Court would reach this result.

In fact, considering these examples lends some support for the Single Thread view, according to which the intentions of state actors are not relevant to the constitutional permissibility of governmental action at all.[60] Of course, each of the policies just mentioned could be adopted for

[58] Samuel R. Bagenstos, Disparate Impact and the Role of Classification and Motivation in Equal Protection Law After *Inclusive Communities*, 101 Cornell L. Rev. 1115, 1130 (2016) ("Because prohibitions on disparate impact do not individually classify people based on their race . . . the prohibitions are not themselves constitutionally suspect simply because they seek to achieve the 'race-conscious' goals of promoting integration and closing racial gaps.").

[59] See Mohammed, supra note 28; Centers for Disease Control and Prevention, supra note 28.

[60] Richard Fallon argues that legislation should not be invalidated "solely because of the subjective intentions of the legislators who voted for it." See Fallon, supra note 40, at 558. In

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other reasons. Universal pre-kindergarten could be adopted to ensure that all children get access to the important benefits of early childhood education. In that sense, perhaps the prohibition on adopting such policies specifically to decrease *racial* disparities is unimportant, as it is so easily circumvented. At the same time, it seems odd to think that whether the adoption of universal pre-kindergarten is permissible or not depends on whether it is adopted to close racial gaps in access to early childhood education or instead to ensure that all children have access to this service.[61] If this intuition is correct, there is some flaw in the Interwoven Threads approach.

Finally, consider Distinct Threads. This approach retains, yet limits, the significance of intentions. In Distinct Threads, equal protection doctrine prohibits race-based differential treatment and prohibits actions taken with an intent to harm. However, these two threads have different normative bases, and therefore cannot be combined. Moreover, the only constitutionally relevant intention for equal protection purposes is the intent to harm. According to this approach, university policies adopted to improve racial diversity, or other policies (like universal pre-kindergarten) adopted to reduce racial disparities in some domain, are

addition, several philosophers have also argued against the relevance of intentions to the moral permissibility of action. See, e.g., Thomson, supra note 41, at 515–16; Scanlon, supra note 41, at 4.

[61] Thomson makes exactly this argument in the context of assessing the moral permissibility of assisted suicide. See Thomson, supra note 41, at 515–16. However, Justice Rehnquist draws on precisely this distinction in *Vacco v. Quill*, 521 U.S. 793 (1997), the companion case to *Washington v. Glucksberg*, 521 U.S. 702 (1997). In *Vacco*, the plaintiffs argued that forbidding physician-assisted suicide while permitting dying patients to refuse unwanted medical care violates equal protection because patients who can end their lives by refusing medical treatment are able to do so, while those who need physicians to prescribe or inject medication to end their lives cannot. 521 U.S. at 797–98. Justice Rehnquist rejected this argument on the grounds that the two cases are different, and thus the law may treat them differently, because the intentions of both the doctor and the patient differ in the two cases. See id. at 800–02. In the first case, "a physician who withdraws, or honors a patient's refusal to begin, life-sustaining medical treatment purposefully intends, or may so intend, only to respect his patient's wishes and 'to cease doing useless and futile or degrading things to the patient.'" Id. at 801 (quoting Assisted Suicide in the United States: Hearing Before the Subcomm. on the Const. of the H. Comm. on the Judiciary, 104th Cong. 368 (1996) (testimony of Dr. Leon R. Kass)). But a "doctor who assists a suicide . . . 'must, necessarily and indubitably, intend primarily that the patient be made dead.'" Id. at 802 (quoting Assisted Suicide in the United States, supra, at 367). The Court in *Vacco* emphasized that "[t]he law has long used actors' intent or purpose to distinguish between two acts that may have the same result." Id.

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permissible because the intent to select recipients on the basis of race is not a prohibited intention.

In my view, Distinct Threads fits current equal protection doctrine better than each of the alternatives, as I argue in Part II. In addition, it is more normatively appealing precisely because it vindicates policies like universal pre-kindergarten that feel like poor candidates for equal protection violations. In addition, the intention it forbids—the intent to *harm*—is readily understandable in moral terms. I present that argument in Part II below. Before doing so, the next Section describes the ways that other scholars have addressed the same puzzle and explains why those explanations are inadequate.

B. Prior Scholarship

In the 2000s, scholars began to seriously examine the constitutional permissibility of adopting facially neutral means of achieving racially allocative ends.[62] For example, in 2000, Kim Forde-Mazrui evaluated the constitutional permissibility of race-neutral means of achieving racial diversity,[63] given then-recent federal court decisions, and argued that such policies would be subject to strict scrutiny unless they are adopted for non-racial reasons.[64] In 2003, Richard Primus raised the question of

[62] See, e.g., Forde-Mazrui, supra note 12, at 2333, 2336 (arguing that facially neutral policies aimed at achieving racial diversity in higher education and elsewhere are in constitutional trouble and arguing that they can be saved either because they can satisfy strict scrutiny or because policymakers can adopt them for other reasons); Brian T. Fitzpatrick, Strict Scrutiny of Facially Race-Neutral State Action and the Texas Ten Percent Plan, 53 Baylor L. Rev. 289, 290–91 (2001) (arguing that facially neutral policies enacted to achieve racial diversity are no more constitutionally permissible than explicit racial classifications because "a state actor cannot circumvent the Equal Protection Clause by formally changing the face of a statute while simultaneously angling to accomplish the same substantive result"); Richard A. Primus, Equal Protection and Disparate Impact: Round Three, 117 Harv. L. Rev. 493, 495 (2003) (examining "whether equal protection [doctrine] could *prohibit* the passage of [disparate impact liability] statutes because of their overt concern with race"); R. Richard Banks, The Benign-Invidious Asymmetry in Equal Protection Analysis, 31 Hastings Const. L.Q. 573, 574 (2003) (arguing that the "characterization of a policy as benign or invidious" does in fact affect how a policy is evaluated, even though the Court asserts otherwise); Andrew M. Carlon, Racial Adjudication, 2007 BYU L. Rev. 1151, 1152–54 (setting up the question of whether facially neutral means of achieving diversity are permissible and arguing that it can be resolved by distinguishing between racial adjudication and race-conscious policymaking).

[63] Forde-Mazrui, supra note 12, at 2335.

[64] Id. at 2332; id. at 2336 ("Strict scrutiny can be avoided if, and only if, such programs are adopted without a racially discriminatory purpose."). Forde-Mazrui does believe, however, that these policies can satisfy strict scrutiny. Id.

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whether Title VII's imposition of disparate impact liability is in tension with equal protection doctrine.[65] If equal protection forbids the adoption of facially neutral policies when they are aimed at reducing racial disparities, then perhaps Title VII's imposition of disparate impact liability is itself unconstitutional, he wondered.[66] In Primus's view, the answer to that question was uncertain as it depended on how a court interpreted both the motive animating Title VII and the demands of equal protection itself.[67]

Primus's framing of the question as centered on the tension between disparate impact liability and equal protection gained ground after the Court's 2009 decision in *Ricci v. DeStefano*,[68] in response to Justice Scalia's comment in a concurring opinion suggesting that Title VII's disparate impact prong might be in conflict with equal protection.[69]

Following *Ricci*, several scholars weighed in on the question of the tension between disparate impact liability and equal protection. Some concluded that facially neutral action deliberately adopted to achieve diversity or reduce racial disparities did not violate equal protection.[70] Others argued for the opposite position—that facially neutral policies adopted to achieve racial diversity violate equal protection.[71] And a third group, Primus included, argued that *Ricci* in particular was open to multiple readings and so the question remained open.[72]

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[65] Primus, supra note 62, at 494.

[66] Id. at 495–96.

[67] Id. at 498–500 (describing that the article will examine "Title VII's disparate impact standard in light of . . . four aspects of equal protection [doctrine]" that he identifies).

[68] 557 U.S. 557, 562–63 (2009) (holding that New Haven's decision to disregard the results of an exam used to determine firefighter promotion eligibility violated Title VII because the decision rested on the racial composition of the results and could not be justified by potential disparate impact liability).

[69] Id. at 594 (Scalia, J., concurring).

[70] See, e.g., Kimberly Jenkins Robinson, The Constitutional Future of Race-Neutral Efforts to Achieve Diversity and Avoid Racial Isolation in Elementary and Secondary Schools, 50 B.C. L. Rev. 277, 283–84 (2009) (arguing that "Justice Kennedy correctly asserted in *Parents Involved* that strict scrutiny should not be applied to race-neutral measures" to achieve diversity in schools); Michelle Adams, Is Integration a Discriminatory Purpose?, 96 Iowa L. Rev. 837, 842–43 (2011) (arguing that facially neutral policies aimed at integration are permissible so long as they do not harm identifiable victims).

[71] See e.g., Brian T. Fitzpatrick, The Hidden Question in *Fisher*, 10 N.Y.U. J.L. & Liberty 168, 169, 172 (2016) (arguing that the Ten Percent Plan used by the University of Texas is unconstitutional).

[72] Richard Primus, The Future of Disparate Impact, 108 Mich. L. Rev. 1341, 1344–45 (2010) (describing three possible readings of *Ricci*, only one of which would invalidate disparate impact liability).

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This worry about the compatibility of disparate impact liability and equal protection was quieted significantly by the Court's 2015 decision in *Inclusive Communities*,[73] in which the Court held that the FHA imposes disparate impact liability.[74] If disparate impact liability is in conflict with equal protection, the Court would have been less likely to validate its inclusion in the FHA, or so the argument went.[75]

Following the decision in *Inclusive Communities*, Samuel Bagenstos argued that that case "promulgates [the] terms for a peace settlement between disparate impact and equal protection."[76] To Bagenstos, that settlement had two components. First, the principle of "consistency,"[77] from *Adarand Constructors, Inc. v. Peña*, which requires that the "standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification,"[78] only applies where racial classifications are operative.[79] Second, while the "motivation to harm minorities is the constitutional equivalent of a racial classification,"[80] "the mere intent to promote integration should not be suspect."[81]

In my view, Bagenstos's account is only partially correct as a descriptive matter. While I agree that the intent to harm is not the constitutional equivalent of an intent to integrate (his second component), I believe that he misdescribes the first component of the doctrine. To Bagenstos, the principle that "the race of those burdened or benefited" does not matter, which applies when a law explicitly classifies, does not carry over into the context in which such classification does not take place.[82] I think this assertion misstates the law. It seems implausible to imagine that a Court would find that the deliberate use of a facially neutral policy to harm white people is constitutionally unproblematic. The claim that better describes the doctrine (and which I argue for in Section II.B) is this: an intent to benefit people of a particular race is not the

[73] 576 U.S. 519 (2015).
[74] Id. at 545–46; see also id. at 544–45 ("If additional measures are adopted, courts should strive to design them to eliminate racial disparities through race-neutral means.").
[75] Bagenstos, supra note 58, at 1128.
[76] Id. at 1117.
[77] Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 224 (1995).
[78] Id. (quoting City of Richmond v. J.A. Croson Co., 488 U.S. 469, 494 (1989)).
[79] Bagenstos, supra note 58, at 1142.
[80] Id. at 1158.
[81] Id. at 1161.
[82] See id. at 1142 (quoting *Adarand*, 515 U.S. at 224).

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constitutional equivalent of an intent to harm people of a particular race. While it is true that when explicit racial classification is used, it does not matter whether state actors aim to harm or aim to benefit those affected. It is this principle that does not carry over to the context of facially neutral laws (not the principle that it does not matter *who* is affected). Another way to restate this latter point is as follows: the "zero-sum" argument of *SFFA*, according to which a benefit to some is treated as the equivalent to the burden to others,[83] only applies when race-based differential treatment is at issue and does not carry over to the context of facially neutral laws.

The second problem with Bagenstos's account, however, is that he merely states two principles that purport to describe what the Court *is doing*. This is not an adequate answer to the puzzle at issue because the argument for the constitutional impermissibility of race-neutral actions deliberately enacted to reduce racial disparities has always rested on claims about the implicit *logic* of the Court's pronouncements, rather than on claims about what the Court has done to date.[84] To answer that argument, we need not only an account of why *Class Rank* is consistent with what the Court has done to date, we also need an account of the normative underpinning of what it has done that would rebut the superficial similarity between *Class Rank* and *Zip Codes*.

That project is especially pressing now for three reasons. First, the key architect of the peace settlement described by Bagenstos was Justice Kennedy. He was the author of the opinion of the Court in *Inclusive Communities*,[85] and he was the author of the influential concurring opinion, staking out an analogous position in the education context, in *Parents Involved in Community Schools v. Seattle School District No. 1*.[86] Without his presence on the Court, that vision may lack an advocate.

Second, the composition of the Court has changed since Justice Kennedy retired. Justice Kavanaugh replaced Justice Kennedy, Justice Barrett replaced Justice Ginsburg, and Justice Jackson replaced Justice Breyer. At least one of those replacements involves a significant change

[83] *SFFA*, 143 S. Ct. 2141, 2169 (2023) ("College admissions are zero-sum.").

[84] See, e.g., Forde-Mazrui, supra note 12, at 2336 (treating the invalidity of race-neutral policies aimed at increasing racial diversity of universities as "the logical implication[]" of the Court's colorblind approach).

[85] Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc., 576 U.S. 519 (2015).

[86] 551 U.S. 701, 782 (2007) (Kennedy, J., concurring in part and concurring in the judgment). In his concurring opinion, Justice Kennedy specifically emphasized that "it is permissible to consider the racial makeup of schools and to adopt general policies to encourage a diverse student body, one aspect of which is its racial composition." Id. at 788.

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in judicial outlook. What these changes augur for the peace settlement described above is unclear.

Third, prior scholarship, spurred by Primus's initial article and Justice Scalia's provocative musing, largely has focused on the tension between disparate impact liability and the constitutional guarantee of equal protection. But that question is an instance of a broader one: Can state actors adopt facially neutral policies if they do so in order to select for, or against, people on the basis of race?[87] In the wake of *SFFA*, it is this framing of the question that will be salient.[88]

Sonja Starr proffers an answer to the question in that broader form in an important, recent article focused on magnet school admissions policies specifically.[89] In Starr's view, current equal protection doctrine requires what she terms "means-colorblindness" but does not require what she calls "ends-colorblindness."[90] By "means-colorblindness," Starr refers to the fact that explicit uses of race are subject to strict scrutiny regardless of the racial group benefited or burdened.[91] However, the fact that means-colorblindness is required does not entail, she argues, that ends-colorblindness is required as well, a term she uses to describe "the position that, even absent classifications or individual-level disparate treatment, any race-related objective itself renders a policy suspect and almost certainly invalid."[92] She draws support for the permissibility of race-conscious ends from the existence of disparate impact liability, thereby circling back to the prior debate,[93] and taking the affirmation of

[87] Other scholars address the question in these terms as well. See, e.g., Elise C. Boddie, The Constitutionality of Racially Integrative Purpose, 38 Cardozo L. Rev. 531, 531 (2016) ("This Essay considers a question that has lingered at the outskirts of equal protection doctrine: is a facially race-neutral policy that is designed to include historically marginalized racial groups presumptively constitutional?").

[88] See, e.g., Jonathan P. Feingold, Affirmative Action After *SFFA*, 48 J. Coll. & U.L. 239, 274 (2023) (arguing that "under prevailing doctrine, facially neutral efforts to achieve racial diversity raise no constitutional concern").

[89] Starr, supra note 22, at 161.

[90] Id. at 164–65. Starr's approach builds on Boddie's. See Boddie, supra note 87, at 544 (arguing that what matters "is the distinction between purpose and means").

[91] See Starr, supra note 22, at 164 (explaining that in her view "[e]xisting 'colorblindness' doctrine focuses on a particular type of suspect *means*—namely, the use of racial classifications").

[92] Id. at 164–65.

[93] Id. at 186 (arguing that "[d]isparate impact liability, in general, has been a key context in which scholars have examined race consciousness in the design of facially neutral policies" because "[d]isparate impact theory (beyond itself resulting from race-conscious

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disparate impact liability in *Inclusive Communities* as a rejection of ends-colorblindness.[94]

While there is much to admire and agree with in Starr's account, it suffers from two flaws in my view. First, it seems to elevate a conceptual distinction between something being a *means* versus an *end* that will not bear the weight she places on it. Second, in describing what she means by "ends-colorblindness," which she rejects, she fuses two different ideas in a confusing manner and fails to identify what precisely she believes is permissible within current doctrine.

In my view, her emphasis on the distinction between something being a means versus an end is not as helpful as she envisions because it is often not possible to say whether we are dealing with a means (in which colorblindness is required) or an end (in which it is not). Consider, for example, a university policy in which students from low-income families are given a boost in the admissions process. Suppose this policy is adopted in order to increase the racial diversity of the class. According to Starr, this policy is constitutionally permissible because the means (favoring poorer students) is colorblind. While the aim of the policy relates to the race of the students admitted, that is okay, according to Starr's account, because colorblindness about ends is not required. Now, suppose that the reason that the university aims to increase the racial diversity of the class is in order to provide a better education to all students. In other words, the university adopts the preference for low-income students in order to increase racial diversity, in order to improve education. After all, many believe, and indeed universities have argued, that racial (and other) diversity has important educational benefits for everyone.[95] In such a case, is racial diversity an end or a means? It seems it is both. If that is correct, then the distinction between means and ends cannot do the work that Starr envisions of separating the permissible from the impermissible and of vindicating the constitutional permissibility of using facially neutral means to achieve racial diversity.

lawmaking) . . . *require[s]* those subject to [disparate impact liability laws] to be race conscious when determining policies" or practices).

[94] See id. at 186, 189–90.

[95] See, e.g., Brief in Opposition at 13, *SFFA*, 143 S. Ct. 2141 (2023) (No. 20-1199) ("For more than four decades, this Court has recognized that universities have a compelling interest in pursuing the educational benefits that flow from student bodies that are diverse along many dimensions, including race.").

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Of course, I understand that this is not what Starr means by "means." Rather she is pointing to the *form* that a law or policy takes, rather than to the goal or motivation that gives rise to it.[96] My objection is that the terms "means" and "ends" are meant to capture something conceptually important that can explain and justify why the two categories are treated differently.[97] My example of something that is both a means and an end demonstrates that this distinction between means and ends is not up to that task.

Second, Starr's use of the term "colorblindness" emphasizes that what is important about "ends-colorblindness" is that it requires state actors to ignore color (or race). But actually, in her discussion of the prior cases, she also emphasizes a different distinction: whether the state actor aims to promote a good or is motivated to harm. In other words, there are two possible distinctions that could explain what the law requires of ends. Either ends must be colorblind, or they need not be (the distinction Starr's term "ends-colorblindness" emphasizes). Or, state actors must not be motivated to harm, or they may be (the view I adopt). Starr's discussion of the cases treats these two distinctions as if they were the same thing.[98] For example, in summing up her discussion of the doctrine to date, she says the following: "Even though the Court has regularly applied strict scrutiny in a 'colorblind' way to the application of racial classifications, it has declined to apply it to race-neutral policies motivated by benign race-related objectives."[99] While I agree with this statement, it obscures

[96] Jonathan Feingold offers an argument for the view that deliberately adopting facially neutral policies to achieve racial diversity is permissible that relies explicitly on this distinction. See Jonathan P. Feingold, The Right to Inequality: Conservative Politics and Precedent Collide, 57 Conn. L. Rev. 1, 9–10, 12 (forthcoming Dec. 2024) (arguing along similar lines to those endorsed in this Article that when a law is facially neutral, what matters is whether there is an intent to harm, not whether the aim has a racial dimension).

[97] See Starr, supra note 22, at 174 (describing part of her article's contribution as adding "what, to the best of [her] knowledge, are new terms: 'means-colorblindness' and 'ends-colorblindness'").

[98] See id. at 175–76. When discussing what she terms the "purpose principle," according to which sometimes the intention of the governmental actor matters, she says the following: "The purpose principle is quite uncontroversial when applied to claims brought by disadvantaged minorities." Id. This statement suggests that what matters is *who* is aggrieved (and suggests that it matters whether it is disadvantaged racial minorities rather than white individuals, for example), not that the policy aims to *harm* rather than to benefit. Yet in other places, she emphasizes the fact that *what* is aimed at is good, not harmful. For example, in describing the doctrine, she notes that "[n]one of these cases involve facially neutral policies with an underlying purpose of *promoting* racial equality, diversity, or integration." Id. at 176.

[99] Id. at 195.

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the difference between colorblindness/race-consciousness on the one hand and harm/benefit on the other, and thus is unable to identify which distinction is doing the work in the doctrine. Is it the fact that the aim is "benign" that matters? Or is it the fact that courts (always) allow aims to be race-conscious? My account differs from Starr's in pulling these two ideas apart. In my view, the deliberate use of a facially neutral policy to harm a racial group is not permissible under current law. On this account, what matters is not that the doctrine rejects ends-colorblindness but instead that it identifies harm as the only impermissible aim.

The decision in *SFFA* invalidating the use of racial preferences in higher education makes the question Starr, Bagenstos, Primus, Fitzpatrick, Forde-Mazrui, and others have wrestled with especially pressing and salient. While facially neutral means of achieving diversity have been used by some universities already,[100] going forward, this approach is likely to become widespread. What is needed, therefore, is an account that not only describes the settlement thus far instantiated in the case law but that also explains and justifies it.

II. THE SOLUTION: TWO DISTINCT THREADS

The doctrine is best characterized as containing two distinct threads. In one, race-based differential treatment is a *pro tanto* violation of equal protection and thus requires heightened review. In the other, the fact that state actors are motivated to harm a person or group is a serious constitutional wrong that invalidates actions taken with that intention. An equal protection doctrine that contains these two threads can explain why

[100] In California and Michigan, for example, where constituents voted to end affirmative action, universities have used a range of race-neutral options to try to diversify their classes, including outreach programs to low-income families and first-generation students. See Zachary B. Wolf, 'Race Neutral' Replaces Affirmative Action. What's Next?, CNN Pol. (July 1, 2023, 7:14 AM), https://www.cnn.com/2023/07/01/politics/affirmative-action-race-neutral-what-matters/index.html [https://perma.cc/52LC-BWTW]; Brief for the University of Michigan as Amicus Curiae in Support of Respondents at 15–16, *SFFA*, 143 S. Ct. 2141 (No. 20-1199). These efforts, the universities say, have proved futile in comparison to the diversity that affirmative action policies once permitted them to achieve. See id. at 15–16, 20–21 (detailing race-neutral outreach and recruitment efforts and then explaining those efforts' inadequacy); Brief for the President & Chancellors of the University of California as Amici Curiae Supporting Respondents at 4, *SFFA*, 143 S. Ct. 2141 (No. 20-1199) (explaining that "UC has implemented numerous and wide-ranging race-neutral measures designed to increase diversity of all sorts, including racial diversity," and that "UC's decades-long experience with race-neutral approaches demonstrates that highly competitive universities may not be able to achieve the benefits of student body diversity through race-neutral measures alone").

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Class Rank is permissible while *Zip Codes* is not. *Class Rank* is permissible because the policy neither treats people differently on the basis of race, nor is motivated by an intent to harm. *Zip Codes*, by contrast, is impermissible. While it also does not treat people differently on the basis of race, this policy is motivated by an intent to exclude Black people from educational opportunity (a significant harm).

This solution to the puzzle may seem deceptively simple, so let me be clear about the contributions it makes. First, this account describes the two threads of the doctrine as separate and distinct. This separation is key because by understanding that these parts of the doctrine are animated by different concerns, we can see why they cannot be combined.[101] Second, this account emphasizes that the only relevant intention is the intent to harm.

To support this account, Section II.A describes the first strand of equal protection doctrine, according to which race-based differential treatment is a *pro tanto* equal protection violation and thus gives rise to strict scrutiny. The key contribution of this Section is the argument that when this feature is present, the intention of governmental actors is irrelevant. This argument supports the claim that this strand is separate from the strand that focuses on intention, thus corroborating the descriptive claim that Distinct Threads fits existing equal protection doctrine. Finally, this Section describes the normative vision that animates the prohibition on race-based differential treatment.

Section II.B turns to the second strand of equal protection doctrine, which forbids state actors from intending to harm. This Section makes several contributions to the existing literature. First, it provides evidence for the claim that when courts invalidate laws on the basis of policymaker intent, the relevant motive at issue is an intent to harm. Second, by noting that the terms "discrimination" and "intention" are ambiguous and amenable to multiple meanings, this Section explains why people have misunderstood what the doctrine says about which intentions are forbidden. Lastly, this Section grounds the prohibition on state actors intending to harm in general obligations that governments have toward those whom they govern.

[101] This argument builds on prior work in which I argue that these two threads have their roots in two different ways of understanding the wrong of discrimination, one as a non-comparative wrong and the other as a comparative wrong. See Deborah Hellman, Two Concepts of Discrimination, 102 Va. L. Rev. 895, 899 (2016).

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A. Race-Based Differential Treatment

The first point to emphasize is that when race-based differential treatment occurs, strict scrutiny applies.[102] In such cases, the intention of the state actor goes unexamined. Race-based differential treatment is an independent route to heightened review, a route through which the intentions of the governmental actors are irrelevant. This fact has been underappreciated and supports the conclusion that there are two distinct tracks that operate within equal protection doctrine.

Cases of so-called "statistical discrimination" demonstrate that when laws and policies treat people differently on the basis of race, the motive of those who adopted them is irrelevant. The term "statistical discrimination" refers to cases in which the protected trait (e.g., race, sex) is correlated with something that is legitimately of interest to the alleged discriminator (e.g., ability to repay a loan, likelihood of success on the job).[103] In such cases, an actor might be tempted to use race, sex, or another protected trait because it is predictive of this legitimate target, rather than out of animus, contempt, or some other offensive attitude.

[102] The term I use here is "race-based differential treatment" rather than "racial classification" because not all racial classifications give rise to strict scrutiny. See, e.g., Morales v. Daley, 116 F. Supp. 2d 801, 810–11, 814–15 (S.D. Tex. 2000) (upholding the use of racial classifications in the census). Another example of a context in which racial classifications do not give rise to strict scrutiny is the use by police of suspect descriptions that include the race of the alleged perpetrator. See Brown v. City of Oneonta, 221 F.3d 329, 333–34, 337–38 (2d Cir. 2000) (holding that the search of all Black residents of the city did not violate the Equal Protection Clause because the victim had reported that the perpetrator was Black). Neither of these examples constitutes race-based differential treatment, in my view. The census example deploys racial categories but does not lead to any differential treatment on the basis of race. Suspect descriptions call for a more nuanced account. While the police do rely on racial categories when making decisions about whom to search, they do so by generalizing about the reliability of witness descriptions about race and thus do not engage in race-based differential treatment. For a defense of this account, see Deborah Hellman, Measuring Algorithmic Fairness, 106 Va. L. Rev. 811, 855–62 (2020). For a critique of this argument, see Duncan Purves & Jeremy Davis, Should Algorithms That Predict Recidivism Have Access to Race?, 60 Am. Phil. Q. 205, 209–13 (2023).

[103] In statistical discrimination cases, the protected trait is arguably used as "proxy" for a target of interest. See Deborah Hellman, Two Types of Discrimination: The Familiar and the Forgotten, 86 Calif. L. Rev. 315, 316, 331 (1998) (describing cases in which the protected trait is a proxy for a legitimate target and cases in which the protected trait does not function as such a proxy, and arguing that in cases of single-sex education a school does not use sex as a proxy for other traits).

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Still, the law does not permit its use.[104] For example, the presumption in 1996 that the majority of women do not have the desire to attend or the physical capacity to succeed at the Virginia Military Institute—even if accurate—did not vindicate the school's use of sex to select for applicants.[105] Similarly, the fact that most married servicemen in 1973 had dependent spouses, while most married servicewomen did not, did not vindicate the use of sex to determine the benefits to which married service members were entitled.[106]

The same is true in contexts in which race correlates with some other trait of interest. For example, prosecutors may not eliminate potential jurors on the basis of race even if their reason for doing so is that race is a good predictor of aversion to the government's case.[107] Race-based differential treatment subjects the policy to strict scrutiny, without recourse to the intentions of the governmental actors at issue. While compelling governmental interests can sometimes justify the race-based differential treatment, it is noteworthy that such explicit classification by race requires strict scrutiny regardless of the motivation of the governmental actor.

The Court's affirmative action cases also demonstrate that race-based differential treatment is a *pro tanto* constitutional violation and so gives rise to strict scrutiny, and that this is so regardless of the motivations of the state actors at issue. For example, in *Regents of the University of California v. Bakke*, the first Supreme Court case addressing the permissibility of affirmative action, Justice Powell announced the judgment of the Court and explained, in an opinion that became influential, that the constitutionality of the university's admissions policies did not depend on whether the policies were adopted with good

[104] In a recent article, Sonja Starr describes how this prohibition on statistical discrimination is violated in several important contexts. See Sonja Starr, Statistical Discrimination, 58 Harv. C.R.-C.L. L. Rev. 579, 582–83 (2023).

[105] United States v. Virginia, 518 U.S. 515, 542 (1996) ("The issue, however, is not whether 'women—or men—should be forced to attend VMI'; rather, the question is whether the Commonwealth can constitutionally deny to women who have the will and capacity, the training and attendant opportunities that VMI uniquely affords." (quoting United States v. Virginia, 52 F.3d 90, 93 (4th Cir. 1995) (Motz, J., dissenting from denial of rehearing en banc))).

[106] Frontiero v. Richardson, 411 U.S. 677, 689–91 (1973) (rejecting administrative convenience as sufficient to justify differentiating between men and women by presuming that male service members had dependent spouses, while requiring female service members with dependent spouses to provide evidence demonstrating such dependency).

[107] Batson v. Kentucky, 476 U.S. 79, 89 (1986).

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intentions rather than animus.[108] Justice Powell specifically refused to lower the standard of review for contexts in which the "purpose can be characterized as 'benign.'"[109]

In *Adarand Constructors, Inc. v. Peña*, a case in which the Court evaluated the constitutionality of a preference for minority-owned contractors,[110] the Court clearly stated that it is race-based differential treatment that matters: "The principle of consistency simply means 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."[111] In addition, the Court stressed that when such race-based differential treatment is present, the intentions of governmental actors do not matter. Specifically, Justice O'Connor, writing for the Court, responded to Justice Stevens's argument that her opinion misses the distinction between "invidious" and "benign" discrimination by saying that only the law's objective features matter.[112]

One might object to my claim that intentions are irrelevant when race-based differential treatment is present by pointing to the fact that the strict scrutiny actually applied in affirmative action cases prior to *SFFA* seems more lenient (a kind of strict-scrutiny-lite) than is applied when the purpose is not even arguably benign. Prior to the Court's decision in *SFFA*, that view was plausible, given the way that strict scrutiny actually operated in affirmative action cases. That said, even in those cases, the Court explicitly stated that benign uses of race will be treated no differently than invidious uses of race when race-based differential

[108] 438 U.S. 265, 294–98 (1978).

[109] Id. at 294–95.

[110] 515 U.S. 200, 204–05 (1995) (invalidating a federal program under which the federal government provided financial incentives for government contractors to hire minority-owned businesses).

[111] Id. at 229–30.

[112] See id. at 228–29 (explaining that "Justice Stevens chides us for our 'supposed inability to differentiate between "invidious" and "benign" discrimination,'" and rejecting that characterization on the grounds that strict scrutiny exists to distinguish permissible from impermissible governmental uses of race, and that even "benign" uses of racial classification can betray harmful stereotyping). I would argue, however, that in Justice Stevens's suggestion that the majority misses the difference "between a 'No Trespassing' sign and a welcome mat," id. at 245 (Stevens, J., dissenting), he is also calling attention to objective features of the law—in particular what the law expresses, understood objectively. See Deborah Hellman, The Expressive Dimension of Equal Protection, 85 Minn. L. Rev. 1, 2 (2000) (arguing that state action violates equal protection if its objective "*meaning* conflicts with the government's obligation to treat each person with equal concern").

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treatment is present.[113] Perhaps more importantly, however, the decision in *SFFA* strengthens the argument that intentions do not matter when race-based differential treatment occurs. While it is unclear whether *SFFA* implicitly overrules *Grutter v. Bollinger*,[114] as Justice Thomas suggests,[115] or is consistent with it, as Justice Kavanaugh argues,[116] what is clear is that the decision rejects the more deferential form of strict scrutiny that prior affirmative action cases deployed.[117] Chief Justice Roberts describes the policies used by the two universities as "[r]acial discrimination" which is "invidious in all contexts,"[118] thereby equating race-based differential treatment with constitutional wrong.

Together, the affirmative action cases and cases addressing statistical discrimination illustrate that when race-based differential treatment occurs, the intention of the governmental actor is irrelevant. This fact is often overlooked because explicit race-based differential treatment is conflated with intentional discrimination, but the two are not equivalent. When explicit classification on protected grounds is present and operative, considerations of motive play no role. This important fact demonstrates that race-based differential treatment is a distinct and independent source of constitutional infirmity.

A critic of this interpretation of equal protection doctrine might object that I have misinterpreted the fact that race-based differential treatment obviates the need to turn to intentions. Courts do not look to intentions when explicit classification is present, one might argue, because the explicit classification *demonstrates* that the relevant intention is

[113] See *Bakke*, 438 U.S. at 299.

[114] See *SFFA*, 143 S. Ct. 2141, 2151 (2023).

[115] Id. at 2207 (Thomas, J., concurring) ("The Court's opinion rightly makes clear that *Grutter* is, for all intents and purposes, overruled.").

[116] Id. at 2221 (Kavanaugh, J., concurring) (emphasizing that, in his view, the Court's opinion is "consistent with and follows from the Court's equal protection precedents, including the Court's precedents on race-based affirmative action in higher education").

[117] Id. at 2168 (majority opinion) (emphasizing that "we have been unmistakably clear that any deference must exist 'within constitutionally prescribed limits,' . . . and that 'deference does not imply abandonment or abdication of judicial review'" (first quoting Grutter v. Bollinger, 539 U.S. 306, 328 (2003); and then quoting Miller-El v. Cockrell, 537 U.S. 322, 340 (2003))).

[118] Id. at 2166 (alteration in original) (quoting Edmonson v. Leesville Concrete Co., 500 U.S. 614, 619 (1991)).

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present.[119] Thus, impermissible intent is still "the touchstone"[120] of an equal protection violation, and explicit classification is relevant only as incontrovertible evidence of such intention.

This alternative interpretation faces an important problem. If explicit classification is incontrovertible evidence of impermissible intention, what precisely is the content of the intention for which it provides evidence? It does not provide incontrovertible evidence of animus, or an intent to harm, as the examples of affirmative action and statistical discrimination demonstrate. All it provides evidence of is an intention to select on the basis of the protected trait. But, then, this argument runs into difficulty. There is something strange (even circular) about arguing that in cases of explicit classification, we need not look to the motive of the relevant actors because the law's explicit classification shows that the actors have the impermissible intention of classifying on the basis of the prohibited trait. Why, exactly, is the *intent* to classify on the basis of the protected trait constitutionally problematic? The answer: because classification on these grounds itself is problematic. If so, the presence of the intention is superfluous, an epiphenomenon that has no relevance.

This evidence supports the claim that current doctrine treats race-based differential treatment as a *pro tanto* violation of equal protection that by itself gives rise to strict scrutiny. When race-based differential treatment is present, the intentions of the relevant actors are irrelevant. This latter point has been underappreciated because intention and classification are often conflated, and it supports the claim that equal protection doctrine contains two distinct threads.

The fact that current doctrine makes race-based differential treatment the heart of an equal protection violation is animated by a distinctive normative vision of what equal protection requires and forbids. Treating people differently on the basis of race, whether for good or bad reasons, is a constitutional wrong in the view of the current Supreme Court

[119] My thanks to the participants in the Constitutional Law Workshop at the University of Chicago for pressing this objection. See also Dale Carpenter, The Dead End of Animus Doctrine, 74 Ala. L. Rev. 585, 590 (2023) (explaining that explicit classification on the basis of race, alienage, and national origin are presumptively unconstitutional because the fact that they "are rarely truly relevant to legitimate public interests" demonstrates that "[t]hey reflect prejudice and antipathy").

[120] The term "touchstone" is used in *Washington v. Davis*, where the Court asserts that "[d]isproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination." 426 U.S. 229, 242 (1976).

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because it "demeans us all."[121] In the Court's view, a person's race should play no role in the allocation of burdens or benefits: "The time for making distinctions based on race ha[s] passed."[122] This vision of constitutional wrong derives from the Court's understanding of what equality and fairness inherently require, as *SFFA* makes clear.[123]

B. Intent to Harm

The second strand of current equal protection doctrine holds that the intent to harm is never a legitimate governmental motive.[124] This strand is most often operative when the law is facially neutral, meaning that the law or policy at issue does not involve differential treatment on the basis of race or indeed any other suspect or quasi-suspect trait. That said, there could very well be cases in which race-based differential treatment is motivated by an intent to harm. In such a case, there would be two distinct constitutional problems, neither of which would depend on the presence of the other.

State actors should not be motivated by the fact that their actions will harm anyone. By this, I mean that if causing harm to someone is the reason that the actor themself takes to count in favor of the action,[125] the action taken with this motive is unconstitutional. In other words, by "intention," I mean only those reasons that actually motivate the actor—*their* reasons for acting. This understanding of "intention" as motives excludes cases in which the actor is aware of the effects of her action but does not select the policy "because of" this effect.[126] My claim has two components. First, only motives matter. Second, the only motive that matters is the aim of causing harm.

Equal protection cases do not speak with one voice, and so I am not claiming that in all equal protection cases in which the intention of the governmental actor is relevant, it is always and exclusively the intent to harm that is relevant. Rather, my claim is that when we consider equal

[121] See *Grutter*, 539 U.S. at 353 (Thomas, J., concurring in part and dissenting in part).
[122] *SFFA*, 143 S. Ct. at 2160.
[123] See supra text accompanying notes 48–51.
[124] U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 529, 534 (1973) (invalidating a requirement limiting households receiving food stamps to households of related individuals).
[125] Scanlon calls such reasons for action that the actor takes to count in favor of acting "operative reason[s]." T.M. Scanlon, What We Owe to Each Other 19 (1998) (emphasis omitted).
[126] See Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979).

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protection doctrine as a whole, what stands out is that when intentions are relevant to constitutional permissibility under equal protection, the relevant intention is an intent to harm. By intent to harm, what I have in mind is the motivation that the Court called attention to in *U.S. Department of Agriculture v. Moreno*, in which the Court emphasized that "a bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest."[127]

The fact that this passage has become canonical is the first piece of evidence in support of the claim that intent to harm is what matters when motives are relevant to constitutional permissibility. When the intentions of the governmental actor are relevant to the disposition of a case, this passage from *Moreno* is nearly always cited,[128] the implication being that it represents the clearest articulation of what is forbidden. State actors must not take actions from a bare desire to harm or act with an "evil eye."[129]

Often, courts describe the impermissible motive (intending to harm) as accompanied by a feeling or attitude toward the group affected. The word the Court uses to describe this feeling or attitude is "animus." For example, in *Romer v. Evans*,[130] the Court invalidated a provision of the Colorado constitution that banned discrimination protection on the basis of homosexual status because this provision of the Colorado constitution was adopted out of animus towards gay people.[131] The Court explained: "[L]aws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected."[132] While Justice Scalia, dissenting, challenged the assessment that the law was enacted out of animus, he did not dispute the fact that if

[127] *Moreno*, 413 U.S. at 534.

[128] See, e.g., N.Y.C. Transit Auth. v. Beazer, 440 U.S. 568, 609 n.15 (1979) (White, J., dissenting); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 446–47, 450 (1985); Lyng v. UAW, 485 U.S. 360, 383–85 (1988) (Marshall, J., dissenting); Romer v. Evans, 517 U.S. 620, 632, 634–35 (1996); Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 381–82 (2001) (Breyer, J., dissenting); Lawrence v. Texas, 539 U.S. 558, 580, 582 (2003) (O'Connor, J., concurring); United States v. Windsor, 570 U.S. 744, 746 (2013); Trump v. Hawaii, 138 S. Ct. 2392, 2420–21 (2018).

[129] Yick Wo v. Hopkins, 118 U.S. 356, 358, 373–74 (1886) (invalidating an ordinance that required that laundries be built of brick or stone unless an exception was granted on the grounds that Asians were refused exceptions because officials harbored animosity toward them).

[130] 517 U.S. 620.

[131] See id. at 624, 626, 634.

[132] Id. at 634.

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animus were present, it would be relevant.[133] Thus, both sides agreed that laws born of animus toward people are constitutionally impermissible.

Animus is important because it helps the Court recognize when a state actor's bare desire to harm is present and operative. After all, many laws and policies will disadvantage some people or groups. The fact that a law harms someone is therefore not conclusive evidence that it was enacted for this reason (i.e., *from* a bare desire to harm). But when the state actors also feel negatively toward the people harmed, there is good reason to believe that the law or policy was adopted *in order to* harm the despised group, rather than for other reasons that could be relevant.

When the Court speaks about intentions, especially in a context in which it considers invalidating a law or policy on the basis of the motives of the governmental actor, the Court often uses the term "invidious" to describe the intentions that are impermissible.[134] Invidious means "of a kind to cause harm or resentment,"[135] and so invidious intentions are those that are aiming at this effect.

Given this evidence for the claim that the relevant intention when assessing whether a law or policy violates equal protection is the intent to cause harm, why has there been confusion about this question? After all, the argument that facially neutral means of achieving diversity are impermissible if they are adopted specifically for the purpose of achieving *racial* diversity only gets off the ground if the intentions that are constitutionally impermissible, under equal protection, include more than being motivated to cause harm. To get that argument going, prohibited intentions must also include the intent to select for people on the basis of race. A key reason for the confusion—by both commentators and courts—lies, in my view, in the fact that two of the concepts that are central to this analysis—discrimination and intention—are amenable to more than one meaning.

[133] See id. at 644 (Scalia, J., dissenting). Justice Scalia describes the motives of those who voted for the amendment as moral disapproval of homosexual conduct (which could even be described as animus toward the *conduct*) rather than animus toward "any human being or class of human beings." Id.

[134] See, e.g., *Yick Wo*, 118 U.S. at 367; Loving v. Virginia, 388 U.S. 1, 8 (1967); Washington v. Davis, 426 U.S. 229, 242 (1976) ("Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination . . . ."); Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265 (1977) (citing *Davis*, 426 U.S. at 242).

[135] Invidious, Merriam-Webster, https://www.merriam-webster.com/dictionary/invidious [https://perma.cc/24UE-Q4S7] (last visited Oct. 4, 2024).

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First, consider ambiguities about the terms "discriminatory," "discriminate," and "discrimination." One reason for the confusion regarding the scope of impermissible intent—that is, whether impermissible intent only includes the intent to harm, or whether impermissible intent also includes the intent to distinguish among people on the basis of race (done for good or bad motives)—is that the cases often speak of "racially discriminatory intent" (or some variant on that term).[136] There is confusion about what intention is proscribed because the term "discrimination" itself is ambiguous as between two different meanings: one non-moralized and one moralized.[137] Sometimes to "discriminate" means to treat people differently on the basis of a property or trait. For example, the requirement that one must be sixteen years old to be eligible for a driver's license constitutes age discrimination in this non-moralized sense. Other times, the term "discriminate" means to treat people differently on the basis of some property or trait *in an impermissible way*. Used in this moralized way, the age requirement for driving does not constitute age discrimination. When the term "discrimination" is used in a moralized way, it has a negative moral valence. By this I mean it is as if the word is $\textit{Discrimination}_{\textit{bad}}$.

As a result, the term "racially discriminatory intent" is ambiguous, as it can carry two different meanings. It could refer to an intent to treat people differently on the basis of race without any judgment attached. Or, it could mean the intent to treat people differently on the basis of race in an impermissible way. When cases refer to "racially discriminatory intent" or some variant of this locution, it is unclear whether they mean simply the intent to treat people differently on the basis of race or if they mean the intent to do so in an invidious way. If the cases generally support the first meaning ($\textit{Discrimination}_{\textit{neutral}}$), this evidence would challenge the view I am presenting here. If the cases generally support the second meaning ($\textit{Discrimination}_{\textit{bad}}$), that evidence would support the claim I advance in this Article.

[136] See, e.g., *Arlington Heights*, 429 U.S. at 265 ("Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause."); Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 272 (1979) ("[A] neutral law . . . is unconstitutional under the Equal Protection Clause only if that [disparate] impact can be traced to a discriminatory purpose."); Batson v. Kentucky, 476 U.S. 79, 93 (1986) ("[T]he 'invidious quality' of governmental action claimed to be racially discriminatory 'must ultimately be traced to a racially discriminatory purpose.' " (quoting *Davis*, 426 U.S. at 240)).

[137] See Deborah Hellman, When Is Discrimination Wrong?, at 2–3 (2008); Benjamin Eidelson, Discrimination and Disrespect 5 (2015).

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Consider *Hunter v. Underwood*.[138] In *Hunter*, the Court invalidated a provision of the Alabama Constitution of 1901 which provided that people could be disenfranchised for non-felony convictions involving "moral turpitude" because the provision was "motivated by a desire to discriminate against blacks on account of race."[139] Which sense of discrimination is in play, $\textit{Discrimination}_{neutral}$ or $\textit{Discrimination}_{bad}$? Justice Rehnquist, writing for the Court, upheld the decision of the Eleventh Circuit, overturning the district court's finding that the provision was not enacted with impermissible intent as clearly erroneous.[140] In doing so, Justice Rehnquist emphasized that historical evidence supports the fact that "the Alabama Constitutional Convention of 1901 was part of a movement that swept the post-Reconstruction South to disenfranchise blacks."[141] In other words, there was an intent to harm, as disenfranchisement is certainly a harm. Moreover, he supported the claim that there was an intent to harm by noting the affective dimension that often accompanies an intent to harm, emphasizing that "neither the District Court nor appellants seriously dispute the claim that this zeal for white supremacy ran rampant at the convention."[142] Justice Rehnquist clearly used the term "discrimination" in the passage quoted above to mean $\textit{Discrimination}_{bad}$.

To be sure, *Hunter v. Underwood* is but one example of a facially neutral law being invalidated because it was enacted with impermissible intent, but it is an important example and provides support for the claim that when the Court speaks about discrimination, it uses that term to mean $\textit{Discrimination}_{bad}$. Moreover, the Supreme Court has not often invalidated laws and policies as in conflict with equal protection on the grounds that they were motivated by impermissible intentions.[143] Indeed, many of the canonical cases about the role of intention in the context of facially neutral laws are cases in which the relevant intention is absent.[144] Barring

[138] 471 U.S. 222 (1985).

[139] Id. at 223, 233.

[140] Id. at 223, 225.

[141] Id. at 229.

[142] Id.

[143] See Fallon, supra note 40, at 529 (arguing that accepting the proposition that courts should never invalidate laws solely on the basis of impermissible intent "would require the rejection of fewer iconic holdings than one might expect" and emphasizing that when courts refer to intentions they are often referring to the objective meaning of the law or policy rather than to the subjective motive of the governmental actors).

[144] See, e.g., Washington v. Davis, 426 U.S. 229, 246, 248 (1976) (upholding the use of a facially neutral screening mechanism which had a disparate negative impact on Black

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examples that show the interpretation offered here is inaccurate, it is fair to conclude that the intention that is relevant in equal protection cases is only an intent to harm.

Perhaps the Court's racial gerrymandering cases can provide such countervailing evidence. In these cases, the lines that delineate electoral districts constitute facially neutral state action. Yet sometimes, these lines are invalidated because state legislators were motivated by race in drawing the lines where they did.[145] These cases likely present the strongest evidence against the claim that the only intention that matters is the intent to harm, in that these cases contain language supporting the position that the intent to select voters on the basis of race (for good or bad reasons) is what matters.[146] For example, in *Shaw v. Hunt*,[147] the Court characterizes its holding in a prior redistricting case in the following way: "We explained in *Miller v. Johnson* that a racially gerrymandered districting scheme, like all laws that classify citizens on the basis of race, is constitutionally suspect. . . . This is true whether or not the reason for the racial classification is benign or the purpose remedial."[148]

Notwithstanding the categorical assertion of this statement, the significance of that language in this line of cases is uncertain. First, while sometimes the Court uses language (as in that passage) that suggests that the intent to classify on the basis of race is a constitutionally impermissible intention, other times it offers a more nuanced description of the intentions that are constitutionally problematic in the redistricting context. For example, in *Miller v. Johnson* itself, the Court characterizes its holding in *Shaw v. Reno* (an earlier redistricting case) in the following

applicants to the police force because the state actor was not motivated by an intent to exclude Black individuals from the police force); Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 274–75, 277, 281 (1979) (upholding a lifetime preference for veterans in civil service jobs in Massachusetts despite its stark negative effect on the job prospects of women because the preference was not enacted in order to exclude women).

[145] See, e.g., Miller v. Johnson, 515 U.S. 900, 917, 920 (1995) (finding that race was the predominant motive in drawing the voting districts and thus that equal protection was violated). Interestingly, the racial gerrymandering cases require that the prohibited motive—whatever it is—predominates rather than is merely present and motivating the state actor. Kim Forde-Mazrui believes that the Court may follow this approach when evaluating whether facially neutral means of achieving diversity are constitutional. So long as such policies are adopted for multiple reasons, even if aiming for diversity is seen as impermissible (in his view), if it is not the predominant motive, these policies may be upheld. See Kim Forde-Mazrui, Alternative Action After *SFFA*, 76 Stan. L. Rev. Online 149, 159 (2024).

[146] I want to thank Brian Fitzpatrick for pressing this point with me.

[147] 517 U.S. 899 (1996).

[148] Id. at 904–05.

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way: "In *Shaw v. Reno*, . . . we held that a plaintiff states a claim under the Equal Protection Clause by alleging that a state redistricting plan, on its face, has no rational explanation save as an effort to separate voters on the basis of race."[149] The intention to "separate" voters is importantly different than the intention to "classify" voters. Separation, like segregation or isolation, is arguably a harm, as I will later contend.[150] This reading is supported by the *Miller* Court's drawing an analogy to the de jure racial segregation that was endemic in the Jim Crow era.[151]

Moreover, in the cases at issue, voters *are* separated by race, rather than integrated. The state legislators do not use facially neutral laws to select voters on the basis of race in order to produce integrated districts. Rather they deploy facially neutral means to produce majority-minority districts.[152] As a result, the significance of these cases is uncertain. While some language supports the claim that aiming to select or classify voters on the basis of race is a constitutionally problematic intention, other language supports the claim that the problematic intention is the intention to "separate" or segregate on the basis of race, which is importantly different. Second, because the cases deal with the intentional creation of majority-minority districts, the intention that is actually at issue is consonant with the narrower view that it is aiming to segregate or separate that is constitutionally problematic.[153]

The second terminological ambiguity that helps to explain why courts and commentators have been confused about precisely what intentions are impermissible in the equal protection context relates to the concept of intention itself. Sometimes, the Court uses the term "intention" to refer to the motive of the governmental actors—in other words, *their* reasons for enacting the law or policy at issue. The philosopher Mark Schroeder calls these "motivating reasons."[154] Other times, the Court uses the term

[149] *Miller*, 515 U.S. at 903.

[150] See infra Section III.A.

[151] *Miller*, 515 U.S. at 911 ("Just as the State may not, absent extraordinary justification, segregate citizens on the basis of race in its public parks, . . . so did we recognize in *Shaw* that it may not separate its citizens into different voting districts on the basis of race.").

[152] See, e.g., id. at 917, 919; *Shaw II*, 517 U.S. 899, 902–03 (1996); Bush v. Vera, 517 U.S. 952, 957 (1996); Cooper v. Harris, 137 S. Ct. 1455, 1463 (2017).

[153] Moreover, in the districting context, the intent to integrate could also be understood as the intent to dilute the voting strength of minority voters, so interpreting the intent to harm in the voting context is likely more complex than in other areas.

[154] Mark Schroeder, Slaves of the Passions 12 (2007) (emphasis omitted); see S. Matthew Liao, Intentions and Moral Permissibility: The Case of Acting Permissibly with Bad

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"intention" to refer to what is sometimes confusingly called the "objective purpose" but which is better described as the objective meaning of the governmental action.[155] For example, in *Shaw v. Reno*, the Court arguably invalidated the redistricting plan at issue because the highly unusual shape of the challenged district sent the message or expressed that race was the predominant factor in the drawing of district lines.[156] This objective purpose refers not to the actual, subjective reasons that the state actor takes to count in favor of choosing the course of action (i.e., motivating reasons), but rather refers to features of the action itself and what it expresses. When the Court refers to intentions in this objective sense, the subjective motivation of the governmental actor is irrelevant.

Several scholars argue that the seeming relevance of intentions to legal permissibility of state action is overstated, as often, when the Court speaks about intentions, it is not referring to the actual motivation of state actors but instead to objective meaning.[157] To the extent that "intentions" are sometimes relevant in this way, they do not bear on the question we are discussing, which is if it matters whether facially neutral policies are adopted deliberately in order to increase enrollment of underrepresented minorities or to decrease racial gaps along some dimension. To answer that question, we must focus on motivating reasons—the reasons that state actors took to count in favor of adopting the law or policy at issue.

This Section has provided evidence for the claim that when courts invalidate facially neutral laws on the basis that the governmental actor adopted the law or policy in question for impermissible reasons, what is impermissible is being motivated to cause harm. Courts often conclude that such a motivation is present because negative feelings—animus—are also present. In addition, I have offered a diagnosis for why this observation has not been obvious to courts and commentators. The confusion results from ambiguities surrounding two important concepts: discrimination and intention. While each of these terms can be used in at

Intentions, 31 Law & Phil. 703, 703 (2012) (explaining that "[a]n intention can be understood as what the agent's aim was when performing a particular act").

[155] See Baker, supra note 40, at 973.

[156] See Shaw v. Reno, 509 U.S. 630, 647 (1993).

[157] See generally Fallon, supra note 40 (showing that forbidden legislative intent has both a mixed meaning and an uncertain effect). See Baker, supra note 40, at 977 (demonstrating that often what courts mean by "intent" vacillates between a focus on the subjective mental state of officials and the objective meaning of their actions); Hellman, supra note 112, at 8–13 (exploring the significance in equal protection doctrine of the expressive meaning of laws and policies).

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least two ways, a careful look at how they are used in cases in which facially neutral governmental action is examined to determine if it is enacted with impermissible intent demonstrates that courts use the term discrimination in a manner that carries a negative moral valence (*Discrimination$_{bad}$*). As a result, what they have to say about intentions to "discriminate" should not be taken to prohibit the intent to select or identify people on the basis of race. In addition, only cases in which courts speak about intentions as subjective motives are relevant to the question this Article addresses. Thus, reference to intentions more generally can be misleading.

The prohibition on state actors enacting laws or policies in order to harm an individual or group, often accompanied by hatred or negative feelings toward the person or group, derives from foundational obligations that any government has to those whom it governs. I am not aware of any case that explicitly articulates this position but perhaps the oft-cited passage in *Moreno* can be seen as gesturing toward it.

Recall, in *Moreno*, the Court said that "a bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest."[158] There is something puzzling about invalidating the law on this basis, however. *Moreno* is a case in which the law did not treat people differently on the basis of a suspect trait. Rather, the law prohibited households of "unrelated persons" from receiving food stamps.[159] As a result, all that is needed to uphold the law is a rational basis. Even if the desire to harm does not constitute such a rational basis (which the Court quite reasonably asserted), surely there are other reasons that one could offer for it. As any student of constitutional law knows, rational basis review is notoriously easy to pass. Surely there are reasons to justify the limitation at issue in *Moreno* that the Court could have imagined, much as the Court does in other rationality review cases.[160]

[158] U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973).

[159] Id.

[160] See, e.g., Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 489 (1955) (upholding a restriction on opticians but not sellers of ready-to-wear glasses on the grounds that the "legislature may think" there is a good reason for the law, and noting that the "legislature may select one phase of one field and apply a remedy there, neglecting the others"); Ry. Express Agency, Inc. v. New York, 336 U.S. 106, 109–10 (1949) (upholding a New York City traffic regulation that allowed trucks driven by their owners to carry advertising, but prohibiting all others from doing so on the grounds of what the authorities "may well have concluded," and emphasizing that "[i]t is no requirement of equal protection that all evils of the same genus be eradicated or none at all").

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The fact that the aim of harming hippies does invalidate a law subject to mere rationality review suggests that being motivated to harm renders the law that results from this motive impermissible per se. A legitimate state should not act from a bare desire to harm those whom it governs; nor should it act from animus or hatred toward any of its subjects.[161] This obligation should go without saying and thus it is unsurprising that there is no specific constitutional provision that contains this obligation. That said, one way to think about the obligation is to recognize that governments are formed to do good things for people. As the Preamble to the U.S. Constitution explicitly provides: "We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility . . . ."[162] While people are likely to disagree about what government actions will "promote the general Welfare,"[163] for example, and so these decisions are left to legislatures and those legislatures are given the wide discretion that rationality review provides, still, state actors should not act from a bare desire to harm those whom they govern.

This Part has argued that two features of current equal protection doctrine are often overlooked. First, while it is true that both race-based differential treatment and the intentions of state actors are relevant to constitutional permissibility, these threads are independent and distinct. When race-based differential treatment is present, the intention of the governmental actor is not relevant. Within this doctrinal track, the equal protection violation is assessed by reference to what the law or policy does, not by reference to the quality of will or attitude of the governmental actor. While others have stressed the importance of classification to equal protection doctrine, what has been missing to date is a recognition that this feature of the doctrine is conceptually distinct and separate from aspects of the doctrine that focus on intent.

The second contribution of this Part is to point out that the only intention that is constitutionally relevant within equal protection doctrine is being motivated to cause harm. This prohibition is rooted in general

[161] The view I put forward has some affinities with Richard Fallon's view that when state actors enact laws motivated by illicit aims, they violate their deliberative obligations. Fallon, supra note 40, at 576–77 (arguing for the view that acting with impermissible intent, which he conceives of more broadly than I do, violates the deliberative obligations of legislators and so should give rise to strict scrutiny).

[162] U.S. Const. pmbl.

[163] Id.

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and foundational obligations of governments toward those whom they govern.

Before leaving this Part, I want to consider one possible worry about this account. I claim that being motivated to harm is different, both morally and constitutionally, from being motivated to benefit. One might wonder whether this claim is in tension with the argument in *SFFA* that in a competitive zero-sum context, like university admissions, a benefit is equivalent to a burden.[164] It is not. The zero-sum argument focuses on the effect of a racial plus-factor. In a competitive context, it may be true that benefitting one group negatively affects the prospects of another group because applicants are evaluated in relation to one another. But motives are not in an analogous competition with one another. The fact that an actor is motivated to benefit veterans, for example, does not entail that the actor is *motivated* to harm women, to borrow the example from *Feeney*. The fact that a policy will have a particular *effect* does not entail that the actor who adopted it was motivated by this effect. *Feeney* rests on precisely this point.[165] To reject it, and to transpose the zero-sum argument from the context in which race-based differential treatment is at issue to the context of facially neutral laws, would be to reject the distinction that *Feeney* itself adopts.

Another way to put this point would be to emphasize that while competitive admissions environments are zero-sum, intentions are not subject to the same economic principles. A person can be motivated to adopt a policy because it will increase the number of Black or Latinx students at the school, for example, without necessitating that she is also motivated to adopt the policy because it will decrease the number of white or Asian students, for example. She may recognize that this consequence will occur, but it need not be her *motive* in adopting the policy.

This distinction between what is specifically intended versus merely foreseen, which is a staple of equal protection doctrine, seems elusive in this context because of the necessary connection between an increase in one group's representation and the decrease in the representation of other

[164] See *SFFA*, 143 S. Ct. 2141, 2169 (2023); see also Deborah Hellman, The Zero-Sum Argument, Legacy Preferences, and the Erosion of the Distinction Between Disparate Treatment and Disparate Impact, 109 Va. L. Rev. Online 185, 188 (2023) (positing that the zero-sum claim "rests, albeit inadvertently, on the assumption that the effects of a policy matter to whether the policy treats the race of an applicant as a negative," thus eroding the current doctrinal distinction between disparate treatment and disparate impact).

[165] See supra note 13.

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groups. This difference appears to matter because of how we often reason about what an actor actually intended. Consider the classic context in which philosophers distinguish the between intention and foresight.[166] According to just war theory, it is permissible to bomb a munitions factory that will predictably cause some civilian deaths so long as the harm to civilians is proportionate and the motive of the military official dropping the bomb is to hit the factory, not the civilians. Of course, the military official foresees that civilian deaths will occur but so long as she doesn't aim to cause these deaths, the bombing is permissible. How can we determine what her true motive is? One tool used in this context is to ask the following hypothetical question: If the official could bomb the factory without killing the civilians, would she adopt that policy instead? If the answer is yes, then her motive is not to kill civilians. If the answer is no, then we conclude that the military official actually is motivated to take the action, at least in part, because civilians will die.

Now imagine the context in which admissions officials adopt a facially neutral policy because it will increase the *percentage* of Black and Latinx students at the university. The admissions official foresees that by increasing the percentage of Black and Latinx students, she necessarily will decrease the percentage of either white or Asian students or both (assuming those are the only or main groups represented at the school). The official maintains that though she foresees this result, it is not her aim or motivation. The problem is that when we use the tool of the hypothetical counterfactual question, the admissions official is unable to provide the answer that is open to the military official. We ask: If you could increase the *percentage* of Black and Latinx students without reducing the percentage of white or Asian students, would you still adopt the policy at issue? It seems she cannot answer "yes." The reason she

[166] According to the Doctrine of Double Effect ("DDE"), there is a moral difference between intending to cause harm and merely foreseeing that harm will occur. In the classic example used to illustrate the moral appeal of that doctrine, the so-called *Tactical Bomber* is contrasted with the *Terror Bomber*. The *Tactical Bomber* acts permissibly if he targets a munitions factory, even if the bombing will likely cause civilian casualties, so long as those losses are proportionate and causing these deaths is not his aim but instead a regrettable side effect of targeting the factory. By contrast, the *Terror Bomber*, who aims to kill civilians in order to terrorize the enemy and thus win the war, acts impermissibly even if the same number of civilians are expected to die. The difference is said to lie in the actors' intentions. The *Terror Bomber* intends to kill civilians, while the *Tactical Bomber* merely foresees that they will die. Examples like this one appear to support the DDE and the claim that intentions are relevant to the permissibility of actions. For a straightforward description of these contrasting cases as they are used in the literature, see Liao, supra note 154, at 704–05.

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cannot is because the question is posed in a manner that links the foreseen consequence to the intended outcome, as percentages of a total necessarily relate to one another.

It is this fact that makes it tempting to conclude that the intention to increase the Black and Latinx population is also the intention to decrease the white or Asian population. However, this conclusion mistakes the test for the thing being tested for. The hypothetical counterfactual question is a *method* that can be helpful for ascertaining a fact about the mental state of the actor: what is her actual motivation? It is a useful method in some circumstances. But when the motivation relates to something (an increase in the percentage of *X*) that is logically connected to something else (a decrease in the percentage of not-*X*), then this method loses its utility. However, while this fact means that the actor cannot logically envision achieving her aim without the occurrence of the foreseen consequence, this fact does not reveal what the actual motivation of the actor is. The fact that *in the world*, the desired effect and the foreseen consequence are necessarily connected does not entail that an actor's intentions are also linked in the same way. The official can be motivated to increase the representation of some racial groups without being motivated to decrease the representation of others.

This Article asks whether universities may pursue racial diversity by facially neutral means. The answer it provides is "yes." But simply providing an answer is not enough. The challenge was to explain *why* this answer is correct under current equal protection doctrine. That is, why is it that *Class Rank* is presumptively permissible, while *Zip Codes* is not? These cases should be treated differently because equal protection doctrine's focus on race-based differential treatment exists independently and apart from its focus on intent. The threads are distinct and cannot be woven together. In addition, the reasons that motivate state actors only matter when the actors are motivated to cause harm. Absent that intention, usually accompanied by negative feelings or animus, intent is irrelevant. As a result, a university may deliberately adopt facially neutral policies to increase the enrollment of minority students. Such policies do not involve race-based differential treatment. Nor are they motivated by a desire to cause harm. They are therefore permissible.

III. ELABORATION OF THE THEORY

It is now time to further refine the account. In what follows, I elaborate how we should think about cases in which actors are motivated by aims

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that they perceive as beneficial or benign but which are, at least arguably, harmful. Section III.A explores this question. In Section III.B, I describe some implications of the account. In particular, the account shows why the term "race-conscious" is ambiguous and so should be avoided. The account also demonstrates that implicit bias is a form of race-based differential treatment and should be treated as such.

A. Objective Harm and Racial Isolation

To fully flesh out the account presented in this Article, we must say a bit more about what counts as a harm. In order to do so, it may be useful to consider a variation on a question posed by Justice Thomas in *Grutter v. Bollinger*.[167] Citing evidence that a homogeneous learning environment benefits Black students, Justice Thomas challenged the deference the Court accorded to the University of Michigan in that case. He wondered whether a Court would offer similar deference to the educational judgment of a historically Black college or university ("HBCU") that a homogeneous student body has educational benefits, and which thereby wished to privilege the applications of Black students to achieve such racial homogeneity.[168] This argument has the form of a *reductio ad absurdum*. Justice Thomas assumes that such deference is clearly impermissible, and therefore, so too must be the deference accorded to the university's judgment that a diverse student body has educational benefits that is accorded by the Court in *Grutter*.[169]

As the preference for Black and other minority applicants is held impermissible in *SFFA*, neither that preference nor an analogous one by a hypothetical HBCU aimed at achieving homogeneity rather than diversity would be constitutional today. Both clearly involve race-based differential treatment. However, Justice Thomas's musings provide an important example to use to consider what counts as a "harm" within the proscription on state actors intending to harm. Consider the following variant on Justice Thomas's example.

> *Homogeneous*: A university adopts a facially neutral policy with the aim of increasing the number of students of *X* race in order to improve the homogeneity of the student body and does so because university

[167] 539 U.S. 306, 364–66 (2003) (Thomas, J., concurring in part and dissenting in part).
[168] Id.
[169] Id. at 365 (citing United States v. Fordice, 505 U.S. 717, 748 (1992) (Thomas, J., concurring)).

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> admissions officials believe, in good faith, that a racially homogeneous environment improves student learning.

Is *Homogeneous* constitutionally permissible?

To start, we should note that the policy is facially neutral (by stipulation). It therefore does not involve race-based differential treatment. In addition, the university officials actually and honestly believe that homogeneity benefits students and adopt the policy for that reason. It would therefore appear to be constitutionally permissible under the principles thus far articulated. Indeed, this would be the conclusion regardless of the race preferred. After all, *Homogeneous* might come in multiple variations: *Homogeneous$_{race}$* where the race is filled in by Black, white, Asian, Native American, etc. When we consider the variation in which a predominantly white institution provides a preference to white applicants because its admissions officials believe that a racially homogeneous learning environment is good for students, the view put forward in this Article starts to look especially implausible.

Perhaps we can avoid this counterexample by noting that while a homogeneous student body is beneficial for minority students, this homogeneity is not likely to be beneficial for white students. Or perhaps we can avoid it by noting that a policy like *Homogeneous$_{white}$* is more likely to actually be motivated by antipathy toward Black and other racial minority students rather than by a sincere belief in the importance of racially homogeneous learning environments. While each of these assumptions could be correct, they will not help the theory I defend in this Article. I am assuming, in order to test and elaborate the theory under consideration, that the state actors at issue genuinely believe that a racially homogeneous student body benefits students and that the admissions officials are actually motivated to adopt the policy for this reason. If your instincts, like mine, suggest that the current Court would not (and should not) approve the facially neutral policy *Homogeneous$_{white}$*, then we do not yet have a complete, normatively plausible, account.

The first modification I offer is that harm must be assessed objectively. Therefore, there is both a subjective and an objective aspect of the prohibition on state actors intending to harm. A governmental actor's intention, in the sense of *her* reasons for acting, matter. This is the subjective dimension. But when assessing whether these motivating reasons constitute an intent *to harm*, courts must assess *harm* objectively. If the state actor (subjectively) aims to produce *X* and *X* is a harm

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(objectively), then the state actor aims to harm, even if *she* does not see *X* as a harm.

To see why what counts as a harm must be assessed objectively, consider the phenomenon of benevolent sexism. Suppose a state employer were to consider a recent gap in an applicant's employment history as a negative when considering which applicants to bring in for interviews. This feature of the review process is facially neutral, as a gap in a resume is not a suspect trait. Further, suppose the employer does so deliberately in order to exclude women with young children, as such resume gaps are correlated with sex. At the same time, suppose the employer aims to exclude women with young children because he believes that young mothers are happier and do better when they stay home with their children. Clearly, the fact that this employer believes he is helping rather than harming women does not save this policy. His use of the facially neutral trait to exclude women is an intent to harm because exclusion from a valued employment opportunity is objectively harmful, whether the employer sees it that way or not.

If harms are assessed objectively, then courts must determine *what* is objectively harmful. Exclusion from valuable opportunities, like jobs, is surely harmful. To operationalize this account, and address a case like *Homogeneous$_{race}$*, courts would need to determine whether racial isolation is a harm. *Homogeneous$_{race}$* refers to a policy of using facially neutral selection policies to achieve a homogeneous student body because racial homogeneity is believed by the state actors to be educationally beneficial. If this policy were to be judged to be impermissible using the "Two Threads" account presented in this Article, it would be because a court would find racial isolation to be a harm.

This example illustrates two important points. First, courts must pass judgment about what is good and what is bad in order to identify what counts as an intent to harm. Second, the Court's equal protection doctrine rests ultimately on a vision of the role that race should play in the ideal world. I believe the Court would reject *Homogeneous$_{race}$* because racial homogeneity is, at some level, inconsistent with the constitutional vision that undergirds the Court's equal protection jurisprudence.[170] The

[170] The racial gerrymandering cases, among others, support the claim that racial isolation is a harm. Starr, in part, explains these cases in a similar manner. See Starr, supra note 22, at 190–91 (asserting that "[b]ecause segregation is the epitome of an invidious purpose, it makes sense that once an electoral policy is characterized as having this purpose, it would trigger strict scrutiny" and distinguishing this purpose from one that is "integrative").

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idealized constitutional world that animates the doctrine is one in which race does not play the social role that it plays in the actual world. It is for this reason that the state may not engage in race-based differential treatment. And it is for this reason that aiming at racial homogeneity is to aim at constitutional harm. Because racial isolation is a harm, aiming at a world in which we live in racially separate enclaves and in which racial differences in wealth, health, and educational attainment continue constitutes an intent to *harm* within constitutional law and is therefore prohibited.

B. Race-Consciousness and Implicit Bias

There are two additional implications of the analysis presented in this Article that are worth emphasizing. First, the term "race-conscious" which appears in both cases and commentary is ambiguous in ways that are unhelpful and therefore should be avoided. Second, implicit bias is a form of race-based differential treatment rather than a problem of intentions and should be treated as such. I discuss each point below.

The term "race-conscious" is ambiguous. It could refer to an awareness of the racial implications of the action to be taken. This form of race consciousness is clearly not relevant to the permissibility of governmental action. *Personnel Administrator of Massachusetts v. Feeney* makes clear that mere awareness of consequences is not of constitutional relevance.[171] In *Feeney*, the State of Massachusetts may well have been aware that a preference for veterans in civil service jobs would disadvantage women. Still, the Court held that the Massachusetts policy would only be viewed as a form of sex discrimination if it had been adopted "because of" this likely effect.[172] The Court adopts the same approach to awareness of racial consequences in *Washington v. Davis*[173] as it does to awareness of the consequences for women (or men) in *Feeney*. Race-consciousness as awareness of racial consequences is thus clearly permissible.

The term "race-consciousness" could also describe the context in which a facially neutral policy is adopted in order to select people on the basis of race or sex. This form of race-consciousness is also permissible.

[171] 442 U.S. 256, 279 (1979) ("'Discriminatory purpose,' however, implies more than intent as volition or intent as awareness of consequences.").

[172] Id.

[173] 426 U.S. 229, 240 (1976) (holding that, to be subject to heightened scrutiny under equal protection doctrine, a law must be passed with an invidious purpose to discriminate against a suspect class).

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As this Article has argued, only an intent to harm is constitutionally problematic. Thus, race-conscious governmental action itself is not impermissible. Rather, only one form of it is: when a state actor adopts a facially neutral policy in order to harm some person or group. Moreover, it is not the race-consciousness that is the source of the constitutional wrong. For these reasons, use of the term, to the extent that it carries a connotation of impermissibility, is misleading and should be avoided.

Second, the analysis presented in this Article has implications for how courts ought to treat implicit bias. The term "implicit bias" refers to the context in which an actor treats members of a particular race or sex (to focus on two prominent examples) differently than members of a different race or sex but does so unintentionally and without awareness.[174] For example, suppose a state employer harbors implicit bias against Black people. This employer may evaluate the work of Black employees more critically than white employees and may do so without being aware of doing so. Indeed, this employer might even consciously reject the permissibility of treating people differently on the basis of race and judge such conduct to be morally wrong.

Action taken as a result of implicit bias is a form of race-based differential treatment and should be treated as such. Current doctrine prohibits race-based differential treatment regardless of the intention that motivates it. Whether motivated by good intentions or bad, and whether done intentionally or unintentionally, race-based differential treatment warrants strict scrutiny. When implicit bias affects the treatment an actor provides, the state actor treats people differently on the basis of race (or some other trait). While it will be difficult to know—and also to prove—that such bias caused race-based differential treatment to be sure, nonetheless, we should acknowledge that implicit bias is a form of race-based differential treatment and therefore constitutionally impermissible unless it satisfies strict scrutiny.

Why then has implicit bias not been recognized as a form of race-based differential treatment?[175] The reason may lie in an additional ambiguity

[174] Implicit Bias, Merriam Webster, https://www.merriam-webster.com/dictionary/implicit%20bias [https://perma.cc/GB6U-QS4U] (last visited Oct. 4, 2024) (defining "implicit bias" as "a bias or prejudice that is present but not consciously held or recognized").

[175] Some scholars have treated it as such. See, e.g., Eidelson, supra note 137, at 19 (describing his "Explanatory Condition" for discrimination in in the following way: "[W]e might say that the grounds on which a person discriminates are marked by the links on a chain of explanation that go through [the discriminator's] mind.").

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about the meaning of the term "intention." Earlier I noted that the term is sometimes misleadingly used to refer to what a policy expresses (sometimes called the "objective intention"). In addition, sometimes the term "intention" is used to refer to any internal mental state, something in the head of the governmental actor. If this is the meaning of "intention," then implicit bias seems like a form of intention because it occurs is in a person's head. This is a mistake.

Intentions can be understood as reasons for action. Pamela Hieronymi offers a taxonomy of three different conceptions of reasons for action that is helpful in disentangling the different ideas in play and in sorting out the constitutional relevance of each.[176] First, there are "considerations that (in fact, truly) count in favour of acting" which she, borrowing the term, calls "normative reasons."[177] Second, there are "motivating reasons," which we have focused on thus far, meaning the reasons that the actor him or herself "*took* to count in favour of acting."[178] Lastly, there are considerations that explain why the agent acted. These include facts about her psychological or mental state, and so would include implicit bias.[179]

As we have seen, it is the second conception of reasons for action, motivating reasons, that are relevant in the thread of equal protection doctrine that makes so-called "intentions" relevant. When the agent's motivating reasons include harming another, the action that results from this intention is impermissible. The third conception of reasons for action refer to the facts about an actor's psychological state that cause the action she takes. These psychological causes are something different than the reasons that an agent him or herself took to count in favor of acting. Only these latter reasons for action are relevant to the thread of equal protection doctrine that focuses on an actor's intentions. By contrast, psychological causes are relevant to the thread that prohibits race-based differential treatment. Because the actor reacts differently to people of one race than to people of another, the actor engages in race-based differential treatment. This race-based differential treatment occurs in the head of an actor rather than on the face of the law or policy. But this difference does not convert these mental causes into motivating reasons. Thus, implicit bias is a form of race-based differential treatment. While hard to identify

[176] Pamela Hieronymi, Reasons for Action, 111 Proc. Aristotelian Soc'y 407, 413 (2011).
[177] Id.
[178] Id.
[179] Id.

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or prove because it occurs inside someone's head, we should nevertheless see it as what it is.

CONCLUSION

The Court's decision in *SFFA* makes salient a long-simmering debate. May universities and other state actors deliberately adopt facially neutral means of increasing racial diversity? The answer to this question is important, not only for higher education but also for the myriad other policies that states and localities might adopt that are aimed at increasing racial diversity or at reducing racial disparities in areas like health, education, and access to lending.

The pragmatic answer to this question may well be that courts will approve of these measures. If so, the contribution of this Article is theoretical rather than practical. It tells us why the answer the Court is likely to adopt is correct. But this guess about what the Supreme Court is likely to do is no more than a guess. If the Justices believe that the combined logic of the two strands of equal protection doctrine leads to the conclusion that state actors may not deliberately adopt facially neutral means of achieving racial diversity or of decreasing racial disparities, then the consequences could be far-reaching. The stakes of correctly answering this question are thus extremely high.

This Article has argued that the deliberate use of facially neutral means of achieving diversity is constitutionally permissible. In addition, it has argued that such a policy should be treated differently than the deliberate use of facially neutral means of excluding people from valuable opportunities. *Class Rank* should be treated differently than *Zip Codes* because equal protection doctrine contains two distinct threads that rest on different normative justifications and should not be combined.

Equal protection doctrine subjects race-based differential treatment to strict scrutiny. As both policies are facially neutral, neither runs afoul of this requirement. Equal protection doctrine also prohibits state actors from acting from a motive to harm. As *Class Rank* is not motived by a desire to harm, it is not prohibited. *Zip Codes*, by contrast, is motivated by such a desire. This difference in motivating reasons matters because the only prohibited intention is the intent to harm. This seemingly simple resolution of a puzzle that has long plagued scholars arises from a recognition of the underlying normative vision that animates each of these distinct principles. The prohibition on race-based differential treatment rests on a view about how people are entitled to be treated. In the Court's

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view, equal protection guarantees people the right that their race not affect the treatment they receive. By contrast, the focus on intention has its roots in a more fundamental commitment to duties that governments owe to those whom they govern. While states enjoy broad discretion to adopt all manner of aims, intending to harm those whom they govern is proscribed.