THE CONSTITUTIONALITY OF RACIALLY INTEGRATIVE PURPOSE

Elise C. Boddie†

TABLE OF CONTENTS

INTRODUCTION 531
I. THE MEANING OF "DISCRIMINATORY PURPOSE" 533
A. *Categories of Race Jurisprudence in Equal Protection* 534
B. *Unpacking Racially Integrative Purpose* 536
C. *Exploring Intent* 539
II. THE CONSTITUTIONALITY OF RACIALLY INTEGRATIVE PURPOSE 544
A. *Public Schools* 544
B. *State-Subsidized Housing* 545
C. *Government Employment* 547
III. RACIALLY INTEGRATIVE PURPOSE IN PRACTICE: TEXAS'S TOP TEN PERCENT PLAN 548
CONCLUSION 550

INTRODUCTION

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?[1]

† Professor of Law, Henry Rutgers University Professor, and Judge Robert L. Carter Scholar, Rutgers Law School. B.A., Yale College; M.P.P., John F. Kennedy School of Government, Harvard University; J.D. Harvard Law School. I thank Michelle Adams for her comments on an earlier draft. I also thank the editorial staff of the *Cardozo Law Review* for their helpful comments and suggestions.

[1] Other legal scholars have examined this question. *See, e.g.*, Michelle Adams, *Is Integration a Discriminatory Purpose?*, 96 IOWA L. REV. 837 (2011); Elise C. Boddie, *The Way*

In earlier affirmative action cases, the Court declared its inability to tell the difference between policies that are designed to harm and those that aim to benefit people of color.[2] But in more recent opinions, Justice Kennedy has come to embrace this distinction openly.[3] His affirmation of policies that seek to promote racial inclusion—what I refer to here as "integrative purpose"—points to a fault line in conservative constitutional jurisprudence on race. On one side is longstanding equal protection doctrine that treats the use of facially race-conscious policies, meaning those that burden or benefit specific individuals on the basis of race, as presumptively unconstitutional.[4] On the other side appears to be an emerging consensus on the Roberts Court, forged most explicitly by Justice Kennedy, that the state will largely be held harmless for policies that promote racial inclusion if they do not use race-specific means.[5]

The Court has yet to decide a case on this question, but this apparent consensus—about the constitutionality of facially-neutral but intentionally integrative policies—undermines the conventional wisdom that the Court is unable, or unwilling, to distinguish between benign and invidious racial purpose.[6] It also indicates that a majority of the

---

Forward: Racial Integration After Ricci, *a Response to Michelle Adams*, 96 IOWA L. REV. BULL. 100 (2011) [hereinafter Boddie, *The Way Forward*]; Cynthia L. Estlund, *Working Together: The Workplace, Civil Society, and the Law*, 89 GEO. L.J. 1, 79–85 (2000); Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493 (2003); Reva B. Siegel, *Race-Conscious but Race-Neutral: The Constitutionality of Disparate Impact in the Roberts Court*, 66 ALA. L. REV. 653, 655–56 (2015).

2 As the Court observed in *Adarand Constructors, Inc. v. Pena*,

> Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are "benign" or "remedial" and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics. Indeed, the purpose of strict scrutiny is to 'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool.

515 U.S. 200, 226 (1995) (quoting City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989)).

3 *See infra* Part II.

4 *See, e.g.*, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007) (striking down race-specific student assignment policy to achieve racial integration); *Adarand*, 515 U.S. at 227 ("We hold today that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny.").

5 *See generally* Boddie, *The Way Forward*, *supra* note 1.

6 In his dissent in *Adarand*, Justice Stevens poignantly argued this point:

> The Court's concept of "consistency" assumes that there is no significant difference between a decision by the majority to impose a special burden on the members of a minority race and a decision by the majority to provide a benefit to certain members of that minority notwithstanding its incidental burden on some members of the majority. In my opinion that assumption is untenable. There is no moral or constitutional equivalence between a policy that is designed to perpetuate a caste

Justices do not embrace strict colorblindness as a constitutional goal. More deeply, it creates an opportunity to infuse new meaning into equal protection by rejecting doctrinally-laced assumptions that racial inclusion is tantamount to "reverse discrimination" against whites.

Part I discusses the meaning of discriminatory purpose. Part II explores Justice Kennedy's opinions during the term of the Roberts Court in which he has condoned racially integrative purpose in public education, state-subsidized housing, and government employment. Part III applies these insights to the facially race-neutral—but purposefully integrative—Texas state law discussed in *Fisher v. University of Texas at Austin* (*Fisher II*).[7] That law requires the top ten percent of graduating seniors to be admitted to the state's public colleges. The purpose of this law is to increase student diversity, but it does not rely on race-specific means, such as racial classifications, to achieve this goal. In other words, it is facially race-neutral. Therefore, it squarely presents the constitutional question considered in this Essay.

I. THE MEANING OF "DISCRIMINATORY PURPOSE"

Last term, Justice Kennedy surprised many with his majority opinion in *Fisher II* upholding a race-conscious policy in college admissions.[8] As commentators noted, until *Fisher II* Kennedy had never voted in favor of a policy that explicitly relied on the race of individuals in allocating government-sourced opportunities.[9]

This skepticism about Kennedy's support for affirmative action, however, glosses over an important distinction. Although Kennedy disfavors facially race-conscious policies that burden or benefit

> system and one that seeks to eradicate racial subordination. Invidious discrimination is an engine of oppression, subjugating a disfavored group to enhance or maintain the power of the majority. Remedial race-based preferences reflect the opposite impulse: a desire to foster equality in society. No sensible conception of the Government's constitutional obligation to "govern impartially" should ignore this distinction.

515 U.S. at 243 (Stevens, J., dissenting) (quoting Hampton v. Mow Sun Wong, 426 U.S. 88, 100 (1976)).

7 136 S. Ct. 2198 (2016).

8 *Id.* at 2215.

9 *See, e.g.*, Adam Liptak, *Supreme Court Upholds Affirmative Action Program at University of Texas*, N.Y. TIMES (June 23, 2016), http://www.nytimes.com/2016/06/24/us/politics/supreme-court-affirmative-action-university-of-texas.html (observing that the decision was "unexpected" and that Justice Kennedy "has long been skeptical of race-sensitive programs and had never before voted to uphold an affirmative action plan").

individuals on the basis of their race,[10] he has expressed support generally for diversity,[11] integration,[12] and the elimination of both overt and implicit racial bias[13] as government objectives. Kennedy's endorsement of these governmental purposes—presumably with the support of the four liberal Justices—could resolve a question that has lain dormant in equal protection: Would a state policy that is intended to include historically marginalized racial groups[14] violate the discriminatory purpose doctrine if it is facially neutral? We can begin to answer this question by situating it within existing doctrine. I turn to this below.

A. *Categories of Race Jurisprudence in Equal Protection*

Equal protection can be divided into three categories of race cases. The first category involves racial classifications that invidiously exclude historically subordinated groups on the basis of race.[15] This category is inapposite to the question at issue here because our hypothetical facially race-neutral but purposively integrative policy neither relies on racial classifications nor is intended to exclude groups that historically have been burdened by racial discrimination.

The second category of equal protection concerns policies that are facially neutral, but which have a disproportionately adverse impact by excluding historically marginalized racial groups.[16] Because the state's intentions here are undeclared, the Court examines the policy's context to assess whether it is motivated by an "invidious discriminatory

---

10 *See, e.g.*, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 790 (2007) (Kennedy, J., concurring in part and concurring in the judgment) (suggesting that racial classifications endanger "individual freedom" and may cause "hurt" and "anger").

11 *See, e.g.*, *id.* at 783 (Kennedy, J., concurring) ("Diversity, depending on its meaning and definition, is a compelling educational goal a school district may pursue.").

12 *See, e.g.*, *id.* at 788 (critiquing the plurality opinion for suggesting that "state and local school authorities must accept the status quo of racial isolation in schools").

13 *See, e.g.*, Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2522 (2015) ("Recognition of disparate-impact liability under the FHA also plays a role in uncovering discriminatory intent: It permits plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment. In this way disparate-impact liability may prevent segregated housing patterns that might otherwise result from covert and illicit stereotyping.").

14 I principally refer here to African Americans and Latinos, but I would leave the scope of such a racially integrative policy to the discretion of the institution to fashion a policy based on its own institutional history and social context.

15 *See, e.g.*, Brown v. Bd. of Educ., 347 U.S. 483 (1954).

16 *See* Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 273 (1979) ("The cases of *Washington v. Davis* and *Arlington Heights v. Metropolitan Housing Dev. Corp.* recognize that when a neutral law has a disparate impact upon a group that has historically been the victim of discrimination, an unconstitutional purpose may still be at work." (citations omitted)).

purpose."[17] These cases too are inapposite. By definition, our policy would not negatively affect underrepresented groups because its whole point is to promote their inclusion in predominantly white institutions.

The final group of cases addresses policies that use racial classifications to promote affirmative action, various forms of integration, and diversity in higher education. Once again, the Court applies strict scrutiny, despite the state's inclusionary objectives.[18] Because our policy does not use racial classifications, this category of cases also has limited utility for diagnosing its constitutionality.

The two exceptions are *Grutter v. Bollinger*[19] and *Fisher II*. Both cases endorsed the educational benefits of student diversity in higher education as a governmental purpose[20] and upheld policies that were facially race-conscious.[21] These cases suggest that the Court would uphold policies that achieve the same diversity goals in higher education using race-neutral means.[22] *Grutter* is also telling for what it suggests about Justice Kennedy's general views of diversity. Although he voted to strike down the university's specific use of race in that case, he did not object to the constitutional legitimacy of diversity itself.[23]

What then are we to make of a policy that blends the racially inclusionary objectives of affirmative action, diversity, and integration (the third case category) with facially neutral means (the second category)? I contend that such a policy is presumptively constitutional. But, to be clear, my framing of the question—and the answer that flows from it—depends on an important threshold understanding: such a policy is not, as some commentators have suggested, purposefully

---

17 Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977) ("Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.").

18 *See, e.g.*, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007) (applying strict scrutiny to local policies that considered race to advance racial integration in public schools); Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 226 (1995) (applying strict scrutiny to racial classifications in affirmative action policy); Shaw v. Reno, 509 U.S. 630, 644 (1993) (concluding that strict scrutiny applies to redistricting legislation that is "unexplainable on grounds other than race"); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (applying strict scrutiny to racial classifications in affirmative action policy).

19 539 U.S. 306 (2003).

20 *Fisher II*, 136 S. Ct. 2198, 2210 (2016) (discussing educational benefits of student diversity); *Grutter*, 539 U.S. at 329 (concluding that the Law School had a "compelling interest in a diverse student body").

21 *Fisher II*, 136 S. Ct. at 2207; *Grutter*, 539 U.S. at 343.

22 *See Fisher II*, 136 S. Ct. at 2212–13 (discussing the university's unsuccessful efforts to achieve student diversity through race-neutral means).

23 *See* Elise C. Boddie, *The Indignities of Color Blindness*, 64 UCLA L. REV. DISCOURSE 64, 86 (2016).

discriminatory *against* whites.[24] Nor would it promote racial stereotypes or entail any of the "expressive harms" that the Court has cited in striking down other government policies that are motivated by racial concerns.[25] Before addressing these arguments, however, I will explore briefly below the kinds of policies that we traditionally associate with racially integrative purpose.

B. *Unpacking Racially Integrative Purpose*

My working assumption is that affirmative action, diversity, and integration policies are all racially inclusionary in the sense that each seeks to bring historically underrepresented groups into the fold of majority-white institutions. Until this point I have used these terms interchangeably. Yet they all have slightly different connotations. Although more precise definitions of these terms are beyond the scope of this Essay, understanding some of their contours helps us to unpack the meaning of racially integrative purpose.

Affirmative action can take a variety of forms, but I define it here to refer to a race-conscious remedy that benefits specific individuals to compensate for past discrimination by a particular institutional actor[26] or to redress pervasive racial disparities that stem from unspecified causes.[27] State institutions have deployed both kinds of these affirmative action policies to create opportunities for individual members of groups that have been excluded from predominantly white institutions.[28] For the last several decades, however, the Court has struck down the latter forms of affirmative action on the grounds that they were not designed

---

24 *See, e.g.*, Brian T. Fitzpatrick, *Strict Scrutiny of Facially Race-Neutral State Action and the Texas Ten Percent Plan*, 53 BAYLOR L. REV. 289, 291 (2001) (describing policies like the ones I examine here as an "[i]ndirect effort[] to practice racial discrimination").

25 *Id.* at 304.

26 *See, e.g.*, City of Richmond v. J.A. Croson Co., 488 U.S. 469, 505 (1989) (observing that race-specific contracting programs require a showing of "identified discrimination").

27 *See, e.g.*, *id.* (rejecting "societal discrimination" as constitutional justification for affirmative action in local government contracting program); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 274 (1986) (Powell, J.) (plurality opinion) (rejecting "societal discrimination" as basis for race-specific layoff provision in collective bargaining agreement); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 309–10 (1978) (Powell, J.) (plurality opinion) (rejecting "societal discrimination" in context of state medical school's race-specific admissions policy).

28 *See generally* Elizabeth S. Anderson, *Integration, Affirmative Action, and Strict Scrutiny*, 77 N.Y.U. L. REV. 1195 (2002) (discussing affirmative action as a source of opportunity and access for racially marginalized groups and as a compensatory program for past discrimination).

to remedy discrimination that the Court considers constitutionally cognizable.[29]

Like affirmative action, integration policies tend to be justified by reference to some form of past discrimination and also have been struck down over the last several decades for relying on race-specific means to redress discrimination that is not recognized by the Court.[30] Diversity is different from both affirmative action and integration in that it is not typically justified as a remedy for past societal or identified discrimination.[31] Although diversity derives its significance and importance from the *fact* of past discrimination, it is a forward-looking rationale: its focus is on promoting inclusion, regardless of the cause of an institution's racial deficiencies.[32]

Cynthia Estlund draws additional distinctions between diversity and integration. Alluding to its connections to prior discrimination, she contends that integration is "limited by remedial objectives and cannot justify preferences that disfavor historically disadvantaged groups."[33] For Estlund, integration also operates from a different premise than diversity. While integration emphasizes the benefits of interconnectedness and commonality in broader society,[34] diversity, Estlund writes, stresses the "virtues of difference."[35] This framing of diversity's benefits, she says, leads to "implicit racial generalizations about individuals"[36] and treats "racial and ethnic differences [as] proxies for other sorts of differences that are valuable within" a given

---

29 *See, e.g.*, *Croson*, 488 U.S. at 505 (rejecting "societal discrimination" as constitutional justification for affirmative action in local government contracting program); *Wygant*, 476 U.S. at 274 (Powell, J.) (plurality opinion) (rejecting "societal discrimination" as basis for race-specific layoff provision in collective bargaining agreement); *Bakke*, 438 U.S. at 309–10 (Powell, J., concurring) (rejecting "societal discrimination" in context of state medical school's race-specific admissions policy).

30 *Cf.* Bd. of Educ. of Okla. City Pub. Sch. v. Dowell, 498 U.S. 237, 249–50 (1991) (concluding that federal court's termination of desegregation decree against school district does not depend on continuing de facto segregation, but on whether the district has shown that it "complied in good faith with the desegregation decree since it was entered, and [that] the vestiges of past discrimination [have] been eliminated to the extent practicable").

31 *See Croson*, 488 U.S. at 500 (calling for findings of "identified discrimination" in the local construction industry to justify race-specific affirmative action). Note, however, that affirmative action can be based on a diversity rationale. *See* Elise C. Boddie, Response, *The Future of Affirmative Action*, 130 HARV. L. REV. F. 38, 39 (2016).

32 *See* Estlund, *supra* note 1, at 80 ("[T]he importance of workplace integration is based on the *fact* of widespread prejudice and de facto segregation among racial and ethnic groups in the society; but the integration argument is forward-looking and does not require us to sort out the admittedly complex causes of these social facts.").

33 *Id.*

34 *Id.* at 81.

35 *Id.*

36 *Id.* at 83.

institution.[37] For these reasons, Estlund favors integration over diversity because it accentuates the benefits of simple connectedness between and among people, regardless of their real or perceived dissimilarities.[38]

Estlund wrote before the Court's decision in *Grutter*, which defined the benefits of diversity in ways that are comparable to her description of integration.[39] *Grutter* specifically observed, for example, that diversity "promotes 'cross-racial understanding,' helps to break down racial stereotypes, and 'enables [students] to better understand persons of different races.'"[40] The experience of interacting with someone of a different racial background, in other words, enables students to better appreciate their commonalities across a vast social divide. In this respect, the goals of integration described by Estlund are not so different from the benefits of diversity recognized by *Grutter*.[41]

In sum, although affirmative action, integration, and diversity spring from the same overarching premise about the importance of racial inclusion, there are some shades of difference in their underlying rationales. As conceived by government officials and by the courts, affirmative action and integration tend to be more remedial in focus, while diversity stresses the value of shared institutional space largely for its own sake.[42] As discussed below, however, these slight variations should make no difference in terms of their constitutionality as government objectives.

---

37 *Id.*

38 *Id.*

39 *Id.* at 84 (describing the benefits of integration as "the cultivation of empathy and understanding and friendship, the formation of social capital, and the promotion of communication among citizens across social cleavages[,] [which] accrue to the society as a whole").

40 Grutter v. Bollinger, 539 U.S. 306, 330 (2003) (alteration in original) (citation omitted).

41 *Grutter* also observed that diversity enhances the legitimacy of state institutions:

> In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity. All members of our heterogeneous society must have confidence in the openness and integrity of the educational institutions that provide this training.

Id. at 332.

42 The Court did include a nod to the role of past discrimination in appreciating diversity's underlying value and significance. *Id.* at 338 (observing that the value of diversity springs from "our Nation's struggle with racial inequality" and that minority students "are both likely to have experiences of particular importance to the Law School's mission, and less likely to be admitted in meaningful numbers on criteria that ignore those experiences").

C. *Exploring Intent*

Having discussed some contours of racially integrative purpose, we can return now to my original question about whether facially-neutral policies that are motivated by such a purpose—as manifested through affirmative action, integration, and/or diversity rationales—constitutes discrimination against whites.

Some commentators argue that facially race-neutral policies that intend to effect disparate impact against whites, segregation, and/or a "change in racial composition" violate equal protection.[43] Some of this seems right. For instance, we can agree that an intent to exclude whites, by means of segregation or policies that are designed to have a disproportionate adverse impact on them as a group, are unconstitutional. However, the answer to the question presented in this Essay critically depends on what we mean by "intent." Citing *Personnel Administrator of Massachusetts v. Feeney*,[44] some argue that state actors need only intend the consequences of their action.[45] On this view, if government officials deliberately adopt a policy that *happens* to—rather than *intends* to—generate adverse racial effects, the policy would violate equal protection.[46] This interpretation equates policies designed to bring, for example, more African Americans and Latinos into predominantly white institutions with unconstitutionally purposeful discrimination against whites.

This claim, however, seriously misinterprets *Feeney*'s admonition that state action must be taken "at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."[47] In *Feeney*, the Court limited equal protection by imposing a heightened, animus-based[48] standard for finding intent.[49] Earlier, in *Washington v. Davis*,[50]

---

43 *See* Fitzpatrick, *supra* note 24, at 298–312; *see also* Adams, *supra* note 1 (discussing whether an integrative purpose is "discriminatory").

44 442 U.S. 256 (1979).

45 *See* Fitzpatrick, *supra* note 24, at 308–09.

46 *Id.* at 309 ("Contrary to the suggestions of some commentators, it is irrelevant whether the state actors harbor ill will or animus towards a particular race when passing legislation. Instead, state actors run afoul of the Constitution only if they act with a particular 'state of mind' toward certain effects of their action." (footnote omitted)).

47 *Id.* at 308; *see also* Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 764 (2011) (observing that *Feeney* "defined 'discriminatory purpose' so stringently" that "disparate impact ha[s] to operate as at least a partial incentive for the state action").

48 *See Feeney*, 442 U.S. at 274 (indicating that equal protection is focused on rooting out "invidious" discrimination).

49 *See* Yoshino, *supra* note 47, at 764 ("In the vast run of cases after *Feeney*, only facial discrimination has drawn heightened scrutiny under the equal protection guarantees. If legislators have the wit—which they generally do—to avoid words like 'race' or the name of a particular racial group in the text of their legislation, the courts will generally apply ordinary

the Court required a finding of intent expressly to curb challenges to policies with severe disproportionate impact against African Americans.[51] Having been consistently deployed to the detriment of racial minorities,[52] it would be ironic (to say the least) if these same cases were now used to strike down policies designed to extend opportunities to historically subordinated racial groups.

Some might point to the Court's affirmative action and school integration cases to support a broad interpretation of intent. As described above, in cases like *Parents Involved in Community Schools v. Seattle School District No. 1*[53] and even in *Grutter*[54] and *Fisher II*,[55] the Court applied strict scrutiny to intentionally integrative policies that used racial classifications to achieve their goals. In these cases and others,[56] the Court has placed policies that promote the inclusion of racial minorities on the same constitutional footing as policies that seek to exclude or segregate. In so doing, the Court has appeared to require colorblindness as a goal of equal protection. Under this doctrine, affirmative action came to be defined as "reverse discrimination" against whites.[57]

Still, these cases can be reconciled with our facially neutral policy. Once again, they turn on the state's use of racial classifications and, therefore, are factually distinguishable. Because the Court has consistently emphasized that the equal protection guarantee is personal

---

rational basis review. This tendency is true even if the state action has an egregiously negative impact on a protected group.").

50 426 U.S. 229 (1976).

51

> A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far-reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white.

Id. at 248; *cf. Feeney*, 442 U.S. at 273 ("[T]he Fourteenth Amendment guarantees equal laws, not equal results.").

52 *See, e.g.*, McCleskey v. Kemp, 481 U.S. 279, 286–87, 292–93 (1987) (finding that equal protection demanded a showing of racially discriminatory intent as to a specific individual on death row, regardless of significant racial disparities in the application of the death penalty).

53 551 U.S. 701 (2007).

54 539 U.S. 306, 326 (2003) ("We have held that all racial classifications imposed by government 'must be analyzed by a reviewing court under strict scrutiny.'" (quoting Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995))).

55 136 S. Ct. 2198, 2208 (2016) (observing that strict scrutiny applies to university's race-conscious admissions program).

56 *See* cases cited *supra* note 4.

57 *See generally* Elise C. Boddie, *The Sins of Innocence in Standing Doctrine*, 68 VAND. L. REV. 297 (2015) [hereinafter Boddie, *The Sins of Innocence*].

to the individual,[58] this difference is crucial for purposes of our hypothetical policy. Existing doctrine treats racial classifications, which burden or benefit individuals on the basis of their race, as infringing on that personal guarantee. Although courts apply strict scrutiny to them, they are far more deferential to the use of facially-neutral policies, which tend to readily satisfy judicial review.[59]

The Court's redistricting cases arguably pose a closer question. In *Shaw v. Reno*[60] and *Miller v. Johnson*,[61] the Court applied strict scrutiny[62] to majority-minority voting districts that were drawn "predominantly" based on the race of individual voters.[63] The Court, however, made clear in both cases that a state legislature's mere awareness of race does not necessarily mean that "race predominates in the redistricting process"[64] or that "'the intentional creation of majority-minority districts, without more,' always gives rise to an equal protection claim."[65] Because of the Court's willingness to tolerate some uses of race in drawing electoral boundaries, redistricting cases may help delineate the constitutional boundary between race-conscious policies that trigger strict scrutiny and those that do not.

As an opinion by Justice Kennedy, the Court's conventional swing vote on racial matters, *Miller* is instructive. Some commentators have interpreted *Miller* to mean that the Court will be skeptical of any declared intention to effect a "change in the racial composition" of a government institution under the auspices of a facially-neutral policy.[66] But this seems too simplistic. As discussed further below, the Court in

---

58 *See Adarand*, 515 U.S. at 223–25 (observing that racial classifications trigger strict scrutiny because they affect the personal rights of the individual); *see also* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 299 (1978) (Powell, J.) (plurality opinion) (same).

59 *See* Yoshino, *supra* note 47, at 764.

60 509 U.S. 630 (1993).

61 515 U.S. 900 (1995).

62 *See id.* at 913 ("Our reasoning in *Shaw* compels this conclusion. We recognized in *Shaw* that, outside the districting context, statutes are subject to strict scrutiny under the Equal Protection Clause not just when they contain express racial classifications, but also when, though race neutral on their face, they are motivated by a racial purpose or object.").

63 *Id.* at 916 (observing that in redistricting it is "plaintiff's burden . . . to show, either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district").

64 *Id.*; *cf.* Bush v. Vera, 517 U.S. 952, 958 (1996) (plurality opinion) ("Strict scrutiny does not apply merely because redistricting is performed with consciousness of race. . . . Electoral district lines are 'facially race neutral,' so a more searching inquiry is necessary before strict scrutiny can be found applicable in redistricting cases than in cases of 'classifications based explicitly on race.'" (quoting Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 213 (1995))).

65 *Shaw*, 509 U.S. at 649 (quoting the dissent).

66 *See* Fitzpatrick, *supra* note 24, at 303 ("The gerrymandering cases effectively held that any change in the racial composition of an electoral district can be subjected to strict scrutiny so long as the state had the requisite purpose to affect that change.").

several cases has endorsed the goal of racial inclusion.[67] A policy that is crafted specifically to change an institution's racial composition in order to promote integration, therefore, should not by itself run afoul of equal protection.

This brings us to the core issue in *Miller*. The problem was not that the state intended simply to change the racial composition of the contested electoral districts, but that race had so predominated the Georgia state legislature's redistricting plan that it effectuated a racial classification of the districts' residents.[68] The Court affirmed the district court's conclusion that "the legislature [had] subordinated traditional race-neutral districting principles"[69] in "assign[ing] black populations" to the districts.[70] Because the state legislature had used race to group together disparate black communities,[71] the Court concluded that the plan was "unexplainable on grounds other than race."[72] Therefore, it triggered strict scrutiny.[73]

Thus, *Miller* is significant for several reasons. First, it indicates that the Court will allow *some* governmental uses of race without applying strict scrutiny, at least in the context of redistricting. In this respect, *Miller* is consistent with this Essay's premise that the state's pursuit of racially integrative objectives is not by itself presumptively unconstitutional.[74] At the same time, *Miller* cautions that a facially race-neutral policy requires strict scrutiny if a court determines that it is functionally equivalent to a racial classification.[75]

That leaves the thornier question of how to determine when a facially-neutral policy effects a racial classification. As the Court's redistricting cases indicate, such a determination can involve close

---

67 *See infra* Part II.

68 *Miller*, 515 U.S. at 917 ("In our view, the District Court applied the correct analysis, and its finding that race was the predominant factor motivating the drawing of the Eleventh District was not clearly erroneous.").

69 *Id.* at 916.

70 *Id.* at 917.

71 *Id.* at 919 (describing the "fractured political, social, and economic interests within the [contested] district's black population").

72 *Id.* at 905 ("Our analysis began from the premise that '[l]aws that explicitly distinguish between individuals on racial grounds fall within the core of [the Equal Protection Clause's] prohibition.' This prohibition extends not just to explicit racial classifications, but also to laws neutral on their face but 'unexplainable on grounds other than race.'" (alterations in original) (quoting Shaw v. Reno, 509 U.S. 630, 642, 644 (1993))); *id.* at 916 (concluding that race was "the predominant factor" in the drawing of the contested district).

73 *Id.* at 920.

74 *Cf.* Pamela S. Karlan, Lecture, *Easing the Spring: Strict Scrutiny and Affirmative Action after the Redistricting Cases*, 43 WM. & MARY L. REV. 1569, 1584 (2002) (observing that *Miller* "might reflect the Court's implicit recognition that uses of race that are not intended to injure should be treated differently even if there is no compelling justification for using race").

75 *Miller*, 515 U.S. at 916–17.

review of the underlying record. In *Miller*, the Court was satisfied that the state legislature had effectively used racial classifications because of the district's shape[76] and comments by legislators that their intention was to maximize the district's black representation.[77] However, in *Easley v. Cromartie*,[78] the Court accepted the defendants' rationale that racially identifiable districts were created for partisan political reasons, indicating that even a high correlation between race and other demographic criteria, such as party affiliation, may not be enough to activate close judicial review.[79]

Here is where the redistricting cases may cease to be helpful. The Court tends to regard majority-minority districts as segregative, rather than integrative, making them analogous in the Court's view to intentionally discriminatory policies that promoted racial segregation during the era of Jim Crow.[80] This characterization matters because it provides a basis for distinguishing redistricting policies from other kinds of race-conscious policies that the Court may perceive as racially inclusive.[81]

Part II discusses cases decided during the term of the Roberts Court in which Justice Kennedy embraced policies that promote racially inclusionary goals. These cases point to an emerging understanding that integrative policies can readily survive judicial scrutiny as long as they do not impinge on particular opportunities for individuals on the basis of race.

These insights may spur some rethinking of the conventional rationale for equal protection's close judicial scrutiny of racial classifications. Policies that type individuals by race trigger strict scrutiny not because they are rationally understood as invidiously discriminatory against whites, as the term "reverse discrimination" suggests. Rather, as Reva Siegel has observed, Justice Kennedy's primary worry is that affirmative action alienates resentful whites and, therefore,

---

76 *Id.* at 917 ("Although by comparison with other districts the geometric shape of the Eleventh District may not seem bizarre on its face, when its shape is considered in conjunction with its racial and population densities, the story of racial gerrymandering seen by the District Court becomes much clearer.").

77 *Id.* at 917–20.

78 532 U.S. 234 (2001).

79 *Id.* at 258 (concluding that mere correlation of political affiliation with race was not itself sufficient to establish that race predominated in redistricting plan).

80 *Miller*, 515 U.S. at 911 (comparing majority-minority districts to segregation in public parks, golf courses, beaches, and schools).

81 *But see* Shaw v. Reno, 509 U.S. 630, 676 (1993) (Blackmun, J., dissenting) ("It is particularly ironic that the case in which today's majority chooses to abandon settled law and to recognize for the first time this 'analytically distinct' constitutional claim is a challenge by white voters to the plan under which North Carolina has sent black representatives to Congress for the first time since Reconstruction." (citation omitted)).

is (in his view) socially divisive.[82] Properly understood, strict scrutiny in the context of affirmative action is not at all about colorblindness goals, but rather is designed to minimize the risk of stoking white resentment.[83] This objective is unquestionably race-conscious, which indicates that race-consciousness per se is not the constitutional problem that critics of affirmative action have made it out to be. What matters instead is the distinction between purpose and means.

II. THE CONSTITUTIONALITY OF RACIALLY INTEGRATIVE PURPOSE

In this Part, I discuss several examples of the dividing line between race-conscious means and race-conscious purpose across cases that address school and housing segregation and government employment.

A. *Public Schools*

In *Parents Involved*, the Court struck down voluntary integration policies in Jefferson County, Kentucky and Seattle, Washington that used race to assign students to public schools.[84] Under these policies, admission depended on the race of the student and the particular school's racial demographics.[85] Students were admitted if their race enhanced a school's level of integration and denied if it did not.[86]

Justice Kennedy joined the Court's four other conservative members to reject the policies on narrow tailoring grounds.[87] But he criticized Chief Justice Roberts's plurality opinion as "too dismissive of the legitimate interest government has in ensuring all people have equal opportunity regardless of their race."[88] He also rejected its suggestion that "the Constitution requires school districts to ignore the problem of *de facto* resegregation in schooling."[89] Colorblindness may be a useful

---

82 Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278, 1307 (2011).

83 *See* Boddie, *The Sins of Innocence*, *supra* note 57, at 324–30 (discussing how equal protection doctrine has been formulated to minimize white resentment).

84 Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 733–35 (concluding that the districts' use of race failed on narrow tailoring grounds).

85 *Id.* at 712 (describing use of racial "tiebreaker" in student assignment to Seattle public schools); *id.* at 716–17 (describing similar use of race in Jefferson County public schools).

86 *Id.* at 712; *id.* at 716–17.

87 *Id.* 782–98 (Kennedy, J., concurring in part and concurring in judgment).

88 *Id.* at 787–88; *see also id.* at 783 ("The plurality . . . does not acknowledge that the school districts have identified a compelling interest here. For this reason, among others, I do not join Parts III-B and IV. Diversity, depending on its meaning and definition, is a compelling educational goal a school district may pursue.").

89 *Id.* at 788.

aspiration, Kennedy noted, but "[i]n the real world, it is regrettable to say, it cannot be a universal constitutional principle."[90]

Kennedy's concurring opinion is significant for its endorsement of inclusionary racial objectives, such as diversity and the avoidance of racial isolation, particularly if carried out through race-neutral means. His concurrence ends with this important nugget:

> If school authorities are concerned that the student-body compositions of certain schools interfere with the objective of offering an equal educational opportunity to all of their students, they are free to devise race-conscious measures to address the problem in a general way and without treating each student in different fashion solely on the basis of a systematic, individual typing by race.[91]

Kennedy's reference to "race-conscious measures [that] address the problem [of racial isolation] in a general way"[92] refers to the racially integrative purpose I have been describing throughout this Essay. His caution about "treating each student in different fashion solely on the basis of a systematic, individual typing by race"[93] underscores the distinction between race-conscious ends and race-conscious means.

This concurrence indicates that racially integrative purpose as a goal (here in the form of increasing diversity or reducing de facto racial segregation) is presumptively valid and would be subject to minimal scrutiny. It also intimates that Kennedy will be more favorably disposed to policies that emphasize the cross-racial benefits of racial inclusion. He continues this line of reasoning in *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.*[94] and in *Ricci v. DeStefano*[95] discussed below.

B. *State-Subsidized Housing*

Texas Department of Housing and Community Affairs involved a challenge to a state housing agency's practice of allocating low-income housing tax credits for developments in predominantly black neighborhoods and relatively fewer credits for developments in mostly white suburbs.[96] Inclusive Communities, a non-profit that helps low-

90 *Id.*
91 *Id.* at 788–89.
92 *Id.*
93 *Id.* at 789.
94 135 S. Ct. 2507 (2015).
95 557 U.S. 557 (2009).
96 *Tex. Dep't of Hous. & Cmty. Affairs*, 135 S. Ct. at 2514.

income families find affordable housing, argued that the practice reinforced racial segregation in housing and sued the state agency for disparate impact under the federal Fair Housing Act.[97]

The question before the Court was whether disparate-impact claims are cognizable under the Fair Housing Act.[98] These claims provide a statutory cause of action against policies that have a "disproportionately adverse effect on minorities."[99] Writing for the majority, Justice Kennedy concluded that disparate impact is a legitimate fair housing claim.[100]

More interesting for our purposes, however, are the racial optics of the opinion and its tone. Kennedy gives a forceful account of the history of segregation[101] and its continuing impact on the "country's economic and social life."[102] Further, he acknowledges the importance of disparate impact claims as a tool for "counteract[ing] unconscious prejudices and disguised animus that escape easy classification as disparate treatment"[103] and for "revitaliz[ing] . . . communities that have long suffered the harsh consequences of segregated housing patterns."[104] Kennedy is wary of statutory interpretations that give rise to racial classifications and quotas, but he is also quick to extol the importance of racial integration as a government objective:

> Much progress remains to be made in our Nation's continuing struggle against racial isolation. In striving to achieve our "historic commitment to creating an integrated society," we must remain wary of policies that reduce homeowners to nothing more than their race. But since the passage of the Fair Housing Act in 1968 and against the backdrop of disparate-impact liability in nearly every jurisdiction, many cities have become more diverse. The FHA must play an important part in avoiding the Kerner Commission's grim prophecy that "[o]ur Nation is moving toward two societies, one black, one white—separate and unequal." The Court acknowledges the Fair Housing Act's continuing role in moving the Nation toward a more integrated society.[105]

As in *Parents Involved*, Justice Kennedy rejects colorblindness as a goal by endorsing policies that are racially inclusionary. His decision for

---

97 *Id.*
98 *Id.* at 2513.
99 *Id.*
100 *Id.* at 2525.
101 *Id.* at 2515–16.
102 *Id.* at 2515.
103 *Id.* at 2522.
104 *Id.* at 2525.
105 *Id.* at 2525–26 (alteration original) (citations omitted).

the Court in *Ricci v. DeStefano*,[106] discussed below, similarly indicates that he would apply strict scrutiny only to government policies and practices that rely on race-specific means.

C. *Government Employment*

Ricci addressed whether the City of New Haven violated Title VII's disparate treatment provisions when it decided not to certify the results of a civil service exam used to determine promotions for city firefighters.[107] Only whites and two Hispanics scored high enough on the exam to be considered for promotions.[108] These results led the City's Civil Service Board to conclude that the exam was unlawful under Title VII's disparate impact provision because it had a disproportionate adverse effect on African American candidates.[109] In an opinion that set Title VII's disparate impact and disparate treatment provisions on a collision course, the Court instead determined that the City "lacked a strong basis in evidence" for its judgment that the test was unlawful on disparate impact grounds.[110] Thus, by cancelling the exam results, the Court concluded that the City had intentionally discriminated against the individual white plaintiffs under Title VII.[111]

Because Justice Kennedy's opinion for the majority resolved the case under Title VII, the Court avoided the white plaintiffs' equal protection claim for intentional discrimination.[112] But the case raised the possibility that a state actor could run into constitutional problems if it elected a course of action that disadvantaged specific individuals on the basis of their race.[113]

Kennedy's opinion provides safe harbor under Title VII for a government's "affirmative efforts to ensure that all groups have a fair opportunity to apply for promotions and to participate in the process by which promotions will be made,"[114] as long as the state does not change

106 557 U.S. 557 (2009).

107 *Id.* at 562–63.

108 *Id.* at 566.

109 *Id.* at 572–74.

110 *Id.* at 592 ("On the record before us, there is no genuine dispute that the City lacked a strong basis in evidence to believe it would face disparate-impact liability if it certified the examination results.").

111 *Id.*

112 *Id.* at 584 (observing that because the City had not met its Title VII burden, the Court "need not decide whether a legitimate fear of disparate impact is ever sufficient to justify discriminatory treatment under the Constitution").

113 *Id.* at 594–96 (Scalia, J., concurring).

114 *Id.* at 585 (majority opinion).

the selection criteria after settling on a specific process.[115] The particular Title VII problem in *Ricci* stemmed from the City's decision to invalidate the test results after learning the racial distribution of the high-scoring candidates.[116] The statutory problem—and we might infer, the equal protection problem[117]—arises from a decision that "upset[s] an employee's legitimate expectation not to be judged on the basis of race."[118] In other words, the City likely could have avoided liability had it cancelled the exam *before* learning the results.[119] But doing so once it was aware of the racial impact set it up for a Title VII violation and, potentially, an equal protection claim on similar grounds.[120]

Ricci, like *Miller*, therefore, helps us understand what it means for a policy to be facially neutral. It demonstrates that a policy will not escape strict scrutiny simply because it does not expressly rely on race. Rather, an otherwise neutral policy can effectuate the functional equivalent of a racial classification if it demonstrably affects opportunities for specific individuals on the basis of race.

III. RACIALLY INTEGRATIVE PURPOSE IN PRACTICE: TEXAS'S TOP TEN PERCENT PLAN

Each of the opinions discussed in the previous Part points to an emerging principle in the Court's equal protection jurisprudence that racially integrative objectives are permissible if pursued through race-neutral channels. Although I have focused on the opinions of Justice Kennedy, even the more conservative Justices, including Justice Scalia himself before his passing, have acknowledged the legitimacy of facially race-neutral efforts by the state to promote racial inclusion.[121]

What does all of this mean in practice? The constitutionality of racially integrative purpose potentially has new salience after the Court's decision last term in *Fisher II* to uphold the consideration of race in

115 *Id.*

116 *Id.* at 562.

117 The case echoes equal protection in its application of the strong basis in evidence standard, which Kennedy imported from the Court's affirmative action decision in *City of Richmond v. Croson*. *See Ricci*, 557 U.S. at 582–83 (citing City of Richmond v. J. A. Croson Co., 488 U.S. 469, 500 (1989)). And Kennedy's language in *Ricci* emphasizing the importance of "equal opportunity regardless of race," *id.* at 585, also has constitutional overtones.

118 *Ricci*, 557 U.S. at 585.

119 *See* Boddie, *The Way Forward*, *supra* note 1, at 113 ("The key for government employers then is to design policies and procedures that seek to maximize integration and diversity and to assess their effectiveness (as much as practicable) before they are implemented.").

120 *See id.* at 112–13.

121 *See id.* at 112 & n.82 (discussing Justice Scalia).

higher education admissions.[122] As already discussed, *Fisher II* was decided against the backdrop of a state law that requires Texas colleges to admit the top ten percent of graduating high school seniors.[123] The law is facially neutral in that it does not use race to determine university admissions.[124] However, it is unquestionably race-conscious in purpose[125]: the state legislature passed it to promote student diversity after an earlier federal court ruling struck down affirmative action.[126] Because of persistent residential segregation in the state, the law has been modestly successful in promoting student diversity.[127] This raised the question in *Fisher II* whether the university still needed race-specific admissions to achieve its educational objectives.[128]

Again, the constitutionality of the percentage law was not before the Court in *Fisher II*, but we can infer that it would pass constitutional muster in its current form based on the Kennedy opinions described above. Although it is race-conscious, it does not rely on racial classifications to advance its objectives.

On the other hand, what if admissions at the University of Texas were decided *solely* on the basis of the percentage plan, such that—due to demographic changes in the state—the university in fact became a majority-minority institution? Justice Kennedy expressed skepticism about the educational value of such a policy.[129] But would such a law itself be unconstitutional?

Under the conventional rules of equal protection, the answer is likely to be no in the absence of some showing of invidious intent. Under *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, a court would engage in the same "sensitive inquiry into such circumstantial and direct evidence of intent as may be

---

122 136 S. Ct. 2198, 2215 (2016).

123 *Id.* at 2205, 2208–09, 2213–14 (discussing top ten percent plan in context of University's admissions policy).

124 *Id.* at 2213 ("[T]he Top Ten Percent Plan, though facially neutral, cannot be understood apart from its basic purpose, which is to boost minority enrollment.").

125 *Id.*

126 *Id.* at 2205 (observing that the state legislature passed the Top Ten Percent Plan in response to the Fifth Circuit Court of Appeals' decision in *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996), to strike down race-conscious admissions at the University of Texas).

127 *Id.* at 2213 ("Percentage plans are 'adopted with racially segregated neighborhoods and schools front and center stage.'" (quoting Fisher v. Univ. of Tex. at Austin (*Fisher I*), 133 S. Ct. 2411, 2433 (2013) (Ginsburg, J., dissenting))); *see also* Michelle Adams, *Isn't It Ironic? The Central Paradox at the Heart of "Percentage Plans,"* 62 OHIO ST. L.J. 1729 (2001) (pointing to irony that percentage plans leverage residential and public school segregation to advance diversity in higher education).

128 *Fisher II*, 136 S. Ct at 2213–14 (rejecting petitioner's proposal to "uncap the Top Ten Percent Plan, and admit more—if not all—the University's students through a percentage plan" instead of using race in student admissions).

129 *Id.* at 2213–14.

available."[130] Such evidence would include clear, disproportionate adverse impact on white candidates; the historical background for the decision; the sequence of events that led to the decision; and contemporary legislative or administrative history that suggests invidious racial motive.[131] A defendant could overcome a showing of racial motive by demonstrating that it would have made the same decision in its absence.[132] As in *Personnel Administrator of Massachusetts v. Feeney*, however, a showing even of severe, disparate impact would not alone satisfy this constitutional prerequisite.[133]

In sum, the genuineness of the government's purpose as to facially neutral policies like the Top Ten Percent Plan would be policed through the same constitutional standards that have applied to minority plaintiffs. These standards can be used to identify policies that are used to disadvantage a particular person for reasons that are intentionally racially discriminatory. Without such a showing, a plaintiff would have no viable constitutional claim.

CONCLUSION

The future of our country critically depends on ensuring that racially marginalized groups are fully included across all productive dimensions of our society. They too must reap the social, economic, and political benefits of inclusion and belonging in our public and private institutions.

The Court's decisions in *Grutter* and *Fisher II* have been a step in the right direction. But the more general limitations on the specific uses of race under the majority of equal protection decisions, including those decided by the Roberts Court, have undermined this goal. This Essay argues that these negative constitutional outcomes may finally have bottomed out in the form of racially integrative purpose achieved through facially-neutral means. These kinds of policies are no substitute for more rigorous forms of affirmative action. But we can at least be reasonably clear that they stand on firm constitutional footing.

130 Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977).

131 *Id.* at 266–68.

132 *Id.* at 270 & n.21.

133 Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979) ("'Discriminatory purpose,' . . . implies more than intent as volition or intent as awareness of consequences.").