

COMMENTS

BLACK AND WHITE AND GRAY ALL OVER: HOW ANTICLASSIFICATION THEORY CAN ENDORSE RACE-BASED AFFIRMATIVE ACTION POLICIES

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INTRODUCTION

Constitutional commentators have long emphasized two dominant strains in the Court's approach to the Equal Protection Clause, often termed "antisubordination" and "anticlassification." In the classical formulation, anticlassification sees the treatment of individuals based on race or ethnicity as the primary concern of equal protection; it therefore equates remedial policies with discriminatory policies, based on the principle that the Equal Protection Clause is "colorblind."¹ By contrast, antisubordination sees the

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¹ See, e.g., *Missouri v. Jenkins*, 515 U.S. 70, 120–21 (1995) (Thomas, J., concurring) ("At the heart of this interpretation of the Equal Protection Clause lies the principle that the government must treat citizens as individuals, and not as members of racial, ethnic, or religious groups. It is for this reason that we must subject all racial classifications to the strictest of scrutiny" (citations omitted)); Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 *YALE L.J.* 1278, 1281 (2011) ("The Justices who vote against affirmative action and other race-conscious civil rights policies are said to reason from a colorblind anticlassification principle, premised on the belief that the Constitution protects individuals, not groups, and so bars all racial classifications, except as a remedy for specific wrongdoing."); see also Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 *N.Y.U. L. REV.* 1003, 1006 (1986) ("It is equally invidious for white men to be treated differently from black women as for black women to be treated differently from white men . . . because both situations violate the preeminent norm of equal treatment. Anti-differentiation advocates therefore argue for 'color-blindness' . . . and frequently criticize affirmative action as violating that principle.").

Justice Harlan introduced "colorblindness" into the equal protection lexicon in *Plessy v. Ferguson*, 163 U.S. 537 (1896), but, as Owen Fiss pointed out, Harlan in fact borrowed it from Albion W. Tourgee, Homer Plessy's attorney, who wrote: "Justice is pictured blind and her daughter, the Law, ought at least to be color-blind." Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 *PHIL. & PUB. AFF.* 107, 119 n.17 (1976) (quoting Brief for Plaintiff in Error at 19, *Plessy v. Ferguson*, 163 U.S. 537 (1896) (No. 210), 1893 WL 10660, at *19). A closer look at Tourgee's brief shows that his

subordination of minorities as the clause's principal concern, and therefore holds that remedial policies aiding racial minorities do not violate the Equal Protection Clause.² The dispute seems to implicate ideology as much as constitutional interpretation, with anticlassification linked to classical liberalism (or conservative politics) and antisubordination with progressivism and social justice (or liberal politics).³ Given its ideological significance, it is perhaps unsurprising that the dispute has continued for decades.⁴

But while scholars debate which approach is truer to original intent, to American ideals, or to universal notions of fairness,⁵ this Comment poses a

call for "colorblindness" was not an appeal for post-racialism but was actually meant to support the preceding sentence's antisubordinationist thesis: "[T]his act [requiring separate accommodations for black and white passengers on trains] is plainly and evidently intended to promote the happiness of one class by asserting its supremacy and the inferiority of another class." Brief for Plaintiff in Error at 19, *Plessy v. Ferguson*, 163 U.S. 537 (1896) (No. 210), 1893 WL 10660, at *19.

- 2 See, e.g., Colker, *supra* note 1, at 1007–08 ("Th[e] [anti-subordination] approach seeks to eliminate the power disparities between men and women, and between whites and non-whites . . . From an anti-subordination perspective, both facially differentiating and facially neutral policies are invidious only if they perpetuate racial or sexual hierarchy."); Siegel, *supra* note 1, at 1288–89 ("[T]he antisubordination principle is concerned with protecting members of historically disadvantaged groups from the harms of unjust social stratification. . . . Because the antisubordination principle focuses on practices that disproportionately harm members of marginalized groups, it can tell the difference between benign and invidious discrimination.>").
- 3 See Charles R. Lawrence III, *Two Views of the River: A Critique of the Liberal Defense of Affirmative Action*, 101 COLUM. L. REV. 928, 950 (2001) (identifying anticlassification with "[l]iberal legality[,] [which] sees the equality principle as primarily concerned with protecting individuality, and views racial discrimination as unjust because when we judge a person based on her race we disregard her unique human individuality"); see also *id.* at 957–58 (identifying antisubordination, in the university admissions context, with the moral imperative "to make racial justice central to [a university's] mission and to expand its constituency to include those most in need . . . [and to] address systemic racism"); Julie A. Nice, *Equal Protection's Antinomies and the Promise of a Co-Constitutive Approach*, 85 CORNELL L. REV. 1392, 1394–95 (2000) (asserting that while "[c]onservative scholars have insisted that equal protection requires that government treat every individual the same . . . progressive scholars have argued that equal protection's primary end should be to disrupt the use of law as an instrument for perpetuating hierarchical power relations[;] [s]ome scholars label this as the anti-subordination or anticaste principle").
- 4 See Siegel, *supra* note 1, at 1291–92 (asserting that several Court decisions in the 1970s and 1980s upholding "facially neutral practices with a disparate racial impact" and applying strict scrutiny to "benign" racial classifications "seemed to split apart concerns with anticlassification and antisubordination").
- 5 Compare Michelle Adams, *The Last Wave of Affirmative Action*, 1998 WIS. L. REV. 1395, 1463 (1998) ("Race-conscious, nonpreferential affirmative action programs ensure enhanced and vigorous competition for benefits . . . and seek to even what has historically been an extraordinarily skewed playing field. As such, these programs promote the American ideal of a truly colorblind society and are necessary to ensure equal opportunity for all its citizens."), Colker, *supra* note 1, at 1012 (arguing that anti-subordination is both "consistent with the history of the [E]qual [P]rotection [C]ause . . . [which] developed to remedy a history of subordination against a particular group in society, blacks," "and reflects a living aspiration that will help us move towards a world of equality"), and Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470, 1498 (arguing that anticlassification as an independent principle developed in the wake of resistance to *Brown*, reasoning that "[a] constitutional regime that

more practical and more burning question: does it really matter? Or is there room for discourse about affirmative action without getting stuck in the thornier weeds of these larger and more divisive questions? More specifically, can advocates of affirmative action argue their position not through antisubordination but through anticlassification? This Comment answers yes. Must experimentation with affirmative action be nipped in the bud by an ideological majority of the Court and consigned to law review articles and law school classrooms? This Comment answers no. It aims to show that there is room for dialogue on anticlassification's own terms—that anticlassification as a theory provides a firm basis for upholding race-based remedial programs in practice.

To clarify, the goal of this Comment is neither to defend nor to contest anticlassification. Instead, this Comment takes anticlassification at its word, accepting both its legal and normative premises. It seeks rather to point out that anticlassification is not black and white, but contains broad swaths of gray, in which one might cogently argue that race-based affirmative action programs are presumptively constitutional. Critics of anticlassification on policy grounds can thus accept its theoretical bases while realizing their policy goals too. That is, they may accept the *theory* of anticlassification without subscribing to the *legal doctrine* that all racial classifications deserve strict scrutiny.

This approach has two advantages. First, it opens the door to race-conscious measures without having to write off an approach accepted by many Justices. This allows proponents of race-based affirmative action programs to transcend the ideological divide and advocate their policy interests without having to shout through walls.

Second, whether antisubordination is textually or historically truer than anticlassification is far less important than how each approach serves to broaden the Equal Protection Clause's promise. For, as Professor John Hart Ely points out, the Equal Protection Clause is staggeringly vague—even

treated racial classification as presumptively irrational would legitimate *Brown* by deflecting attention away from social struggle over the kinds of injury to which equal protection doctrine ought to be responsive"), with Michael C. Dorf, *Equal Protection Incorporation*, 88 VA. L. REV. 951, 1014–15 (2002) (arguing that the antidiscrimination principle "gives effect to the intuition that discrimination against whites . . . poses a more substantial constitutional problem than, say, discrimination against people who . . . drive red cars . . . [and that] antidiscrimination . . . does not necessarily say that whites and blacks, men and women, or heterosexuals and homosexuals are identically situated . . . [only] 'that the government's use of race [or sex or sexual orientation, etc.] is frequently inconsistent with notions of human dignity' in a way that the use of other classifications—like owning versus renting or the color of one's automobile—is not" (eighth alteration in original) (footnotes omitted) (quoting Peter J. Rubin, *Reconnecting Doctrine and Purpose: A Comprehensive Approach to Strict Scrutiny After Adarand and Shaw*, 149 U. Pa. L. Rev. 1, 19 (2000))), and Sophia Moreau, *What is Discrimination?*, 38 PHIL. & PUB. AFF. 143, 147 (2010) (arguing that antidiscrimination law is meant to protect individuals' "deliberative freedoms, freedoms to . . . decide how to live in a way that is insulated from pressures stemming from extraneous traits of ours").

more than, say, the Eighth Amendment's prohibition against cruel and unusual punishment.⁶ How the Court is to assess contemporary punishments is certainly debatable, but the amendment itself provides the standard by which to measure them—"cruel and unusual."⁷ By contrast, the Equal Protection Clause gives no inkling how to define "equal protection of the laws"⁸—a somewhat paradoxical statement to begin with considering the function of laws is generally to draw distinctions.⁹ While ordinarily we would turn to concurrent statements by legislators, draftsmen, or the ratifying populace, no such record exists.¹⁰ Thus, if any collective "original intent" can be divined from the clause's text, it is that we should stop trying to divine and instead look to some external source if we want the clause to be more than just a platitude.¹¹ The rub, of course, lies therein. Are we meant to look to history, to moral philosophy, or to something else to determine what a government or school district or police officer may do?

In short, discovering the "true" intent of the Equal Protection Clause is

6 U.S. CONST. amend. VIII; JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 14, 31–32 (1980) (contrasting the Eighth Amendment's ambiguous but not wholly open-ended parameters with the Equal Protection Clause's "sweeping mandate" whose definitions "will not be found anywhere in its terms or in the ruminations of its writers"); *see also* Trimble v. Gordon, 430 U.S. 762, 779–80 (1977) (Rehnquist, J., dissenting) (contrasting most constitutional guarantees of individual rights, which "have implicit within them an understandable value judgment that certain types of conduct . . . [such as] free speech, freedom from unreasonable search and seizure, and the right to a fair trial," "have a favored place and are to be protected to a greater or lesser degree," leaving the judiciary only "to determine whether . . . the constitutional value judgment embodied in such a provision has been offended in a particular case," with the Equal Protection Clause, whose "thing to be protected . . . is not even identifiable from within the four corners of the Constitution").

7 ELY, *supra* note 6, at 14 ("The Cruel and Unusual Punishment Clause[s] . . . subject is punishments, not the entire range of government action, and even in that limited area . . . the interpreter is not entirely unguided: only those punishments that are in some way serious ('cruel') and susceptible to sporadic imposition ('unusual') are to be disallowed.").

8 U.S. CONST. amend XIV, § 1.

9 *See* Trimble, 430 U.S. at 779 (Rehnquist, J., dissenting) ("The Equal Protection Clause is itself a classic paradox, [because] . . . [i]t creates a requirement of equal treatment to be applied to the process of legislation—legislation whose very purpose is to draw lines in such a way that different people are treated differently."); ELY, *supra* note 6, at 30 ("Obviously, all unequal treatment by the state cannot be forbidden[,] [for] [] legislation characteristically classifies . . . on the basis of generalizations that are known to be imperfect.").

10 *See* Brown v. Bd. of Educ., 347 U.S. 483, 489 (1954) (noting the historical record was "inconclusive," because, while "[t]he most avid proponents of the post-War Amendments undoubtedly intended them to remove all legal distinctions[,] . . . [t]heir opponents, just as certainly . . . wished them to have the most limited effect" and the intent of moderate legislators "cannot be determined with any degree of certainty"); *see also* JACOBUS TENBROEK, *EQUAL UNDER LAW* 237 (1965) (concluding that the most important word of the Equal Protection Clause was "protection," not "equal," and that "[i]t was because the protection of the laws was denied to some men that the word 'equal' was used," and "[t]he word 'full' would have done as well"); Bret Boyce, *Originalism and the Fourteenth Amendment*, 33 WAKE FOREST L. REV. 909, 971 (1998) (reviewing various scholarly attempts at discerning the original intent of the Equal Protection Clause from historical documentation, and arguing that the results are far from conclusive).

11 ELY, *supra* note 6, at 31.

difficult, if not impossible. At this point, then, whatever values members of the Court read into it are fair game; they should be explored and used to advance a conception of equality under the law that best benefits society. Thus, accepting anticlassification and its implicit values—all of which, of course, promote some notion of equality—as an alternate route towards a more level playing field, instead of fixating on antidisubordination, can identify more facets of equality as an ideal and more means of promoting it in practice.

This Comment's analysis proceeds on two basic premises. First, anticlassification does not mean that all racial classifications are equally unequal and thus deserving of strict scrutiny. Anticlassification is not a legal result, but a theory of interpreting the Equal Protection Clause and the Court's role in upholding it. While it has been invoked to impose strict scrutiny on all racial classifications, anticlassification theory itself does not necessarily call for that application. As this Comment will argue, race-based remedial legislation may be presumptively constitutional even accepting anticlassification theory.

Second, anticlassificationist Justices do not speak with one mind. This Comment aims to bring to the surface the subtle and not-so-subtle variations within anticlassification by exploring the respective versions of three Justices traditionally associated with it: Justices Sandra Day O'Connor, Antonin Scalia, and Anthony Kennedy. This analysis will show that anticlassification is not a single school of thought but a coalition of differing theories and doctrines, grounded in different conceptions of equality and the judicial duty to protect it, which usually (but not always) converge in the result of a given case.

Part I of the Comment will distinguish between two poles within the anticlassification movement, which I identify with Justices Scalia and O'Connor. Justice Scalia subscribes to a unique version of anticlassification, which draws its force from a value he sees pervading the whole of the Constitution: repulsion from genetically determined access to opportunity. Justice O'Connor's anticlassification, by contrast, is less concerned with the ills of classification *per se* as with the invidious legislative intent that may lurk behind classifications. This leads them to very different views of what strict scrutiny is supposed to accomplish in the race context. This divergence is crystallized in *City of Richmond v. J.A. Croson Co.*,¹² so my analysis will begin there, with the aim of uncovering patterns in the two Justices' other opinions.

Part II will focus on a version of anticlassification unique to Justice Kennedy, one centered on the dignity of self-definition. Its analysis will draw mainly on Kennedy's opinions in *Croson*, *Parents Involved in Community Schools v. Seattle School District No. 1*,¹³ and *Obergefell v. Hodges*,¹⁴ and it will unpack Kennedy's equal

¹² 488 U.S. 469 (1989).

¹³ 551 U.S. 701 (2007).

¹⁴ 135 S. Ct. 2584 (2015).

protection analysis in *Obergefell*—a puzzling passage that left many, including Chief Justice John Roberts, scratching their heads.¹⁵ After analyzing each of these three versions of anticlassification, I will argue that it provides a basis for reviewing race-based remedial policies under a deferential standard.

I. CLASSIFYING AMONG ANTICLASSIFICATIONISTS

Anticlassification is often described as operating on the premise of a “colorblind Constitution” and believing that racial classifications are inherently harmful, whether discriminatory or remedial in purpose.¹⁶ However, a careful reading reveals subtler differences among the Justices associated with anticlassification. In fact, the term “anticlassification” is itself misleading because it fails to capture a critical distinction within that camp, namely between those who interpret the Equal Protection Clause as prohibiting racial classifications save for a compelling reason, and those who view racial classifications as simply a trigger for strict scrutiny. For, as with other constitutional passages, the Court must resort to interpretive principles to give meaning to the Equal Protection Clause.¹⁷ These interpretive principles are intended to uncover the underlying “operative proposition”¹⁸—what “equal protection of the laws” actually means. But the Court has other considerations beyond simply interpreting the clause: it must formulate rules for uniform, objective, and “value-neutral” application of the operative principle.¹⁹ These rules use presumptions as a mechanism to facilitate efficient, uniform, and unbiased adjudication of similar matters; these, of course, are the tiers of scrutiny.²⁰ These are not operative principles, but judicial mechanisms, or

¹⁵ *Id.* at 2623 (Roberts, C.J., dissenting) (describing the majority’s discussion of the equal protection claim as “quite frankly, difficult to follow”); see also Ilya Shapiro, *Justice Kennedy: The Once and Future Swing Vote*, CATO INST. (Nov. 13, 2016), <https://www.cato.org/publications/commentary/-justice-kennedy-once-future-swing-vote> (“The rule of *Obergefell* seems to be that you take a scoop of due process clause and a cup of equal protection, wrap them in some dignity, and away you go.”).

¹⁶ See *supra* note 1 and accompanying text.

¹⁷ Fiss termed these “mediating” principles. Fiss, *supra* note 1, at 107.

¹⁸ See Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 9 (2004). To simplify, I will call this the “operative principle.”

¹⁹ See Fiss, *supra* note 1, at 120–22.

²⁰ See Kermit Roosevelt III, *Constitutional Calcification: How the Law Becomes What the Court Does*, 91 VA. L. REV. 1649, 1655–56, 1659–60 (2005) (distinguishing between the actual constitutional mandate, which binds all government actors, and decision rules, which “the Court intentionally crafts” and which “depart, in some cases quite substantially, from its understanding of constitutional operative propositions,” and are designed to ensure uniform and predictable adjudication while considering the “institutional competence” of courts).

However, it is important to distinguish between the mechanics of the tiers of scrutiny, which measure by a predetermined formula of “fit” (e.g., “narrowly tailored to a compelling interest” or “substantially related to an important interest,” or “reasonably related to a legitimate interest”), and the fact that different tiers do exist within the very framework of the Equal Protection Clause. While the precise hierarchy of suspect and quasi-suspect classes and the method of review for each

“decision rules.”²¹ In other words, when a court strikes down a classification under strict scrutiny, it is not saying that the Equal Protection Clause actually forbids this legislation, but that to perform its proper role, the judiciary must as a rule strike down such laws. Whether the law in fact deviates from the “true” meaning of “equal protection” may remain unresolved.²²

Among those Justices that would apply strict scrutiny to all racial classifications, there are those that see anticlassification as an operative principle (and see all racial classifications as precisely what the Equal Protection Clause forbids) and those that use it as a decision rule (and who understand the clause as forbidding some other kind of harm). In this sense, “anticlassification” is a meaningless term, as it encompasses two entirely distinct ideas, one describing the underlying mandate of the Equal Protection Clause and the other describing what triggers the judicial mechanism of strict scrutiny. It is helpful therefore to distinguish between the “anticlassification principle” (operative principle) and the “anticlassification rule” (decision rule).

There are subtler differences yet. Anticlassification as an operative principle is said to reflect an emphasis on individualism that recoils from legally sanctioned identification of racial or ethnic groups.²³ What values inform this principle? A close analysis of Justices Scalia’s and Kennedy’s opinions reveals two interrelated yet distinct values: fairness (specifically the fairness of not being predetermined by ancestry) and dignity.²⁴ These two values often coincide but can also diverge in their result.

Justice Kennedy’s version demands exploration in somewhat greater depth for two reasons. First, many commentators view Kennedy’s vote on equal protection issues as the most powerful on the Court, so a fuller understanding of the values that animate his approach, and thus how he may lean in any future case, is critical. Second, many scholars think his discussion of

are judge-made decision rules, that race should be more suspect is part and parcel of the Equal Protection Clause’s operative principle. That is, the clause itself demands (although silently) a stricter review of racial classifications than of other classifications, because the only way to reconcile the mandate of equality with the legislative necessity of classifying individuals is to distinguish between race—which was foremost in the nation’s mind when it ratified the Fourteenth Amendment—and other classifying criteria. See *Trimble v. Gordon*, 430 U.S. 762, 779–82 (1977) (Rehnquist, J., dissenting) (acknowledging that the Equal Protection Clause itself demands different standards of review for different classifications, but viewing the doctrine of tiers, based on “some analysis of the relation of the ‘purpose’ of the legislature to the ‘means’ by which it chooses to carry out that purpose,” as an artificial and “self-imposed” “judicial task”); ELY, *supra* note 6, at 31 (concluding that the Equal Protection Clause itself demands a different standard of review for racial classifications than for others, but that “the constitutional text doesn’t give us a clue as to what [the different standards of review] might be”).

²¹ Berman, *supra* note 18, at 9.

²² Roosevelt, *supra* note 20, at 1658.

²³ See *supra* note 1 and accompanying text.

²⁴ I do not suggest these are the only values animating Justices Scalia’s and Kennedy’s approaches to equal protection, but that they are the most prominent and pervasive in their respective opinions.

equal protection in *Obergefell*—its eloquent passion aside—lacks rigor,²⁵ so it is important to show how its rhyme is anchored in reason. Peeling away the “mystical aphorisms”²⁶ and fleshing out the underlying logic reveals a nuanced approach to equal protection, with curious ramifications for race-conscious legislation.²⁷

A. Justices O’Connor and Scalia in *Croson*: A Coalition of Anticlassificationists

In *City of Richmond v. J.A. Croson Co.*,²⁸ a local ordinance required prime contractors bidding on municipal contracts to set aside at least 30% of a contract’s dollar amount for subcontractors classified as “Minority Business Enterprises” (“MBEs”).²⁹ An MBE was defined as “[a] business at least fifty-one (51) percent of which is owned and controlled . . . by minority group members,” meaning “Blacks, Spanish-speaking, Orientals, Indians, Eskimos, or Aluts.”³⁰ A contractor who bid on a public contract could not find an MBE

²⁵ See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584, 2623 (2015) (Roberts, C.J., dissenting) (“The majority goes on to assert in conclusory fashion that the Equal Protection Clause provides an alternative basis for its holding. Yet the majority fails to provide even a single sentence explaining how the Equal Protection Clause supplies independent weight for its position . . .” (citation omitted)); Shapiro, *supra* note 15 (“In *Obergefell*, meanwhile, what to my mind should’ve been an easy case about the propriety of certain marriage-licensing schemes, instead became a purple disquisition on . . . I’m not sure what.” (alteration in original)); Ilya Somin, *A Great Decision on Same-Sex Marriage—But Based on Dubious Reasoning*, WASH. POST (June 26, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/06/26/a-great-decision-on-same-sex-marriage-but-based-on-dubious-reasoning/?utm_term=.c750fcb6f7b0 (“Unfortunately, much of Justice Anthony Kennedy’s majority opinion is based on dubious and sometimes incoherent logic.”). But see Laurence H. Tribe, *Equal Dignity: Speaking Its Name*, 129 HARV. L. REV. FORUM 16, 16, 23 (2015) (noting that “many are quick to claim that his sweeping opinion was . . . a political masterstroke but a doctrinal dud” but countering that Kennedy’s rhetoric was intended to “foster[] dialogue among ordinary citizens and, in a sense, even among the very clauses of the Constitution itself”); Michael C. Dorf, *Symposium: In Defense of Justice Kennedy’s Soaring Language*, SCOTUSBLOG (June 27, 2015, 5:08 PM), <http://www.scotusblog.com/2015/06/symposium-in-defense-of-justice-kennedys-soaring-language/> (suggesting Kennedy’s flowery rhetoric was meant to “invit[e] the victors to celebrate their victory”).

²⁶ *Obergefell*, 135 S. Ct. at 2630 n.22 (Scalia, J., dissenting).

²⁷ See *infra* Part III.B. I do not suggest that any Justice consistently adheres to a certain principle by which he or she approaches all equal protection issues. But a Justice’s language and legal conclusions do reveal the concerns that are generally uppermost in his or her mind. Professor Alexander M. Bickel thought so too:

Of course, nobody . . . [with] an active career of fifty years’ duration leaves behind a wholly coherent and self-consistent philosophy of law and politics, or of the Constitution, or even of a single large subject of constitutional adjudication. . . . Any attempt to draw from such lives a coherent, self-consistent view of the system that underlay the life work commits some injustice But we infer what we can from the evidence taken as a whole from the work of such men. It is, as it must be, an exercise in judgment and is not infallible.

ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 10–11 (1975).

²⁸ 488 U.S. 469 (1989).

²⁹ *Id.* at 477.

³⁰ *Id.* at 478 (alterations in original) (citation omitted).

supplier at the market price, and requested either a waiver of the MBE requirement or permission to raise its original contract price.³¹ When the city denied both requests, the general contractor challenged the MBE ordinance on equal protection grounds.³² The district court dismissed the claim, relying on the Court's ruling in *Fullilove v. Klutznick*,³³ which held that Congress may require set-asides to minority-owned businesses as long as its objective was within Congress's enumerated powers and its means were constitutionally permissible.³⁴ The Court of Appeals for the Fourth Circuit vacated the district court's ruling, holding that to pass constitutional muster, a remedial racial classification must meet a compelling interest, and that a compelling interest only existed where there was evidence of specific constitutional or statutory violations by the state or local government enacting the legislation.³⁵

The Court, with Justice O'Connor writing for a plurality, affirmed, but under a different standard.³⁶ The plurality opinion first found that the decision in *Fullilove* was not controlling, because the federal government, with its Section 5 powers under the Fourteenth Amendment, was less restricted than the states in attempting to remedy or preempt discriminatory practices.³⁷ Second, the plurality found, in contrast to the court of appeals, that a state or local government has a compelling interest in rectifying private as well as governmental discrimination.³⁸ Third, the plurality opinion found that such legislation was only justified when there was substantial evidence of specific instances of private or government discriminatory practices in the construction sub-contractor market.³⁹ The plurality held that, in this case, there was insufficient evidence of specific instances of discrimination against MBEs—only conclusory statements by the city council that there was widespread discrimination in the construction industry and the council's assurance that its purpose was remedial.⁴⁰

31 *Id.* at 483.

32 *Id.*

33 448 U.S. 448 (1980).

34 *Croson*, 488 U.S. at 483–84; *Fullilove*, 448 U.S. at 473.

35 *J.A. Croson Co. v. City of Richmond*, 822 F.2d 1355, 1358 (4th Cir. 1987) (citing *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274 (1986)).

36 *Croson*, 488 U.S. at 492 (plurality opinion) (“[T]he Court of Appeals erred in following *Wygant* by rote . . .”).

37 *Id.* at 489–90.

38 *Id.* at 491–92 (“It would seem equally clear, however, that a state or local subdivision . . . has the authority to eradicate the effects of private discrimination within its own legislative jurisdiction.”).

39 *Id.* at 509 (“If the city of Richmond had evidence before it that nonminority contractors were systematically excluding minority businesses from subcontracting opportunities, it could take action to end the discriminatory exclusion.”).

40 *Id.* at 500, 505.

O'Connor's plurality opinion unequivocally held that racial classifications, regardless of the government's stated motive, warrant strict scrutiny.⁴¹ Thus, even if the government could identify specific episodes of discriminatory contracting practices, it would be prohibited from using any racial classifications if race-neutral means were available to it, in keeping with the "narrowly tailored" component of strict scrutiny.⁴² However, O'Connor qualified this restriction by adding, somewhat vaguely, that "[i]n the extreme case, some form of narrowly tailored racial preference might be necessary to break down patterns of deliberate exclusion."⁴³

Justice Scalia, concurring in the judgment, disagreed with the plurality that a state has a compelling interest in "ameliorat[ing] the effects of past discrimination"⁴⁴ based on evidence of specific private or government discriminatory practices.⁴⁵ Scalia found that race-based differential treatment is never constitutional, with two exceptions: to avoid imminent danger to life or limb, and to undo a government's own continuance of unconstitutional segregation.⁴⁶ "If, for example, a state agency has a discriminatory pay scale compensating black employees in all positions at 20% less than their nonblack counterparts, it may assuredly promulgate an order raising the salaries of 'all black employees' to eliminate the differential."⁴⁷ In this way Scalia explained the Court's decisions that governments are obligated to employ race-conscious remedies to desegregate schools—namely, that in the absence of such measures, the state would be engaging in the ongoing unconstitutional maintenance of a dual school system.⁴⁸ Race-neutral measures to integrate schools would be incapable of effectively dismantling a segregated school system, and so race-conscious remedies are constitutional, precisely because without them the state would be in violation of the Constitution.⁴⁹ However,

41 *Id.* at 493 ("Absent searching judicial inquiry . . . 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.").

42 *Id.* at 507 ("In determining whether race-conscious remedies are appropriate, we look to several factors, including the efficacy of alternative remedies." (quoting *United States v. Paradise*, 480 U.S. 149, 171 (1987))).

43 *Id.* at 509.

44 *Id.* at 476–77.

45 *Id.* at 520 (Scalia, J., concurring).

46 *Id.* at 521, 524–25.

47 *Id.* at 524.

48 *Id.* ("This distinction explains our school desegregation cases, in which we have made plain that States and localities sometimes have an obligation to adopt race-conscious remedies.").

49 *Id.* at 524–25 ("Concluding in this context that race-neutral efforts at 'dismantling the state-imposed dual system' were so ineffective that they might 'indicate a lack of good faith,' we have permitted . . . such voluntary (that is, noncourt-ordered) measures as attendance zones drawn to achieve greater racial balance, and out-of-zone assignment by race . . ." (citation omitted) (first quoting *Green v. New Kent Cty. Sch. Bd.*, 391 U.S. 430, 439 (1968); and then quoting *McDaniel v. Barresi*, 402 U.S. 39, 40–41 (1971))).

Scalia distinguished between remedial measures aimed at dismantling an ongoing “dual school system” and remedial measures meant to undo the lingering effects of a once-segregated system now deemed officially “integrated.”⁵⁰ Additionally, he held that a state may redress a harm suffered by a minority member due to discrimination, because such a policy would not be based on racial classification, but on the individual harm suffered by the minority member, which only happens to have been a result of discrimination.⁵¹ In short, Scalia rejects all remedial race-based classifications.⁵²

B. Justice O'Connor

1. Anticlassification as a Decision Rule

The opinions of O'Connor and Scalia reveal a stark difference in their conception of the judiciary's role in conducting strict scrutiny. O'Connor holds that strict scrutiny is truly that: a form of scrutiny intended to weed out illegitimate classifications from legitimate.⁵³ In other words, she believes that there are instances in which racial classifications do not violate the Equal Protection Clause, and judicial scrutiny will recognize and uphold them.⁵⁴ She expressly dismisses the notion that “strict scrutiny is strict in theory but fatal in fact.”⁵⁵ For O'Connor, the purpose of strict scrutiny is to “smoke out” invidious or improper state motives, and to ensure the state policy in fact serves a remedial purpose.⁵⁶ While allowing racial classifications in limited circumstances, the judicial task is to make

⁵⁰ *Id.* at 525 (“And it is implicit in our cases that after the dual school system has been completely disestablished, the States may no longer assign students by race.”).

⁵¹ *Id.* at 526–27 (“Nothing prevents Richmond from according a contracting preference to identified victims of discrimination. While most of the beneficiaries might be black, neither the beneficiaries nor those disadvantaged by the preference would be identified on the basis of their race.”).

⁵² *Id.* at 528 (“Only such a [race-neutral] program, and not one that operates on the basis of race, is in accord with the letter and the spirit of our Constitution.”).

⁵³ *Id.* at 493 (plurality opinion) (“Absent searching judicial inquiry . . . 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.”).

⁵⁴ As Justice O'Connor explained in *Grutter v. Bollinger*:

[W]e made clear that strict scrutiny must take ‘relevant differences’ into account. Indeed, as we explained, that is its ‘fundamental purpose.’ Not every decision influenced by race is equally objectionable and strict scrutiny is designed to provide a framework for carefully examining the importance and the sincerity of the reasons advanced by the governmental decision-maker for the use of race in that particular context.

539 U.S. 306, 327 (2003) (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 228 (1995)).

⁵⁵ *Id.* at 326–27 (quoting *Adarand*, 515 U.S. at 237) (“Although all governmental uses of race are subject to strict scrutiny, not all are invalidated by it.”).

⁵⁶ *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion) (“[T]he purpose of strict scrutiny is to ‘smoke out’ illegitimate uses of race The test also ensures that the means chosen ‘fit’ this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.”); accord *Johnson v. Cal.*, 543 U.S. 499,

[p]roper findings in this regard . . . to define both the scope of the injury and the extent of the remedy necessary to cure its effects. Such findings also serve to assure all citizens that the deviation from the norm of equal treatment of all racial and ethnic groups is . . . a measure taken in the service of the goal of equality itself. Absent such findings, there is a danger that a racial classification is merely the product of unthinking stereotypes or a form of racial politics.⁵⁷

Two points emerge from this passage. First, race-based classifications are permitted only as “a measure taken in the service of the goal of equality itself.”⁵⁸ Second, “the scope of the injury” must match “the extent of the remedy necessary to cure its effects.”⁵⁹ Judicial scrutiny thus has two objectives: to “smoke out” legislative motives other than furthering “the goal of equality,” and to ensure that the remedial measures are precisely designed to cure the effects of past discrimination.⁶⁰

2. *Antisubordination as the Operative Principle*

Since O'Connor's discussion of racial classifications revolves around the Court's duty to root out invidious discrimination, anticlassification, for her, is clearly not an operative principle but a decision rule: The Court applies strict scrutiny to all classifications because they so often involve illegitimate motives and ill-tailored remedial policies.⁶¹ If so, what is the operative principle according to O'Connor? What is “unequal”?

O'Connor's statement that racial classifications can potentially serve “the goal of equality itself” is instructive. It indicates her view that the Equal Protection Clause's operative principle is antisubordination; she therefore holds that equal protection under the law is not synonymous with equal treatment of all individuals.⁶² Although O'Connor denounces the idea that the Equal

505 (2005) (“The reasons for strict scrutiny are familiar. Racial classifications raise special fears that they are motivated by an invidious purpose.”).

⁵⁷ *Crosen*, 488 U.S. at 510 (emphasis added).

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* at 493 (“[T]he purpose of strict scrutiny is to ‘smoke out’ illegitimate uses of race The test also ensures that the means chosen ‘fit’ this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.”); *see also id.* at 510 (“Absent such findings, there is a danger that a racial classification is merely the product of unthinking stereotypes or a form of racial politics.”); *id.* at 505 (holding that racial classifications call for a searching inquiry to ensure the government's findings “define the scope of any injury” and “the necessary remedy”); *cf. Grutter*, 539 U.S. at 327 (“[S]trict scrutiny is designed to provide a framework for carefully examining the importance and the sincerity of the reasons advanced by the governmental decision-maker for the use of race in that particular context.”).

⁶¹ *Crosen*, 488 U.S. at 505 (“[B]ecause racial characteristics so seldom provide a relevant basis for disparate treatment, . . . it is especially important that the reasons for any such classification be clearly identified and unquestionably legitimate.” (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 533–35 (1980) (Stevens, J., dissenting))).

⁶² However, O'Connor's version of antisubordination is no more sympathetic towards politically weak

Protection Clause might “mean one thing when applied to one individual and something else when applied to a person of another color,”⁶³ she believes, apparently, that treating racial groups differently is not necessarily the same as measuring them by a double standard. Why not?

It appears that O’Connor believes that remedial policies do not in fact qualify as “unequal protection of the laws,” which describes only preferential treatment, not remedial. Reasoning from an antistatutory principle, the two are distinct, at least in theory: Preferential policies place members of one race at an advantage over another, while remedial policies seek to erode the barriers that put one race at a disadvantage. The problem, as O’Connor sees it, is how to demarcate between preferential and remedial policies.⁶⁴ Because her concerns are not with the inequality of remedial measures, but with distinguishing between remedial and preferential, her anxiety about racial classifications stems from her awareness of the Court’s inability to accurately make that distinction.⁶⁵

But if remedial policies are technically “equal,” why can’t the Court simply approve them? Why do racial classifications call for the most exacting judicial inquiry? What exactly is that inquiry supposed to “smoke out”?

O’Connor’s opinion in *Croson* suggests two answers: (a) Race is rarely, if ever, relevant to allocation of burdens and benefits,⁶⁶ and (b) there is a special

minorities than towards a majority because its aim is not “to eliminate the power disparities” among groups. See Colker, *supra* note 1, at 1007–08 (providing a definition for antistatutory based on a hierarchical perspective). O’Connor strongly believes that the Equal Protection Clause is concerned not with group-based power dynamics but with equal treatment of all individuals. See *Croson*, 488 U.S. at 493, 495 (implying that “some maintain” that “the level of scrutiny varies according to the ability of different groups to defend their interests in the representative process,” but then rejecting that theory, stating that she instead would hold that “rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual[,] [for] [t]he rights established are personal rights” (quoting *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948))). Nonetheless, antistatutory need not imply a group-based view of rights as Fiss and Ely suggest, but simply that no individual be treated worse because of race. See ELY, *supra* note 6, at 170–71 (advocating a relaxed judicial scrutiny of classifications that disadvantage the majority group); Fiss, *supra* note 1, at 155–57 (advocating a “group-disadvantaging” principle, under which the Equal Protection Clause prohibits laws that “aggravate the subordinate position of” a social group that has experienced “perpetual subordination” and that lacks meaningful political power). This conception of antistatutory differs from the anticlassification principle in that it does not hold that racial classifications are inherently unequal, but rather that they are unequal inasmuch as they confer a preference but do not level the playing field. See *infra* text accompanying notes 64 and 66.

⁶³ *Croson*, 488 U.S. at 494 (quoting *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 289–90 (1978)).

⁶⁴ *Id.* at 493 (“Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are ‘benign’ or ‘remedial’ . . .”).

⁶⁵ See *id.*

⁶⁶ *Id.* at 505 (“[B]ecause racial characteristics so seldom provide a relevant basis for disparate treatment, and because classifications based on race are potentially so harmful to the entire body politic, it is especially important that the reasons for any such classification be clearly identified and unquestionably legitimate.” (quoting *Fullilove*, 448 U.S. at 533–35 (Stevens, J., dissenting))).

danger that racial classifications are motivated by illegitimate goals or based on illegitimate assumptions about race.⁶⁷ Synthesized, these two ideas explain the rationale and mechanism of O'Connor's anticlassification rule. Strict scrutiny for racial classifications is necessary because of two concerns Professor Roosevelt identifies as driving the Court's decision rules: the risk of "legislative pathology" and high "enforcement costs."⁶⁸ The risk of legislative pathology exists "when there is reason to doubt the good faith of the legislature."⁶⁹ Racial classifications give reason to suspect lack of good faith—whether due to racial stereotyping, anti-minority sentiment, or the desire to help "one's own kind"—because they are so seldom relevant to legitimate legislative goals. Enforcement costs refer to courts' limited capacity to discern through objective factors whether a law is driven by legislative pathology, a constraint that counsels the use of non-deferential, bright-line rules.⁷⁰ Because racial classifications are invalid if they are the product of legislative pathology, and because they are especially suspect of involving that pathology, they entail "costly and intrusive" efforts to plumb the depths of legislative intent.⁷¹ Thus, the anticlassification rule is ultimately premised on the irrelevance of race to legitimate legislative goals. Because of this irrelevance, racial classifications raise the Court's suspicions of legislative pathology and call to mind its own inability to distinguish reliably between legislative pathology and the legitimate remedial goal of leveling the playing field.⁷²

67 *Id.* at 493 (stating that strict scrutiny is necessary to isolate "classifications [that] are in fact motivated by illegitimate notions of racial inferiority or simple racial politics," by "smok[ing] out" classifications based on "illegitimate racial prejudice or stereotype[s]"); *id.* at 510 ("Absent such findings, there is a danger that a racial classification is merely the product of unthinking stereotypes or a form of racial politics.").

68 Roosevelt, *supra* note 20, at 1664–66.

69 *See id.* at 1664–65 ("Even if the subject matter of the decision falls within the legislative competence, courts may craft non-deferential decision rules to deal with situations in which it appears the legislature may be . . . distributing benefits to its powerful constituents. Deference is inappropriate where the legislature cannot offer an unbiased assessment of the situation.").

70 *See id.* at 1665 ("[P]lumbing the mind of the governmental actor is costly and intrusive at the least, and perhaps impossible, especially in the case of multi-member legislative bodies. Thus, a court may substitute a decision rule that turns on objective and easily ascertainable factors.").

71 *Id.*

72 *See Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) ("[A]ll governmental action based on race—a group classification long recognized as 'in most circumstances irrelevant and therefore prohibited'—should be subjected to detailed judicial inquiry to ensure that the personal right to equal protection of the laws has not been infringed." (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943) (emphasis omitted)); *Croson*, 488 U.S. at 505 ("[B]ecause racial characteristics so seldom provide a relevant basis for disparate treatment, and because classifications based on race are potentially so harmful to the entire body politic, it is especially important that the reasons for any such classification be clearly identified and unquestionably legitimate." (quoting *Fullilove*, 448 U.S. at 533–35 (Stevens, J., dissenting))); *cf. City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985) (applying strict scrutiny to classifications based on "race, alienage, or national origin" because "[t]hese factors are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy"); *id.* at

These classifications must therefore be narrowly tailored to a compelling interest—other than remedying discrimination—to dispel the Court’s anxiety that the law is rooted in legislative pathology.⁷³

3. *Race as a Proxy for the Legislative Goal vs. Race as the Legislative Goal Itself*

The above analysis suggests that if race were relevant to distribution of burdens and benefits, it would be less suspect. Because it is rarely if ever

440–41 (“[C]lassifications based on gender also call for a heightened standard of review. That factor generally provides no sensible ground for differential treatment. . . . Rather . . . statutes distributing benefits and burdens between the sexes in different ways very likely reflect outmoded notions of the relative capabilities of men and women.”); *Frontiero v. Richardson*, 411 U.S. 677, 686–87 (1973) (holding sex as a suspect class, in contrast to “nonsuspect statuses [like] intelligence or physical disability,” because sex “frequently bears no relation to ability to perform or contribute to society [and] [a]s a result, statutory distinctions between the sexes often . . . relegate[e] the entire class of females to inferior legal status without regard to the actual capabilities of its individual members”); *Korematsu v. United States*, 323 U.S. 214, 235 (1944) (Murphy, J., dissenting) (arguing that orders banning people of Japanese ancestry from certain areas were unconstitutional because “[i]t is difficult to believe that reason, logic or experience could be marshalled in support of . . . [the] assumption” that “all persons of Japanese ancestry may have a dangerous tendency to commit sabotage and espionage” (emphasis omitted)).

⁷³ *Croson*, 488 U.S. at 493 (plurality opinion) (stating that strict scrutiny is necessary to isolate “classifications [that] are in fact motivated by illegitimate notions of racial inferiority or simple racial politics,” by “smok[ing] out” classifications based on “illegitimate racial prejudice[s] or stereotype[s]”); see also *id.* at 495 (“[T]he mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme.” (quoting *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 (1975))); *id.* at 497–98 (holding “[s]ocietal discrimination . . . is too amorphous” to “support and define the scope of race-based relief” because “it could be used to ‘justify’ race-based decisionmaking essentially limitless in scope and duration” (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 276 (1986) (plurality opinion))).

O’Connor’s reference to the ambiguous reach of remedying societal discrimination may also reflect a concern that a local government, even with good intentions, cannot be trusted to classify by race because it lacks the competence and capacity to actually equalize opportunities through remedial policies:

It is sheer speculation how many minority firms there would be in Richmond absent past societal discrimination Defining these sorts of injuries as “identified discrimination” would give local governments license to create a patchwork of racial preferences based on statistical generalizations about any particular field of endeavor. . . .

. . . . [T]he city does not even know how many MBE’s in the relevant market are qualified to undertake prime or subcontracting work in public construction projects. Nor does the city know what percentage of total city construction dollars minority firms now receive as subcontractors on prime contracts let by the city. . . . Without any information on minority participation in subcontracting, it is quite simply impossible to evaluate overall minority representation in the city’s construction expenditures.

Id. at 499, 502–03 (citations omitted). This implicates another consideration of decisional rules: “institutional competence,” which counsels either trust or distrust of a government depending on whether its ability to make factual determinations is superior or inferior to the courts’ ability. See Roosevelt, *supra* note 20, at 1665 n.42 (citing Ely, *supra* note 6, at 153, 157) (describing the propensity of “legislatures to err in their assessments of the impact or efficacy of laws” as “an issue of institutional competence”).

relevant, it raises concerns about racial animosity and “racial politics.” Paradoxically, it follows that a policy intended to address race head on should be subject to a lower level of scrutiny. To illustrate: Members of racial group A dislike members of racial group B and often engage in violent attacks on group B members. As episodes of violence increase, the local government enacts a curfew, but only on members of group A. The curfew policy would undoubtedly get strict scrutiny. Although only members of group A pose a threat, treating them differently implicates two concerns: that members of group A who pose no threat will be punished unfairly (over-inclusiveness), and that the classification is based on assumptions of group-determined character (suspicion of racial prejudice). In other words, the law deems their race irrelevant to the threat they pose.

What if the government decides instead to provide members of group B with security personnel to protect their homes and escort them through the streets? Under what level of scrutiny should the policy be reviewed? To be sure, it is a racial classification, but the dangers of such classifications are absent. Unlike most racial classifications, here, race is entirely relevant to the legislative goal, because group B members are not simply targeted, but targeted precisely because of their race. There is therefore little concern about over-inclusiveness—at worst, more people will be protected than necessary—or group-based assumptions, since the security policy does not assume anything about the nature of group B members, only about external circumstances (prevalence of violent attacks) directly related to their race. One might counter, however, that the policy should still be subject to strict scrutiny because the government need not single out group B members to protect them, as it could provide security for everyone without mentioning race at all. But the flaw in this argument is that it puts the cart before the horse—it demands a narrow means-end fit without first asking the critical question: does this policy require strict scrutiny? For how tightly the legislative means must fit the legislative ends depends on the threshold inquiry of which level of scrutiny should be applied, and the level of scrutiny depends, in turn, on how relevant race is to the legislative goal. In this hypothetical, the racial classification is directly relevant to the legislative goal of protecting group B members from race-based violence, so it raises no suspicions about unfair disparate treatment or illegitimate ends. It should thus not require strict scrutiny and a less-than-narrowly-tailored means-end fit is of no concern.

Now consider another hypothetical. Members of group B, a racial minority, suffer from disproportionate poverty and begin to protest the government, claiming they have fewer opportunities because of racist biases among state actors. Concerned about public perception and hoping to ensure the loyalty of all citizens, the state decides to provide educational subsidies to group B members alone. Should this policy be reviewed under strict scrutiny? Arguably, by O’Connor’s logic, it should not. Here, as in the previous

hypothetical, the racial classification is not a proxy for lack of opportunity, but instead precisely tracks the problem the policy intends to avert: discontent due to a feeling of racial discrimination. Because the state's purpose is not to equalize opportunities for education, but to demonstrate its recognition of and respect for group B's plight, it must necessarily classify by membership in group B. And, because the ethnic classification is entirely relevant to the statutory goal, there is little reason to suspect a prejudicial assumption that all group B members are alike. There is also no concern about unfairly treating non-members (by excluding needy non-members or by forcing them to pay the cost of historical discrimination to group B members) because the state is not attempting to afford either remedial or preferential treatment to group B members, only to refute accusations of racial bias against group B. Just as a state may dedicate a monument to commemorate a group B's contributions or struggles, even with public tax dollars,⁷⁴ so it should be able to use whatever means it determines will best confirm its respect for the struggles of group B members. Neither a monument nor a subsidy benefitting group B gives non-members the short end of a preferential policy. They are simply required to contribute to the welfare of the state by ensuring the loyalty of citizens of all races. Whether the state has narrower means of accomplishing this goal is of little concern, because that question must follow the initial determination of which level of scrutiny is to be applied. Because, in this case, race is relevant, the policy should be reviewed under a deferential standard and the loose means-end fit should not matter.

C. *Justice Scalia*

1. *Anticlassification as the Operative Principle*

In contrast to O'Connor, Justice Scalia does not understand strict scrutiny for racial classifications as a judicial mechanism of "smoking out" illegitimate motives or ensuring a tight fit between legislative means and ends. This is directly related to the mediating principle Scalia adopts to interpret the Equal Protection Clause: differential treatment on the basis of race is inherently unconstitutional.⁷⁵ Racial classifications are thus not merely red

⁷⁴ See, e.g., National Museum of African American History and Culture Act, Pub. L. No. 108-184, 117 Stat. 2676 (2003) (codified as amended at 20 U.S.C. §§ 80r(3), 80r-2 (2012)) (establishing a national museum "dedicated to the collection, preservation, research, and exhibition of African American historical and cultural material reflecting the breadth and depth of the experiences of individuals of African descent living in the United States").

⁷⁵ *Croson*, 488 U.S. at 521 (Scalia, J., concurring in the judgment) ("I share the view expressed by Alexander Bickel that '[t]he lesson of the great decisions of the Supreme Court and the lesson of contemporary history have been the same for at least a generation: discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society.'" (quoting BICKEL, *supra* note 27, at 133)).

flags that trigger judicial anxiety about potential unconstitutionality, but are actual violations of the Constitution itself.⁷⁶ In this sense, “strict scrutiny” is a misnomer: no scrutiny is needed to weed out valid policies from invalid, since all racial classifications are by definition invalid. Strict scrutiny, for Scalia, is fatal not only in fact but in theory. This emerges from his doctrinal approach. Doctrinally, he would prohibit any and all racial classifications for whatever purpose (besides an imminent threat to life or limb⁷⁷), save to “dismantle” an ongoing unlawful discriminatory policy.⁷⁸ The best understanding of the “dismantling” exception is that classification in such a case does not confer a race-based preference, but simply removes the preference that is currently in place. In Scalia’s words, it allows a state to “declassify racially classified students, teachers, and educational resources.”⁷⁹

2. *Anticlassification: The Immorality of Genetics-Based Preferences*

What value underlies Scalia’s anticlassification principle? To explain it on the grounds that race is categorically never relevant, and therefore distinguishing by race is simply unfair, is belied by Scalia’s own dicta, which imply there is a unique evil in race-based classifications. He asserts, quoting Alexander Bickel, that “discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society” and that:

[A] racial quota derogates the human dignity and individuality of all to whom it is applied; it is invidious in principle as well as in practice. . . . [A] quota is a divider of society, a creator of castes, and it is *all the worse for its racial base*, especially in a society desperately striving for an equality that will make race irrelevant.⁸⁰

He further clarified this view in *Adarand Constructors, Inc. v. Peña*:

[U]nder our Constitution there can be no such thing as either a creditor or a debtor race. That concept is alien to the Constitution’s focus upon the individual and its rejection of dispositions based on race, or based on blood. To pursue the concept of racial entitlement—even for the most admirable and benign of purposes—is to reinforce and preserve for future mischief the way of thinking that produced race slavery, race privilege and race hatred. In the eyes of government, we are just one race here. It is American.⁸¹

⁷⁶ See *id.* at 521 (explaining that the only exception to the constitutional ban on racial classifications would be an “emergency” that threatens “both life and limb”).

⁷⁷ *Id.*

⁷⁸ *Id.* at 524–25 (quoting *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 458–59, 465 (1979)).

⁷⁹ *Id.* at 525 (emphasis omitted).

⁸⁰ *Id.* at 521, 527 (quoting BICKEL, *supra* note 27, at 133) (emphasis added).

⁸¹ 515 U.S. 200, 239 (1995) (Scalia, J., concurring in part and concurring in the judgment) (first citing U.S. CONST. amend. XIV, § 1 (“Nor shall any State . . . deny to *any person*’ the equal protection of the laws[.]”); then citing U.S. CONST. amend. XV, § 1 (“prohibiting abridgment of the right to vote “on account of race”); then citing U.S. CONST. art. III, § 3 (“No Attainder of Treason shall work Corruption of Blood[.]”); and then citing U.S. CONST. art. I, § 9, cl. 8 (“No Title of Nobility shall

This import of this second passage is that when people are classified by race, the unfairness of unequal treatment is compounded, because race is a particularly noxious classifier since it is based on ancestry, a factor the Constitution has forsworn from legal consideration.⁸² In other words, racial classifications are simply unfair, because they force the innocent to bear the burden of others' past crimes.⁸³ But beyond that, they are uniquely wrong because they treat individuals as either entitled or obligated based on their ancestry, sorting them into a "creditor or debtor race."⁸⁴ Thus, Scalia equal protection embodies both the universal imperative to treat similar persons alike (and avoid over- and under-inclusivity) as well as the specific imperative (informed by pervasive constitutional themes and by regretful American historical experience) to disregard all ancestral traits when apportioning burdens and benefits.⁸⁵

3. *The Gray Area in Anticlassification*

The anticlassification principle seems black and white—that is part of its appeal. But, while Scalia has consistently voted to strike down all race-based

be granted by the United States[.]”).

⁸² *Id.*; *cf.* *Kotch v. Bd. of River Port Pilot Comm'rs*, 330 U.S. 552, 565 (1947) (Rutledge, J., dissenting) (“The result of the decision . . . is to approve as constitutional state regulation which makes admission . . . turn finally on consanguinity. Blood is, in effect, made the crux of selection. That, in my opinion, is forbidden by the Fourteenth Amendment’s guaranty against denial of the equal protection of the laws.”).

⁸³ *Adarand*, 515 U.S. at 239; *see also Croson*, 488 U.S. at 527 (Scalia, J., concurring) (“[E]ven ‘benign’ racial quotas have individual victims, whose very real injustice we ignore whenever we deny them enforcement of their right not to be disadvantaged on the basis of race. . . . When we depart from this American principle we play with fire . . .”).

⁸⁴ *Adarand*, 515 U.S. at 239.

⁸⁵ *See Croson*, 488 U.S. at 527 (Scalia, J., concurring) (“[A racial] quota is a divider of society, a creator of castes, and *it is all the worse for its racial base*, especially in a society desperately striving for an equality that will make race irrelevant.” (quoting BICKEL, *supra* note 27, at 133) (emphasis added)); *cf.* *Fullilove v. Klutznick*, 448 U.S. 448, 533 (1980) (Stevens, J., dissenting) (footnote omitted) (arguing that equal protection prohibits “[g]rants of privilege on the basis of characteristics acquired at birth,” a value echoed in “[o]ur historic aversion to titles of nobility,” as well as “different treatment . . . [of] different persons” without “a reason for the difference”); *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 681, 682 n.3 (1966) (Harlan, J., dissenting) (advocating, besides a universal view of equal protection “prevent[ing] States from arbitrarily treating people differently under their laws,” for the doctrine of suspect classification, because “insofar as that clause may embody a particular value in addition to rationality, the historical origins of the Civil War Amendments might attribute to racial equality this special status”); *Korematsu v. United States*, 323 U.S. 214, 243 (1944) (Jackson, J., dissenting) (arguing a race-based geographical exclusion order was unconstitutional because “if any fundamental assumption underlies our system, it is that guilt is personal and not inheritable[] [and] [e]ven if all of one’s antecedents had been convicted of treason, the Constitution forbids its penalties to be visited upon him,” and that the order rendered “an otherwise innocent act a crime merely because this prisoner is the son of parents as to whom he had no choice, and belongs to a race from which there is no way to resign” (citing U.S. CONST. art. III, § 3)), *superseded by statute*, Civil Liberties Act of 1988, Pub. L. No. 100-383, § 2(a), 102 Stat. 903, 903-904 (codified at 50 U.S.C. § 1989(a) (1988)).

preferences, his own theoretical framework would seem to allow for a much larger gray area. For Scalia's one exception to the anticlassification principle is to dismantle ongoing discriminatory state policies, based on the Warren Court's desegregation orders.⁸⁶ While analytically clear and compelling, the distinction between an *ongoing* unconstitutional system and the mere lingering effects of a *past* unconstitutional system is much hazier as a practical matter. To illustrate, Scalia cites *Bazemore v. Friday* for the proposition that, outside the school assignment context, once a state has discontinued a race-conscious policy, it has successfully "dismantled" an unlawful segregated system, and is barred from using racial classifications to counter the effect of the former discriminatory policy.⁸⁷ However, Scalia himself concedes that where a state had a former discriminatory payment policy under which black state employees were paid 20% less than white employees, the state "may assuredly promulgate an order raising the salaries of 'all black employees' to eliminate the differential."⁸⁸

There is an ambiguity here: by "eliminating the differential," does Scalia mean to eliminate the 20% disparity only going forward, or even to compensate black employees for the payment they were denied under the former unconstitutional policy? The proposition he derives from *Bazemore*, that once a state neutralizes its policy it need not, and may not, use racial classifications any longer, would suggest the state may not employ racial classifications to compensate for lost pay under the previous unconstitutional policy—only to equalize the payment going forward. This conclusion is, however, untenable according to Scalia, because such a policy need not mention race at all; the state needs only to enact a race-neutral payment policy going forward—that all employees will be paid equally regardless of race. And Scalia is adamant that where rectifying injuries caused by unconstitutional policies may be achieved through race-neutral means, racial classifications are forbidden.⁸⁹

One is forced to conclude, then, that to make sense of Scalia's framework, there must be a distinction between club membership and payment policies. While enacting a race-neutral policy of club membership suffices to "undo" the former constitutional violation, despite the "continued existence of single-race clubs,"⁹⁰ enacting a race-neutral payment policy does not suffice—

⁸⁶ *Green v. Cty. Sch. Bd.*, 391 U.S. 430 (1968); *Cooper v. Aaron*, 358 U.S. 1 (1958).

⁸⁷ *Croson*, 488 U.S. at 524–25 (Scalia, J., concurring in the judgment) (citing *Bazemore v. Friday*, 478 U.S. 385, 408 (1986) (White, J., concurring)).

⁸⁸ *Id.* at 524 (Scalia, J., concurring in the judgment).

⁸⁹ As Scalia put it in *Croson*:

Nothing prevents Richmond from according a contracting preference to identified victims of discrimination. While most of the beneficiaries might be black, neither the beneficiaries nor those disadvantaged by the preference would be identified *on the basis of their race*. In other words, far from justifying racial classification, identification of actual victims of discrimination makes it less supportable than ever, because more obviously unneeded.

Id. at 526–27.

⁹⁰ *Bazemore*, 478 U.S. at 408 (White, J., concurring); *see also Croson*, 488 U.S. at 525 (Scalia, J.,

meaning the state may, going forward, pay black employees more than their non-black counterparts until the lost wages have been made up. Why club membership is different than payment policies, Scalia does not say.

It may be that the effects of a former wage gap are quantifiable, and thus directly and precisely attributable to the former unconstitutional policy. For example, if a 20% wage gap over ten years came to a difference of \$1,000, black employees would still have \$1,000 less in their wallets than non-black employees even after the policy was amended, and it would thus be more akin to an ongoing dual system. However, this distinction itself reveals that Scalia's clear-cut doctrine is murkier beneath the surface. For if past racial discrimination in, say, a state university's admission policy has effects on the children of those black applicants who suffered from it, and those effects can be readily and precisely traced, the state should arguably be deemed as perpetuating "a system of unlawful racial classification."⁹¹ How direct and precise a relationship between past unlawful discrimination and a current discrepancy can we require without crossing into overly formalistic reasoning?

The question is even stronger given the rationale behind the *Bazemore* concurrence on which Scalia relies. The concurrence there distinguished between school assignments and club membership based on the Court's conclusion in *Green v. County School Board*⁹² "that voluntary choice programs in the public schools were inadequate and that the schools must take affirmative action to integrate their student bodies," whereas "one's choice of a Club is entirely voluntary."⁹³ The *Bazemore* concurrence explained:

While schoolchildren must go to school, there is no compulsion to join 4-H or Homemaker Clubs, and while school boards customarily have the power to create school attendance areas and otherwise designate the school that particular students may attend, there is no statutory or regulatory authority to deny a young person the right to join any Club he or she wishes to join.⁹⁴

In other words, school attendance is both mandatory and subject to potentially discriminatory assignment plans, whereas club membership is voluntary and free of any regulatory authority, and thus mere neutralization of admissions policies would suffice to allow integration. Implicit in this distinction is that where voluntary membership is inadequate to "undo" the effects

concurring) ("There [in *Bazemore*] we found both that the government's adoption of 'wholly neutral admissions' policies for 4-H and Homemaker Clubs sufficed to remedy its prior constitutional violation of maintaining segregated admissions . . ." (quoting *Bazemore*, 478 U.S. at 408 (White, J., concurring))).

⁹¹ *Crosen*, 488 U.S. at 524 (Scalia, J., concurring in the judgment).

⁹² *Green v. Cty. Sch. Bd.*, 391 U.S. 430, 439–41 (1968) (holding that a school district's plan to allow students to voluntarily choose their school placement was not "sufficient" to create "a unitary, non-racial" school system).

⁹³ *Bazemore*, 478 U.S. at 408 (White, J., concurring).

⁹⁴ *Id.*

of the former segregationist policy, a government might be permitted, or even obligated, to affirmatively integrate a state or municipal institution, because any “failure or refusal to fulfill this affirmative duty *continues the violation* of the Fourteenth Amendment.”⁹⁵ Thus, the duty to dismantle a dual system of housing should apply where, as a result of former state-sanctioned segregated residential zoning, voluntary choice of residence is inadequate to undo its effects. In other words, “maintenance of a system of unlawful racial classification” need not only apply to school assignments, leaving all other areas of prior unconstitutional discrimination in the broad category of “continuing effects”; the concurrence’s logic in *Bazemore* indicates that any lingering effects are considered an ongoing dual system where integration was not left solely to the individual’s decision.⁹⁶

While voluntary clubs may have official nondiscriminatory policies, that cannot be the end of the inquiry into whether minorities are free to apply. As *Brown v. Board of Education* famously established, “separate but equal” education is unequal, because a law discriminates not just by directly treating races differently but by causing necessarily different experiences.⁹⁷ Official school segregation violates the Equal Protection Clause because it requires, although indirectly, black children to experience psychological effects that render their quality of education unequal.⁹⁸ In its second *Brown v. Board of Education*

⁹⁵ *Crosby*, 488 U.S. at 524 (Scalia, J., concurring in the judgment) (quoting *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 458–59 (1979)).

⁹⁶ In *Bazemore*, the Court further explained that a neutral club admissions policy was sufficient to “undo” the former dual system because

[t]he District Court . . . concluded as a matter of fact that any racial imbalance existing in any of the clubs was the result of *wholly voluntary and unfettered choice of private individuals*. . . . The court found that “the Extension Service has had a policy that all voluntary clubs be organized without regard to race and that each club certify that its membership is open to all persons regardless of race; that it instructs its agents to encourage the formation of new clubs without regard to race; that it publishes its policies in the media; that all of its club work and functions above the local community level are being conducted on a fully integrated basis; that its 4-H camps are fully integrated and have been for over ten years; and that no person has been denied membership in any club on account of race.”

Bazemore, 478 U.S. at 407 (emphasis added) (citations omitted). This is not to suggest that race-based integrative policies are mandated, or even permitted, where alternative, race-neutral options exist. It does suggest, though, that integration would be a permissible state interest for implementing such race-neutral policies. Scalia reached a different conclusion in *Parents Involved*, where he joined Chief Justice Roberts’s plurality opinion that reducing “racial isolation” was an impermissible state interest. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 731–32 (2007) (plurality opinion) (stating that “remedying past societal discrimination does not justify race-conscious government action” and that “[r]acial balancing is not transformed from ‘patently unconstitutional’ to a compelling state interest simply by relabeling it . . . racial diversity, avoidance of racial isolation, [or] racial integration”).

⁹⁷ 347 U.S. 483, 495 (1954).

⁹⁸ *Id.* at 493–95 (holding segregation of public schools violated equal protection because “the policy of separating the races is usually interpreted as denoting the inferiority of the negro group,” and that “sense of inferiority affects the motivation of a child to learn” and thus “has a tendency to [retard] the educational and mental development of Negro children and to deprive them of some

decision,⁹⁹ the Court held that even after a school deactivates its segregation policy, so long as voluntary enrollment cannot actually integrate the schools and black students continue to suffer the psychological stigma of segregation, the government or school district continues to violate the Equal Protection Clause.¹⁰⁰ But how is that possible? How can a government violate the Constitution when it no longer has in effect any unconstitutional policy?

The answer, inevitably, is that where the adverse psychological effects of segregation linger after the government no longer segregates, those effects are still attributed to the government. This is precisely analogous to Scalia's hypothetical of the wage gap between black and non-black employees (as Scalia himself points out). There, abolishing the former wage gap does nothing to cure the current discrepancy, and so the state is deemed to be currently engaged in providing unequal protection of the laws—despite the absence of any link between the state's *current* policy and the *current* financial discrepancy. The link between the state's *former* policy and the *current* discrepancy makes today's discrepancy inseparable from yesterday's policy. The same in *Brown II*: Abolishing segregation does nothing to cure the psychological effects of current voluntary segregation, so the state is *currently* guilty of offering unequal education, because the current voluntary segregation is a direct product of the former state-mandated segregation. Thus, the *current* psychological effects—which render the education unequal—are inseparable from the *former* official segregation policy.

The same should be true with student clubs. If a former discriminatory admissions policy caused a current emotional discomfort with joining a club whose members are all of another race, and, as a result, would-be minority members suffer unequal access to state programs, *Brown II*'s rationale should apply. The current unequal access is attributable to the former discriminatory policy. Thus, the line between an ongoing constitutional violation and its mere after-effects is quite blurry. Following Scalia's model, a state may arguably implement a race-based policy to integrate schools long after state-sanctioned segregation has been dismantled, so long as there is evidence that the current unequal access to quality education is a direct outgrowth of the state's former policy.¹⁰¹ The very notion that societal discrimination is inherently

of the benefits they would receive in a racial[ly] integrated school system" (alterations in original).

⁹⁹ *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294 (1955).

¹⁰⁰ *Green v. Cty. Sch. Bd.*, 391 U.S. at 436–38 (stating that "[u]nder *Brown II* . . . [t]he transition to a unitary, nonracial system of public education was and is the ultimate end" necessary "to remedy the established unconstitutional deficiencies of its segregated system," because "*Brown II* was a call for the dismantling of well-entrenched dual systems" and established "the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch" (quoting *Brown II*, 349 U.S. at 299–301)).

¹⁰¹ See Graziella Bertocchi & Arcangelo Dimico, *The Evolution of the Racial Gap in Education and the Legacy of Slavery* 2 (Inst. for the Study of Labor, Discussion Paper No. 6192, 2011) (finding that "past

different than official discrimination is belied by *Brown II*, which held that societal causes of segregation were attributable to former state policies. In *Croson* as well, the City of Richmond could have implemented a race-based policy favoring minority-owned construction firms if it had determined that a current discrepancy in contracting opportunities between white and non-white firms was an outgrowth of previous official discriminatory policies. As in *Brown II*, official discrimination, even when repealed, can leave societal discrimination in place which can only be seen as an ongoing “dual system.”¹⁰²

II. JUSTICE KENNEDY

Justice Kennedy’s theoretical approach echoes through his opinions in *Croson*, *Parents Involved*,¹⁰³ and *Obergefell*,¹⁰⁴ three cases that span most of his career on the bench. In *Croson*, Kennedy agrees with Justice Scalia’s view that “[t]he moral imperative of racial neutrality is the driving force of the Equal Protection Clause.”¹⁰⁵ Kennedy also professes his preference for the “automatic invalidity” rule suggested by Scalia, under which all racial classifications would be automatically struck down absent an ongoing constitutional violation by the state or local government through the maintenance of a “dual system.”¹⁰⁶ Such a rule “would serve important structural goals” by freeing the Court from having to scrutinize each specific case of race-based state action.¹⁰⁷ A near absolute rule of invalidity would “make it crystal clear to the political branches, at least those of the States, that legislation must be based on criteria other than race.”¹⁰⁸ However, Kennedy concludes that the less absolute rule proposed by O’Connor—that all racial classifications, remedial or otherwise, be subject to “the most rigorous scrutiny”—is more loyal to the Court’s precedent, and will “in application . . . operate in a manner generally consistent with the imperative of race neutrality, because it forbids the use even of narrowly drawn racial classifications except as a last resort.”¹⁰⁹

While in *Croson*, Kennedy’s view of the Equal Protection Clause appears aligned with Scalia’s, *Parents Involved* shows the divergence between the two

slavery—being a crucial determinant of the initial [racial] gap [in education]—stills [sic] plays a considerable role in” disparities “in educational attainment” between African Americans and whites).

¹⁰² City of Richmond v. J. A. Croson Co., 488 U.S. 469, 524 (1989) (Scalia, J., concurring in the judgment) (quoting *Green*, 391 U.S. at 439).

¹⁰³ *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007).

¹⁰⁴ *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

¹⁰⁵ *Croson*, 488 U.S. at 518 (Kennedy, J., concurring in part and concurring in the judgment).

¹⁰⁶ *Id.*; see also *id.* at 524 (Scalia, J., concurring).

¹⁰⁷ *Id.* at 518 (Kennedy, J., concurring in part and concurring in the judgment).

¹⁰⁸ *Id.* at 518–19.

¹⁰⁹ *Id.* at 519.

Justices' views by highlighting a subtle difference already expressed in *Croson*. In *Parents Involved*, the question facing the Court was whether a school district may voluntarily implement a school-assignment plan that used race as one of three variables in assigning children to schools.¹¹⁰ The Court held the plan unconstitutional, 5-4, with Kennedy's carefully worded concurrence making the majority.¹¹¹ Chief Justice Roberts' plurality opinion (in which Scalia joined in full) and Justice Thomas's concurrence stressed that only remedying identifiable intentional discrimination by the school district would warrant the use of race as a factor in any school assignment plan.¹¹² Further, they equate the school's aim of achieving a racial distribution among schools proportional to local demographics with "racial balancing," which they hold is a patently unconstitutional goal.¹¹³ Kennedy, agreeing that racial classifications are rarely if ever permitted to correct de facto segregation, nonetheless stresses that providing educational opportunities to disadvantaged groups, or combatting "racial isolation," is a valid and compelling state interest, and cannot be simply equated with "racial balancing."¹¹⁴ However, it can only serve as the motive for race-neutral assignment plans; racial classifications are not justifiable to cure de facto segregation.¹¹⁵ Even in this aspect, though, Kennedy differs in two important respects from the plurality.

A. *The De Jure-De Facto Distinction as a Decision Rule*

First, Kennedy's adoption of the de jure-de facto distinction is far more cautious than the plurality's. While the plurality takes for granted that the

¹¹⁰ *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 709–11 (2007).

¹¹¹ *Id.* at 708–09; *id.* at 782–83 (Kennedy, J., concurring in part and concurring in the judgment).

¹¹² *See id.* at 736 (plurality opinion) ("The distinction between segregation by state action and racial imbalance caused by other factors has been central to our jurisprudence The dissent elides this distinction between *de jure* and *de facto* segregation . . . and fails to credit the judicial determination—under the most rigorous standard—that Jefferson County had eliminated the vestiges of prior segregation." (footnote omitted) (citations omitted)); *see also id.* at 751 (Thomas, J., concurring) ("[T]his Court has authorized the use of race-based measures for remedial purposes . . . in schools that were formerly segregated by law").

¹¹³ *Id.* at 729–30 (plurality opinion) ("This working backward to achieve a particular type of racial balance . . . is a fatal flaw under our existing precedent. We have many times over reaffirmed that '[r]acial balance is not to be achieved for its own sake.'" (last alteration in original) (quoting *Freeman v. Pitts*, 503 U.S. 467, 494 (1992)); *id.* at 750 (Thomas, J., concurring) ("Racial imbalance is not segregation.").

¹¹⁴ *Id.* at 787–88 (Kennedy, J., concurring in part and concurring in the judgment) ("The plurality opinion is too dismissive of the legitimate interest government has in ensuring all people have equal opportunity regardless of their race. . . . [I]t 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.").

¹¹⁵ *Id.* at 788–89 ("[S]chool authorities 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.").

correction of de jure discrimination is the only interest compelling enough to justify race-based preferences (except in institutions of higher learning, where diversity is a compelling interest too),¹¹⁶ Kennedy acknowledges that the distinction has little substantive meaning for the victims of racial isolation: “From the standpoint of the victim, it is true, an injury stemming from racial prejudice can hurt as much when the demeaning treatment based on race identity stems from bias masked deep within the social order as when it is imposed by law.”¹¹⁷ He also notes that de jure and de facto discrimination are artificial constructs: “The distinction between government and private action, furthermore, can be amorphous both as a historical matter and as a matter of present-day finding of fact. Laws arise from a culture and vice versa. Neither can assign to the other all responsibility for persisting injustices.”¹¹⁸ The distinction is nonetheless important as a judicial device of distinguishing between compelling and non-compelling interests—to draw a line, artificial as it is, so that race-based policies have some stopping point:

Yet, like so many other legal categories that can overlap in some instances, the constitutional distinction between *de jure* and *de facto* segregation has been thought to be an important one. It must be conceded its primary function in school cases was to delimit the powers of the Judiciary in the fashioning of remedies. The distinction ought not to be altogether disregarded, however, when we come to that most sensitive of all racial issues, an attempt by the government to treat whole classes of persons differently based on the government’s systematic classification of each individual by race. There, too, the distinction serves as a limit on the exercise of a power that reaches to the very verge of constitutional authority.¹¹⁹

Since allowing the proposed school assignment policy would “have no principled limit and would result in the broad acceptance of governmental racial classifications in areas far afield from schooling,” the Court needs some line to distinguish among compelling interests as a prophylactic means of “guard[ing] our freedom.”¹²⁰ The line chosen by the Court is between de jure and de facto injuries.¹²¹ This reluctant acceptance of the distinction stands in contrast to the plurality’s ready acceptance. It also serves to shed light on Kennedy’s concurrence in *Croson*. There, Kennedy was of a mind to adopt Scalia’s rule forbidding all racial classifications “which are not necessary remedies to victims of unlawful discrimination.”¹²² But regarding

¹¹⁶ *Id.* at 720 (plurality opinion).

¹¹⁷ *Id.* at 795 (Kennedy, J., concurring in part and concurring in the judgment).

¹¹⁸ *Id.*

¹¹⁹ *Id.* (citing *Milliken v. Bradley*, 418 U.S. 717, 746 (1974)).

¹²⁰ *Id.* at 791.

¹²¹ *Id.* at 795 (“[T]he distinction serves as a limit on the exercise of a power that reaches to the very verge of constitutional authority.”).

¹²² *City of Richmond v. J. A. Croson Co.*, 488 U.S. 569, 518 (1988) (Kennedy, J., concurring in part and concurring in the judgment).

what concerns a state may consider in designing race-neutral policies, Kennedy agreed that “the State has the power to eradicate racial discrimination and its effects in both the public and private sectors,” and “[t]he Fourteenth Amendment ought not to be interpreted to reduce a State’s authority in this regard.”¹²³ Thus, in both *Croson* and *Parents Involved*, Kennedy holds that racial classifications are never permitted except to correct de jure injuries, but that curing de facto injuries is a constitutional, even compelling, interest for the use of “race-conscious” policies, as long as they are race-neutral on their face. This distinction between “race-conscious” policies and “racial classifications” is directly contrary to the “colorblind” anticlassification principle—which holds race is a constitutionally invalid legislative factor—by which the plurality in *Parents Involved* interprets the Equal Protection Clause.¹²⁴

B. Anticlassification and Individual Identity

The second way in which Kennedy departs from the plurality in *Parents Involved* is in his conception of the harm of racial classifications: “When the government classifies an individual by race, it must first define what it means to be of a race. Who exactly is white and who is nonwhite? *To be forced to live under a state-mandated racial label is inconsistent with the dignity of individuals in our society.*”¹²⁵ Thus, Kennedy sees racial classifications as harmful because they forcibly label individuals as belonging to one race or another, which denigrates them as individuals. While governments are free to change the conditions that result in racial isolation through facially neutral—although race-conscious—policies, “[a]ssigning to each student a personal designation according to a crude system of individual racial classifications is quite a different matter.”¹²⁶ The perniciousness of racial classifications, it appears, lies in their state-assignment of racial identity to determine an individual’s share in benefits and burdens, a government action that denies the individual the opportunity to “self-define.”¹²⁷ Through racial classifications, the government goes

¹²³ *Id.* (emphasis added).

¹²⁴ See *Parents Involved*, 551 U.S. at 730 n.14 (plurality opinion) (contrasting the school district’s stated intent to discard a “colorblind mentality” with Justice Harlan’s declaration in *Plessy v. Ferguson* that “[o]ur Constitution is color-blind” to underscore the invalidity of the school district’s purpose (quoting *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting))); *id.* at 772 (Thomas, J., concurring) (“The dissent attempts to marginalize the notion of a color blind Constitution by consigning it to me and Members of today’s plurality.”).

¹²⁵ *Id.* at 797 (Kennedy, J., concurring in part and concurring in the judgment) (emphasis added).

¹²⁶ *Id.* at 789.

¹²⁷ *Id.* (“These mechanisms are race conscious but do not lead to different treatment based on a classification that tells each student he or she is to be defined by race” (emphasis added)); see also *id.* at 797 (“Under our Constitution the individual, child or adult, can find his own identity, can define her own persona, without state intervention that classifies on the basis of his race or the color of her skin.”).

beyond being simply mindful of race to *using* it: “Reduction of an individual to an assigned racial identity for differential treatment is among the most pernicious actions our government can undertake,” largely because it creates a system “where race serves not as an element of our diverse heritage but instead as a bargaining chip in the political process.”¹²⁸ The harm, then, is in the government-mandated debasement of individuals by “reducing” them to a prescribed identity they did not choose, undermining the constitutional imperative that “the individual, child or adult, can find his own identity, can define her own persona, without state intervention that classifies on the basis of his race or the color of her skin.”¹²⁹

Kennedy’s concern with state-mandated racial identity stands in contrast to Scalia’s concern about the “immoral, unconstitutional, inherently wrong, and destructive”¹³⁰ nature of racial classifications. Whereas Scalia’s version of anti-classification is sensitive to preferential treatment based on ancestry or race, which he sees as “alien to the Constitution’s . . . rejection of dispositions based on race or based on blood,”¹³¹ Kennedy’s version is sensitive to the debasement of individuals through the presumption of the state to assign them racial identities. The first sees the Equal Protection Clause as securing a right against a comparative injustice, meaning the injustice of being treated worse than an equal for an illegitimate reason.¹³² The second sees the Clause as protecting the right against a non-comparative, or independent, injustice, meaning an injustice suffered by an individual independent of how others are treated.¹³³ The

¹²⁸ *Id.* at 797.

¹²⁹ *Id.*

¹³⁰ *Croson*, 488 U.S. at 521 (Scalia, J., concurring in the judgment) (quoting BICKEL, *supra* note 27, at 133).

¹³¹ *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 239 (1995) (Scalia, J., concurring) (citations omitted).

¹³² See Deborah Hellman, *Two Concepts of Discrimination*, 102 VA. L. REV. 895, 897 (2016) (describing the distinction between comparative and non-comparative justice as whether “one’s due is determined independently of that of other people . . . [or] *only* by reference to his relations to other persons” (quoting Joel Feinberg, *Noncomparative Justice*, 83 PHIL. REV. 297, 298 (1974))). Hellman argues further that

[d]iscrimination is either a comparative wrong or a noncomparative wrong. If it is comparative, the treatment one person receives must be compared to the treatment accorded to others in order to determine if a law or policy wrongfully discriminates. If it is noncomparative, a law or policy wrongfully discriminates when it treats a person in a manner that departs from how she is independently entitled to be treated.

Id. at 899. But see Kenneth W. Simons, *Discrimination Is a Comparative Injustice: A Reply to Hellman*, 102 VA. L. REV. ONLINE 85, 86 (2016) (arguing that discrimination law by definition involves a comparative injustice). For Hellman’s response to Simons’s critique, see generally Deborah Hellman, *Defending Two Concepts of Discrimination: A Reply to Simons*, 102 VA. L. REV. ONLINE 113 (2016).

¹³³ See Hellman, *Two Concepts of Discrimination*, *supra* note 132. I do not suggest that Kennedy sees the Equal Protection Clause as only protecting against independent injustice, as the clause clearly encompasses other areas not involving state-imposed labels (e.g., wherever similarly situated individuals are treated disparately on an arbitrary basis—a comparative injustice). That is, Kennedy need not dismiss antidiscrimination as an operative principle simply because he sees preservation of

injustice lies in the indignity of being barred the opportunity to “find [one’s] own identity, . . . define [one’s] own persona, without state intervention.”¹³⁴

C. De Jure Remedies: Equal, or Unequal But Worth It?

The distinction between Kennedy’s dignity-centric version of anticlassification and Scalia’s genetics-based-preference version sheds light on their divergent attitudes towards the de jure-de facto distinction. For if the harm envisioned by the Equal Protection Clause is “reducing” an individual to a racial chit, that harm exists whenever a state classifies based on race. It is irrelevant whether the classification is understood as remedying previous unlawful discrimination, providing equality of opportunity, or conferring a race-based preference. Regardless, the harm of being subject to a state-imposed identity is present. Necessarily, then, the permissibility of using racial classifications to remedy de jure injuries, or to dismantle an ongoing “dual system,” is not because such classifications are “equal” within the meaning of the Equal Protection Clause—they are not equal so long as they assign a racial identity—but because the damage to individual dignity is outweighed by the critical goals of rectifying injuries and dismantling segregation. The Court has thus, in effect, made a cost-benefit decision, and concluded that some goals, like integrating an illegally segregated school system or remedying the effects of de jure discrimination, are important enough to disregard the denigration they cause.

But once it is acknowledged that some goals outweigh the harms of racial classifications, there is no inherently obvious stopping point. In theory, any state interest—including remedying the effects of de facto discrimination—might be weighed against the harm of denigration and deemed sufficiently compelling. The importance of remedying de facto discrimination is, as Kennedy points out, essentially indistinguishable from that of remedying de jure discrimination, as there is little difference in the victims’ suffering¹³⁵ and the demarcation between legal and societal discrimination is simply an artificial construct.¹³⁶ Thus, the judicially created de jure-de facto distinction is, Kennedy implies, a crude device meant to help the courts draw some line between valid and invalid government interests, to prevent the “widespread

dignity as an additional operative principle, even though one relates to an independent injustice and the other to a comparative injustice.

¹³⁴ *Parents Involved*, 551 U.S. at 797 (Kennedy, J., concurring in part and concurring in the judgment).

¹³⁵ *Id.* at 795 (“From the standpoint of the victim . . . an injury stemming from racial prejudice can hurt as much when the demeaning treatment based on race identity stems from bias masked deep within the social order as when it is imposed by law.”).

¹³⁶ *Id.* (“The distinction between government and private action, furthermore, can be amorphous both as a historical matter and as a matter of present-day finding of fact. Laws arise from a culture and vice versa. Neither can assign to the other all responsibility for persisting injustices.”).

governmental deployment of racial classifications.”¹³⁷ The distinction is based on the presumption that *de jure* injuries are “cognizable,” and therefore remediable through precise and limited policies, whereas societal discrimination is not “cognizable” in the same manner, because it is “inherently unmeasurable.”¹³⁸ This analysis suggests that if the societal effects of past unlawful discrimination could, theoretically, be identified and isolated, they would be grounds for designing a constitutionally valid remedy based on racial classifications. The *de jure-de facto* distinction is not a product of theory but of practicality.

By contrast, for Scalia and the plurality in *Parents Involved*, which he joins in full, the *de jure-de facto* distinction is not a judicial contrivance, but an essential gloss to the Equal Protection Clause. It is derived from the desegregation cases, where the Court required states to use racial classifications to create a “unitary” school system.¹³⁹ Scalia’s explanation of those decisions is, as discussed above, that they represent the single exception to the rule of forbidden classification—where it is necessary to dismantle an ongoing discriminatory policy.¹⁴⁰ As explained above, this is not merely an exception to the Equal Protection Clause’s anti-preference rule, but entirely outside the Equal Protection Clause’s purview. In other words, such race-based integration policies are “equal,” because the classifications are not being used to confer preference but to remove preferences already in place—to “declassify racially classified” individuals.¹⁴¹ Since Scalian anticlassification sees preferential treatment based on race as the principal harm of racial classifications, classifications that confer no preference raise no constitutional objections.

¹³⁷ *Id.* at 791. Kennedy also exclaims:

Yet, like so many other legal categories that can overlap in some instances, the constitutional distinction between *de jure* and *de facto* segregation has been thought to be an important one. . . . The distinction ought not to be altogether disregarded, however, when we come to that most sensitive of all racial issues, an attempt by the government to treat whole classes of persons differently based on the government’s systematic classification of each individual by race.

Id. at 795.

¹³⁸ *Id.* at 795–96 (quoting *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 505–06 (1989)).

¹³⁹ See, e.g., *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 458 (1979) (“Under the Fourteenth Amendment and the cases that have construed it, the Board’s duty to dismantle its dual system cannot be gainsaid.”); *Green v. Cty. Sch. Bd.*, 391 U.S. 430, 437–38 (1968) (“School boards such as the respondent then operating state-compelled dual systems were nevertheless clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch.”); *Brown II*, 349 U.S. 294, 300 (1955) (“[T]he courts will require that the defendants make a prompt and reasonable start toward full compliance with our May 17, 1954, ruling.”).

¹⁴⁰ *Croson*, 488 U.S. at 524 (Scalia, J., concurring in the judgment) (“[T]here is only one circumstance in which the States may act *by race* to ‘undo the effects of past discrimination’: where that is necessary to eliminate their own maintenance of a system of unlawful racial classification. . . . This distinction explains our school desegregation cases . . .”).

¹⁴¹ *Id.* at 525 (emphasis omitted).

Thus, Scalia views remedying de jure discrimination and dismantling a segregated system as entirely consistent with equal protection of the law. By contrast, remedying de facto discrimination is, in Scalia's view, simply a race-based preferential policy because it is not necessary to dismantle an ongoing constitutional violation. The distinction between remedying de jure and de facto discrimination is therefore essential to Scalia's interpretation of the Equal Protection Clause. Remedying de jure discrimination is not, as Kennedy holds, a compelling goal that outweighs the harm of racial classifications, but is rather within the scope of "equal protection of the law"; remedying de facto discrimination is categorically outside of it.

III. *OBERGEFELL* AND THE SYNERGY BETWEEN EQUAL PROTECTION AND DUE PROCESS

That Justice Kennedy's conception of the Equal Protection Clause is based on the value of dignity is most apparent in his majority opinion in *Obergefell v. Hodges*.¹⁴² *Obergefell* held unconstitutional all state bans on same-sex marriage.¹⁴³ While the crux of the decision relies on substantive due process by recognizing marriage as a fundamental right,¹⁴⁴ Kennedy makes a detour to strike down bans on same-sex marriage on equal protection grounds as well.¹⁴⁵ However, as Chief Justice Roberts notes in his dissent, Kennedy's equal protection analysis is unusual:

The majority[']s] . . . central point seems to be that there is a "synergy between" the Equal Protection Clause and the Due Process Clause, and that some precedents relying on one Clause have also relied on the other. Absent from this portion of the opinion, however, is anything resembling our usual framework for deciding equal protection cases. It is casebook doctrine that the "modern Supreme Court's treatment of equal protection claims has used a means-ends methodology in which judges ask whether the classification the government is using is sufficiently related to the goals it is pursuing."¹⁴⁶

Additionally, Roberts argues that "the majority fails to provide even a single sentence explaining how the Equal Protection Clause supplies independent weight for its position, nor does it attempt to justify its gratuitous violation of the canon against unnecessarily resolving constitutional questions."¹⁴⁷

¹⁴² 135 S. Ct. 2584, 2603, 2608 (2015) (expounding on the historically common "invidious sex-based classifications" which "denied the equal dignity of men and women").

¹⁴³ *Id.* at 2604–05.

¹⁴⁴ *Id.* at 2597–602.

¹⁴⁵ *Id.* at 2602–04.

¹⁴⁶ *Id.* at 2623 (Roberts, C.J., dissenting) (citation omitted) (quoting GEOFFREY R. STONE, LOUIS M. SEIDMAN, CASS R. SUNSTEIN, MARK V. TUSHNET, & PAMELA S. KARLAN, *CONSTITUTIONAL LAW* 453 (7th ed. 2013)).

¹⁴⁷ *Id.*

Thus, to understand Kennedy's equal protection analysis, it is necessary to explain: (a) what analytical work the evidence of a "synergy" between due process and equal protection does; (b) how Kennedy can hold that same-sex marriage bans violate the Equal Protection Clause without first determining that such bans use a suspect classification, as he himself implies that they have some rational basis;¹⁴⁸ and (c) why Kennedy thinks it necessary to reach the equal protection question, since his due process analysis already requires recognition of same-sex marriage.

A. The "Why" and the "How" of Obergefell's "Synergy" Analysis

The answer to (a) appears to lie in the answer to (b) and (c). In other words, the point of Kennedy's "synergy" analysis is to explain why same-sex marriage bans violate equal protection without using a suspect classification, and why it is necessary to reach the equal protection issue at all. Kennedy does this by demonstrating that although the Equal Protection and Due Process Clauses protect distinct rights, "each may be instructive as to the meaning and reach of the other."¹⁴⁹ This "cross-instructiveness" works in three ways. First, as society becomes aware that certain distinctions (such as race) are irrelevant in the exercise of a certain fundamental right (such as marriage), those distinctions become illegitimate grounds for denying a fundamental right. Thus, social movements promoting equal rights that generally appeal to the Equal Protection Clause have a secondary broadening effect on the liberties granted by substantive due process. "[I]n interpreting the Equal Protection Clause, the Court has recognized that new insights and societal understandings can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed . . . [T]hese precedents show the Equal Protection Clause can help to identify and correct inequalities in the institution of marriage . . ."¹⁵⁰ Second, arbitrary distinctions among similarly situated individuals, even where the classification is not suspect, call for strict scrutiny where they implicate a fundamental right.¹⁵¹

¹⁴⁸ *Id.* at 2602 (majority opinion) ("Many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises . . .").

¹⁴⁹ *Id.* at 2603.

¹⁵⁰ *Id.* at 2603–04. Kennedy's reference to *Loving v. Virginia*, 388 U.S. 1, 12 (1967), illustrates this dynamic:

The Court first declared the [antimiscegenation] prohibition invalid because of its unequal treatment of interracial couples. . . . With this link to equal protection the Court proceeded to hold the prohibition offended central precepts of liberty: "To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law."

Obergefell, 135 S. Ct. at 2603 (citation omitted).

¹⁵¹ Kennedy's citation to *Zablocki v. Redhail*, 434 U.S. 374, 375–77, 382–87 (1978), indicates this:

Third, even where the Equal Protection Clause is not actually triggered, the value of equality actually helps *define* certain fundamental rights. “[T]he two Clauses may converge in the identification and definition of the right.”¹⁵²

The second principle explains why Kennedy could hold same-sex marriage bans violate the Equal Protection Clause without first determining whether they involve a suspect classification: non-suspect classifications that impinge on a fundamental right deserve strict scrutiny. The third principle, that the value of equality can define the scope of a fundamental right, explains why it was necessary to reach the equal protection issue at all. But it requires an explanation of its own. The following is my understanding of the analysis.

The core of *Obergefell*'s holding is that there is not only a fundamental right to an intimate union of one's choice,¹⁵³ but to the state's respect and recognition of one's commitment to such a union¹⁵⁴ through conferral of the legal status of marriage.¹⁵⁵ This right derives from the dignity that is inherent

[In *Zablocki*] the Court invoked the Equal Protection Clause as its basis for invalidating the challenged law, which . . . barred fathers who were behind on child-support payments from marrying without judicial approval. The equal protection analysis depended in central part on the Court's holding that the law burdened a right “of fundamental importance.” It was the essential nature of the marriage right, discussed at length in *Zablocki*, that made apparent the law's incompatibility with requirements of equality.

Obergefell, 135 S. Ct. at 2603 (citations omitted). The same principle emerges from *Skinner v. Oklahoma*, which held that a state law requiring sterilization of certain “habitual criminals” to prevent passing on “inheritable [criminal] traits,” but not of other felons in the same class (e.g., embezzlers), violated the Equal Protection Clause. 316 U.S. 535, 536–38, 541 (1942). Adhering to its precedent that sterilization did not violate due process, the *Skinner* Court nonetheless held the law invalid under the Equal Protection Clause, due to the fundamental nature of the right to have children and the law's arbitrary distinction among felons. *Id.* at 538, 541–42. The Court reasoned that a classification, even if not based on a suspect criterion, which affects “a sensitive and important area of human rights” presents a danger of invidious discrimination. *Id.* at 536, 541 (“When the law lays an unequal hand on those who have committed intrinsically the same quality of offense and sterilizes one and not the other, it has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment.” (first citing *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886); then citing *Gaines v. Canada*, 305 U.S. 337 (1938))).

¹⁵² *Obergefell*, 135 S. Ct. at 2603.

¹⁵³ See *Lawrence v. Texas*, 539 U.S. 558, 567 (2003) (“When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.”).

¹⁵⁴ *Obergefell*, 135 S. Ct. at 2599 (“[T]he right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals.”); see also *id.* at 2600 (“[P]risoners could not be denied the right to marry because their committed relationships satisfied the basic reasons why marriage is a fundamental right. The right to marry thus dignifies couples who ‘wish to define themselves by their commitment to each other.’” (first citing *Turner v. Safley*, 482 U.S. 78, 95–96 (1986); and then quoting *United States v. Windsor*, 133 S. Ct. 2675, 2689 (2013))).

¹⁵⁵ *Id.* at 2601 (“[J]ust as a couple vows to support each other, so does society pledge to support the couple, offering symbolic recognition and material benefits to protect and nourish the union.”); see also *id.* at 2601–02 (“[T]he State itself makes marriage all the more precious by the significance it attaches to it”); *Windsor*, 133 S. Ct. at 2689 (“New York . . . decided that same-sex couples should have the right to marry and so live with pride in themselves and their union . . . [and so]

in the choice to make such a commitment¹⁵⁶—a dignity that stems from the self-defining nature of that choice¹⁵⁷—and from the fact that states have chosen to recognize that dignity by conferring on them a special legal status: “The States have contributed to the fundamental character of the marriage right by placing that institution at the center of so many facets of the legal and social order.”¹⁵⁸ Consequently, by withholding from certain commitments the legal recognition of marriage, the state *denies* them recognition of their union: “As the State itself makes marriage all the more precious by the significance it attaches to it . . . [i]t demeans gays and lesbians for the State to lock them out of a central institution of the Nation’s society.”¹⁵⁹ This is one sense in which “the two Clauses . . . converge in the identification and definition of the right”¹⁶⁰ to marriage. Since the state has created a fundamental right, and since all must be equal, conferring on one union state recognition but not on another not only treats them unequally but *deprives* the second of a fundamental right, violating substantive due process.

However, requiring the state to formally recognize same-sex marriages is not enough, because marriage contains, beyond a state-recognized relationship, certain state-conferred benefits and privileges, like tax benefits and

acted to enlarge the definition of marriage . . .”).

- ¹⁵⁶ *Obergefell*, 135 S. Ct. at 2599 (“There is dignity in the bond between two men or two women who seek to marry and in their autonomy to make such profound choices.”); *Lawrence*, 539 U.S. at 567 (“[A]dults may choose to enter upon this relationship in the confines of their homes and their own private lives and still *retain their dignity as free persons*.” (emphasis added)); *see also id.* at 578 (“The petitioners are *entitled to respect* for their private lives. The State cannot *demean their existence or control their destiny* by making their private sexual conduct a crime.” (emphasis added)); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992) (“[C]hoices central to *personal dignity* and autonomy[] are central to the liberty protected by the [Due Process Clause of the] Fourteenth Amendment. At the heart of liberty is the *right to define one’s own concept of existence*, of meaning, of the universe, and of the mystery of human life.” (emphasis added)); Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under Casey/Carhart*, 117 *YALE L.J.* 1694, 1735–45 (2008) (showing that the theme of dignity is central to many of Justice Kennedy’s opinions on substantive due process and equal protection).
- ¹⁵⁷ *Obergefell*, 135 S. Ct. at 2599 (“Choices about marriage shape an individual’s destiny. . . . ‘[C]ivil marriage is an esteemed institution, and the decision whether and whom to marry is among life’s momentous acts of self-definition.’” (quoting *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 955 (Mass. 2003))); *Windsor*, 133 S. Ct. at 2689 (“[S]ome States concluded that same-sex marriage ought to be given recognition and validity in the law for those same-sex couples who wish to define themselves by their commitment to each other.”).
- ¹⁵⁸ *Obergefell*, 135 S. Ct. at 2601; *see also Windsor*, 133 S. Ct. at 2692 (“[I]ts recognition of the validity of same-sex marriages . . . sought to give further protection and dignity to that bond . . . [by] giv[ing] their lawful conduct a lawful status . . . [which] is a far-reaching legal acknowledgment of the intimate relationship between two people, a relationship deemed by the State worthy of dignity . . .”).
- ¹⁵⁹ *Obergefell*, 135 S. Ct. at 2602; *see also Windsor*, 133 S. Ct. at 2694 (“Responsibilities, as well as rights, enhance the *dignity* and *integrity* of the person. And DOMA [the Defense of Marriage Act], contrives to deprive some couples . . . of both rights and responsibilities . . . [.] diminishing the stability and predictability of basic personal relations *the State has found it proper to acknowledge and protect*.” (emphasis added)).
- ¹⁶⁰ *Obergefell*, 135 S. Ct. at 2603.

“medical decision-making authority.”¹⁶¹ If all were left to substantive due process, a state might constitutionally recognize same-sex marriages while withholding from them some of the benefits or privileges it confers on opposite-sex marriages. As there is no fundamental right to tax benefits or medical decision-making authority, only to the state’s formal dignification of the union, a state could recognize and respect same-sex unions but not confer on it the same package of benefits it does opposite-sex marriages without running afoul of substantive due process. Thus, the Equal Protection Clause is necessary to require not only the conferral of dignity, but of “equal dignity.”¹⁶² And, because the benefits a state confers on married couples is a means of demonstrating its respect for the fundamental importance of the institution,¹⁶³ to confer fewer of those benefits to some marriages is to show them less respect, therefore according unequal dignity.¹⁶⁴ This right to the equal respect of the state is what Kennedy means, in his opening paragraph, that the petitioners seek to have their marriages “deemed lawful on the same terms and conditions”¹⁶⁵ as other marriages, meaning with the same level of state-recognition, which includes the benefits provided by the state for married individuals.

This explanation of why Kennedy thinks it necessary to reach the equal protection issue resolves another related question: why does he not do so in *Lawrence v. Texas*?¹⁶⁶ In *Lawrence*, Kennedy, writing for the majority, explicitly declines to hold a state law criminalizing homosexual acts of intimacy on equal protection grounds, instead relying solely on substantive due process to strike it down.¹⁶⁷ Kennedy explains that the Due Process Clause has a more encompassing effect than the Equal Protection Clause, because “[w]ere we to hold the statute invalid under the Equal Protection Clause some might question whether a prohibition would be valid if drawn differently, say, to prohibit the conduct both between same-sex and different-sex

¹⁶¹ *Id.* at 2601.

¹⁶² *Id.* at 2595.

¹⁶³ *Id.* at 2601 (“[J]ust as a couple vows to support each other, so does society pledge to support the couple, offering symbolic recognition and material benefits to protect and nourish the union. Indeed . . . States . . . have throughout our history made marriage the basis for an expanding list of governmental rights, benefits, and responsibilities.”).

¹⁶⁴ The court in *Obergefell* noted:

[B]y virtue of their exclusion from that institution, same-sex couples are denied the constellation of benefits that the States have linked to marriage. This harm results in more than just material burdens. . . . As the State itself makes marriage all the more precious by the significance it attaches to it, exclusion from that status has the effect of teaching that gays and lesbians are unequal in important respects. It demeans gays and lesbians for the State to lock them out of a central institution of the Nation’s society.

Id. at 2601–02.

¹⁶⁵ *Id.* at 2593.

¹⁶⁶ 539 U.S. 558 (2003).

¹⁶⁷ *Id.* at 574–75 (finding that the state law violated the Due Process Clause rather than the Equal Protection Clause).

participants.”¹⁶⁸ This result would both fail to address the personal liberty issue at stake as well as perpetuate the stigma associated with homosexuality, as such a law would have a disproportionately restrictive effect on gays and lesbians.¹⁶⁹ But striking it down on substantive due process grounds kills those two birds with one stone: it protects the personal liberty of intimate relationships, and vitiates any inequality (i.e., the disproportionate stigma felt by gays and lesbians) that might result from a redrawing of the statute to accord with the Equal Protection Clause. Why, then, does Kennedy seemingly depart from his own precedent in *Lawrence* and strike down same-sex marriage bans on equal protection grounds as well in *Obergefell*?

The inconsistency disappears with the above analysis.¹⁷⁰ Because the equal protection holding of *Obergefell* was necessary to prevent states from conferring unequal packages of benefits on same-sex marriages, as discussed above, the same concern is of no relevance where the right to marriage is not at issue. Thus, in *Lawrence*, where the Court only faced a challenge to a law prohibiting homosexual intimacy, but which did not concern same-sex marriage, it was unnecessary to resort to equal protection where substantive due process could do all the analytical work.

To sum up, the Equal Protection and Due Process Clauses “may be instructive as to the meaning and reach of the other”¹⁷¹ as follows: Substantive due process protects an individual’s right to make certain self-defining choices, in which the state has no authority to intervene.¹⁷² Substantive due process therefore protects the choice of whom to marry from state intervention, because the choice of whom to marry is fundamental to one’s ability to self-define.¹⁷³ Further, a state must not only grant the liberty to choose one’s spouse, but must respect it by conferring on it the legal status of marriage,

¹⁶⁸ *Id.* at 575.

¹⁶⁹ *Id.* (“If . . . the law . . . remains unexamined for its substantive validity, its stigma might remain even if it were not enforceable as drawn for equal protection reasons. When homosexual conduct is made criminal by the law of the State, that declaration . . . is an invitation to subject homosexual persons to discrimination . . .”).

¹⁷⁰ See *supra* notes 148–64.

¹⁷¹ *Obergefell*, 135 S. Ct. at 2603.

¹⁷² See *Lawrence*, 539 U.S. at 562 (“And there are other spheres of our lives and existence . . . where the State should not be a dominant presence. . . . Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.”); see also *id.* at 574 (“These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment.” (quotation marks omitted) (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992))).

¹⁷³ *Obergefell*, 135 S. Ct. at 2599 (“Choices about marriage shape an individual’s destiny. . . . ‘[C]ivil marriage is an esteemed institution, and the decision whether and whom to marry is among life’s momentous acts of self-definition.’” (quoting *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 955 (Mass. 2003))).

under the Due Process Clause.¹⁷⁴ Because one of the state's means of affirming its respect of the institution of marriage is by conferring certain secondary benefits,¹⁷⁵ it must affirm that respect of all marriages equally—it must confer equal dignity—under the Equal Protection Clause.

B. *The Gray Area in Justice Kennedy's Anticlassification*

As evident from *Parents Involved* and *Obergefell*, the value of dignity animates Kennedy's equal protection jurisprudence in different ways. It forbids the state from labeling an individual with an official racial identity, and it requires the state to affirmatively recognize and respect the identity an individual chooses for him or herself. Thus, the "equal dignity" principle leads to curious results. In the context of LGBTQ rights, it compels governments to accord equal respect to all unions, sexual orientations, and sexual identities, all of which involve "intimate choices that define personal identity,"¹⁷⁶ and it therefore requires the state to recognize in individuals the "dignity in their own distinct identity."¹⁷⁷ The dignity principle, in these cases, broadens the constitutional mandate of equality. By contrast, in the context of providing more opportunities to minorities, the dignity principle restricts the ability of state and local governments to implement affirmative action programs that use race as a factor, thereby guarding the equal dignity of individuals while limiting their options for equal opportunities.

But the dignity principle does not compel this second result. It is possible to hold that equal dignity, while mandating respect for individuals' self-defining choices, does not forbid racial classifications. First, the continued racial isolation and limited access to opportunity many African Americans experience may itself be degrading,¹⁷⁸ and the indignity of those conditions may

¹⁷⁴ *Id.* at 2601 ("[J]ust as a couple vows to support each other, so does society pledge to support the couple, offering symbolic recognition and material benefits to protect and nourish the union."); *see also id.* at 2602 ("It demeans gays and lesbians for the State to lock them out of a central institution of the Nation's society."); *Lawrence*, 539 U.S. at 575 (describing substantive due process as the "right to demand respect for conduct protected by the substantive guarantee of liberty").

¹⁷⁵ *Obergefell*, 135 S. Ct. at 2601 (Indeed . . . States . . . have throughout our history made marriage the basis for an expanding list of governmental rights, benefits, and responsibilities.).

¹⁷⁶ *Id.* at 2597.

¹⁷⁷ *Id.* at 2596.

¹⁷⁸ *See* Evadne Grant, *Dignity and Equality*, 7 HUM. RTS. L. REV. 299, 326 (2007) (arguing that dignity "is not only concerned with an individual's sense of self-worth, but constitutes an affirmation of the worth of human beings in our society," and therefore the value of dignity requires "that individuals are not forced to live in deprived material and social conditions" (quoting *Khumalo v. Holomisa* 2002 (5) SA 401 (CC) at para. 27 (S. Afr.)); Thena Robinson Mock et al., *An Immediate End to the Criminalization and Dehumanization of Black Youth Across All Areas of Society Including, but Not Limited to, Our Nation's Justice and Education Systems, Social Service Agencies, Media, and Pop Culture*, MOVEMENT FOR BLACK LIVES, <https://policy.m4bl.org/wp-content/uploads/2016/07/End-Criminalization-of-Youth-Policy-Brief.pdf> (last visited Nov. 17, 2017) ("The disparities grow at almost every step, *stealing the dignity*

arguably outweigh the indignity of state-assigned identity. Second, the indignity that Kennedy perceives in a state-imposed racial identity only exists if race is understood as an identifying label, as opposed to a simple proxy of a statistically-proven likelihood of access to opportunity. Since the significance of race to personal identity—as opposed to statistics—depends on societal perceptions, it is unclear that the Court is the best authority on whether racial classifications are “assignments of identity.” The social resonance of race is further diluted with the increase in multiracial and multiethnic backgrounds.¹⁷⁹ As more individuals define themselves not as belonging to one race but as multiracial, the correlation between race and identity is necessarily weakened.¹⁸⁰ If this trend continues—and presumably it will¹⁸¹—race will be seen less as an identifying badge than a simple socioeconomic and cultural variable. The less meaning race has as an identifier, the less race-based classifications should be seen as assigning individuals a certain identity and thus as denying individual dignity. Thus, we can accept Kennedy’s theoretical premise that equal protection is concerned with self-definition while limiting its application to require equal dignity for personal decisions whose self-defining nature the Court has already recognized. This would enable the conversion of Kennedy’s theory into a more principled doctrinal approach to equal protection cases. It would also steer the judiciary from

of young Black people and forcing them onto lifelong pathways of criminalization and diminished opportunity.” (emphasis added).

179 See Nicholas A. Jones & Jungmiwha Bullock, *The Two or More Races Population: 2010*, U.S. CENSUS BUREAU (Sept. 2012), <https://www.census.gov/prod/cen2010/briefs/c2010br-13.pdf> (analyzing data from the 2010 Census Redistricting Data (Public Law (P.L.) 94-171) Summary File, and finding that the population “who reported White as well as Black or African American . . . increas[ed] by 134 percent” and the number of people “reporting White as well as Asian . . . increas[ed] by 87 percent”); *Multiracial in America, Chapter 3: The Multiracial Identity Gap*, PEW RES. CTR. (June 11, 2015), <http://www.pewsocialtrends.org/2015/06/11/chapter-3-the-multiracial-identity-gap/#fnref-20523-45> (“The share of multiracial babies has risen from 1% in 1970 to 10% in 2013.”).

180 See Susan Saulny, *Black? White? Asian? More Young Americans Choose All of the Above*, N.Y. TIMES, Jan. 30, 2011, at A1 (observing that “[m]any young adults of mixed backgrounds are rejecting the color lines that have defined Americans for generations in favor of a much more fluid sense of identity” as a means of “asserting their freedom to identify as they choose,” such as by checking off more than one race or ethnicity on official forms); *Multiracial in America*, PEW RES. CTR., *supra* note 179 (reporting that one fourth of adults of white and American Indian descent “say they consider themselves multiracial,” and that “61% of those with a white and black background say they identify as multiracial,” as do “seven-in-ten white and Asian biracial adults,” and “[a]mong Hispanics who count two or more races in their background, about six-in-ten (62%) say they consider themselves to be multiracial”); *see also id.* (reporting that “about three-in-ten mixed-race adults (29%) who now report more than one race for themselves say they used to see themselves as just one race,” and that “the share of biracial adults with a white and black background (31%) who view their race as essential to their identity is substantially smaller than the proportion of single-race blacks (55%) who hold the same view”).

181 *Multiracial in America*, PEW RES. CTR., *supra* note 179 (“[W]ith interracial marriages also on the rise, demographers expect this rapid growth to continue, if not quicken, in the decades to come.”).

making assumptions about the relationship between race and identity, a highly intangible factor that, in any event, is in constant flux.

But even as the link between race and identity weakens, race remains an undeniable factor in socioeconomic status. As Kennedy acknowledges in *Parents Involved*, race often does matter,¹⁸² or at least matters enough to allow race-neutral policies to counter race-based disadvantages. If so, it may matter enough to allow for racial classifications as well. As explained in Part II.C., Kennedy views remedying de jure discrimination as outweighing the harm of denigration caused by racial classifications. Further, he holds the de jure-de facto distinction is an essentially artificial construct designed to prevent race-based policies without foreseeable limits. In light of these conclusions, the leap from race-conscious to race-based policy is not far at all.

CONCLUSION

These issues are uniquely urgent in our times. It is important to realize that unequal opportunity and uneven protection of the law are not the only concerns that should inform race-conscious policies; frank acknowledgment of race-based disparity may also be critical. There has never been a formal, coordinated attempt to correct, to whatever extent possible, the wrongs committed against African Americans under the auspices of the federal and state governments. Since it was those governments that sanctioned and profited from the dehumanization of black individuals, any healing of those wounds must be sanctioned by those governments, too. Legally sanctioned race-based remedial policy, besides evening the playing field, imply official acknowledgment of and remorse for legally sanctioned race-based wrongs.¹⁸³

¹⁸² *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 787 (2007) (Kennedy, J., concurring in part and concurring in the judgment) (“The enduring hope is that race should not matter; the reality is that too often it does.”).

¹⁸³ See Commission to Study Reparation Proposals for African-Americans Act, H.R. 40, 113th Cong. (2013) (proposing establishing “a commission to examine the institution of slavery, . . . discrimination against African-Americans, and the impact of these forces on living African-Americans,” and “[t]o acknowledge the fundamental injustice, cruelty, brutality, and inhumanity of slavery in the United States . . . between 1619 and 1865,” with the aim of “recommend[ing] to the Congress . . . appropriate remedies”); H.R. 1011, 99th Gen. Assemb. (Ill. 2015) (proposing commissioning a study of “how Emancipation, while freeing [African slaves] of their literal bonds, . . . did not guarantee equality in education, employment, housing, and access to quality affordable health care,” and considering “proposal[s] for reparations to the descendants of slaves in America”); Arielle Humphries & Marbre Stahly-Butts, *Reparations for the Cultural and Educational Exploitation, Erasure, and Extraction of Our Communities*, MOVEMENT FOR BLACK LIVES, <https://policy.m4bl.org/wp-content/uploads/2016/07/CulturalReparations-OnePager.pdf> (last visited Nov. 17, 2017) (advocating “cultural reparations to publically acknowledge the history of mass violence in the U.S. in order to begin to heal from the trauma,” in light of “an insufficient recognition . . . of the influence of the baggage of the past, which necessitates specific institutions and programmes tailored to the situation of people of African descent” (citation omitted)).

Even if race-neutral measures would do much to equalize opportunities, they would not have the reconciliatory effect of a formal acknowledgment of past wrongs committed and the harms they set in continuous motion. To be sure, the wisdom and efficacy of such measures are debatable.¹⁸⁴ But so long as race-based affirmative action programs are automatically constitutionally suspect, that debate must remain primarily academic. To once again allow legislative experimentation with such programs to realize the full promise of the Equal Protection Clause, scholars must begin engaging with anticlassification in its various forms and seeking flexibility within its framework.

¹⁸⁴ See, e.g., Rhonda V. Magee Andrews, *The Third Reconstruction: An Alternative to Race Consciousness and Colorblindness in Post-Slavery America*, 54 ALA. L. REV. 483, 486 (2003) (arguing that “race conscious approaches, though superior to colorblind approaches from the standpoint of corrective justice,” are insufficient to “redress[] the myriad present-day harms that result from the legacy and contemporaneous manifestations of racist thought and policy” and “inevitably enhanc[e] [the] sociopolitical significance” of race and “perpetuat[e] racialization”).