UNEXPLAINABLE ON GROUNDS OTHER THAN RACE*

DAVID KAIRYS**

INTRODUCTION

Each new pronouncement by the Supreme Court on the American dilemma—race—creates a hailstorm of analysis and turns the attention of the legal community, and the community at large, to basic questions about justice and the meaning of American freedom, democracy, and equality. This has been so for decades, if not centuries. Three decisions on racial issues handed down at the end of the Court's 1994-1995 Term[1] were no exceptions, heralding for some the dawn of a new conservative paradigm on race.[2]

On such occasions, analyses in both legal and popular venues tend to focus on the particular area of equal protection at issue in the recent decision and on comparisons to earlier decisions and principles in that area. A voting rights case prompts discussion of voting rights, an affirmative action case prompts discussion of affirmative action, and so on. This is useful and important, but an analysis that ends there misses the Court's overall perspective and approach to

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** Professor of Law, *Temple University School of Law.* This Essay was written to introduce in this symposium issue the panel discussion entitled "Color-Blindness Versus Racial Justice: The Supreme Court's 1994-1995 Term and the Struggle to Define Equal Protection" at the conference "The Rehnquist Court and the American Dilemma" held at the Washington College of Law of The American University on September 21, 1995. I appreciate comments from Mark Rahdert, Jamin Raskin, and Robert Reinstein; the discussion and feedback at a faculty colloquium at the Washington College of Law; and research assistance by John L. Day, II. Portions of the summary of what I call the "dual system" are drawn from my book WITH LIBERTY AND JUSTICE FOR SOME (1993) and my essay *Race Trilogy*, 67 TEMPLE L. REV. 1 (1994). This Essay is dedicated to Alan Freeman, whose pathbreaking work and commitment to critical understanding of the jurisprudence of race deeply affected me.

1. *See* Miller v. Johnson, 115 S. Ct. 2475 (1995); Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097 (1995); Missouri v. Jenkins, 115 S. Ct. 2038 (1995).

2. *See* Joan Biskupic, *Court's Conservatives Make Presence Felt*, WASH. POST, July 2, 1995, at A1; David O'Brien, *Rehnquist Tilt*, DALLAS MORNING NEWS, July 9, 1995, at 5J; David Savage, *Supreme Court Rulings Herald Rehnquist Era*, L.A. TIMES, July 2, 1995, at A1.

equality. Is there, as the Court regularly proclaims, one approach and one set of rules and assumptions applicable to all equal protection claims? Or are there differing rules, assumptions, and approaches; and, if so, what determines which are applied in particular cases? To address such questions, one must look across the range of various equal protection issues and cases.

In recent writings, I identified three major types of equal protection race cases—challenges to discrimination against minorities, challenges to affirmative action, and challenges to race-conscious remedial measures. Looking at the results and reasoning in the three types of cases, I concluded that the Court's conservative majority has developed a "dual system": two distinct sets of rules, assumptions, and approaches—one that makes it nearly impossible for a discrimination claim to succeed, another that makes it quite easy.[3]

Which of these different sets of rules, assumptions, and approaches applies in a particular case depends on the race of the persons claiming discrimination, but not in a way that is immediately obvious. Conventional wisdom starts with the assumption that African Americans have been favored by antidiscrimination law, which should be uniformly applied irrespective of race so that whites receive equal treatment. In this view, African Americans who claim discrimination have received either too much relief from the courts or a level of relief that has not been extended to whites, and affirmative action should be prohibited as reverse discrimination.[4] This is how the Court has addressed the question, including a discussion of it in one of the major cases of last Term.[5] Another view, usually put forward

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3. *See* DAVID KAIRYS, WITH LIBERTY AND JUSTICE FOR SOME 129-45 (1993) [hereinafter KAIRYS, WITH LIBERTY AND JUSTICE FOR SOME] (recognizing dual meaning of equality through examination of Fourteenth Amendment cases); David Kairys, *Race Trilogy*, 67 TEMPLE L. REV. 1, 1 (1994) [hereinafter Kairys, *Race Trilogy*] (identifying three major types of Fourteenth Amendment race cases and discussing Court's "tendency to apply different standards to claims of racial discrimination" depending on which group is disfavored); *see also* David Kairys, *Prejudicial Restraint: Race and the Supreme Court*, TIKKUN, May/June 1991, at 37 (discussing different definitions of equality).

4. *See, e.g.*, Lily Dizon, *Under the Skin*, L.A. TIMES, Oct. 27, 1993, at A1 ("Almost half of the people polled—47%—said they believe anti-discrimination laws have gone too far."); Ernest Lefever, *The Danger of Quotas*, WASH. TIMES, Oct. 18, 1995, at A21 (noting "legal preferences for ethnic minorities and women"); Paul Roberts, *The Rise of the New Inequality*, WALL ST. J., Dec. 6, 1995, at A20 (asserting that white males are disadvantaged because "people have different rights under the law based on their race and gender"); Donna St. George, *A Simmering Political Battle; Backlash Against Affirmative Action Becoming More Visible*, AUSTIN AM.-STATESMAN, Nov. 19, 1995, at D1. Polls cited in these articles generally show majority opposition to "quotas" but acceptance of affirmative action, although politicians and pundits regularly assume that there is widespread opposition to affirmative action.

5. "'[T]he standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification.'" *Adarand*, 115 S. Ct. at 2100 (quoting City of Richmond v. J.A. Croson, 488 U.S. 469, 494 (1989)).

by liberals, advocates either different rules or recognition within the same rules of the different history and circumstances faced by whites and racial minorities. This leads to vigorous protection of minorities and permits affirmative action because of the history, current reality, and lingering effects of discrimination against them.[6]

These two positions, which can fairly be characterized as conservative and liberal, assume that minorities have been favored or at least treated the same as whites in the Court's equal protection decisions, and go on to propose better treatment for whites or minorities, respectively. Whatever the merits of their arguments for better treatment, the focus here is the initial assumptions of both positions. The dual system established by the Court over the last two decades favors white people.

The race cases of last Term permit an elaboration of the dual system thesis, presented in the form of a table that highlights the different approaches, rules, and assumptions when whites and African Americans claim discrimination. They also permit an explanation of how the conservative majority has established a dual system based on what is easily described as a single set of equality rules.

THE DUAL SYSTEM THESIS

Since the mid-1970s, discrimination claims brought by African Americans and other minorities have run into a near impenetrable brick wall: the purposeful-discrimination rule:[7] While lower federal courts, applying principles and approaches developed in the 1960s and early 1970s, sometimes granted relief to minorities, the occasions on which the Supreme Court has done so are extremely rare and are based primarily on other, overriding concerns.[8]

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6. *See, e.g.*, Metro Broadcasting Inc. v. FCC, 497 U.S. 547, 565-67 (1990); *Croson*, 488 U.S. at 528 (Marshall, J., dissenting). Chief Justice Rehnquist has adopted this argument as to gender discrimination, but not as to racial discrimination. Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 735 (1982) (Powell & Rehnquist, JJ., dissenting); Michael M. v. Superior Court, 450 U.S. 464, 466 (1981); Craig v. Boren, 429 U.S. 190, 217 (1976) (Rehnquist, J., dissenting). The combination of the intermediate standard for gender discrimination and the principle that affirmative action for any group be judged by the same standard as discrimination against that group has made affirmative action for women easier than for African Americans, although the higher standard for racial discrimination is based on the notion that it is socially and constitutionally worse.

7. Justice Blackmun, dissenting in Ward's Cove Packing Co. v. Atonio, 490 U.S. 642, 662 (1989), put it this way: "One wonders whether the majority still believes that race discrimination—or, more accurately, race discrimination against nonwhites—is a problem in our society, or even remembers that it ever was."

8. The principal rare exceptions have been explicitly racial measures, mainly school desegregation cases of which *Jenkins* is the latest retreat, and challenges to discriminatory jury selection systems. *But see* Rogers v. Lodge, 458 U.S. 613 (1982) (affirming lower court

The purposeful-discrimination doctrine is a hallmark of the conservative judicial approach.[9] Starting from the premise that the most serious social and institutional forms of racism have been overcome, the proper role for the courts is seen as deference to legislative authority and judicial restraint. Legal relief will be considered if, and only if, it can be proved that an action harmful to a racial minority was undertaken for the specific purpose of discriminating rather than for some other purpose.

Most significantly, this proof of purposeful discrimination must be presented before and as a pre-condition to any serious questioning or scrutiny of the government's action. Even measures that have a clearly harmful, particularized effect on minorities are now assumed to be completely free from the influence of racial considerations, no matter how extensive or unnecessary the harm may be, or how closely the circumstances and context may fit historical patterns of racism. If purposeful discrimination is not proved, the courts will not seriously examine the government action at all: any legitimate-sounding, generally stated purpose will simply be accepted.

There are many examples of this.[10] Perhaps the clearest is *City of*

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invalidation of at-large voting system that was part of pervasive pattern of exclusion of African Americans from voting and politics).

The Court has in effect exempted jury challenges from the purposeful discrimination rule while still employing the language of intentional discrimination. *See* Duren v. Missouri, 439 U.S. 357 (1979) (finding prima facie case established by substantial underrepresentation traceable to some aspect of jury selection system); Casteneda v. Partida, 430 U.S. 482, 493-94 (1977) (holding that prima facie case established by substantial underrepresentation and system that provides "opportunity to discriminate"). The Court has done this because, in addition to the rights and interests of underrepresented persons and groups that are present in every equal protection claim, actual jury representativeness, regardless of the intentions of jury selection laws or officials, is necessary to the integrity and legitimacy of jury verdicts and to fairness for litigants. *See* Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 266 n.13 (1977); Washington v. Davis, 426 U.S. 229, 241 (1976); Taylor v. Louisiana, 419 U.S. 522, 530-31 (1975). *See generally* David Kairys et al., *Jury Representativeness: A Mandate for Multiple Source Lists*, 65 CAL. L. REV. 776, 784-88, 786 n.64 (1977). The essentially impact-based rules applied in jury challenges have benefited whites and men as well as minorities and women since the Court has held that, because of the importance of actual representativeness, a challenger does not have to have the underrepresented characteristic. *See* Holland v. Illinois, 493 U.S. 474, 476-77 (1990) (holding that white defendant has standing to object to prosecutor's use of peremptory challenges to exclude blacks from jury); Duren v. Missouri, 439 U.S. 357, 364 (1979) (holding that fair cross-section requirement of Sixth Amendment cannot be satisfied if women are systematically eliminated from jury panels); Taylor v. Louisiana, 419 U.S. 522, 526 (1973) (holding that male defendant had standing to assert claim that "exclusion of women from jury service" deprived him of kind of factfinder to which he was constitutionally entitled).

9. The focus on government purpose is familiar in race discrimination cases. This focus is also part of a trend, which I have called the purpose doctrine, that dominates recent conservative decisions covering the whole range of civil rights and civil liberties. KAIRYS, WITH LIBERTY AND JUSTICE FOR SOME, *supra* note 3, at 183-86 (discussing "purpose doctrine" and how it excuses constitutional violations unless victim can prove that government acted maliciously).

10. *See, e.g.*, McCleskey v. Kemp, 481 U.S. 279, 279 (1987) (stating that petitioner must prove that decisionmakers in case acted with "discriminatory purpose" in order to prove Equal

Memphis v. Greene,[11] in which the city of Memphis erected a traffic barrier between an all-white community, constructed before World War II as a segregated development, and a neighboring black community.[12] The city, claiming it acted only to further "traffic safety,"[13] closed a thoroughfare for the first time in its history, violating in the process its own procedures and rules.[14] It also sold a twenty-five foot wide strip of the street to two adjacent white property owners, declaring in a city council resolution that the strip was "closed to the public."[15] Closing the thoroughfare impeded the black community's access to a public park and zoo that had been segregated until 1963,[16] caused inconvenience, potentially reduced property values in the black community, and resembled, at least symbolically, segregation, second-class citizenship, or even apartheid.[17]

The Court accepted the city's general explanation that the street was closed for safety related to traffic and to preserve the residential character of the neighborhood.[18] The possibility of less extreme

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Protection Clause violation); City of Memphis v. Greene, 451 U.S. 100, 124 (1981) (rejecting plaintiffs' claim that state was conferring benefit on white citizens); City of Mobile v. Bolden, 446 U.S. 55, 55 (1980) (identifying "racially discriminatory motivation" as necessary to challenge electoral scheme that favored whites); Washington v. Davis, 426 U.S. 229, 230 (1976) (asserting that purpose to discriminate must be present for successful Equal Protection Clause challenge); *see also* Milliken v. Bradley, 418 U.S. 717, 718 (1974) (identifying need to establish boundary lines for school districts formed with "purpose of fostering racial segregation"). The same phenomena characterizes the Court's Title VII cases. *See* Ward's Cove Packing Co. v. Atonio, 490 U.S. 642, 662 (1989) (requiring proof that challenged employment practices caused disparate impact on employment of workers and accepting "business considerations" as sufficient justification for such employment practices). *See generally* Alan Freeman, *Anti-Discrimination Law: The View from 1989*, *in* THE POLITICS OF LAW, ch. 6 (David Kairys ed., 2d ed., 1990).

11. 451 U.S. 100 (1981).

12. City of Memphis v. Greene, 451 U.S. 100, 102-03 (1981).

13. *Id.* at 104 (stating that city's justifications for closing thoroughfare included reducing traffic flow, increasing safety for children walking to local junior high school, and reducing "traffic pollution" in residential area).

14. *See id.* at 142-43 (Marshall, J., dissenting). The city required the unanimous consent of all the adjoining property owners before a street could be closed to traffic (which had been done previously to deadends, alleys and non-thoroughfares), but one white owner objected. *Id.* The first round of city hearings proceeded without any notice to the black community, and at later hearings their time for presentations was severely limited. *Id.* at 143 (Marshall, J., dissenting).

15. *Id.* at 112-13 n.19. The majority acknowledged that this might include pedestrians as well as cars. *Id.* at 112-13 n.21.

16. *Id.* at 102-03; *see* Watson v. City of Memphis, 373 U.S. 526, 534 (1963) (finding "an unmistakable and pervasive pattern of local segregation").

17. *Greene*, 451 U.S. at 138 (Marshall, J., dissenting) (stating that majority ignored "plain and powerful symbolic message" of barrier). The lead plaintiff, N.T. Greene, recalled in his testimony being chased by police from the white community, in which blacks were not allowed. The plaintiffs claimed that the street closure and barrier were a "badge of slavery" prohibited by the Thirteenth Amendment. *Id.* at 124. This claim as well as all of the plaintiffs' other claims were rejected by the Court. *Id.* at 128-29.

18. *Id.* at 119.

traffic measures, such as reduction of speed limits or installation of traffic control bumps, was of no import in Justice Stevens's majority opinion.[19] Because the African-American neighborhood presented "no evidence" of purposeful discrimination, the street closing could not be seriously questioned or scrutinized.[20]

Of course, some general, legitimate-sounding purpose often accompanies such actions or is available as a justification after the fact. Unless there is a written confession of racist motivation, racist officials and institutions are allowed by this analysis to adopt measures that harm minorities without running into any legal obstacles. This rule not only undercuts the constitutional prohibition of discrimination—which, contrary to public understanding, was faithfully enforced for, at most, only two decades—but has made purposeful discrimination quite easy.[21]

The Court's affirmative action decisions, best exemplified by *City of Richmond v. J.A. Croson Co.*,[22] purport to follow the same rule and approach, but subject governmental actions to a detailed, searching scrutiny aimed at, in the Court's words in *Croson*, "smok[ing] out" racism.[23] The stated reason for this stark difference in approach was that the affirmative action plan at issue set up an explicitly racial classification.[24]

Scrutiny of race-specific measures makes sense, but the conservative Justices never adequately explained why they concluded that remedying racial discrimination or its lingering effects is an insufficient or illegitimate governmental goal. Nor did they explain why measures that seriously disadvantage minorities and even fit historic patterns of racism, though not race-specific, merit no scrutiny at all.

Explicitly mentioning race—which any good-faith affirmative-action plan would have to do and any bad-faith racist practice can easily avoid—was established as the only circumstance requiring courts to seriously scrutinize possibly discriminatory measures. Even strong circumstantial evidence of purposeful discrimination against minorities has been regularly discounted or ignored, as in the "no evidence" conclusion in the *Greene* case.

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19. *See id.* at 152 n.17 (Marshall, J., dissenting) (reiterating testimony by city official that street closing for traffic control purposes was unprecedented). Justice Stevens' recent votes in race cases, including the three cases last Term focused on in this Essay, raise a question about whether he would now vote as he did in *Greene*.

20. *Id.* at 126.

21. *See* Alan Freeman, *Legitimating Racial Discrimination Through Anti-Discrimination Law*, 62 MINN. L. REV. 1049 (1978).

22. 488 U.S. 469 (1989).

23. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989).

24. *Id.* at 476-77.

Nor is it clear what the Court in *Croson* meant by "racism" that should be "smoke[d] out." The Richmond City Council did, in fact, wish to help African Americans,[25] much as other city governments have sought—and were allowed—to provide economic and social opportunities for other disadvantaged minorities. Unless we assume the improbable—that there were no qualified African-American contractors or subcontractors, despite the fact that they constituted over half of the city's population[26]—the plan did not give African Americans an unfair advantage or preference, and did not harm whites.[27] Blacks simply gained access to a previously denied opportunity—less of a break than was provided to other previously excluded groups by many of our large cities, which in some periods had police or fire departments that were almost all Irish, Italian, or German American.[28] When white officials adopt measures that aid their own, there is a strong presumption that they act for significant, legitimate reasons unrelated to ethnicity or race; when African Americans do the same, the Court's tendency is to call it racism.[29]

The Court's recent decisions in cases in which white plaintiffs challenge measures designed to remedy past discrimination against minorities fill out the picture, particularly because some of them do not involve explicitly racial classifications. In *Shaw v. Reno*,[30] for example, the North Carolina legislature, seeking to comply with the Voting Rights Act of 1965[31] and directives from the Bush administration Department of Justice, created two majority-black congressional districts out of its total of twelve.[32] Due to consistent racial bloc

25. *See id.* at 528 (Marshall, J., dissenting) (stating that Richmond's actions were forthright attempt "to confront the effects of racial discrimination in its midst").

26. *Id.* at 479, 495.

27. Some individual blacks got an opportunity they never had before, and some individual whites were denied an advantage they previously had.

28. For example, Frank Rizzo rose to the top of the Philadelphia police department after Italian Americans were brought into ranks previously dominated almost entirely by Irish and German Americans. *See generally* S.A. PAOLANTONIO, FRANK RIZZO: THE LAST BIG MAN IN BIG CITY AMERICA (1993).

29. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (referring to "illegitimate uses of race"). The Court was specifically troubled by the black majority on the Richmond city council that formulated and adopted the plan. *Id.* at 495-96. There is duplicity here, given that the Court does not seem to view the race of white legislatures who help whites as relevant. There is no reason to believe, however, that the result would be any different if the council had been all white. *See* Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 603 (1990) (O'Connor, J., dissenting) (declaring that FCC's policies, which benefited minorities, indirectly contributed to "an escalation of racial hostility and conflict").

30. 113 S. Ct. 2816 (1993).

31. Voting Rights Act of 1965, § 5, Pub. L. No. 89-110, 79 Stat. 445 (codified as amended at 42 U.S.C. § 1973c (1989)).

32. Shaw v. Reno, 113 S. Ct. 2816, 2817 (1993) (stating that Voting Rights Act of 1965 prohibits covered jurisdiction from implementing changes in voting in "standard practice, or procedure absent federal authorization").

voting by whites and the prior drawing of the districts, there had not been any black member of Congress from North Carolina since Reconstruction.[33] The new apportionment resulted in two black members of Congress from North Carolina, still less than the black proportion of the state.[34] Nevertheless, five white voters, who suffered no harm and would seem to lack standing under the Court's decisions regarding the standing of minority plaintiffs, challenged the newly created districts.[35]

Although this reapportionment measure did not explicitly mention race[36]—and therefore the evidence was, as in *Greene*, circumstantial—the Court analyzed it as a racial classification because of the appearance of discrimination. The Court found the odd shape of one of the majority-black districts[37] "bizarre"—"'unexplainable on grounds other than race,'"[38] with an "uncomfortable resemblance to political apartheid."[39] Race-conscious redistricting as a remedy for discrimination is not, the Court emphasized, necessarily unconstitutional, but the white plaintiffs should win if they prove at trial that the purpose was to "segregate voters."[40]

The appearance of discrimination was irrelevant in *Greene*—and in *City of Mobile v. Bolden*,[41] where African Americans, who comprised over a third of the population of Mobile, Alabama, challenged an at-large electoral scheme that, combined with regular bloc voting by

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33. *Id.* at 2834 (White, J., dissenting).

34. *Id.* at 2818.

35. *Id.* at 2818-19. Standing requires an "injury in fact," a causal connection between the injury and the challenged measure or conduct, and a likelihood that the injury can be redressed by the relief requested. *See, e.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (outlining three elements of standing required by Constitution). The injury must be particular to the plaintiffs; generalized social harms and the stigma of racial stereotyping—emphasized in *Shaw*—have not been sufficient to confer standing on minority plaintiffs. *See* Allen v. Wright, 468 U.S. 737, 754, 756 (1984) (stating that "asserted right to have the Government act in accordance with law" and claim that measure "stigmatizes" a race are insufficient); *see also* Davis v. Bandemer, 478 U.S. 109, 129-34 (1986) (holding that threshold showing of discriminatory vote dilution is required to show equal protection violation); City of Los Angeles v. Lyons, 461 U.S. 95, 104 (1983) (stating that respondent's assertion that "he *may* again be subject to an illegal chokehold" is insufficient) (emphasis added). *See generally* Pamela Karlan, *All Over the Map: The Supreme Court's Voting Rights Trilogy*, 1993 SUP. CT. REV. 245 (1994); Frank R. Parker, *The Constitutionality of Racial Redistricting: A Critique of* Shaw v. Reno, 3 D.C. L. REV. 1 (1995) (arguing that decision has "enormous consequences for minority voters seeking to overcome decades of discrimination").

36. Shaw v. Reno, 113 S. Ct. 2816, 2833 (1993) (indicating that measure only specified new boundaries of state's 12 districts).

37. *Id.* at 2818.

38. *Id.* at 2825 (quoting Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 266 (1977)).

39. *Id.* at 2827.

40. *Id.* at 2826.

41. 446 U.S. 55 (1980).

whites, consistently resulted in an all-white city commission and a white mayor.[42] The plurality opinion admonished the African American plaintiffs:[43] "their freedom to vote has not been denied or abridged by anyone;" the Constitution "does not entail the right to have Negro candidates elected."[44]

Shaw dispels the plausibility of any claim to neutrality or consistency in the conservative tendency in race discrimination cases to exercise judicial restraint where blacks are disadvantaged and judicial activism where whites are disadvantaged. The redistricting scheme was not race-specific, its purpose and effect were to remedy a longstanding disempowerment of black voters, and white voters were not harmed as a group or individually. Yet, the Court responded with judicial activism and moral repudiation.

The crux of the *Croson* and *Shaw* decisions is the assumption that openly affirmative or remedial actions—even in response to conceded discrimination—are racist or could mask racism. This assumption comports with the notion of color-blindness that dominates the current debate surrounding race and affirmative action, but it is a complete inversion of the logic behind the *Greene* ruling, which accepted, without question, non-racial rationales for a physical barrier between white and black communities that lacked any sufficient, legitimate justification. Surely the white-initiated physical barrier between black and white communities approved in *Greene* more closely resembles apartheid and segregation (and racism) than the attempt to remedy a longstanding disenfranchisement of blacks repudiated in *Shaw*.

The Court has reversed the social roles that shaped the history of American racism: whites have become the presumed victims and African Americans the presumed racists. To rationalize this reversal of social roles, the Court has employed the history, language, and moral force of the progressive struggle against racism. Thus, while challenges to discrimination against minorities or women are greeted with skepticism, deference to government officials, restraint and an obliviousness to reality, affirmative action is an occasion to "smoke out racism" and remedial redistricting draws a charge of "segregation." In *Shaw*, the conservative Court appropriated even the history and moral force of apartheid.

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42. City of Mobile v. Bolden, 446 U.S. 55, 58 (1980).
43. They were also quite critical of Justice Marshall, who dissented. *Id.* at 75-80.
44. *Id.* at 65.

This analysis of cases across the range of the major areas of discrimination law led to the dual system thesis:

> The result is a dual system of equality rules that depend first and foremost on which group in society has been disadvantaged by a government measure challenged as discriminatory. Challenges to measures that disadvantage blacks, other minorities, or women face an inordinate burden to prove purposeful action, and the tendency to ignore the appearance of discrimination or stereotyping or even strong circumstantial proof; judicial restraint articulated as a highest-level, general principle; and moral skepticism that doubts that white men discriminate anymore and questions the credibility and motives of challengers who claim otherwise. Challenges to measures that disadvantage whites, even if there is no real harm done, face a minimal burden, satisfied by circumstantial evidence, the appearance of discrimination or stereotyping, or a remedial or affirmative purpose, even if it is clearly a good-faith response to conceded discrimination; judicial activism, with no discussion or mention of judicial restraint; and moral repudiation drawing on the history and symbols of the worst forms of racism. This is what we now call equality.[45]

THE 1994-95 TERM DECISIONS

The 1994-1995 Term added a new case in each of the three major areas and, most significantly, clarified and extended *Croson* and *Shaw*.

Missouri v. Jenkins[46] continued the Court's retrenchment of remedies for school desegregation. The conservative majority[47] rejected as impermissible a remedy for longstanding *de jure* discrimination that focused on improvement of urban schools to attract predominantly white students from surrounding suburbs.[48] In Chief Justice Rehnquist's majority opinion, actually integrating schools, which he opposed at the outset, is less important than the time and money expended.[49] The inordinate burden of proof, rules, and assumptions that characterize the Court's approach to challenges to

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45. Kairys, *Race Trilogy*, *supra* note 3, at 12.

46. 115 S. Ct. 2038 (1995).

47. In all three of these cases, the conservative majority consists of Chief Justice Rehnquist and Justices Kennedy, O'Connor, Scalia, and Thomas.

48. Missouri v. Jenkins, 115 S. Ct. 2038, 2040 (1995). Measures included salary increases for all staff within the Kansas City school district and continuation of funding for remedial education programs. *Id.*

49. *See id.* at 2054. When a law clerk to Justice Robert Jackson, Chief Justice Rehnquist wrote a memorandum opposing what became the unanimous opinion in Brown v. Board of Educ., 347 U.S. 483 (1954). David Savage, TURNING RIGHT: THE MAKING OF THE REHNQUIST SUPREME COURT, ch. 2 (1992).

discrimination against African Americans are applied even though there was undisputable purposeful discrimination.[50] This is the unusual circumstance where purposeful discrimination was found, because it was explicitly set out in state law, and local and state authorities attempted to do something about it—improve their schools for all pupils. The Court responded with activist intervention, disdain, and rules and assumptions that reward government stonewalling, evasion, and stalling to avoid integration.

In *Adarand Constructors, Inc. v. Pena*,[51] the Court applied *Croson* to federal affirmative action programs,[52] overruling *Metro Broadcasting, Inc. v. FCC*.[53] The Court held in *Metro Broadcasting* that the federal government had broader constitutional authority than the states for affirmative action.[54]

Justice O'Connor's majority opinion in *Adarand* stressed three single-word principles. First, "skepticism" toward any explicit racial classification, which covers good-faith affirmative action, but the Court makes no mention of bad-faith discrimination against minorities.[55] The Court's skepticism does not extend to non-explicit measures that disadvantage minorities, even if they fit the historic patterns of racism and discrimination that led to the Fourteenth Amendment and to the modern jurisprudence of equality, on which the conservative majority draws when whites are disadvantaged.[56]

Second, "consistency," referring to the regular claim, disputed here, that the rules, assumptions, and approaches in equal protection cases have not depended on the "'race of those burdened.'"[57] The Court's point is that whites should get no less protection than African Americans; my argument is that whites have received considerably more protection.[58] There is a consistency in *Miller*, *Shaw*, and *Bolden*, but it does not reside in any uniform rules or application of rules: in all three, the Court maintains and legitimates an imbalance of political and electoral power that favors whites. More generally, since

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50. *But see Jenkins*, 115 S. Ct. at 2062 (Thomas, J., concurring) (referring to "alleged constitutional violation"). Justice Thomas suggests that any further remedy for school desegregation depends on a showing of continuing purposeful discrimination. *Id.* at 2062-63.

51. 115 S. Ct. 2097 (1995).

52. Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2100 (1995).

53. 497 U.S. 547 (1989).

54. Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 565-66 (1989).

55. *Adarand*, 115 S. Ct. at 2111.

56. Interestingly, Justice O'Connor did not include *Shaw* on her list of leading cases dealing with non-explicit measures. *Id.* at 2105.

57. *Id.* at 2111 (quoting City of Richmond v. J.A. Croson Co., 488 U.S. 469, 494 (1989)).

58. Justice O'Connor starts with the unsubstantiated conventional wisdom that African Americans have been favored, which is belied by the string of cases like *Greene* since 1976. To her, consistency requires treating whites as favorably as blacks, rather than the converse.

the mid-1970s, the Court's equal protection decisions have consistently maintained, enforced, and legitimized exclusive or excessive power and privilege for white people.[59]

Third, "'congruence,'" meaning "'equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment,'" so affirmative action programs established by Congress should get the same strict scrutiny treatment as state affirmative action programs.[60] This last principle brings the conservative majority into conflict with a recent precedent—Justice Brennan's majority opinion in *Metro Broadcasting*.

The attack on *Metro Broadcasting* is revealing. The Court depicts *Metro Broadcasting* as out of step with a seamless web of cases that require the same equal protection standards in Fifth and Fourteenth Amendment cases.[61] If this characterization were true—if the same standards should be applied to congressional and state affirmative action—*Croson* was wrongly decided: it should have followed the less stringent test applied to congressional affirmative action in *Fullilove v. Klutznick*.[62] In *Croson*, Justice O'Connor announced for the conservative majority that strict scrutiny, rather than the lessor standard set out in *Fullilove*, would be applied to state affirmative action.[63] She distinguished *Fullilove*—on which the Richmond city council had literally based its plan,[64] thinking it was safe to do so because of what the Court now calls "congruence"—on the specific ground that Congress has broader authority for affirmative action than the states.[65]

In any event, in *Adarand* the Court still had to deal with *Metro Broadcasting*, a recently decided contrary case right on point. For this, the conservative majority announced a substantially modified version of *stare decisis*: "Remaining true to an 'intrinsically sounder' doctrine

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59. The only significant exception is jury discrimination cases, in which other concerns are overriding. *See supra* note 8.

60. *Id.* (quoting Buckley v. Valeo, 424 U.S. 1, 93 (1976)). Justices Scalia and Thomas, concurring, go further. Justice Scalia would invalidate all explicit racial classifications. *Id.* at 2118 (Scalia, J., concurring). Justice Thomas states emphatically that good intentions do not excuse constitutional violations, *id.* at 2119, although he has decided that they do in a range of other civil rights cases. *See generally* KAIRYS, WITH LIBERTY AND JUSTICE FOR SOME, *supra* note 3 (discussing role of intention and purpose in equal protection analysis).

61. *See Adarand*, 115 S. Ct. at 2111 (referring to Court's decision in *Metro Broadcasting* as "surprising turn").

62. 448 U.S. 448 (1980).

63. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 494 (1989).

64. *Id.* at 491. The language that the Richmond city council used to list minorities subject to the plan was directly from *Fullilove*. *See* Fullilove v. Klutznick, 448 U.S. 448, 478 (1980) (listing some minority groups, such as Indians, Eskimos, and Aleuts, which are not present in Richmond in significant numbers).

65. *Id.* at 490.

established in prior cases better serves the values of *stare decisis* than would following a more recently decided case inconsistent with the decisions that came before it; the latter course would simply compound the error . . . ."[66]

The meaning and import of *stare decisis* are hard to grasp after this passage.[67] If *stare decisis* has any significance at all, it would seem to be that decisions with which the current Justices disagree have some authoritative or binding effect. Stated another way, *stare decisis* would be meaningless if its strictures are limited to following cases with which the current majority agrees.[68] Yet, the Court in *Adarand* explicitly states that it is appropriate to skip a precedent it does not agree with as long as there is some older precedent with which it agrees (which there usually is).[69] An appropriate formal name for the principle as so modified might be *stare decisis quod omitti.*[70]

Miller v. Johnson[71] is the most significant, for present purposes, of the three new decisions because it raises the same issues as *Shaw* without the bizarre-shaped district so emphasized by the Court. Georgia sent its first African American since Reconstruction to Congress in 1972 and got its first majority-black district in 1981 after a district court refused to approve the latest in a series of reapportionment schemes that had no majority-black district.[72] When Georgia received an additional, eleventh seat as a result of the 1990 Census, the legislature created a second majority-black district.[73] The Department of Justice rejected that plan, suggesting that three majority-black districts would be closer to the appropriate proportions of the population and the requirements of the Voting Rights Act.[74] The Georgia General Assembly, declining the option to go to court

66. Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2115 (1995). The Court cited as support only Helvering v. Hallock, 309 U.S. 106 (1940).

67. While *stare decisis* and judicial restraint are commonly thought to be conservative principles, neither conservatives nor liberals have followed either. *See generally* KAIRYS, WITH LIBERTY AND JUSTICE FOR SOME, *supra* note 3; David Kairys, *Legal Reasoning, in* THE POLITICS OF LAW (David Kairys ed., 1st ed. 1982).

68. This sort of statement would surely cause a scandal if uttered by a liberal justice. *See generally* KAIRYS, WITH LIBERTY AND JUSTICE FOR SOME, *supra* note 3.

69. *See Adarand,* 115 S. Ct. at 2115 (stating that "adherence to precedent is not rigidly required in constitutional cases" as long as departure can be justified).

70. I asked Monsignor Michael Doyle, Pastor of the Church of the Sacred Heart in Camden, New Jersey, a friend with knowledge of Latin, to translate into Latin "stand by prior decisions but you can skip the ones you don't agree with." He provided the following approximation: *stare decisis quod omitti potest, si cum eo non consentis.* I propose the short form *stare decisis quod omitti.*

71. 115 S. Ct. 2475 (1995).

72. Miller v. Johnson, 115 S. Ct. 2475, 2483-84 (1995).

73. *Id.*

74. *Id.*

to obtain preclearance for the plan with two majority-black districts, adopted a plan that had three majority-black districts.[75] None of these majority-black districts was bizarrely shaped.[76]

The Court acknowledged what it refused to see or acknowledge in *Shaw*—that the reapportionment measure was not an explicitly racial classification, and therefore presented a circumstantial case.[77] Nonetheless, Justice Kennedy concluded for the Court that this reapportionment was also unconstitutional "racial stereotyping" because it was "'unexplainable on grounds other than race'"[78] and "race was the predominant factor."[79] The Court based this conclusion on two findings: that the Georgia legislature "deliberately" drew the boundaries of the majority-black districts to create black majorities, which, the Court said, was alone a "quite compelling" basis for unconstitutionality;[80] and that under pressure from the Department of Justice, the legislature created three, instead of two, majority-black districts.[81]

Both of these findings are, of course, indisputably true, but they are also explainable in terms so benign and typical as to seem trite. Race was not the sole or predominant criteria if one considers the legislature's entire plan. The legislature protected the incumbents of both parties and made the usual assortment of very deliberate trade-offs and deals involving Democrats and Republicans and the range of groups and interests in the state. After all, eight of the eleven districts were majority-white.[82] Race was the "predominant" factor and the result is "unexplainable" except based on race only if one's focus is limited[83] to the white people in majority-black districts who wound up for the first time represented in Congress by African Americans.[84]

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75. *Id.*

76. *Id.* at 2489. The Court notes what it regards as some unusual characteristics, without comparing the shape of these districts to the range of districts around the country, but concedes that none of these districts is bizarre. *Id.*

77. *Id.* at 2483.

78. *Id.* at 2483, 2487 (quoting Arlington Heights v. Metropolitan Hous. Dev. Auth., 429 U.S. 252, 266 (1977)).

79. *Id.* at 2488.

80. *Id.* at 2489.

81. *Id.* at 2488-90.

82. *Id.* at 2488-89.

83. The limited focus is also apparent in the Court's discussion of standing and the alleged harm to the plaintiffs. *Id.* at 2488-90; *see supra* note 35.

84. The Court placed great emphasis on the fact that three, rather than two, majority African-American districts were created, although three black members on the Georgia delegation do not overrepresent African Americans. *Miller*, 115 S. Ct. at 2488-90.

Further, deliberately drawing district boundaries to achieve a desired racial outcome is not at all unusual—common would describe it best. Politicians participating in redistricting regularly and quite deliberately consider race when drawing lines, and race is commonly a "predominant" concern in drawing the lines of many districts. For example, conservative Republicans have recently favored the creation of a small number of majority-black districts, deliberately drawing the lines so as to maximize the number of black voters in these districts.[85] Their reasoning is based on a political calculation that is far from color-blind: African Americans vote Democratic by an overwhelming proportion, so the Republicans wind up with more seats if black votes are concentrated in a small number of districts rather than providing the Democrats with a cushion of black votes in many districts.

Deliberately drawing redistricting lines predominantly based on race is also a fair description of precisely what Georgia and North Carolina did to create all white-majority districts before the Voting Rights Act. Race was more "predominant" than in *Miller* in the sense that it influenced the lines of all the districts. Yet, when whites rigged apportionment plans and electoral schemes to continue the disempowerment of blacks after they won the right to vote, there was no discussion by the Court of "separating voters," "segregating citizens,"[86] or "political apartheid."[87] Rather, in the leading case of the current conservative era, *City of Mobile v. Bolden*,[88] the Court required a higher, virtually impossible level of proof of purposeful racist action as a pre-condition to any serious scrutiny.[89] In such cases, blacks were disadvantaged, so benign non-racial purposes and government interests needed only be asserted to defeat discrimination claims. When whites are seen by the Court as disadvantaged, the "mere assertion"[90] of necessity, as the *Miller* Court said, is insufficient. Further, when whites are disadvantaged, if race is "predominant,"

85. *See* Mellow v. Mitchell, 607 A.2d 204, 208 (Pa. 1992) (discussing use of districts to "dilute minority voter strength"). *See* Jeffrey Rosen, *Southern Comfort*, NEW REPUBLIC, Jan. 8 & 15, 1996, at 4 (stating that "cynical alliance" between conservative Republicans and black Democrats created large number of majority black districts following 1990 Census, deprived Democrats of black votes across range of districts, and greatly increased Republican proportion of House delegations from southern states).

86. *Miller*, 115 S. Ct. at 2486.

87. Shaw v. Reno, 113 S. Ct. 2816, 2827 (1993).

88. 446 U.S. 55 (1980).

89. City of Mobile v. Bolden, 446 U.S. 55, 62 (1980) (stating that state action that is racially neutral on its face violates Fourteenth or Fifteenth Amendment only if "motivated by discriminatory purpose").

90. *Miller*, 115 S. Ct. at 2488.

which the Court had to admit is a "difficult" line to draw, there is no need for judicial restraint[91] and the Court's usual deference to an administrative agency's interpretation of its statutory mandate is suspended.[92]

The deeply contradictory approaches are particularly evident in the majority's discussion in *Miller* of its racial "stereotyp[ing]" conclusion.[93] Redistricting to provide more (rather than less or the same) representativeness embodies the "offensive and demeaning assumption that voters of a particular race, because of their race, 'think alike.'"[94] The logic seems to be this: it is inappropriate to remedy the longstanding disempowerment of African Americans, which was based on reprehensible stereotyping and demeaning of them (and implemented by the consistent practice of white-bloc voting), because to do so would stereotype and demean them. In other words, African Americans should be denied relief because recognizing their rights and establishing electoral plans that enable them to elect even a token number of black candidates demeans and stereotypes African Americans. In the terms of the dual system thesis, relief should be denied to the "advantaged" group (more precisely as to African Americans, the group that had been unfairly disadvantaged) because it would stereotype and demean them. No such thinking even appears in the cases in which whites are advantaged.

The conservative majority is creating what appears to be a white constitutional right not to be represented by an African American as a result of redistricting under the Voting Rights Act, and thereby essentially invalidating the Act. They have not explained what is constitutionally repugnant about using the same means as politicians regularly use—deliberate jockeying and compromise in which race and a range of other factors play a major role—to achieve some significant degree of racial representativeness, rather than, as was and continues to be the common practice, to suppress black representa-

91. *Id.*

92. *See id.* at 2491; *cf.* Rust v. Sullivan, 500 U.S. 173, 187 (1991) (holding that judges should defer to administrative agency's interpretation of its statutory mandate); Heckler v. Chaney, 470 U.S. 821, 838 (1985) (holding that decision as to whether agency's refusal to institute proceedings is judicially reviewable is best left to Congress, not courts); Chevron v. National Resources Defense Council, 467 U.S. 837, 866 (1984) (stating that federal judges having no constituency have duty to respect policy choices made by agencies who do).

93. *See Miller*, 115 S. Ct. at 2486 (asserting that when state assigns voters on basis of race these race-based assignments "'embody stereotypes that treat individuals as the product of their race'" (quoting Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 604 (1990) (O'Connor, J., dissenting))).

94. *Id.* (quoting Shaw v. Reno, 115 S. Ct. 2816, 2827 (1993)).

tion and power well below the levels of their proportion of the population.

THE DUAL SYSTEM: UNEXPLAINABLE ON GROUNDS OTHER THAN RACE

The Court has decided enough cases in each of the three main categories of equal protection decisions to summarize the major differences in the two sets of rules, assumptions, and approaches. Such a summary is set forth in table form on the next page. These cases also provide the basis for an understanding of how, using what is easily described as a single set of equality rules, the conservative majority has erected a dual system.

The structure of the purposeful discrimination framework and analysis makes purpose the focus and establishes the content and extent of what might be called pre-scrutiny scrutiny as the most significant—arguably the only significant—variable. Resolution of all the important questions and the outcome depend on the determination of whether the Court will engage in strict scrutiny. If it does, the measure is invalid; if it does not, the measure will not be subject to any serious questioning or analysis and will be upheld.[95]

The only exception is *Korematsu v. United States*[96] and its companion cases upholding the imprisonment of all persons of Japanese ancestry on the west coast during World War II.[97] Although the Court in *Korematsu* said it was engaging in strict scrutiny, it did not apply a scrutiny we would now call strict. In fact, the decision is based on an extreme version of the purposeful discrimination rule: even though the measure singled out explicitly by race the persons punished without trial or charges, the Court concluded it was not purposeful discrimination because the purpose was national security. This analysis is an extreme form of what I call the purpose doctrine that now dominates civil rights and civil liberties decisions.[98]

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95. In some recent decisions, Justice O'Connor has suggested a less stringent view of "compelling" that would result in upholding some measures subjected to strict scrutiny. *See* Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2117 (1995); Employment Div. v. Smith, 494 U.S. 872, 894 (1990) (O'Connor, J., concurring in part and dissenting in part).

96. 323 U.S. 214 (1994).

97. Korematsu v. United States, 323 U.S. 214, 215 (1994).

98. *See* KAIRYS, WITH LIBERTY AND JUSTICE FOR SOME, *supra* note 3, at 183-87 (suggesting that purpose should be irrelevant).

Comparison of Conservative Era Discrimination Cases in which Blacks and Whites Were Disadvantaged*

Issue	Blacks Disadvantaged	Whites Disadvantaged
Usual basis for equal protection claim	disadvantage measured by at least a concrete disparity[a,1]	affirmative or remedial action, sometimes without a concrete disparity or disadvantage[b,1]
Criteria for plaintiff's standing to sue	actual, substantial interest at stake required[c]	perceived disadvantage sufficient[d]
Government's purported interest furthered by challenged measure	accept as stated, with minimal or no question[a]	questioned, with presumption of racism[b]
Plaintiff's burden of proof	near impossible[a]	minimal[b]
Appearance of discrimination or stereotyping	irrelevant (and trivialized)[a]	sufficient basis for claim[d]
Claimed benign purpose	sufficient to defeat claim[a]	irrelevant[b]
Proof of a pretext used to hide discrimination	ignored[a]	sufficient basis for claim[d]
Level of scrutiny	minimal or none[a]	searching and strict[b]
Pre-scrutiny scrutiny[2]	minimal or none[a]	searching and strict[b]
Stare decisis: -Precedents deny relief -Precedents grant relief	 binding[a] optional[a]	 optional[c] binding[c]
"Demeaning" effect on "advantaged" group[3]	irrelevant (or presumptively nonexistent)[a]	sufficient basis for claim[d]
Judicial role	restraint[a]	activism[b]
Moral stance	skepticism[a]	repudiation[b]
Rhetorical style	legal bland[a]	lively, indignant, analogies to worst forms of racism[b]

*Authorities (full citations *supra*): a. McCleskey v. Kemp, Memphis v. Greene, Mobile v. Bolden, Arlington Hghts. v. Metro. Hous. Devel. Corp., Washington v. Davis; b. Richmond v. Croson, Shaw v. Reno, Adarand v. Pena, Miller v. Johnson; c. Allen v. Wright; d. Shaw v. Reno, Miller v. Johnson; e. Adarand v. Pena. Numbered notes: 1. "Disparity" refers to a group having less than its proportion of the relevant population or disparate treatment that is punitive or exclusionary. 2. "Pre-scrutiny scrutiny" refers to the content and intensity of scrutiny before the determination of the appropriate level of scrutiny. 3. "Demeaning" refers to the insulting and dependency-producing effect on an advantaged group of receiving an advantage, even where the "advantage" is simply a remedy for a past wrong.

In the vast and undefined pre-scrutiny scrutiny space,[99] judges explore, without any stated limits on content or intensity of analysis or any consistency, the meaning of racism and discrimination, the appropriate goals of equality, the credibility of the actors, the social worth of various measures, the government's actual and conceivable interests and purposes, and so on.

The Court articulated some standards or criteria for determining what proof establishes a circumstantial case of purposeful discrimination in *Arlington Heights v. Metropolitan Housing Development Authority*[100]—which set out the standard relied on in *Shaw* and *Miller*, "unexplainable on grounds other than race."[101] Justice Powell's majority opinion rejected any search for "'dominant' or 'primary'" purposes as elusive.[102] Because of the particular constitutional and social importance of racial discrimination, judicial deference should cease and a plaintiff's burden of proof should be met when a discriminatory purpose has been shown to be "a motivating factor."[103] This is not established by disproportionate impact alone unless there is "a clear pattern, unexplainable on grounds other than race."[104] Otherwise, a court should consider a range of factors that include, "without purporting to be exhaustive:" (1) the historical background, "particularly if it reveals a series of official actions taken for invidious purposes;" (2) the "sequence of events;" (3) "departures" from usual procedures or substantive decisions; and (4) legislative and administrative history.[105]

The attempt to develop or use standards, however, was quickly abandoned. *Greene* cites *Arlington Heights*,[106] but the Court rejected the black plaintiffs' claim without considering the specific indicia of discrimination set out in *Arlington Heights*, although all or almost all of them were present. *Shaw* and *Miller* reach the "unexplainable" conclusion without discussing specific standards or criteria, although there was not any disproportionate impact or invidious pattern and the white plaintiffs did not and could not present the kinds of proof set out in *Arlington Heights*.

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99. When the Court decides to exercise strict scrutiny, this analysis spills over into the scrutiny space.

100. 429 U.S. 252 (1977).

101. Arlington Heights v. Metropolitan Hous. Dev. Auth., 429 U.S. 252, 266 (1977).

102. *Id.* at 265.

103. *Id.* at 266.

104. *Id.* (explaining that discriminatory purpose can only be discovered through inquiry into circumstantial and direct evidence of interest).

105. *Id.* at 267-69.

106. City of Memphis v. Greene, 451 U.S. 100, 119 (1981) (citing Arlington Heights v. Metropolitan Hous. Dev. Auth., 429 U.S. 252 (1977)).

The conservative majority has used the pre-scrutiny scrutiny space to articulate and enforce a vision of equality and American society that is familiar in the politics of our time. Color-blindness is the key word, invoking the notion and vision, which only an overt racist could reject, of a society free of racial discrimination. This is not presented as an abstract goal, however; it is supposed to happen now, in current society.

If we examine that goal and the state of our nation as we approach the twenty-first century, real equality in the current context is an illusion.[107] *De jure* discrimination has been eliminated and progress has been made, but enforcement of antidiscrimination rules to eliminate the effects of slavery, second-class citizenship, and entrenched discrimination proceeded systematically for only a decade or two (before the conservative purposeful discrimination analysis was adopted).[108] The process of integrating African Americans into the economy and social life of the nation started with great promise, but it quickly stalled and may stop completely.

Perhaps the hallmark of our time is the use of the ideal of color-blindness as a non-racist symbol and rationalization for halting and reversing the process of integration of African Americans into the economy and society. In the cruelest of ironies, color-blindness has become a code word not for inclusion or integration—words and ideas not heard much lately—but for the separation and segregation that increasingly characterize American society as we move toward what looks like a developing American apartheid. This is not a reaction or response to equality that has gone too far, but to the first substantial entry in our history of African Americans into the economy and social life of the nation.

And the vision is not non-racial. In base terms, the vision disguised by color-blindness, along with the other favorite catchwords of our time, "free market" and "dependency," is of a society in which people value only themselves and those close to or like them, glorify greed, and receive essential resources and services only to the extent they can individually pay for them—as we dismantle basic public services, abandon the concern and respect for others that makes us human,

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107. *See* ANDREW HACKER, TWO NATIONS 3-16 (1992) (discussing prevalence of awareness of distinction between races and role of awareness in "[d]ividing American [s]ociety").

108. *See* KAIRYS, WITH LIBERTY AND JUSTICE FOR SOME, *supra* note 3, at 129-31 (acknowledging that "institutional forms of racism" have been eradicated, but identifying purposeful discrimination doctrine as "hallmark of the conservative judicial approach" and impediment to serious examination of governmental actions, even when such action is clearly harmful to minorities). This affected interpretations of civil rights laws, like Title VII, as well as the Constitution.

and retreat into enclaves, increasingly self-contained, walled and defined by race and class.[109]

The logic of the times subsumes not only compassion but common sense: Helping people in the growing bottom segment of the economic and social ladder used to make sense, because it reduces suffering and provides some opportunity by at least maintaining a minimal level of subsistence; then we noticed that poverty did not disappear, which must mean that helping people in need does not really help; now we seem convinced that helping actually does harm.

The economy and the American nation have undergone far-reaching economic and social changes on the national and international levels, leaving many who thought of themselves as securely in the middle class without security or work; a substantial and growing portion of our people without a place in the economy, meaningful social connection, or hope; and widespread conflict and confusion about the meaning of work, family, life, and country. But we cannot seem to grasp that these changes—and our response or lack of response to them—are at the core of the deep economic, social, and cultural disruption so evident in everyday life. Instead of facing this crisis, by, for example, debating and deciding how to minimize and share the pain, we have chosen to focus on and blame those who have suffered the most and the understandably incomplete and insufficient attempts by government to help. Community and society, as well as equality, seem to have lost all meaning.

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109. *See The Serene Fortress: A Special Report; Many Seek Security in Private Communities*, N.Y. TIMES, Sept. 3, 1995, at 1 (discussing trend toward closed communities that privatize public spaces and sacrifice diversity and community and noting that largely conservative residents are not bothered by high taxes and overbearing regulations, including gun control and strict environment restrictions). There are already more private security guards than police, and we imprison a higher proportion of our people than any other nation. *See* Ron Galperin, *Gated Communities on Rise in Number and Popularity*, L.A. TIMES, Aug. 25, 1992, at A14; Howard Goodman, *U.S. Jail Rate Still Tops World*, PHILA. INQUIRER, Feb. 11, 1992, at A3; Amy Kaslow, *The High Cost of Crime*, CHRISTIAN SCI. MONITOR, May 9, 1994.