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Affirmatively Furthering Equal Protection: Constitutional Meaning in the Administration of Fair Housing

BLAKE EMERSON†

INTRODUCTION

The meaning of equal protection is intimately linked with administrative practice. The Fourteenth Amendment was passed in part to further the interventions and ensure the constitutionality of the Freedmen’s Bureau, which provided public services and legal protection for emancipated African Americans in the Southern states in the wake of the Civil War.¹ After the passage of the Civil Rights Act of 1964, federal administrative agencies such as the Equal Employment Opportunity Commission, the Federal Communications Commission, and the Department of Health, Education, and Welfare offered expansive interpretations of their statutory mandates that in some cases influenced the federal courts’ interpretation of the Constitution.² The civil rights agencies have been the

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1. See ERIC FONER, RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION, 1863–1877 at 258–59 (1988); Mark A. Graber, *The Second Freedmen’s Bureau Bill’s Constitution*, 94 TEX. L. REV. 1361, 1362, 1367 (2016).

2. See generally 3 BRUCE ACKERMAN, WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION 236, 238, 243–45 (2014) (describing the partnership between federal

paradigmatic site for our history of “administrative constitutionalism,” in which constitutional norms permeate administrative law, and evolve in response to administrative action.³

The U.S. Department of Housing and Urban Development (HUD) has joined this tradition with its recently promulgated rule implementing the “affirmatively . . . further fair housing” (AFFH) provisions of the Fair Housing Act.⁴ The Rule requires recipients of HUD funds to engage in and document a data-driven, participatory, race-conscious planning process to promote residential integration, reduce housing disparities, and increase access to opportunity in racially or ethnically concentrated areas of poverty. This AFFH rule shows, first, how administrative law implements constitutional law. The

administrators and courts between 1964 and 1972 as “a new synthesis between New Deal administrative expertise and the egalitarian ideals of the civil rights revolution”); Sophia Z. Lee, *Race, Sex, and Rulemaking: Administrative Constitutionalism and the Workplace, 1960 to the Present*, 96 VA. L. REV. 799, 801 (2010) (comparing “the history of the of equal employment rulemaking at the FCC and FTC to examine how federal officials in a range of administrative offices, including executive departments, adopted or rejected a broad and affirmative understanding of equal protection”).

3. WILLIAM N. ESKRIDGE, JR. & JOHN FEREJOHN, *A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION* 33 (2010) (“[A]dministrative constitutionalism, including but not limited to Constitutional analysis by executive and legislative officials, is the dominant governmental mechanism for the evolution of America’s fundamental normative commitments What we are calling administrative constitutionalism is the process by which legislative and executive officials, America’s primary governmental norm entrepreneurs, advance new fundamental principles and policies.”); see also Jeremy K. Kessler, *The Administrative Origins of Modern Civil Liberties Law*, 114 COLUM. L. REV. 1083, 1085 (2014) (describing how, during World War I, “Progressive lawyers within the executive branch took the lead in forging a new civil-libertarian consensus and . . . did so to strengthen rather than to circumscribe the administrative state.”); Gillian Metzger, *Administrative Constitutionalism*, 91 TEX. L. REV. 1897, 1900 (2014) (“[A]dministrative constitutionalism . . . encompasses the elaboration of new constitutional understandings by administrative actors.”).

4. 42 U.S.C. § 3608 (2012); *Affirmatively Furthering Fair Housing*, 80 Fed. Reg. 42271 (July 16, 2016) (to be codified at 24 C.F.R. pts. 5, 91, 92, 570, 574, 576, 903).

Rule assiduously adheres to the formal requirements of the U.S. Supreme Court's current equal protection jurisprudence, which permits policymakers to consider racial effects in a general way, but disfavors explicit racial classifications. Though the Rule requires race-conscious policy formulation, it does not require, and indeed cautions against, the use of racial criteria to carry out those policies.

At the same time as the AFFH rule hews to the formal rules of the Court's current equal protection doctrine, however, its logic resists an underlying rationale for that doctrine. The Court currently aims to make official considerations of race less visible and direct, so as to render race less prominent in social consciousness. HUD's rule, by contrast, aims to heighten the salience of race in local housing policy. It requires HUD grantees to consider the racial consequences of their policy explicitly; to identify the obstacles to integrated and equitable housing; to consult the affected public extensively in its policy-making process; and to adopt concrete goals to promote fair housing. This aspect of the Rule puts pressure on current equal protection doctrine's effort to conceal race-conscious policy choices beneath facially race-neutral criteria. By opening up new administrative contexts for social contestation over the meaning of equality, the Rule promises to increase rather than diminish race-conscious public policy and discourse. It thus conforms to the letter of current equal protection doctrine, but tangles with its spirit.

While the AFFH rule is in tension with current equal protection doctrine's effort to conceal race-related policy choices, I argue that it aligns neatly with a different rationale that finds substantial support in earlier precedent, and in the Court's most recent affirmative action decision, *Fisher v. University of Texas at Austin II*.⁵ I call this approach *administrative equal protection*. Administrative equal protection focuses not on the salience of race in state action,

5. See generally 136 S. Ct. 2198 (2016).

but rather on the importance of factual findings, sound reasoning, procedural regularity, and public deliberation in guarding against arbitrary, race-based policy-making. Equal protection principles, in this register, require state actors to document the motivating purposes, factual predicates, and discursive processes that support their race-conscious policy-making. Race-conscious action survives review if the actor pursues a permissible objective, and justifies the means it takes to fulfill that objective through a contemporaneous, reasoned account of the relationship between this objective and the relevant empirical and social circumstances. This approach is immanent within some of the Court's jurisprudence, but it contends with the dominant concern over appearances, visibility, and salience. I conclude that the administrative-law perspective on equal protection analysis is preferable to the Court's preoccupation with concealing legitimate race-conscious purposes, because it promotes transparent, rational, and accountable decision-making. Administrative equal protection fosters a deliberative-democratic decision-making procedure in which the racial motivations and consequences of policy become a matter of political contention, reasoned discourse, and public record.

The purpose of this argument is four-fold. My first, most basic objective, is to describe the sometimes perplexing requirements of the court's equal protection doctrine. Racial equal protection sits in an uncertain place today, giving strict scrutiny to policies that are found to deploy a "racial classification," while allowing certain facially "race neutral," but nonetheless implicitly "race-conscious," programs to avoid rigid constitutional scrutiny.⁶ By distinguishing the permissible use of *racial data* and *racial policy considerations*, on the one hand, from the suspect use of *racial criteria of decision*, on the other, I hope to bring greater

6. See generally Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493 (2003); Reva B. Siegel, *Race Conscious but Race Neutral: The Constitutionality of Disparate Impact in the Roberts Court*, 66 ALA. L. REV. 653, 655 (2015).

clarity to equal protection's current rule-structure. The example of the AFFH rule shows how these constitutional rules may be applied by administrative actors.

My second objective is to contribute to the emerging literature on the statutory requirement of affirmatively furthering fair housing with a detailed analysis of a recent rule that implements this provision.⁷ Housing policy lies at the foundation of the racial hierarchies that permeate society, determining access to employment, education, and wealth.⁸ The AFFH rule represents an ambitious effort to reframe and reshape such policy to remedy the racial opportunity structure. As Professor David Troutt argues in the lead Article of this Issue, the AFFH rule is consistent with a broader norm of "metropolitan equity," which implicates the wide range of public policies that relate to housing fairness, inclusion, and opportunity.⁹ I aim to complement this promising agenda with a consideration of the constitutional significance of affirmatively furthering fair housing. Insofar as the Rule's planning process is limited to evaluation of racial data, and the consideration of race in policy formation, but disclaims directly race-based allocations of housing resources, it implements the constitutional presumption against racial classifications. But the Rule's provisions for race-conscious policy-making are so extensive as to point beyond the limited doctrinal structure that it inhabits. I therefore suggest that the AFFH rule enables us to rethink not only the meaning of fair housing, but also of equal protection itself.

7. *E.g.*, Olatunde Johnson, *The Last Plank: Rethinking Public and Private Power to Advance Fair Housing*, 13 U. PA. J. CONST. L. 1191 (2011); Robert G. Schwemm, *Overcoming Structural Barriers to Integrated Housing: A Back to the Future Reflection on the Fair Housing Act's "Affirmatively Further" Mandate*, 100 KY. L.J. 125, 135–44 (2011).

8. CHARLES M. HARR, *SUBURBS UNDER SIEGEL: RACE, SPACE, AND AUDACIOUS JUDGES* 7 (1996).

9. *See generally* David D. Troutt, *Inclusion Imagined: Fair Housing as Metropolitan Equity*, 65 BUFF. L. REV. 5 (2017).

My analysis of the AFFH rule thus addresses a third, deeper, concern to reform equal protection analysis. The Court's current compromise position, which I explain in detail below, allows for certain race-conscious policies, but strongly encourages state actors to conceal and soften such policies so as to decrease the social significance of race. I argue that this vision of equal protection undermines democratic values and prevents forthright, evidence-based, rational deliberation about racism and racial inequality. Rather than encouraging state actors to hide the racial considerations that motivate their policy, the Court should encourage them to make race-conscious policy discourse legible, well-justified, factually-supported, and open to public comment. These core administrative-law concerns provide a promising basis for ensuring that race-conscious public policy is neither arbitrary nor capricious, and instead furthers legitimate race-related objectives, like diversity and inclusion, in a thoughtful and accountable manner.

Finally, my proposed administrative turn in equal protection analysis addresses certain ambiguities of the literature on administrative constitutionalism. The least controversial form of administrative constitutionalism is the direct invocation or indirect implication of constitutional doctrines, such as the separation of powers, in ordinary administrative law.¹⁰ More controversial are understandings of administrative constitutionalism as a "creative," "selective," and "resistant" process, where federal agencies *challenge* prevailing constitutional understandings, rather than merely implement them.¹¹ My study of the AFFH rule shows that these two understandings can be two aspects of a

10. See, e.g., Gillian Metzger, *Ordinary Administrative Law as Constitutional Common Law*, 110 COLUM. L. REV. 479, 484 (2010) ("[C]onstitutional law and ordinary administrative law are inextricably linked: Statutory and regulatory measures are created to address constitutional requirements; constitutional concerns . . . underlie core administrative law doctrines; and agencies are encouraged to take constitutional concerns seriously.").

11. Lee, *supra* note 2, at 801 (emphasis omitted).

single administrative process: agencies can embrace the formal rules of constitutional jurisprudence, while deploying those rules in such an expansive or novel way that the justification for those rules is called into question. Administrative action then not only reflects but also refracts our constitutional order, shedding new light on our most basic legal commitments. Administrative practice can in such cases serve as a zone of constitutional experimentation.¹²

This Article proceeds in four parts. In Part I, I introduce HUD's AFFH rule, describing its origins and its basic features. In Part II, I demonstrate how the Rule comports with the formalities of current equal protection doctrine, in that it avoids the use of racial classifications, while making extensive provisions for race-conscious data analysis and policy development. In Part III, I show how the Rule nonetheless is in tension with one of the underlying rationales for current equal protection doctrine, because it aims to heighten rather than reduce the salience of race in local government action. I argue, however, that the salience rationale with which the Rule conflicts has not achieved its objective of reducing racial antagonism, and that this rationale subverts democratic principles of deliberative and transparent official action. In Part IV, I suggest that equal protection doctrine should be reformulated to focus on the kind of reasoned decision-making the AFFH rule embodies and facilitates. I show how certain key equal protection cases already contain this logic, and explain how the doctrine might work if applied to the AFFH rule itself.

12. Bertrall L. Ross II, *Embracing Administrative Constitutionalism*, 95 B.U. L. REV. 519, 556 (2015) ("agencies' role in constitutionalism should be embraced because of the opportunities that they create for experimentation with constitutional applications.").

I. THE AFFIRMATIVELY FURTHER FAIR HOUSING RULE

This Part introduces the AFFH Rule. As the word “affirmative” suggests, the Rule on its face may trigger constitutional concerns that have arisen with regard to affirmative action in the employment and education contexts.¹³ I show in the next Part that the Rule abides by the strictures of equal protection doctrine that constrain public-sector affirmative-action programs. I foreground this analysis here by describing the statutory and administrative origins of the Rule, its basic requirements, and its distinctive procedural innovations.¹⁴

A. *Statutory and Administrative Background*

Title VIII of the Civil Rights Act of 1968—the Fair Housing Act—was passed “to provide, within constitutional limitations, for fair housing throughout the United States.”¹⁵ The Act was a legislative response to the “rioting and civil disturbances that had rocked the central cores of many of the nation’s major cities the previous summer.”¹⁶ Congress aimed to prevent the United States from becoming, in the famous words of the Kerner Commission, “two societies, one

13. See, e.g., *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013); *Ricci v. DeStefano*, 557 U.S. 557, 594–96 (2009) (Scalia, J., concurring).

14. The discussion that follows focuses on the racial dimensions of the AFFH rule. This is because I am concerned with the constitutional significance of the Rule with regard to race consciousness and racial discrimination, in particular. It is worth emphasizing, however, that the Rule is aimed at a number of other protected characteristics as well: “Fair housing choice means that individuals and families have the information, opportunity, and options to live where they choose without unlawful discrimination and other barriers related to race, color, religion, sex, familial status, national origin, or disability.” 24 C.F.R. § 5.152 (2016) (emphasis omitted). Each of these protected bases have different constitutional, social, and political significance, which are beyond the scope of this Article.

15. 42 U.S.C. § 3601 (2012).

16. *Laufman v. Oakley Bldg. & Loan Co.*, 408 F. Supp. 489, 496 (S.D. Ohio 1976).

black, one white—separate and unequal.”¹⁷ To address the social crisis, the Act went beyond rules against housing discrimination. In addition, Title VIII required “all executive departments and agencies” and the Secretary of HUD, in particular, to “administer their programs . . . in a manner affirmatively to further the purposes of this title”¹⁸

This AFFH provision has been interpreted by the federal courts to impose additional, judicially enforceable requirements above and beyond the Act’s non-discrimination provisions.¹⁹ In *NAACP v. HUD*, for example, the First Circuit noted that the affirmatively further provision imposes an obligation to “do more than simply not discriminate itself [I]t reflects the desire to have HUD use its grant programs to assist in ending discrimination and segregation, to the point where the supply of genuinely open housing increases.”²⁰

Until its 2015 rule, however, HUD’s enforcement of its

17. NAT’L ADVISORY COMM. ON CIVIL DISORDERS, REPORT OF THE NATIONAL ADVISORY COMMITTEE ON CIVIL DISORDERS 1 (1967). On the influence of the National Advisory Committee on the Fair Housing Act and the Act’s legislative history, see Jean Eberhardt Dubovsky, *The Fair Housing Act: A Legislative History and a Perspective*, 8 WASHBURN L.J. 149, 158 (1969).

18. Civil Rights Act of 1968, Pub. L. 90-284, § 808, 82 Stat. 73, 84–85 (1968) (codified as amended at 42 U.S.C. § 3608 (2012)).

19. *NAACP v. Sec’y of Hous. & Urban Dev.*, 817 F.2d 149, 157 (1st Cir. 1987) (stating that judicial review of Secretary’s actions is available under the Administrative Procedure Act to determine if he had violated HUD’s affirmatively further provisions); *Otero v. New York City Hous. Auth.*, 484 F.2d 1122, 1133–34 (2d Cir. 1973) (recognizing affirmatively further obligation to “fulfill . . . the goal of open, integrated residential housing patterns” in assessing city housing authority’s public housing decisions); *Shannon v. U.S. Dep’t of Hous. & Urban Dev.*, 436 F.2d 809, 820 (3d Cir. 1970) (stating that judicial review of secretary’s actions is available as to his § 808(d) duties); *United States ex rel. Anti-Discrimination Ctr. of Metro N.Y. v. Westchester Cty.*, 668 F. Supp. 2d 548 (S.D.N.Y. 2009) (permitting qui tam action under False Claims Act against Westchester County for falsely certifying to HUD that it was affirmatively furthering fair housing); *Thompson v. U.S. Dep’t of Hous. & Urban Dev.*, 348 F. Supp. 2d 398, 451 (D. Md. 2005) (holding that HUD violated AFFH obligation by failing to consider regional approaches to desegregation).

20. *NAACP*, 817 F.2d. at 155.

AFFH obligation had been tentative at best.²¹ In 1988, HUD issued a rule for its Community Development Block Grant program, which stated that HUD would presume grantees to be in compliance if they certified that they had completed an “analysis to determine the impediments to fair housing choice . . .” and had taken “lawful steps . . . to overcome the effects of conditions that limit fair housing choice”²² In 1996 it followed up with a “Fair Housing Planning Guide” to flesh out HUD’s expectations for AFFH compliance,²³ which some participants have relied upon to complete their analyses of impediments (AI).²⁴ These AI’s have in some instances served an important enforcement role, enabling HUD to identify participants’ non-compliance with Fair Housing Act obligations.²⁵ In 2010, the U.S. Government

21. See Brief of Housing Scholars as Amicus Curiae Supporting Respondent at 40, *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507 (2015) (No. 13-1371).

The FHA targeted not only individual housing discrimination but also charged the government with ‘affirmatively furthering’ fair housing. However, federal, state and local housing agencies failed to adequately enforce this mandate. HUD has only recently proposed a rule that would condition grants on policies to affirmatively further fair housing, but that such a rule is now being considered nearly 47 years after the Fair Housing Act required it, is itself suggestive of how racial segregation has been permitted to rigidify.

Id.; see also Robert G. Schwemm, *Overcoming Structural Barriers to Integrated Housing: A Back-to-the-Future Reflection on the Fair Housing Act’s “Affirmatively Further” Mandate*, 100 KY. L.J. 125, 135–44 (2011).

22. Community Development Block Grants, 24 C.F.R. §§ 570.904(c)(1)–(2) (1989).

23. U.S. DEP’T OF HOUS. & URBAN DEV., FAIR HOUSING PLANNING GUIDE 1 (1996), <http://www.hud.gov/offices/fheo/images/fhpg.pdf>.

24. See, e.g., DEP’T OF CITY PLANNING, N.Y.C., CONSOLIDATED PLAN ANNUAL PERFORMANCE REPORT 2014: AFFIRMATIVELY FURTHER FAIR HOUSING STATEMENT (2015), <https://www1.nyc.gov/assets/planning/download/pdf/about/consolidated-plan/2014-conplan-apr-vol1.pdf>; CITY OF ATLANTA, GA., ANALYSIS OF IMPEDIMENTS TO FAIR HOUSING CHOICE 2013, at 6 (2014), <http://www.atlantaga.gov/modules/showdocument.aspx?documentid=18139>.

25. Letter of Findings of Non-Compliance from U.S. Dep’t of Hous. & Urban Dev., Fort Worth Regional Office, Region VI to the City of Dallas, C/O Charles Estee 8–11 (2013), http://nlihc.org/sites/default/files/HUD_Dallas_Fair_

Accountability Office nonetheless found that many HUD participants were shirking HUD's regulations, and that the regulations themselves were deficient for failing to require measurable results, updating of the analyses, or submission of the analyses to HUD.²⁶

Private litigation sparked renewed scholarly attention to the affirmatively-further provision. In 2009, the U.S. District Court for the Southern District of New York entertained a *qui tam* action against Westchester County by the Anti-Discrimination Center, which alleged that the County had falsely certified to HUD its compliance with the AFFH provision.²⁷ Before a judgment on the merits had been reached, HUD and the County reached a settlement, which provided for repayment of funds and monitoring to ensure future compliance with the provisions in the County's AI submissions to HUD.²⁸ HUD, however, subsequently rejected the County's AI for failing to acknowledge certain barriers to housing in the County, such as exclusionary zoning rules.²⁹ Because of the County's failure to submit an adequate AI, HUD cut off its Community Development Block Grant program and other funding.³⁰ The District Court and Second Circuit subsequently rejected the County's challenge to HUD's decision, finding that the funding cut off was neither arbitrary nor capricious.³¹ The Westchester litigation highlighted the largely untapped regulatory potential of the

Housing_11-22-13.pdf (referencing Dallas' AI's to demonstrate City's obligation to expand affordable housing).

26. GOV'T ACCOUNTABILITY OFFICE, HOUSING AND COMMUNITY GRANTS: HUD NEEDS TO ENHANCE ITS REQUIREMENTS AND OVERSIGHT OF JURISDICTIONS' FAIR HOUSING PLANS (2010), <http://www.gao.gov/products/GAO-10-905>.

27. United States *ex rel.* Anti-Discrimination Ctr. of Metro N.Y., Inc. v. Westchester Cty., 668 F. Supp. 2d 548, 550 (S.D.N.Y. 2009).

28. Cty. of Westchester v. U.S. Dep't of Hous. & Urban Dev., 116 F. Supp. 3d 251, 261 (S.D.N.Y. 2015), *aff'd*, 802 F.3d 413 (2d Cir. 2015).

29. *Id.*

30. *Id.*

31. *Cty. of Westchester*, 802 F.3d at 431–32.

“Affirmatively Further” provisions.³²

B. *The AFFH Rule and Related Guidance*

In 2013, HUD issued a notice of proposed rulemaking to address the deficiencies of its previous implementation of the AFFH provisions.³³ The final rule was promulgated in the summer of 2015.³⁴ The purpose of the Rule is to “provide program participants with an effective planning approach to aid program participants in taking meaningful actions to overcome historic patterns of segregation, promote fair housing choice, and foster inclusive communities that are free from discrimination.”³⁵ The Rule offers HUD’s definition for affirmatively furthering fair housing:

[A]ffirmatively furthering fair housing means taking meaningful actions that, taken together, address significant disparities in housing needs and in access to opportunity, replacing segregated living patterns with truly integrated and balanced living patterns, transforming racially and ethnically concentrated areas of poverty into areas of opportunity, and fostering and maintaining compliance with civil rights and fair housing laws.³⁶

This substantive definition is then operationalized through a planning procedure. HUD program participants, such as public housing authorities, municipalities, and states, must conduct and submit to HUD an “Assessment of Fair Housing” (AFH), which replaces the previously required AI.³⁷ The AFH deploys HUD-data and local knowledge to

32. See Johnson, *supra* note 7, at 1194.

33. Affirmatively Further Fair Housing, 78 Fed. Reg. 43,710 (proposed July 19, 2013) (to be codified at 24 C.F.R. pts. 5, 91, 92, 570, 574, 576, 903).

34. Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42,272 (proposed July 16, 2015) (to be codified at 24 C.F.R. pts. 5, 91, 92, 570, 574, 576, 903).

35. 24 C.F.R. § 5.150 (2016).

36. *Id.* § 5.152.

37. *Id.* § 5.154.

identity fair housing issues, such as patterns of segregation, racially or ethnically concentrated areas of poverty (R/ECAPs), and disproportionate housing needs.³⁸ The Rule also provides that the AFH shall be “informed by meaningful community participation,” instructing program participants to “give the public reasonable opportunities for involvement in the development of the AFH”³⁹ Based on this data and public deliberation, participants must identify “contributing factors” that cause these issues.⁴⁰ Finally participants must “[s]et goals for overcoming the effects of contributing factors”⁴¹ Though the AFFH rule is primarily a planning rule, not a rule directed to the enforcement of the duty to affirmatively further fair housing, the Rule permits the use of existing administrative enforcement mechanisms if participants do not comply with its provisions, such as funding cut-offs, under Title VI of the Civil Rights Act of 1964.⁴²

HUD has also promulgated a *Guidebook*⁴³ to help program participants develop their AFH. The *Guidebook* includes: resources for conducting an analysis of fair housing data, such as HUD maps visualizing residential segregation data;⁴⁴ details on joint AFH submission and community planning processes;⁴⁵ explanations of the categories of “fair housing issues,” such as segregation, racially or ethnically concentrated areas of poverty, disparities in access to

38. *Id.* § 5.154(d)(2).

39. *Id.* § 5.158(a).

40. *Id.* § 5.154(d)(3).

41. *Id.* § 5.154(d)(4).

42. 42 U.S.C. § 2000d-1 (2012); Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42,313 (July 16, 2015) (to be codified at 24 C.F.R. 5, 91, 92).

43. U.S. DEP’T OF HOUS. & URBAN DEV., AFFIRMATIVELY FURTHER FAIR HOUSING RULE GUIDEBOOK (2015), <https://www.hudexchange.info/resource/4866/affh-rule-guidebook/>.

44. *Id.* at 9 (linking to *AFFH Data and Mapping Tool*, U.S. DEP’T OF HOUS. & URBAN DEV., <http://egis.hud.gov/affht/> (last visited Jan. 12, 2016)).

45. U.S. DEP’T OF HOUS. & URBAN DEV., *supra* note 43, at 17–32.

opportunity, disparate housing needs, and enforcement capacity;⁴⁶ and descriptions of possible “contributing factors” to these issues, such as environmental health hazards, inadequate public transportation, zoning restrictions, and lack of private investment.⁴⁷

The *Guidebook* also provides examples of the “goals” that program participants must identify in their AFH.⁴⁸ For example, “to increase access to opportunity for a specified racial or ethnic minority, the number of multifamily properties serving very low-income families in neighborhoods that have schools in the top 25th percentile for the jurisdiction will increase by at least 100 units.”⁴⁹ Such examples give significant specificity to the broad, multi-factored definition of AFFH that the Rule provides. The *Guidebook* explains that the AFH requires participants to identify and pursue one or more such quantitative goals “to overcome each of the fair housing issues for which significant contributing factors have been identified.”⁵⁰ Participants must establish “metrics and milestones” to measure progress toward the goal, and explain which particular agency or institution will be responsible for pursuing it.⁵¹

The AFFH rule thus sets out a mandatory planning procedure, which requires HUD grantees to think through impediments to fair housing and commit to measurable steps to overcome them. The Rule is both expansive in its reach, but flexible in its prescriptive force. It is expansive because it aims to capture a broad range of practices and policies that might escape the notice of the affected public, courts, and HUD itself.⁵² But it is flexible because it does not dictate to

46. *Id.* at 56–106.

47. *Id.* at 107–10, 157.

48. *Id.* at 110–19, 176–94.

49. *Id.* at 115.

50. *Id.* at 110.

51. *Id.* at 111.

52. DEP’T OF HOUS. AND URBAN DEV., AFFIRMATIVELY FURTHERING FAIR

HUD grantees what specific actions they must take to overcome the barriers they identify.⁵³ It is an example of what Professor Richard B. Stewart has called “reconstitutive law,” wherein federal regulation alters the incentive structure and decision-making procedures of legal sub-systems, rather than resorting to command-and-control requirements that bind parties to fixed rules of conduct.⁵⁴

While the AFFH Rule is typical of metrics-based administrative action, its requirement of race-conscious political discourse is more novel. Administrative agencies frequently require their state, local, and private counterparts to undertake and document data-driven analysis of their programs.⁵⁵ In the civil rights context, in particular, data collection has been a crucial instrument for encouraging voluntary compliance and facilitating federal enforcement. The Equal Employment Opportunity Commission’s EEO-1 Form is the paradigmatic example, requiring employers to submit racially and sexually disaggregated employment data to the Commission.⁵⁶ But

HOUSING FINAL RULE: REGULATORY IMPACT ANALYSIS 4, https://www.huduser.gov/portal/sites/default/files/pdf/AFFH_Regulatory_Impact_Analysis_FinalRule.pdf (last visited Nov. 12, 2016) (“While efforts to combat ongoing discrimination are important, they are also at the core of HUD’s existing fair housing efforts. HUD’s final rule is designed to support and facilitate those efforts, but goes further and addresses other significant barriers to fair housing choice that have been largely absent from HUD’s fair housing policy initiatives.”)

53. James J. Kelly, Jr., *Affirmatively Further Neighborhood Choice: Vacant Property Strategies and Fair Housing*, 46 U. MEM. L. REV. 1009, 1017–18 (noting under the AFFH rule, “HUD cannot require a suburban county government to repeal its exclusionary zoning practices as a condition of continued funding. HUD can, however, insist that it acknowledge that such duly adopted laws create barriers to affordable housing, the lack of which disproportionately harms racial minorities and perpetuates racial segregation.”)

54. Richard B. Stewart, *Reconstitutive Law*, 46 MD. L. REV. 86 (1986).

55. See, e.g., Jerry L. Mashaw & Dylan S. Calsyn, *Block Grants, Entitlements, and Federalism: A Conceptual Map of Contested Terrain*, 14 YALE L. & POL’Y REV. 297 (1996) (describing reporting requirements in block grant programs).

56. *EEO-1 Frequently Asked Questions and Answers*, EQUAL EMP. OPPORTUNITY COMM., <https://www.eeoc.gov/employers/eo1survey/faq.cfm> (last accessed Dec. 11 2016). For a discussion on the early history of the EEO-1 form, see ACKERMAN, *supra* note 2, at 181–83.

the HUD rule goes beyond this now entrenched aspect of civil rights administration with its local public participation requirements.⁵⁷ By requiring that housing authorities determine how to meet their AFFH obligations in open consultation with affected communities, the Rule is not merely promoting the audibility of local governance, but encouraging a kind of racialized political discourse. It is the marriage of these two features—racial empiricism and racial deliberation—that makes the Rule distinctive, in an administrative and constitutional sense. The AFFH rule becomes an obligation to make policy decisions on the basis of data about the housing market, public opinion about that data, and the goals that HUD and its counterparts have derived from the ambiguous provisions of the Fair Housing Act’s AFFH obligation.

II. THE AFFH RULE’S CONFORMITY WITH EQUAL PROTECTION DOCTRINE

In this Part, I argue that the AFFH rule conforms to the formal limitations laid out in the Court’s equal protection jurisprudence. I therefore provide a general treatment of racial equal protection principles, drawing on relevant cases on housing, employment, and educational discrimination. To be sure, these domains are not totally isomorphic. The legitimate race-related objectives vary by domain. In education, for example, promotion of diversity is legitimate rationale for race-conscious state action, whereas in employment it arguably is not.⁵⁸ Despite such differences, I

57. Other administrative rules have similar local public participation requirements. Such requirements, however, generally do not concern regulations that are principally concerned with civil rights, but rather with other policy domains. *See, e.g.*, Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662, 64,668 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60) (“EPA is requiring states to demonstrate how they are meaningfully engaging all stakeholders, including workers and low-income communities, communities of color, and indigenous populations living near power plants and otherwise potentially affected by the state’s plan.”).

58. *See Taxman v. Bd. of Educ.*, 91 F.3d 1547, 1558 (3d Cir. 1996) (“[T]here is

show how the Court's equal protection jurisprudence provides a unified set of rules for assessing governmental policies and practices with racial implications.

I should also note at the outset that the opinions of Justice Kennedy play a major role in the interpretation of equal protection I advance. As a swing vote on a court that is ideologically divided on civil rights, as well as many other issues, Kennedy's articulation of equal protection principles have had significant doctrinal weight. With the passing of Justice Scalia, and a vacancy on the Court at the time of this writing, the future development of equal protection principles is uncertain. This offers both a challenge and an opportunity for civil rights scholarship. As the Court moves forward in its interpretation of racial discrimination and racial inequality, the landmark opinions of Justice Kennedy will have to be contended with—either to be more firmly entrenched or displaced by new understandings. It is therefore worth reconstructing the rule structure, and the underlying doctrinal rationales, he has led the Court to embrace to date. We can then better understand the virtues and vices of this jurisprudence and imagine what new forms it might take.

The *AFFH Guidebook* explicitly recognizes the constitutional limitations that must constraint the operation of the Rule:

no congressional recognition of diversity as a Title VII objective requiring accommodation.”).

Note that while goals must seek to overcome significant contributing factors and related fair housing issues, program participants should use caution to not employ goals, strategies or actions that operate to discriminate in violation of applicable laws, including constitutional standards—through, for example, the use of racial classifications not narrowly tailored to further a compelling interest.⁵⁹

The Rule thus absorbs and operationalizes the doctrinal requirements of equal protection law by cautioning against the use of racial classifications. At the same time, it requires forms of race-conscious policy-making that equal protection doctrine permits.

Equal protection jurisprudence polices race-conscious state action by reviewing certain kinds of race-conscious policy with “strict scrutiny” to ensure that the policy is narrowly tailored to further a compelling governmental interest.⁶⁰ Not all kinds of race-conscious state action trigger strict scrutiny, however. The Court subjects public decisions that deploy a racial classification to strict scrutiny, but it permits certain race-conscious purposes—such as remedying past discrimination, or promoting equal opportunity, integration, or diversity—to influence the choice of facially neutral standards.⁶¹ This carves out a broad area of presumptively constitutional state action. Race may be used (1) as *data* to establish the existence of discrimination or other race-related social problems or (2) as a *consideration* to guide policy-making. However, the use of race as a *criterion of decision* is constitutionally suspect. The AFFH rule tracks and abides by these distinctions, by requiring the use of racial data, and requiring that race be considered by policymakers who receive HUD funds, but not requiring, and in fact cautioning against, the use of race as a criterion of decision to allocate benefits and burdens.

59. U.S. DEP'T OF HOUS. & URBAN DEV., *supra* note 43, at 115.

60. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995).

61. Siegel, *supra* note 6, at 675–76.

A. The Permissible Use of Race as Data

The AFFH rule places great emphasis on the use of racial data. By racial data, I mean any information about the race of an individual or a group of individuals. “The [R]ule provides for program participants to supplement data provided by HUD with available local data and knowledge and requires them to undertake the analysis of this information to identify barriers to fair housing.”⁶² For example, HUD participants are required to identify “integration and segregation patterns and trends based on race . . . within the jurisdiction and region.”⁶³ By requiring the collection and analysis of racially-disaggregated data, the Rule aims to ensure that local decision-makers are aware of the racial impacts of their current and proposed policies.

The use of race as data is an essential ingredient of anti-discrimination law. To establish a *prima facie* case of individual disparate treatment, for example, an individual must establish that he or she is a member of a protected class.⁶⁴ If individuals could not plead their possession of a protected characteristic, there could be no finding that they were discriminated against because of that status. Thus, even in the paradigm case of employment discrimination, where an employer intentionally treats an employee or applicant less favorably than others because of her race, the court must recognize the race of the petitioner in order to make sense of her discrimination claim.

Racial data plays a more expansive role in disparate impact suits. Under the disparate impact framework, racial data may establish a *prima facie* case, where they show that a particular business practice significantly and unequally

62. Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42, 272, 42,273 (July 16, 2015) (to be codified at 24 C.F.R. 5, 91, 92, *et al.*).

63. 24 C.F.R. § 5.154(d)(2)(i) (2016).

64. *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

affected individuals according to a protected characteristic.⁶⁵ The racial makeup of the workforce, applicant pools, and labor markets provide crucial information by which to evaluate facially neutral employment practices. While the late Justice Scalia has suggested that disparate impact liability raises serious constitutional questions,⁶⁶ this position has not won broader support on the Court.

The Court's decision in *Texas Department of Community Affairs v. Inclusive Communities*⁶⁷ confirmed the applicability of disparate impact under the Fair Housing Act. Justice Kennedy cautioned, in his opinion for the Court, that "serious constitutional questions . . . *might* arise under the FHA . . . *if* such liability were imposed based solely on a showing of statistical disparity."⁶⁸ The implication is that disparate impact analysis, in its current form, does not raise serious constitutional questions.⁶⁹ The disparate impact

65. See *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). According to the EEOC, "A selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate" generally constitutes a disparate or "adverse" impact. 29 C.F.R. § 1607.4(D) (2016).

66. *Ricci v. DeStefano*, 557 U.S. 557, 594–97 (2009) (Scalia, J., concurring).

67. 135 S. Ct. 2507 (2015).

68. *Id.* at 2522 (emphasis added).

69. Justice Kennedy nonetheless struck a cautious note when it came to judicial remedies upon a finding of disparate impact liability:

[W]hen courts do find liability under a disparate-impact theory, their remedial orders must be consistent with the Constitution. Remedial orders in disparate-impact cases should concentrate on the elimination of the offending practice . . . [and] courts should strive to design . . . race-neutral means. Remedial orders that impose racial targets or quotas might raise more difficult constitutional questions." *Id.* at 2524.

Beyond his concern about quotas, Justice Kennedy aims to discourage "automatic or pervasive injection of race into public and private transactions." *Id.* at 2525. Justice Kennedy is here signaling his worry that the use of disparate-impact liability may "impose onerous costs on actors who encourage revitalizing dilapidated housing in our Nation's cities merely because some other priority might seem preferable." *Id.* at 2523. He is referring to the small number of cases concerning the disparate impact of efforts to improve housing (such as the allocation of housing tax credits at

framework does not impose liability merely because of statistical disparity, but also requires isolation of the cause of the disparity, as well as an opportunity for the respondent to provide a compelling business justification for the practice that causes it.⁷⁰ These safeguards ensure that racial statistics alone do not determine liability. In disparate impact suits, statistics about the race of individuals are not truly racial “classifications” because they do not determine the outcome. They are just data—important background information that may (or may not) lead to inferences about the discriminatory effects of social practices.

Such data may also play an important role outside of the litigation context in the policy discourse of government bodies. In *Parents Involved in Community Schools v. Seattle School District No. 1*, Justice Kennedy stated in his concurrence that school districts may “track[] enrollments, performance, and other statistics by race”⁷¹ as part of broader efforts to promote equal educational opportunity and diversity. Lower courts have repeatedly rejected constitutional challenges to the collection of racial data.⁷² These forms of state action all share a common feature: they do not “allocate benefits and burdens” to persons on the basis

issue in *Inclusive Communities*) rather than the disparate impact of barriers to housing, such as zoning rules. *Id.* at 2522 (citing Stacy E. Seicshnaydre, *Is Disparate Impact Having Any Impact? An Appellate Analysis of Forty Years of Disparate Impact Claims Under the Fair Housing Act*, 63 AM. U. L. REV. 357 (2013)). Perhaps motivated by federalism considerations, as well as to avoid overly intrusive racial considerations, Justice Kennedy cautions courts and other actors not to displace other valid fair housing priorities, or other local policies, with a sole focus on reducing racial segregation. *See id.* at 2524–25. I discuss how the AFFH rule addresses these concerns in Section V.B.

70. Civil Rights Act of 1991, 42 U.S.C. § 2000e-2(k) (2012).

71. 551 U.S. 701, 789 (2007).

72. Andrew M. Carlon, *Racial Adjudication*, 2007 BYU L. REV. 1151, 1158 (2007) (“racial classifications without immediate effect have survived challenge in the lower courts”). *See, e.g.*, *Caulfield v. Bd. of Educ.*, 583 F.2d 605, 612 (2d Cir. 1978); *United States v. New Hampshire*, 539 F.2d 277, 280–82 (1st Cir. 1976); *Morales v. Daley*, 116 F. Supp. 2d 801, 814 (S.D. Tex. 2000).

of the racial characteristics they identify.⁷³

HUD's extensive data collection and analysis provisions therefore fall well within constitutional limitations on race-conscious policy-making. AFFH rule requires HUD participants to "us[e] HUD-provided data, local data, local knowledge" to identify "integration and segregation patterns," "racially or ethnically concentrated areas of poverty," "significant disparities in access to opportunity," and "housing needs."⁷⁴ These data initiatives provide an empirical baseline from which participants can identify factors that contribute to these problems, and set goals to address them. To make HUD-provided data useful and accessible, HUD provides a "mapping tool," which enables users to evaluate racially-disaggregated housing patterns within their jurisdiction.⁷⁵ The AFFH rule further requires HUD participants to use an "Assessment Tool," which provides detailed outlines of what participants must include in their AFH submissions to HUD.⁷⁶ The Assessment Tool for local governments, for instance, requires participants to "[d]escribe and compare segregation levels in the jurisdiction and region"; "[e]xplain how these segregation levels have changed over time (since 1990)"; and "[d]iscuss whether there are any trends demographic trends, policies, or practices that could lead to higher segregation in the jurisdiction in the future."⁷⁷ Together, these resources require and enable states and local governments to evaluate the racial-characteristics of their housing market. This

73. *Parents Involved*, 551 U.S. at 780 (Kennedy, J., concurring in part and concurring in judgment).

74. 24 C.F.R. § 5.154(d)(2) (2016).

75. Dep't of Hous. & Urban Dev., *AFFH Data and Mapping Tool*, HUD EXCHANGE (July 2016), <https://www.hudexchange.info/resource/4867/affh-data-and-mapping-tool/>.

76. 24 C.F.R. § 5.154(d).

77. DEP'T OF HOUS. & URBAN DEV., ASSESSMENT OF FAIR HOUSING TOOL 4 (2015), <https://www.huduser.gov/portal/sites/default/files/pdf/Assessment-of-Fair-Housing-Tool.pdf>.

evidentiary basis lays the foundation for race-oriented policy development.

B. *The Permissible Use of Race as a Policy Consideration*

The AFFH rule requires that race be treated as a policy consideration by HUD participants. By policy consideration, I mean a factor taken into account in assessing and developing policy. The Rule requires that grantees' AFH "identify the contributing factors for segregation, racially or ethnically concentrated areas of poverty, disparities in access to opportunity, and disproportionate housing needs"78 The AFH must then "[s]et goals for overcoming the effects of contributing factors"79 The AFFH rule thus requires HUD participants not only to analyze race-related data, but to commit to specific, quantitative goals that overcome identified barriers to fair housing.

Equal protection jurisprudence permits such uses of race as a policy consideration. In his concurrence in *Parents Involved*, Justice Kennedy stated that school districts may "consider the racial makeup of schools and . . . adopt general policies to encourage a diverse student body," including "strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; and recruiting students and faculty in a targeted fashion."⁸⁰ Decision-makers may "consider the impact a given approach may have on students of different races" without fear of violating constitutional limitations.⁸¹

Such racial policy considerations are also permissible in the employment context. In *Ricci v. DeStefano*,⁸² the Court

78. 24 C.F.R. § 5.154(d)(3).

79. *Id.* § 5.154(d)(4)(iii).

80. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 788–89 (2007) (Kennedy, J., concurring).

81. *Id.* at 789.

82. 557 U.S. 557 (2009).

held that the City of New Haven had violated Title VII when it threw out test results because of the racial makeup of the resulting promotion pool.⁸³ While the opinion did not reach the question of disparate impact's constitutionality, the reasoning was permeated by constitutional reasoning, borrowing standards from equal protection jurisprudence to assess the City's argument that it threw out the test to avoid disparate impact liability.⁸⁴ Justice Kennedy emphasized, in his plurality opinion, that the holding did not put into "question an employer's affirmative efforts to ensure that all groups have a fair opportunity to apply for promotions and to participate in the process by which promotions will be made."⁸⁵ The implication is that race-conscious deliberations by public officials do not amount to constitutionally suspect racial classifications. Public officials may consider racial demographics and the racial effects of proposed policies, so long as they do so in pursuit of some legitimate governmental purpose in the relevant context, such as equal opportunity, diversity, or integration.

Inclusive Communities extends this framework to the fair housing context.⁸⁶ Justice Kennedy, writing now for the majority, cited *Parents Involved* and *Ricci* before stating that the Court "does not impugn housing authorities' race-neutral efforts to encourage revitalization of communities that have long suffered the harsh consequences of segregated housing patterns."⁸⁷ When setting their larger goals, local housing authorities "may choose to foster diversity and combat racial isolation with race-neutral tools, and mere awareness of race

83. *Id.* at 592–93.

84. *Id.* at 582 (citing *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500 (1989)). The "strong basis in evidence test" from *Croson* was used in *Ricci* to determine whether the City was justified in believing that it would be subject to disparate impact liability under Title VII if it had acted on the results of the test. *Id.*

85. *Id.* at 585.

86. *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project*, 135 S. Ct. 2507 (2015).

87. *Id.* at 2525.

in attempting to solve the problems facing inner cities does not doom that endeavor at the outset.”⁸⁸

Housing authorities are therefore constitutionally permitted, and may be statutorily required, to be “aware” of the racial dimension of their housing policy, as they attempt to revitalize “segregated” communities, foster “diversity,” and reduce “racial isolation.” This condones not merely an official awareness of race, then, but programs that aim to alter the significance of race, and to “reduce the salience of race in our social and economic system.”⁸⁹

HUD’s AFFH rule requires precisely such race-conscious policy-making to redress segregated housing, unequal housing opportunities, and related geographic inequities. What makes the Rule distinctive, as an affirmative action requirement, is that it does not merely mandate race-conscious policy, but requires a public participation process within the planning procedure that is itself race-conscious. The Rule defines community participation as “a solicitation of views and recommendations from members of the community and other interested parties, a consideration of the views and recommendations received, and a process for incorporating such views and recommendations into decisions and outcomes.”⁹⁰ In particular, HUD grantees must publicize their data analyses and proposed AFH “in a manner that affords residents and others the opportunity to examine its content and submit comments” and “[p]rovide for at least one public hearing during the development of the AFH and provide notice of this public hearing.”⁹¹ These public participation requirements must go above and beyond

88. *Id.* at 2512.

89. *Id.* at 2524.

90. 24 CFR § 5.152 (2016).

91. DEP’T OF HOUS. & URBAN DEV., AFFH FACT SHEET: COMMUNITY PARTICIPATION AND AFFH, GUIDANCE FOR CONSOLIDATED PROGRAM PARTICIPANTS (2015), <https://www.hudexchange.info/resources/documents/AFFH-Fact-Sheet-Community-Participation-and-AFFH-Guidance-for-Consolidated-Plan-Program-Participants.pdf>.

a mere opportunity for comment. HUD participants, “must conduct outreach to those populations who have historically experienced exclusion, including racial and ethnic minorities, limited English proficient (LEP) persons, and persons with disabilities.”⁹² By requiring that HUD participants reach out to groups that have been historically excluded, the Rule aims to change the political status quo away from the current constellation of interest and power within the relevant jurisdiction. This requirement can serve to “stack the deck” to the benefit of racial minorities and other groups who would otherwise not have an equal opportunity to influence the decision making process, owing to inequalities of access, resources, or the transaction costs of participation.⁹³

The Rule therefore requires state actors not only to consider race in their planning procedures, but to consider race in the way they involve the public within the planning procedures. The mandated consideration of race is layered and multifaceted, requiring consideration of racial housing problems and solutions, and empowering race-related social interests to have a voice in that policy process. In this sense, the Rule goes beyond the “mere awareness of race” Justice Kennedy would permit into a pervasive and systematic awareness of race.⁹⁴ It is hard to imagine how a justiciable constitutional line could be drawn simply between such “mere” and “major” awareness—between a permissible kind of vague, casual, and undocumented sense that racial issues are implicated in a policy decision, and an impermissibly extensive effort to make these felt racial considerations legible, subject to public scrutiny, and efficacious. But the breadth of the AFFH rule’s race-consciousness requirements nonetheless gives pause that the normative foundations of

92. *Id.*

93. See Mathew D. McCubbins et al., *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243, 255 (1987).

94. *Inclusive Cmty.*, 135 S. Ct. at 2525.

current equal protection doctrine are being called into question, even as the formal rules of that doctrine shape the content and limits of the administrative intervention.

C. *The Suspect Use of Race as a Criterion of Decision*

The AFFH rule does not condone the use of race as a criterion of decision. By a criterion of decision, I mean a factor which may determine the allocation of benefits or burdens, rights or obligations. As noted above, the AFFH *Guidebook* advises that an “inappropriate goal would be the implementation of policies that limit occupancy of new housing to certain racial or ethnic groups.”⁹⁵ At the conclusion of this Part, I underscore the AFFH rule’s scrupulous avoidance of such racial decision-making criteria.

Policy considerations lead to the formulation of decision criteria, but the two are distinct. At the stage of policy evaluation and formulation, factors may be taken into account to craft an appropriate decision-rule, which play no role in how the ultimate decision is to be made. For example, a public university might aim to increase the racial diversity of its student body through a program that admits the top ten percent of every high school class in the state.⁹⁶ The policy is race-conscious but the decision-rule is race-neutral. This distinguishes a suspect racial classification from valid race-related categorizations. A suspect racial classification does not refer to an inquiry into the racial characteristics of individuals or groups at the stage of information gathering, nor to the pursuit of certain valid race-conscious purposes at the stage of policy formulation. It rather refers to racial markers which actually determine how goods and entitlements are distributed.⁹⁷

When race is used as a criterion of decision, either by

95. U.S. DEP’T OF HOUS. & URBAN DEV., *supra* note 43, at 112.

96. See Danielle Holley & Delia Spencer, *The Texas Ten Percent Plan*, 34 HARV. C.R.-C.L. L. REV. 245, 253 (1999).

97. Carlon, *supra* note 72, at 1159–60.

courts or by other government actors, it is constitutionally suspect, though not necessarily constitutionally proscribed. In the employment context, judicial remedies which compel the promotion of a certain number of individuals of a certain race must be narrowly tailored to advance a compelling governmental interest, such as remedying gross and persistent intentional discrimination.⁹⁸ The same principle allies in the housing context. In *Walker v. City of Mesquite*,⁹⁹ for example, the Fifth Circuit vacated a remedial order of the District Court which required the Dallas Housing Authority to construct 3200 new units of public housing “in predominantly white areas of metropolitan Dallas in which the poverty rate does not exceed 13%.”¹⁰⁰ The order was the latest chapter in litigation going back to 1985, when thousands of black households sued the Dallas Housing Authority for excluding them from its housing voucher program in violation of the Equal Protection Clause of the Fourteenth Amendment.¹⁰¹ In 1999, the Court vacated the District Court’s latest injunction under a strict scrutiny standard, emphasizing that race neutral tools like expansion of Section 8 vouchers “have not been given a fair try” and “other criteria than a racial standard will ensure the desegregated construction or acquisition of any new public housing.”¹⁰² In this case, the order to construct fair housing triggered strict scrutiny because it required that public housing be allocated in part to “predominantly white areas.”¹⁰³ It is important to emphasize, however, that strict

98. *United States v. Paradise*, 480 U.S. 149, 166–67 (1987).

99. 169 F.3d 973 (5th Cir. 1999).

100. *Id.* at 977.

101. *Walker v. U.S. Dep’t of Hous. & Urban Dev.*, 734 F. Supp. 1231, 1233–34 (N.D. Tex. 1989). For a full discussion of the case and critique of the Circuit Court’s equal protection analysis, see Michelle Wilde Anderson, *Colorblind Segregation: Equal Protection as a Bar to Neighborhood Integration*, 92 CAL. L. REV. 841 (2004).

102. *Walker*, 169 F.3d. at 983.

103. *Id.* at 977.

scrutiny does not categorically preclude the use of racial classifications in remedial orders; it rather subjects them to an intensive review to ensure that they are necessary to cure particularly egregious or protracted unconstitutional or unlawful conduct.

Race-based decisions by public actors other than courts are also treated to strict scrutiny. The use of racial criteria in public contracting is constitutionally suspect.¹⁰⁴ Likewise, in *Grutter v. Bollinger*¹⁰⁵ the Court applied strict scrutiny to a law school admissions policy which allowed the consideration of race as a “soft variable” in order to promote a diverse student body.¹⁰⁶ Since the law school explicitly condoned consideration of race in making admissions determinations, race was a factor that could be considered in conferring a benefit, and thus the Court evaluated it as a suspect racial classification.

In *Fisher v. University of Texas at Austin*, by contrast, the constitutionality of a decision rule that admitted the top ten percent of every graduating high school class in the state to the university was not challenged by any member of the court.¹⁰⁷ In that case, racial diversity had been a policy consideration which had motivated the formulation of the ten percent rule,¹⁰⁸ but the Rule itself did not in any way use the racial characteristics of applicants to determine the allocation of benefits. Another admissions policy that treated race as a “plus factor” within a broader set of metrics did,

104. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 204 (1995) (applying strict scrutiny to federal rule classifying members of racial minorities as presumptively “socially and economically disadvantaged” for the purpose of receiving statutorily mandated federal contracting preference); *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 476–86 (1989) (applying strict scrutiny for city ordinance requiring prime contractors to award at least 30 percent of the value of each contract to businesses with at least 51 percent minority ownership).

105. 539 U.S. 306 (2003).

106. *Id.* at 315 (citation omitted).

107. 133 S. Ct. 2411 (2013); Siegel, *supra* note 6, at 674.

108. Siegel, *supra* note 6, at 673.

however, trigger strict scrutiny.¹⁰⁹ What distinguishes these two aspects of Texas' policy is that the Ten Percent Plan did not use racial characteristics as admission criteria, whereas the "plus factor" explicitly incorporated race into a matrix that determined students' admissibility. In *Fisher v. University of Texas at Austin II*, the Court upheld the constitutionality of Texas' use of race as a plus factor in a way that formally adheres to the presumption against the use of racial classifications, but arguably relaxes the strictness of the scrutiny applied.¹¹⁰

This distinction underlies Justice Kennedy's recent equal protection jurisprudence outside of the educational domain as well. In *Parents Involved*, Justice Kennedy concurred in the judgment that the use of race as a "tiebreaker" in public school assignment decisions triggered strict scrutiny, and was not narrowly tailored to achieve a compelling governmental interest.¹¹¹ Justice Kennedy noted, however, that school districts are "free to devise race-conscious measures . . . in a general way and without treating each student in different fashion based solely on a systematic, individual typing by race."¹¹² While Justice Kennedy presents the distinction as one between considering race in a "general way" versus "individual typing by race" this distinction cannot do all the work on its own.¹¹³ As described above, Justice Kennedy permits school districts to type individuals by race by collecting racially disaggregated data about school enrollments and academic performance.¹¹⁴ It is not the fact that individuals are typed that triggers strict scrutiny, but rather that this typing may be part of the decision-rule that determines their school assignment.

109. See *Fisher v. Univ. of Tex. at Austin II*, 136 S. Ct. 2198 (2016).

110. *Id.* I discuss *Fisher II* at greater length below, at *infra* Part V.

111. 551 U.S. 701 *passim* (2007).

112. *Id.* at 788–89.

113. *Id.*

114. *Id.* at 789.

Inclusive Communities continues to adhere to this distinction. Justice Kennedy went to great lengths to show that disparate impact liability is not structured in such a way as to encourage race-based decision-making, and to urge courts to structure remedies that do not make race a criterion of decision.¹¹⁵ He referred to the “serious constitutional questions that might arise” if potential defendants adopt “racial quotas,” or if race is “used and considered in a pervasive and explicit manner to justify governmental or private actions.”¹¹⁶ Racial quotas are the clearest instance of the use of race as a criterion of decision, as they require benefits and burdens to be assigned to a certain number of individuals because of a racial characteristic. Less drastic racial decision rules, such as the soft racial variable in *Grutter*, or the general concern about “not enough minorities” in *Ricci*,¹¹⁷ nonetheless may determine how benefits and burdens are distributed across individuals. Such explicit invocations of race to adjudicate the claims and competencies of individuals raise constitutional concerns. Justice Kennedy urges that race be reserved to the stage of data analysis and policy consideration, where it may inform the decision rules public and private officials craft, without playing any role in the decision calculus itself.

The AFFH rule has fully imbibed this constitutional presumption against the use of racial classification in decision rules. *None* of the goals that HUD provides as examples in its *Guidebook* use race as a criterion of decision.¹¹⁸ That is to say, none of the suggested goals would

115. See *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project*, 135 S. Ct. 2507 (2012).

116. *Id.* at 2522–24 (2012).

117. *Ricci v. DeStefano*, 557 U.S. 557, 579 (2009) (internal quotation omitted).

118. U.S. DEP’T OF HOUS. & URBAN DEV., *supra* note 43. Other goals suggested by the AFFH rule include changes to zoning ordinances as well as the dedication of public funds to preserving and improving affordable housing. Hypothetical examples include: (1)

[T]o increase integration and overcome the disproportionate housing

have local housing authorities allocate housing resources, burdens, or benefits according to the racial identity of individuals or populations. While race plays a major role in designing policies that will have race-related impacts, the goals themselves do not use racial criteria. Instead, they generally focus on creating housing opportunities that will

needs of a specified protected class, at least 10 percent of newly developed housing units in the Pacific and Huron neighborhoods will be affordable to families with incomes at or below 50 percent of AMI [Area Median Income], and at least another 10 percent of newly developed housing units in these neighborhoods will be affordable to families with incomes between 50 and 80 percent of AMI.

Id. at 115–16. (2) To address disproportionate housing needs and promote access to opportunity for members of protected classes in gentrifying neighborhoods, “preserve 100 units of current assisted housing . . . while investing in neighborhood schools to improve quality.” *Id.* at 178. (3) To address neighborhood segregation and disparities in access to opportunity between a majority-minority “City” and a majority-white “County,” “[a]mend County zoning ordinances and other regulatory barriers to the construction of new affordable housing in the County,” such as permit requirements and lot size requirements; and “[p]reserve existing publicly supported housing and other affordable housing in the City.” *Id.* at 179–81. (4) To address segregation and disparities in access to education between the “suburbs” and “downtown area,” “[a]mend zoning ordinances to eliminate restrictions to multifamily housing development in integrated areas and areas with educational, transportation, and low poverty exposure opportunities.” *Id.* at 185. (5) To address effects of a single-family half-acre zoning ordinance, and the resulting concentration of poverty in a majority-minority area, “[e]nact an inclusive zoning ordinance with a 10% set aside of ‘moderately priced housing units’ for sale to households with incomes at or below 80 percent of the standard metropolitan statistical area.” *Id.* at 186–87. (6) To address “widespread discriminatory steering of minority home seekers by real estate brokers,” “[e]nact fair housing ordinance modeled after the Fair Housing Act, which establishes a City Commission on Human Rights to investigate complaints and conduct outreach.” *Id.* at 187–88. (7) To address gentrification of the “Southwestern Quadrant” of a City, which has placed affordable housing in the quadrant at risk of conversion to high market rates, “preserv[e] . . . existing Long-Term Affordable Housing Stock in Southwest Quadrant” by identifying and preserving by X percent of affordable housing unit. *Id.* at 191–92. (8) To address poor housing for predominately Hispanic Housing Choice Voucher (HCV) recipients,

provide light rehabilitation for a pool of voucher eligible 1–4 unit rental units in areas of opportunity. As a condition of receiving the funding for light rehabilitation, the owners of such units will be required to accept HCVs for a period of ten years. The City Housing Authority will also provide a higher payment standard of 110% for large (3 or more bedroom) units.

Id. at 193–94.

have a disproportionately positive effect on minorities, owing to other demographic characteristics of the group. The goals use various *proxies* for race, such as income level. Most of the suggested goals focus on the creation and maintenance of affordable housing and related public services, both within areas of racially and ethnically concentrated poverty and outside of them. In this way, the AFFH rule urges participants to think about race when they analyze the problems in their housing market and craft solutions for those problems. But it counsels them not to set goals that explicitly mention race or make race determinative in the allocation of resources.

III. DIALECTICS OF ADMINISTRATIVE CONSTITUTIONALISM:
ADMINISTRATIVE CONCRETIZATION OF CONSTITUTIONAL
DOCTRINE/ADMINISTRATIVE CHALLENGE TO DOCTRINAL
JUSTIFICATION

In this Part, I argue that the AFFH rule challenges the rationale for the Court's current equal protection doctrine, even as it adheres to the doctrine's formal requirements. The AFFH rule is a noteworthy study in how constitutional doctrine is operationalized and implemented in administrative law. To borrow a phrase from German public law, it shows how administrative law is "concretized constitutional law."¹¹⁹ The Rule makes use of the broad range of constitutionally permissible race-conscious policy-making that equal protection jurisprudence currently permits. But it makes sure to stop short of requiring, proposing, or in any way encouraging the explicit use of a racial classification to allocate benefits and burdens. The Rule goes to show that there is a wide variety of racially progressive policy that the federal government and state and local policymakers can conduct while remaining within the strictures of current doctrine.

119. Fritz Werner, *Verwaltungsrecht als konkretisiertes Verfassungsrecht*, 74 DEUTSCHES VERWALTUNGSBLATT 527, 527-43 (1959) (Ger.) (author's translation).

At the same time, however, the Rule pushes up against one of the broader rationales the Court gives for the distinctions it draws between permissible and suspect uses of race. As Justice Kennedy observed in *Inclusive Communities*, “automatic or pervasive injection of race into public and private transactions covered by the FHA has special dangers”¹²⁰ The Rule does indeed, as described above, automatically and pervasively inject race into HUD participants’ planning processes, and into the Department’s review of submissions to HUD. But the “special dangers” of the “injection of race” Justice Kennedy alludes to here remain undefined. In this Part, I aim to better specify the underlying constitutional concern with such thorough-going consideration of race. I argue that the underlying concern is to avoid forms of state action that heighten the salience of race in public consciousness. The Rule conflicts with this rationale by requiring an explicit reorientation of local housing policy around questions of the racial opportunity structure. In this sense, it runs counter to the emphasis of current equal protection law on making race seem less conspicuous and less visible in public policy. This aspect of the Rule might raise constitutional concerns. But because the Rule so cleanly hews to the distinctions drawn in recent jurisprudence, the Court could not easily find that the Rule ran afoul of equal protection without abandoning the formal distinctions it has drawn. The Rule thus highlights the tension between the constitutional rationale and its doctrinal form—between what Professor Reva Siegel calls equal protection’s “rule structure” and its “justificatory rhetoric.”¹²¹

120. 135 S. Ct. at 2525.

121. Reva B. Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enhancing State Action*, 49 STAN. L. REV. 1111, 1119 (1997).

A. *The Court's Logic of Concealment*

Recent equal protection cases strike an ironic pose. They require state actors to say one thing and to mean another—to conceal legitimate race-conscious purposes beneath facially neutral decisional criteria. For Justice Kennedy, the underlying constitutional issue with race-conscious state action is the risk that it might make race more, rather than less, important in shaping policy outcomes and social interaction more broadly. He is concerned with avoiding overt race-based actions that would “set our Nation back in its quest to reduce the salience of race in our social and economic system.”¹²² The emphasis on “salience” is crucial. It focuses judicial inquiry on the affective responses to race-conscious policy-making, aiming to avoid actions that exacerbate racial antagonism. In *Ricci*, for example, Justice Kennedy was particularly concerned with the way white fire fighters perceived the City’s invalidation of their test results, and about how this perception would impact race relations at large: “Employment tests can be an important part of a neutral selection system that safeguards against the very racial animosities Title VII was intended to prevent. Here, however, the firefighters saw their efforts invalidated by the City in sole reliance upon race-based statistics.”¹²³ A “neutral system” would not necessarily take no account of race whatever.¹²⁴ Rather, it would consider racial impacts *ex ante* in the design of the test, and attempt to adjust the parameters so as to avoid severe differences in performance across racial groups. Such concealed efforts are to be encouraged because they do not give affected parties the impression that their individual cases are disposed of according to their race, even if race was central to designing the evaluation.

122. *Inclusive Communities*, 135 S. Ct. at 2524.

123. *Ricci v. DeStefano*, 557 U.S. 557, 584 (2009).

124. *Id.*

The logic of concealment in equal protection jurisprudence is a compromise position between formal colorblindness, on the one hand, and full-throated race-consciousness, on the other. Since Justice Harlan declared in his dissent in *Plessy v. Ferguson* that “[o]ur constitution is color-blind,”¹²⁵ a major strand of equal protection analysis has sought to expunge the consideration of race from state action.¹²⁶ On the other end of the spectrum, some scholars read *Brown v. Board of Education*,¹²⁷ and the ensuing Civil Rights Revolution, as prescribing principles of “anti-subordination”¹²⁸ or “anti-humiliation,”¹²⁹ which targets not only a *de jure* racial caste system, but also the broader set of social institutions, practices, and meanings that perpetuate material inequality between racial groups.¹³⁰ From this perspective, the use of a racial classification would be presumptively permissible if it were intended to redress past discrimination or to promote equal opportunity—if, in Justice Steven’s words, the classification serves as a “welcome mat” rather than a “[n]o [t]respawning sign.”¹³¹

125. 163 U.S. 537, 559 (1896).

126. See, e.g., *Adarand Constructors v. Peña*, 515 U.S. 200, 240–41 (1995) (Thomas, J., concurring in part and concurring in the judgment); ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 132–33 (1975); Brian T. Fitzpatrick, *Strict Scrutiny of Facially Race-Neutral State Action and the Texas Ten Percent Plan*, 53 BAYLOR L. REV. 289 (2001); Richard A. Posner, *The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities*, 1974 SUP. CT. REV. 1, 19–20 (1974). For a critical review of reactionary colorblindness, see Ian F. Haney López, “A Nation of Minorities”: *Race, Ethnicity, and Reactionary Colorblindness*, 59 STAN. L. REV. 985 (2007).

127. 347 U.S. 483 (1954).

128. Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9, 10 (2003); Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 108 (1976).

129. ACKERMAN, *supra* note 2, at 150.

130. See Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation and Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 327 (1987).

131. *Adarand Constructors*, 515 U.S. at 245 (Stevens, J., dissenting).

As the conservative wing of the Court insisted increasingly on the formal color-blind perspective, Justice Kennedy refused to sign on to an outright ban on the consideration of race in policy decisions.¹³² Recognizing that diversity and group solidarity could have important benefits for a democratic society, at least in the education and voting contexts,¹³³ but still acknowledging the force of the color-blind ideal, Justice Kennedy sought to push racial consideration into the background of policy, where its influence would be less directly felt.

The constitutional need for such concealment stems from the mismatch between a colorblind aspiration and a social reality in which race continues to determine social outcomes. In his concurrence in *Parents Involved*, Justice Kennedy stated the tension squarely: “The enduring hope is that race should not matter; the reality is that too often it does.”¹³⁴ Justice Harlan’s color-blind norm is a fitting “aspiration,” but “[i]n the real world, it is regrettable to say, it cannot be a universal constitutional principle.”¹³⁵ Justice Kennedy acknowledges that an outright ban on race-conscious policy-making would prevent state actors from mitigating the continuing influence of racial identity in shaping individuals’ opportunity.¹³⁶ Such a categorical approach would require that “state and local authorities must accept the status quo of racial isolation in schools”¹³⁷

At the same time that Justice Kennedy wants to preserve the government’s ability to address problems like racial

132. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 782–98 (2007) (Kennedy, J., concurring in part and concurring in the judgment). See generally Heather Gerken, *Justice Kennedy and the Domains of Equal Protection*, 121 HARV. L. REV. 104, 108 (2007).

133. See Gerken, *supra* note 132, at 108.

134. *Parents Involved*, 551 U.S. at 787.

135. *Id.* at 788.

136. *Id.* at 787–88.

137. *Id.* at 788.

segregation, he is keen to avoid forms of action that underscore the social significance of race: “To make race matter now so that it might not matter later may entrench the very prejudices we seek to overcome.”¹³⁸ Condoning race-conscious policies such as “strategic site selection,” and “general recognition of the demographics of neighborhoods,” Justice Kennedy emphasizes that “[t]hese 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.”¹³⁹ The distinction here turns in part on the expressive content of public policy-making. A concern for racial outcomes in policy-making is less likely than an allocation of benefits according to racial criteria to communicate to affected persons that their race significantly influences their opportunities and constraints. Policymakers should therefore try to address racial cleavages and inequalities without explicitly telling anyone they are doing so.

A similar approach can be seen in *Shaw v. Reno*,¹⁴⁰ where the Court found that North Carolina’s electoral reapportionment legislation violated the Equal Protection Clause.¹⁴¹ In that case, North Carolina had drawn a labyrinthine electoral district in response to the Justice Department’s rejection of its earlier proposals under its enforcement powers under Voting Rights Act.¹⁴² The Court found that “redistricting legislation that is so bizarre on its face that it is ‘unexplainable on grounds other than race’ demands the same close scrutiny that we give other state laws that classify citizens by race.”¹⁴³ Justice O’Connor made

138. *Id.* at 782.

139. *Id.* at 789 (emphasis added).

140. 509 U.S. 630 (1993).

141. *Id.* at 649.

142. *Id.* at 634–37.

143. *Id.* at 644 (quoting *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977)). The reference to *Arlington Heights* is not entirely on

it clear that “reapportionment is one area in which *appearances* do matter.”¹⁴⁴ An electoral district that is only explicable in terms of its racial makeup “reinforces the perception that members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidates at the polls.”¹⁴⁵ It reinforces, rather than dispels, race-based thinking about the social and political world we inhabit.

Professors Richard H. Pildes and Richard G. Niemi argue that this case is concerned with avoiding “value reductionism . . . [T]he process of designing election districts violates the Constitution not when race-conscious lines are drawn, but when race-consciousness dominates the process too extensively.”¹⁴⁶ While this interpretation might accurately capture that case standing alone, it is difficult to square with equal protection doctrine more broadly. It cannot account for those cases where racial classifications were simply one factor among many in awarding contracts or granting university admissions, and yet the use of such classifications nonetheless triggered strict scrutiny,¹⁴⁷ and in some cases rendered them unconstitutional.¹⁴⁸ *Shaw* is therefore better understood as aiming to avoid forms of state action that make the influence of racial purpose too obvious

point because in that passage the Court was explaining how indirect evidence such as racial effects can sometimes demonstrate a discriminatory intent. 429 U.S. at 266. In *Shaw*, by contrast, the concern was not whether North Carolina’s legislation was motivated by an invidious discrimination, but rather, whether a legitimate race-related purpose (avoiding minority voter dilution) simply had become too obvious. 509 U.S. at 644.

144. *Shaw*, 509 U.S. at 647 (emphasis added).

145. *Id.*

146. Richard H. Pildes & Richard G. Niemi, *Expressive Harms, “Bizarre Districts,” and Voting Rights: Evaluating Election District Appearances After Shaw v. Reno*, 92 MICH. L. REV. 483, 500 (1993).

147. See, e.g., *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013); *Grutter v. Bollinger*, 539 U.S. 306 (2003).

148. See, e.g., *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

and transparent to the affected public. The case again councils state action that does not reveal its benign racial motives. The hope is that the public will stop thinking and speaking in racial terms while subtle polices surreptitiously make the world less racially polarized around them.

Shaw, *Inclusive Communities*, *Ricci*, and *Parents Involved* all concern the phenomenology of race—the extent to which race is perceived by the public to be a significant factor in social organization and political decisions. Professor Richard Primus describes this as a concern with “visibility.”¹⁴⁹ In his view, the problem in *Ricci* “was not the race-consciousness of the defendant’s decision per se but the fact that the decision disadvantaged determinate and visible innocent third parties, thus making the racially allocative aspect of the defendant’s actions publicly salient.”¹⁵⁰ Professor Siegel’s diagnosis of an “antibalkanization” rationale in equal protection jurisprudence likewise rests in part on the salience of race in public policy and social life more broadly.¹⁵¹ Siegel draws the term from Justice O’Connor’s opinion in *Shaw*, where she said “[r]acial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions.”¹⁵² Because the *Shaw* decision does not in any way suggest that the Voting Rights Act is unconstitutional for requiring consideration of race in drawing voting districts, the concern with balkanization must distinguish between legitimate and illegitimate ways of protecting minority political influence. The gerrymandered district at issue in *Shaw* was illegitimate

149. Richard A. Primus, *Of Visible Race Consciousness and Institutional Role: Equal Protection After Ricci and Inclusive Communities*, in *TITLE VII OF THE CIVIL RIGHTS ACT AFTER 50 YEARS: PROCEEDINGS OF THE NEW YORK UNIVERSITY 67TH ANNUAL CONFERENCE ON LABOR* 295, 308–18 (Anne Marie Lofaso ed., 2015).

150. *Id.* at 297.

151. See Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 *YALE L.J.* 1278, 1347–48 (2011).

152. *Id.* at 1295–96.

because it could not be explained on grounds other than race, and so “threaten[ed] to carry us further from the goal of a political system in which race no longer matters.”¹⁵³ The influence of race was plain for all to see. It told some voters that they had been assigned to districts because of their race.¹⁵⁴ The antibalkanization rationale may go further in helping to distinguish between race-conscious efforts that facilitate harmonious integration and those that “exacerbate racial and ethnic antagonisms rather than alleviate them.”¹⁵⁵ But the Court’s analysis in this case suggests that race-conscious public policy is more likely to fracture the polity along racial lines when it operates in the open, without cover of race-neutral proxies that carry out permissible race-conscious policies.¹⁵⁶ The Court urges that racial inclusion, equality, and diversity should be accomplished through indirect means that will not be appreciated by the affected public. Equality will be advanced, in Hegel’s terms, “behind the back of consciousness.”¹⁵⁷

B. *AFFH’s Challenge to the Logic of Concealment*

HUD’s AFFH rule runs counter to this logic of concealment. Though the Rule adheres to the formal command of avoiding racial classifications, it nonetheless aims to make race highly salient in local political decision-making. The purpose of the Rule is to implement the Fair Housing Act’s requirement that “meaningful actions . . . be taken to overcome the legacy of segregation, unequal treatment, and historic lack of access to opportunity in housing.”¹⁵⁸ It aims to “incorporate, explicitly, fair housing

153. *Shaw v. Reno*, 509 U.S. 630, 657 (1993).

154. *Id.* at 658.

155. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 298–99 (1978).

156. *See generally Shaw*, 509 U.S. at 630.

157. G.W.F. HEGEL, *PHENOMENOLOGY OF SPIRIT* 56 (A.V. Miller trans., 1977).

158. *Affirmatively Furthering Fair Housing*, 80 Fed. Reg. 42,272 (July 16, 2016) (to be codified at 24 C.F.R. pts. 5, 91, 92, 570, 574, 576, 903).

planning into existing planning processes”¹⁵⁹ In addition, the Rule aims to:

Provide an opportunity for the public, including individuals historically excluded because of characteristics protected by the Fair Housing Act, to provide input about fair housing issues, goals, priorities, and the most appropriate uses of HUD funds and other investments, through a requirement to conduct community participation as an integral part of the new assessment of fair housing process.

This new approach is designed to empower program participants and to foster diversity and strength of community by overcoming historic patterns of segregation, reducing racial or ethnic concentrations of poverty, and responding to identified disproportionate housing needs¹⁶⁰

The issues HUD asks participants to consider, and open up for public discussion, cover a vast terrain of local policy issues, from zoning regulation, to the placement of schools, to access to public services.¹⁶¹ All of these issues need to be considered and discussed in terms of their impact on problems of racial segregation, unequal treatment, and access to opportunity.

Such an approach is likely to engender political opposition. Historically, issues of housing segregation and integration have triggered immense social confrontation.¹⁶²

159. *Id.* at 42,273.

160. *Id.*

161. U.S. DEP'T OF HOUS. & URBAN DEV., *supra* note 43, at 11.

162. ARNOLD R. HIRSCH, MAKING THE SECOND GHETTO: RACE AND HOUSING IN CHICAGO, 1940–1960, at 9 (Robert Fogel & Stephan Thernstrom eds., 1983) (“As black migration northward increased in the first quarter of the twentieth century and racial lines began to harden, it was apparent that white hostility was of paramount importance in shaping the pattern of black settlement. Sometimes violent, sometimes through peaceful cooperation of local real estate boards, white animosity succeeded, informally and privately, in restricting black areas of residence.”); *see also* CHARLES M. LAMB, HOUSING SEGREGATION IN SUBURBAN AMERICA SINCE 1960: PRESIDENTIAL AND JUDICIAL POLITICS 57–96 (2005)

The recent Westchester litigation goes to show that federal efforts to address unlawful discrimination continue to provoke great resistance from suburban communities, and stoke wider ideological confrontation.¹⁶³ This resistance was plainly visible in the AFFH rulemaking process itself. HUD indicated, for example, that some “[c]ommenters stated that through this rule, HUD is furthering the idea that there is housing discrimination and unfairness toward those who are not financially able to afford living in a more affluent neighborhood.”¹⁶⁴ The rulemaking docket is littered with comments expressing the intense animosities that a forthright discussion of the racial determinants of housing opportunity engenders.¹⁶⁵

(discussing HUD Secretary George Romney’s conflicts with President Nixon over suburban integration); NAT’L ADVISORY COMM. ON CIVIL DISORDERS, *supra* note 17, at 91.

163. Editorial, *The Battle for Westchester*, N.Y. TIMES, May 12, 2013, at SR12 (“In affluent Westchester County, just outside New York City, officials continue to resist integrated housing, even as they endure repeated setbacks in federal court. The latest outburst came last week, when a Republican candidate for the United States Senate, Bob Turner, went to Westchester and accused President Obama and the Department of Housing and Urban Development of trying to ‘socially engineer’ rich communities into accepting poorer people. ‘Call off the dogs, Mr. President,’ his news release said, an especially unfortunate choice of words to use in a segregation case. He was standing his ground in Larchmont, which is 93 percent white.”); Howard Husock, *The Chappaqua Case: The Feds Muscle in on Local Zoning Laws*, NAT’L REV. (July 30, 2015), <http://www.nationalreview.com/article/421766/chappaqua-case-feds-muscle-local-zoning-laws-howard-husock> (“HUD has a novel idea about fair housing and is using the courts and a federal grant to force Westchester County to accept and, indeed, promote it. This is a long way from the American federalist tradition, in which local residents, as Woodrow Wilson put it, ‘govern themselves.’ Nor is it self-evident that HUD’s race-conscious approach—which inevitably devalues the gains of those minority families who can afford to buy a house in Chappaqua—is even the best way to assist minorities in achieving upward mobility.”)

164. Affirmatively Furthering Fair Housing, 80 Fed. Reg. at 42,309.

165. See, e.g., Westchester County, N.Y., Comment Letter on Proposed Rule Affirmatively Furthering Fair Housing (Sept. 17, 2013), <https://www.regulations.gov#!documentDetail;D=HUD-2013-0066-0870> (“HUD’s proposed AFFH rule links what it terms segregation to zoning. However, to do this, HUD redefines ‘segregation.’ Segregation is no longer based on unlawful discriminatory behavior. The proposed definition does not recognize that people may *choose* to live in a homogenous community without any action or

By requiring local governments to take concrete steps to address racial segregation, inequality, and access to opportunity, the AFFH rule challenges the concealment rationale that underlies the formal strictures of equal protection jurisprudence. Rather than reduce the salience of race in public discourse, it requires grantees to ventilate racial issues in public fora, commit to race conscious interventions, and document these efforts in submissions to the federal government. The Rule's extensive public

intent to exclude any other individual from that community.”); Lynn Teger, Comment on Proposed Rule Affirmatively Furthering Fair Housing (Sept. 16, 2013), <https://www.regulations.gov#!documentDetail;D=HUD-2013-0066-0498> (“By putting forth this rule, HUD implies racism and wants to gain control over local zoning as they have controlled our local schools. Implied racism is the key to the greatest redistribution scheme in history. Any minority can sue for any reason like jobs, housing, entrance to a club, anything and win automatically. Minorities could end up suing by the millions and insurance companies may be forced to settle or risk huge activist judge awards. Giving zoning control to the Federal government will allow them to social [sic] engineer each community and takes zoning control out of the hands of your local government.”); Leya Deren, Comment on Proposed Rule Affirmatively Furthering Fair Housing (Sept. 13, 2013), <https://www.regulations.gov#!documentDetail;D=HUD-2013-0066-0419> (“This is a horrible idea that will undoubtedly create hatred and mistrust of both the government and the very people it seeks to help. At best this is a socialist construct, at worst it is racist . . . HUD’s power grab is based on the mistaken belief that zoning and discrimination are the same. They are not. Zoning restricts what can be built, not who lives there.”); Michael Hoff, Comment on Proposed Rule Affirmatively Furthering Fair Housing (Sept. 13, 2013), <https://www.regulations.gov#!documentDetail;D=HUD-2013-0066-0421> (“So you bureaucrats in DC know what the zoning laws should be in communities hundreds/thousands of miles away? It’s either hubris or a coordinated effort to stoke racial violence, given that you leftists have been lying to minorities for years about why they find themselves in poverty. You’ve been blaming white racism for years. Meanwhile you did it yourselves to get votes.”); Gamaliel Isaac, Comment on Proposed Rule Affirmatively Furthering Fair Housing (Aug. 12, 2013) <https://www.regulations.gov#!documentDetail;D=HUD-2013-0066-0256> (“This will import crime into the suburbs and create enormous hostility to the Democratic party.”); Brian Kuck, Comment on Proposed Rule Affirmatively Furthering Fair Housing (Aug. 12, 2013), <https://www.regulations.gov#!documentDetail;D=HUD-2013-0066-0164> (“This plan is an affront to all of those like me who have studied hard, completed a college degree, and have worked hard to purchase a home in a safe neighborhood for their family. By forcefully integrating neighborhoods, you will be subsidizing low income, minority families. With that demographic comes crime and poorer performing schools. You know it, and I know it. Housing values will plummet, as will school performance. Now how is that fair to me or my kids?”).

participation requirements open up these administrative deliberations to public feedback. The Rule is therefore in considerable tension with current equal protection doctrine's effort to minimize visible forms of race-consciousness. Such a compliance system is likely to increase, rather than decrease, the salience of race in public consciousness, even as it attempts to reduce the salience of race in determining individuals' life chances. The Rule adheres to the constitutional presumption against the use of racial classifications to adjudicate the burdens and benefits of individual parties. But it makes use of race as a policy consideration in such a systematic and thoroughgoing way as to challenge the logic of concealment that motivates the Court's wariness of classifications.

The concealment rationale was always an unstable compromise. The Court has sought to allow certain kinds of racially ameliorative state action while making those efforts less conspicuous to the public. The hope was that social balkanization could be avoided by making affirmative action and related programs subtler, less absolute, and less obvious to the population at large. In the years since that approach has been embraced, racial tensions have not abated. We have seen heightened public debate about the continuing power of race and racism in this country, as represented in renewed calls for reparations,¹⁶⁶ comparison between today's criminal justice system and Jim Crow,¹⁶⁷ and the Black Lives Matter Movement.¹⁶⁸ And the presidential election has brought ideologies of white supremacy back into the mainstream.¹⁶⁹

166. See generally Ta-Nehisi Coates, *The Case for Reparations*, ATLANTIC (June 2014), <http://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631>.

167. MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2012).

168. Janell Ross, *How Black Lives Matter Moved from a Hashtag to a Real Political Force*, WASH. POST (Aug. 19, 2015), <https://www.washingtonpost.com/news/the-fix/wp/2015/08/19/how-black-lives-matter-moved-from-a-hashtag-to-a-real-political-force>.

169. Joseph Goldstein, *Alt-Right Gathering Exults in Trump Election with*

If the goal of racial concealment was to somehow achieve racial progress while reducing racial conflict, the effort cannot claim success.

The concealment rationale also rests on a troubling, anti-democratic vision of policy-making. It imagines state actors making race-conscious choices without telling the public precisely what they are doing. As a practical matter, it is difficult to see how elected officials in legislatures could ever discuss and implement a race-conscious policy without making such a policy salient to their constituents. In the administrative context, such purposeful secrecy might be more tenable. But it would nonetheless undermine the bedrock constitutional norm that public policy-making should be responsive to democratic will: that “We the people” are the ultimate author of the laws and policies that bind us.¹⁷⁰ A world in which cloistered bureaucrats design cunning rules, the purpose of which remains opaque to those they bind, is more reminiscent of Kafka than of our progressive tradition of transparent and deliberative administrative governance.¹⁷¹ In our democratic state, we expect administrative agencies to remain sensitive to the public, not only through legislation and presidential

Nazi-Era Salute, N.Y. TIMES, Nov. 20, 2016, at A1; Eric Bradner, *Donald Trump Stumbles on David Duke, KKK*, CNN (Feb. 29, 2016, 10:18 AM), <http://www.cnn.com/2016/02/28/politics/donald-trump-white-supremacists/>; Tim Devaney, *KKK, American Nazi Party Praise Trump's Hiring of Bannon*, HILL (Nov. 14, 2016), <http://thehill.com/blogs/blog-briefing-room/305912-kkk-american-nazi-party-praise-trumps-hiring-of-bannon>.

170. U.S. CONST. pmbl.

171. Compare FRANZ KAFKA, *Before the Law*, in COLLECTED STORIES 173 (Willa Muir & Edwin Muir trans., 1993) (1915) (parable describing a man who waits until his death “to gain admittance to the law,” but is kept outside by a “doorkeeper,” never gaining justice and never knowing what goes on inside) with JOHN DEWEY, *THE PUBLIC AND ITS PROBLEMS* 208 (1927) (arguing that “[n]o government by experts in which the masses do not have the chance to inform the experts as to their needs can be anything but an oligarchy managed in the interests of the few”). On Dewey and the American Progressives’ theory of the administrative state, see Blake Emerson, *The Democratic Reconstruction of the Hegelian State in American Progressive Political Thought*, 77 REV. POL. 545 (2015).

oversight, but through public consultation procedures such as notice-and-comment rulemaking.¹⁷²

The jurisprudence of concealment also reduces the ability of courts, and society at large, to ensure that race-conscious policies are appropriately tailored to achieve their objectives. By insulating from liability affirmative action programs that do not use express racial preferences, the Court incentivizes state actors to use vague, diversity-promoting standards. Such indeterminate race-based action “makes it more difficult to perform any kind of cost-benefit calculus” to evaluate affirmative action programs.¹⁷³ There is an acute risk that the influence of race may be either over-broad, making race more central than necessary in shaping social policy, or under-inclusive, failing to provide adequate remedies or prophylactic measures to address racial exclusion or inequality.

This objection overlaps with concerns about the democratic deficit of the jurisprudence of concealment. When the equal protection rule-structure encourages imprecision, state actors, the courts, and the public lack sufficient information to understand and evaluate race-conscious policies. Racial policies become opaque and unaccountable if those affected by them, and the decision-makers themselves, cannot assess their consequences and effectiveness. There are fewer opportunities for informed democratic discourse and critique.

Given these misgivings, there is reason to doubt whether a jurisprudence of concealment continues to serve our constitutional order well. The effort to allow the consideration of race, but to make such considerations less obvious, has not brought us to a state of post-racial unity. It

172. See, e.g., Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1559–62 (1992); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1775–76 (1975).

173. Ian Ayres & Sydney Foster, *Don't Tell, Don't Ask: Narrow Tailoring After Grutter and Gratz*, 85 TEX. L. REV. 517, 520 (2007).

has at the same time undermined both the rationality and democratic legitimacy of race-conscious public policy.

The AFFH rule points toward a more compelling framework for equal protection analysis that focuses on transparent, inclusive, and evidence-based race-conscious policy. The Rule recognizes the formal constraints of current equal protection doctrine, but requires a race-conscious planning process that implicates a wide spectrum of local policy-making and regulation. Conflict and antagonism may indeed be generated by such a process. But instead of repressing that conflict, the Rule attempts to channel it into a concrete discussion of measures that can be taken to achieve fair housing: the modification of zoning regulations such as occupancy limits, the increase of affordable housing stock, and the extension of public services to areas of racially and ethnically concentrated poverty. The Rule aims to increase public wherewithal to understand and dismantle the obstacles to an integrated society. It does not mandate a particular result, but it does require the public and its government to think through and develop responses to a racial geography that is starkly segregated and highly unequal. The model it provides is an administrative process that combines empirical data, reasoned policy analysis, and public consultation. This model might inform the way the courts practice their equal protection analysis.

IV. ORIGINS AND ARCHITECTURE OF ADMINISTRATIVE-LAW REASONING IN EQUAL PROTECTION JURISPRUDENCE

In this Part I outline my concept of administrative equal protection as an alternative to the Court's current jurisprudence of concealment. This proposal is rooted in the Court's earlier jurisprudence, and has been revived in *Fisher II*. I first briefly trace the history of administrative reasoning in equal protection jurisprudence, showing how principles of deference, official reasonableness, procedural regularity, and avoidance of arbitrariness have been invoked in landmark equal protection and civil rights cases. I then show how this

administrative approach receded as the Court, first, intensified its review of ameliorative race-conscious policy, and then shifted toward its current emphasis on the concealment of benign race-conscious motives. I argue that the Court should resurrect the administrative approach to equal protection, which already shows some signs of life in the reasoning of *Fisher II*. I argue that courts should defer to a state actor's choice of permissible race-conscious objectives, while reviewing the rationality, procedural fairness, and public accountability of the means chosen to fulfill those objectives. This review should be intensive, but it should respect the limits of the Court's institutional competence. Courts should focus not on the substantive merits of the actor's normative and empirical findings, but rather on the quality of the process through which they were reached. I then show how this framework would be applied in evaluating the constitutionality of the AFFH rule itself.

A. *A Brief History of Administrative Equal Protection*

In one of the earliest interpretations of the Equal Protection Clause, *Yick Wo v. Hopkins*,¹⁷⁴ the Court invalidated ordinances in San Francisco which required a license for the operation of dry cleaners and had the effect of allowing state-sanctioned discrimination against residents of Asian descent.¹⁷⁵ In striking down the ordinances on equal protection grounds, the Court observed, “[t]hey seem intended to confer, and actually do confer, not a discretion to be exercised upon a consideration of the circumstances of each case, but a naked and arbitrary power to give or withhold consent, not only as to places, but as to persons.”¹⁷⁶ Similarly, the Court noted in *Baker v. Carr*¹⁷⁷ that the Equal Protection Clause of the Fourteenth Amendment requires

174. 118 U.S. 356 (1886).

175. *Id.* at 373–74.

176. *Id.* at 366.

177. 369 U.S. 186, 225 (1962).

courts to determine whether official “discrimination reflects *no* policy, but simply arbitrary and capricious action.”¹⁷⁸

These cases point to a convergence between equal protection analysis and administrative law. Guarding against “arbitrary” or “capricious” state action has been a central preoccupation of administrative due process since the late nineteenth century,¹⁷⁹ and it has been codified in the judicial review provisions of the Administrative Procedure Act of 1946.¹⁸⁰ These requirements have since been embroidered into a robust judicial commitment to thoroughly reasoned administrative decision-making, which nonetheless grants a degree of deference to the political, empirical, and social-scientific judgment of agencies.¹⁸¹ In this Part, I show how this administrative regime has played an important role in a series of more recent equal protection cases. These cases provide a basis for reconstructing the current rationale for equal protection jurisprudence in a way that reflects the spirit of the AFFH rule: instead of evaluating the social visibility of race-conscious public policy, courts should scrutinize the rationality, transparency, and audibility of political and administrative reasoning over race-conscious policy.

The active involvement of administrative agencies in the Civil Rights Revolution catalyzed a renewed connection

178. *Id.* at 225 (emphasis in original).

179. *See, e.g.*, *Pac. States Box & Basket Co. v. White*, 296 U.S. 176, 180–81 (1935); *Fed. Radio Comm’n v. Nelson Bros. Bond & Mortg. Co.*, 289 U.S. 266, 275–77 (1933); *New York ex rel. Woodhaven Gaslight Co. v. Pub. Serv. Comm’n of N.Y.*, 269 U.S. 244, 245–46 (1925); *New York ex rel. N.Y. & Queens Gas Co. v. McCall*, 245 U.S. 345, 347–49 (1917); *United States ex rel. Ness v. Fisher*, 223 U.S. 683, 691 (1912); *N.Y. & N.E.R. Co. v. Bristol*, 151 U.S. 556, 571 (1894); *Buttz v. N. Pac. R.R. Co.*, 119 U.S. 55, 72 (1886).

180. 5 U.S.C. § 706 (2012) (“The reviewing court shall . . . hold unlawful and set aside agency action . . . found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”).

181. *See generally* Jerry L. Mashaw, *Small Things Like Reasons Are Put in a Jar: Reason and Legitimacy in the Administrative State*, 70 *FORDHAM L. REV.* 17 (2001) (discussing administrative reason-giving).

between administrative and constitutional law. The years after the passage of the Civil Rights Act of 1964 saw an explosion of administrative creativity, as federal administrative agencies sought to interpret their new powers expansively to implement the non-discrimination provisions of the Act.¹⁸² The courts initially welcomed this bureaucratic endeavor, granting deference not only to the agencies' construction of the Act, but, indirectly, to their construction of the Equal Protection Clause itself. This deference regime constricted over time, as courts would defer to race-conscious state action if it was supported by an administrative process with sufficient empirical foundations and procedural safeguards to prevent arbitrary applications of race-conscious criteria. This administrative-law dimension of equal protection jurisprudence provides a promising basis for moving beyond the Court's emphasis on visibility and concealment, and toward the kind of rational race-conscious policy discourse that HUD's recent AFFH rule embodies. It also provides a historical precedent for revising judicial conceptions of equal protection in light of administrative practice.

Judicial deference to administrative interpretations of their organic statutes played a pivotal role in *Griggs v. Duke Power Co.*¹⁸³ In that case, the Court held that an employer had unlawfully discriminated on the basis of race by using a test that disproportionately excluded black workers from promotion and had not been shown to test job-related skills.¹⁸⁴ The Court held that in such cases of disparate impact, no showing of discriminatory purpose was necessary.¹⁸⁵ It reasoned that the Civil Rights Act's non-

182. See generally HUGH DAVIS GRAHAM, *THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY 1960–1972* (1990); JOHN DAVID SKRENTNY, *THE IRONIES OF AFFIRMATIVE ACTION: POLITICS, CULTURE, AND JUSTICE IN AMERICA* (1996).

183. 401 U.S. 424 (1971).

184. *Id.* at 425, 436.

185. *Id.*

discrimination provisions applied to employment “practices that are fair in form, but discriminatory in operation.”¹⁸⁶ To reach this conclusion, the Court had to grapple with a provision of Title VII that allowed the use of “any professionally developed ability test” that was not “designed, intended, or used to discriminate because of race.”¹⁸⁷ To interpret this provision, the Court relied in part on guidelines from the Equal Employment Opportunity Commission (EEOC), which provided that “professionally developed ability tests” do not insulate employers from liability if they were not in fact “job related.”¹⁸⁸ The guidelines required that tests must be backed up by “data demonstrating that the test is predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated.”¹⁸⁹ The Court deferred to the EEOC’s interpretation under settled principles of administrative law: “The Equal Employment Opportunity Commission, having enforcement responsibility, has issued guidelines interpreting [the testing provisions of the Civil Rights Act] to permit only the use of job-related tests. The administrative interpretation of the Act by the enforcing agency is entitled to great deference.”¹⁹⁰

The *Griggs* decision not only evinces the generic principle of judicial deference to expert administrative judgment, but, more specifically, an inquiry into the factual circumstances that drive minority exclusion from the labor market. The EEOC’s emphasis on data, and the actual impact of employment practices, rather than their

186. *Id.* at 431.

187. Civil Rights Act of 1964, Pub. L. No. 88-352 § 703(h), 78 Stat. 257 (1964) (codified at 42 U.S.C. § 2000e-2(h)).

188. *Griggs*, 401 U.S. at 433 n.9; EQUAL EMP’T OPPORTUNITY COMM’N, GUIDELINES ON EMPLOYMENT TESTING PROCEDURES (1966).

189. GUIDELINES ON EMPLOYEE SELECTION PROCEDURES, 35 Fed. Reg. 12,333, 12,334 (Aug. 1, 1970).

190. *Griggs*, 401 U.S. at 433–34.

motivation, complemented the Court's effort to effectuate the purposes of Title VII through an expansive interpretation of the meaning of discrimination. *Griggs* was not a constitutional case, and so the Court's solicitude for the EEOC's interpretation of its enabling legislation is unsurprising. However, until the Court determined in *Washington v. Davis*¹⁹¹ that equal protection analysis was governed by different principles than the discrimination provisions of the Civil Rights Act, the lower courts often interpreted *Griggs* as informing the meaning of the Equal Protection Clause.¹⁹² Indirectly, then, the EEOC's empirically-driven, effects-oriented conceptions of equal opportunity influenced constitutional doctrine.¹⁹³

The influence of administrative rationality on judicial constitutional reasoning was more direct in the school desegregation context. In 1966, the Department of Health, Education, and Welfare (HEW) promulgated guidelines implementing the provisions of Title VI of the Civil Rights Act, which forbids discrimination in federal grant-making.¹⁹⁴

191. 426 U.S. 229 (1976).

192. See Cheryl I. Harris, *Limiting Equality: The Divergence and Convergence of Title VII and Equal Protection*, 2014 U. CHI. LEGAL F. 95, 102; Reva B. Siegel, *The Supreme Court 2012 Term—Foreword: Equality Divided*, 127 HARV. L. REV. 1, 14 (2013).

193. The Court showed similar deference to administrative judgment in the housing discrimination context. In *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205 (1972), the Court relied in part on the Department of Health, Education and Welfare's interpretation of the Fair Housing Act to conclude that tenants who alleged that they had lost the "social benefits of living in an integrated community" as a consequence of their landlord's discrimination against minority tenants, had standing to sue as "persons aggrieved" under the statute. *Id.* at 208. Relying on *Griggs*, the Court stated:

[t]he Assistant Regional Administrator for HUD wrote petitioners' counsel . . . that 'it is the determination of this office that the complainants are aggrieved persons and as such are within the jurisdiction' of the Act. We are told that that is the consistent administrative construction of the Act. Such construction is entitled to great weight.

Id. at 210.

194. See Revised Statement of Policies for School Desegregation Plans Under

The guidelines provided numerical benchmarks for segregated districts to meet in integrating their schools.¹⁹⁵ It reserved special scrutiny for “free choice” plans which formally allowed students to attend whichever school they (or their parents) wished:

A free choice plan tends to place the burden of desegregation on the Negro or other minority group students and their parents [T]he very nature of a free choice plan and the effect of long-standing community attitudes often tend to preclude or inhibit the exercise of a truly free choice by or for minority group students.¹⁹⁶

The Fifth Circuit made these guidelines central to its efforts to desegregate the South and implement the constitutional command of *Brown v. Board of Education*.¹⁹⁷ In *Singleton v. Jackson Municipal Separate School District*,¹⁹⁸ Judge John Minor Wisdom of the Fifth Circuit gave these guidelines “great weight” in determining whether the school district was operating a segregated system in violation of the Equal Protection Clause:

Title VI of the Civil Rights Act of 1964, 45 C.F.R. § 181 (1967); U.S. COMM’N ON CIVIL RIGHTS, FEDERAL RIGHTS UNDER SCHOOL DESEGREGATION LAW (1966).

195. 45 C.F.R. §181.54.

196. *Id.*

197. 347 U.S. 483 (1954).

198. 348 F.2d 729 (1965).

We attach great weight to the standards established by the Office of Education. The judiciary has of course functions and duties distinct from those of the executive department, but in carrying out national policy the three departments of government are united by a common objective. There should be a close correlation, therefore, between the judiciary's . . . and the executive department's standards in administering this policy. Absent legal questions, the United States Office of Education is better qualified than the courts and is the more appropriate federal body to weigh administrative difficulties inherent in school desegregation plans.¹⁹⁹

The Court endorsed HEW and the Fifth Circuit's use of racial classifications to further the constitutional command of equal protection in *Swann v. Charlotte-Mecklenberg Board of Education*,²⁰⁰ though without explicit deference to HEW's guidelines. In the Civil Rights Era, therefore, administrative agencies were understood to be operating with the courts in service of a "common objective" of upending the Jim Crow system.²⁰¹ Courts would defer to administrative agencies' expertise in gathering data on the nature of the problem and developing administrable systems to achieve meaningful progress towards integration, equal opportunity, and equal protection.

As the moral urgency of the Civil Rights Era waned in the consciousness and composition of the Court, this highly deferential posture was supplanted by more rigorous review of public actions that implemented race-conscious purposes.²⁰² In *Regents of the University of California v. Bakke*, rejecting the University of California's racial quota system for medical school admissions, Justice Powell observed that

199. *Id.* at 731.

200. 402 U.S. 1 (1971).

201. *Singleton*, 348 F.2d at 731.

202. *See* *Regents of the Univ. of Cal.*, 438 U.S. 265 (1978).

We have never approved a classification . . . in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations After such findings have been made, the governmental interest in preferring members of the injured groups at the expense of others is substantial, since the legal rights of the victims must be vindicated. In such a case, the extent of the injury and the consequent remedy will have been judicially, legislatively, or administratively defined.²⁰³

Justice Powell thus indicated that some official “finding” of unlawful conduct was necessary before an institution could use racial classifications for remedial purposes.²⁰⁴ But he explicitly acknowledged that an “administrative finding” would suffice for this purpose.²⁰⁵ Once such a finding had been made, the remedy could then be “administratively defined.”²⁰⁶

In *Wygant v. Jackson Board of Education*,²⁰⁷ Justice Powell intensified *Bakke*’s “finding” requirement, writing in his plurality opinion that a public actor must have “a strong basis in evidence for its conclusion that remedial action was necessary” to make use of a racial classification.²⁰⁸ He distinguished between general findings of “societal discrimination,” which cannot justify the use of a racial classification for remedial purposes, from findings of past discrimination by the public actor imposing the classification, which may justify its remedial use.²⁰⁹

In *City of Richmond v. J.A. Croson*, the Court again adopted this evidence-oriented approach to find that the City of Richmond’s findings of past discrimination in the local

203. *Id.* at 307–08.

204. *Id.*

205. *Id.*

206. *Id.*

207. 476 U.S. 267 (1986).

208. *Id.* at 277 (1986).

209. *Id.* at 274.

construction industry were insufficiently robust to justify its numerical preference for minority owned contractors: “While the States and their subdivisions may take remedial action when they possess evidence that their own spending practices are exacerbating a pattern of prior discrimination, they must identify that discrimination, public or private, with some specificity before they may use race-conscious relief.”²¹⁰ In these cases, the emphasis is on the quality of the factual record developed by legislature and administrative bodies.

In other cases over the same period, the Court gave greater weight to the administrative procedures and factual determinations in equal protection challenges. In *Fullilove v. Klutznick*,²¹¹ the Court upheld a ten percent set-aside for minority business enterprises (MBEs) in federal sub-contracting.²¹² The Court not only emphasized that the authorizing legislation fulfilled a legitimate remedial purpose, but also that the administrative scheme that operationalized this purpose reduced the danger of arbitrariness such a numerical requirement might impose: “Administrative definition has tightened some less definite aspects of the statutory identification of the minority groups encompassed by the program. There is administrative scrutiny to identify and eliminate from participation in the program MBE’s who are not ‘bona fide’ within the regulations and guidelines.”²¹³ The Court highlighted the importance of an “administrative waiver on a case-by-case basis” for contractors who certify a good faith effort to meet the prescribed level of participation, as well as “a complaint procedure, to ensure that only bona fide MBE are encompassed by the remedial program.”²¹⁴ In this case, the

210. 488 U.S. 469, 504 (1989).

211. 448 U.S. 448 (1980).

212. *Id.* at 487–89.

213. *Id.* at 487–88.

214. *Id.* at 481–82.

constitutionality of the federal program turned on the quality of the administrative process, which combined more detailed guidelines with discretionary safety valves to prevent arbitrary applications of numerical criteria.

The Court thus suggested that equal protection analysis might incorporate an administrative law methodology. To borrow a classic turn of phrase from administrative law, courts could determine whether the administrative application of race-conscious policy was “calculated to negate the dangers of arbitrariness and irrationality”²¹⁵ This approach was applied in *Metro Broadcasting, Inc. v. FCC*,²¹⁶ which upheld the constitutionality of the Federal Communications Commission’s (FCC) rules granting various privileges for minority ownership in licensing and ownership-transfer proceedings.²¹⁷ The Court referenced as relevant to its equal protection analysis the FCC’s finding of minority underrepresentation in the broadcasting, its consideration of its public-interest obligations under the Communications Act of 1934, court rulings, and the FCC’s conference on minority ownership policies.²¹⁸ The Court explicitly acknowledged that its own analysis must be accompanied by some institutional respect for the implementation decisions of the legislative branch and its administrative agents.²¹⁹ It cited an administrative law precedent to conclude:

215. *Auto. Parts & Accessories Ass’n v. Boyd*, 407 F.2d 330, 338 (D.C. Cir. 1968).

216. 497 U.S. 547 (1990) *overruled by* *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

217. *Id.* at 584–601.

218. *Id.* at 569–79.

219. *Id.* at 569.

[W]e must pay close attention to the expertise of the Commission and the factfinding of Congress when analyzing the nexus between minority ownership and programming diversity. With respect to this ‘complex’ empirical question we are required to give ‘great weight to the decisions of Congress and the experience of the Commission.’²²⁰

Though the Court emphasized that “we do not defer to the judgment of the Congress and the [FCC] on a constitutional question,” it nonetheless observed that “[t]he FCC’s conclusion that there is an empirical nexus between minority ownership and broadcasting diversity is a product of its expertise, and we accord its judgment deference.”²²¹ The Court thus reserved for itself the task of determining the constitutionality of the administrative scheme, but preserved within this framework deference for well-reasoned, empirically based, and expertly informed agency judgment in determining the factual predicates necessary to effectuate a race-conscious purpose.

In *Adarand Constructors v. Pena*,²²² however, the Court overturned *Metro Broadcasting* and held that the strict scrutiny regime the Court had applied to states and localities in *Croson* also applied to similar federal actions giving preferences to minority owned enterprises in federal contracting.²²³ At the same time, the Court loosened the nature of “strict scrutiny” inquiry slightly, emphasizing that “we wish to dispel the notion that strict scrutiny is strict in theory, but fatal in fact The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in

220. *Id.* (quoting *Columbia Broad. Sys., Inc. v. Democratic Nat’l Comm.*, 412 U.S. 94, 102 (1970)).

221. *Id.* at 569–70 (internal citations and quotations omitted).

222. 515 U.S. 200 (1995).

223. *Id.* at 227–30.

response to it.”²²⁴ The Court’s subsequent review of racial classifications in university admissions show that this relaxation of strict scrutiny analysis was real. A racial classification would pass constitutional muster if the decision maker adequately explained the need for it: “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.”²²⁵

Even when practicing “strict scrutiny,” then, the Court has been attendant to the particular administrative form race-conscious policy takes. *Ricci*, too, can be read to incorporate concerns about sound reasoning, even though the opinion primarily sounds in themes of visibility and concealment.²²⁶ Applying the “strong basis in evidence” standard from equal protection law to employers’ liability under Title VII for disparate treatment, Justice Kennedy explained “the standard appropriately constrains employers’ discretion in making race-based decisions: It limits that discretion to cases in which there is a strong basis in evidence of disparate-impact liability, but it is not so restrictive that it allows employers to act only when there is a provable, actual violation.”²²⁷ The “discretion” framework of judicial review of agency action thus remained a persistent theme in equal protection and anti-discrimination jurisprudence, as the courts attempted to carve out some space for race-conscious policy-making, but ensured that such policies were administered so as to avoid arbitrary results. In the next Part, I show how the most recent equal protection decision, *Fisher II*, moves further in the direction of an administrative approach to equal protection.

224. *Id.* at 237 (internal citations and quotations omitted).

225. *Grutter v. Bollinger*, 539 U.S. 326, 327 (2003).

226. *See Ricci v. DeStefano*, 557 U.S. 557 (2009).

227. *Id.* at 583.

B. *Administrative Law Principles in the Review of Race-Conscious State Action*

From these cases we can glean a number of considerations that are relevant to determining the constitutionality of the administrative means used to achieve permissible race-conscious policy objectives: Are they based on factual findings concerning the racial characteristics of the relevant sector of the affected public? Do they allocate benefits and burdens in a way calculated to reduce the risk of arbitrary decisions that do not further the underlying policy objective? Do they respond to public input that is relevant to specifying and implementing the race-conscious policy objectives at issue? These considerations would allow courts to assess whether race-conscious policies that bind the public have emerged from a deliberative process that has disclosed sound reasons for distributing social, economic, and political resources along racial lines.

Administrative equal protection might be further cashed out in terms of the deference regime under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*²²⁸ and arbitrary-and-capricious review under the Administrative Procedure Act.²²⁹ As Professor John Manning has suggested, the *Chevron* framework of judicial deference to agency interpretations of statutory ambiguities might also be applied to constitutional review of legislative interpretations of constitutional ambiguities.²³⁰ While the Court retains sole

228. 467 U.S. 837 (1984).

229. 5 U.S.C. § 706(2)(A) (2012).

230. John R. Manning, *The Supreme Court 2013 Term, Forward: The Means of Constitutional Power*, 128 HARV. L. REV. 1, 78–79 (2014). Manning focuses on the Necessary and Proper Clause, and acknowledges that the Court has taken a much less deferential approach with respect to the Civil War Amendments. *Id.* at 5 n.19. Given that the Fourteenth Amendment was passed in part to ensure the constitutionality of the Freedmen’s Bureau Act, there is at least a colorable argument that the Amendment’s guarantee of equal protection should likewise be read to allow for deference to legislative and administrative determinations. See FONER, *supra* note 1; Graber, *supra* note 1.

responsibility to define the scope of equal protection,²³¹ this exclusive interpretive power is consistent with the existence of multiple race-related objectives that fall within that space.²³² The Court has found that several different race-related objectives lie within the bounds of constitutionally permissible race conscious policy: non-discrimination,²³³ diversity,²³⁴ combatting racial isolation,²³⁵ and remedying past discrimination.²³⁶ State actors can therefore choose from amongst these constitutionally permissible objectives, and courts ought to defer to that choice if the actor provides a reasonable explanation for its decision.

If the state actor is pursuing such a permissible objective, the next question would be whether the means

231. *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997).

232. *Compare* *United States v. Am. Trucking Ass'ns*, 310 U.S. 534, 544 (1940) (“[T]he interpretation of the meaning of statutes, as applied to justiciable controversies, is exclusively a judicial function.”), *with* Peter L. Strauss, “Deference” Is Too Confusing—Let’s Call Them “Chevron Space” and “Skidmore Weight,” 112 COLUM. L. REV. 1143, 1145, 1146, 1159–61, 1162 (2012) (arguing that *Chevron* applies where Congress has delegated a policy space to an agency to interpret a statutory term with multiple possible meanings). In the equal protection context, where the Court has announced that equal protection proscribes only intentional discrimination, *Washington v. Davis*, 426 U.S. 229 (1976), it is not obvious that a state actor can lay a claim to “interpret” the meaning of equal protection itself when they pursue purposes other than remedying intentional discrimination, such as combatting racial isolation in the housing market or promoting educational diversity. Rather, they are selecting from amongst a set of objectives the Court has already condoned as legitimate for the purposes of equal protection analysis. These lie within the policy space left open by the Court’s interpretation of equal protection. The more radical application of *Chevron* to equal protection analysis would be to grant legislative and administrative bodies discretion to interpret the ambiguous constitutional term itself, for example to command integration or to proscribe disparate impact. Whether such a democratic-constitutionalist approach would be consistent with the meaning of the Amendment or structure of the Constitution lies beyond the scope of this Article.

233. *Davis*, 426 U.S. at 243–47 (1976).

234. *Grutter v. Bollinger*, 539 U.S. 306, 322–44 (2003).

235. *Tex. Dep’t of Hous. & Cmty. Aff. v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2525 (2015).

236. *Local 28 of Sheet Metal Workers’ Int’l Ass’n v. EEOC*, 478 U.S. 421, 444 (1986).

chosen to further that objective are well-justified on the record. As Professor David Strauss has suggested,²³⁷ this form of equal protection analysis mirrors that performed in *Motor Vehicle Manufacturers Association v. State Farm Mutual Auto Insurance Co.*²³⁸ According to *State Farm*, in order to survive arbitrary-and-capricious review, the “agency must explain the evidence which is available, and must offer a rational connection between the facts found and the choice made.”²³⁹ Agencies must implement statutory purposes in a way that is evidence-based and well-justified on the “full administrative record” that is before it at the time it makes its decision.²⁴⁰ In the equal protection context, this instrumental-rational requirement translates into a need for gathering race-related data, and explaining how the proposed policy will further the constitutionally permissible race-related goal in light of that evidence.

An important additional consideration under arbitrary-and-capricious review is the quality of the deliberative process through which the agency has reached its conclusions. Deliberative engagement with the affected public is thought not only to strengthen the factual basis of the agency’s determination, but also its democratic legitimacy. As Judge McGowan of the D.C. Circuit put it, “if the Agency . . . has infused the administrative process with the degree of openness, explanation, and participatory democracy required by the APA, it will thereby have ‘negate(d) [sic] the dangers of arbitrariness and irrationality in the formulation of rules.’”²⁴¹ The content of this deliberative process must be documented on the record, so

237. David A. Strauss, *Affirmative Action and the Public Interest*, 1995 SUP. CT. REV. 1, 36 (1995).

238. 463 U.S. 29 (1983).

239. *Id.* at 52 (internal quotations omitted).

240. *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971).

241. *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1027–28 (D.C. Cir. 1978) (quoting *Auto. Parts & Accessories Assoc. v. Boyd*, 407 F.2d 330, 338 (D.C. Cir. 1968)).

that the reviewing court can “see what major issues of policy were ventilated by the informal proceedings and why the agency reacted to them as it did.”²⁴²

Applying this administrative law framework to equal protection cases, the court must (1) determine if the race-related objective proffered by the state actor is within the permissible bounds of the Equal Protection Clause; (2) whether the means chosen to fulfill that objective are well-supported by empirical evidence; (3) whether the actor has drawn a rational connection between the data and the means; (4) whether the actor has engaged in a deliberative process that exposes the policy decision to public input and scrutiny. Conspicuous failure along any of these dimensions would be grounds for striking down the policy as unconstitutional. But where the state actor has offered plausible, if contestable, constructions of race-related public purposes, interpretations of empirical racial data, and responses to public objections, the Court must remain within its institutional competency and affirm the reasonableness of the actor’s informed judgments. While such an approach would evaluate the empirical, instrumental, and deliberative foundations of the race-conscious policy pursued by the state actor, it would not permit courts to contest reasonable empirical assumptions, insist on alternatives not reasonably available to the decision-maker, or micro-manage the deliberative process through which the decision has been reached. Courts should instead aim to ensure that the decision-maker has reasoned carefully before deciding on a course of action.

From this vantage point, the concern with the use of racial classifications would not be with salience, but rather with arbitrariness. The use of classifications may heighten the risk that state actors will be insufficiently responsive to

242. *United States v. N.S. Food Prod. Corp.*, 568 F.2d 240, 252 (2d Cir. 1977) (quoting *Auto. Parts & Accessories Ass’n v. Boyd*, 407 F.2d 330, 338 (D.C. Cir. 1968)).

the empirical and social contexts of their decisions. Such hard-and-fast rules may create an “irrebuttable presumption” that individuals are entitled to certain benefits, or subject to certain burdens, on the basis of a single marker, without deeper inquiry into whether such an allocation would serve the relevant goals.²⁴³ The use of racial classifications to adjust the racial makeup of employees, voters, or students could nonetheless be justified. A state actor could persuasively argue that the benefits of such a classificatory scheme outweigh the costs in terms of administrability, transparency, fairness, and effectiveness in achieving the chosen race-related objective.²⁴⁴ On the other hand, a facially race-neutral policy that pursued a permissible race-conscious objective without sufficient empirical, instrumental, and deliberative support would fail the constitutional test. Thus, the strict line between presumptively permissible race-neutral decision-rules and presumptively suspect race-related decision rules would be removed. Any state action with an underlying race related purpose would be reviewed to ensure it is factually well-supported and normatively well-reasoned.

One objection to this approach is that it might discourage some policies that further racial justice but sacrifice transparency in order to make the policy more palatable. For example, the Texas Ten Percent plan, which has an acknowledged racial purpose, but uses a race-neutral means, would be subject to scrutiny to determine whether this means effectively achieved the objective.²⁴⁵ The decision-

243. *U.S. Dep’t of Agric. v. Murry*, 413 U.S. 508, 514 (1973) (quoting *Vlandis v. Kline*, 412 U.S. 441, 452 (1973) (internal quotations omitted)).

244. For a well-reasoned defense of numerical quotas in employment, see generally David Strauss, *The Law and Economics of Racial Discrimination in Employment: The Case for Numerical Standards*, 79 *GEO. L.J.* 1619 (1991).

245.

[T]he Top Ten Percent Plan, though facially neutral, cannot be understood apart from its basic purpose, which is to boost minority enrollment. Percentage plans are “adopted with racially segregated neighborhoods

maker could attempt to justify the lack of fit between the race-conscious end and the race-neutral means on the political ground that such an indirect approach was necessary to build public support for the program. But administrative equal protection would require such assumptions to be explicitly stated, factually supported, and publicly ventilated.

This last requirement of transparency might undermine the effort to further racial justice by indirection—by using race-neutral policies to conceal race-conscious purposes. If affected parties must be informed of the race-conscious purpose of a proposed policy, the formally race-neutral attributes of the program will no longer effectively hide the race-related objective. Policymakers would therefore be discouraged from pursuing clandestine racial justice initiatives. As I have argued above, such initiatives undermine transparency, accountability, and efficient furtherance of permissible racial goals. Even if such concealed race-conscious programs might generate gains for racial equality, they would fail a basic test of democratic legitimacy: that the members of a political community have the opportunity to assess through reasoned discourse whether the laws and policies that bind them are justifiable.²⁴⁶ If the race-conscious purpose of a policy remains opaque and unknown, such critical assessment is impossible. Pursuing racial justice by indirection misses an opportunity to engage the public on such contested political

and schools front and center stage.” “It is race consciousness, not blindness to race, that drives such plans.” Consequently, petitioner cannot assert simply that increasing the University’s reliance on a percentage plan would make its admissions policy more race neutral.

Fisher v. Univ. of Tex. at Austin II, 136 S. Ct. 2198, 2213 (2016), (quoting *Fisher v. Univ. of Tex. at Austin I*, 133 S. Ct. 2411, 2433 (Ginsberg, J., dissenting)).

246. JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* 104 (William Rehg trans., 1996) (“[T]he legitimacy of law ultimately depends on a communicative arrangement: as participants in rational discourse, consociates under law must be able to examine where a contested norm meets with, or could meet with, the agreement of all those possibly affected.”)

questions, and develop new shared understandings of the problem of racism.

Administrative equal protection would extend constitutional scrutiny to policies to which it currently does not apply, while making such scrutiny less intense and more procedurally oriented. Even color-blind policies, which decline in any way to consider race in public admission, employment, or housing decisions, could be challenged, in so far as color-blindness is itself a race-conscious objective.²⁴⁷ For example, if a state educational actor with few or no minority members had adopted a color-blind admissions and recruitment policy, that policy would need to be justified on the record by data, arguments, and deliberative procedures that presented plausible grounds for the color-blind approach, and thoughtful consideration before it was adopted. Administrative equal protection would therefore force contentious disagreements about race and racism to take both public and rational forms.

Without minimizing legitimate concerns about racial balkanization and conflict, I believe that we are better served over the long-term by such an approach than we have been by previous attempts at racial indirection. A policy discourse that is policed by the norms of administrative legality might be capable of reconstructing a shared sense of legal obligation on the basis of an accurate account of social realities. Even if such an approach does not yield consensus as to the proper means and ends of race-conscious state action, it will encourage decision-makers and the public at large to better justify and rationally debate their approaches

247. Neil Gotanda, *A Critique of "Our Constitution Is Color-blind"*, 44 *STAN. L. REV.* 1, 18–19 (1991) (“To be racially color-blind . . . is to ignore what one has already noticed The characteristics of race that are noticed (before being ignored) are situated within an already existing understanding of race This pre-existing race-consciousness makes it impossible for an individual to be truly nonconscious of race. To argue that one did not really consider the race of an African American is to concede that there was an identification of Blackness. Suppressing the recognition of a racial classification in order to act as if a person were not some cognizable racial class is inherently racially premised.”)

to racial justice.

Fisher II moves in the direction of this administrative approach to equal protection. In holding that the University of Texas' consideration of race in its admissions decision matrix survived strict scrutiny, the Court first found that "deference must be given" to the University's decision to pursue racial diversity as an educational objective, so long as the University has offered a "reasoned, principled explanation" for that decision.²⁴⁸ This is the equivalent to the *Chevron* analysis described above. The next stage is to determine "whether the use of race is narrowly tailored to achieve the university's permissible goals."²⁴⁹ While narrow tailoring implies a lesser degree of deference than arbitrary-and-capricious review in administrative law, the Court's analysis in *Fisher II* in fact suggests that strict scrutiny has loosened to the point where it approximates the rigorous but modestly deferential posture of review of administrative policy-making.²⁵⁰ The Court focused on the quality of the contemporaneous record before the University, emphasizing that "[b]efore changing its policy the University conducted months of study and deliberation, including retreats, interviews, [and] review of data."²⁵¹ Whereas Justice Alito in his dissent rejected the diversity goal as imprecisely defined, and vigorously challenged the conclusions the University drew from student-body data to justify its policy,²⁵² Justice Kennedy's more deferential analysis found that the University's "assessment appears to have been done with care, and a reasonable determination was made that the University had not yet attained its goals."²⁵³ He urged in conclusion that the University has an "ongoing obligation to

248. *Fisher II*, 136 S. Ct. at 2208.

249. *Id.*

250. *See id.* at 2207–15.

251. *Id.* at 2211 (internal citations and quotations omitted).

252. *See id.* at 2220–28 (Alito, J., dissenting).

253. *Id.* at 2212 (majority opinion).

engage in constant deliberation and continued reflection regarding its admissions policies.”²⁵⁴

Fisher II thus shows Justice Kennedy leading the Court back in the direction of an administrative approach to equal protection. Justice Kennedy emphasizes that the Court must define the bounds of race-conscious policy, but defer to state actors’ reasonable choice of a permissible race-related objective. He states that the Court must scrutinize the evidentiary bases of the means chosen to fulfill that policy, but he does not delve into the minutiae of every empirical judgment and normative inference to second-guess the decision-maker’s conclusions. Instead, he gives weight to the decision-maker’s judgment proportional to the degree of deliberative consideration it gave to the formulation of the policy. Such a modest degree of deference is required for a conception of equal protection that gives space to public actors to take reasonable, but contestable, steps to pursue acceptable race-related objectives. If we wish to allow government bodies to remedy past discrimination or racial isolation, or promote diversity, but we wish such decisions to be made out in the open, before the people, we must also limit the judicial inquiry to an evaluation of the overall quality of the deliberative record that supports the decision-maker’s judgment.

C. *Administrative Equal Protection as Applied to the AFFH Rule*

This approach provides a useful perspective from which to assess the constitutionality of the planning process HUD prescribes in the AFFH rule. The Rule may yet face a challenge for its constitutionality. For example, HUD could deny Community Development Block Grant funding to a locality based on a finding that its Assessment of Fair Housing was in some way deficient: HUD may find that the locality failed to identify with specificity all of the fair

254. *Id.* at 2215.

housing issues in its jurisdiction, such as exclusionary zoning provisions; or it might find that it did not commit to specific goals to address those fair housing issues. The grantee might, in addition to challenging the administrative determination itself, also challenge the constitutionality of the AFFH rule, on the basis of which HUD had made its decisions. I have argued that, because the Rule does not require or recommend the use of racial classifications, it is likely to survive constitutional challenge. But because the rule does raise the salience of race in local policy-making, and arguably constitutes an “automatic and pervasive injection of race into public . . . transactions,”²⁵⁵ a plaintiff might try to argue that it runs contrary to the principles underlying the court’s equal protection jurisprudence. Alternatively, they might argue that the planning rule is indeed a racial classification, simply because it requires grantees to evaluate and to create responses to the racial dimensions of their housing policy. If the Court were sympathetic to either of these claims, it could find the Rule unlawful.²⁵⁶ It could, for example, construe the affirmatively further provisions of the Fair Housing Act narrowly so as to preclude the interpretation HUD promulgated in the Rule, and so preserve the Act’s constitutionality.²⁵⁷

Statutory challenges have already been levied against HUD’s actions under the affirmatively further provisions, though not, to my knowledge, under the new Rule. Before

255. *Texas Dept. of Hous. & Cmty. Aff. v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2525 (2015).

256. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009) (“The Administrative Procedure Act separately provides for setting aside agency action that is ‘unlawful,’ which of course includes unconstitutional action.”).

257. *Clark v. Martinez*, 543 U.S. 371, 380–81 (2005) (“[W]hen deciding which of two plausible statutory constructions to adopt, a court must consider the necessary consequences of its choice. If one of them would raise a multitude of constitutional problems, the other should prevail.”); *see NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 506–07 (1979) (interpreting National Labor Relations Board’s statutory jurisdiction not to include “religiously associated” schools to avoid First Amendment concerns).

HUD's new AFFH rule came out, HUD had withheld funding from Westchester County because the Analyses of Impediments the County had submitted to HUD were repeatedly deemed insufficient. HUD explained in a letter to the County that its most recent AI was insufficient because the County's claim that its municipal "zoning ordinance does not show a disparate or segregative impact . . ." was "not supported by the available data and d[id] not reflect an adequate disparate impact analysis."²⁵⁸ The County subsequently challenged HUD's decision under the Administrative Procedure Act.²⁵⁹ The Second Circuit affirmed the District Court's decision upholding HUD's action:

Because exclusionary zoning can violate the FHA, and because HUD is required to further the policies of that statute, it was reasonable for HUD to require the County to include in its AI an analysis of its municipalities' zoning laws Whenever HUD rejected an AI submitted by the County, it provided a written explanation grounded in the evidentiary record, and it gave the County multiple opportunities to make changes and to resubmit a revised AI. We therefore conclude that HUD's decision to withhold and then reallocate the County's CPD funds was neither arbitrary nor capricious within the meaning of the APA.²⁶⁰

The District Court had engaged in an intensive, if somewhat deferential, review of HUD's explanation of its decision. The case reads like an ordinary judicial review of an administrative action that falls squarely within its statutory mandate. The Second Circuit sought to ensure that the decision comported with the policies of the Fair Housing

258. Letter from U.S. Dept. of Hous. & Urban Dev. to the Honorable Robert P. Astorino, Re: Review of County's July 23, 2013 Zoning Submission; Assurances Required by Aug. 15, 2013 to Avoid Reallocation of Funds (Aug. 9, 2013), <http://www3.westchestergov.com/images/stories/astorino/HUdltr20130809.pdf>.

259. *Cty. of Westchester v. U.S. Dep't of Hous. & Urban Dev.*, 802 F.3d 413 (2d Cir. 2015).

260. *Id.* at 432.

Act, was sufficiently reasoned, and based on the factual record before the agency at the time it made the decision.²⁶¹

In this case, the constitutionality of the agency's interpretation of the Fair Housing Act was not at issue. In a constitutional challenge, the review of the decision, and of the underlying Rule, would be more intense. Constitutional questions are for the Court to settle, without traditional deference to administrative prerogatives. But administrative law considerations concerning the integrity of the decision-making process might nonetheless structure the constitutional analysis. Here the approach in *Yick Wo*, *Fullilove*, *Metro Broadcasting*, and *Fisher II* are relevant. The AFFH rule's focus on encouraging and facilitating evidence-based, well-reasoned, and publicly responsive local housing policy would factor into the analysis of the appropriateness of the means the agency had used to further fair housing. HUD's attempts to give flexibility to local housing authorities, its provisions for public participation in local housing decisions, and its caution against the use of racial classifications, would indicate a procedure calculated to avoid the dangers of arbitrariness that might arise from a one-size-fits all approach. Justice Kennedy's concern to ensure that the Fair Housing Act does not "displac[e] . . . valid government policies"²⁶² is respected by the [R]ule's flexible structure, which requires race-conscious planning without dictating a substantive result. This analysis would focus not on whether the Rule had made racial issues unduly conspicuous in housing policy, but rather on the quality of the procedure by which such issues were discussed and ultimately addressed.

261. *Id.*

262. *Tex. Dept. of Hous. & Cmty. Aff. v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2522 (2015).

CONCLUSION

In a context where race is already highly elevated in public consciousness, and where views on race-conscious public policy differ radically, a judicial effort to conceal legitimate race-related policies is likely to disappoint. I have turned to the recent AFFH rule, general principles of administrative law, and recessive themes in Supreme Court precedent to argue for an alternative conception of equal protection. This conception requires courts to police the administrative means chosen to implement valid race-conscious policies, to ensure that they are evidence-based, reasoned, and sensitive to public feedback. It allows for highly salient and contentious discussions about race. But it encourages public authorities to channel this debate into a rational decision-making process that furthers valid race-related objectives while avoiding unjustifiable, race-based allocations of benefits. It invites us to grapple forthrightly with questions of race, rather than conceal them. We might then develop solutions that are responsive both to constitutional principles of equal protection and to the concrete institutional settings, political controversies, and social circumstances in which those principles operate.