

Affirmative Action as Government Speech

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ABSTRACT

This Article seeks to transform how we think about affirmative action. The U.S. Supreme Court's jurisprudence on the subject may appear to be a seamless whole, but closer examination reveals crucial differences between the cases broadly characterized as involving affirmative action. The government sometimes acts in a race-conscious manner by granting a tangible benefit to members of a minority group for remedial or diversifying purposes. But the government may also undertake remedial or diversifying race-conscious action without it resulting in unequal treatment or disadvantage to nonminorities. Under the Court's current equal protection doctrine, both situations are presumptively unconstitutional. Race consciousness itself has become a constitutional harm, regardless of its tangible effects.

This Article breaks new ground by arguing that, functionally, the Court has come to view race-conscious government action as a form of prohibited government speech. The Court's colorblindness doctrine, which is premised on expressive harm, is fundamentally inconsistent with the rationales for the government speech doctrine under the First Amendment. As the government speech doctrine recognizes, disagreement with the message sent by government action is not alone sufficient to state a constitutional claim. Rather, such disagreement is best addressed through the political process. This Article argues that the Court should use government speech principles to inform its equal protection analysis in cases in which the alleged harm is primarily expressive in nature.

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TABLE OF CONTENTS

INTRODUCTION	4
I. THE EXPRESSIVE HARM THEORY OF THE COLORBLINDNESS DOCTRINE	9
II. EXPRESSIVE HARMS TO RACIAL MINORITIES (OR UNEQUAL PROTECTION)	19
III. RACE CONSCIOUSNESS AS GOVERNMENT SPEECH	29
A. The Government Speech Doctrine	31
B. Applying the Speech Paradigm to Government Race Consciousness	36
1. Race Consciousness as Expressive Conduct	36
2. Race Consciousness as Government Speech: Application	43
3. Race Consciousness as Government Speech: Limitations	48
IV. BENEFITS OF THE SPEECH PARADIGM IN ANALYZING RACE-CONSCIOUS GOVERNMENT ACTION	50
CONCLUSION	57

A government entity has the right to speak for itself. It is entitled . . . to select the views that it wants to express. Indeed, it is not easy to imagine how government could function if it lacked this freedom.¹

Government action dividing us by race . . . promote[s] notions of racial inferiority[,] reinforce[s] the belief . . . that individuals should be judged by the color of their skin, endorse[s] race-based reasoning [and] demeans the dignity and worth of a person . . .²

INTRODUCTION

America is no longer legally divided by race. But Americans remain divided about race. Many believe that we have entered a postracial³ era in which discrimination against racial minorities is largely a thing of the past.⁴ The continued subordinate status⁵ of racial minorities is therefore commonly attributed to other factors, such as class disparities, differences in culture, or lack of individual effort.⁶ Conversely, others believe that a significant portion

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1. *Pleasant Grove City, Utah v. Summum*, 129 S. Ct. 1125, 1131, 555 U.S. 460 (2009) (alteration in original) (citations omitted) (internal quotation marks omitted).
 2. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 746 (2007) (plurality opinion) (citations omitted) (internal quotation marks omitted).
 3. *See, e.g.*, Mario L. Barnes, Erwin Chemerinsky & Trina Jones, *A Post-Racial Equal Protection?*, 98 GEO. L.J. 967, 968 (2010) (describing “post-racialism” as “a set of beliefs that coalesce to posit that racial discrimination is rare and aberrant behavior as evidenced by America’s and Americans’ pronounced racial progress”); Sumi Cho, *Post-Racialism*, 94 IOWA L. REV. 1589, 1594 (2009) (describing postracialism as the “belief that due to the significant racial progress that has been made, the state need not engage in race-based decision-making or adopt race-based remedies, and that civil society should eschew race as a central organizing principle of social action”).
 4. *See* Darren Lenard Hutchinson, *Racial Exhaustion*, 86 WASH. U. L. REV. 917, 919 (2009) (citing polling data to show that “an abundance of statistical data consistently demonstrates that persons of color tend to believe that racism remains a substantial barrier to their social and economic advancement, while whites tend to dismiss racial status as a contemporary marker of disadvantage and privilege”). Indeed, many Americans also believe that discrimination against whites is now as significant a problem as discrimination against racial minorities. *See, e.g.*, Charles M. Blow, *Let’s Rescue the Race Debate*, N.Y. TIMES, Nov. 20, 2010, graph at A19 (citing polling data from a survey by the Public Religion Research Institute in which 48 percent of whites, but only 30 percent of blacks and 32 percent of Hispanics, agreed with the statement that “discrimination against whites has become as big a problem as discrimination against blacks and other minorities”).
 5. *See, e.g.*, Barnes, Chemerinsky & Jones, *supra* note 3, at 982–92 (surveying the statistical data showing continued racial disparities in the areas of income, wealth, education, housing, employment, and the criminal justice system); R.A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 N.Y.U. L. REV. 803, 806–07 (2004) (same).
 6. Hutchinson, *supra* note 4, at 919.

of racial inequality is due to contemporary racial discrimination and the present effects of official and unofficial past discrimination.⁷ These individuals, therefore, tend to be substantially less sanguine that we have achieved a postracial society.

Recent U.S. Supreme Court decisions embrace the philosophy of post-racialism, which carries the doctrinal corollary of government colorblindness as the primary command of the Fourteenth Amendment's Equal Protection Clause.⁸ If race is no longer the problem, then race-conscious government action can no longer be the solution. Such action, adherents of the colorblind Constitution suggest, both punishes "innocent whites" and addresses the wrong problem.⁹ Under this doctrine, race-conscious government action is presumptively unconstitutional regardless of whether it aims to aid or injure historically subordinated minority groups.¹⁰ The Court has accordingly struck down a variety of programs broadly characterized as affirmative action because such programs are race conscious.¹¹

Characterizing all instances of government race consciousness as affirmative action, however, elides the difference between government action having redistributive purposes and effects and that which does not. Certain government programs consider minority status to be a positive factor in allocating a limited

7. *Id.*

8. U.S. CONST. amend. XIV, § 1.

9. *See, e.g.*, Derrick Bell, *Racial Equality: Progressives' Passion for the Unattainable*, 94 VA. L. REV. 495, 516 (2008) ("The [Supreme] Court's treatment of affirmative action policies designed to remedy past employment discrimination is a striking illustration of the judicial determination—shared by much of society—to protect innocent whites from any loss in the race remediation process." (internal quotation marks omitted)).

10. *See, e.g.*, *Johnson v. California*, 543 U.S. 499, 505 (2005) ("We have insisted on strict scrutiny in every context, even for so-called 'benign' racial classifications, such as race-conscious university admissions policies, race-based preferences in government contracts, and race-based districting intended to improve minority representation." (citations omitted)).

11. *See, e.g.*, *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009) (incorporating equal protection doctrine to find that a city's efforts to avoid racially disparate impact in promotions violated Title VII of the Civil Rights Act of 1964); *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) (striking down school districts' race-conscious efforts to prevent resegregation of public schools); *Gratz v. Bollinger*, 539 U.S. 244, 275 (2003) (holding that an undergraduate university violated equal protection because it considered applicants' race mechanistically, rather than as an "individualized" factor, in admissions decisions); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (holding that strict scrutiny applied to a federal program designed to increase participation of underrepresented minority businesses in federal contracts); *Shaw v. Reno*, 509 U.S. 630, 657–58 (1993) (holding that strict scrutiny applied to a state redistricting plan that created a majority black voting district in order to avoid dilution of black voting strength); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 511 (1989) (declaring unconstitutional a city's program that designated a portion of the city's construction funds for minority-owned firms); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 319–20 (1978) (plurality opinion) (striking down University of California–Davis Medical School's admissions program under which a set number of slots were reserved for applicants from underrepresented minority groups).

government resource, such as government contracts or admission to state universities. For example, the federal government may offer financial incentives to federal contractors who hire minority-owned subcontractors, in order to increase diversity among its suppliers and to remedy the lingering effects of racially exclusionary business practices.¹² Under such a program, nonminority subcontractors do not benefit from such financial incentives. Similarly, a state university may consider the fact that an applicant is a member of an underrepresented minority group to be a positive factor in the admission process,¹³ with the result that an otherwise similarly situated nonminority applicant may be rejected. In these scenarios, the distribution of a limited resource is determined in part by race. Thus, one can coherently (although, in my view, incorrectly) argue that such programs violate equal protection because they unequally distribute benefits on irrelevant grounds or for insufficiently weighty reasons.¹⁴ Conversely, one could reasonably conclude that government inaction in the face of known racial inequality unconstitutionally perpetuates that inequality.¹⁵

This Article does not seek to directly critique the Court's cases involving such traditional affirmative action measures. Rather, this Article disaggregates the cases to reveal a new understanding under which government race consciousness by itself need not be seen as a violation of the Equal Protection Clause. Government action can be (and often is) race conscious without creating differential treatment or imposing a substantial tangible disadvantage on nonminorities. For example, a legislature may redraw voting districts to maximize minority voting strength that would otherwise be diluted by virtue of the existing district form without imposing any corresponding voting disadvantage

12. See, e.g., *Adarand*, 515 U.S. at 205–10 (describing the relevant statutory and regulatory provisions).

13. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 315–16 (2003) (describing University of Michigan Law School's policy that considered race as one of a number of variables in admissions decisions); *Gratz*, 539 U.S. at 255–56 (describing University of Michigan's undergraduate admissions policies under which applicants belonging to underrepresented minority groups received additional points on admissions scale).

14. See, e.g., *Adarand*, 515 U.S. at 240 (Thomas, J., concurring in part and concurring in the judgment) (“[T]here is a moral [and] constitutional equivalence between laws designed to subjugate a race and those that *distribute benefits* on the basis of race in order to foster some current notion of equality.” (second alteration in original) (citation omitted) (internal quotation marks omitted)).

15. Indeed, it can be argued that even in the redistributive context, speaking of affirmative action as conferring benefits and disadvantages obscures preexisting inequalities. Thus, a redistributive program can be seen as leveling the playing field to correct for embedded advantages and disadvantages already conferred in a racially unequal manner due to contemporary and past discrimination. While I agree with this perspective, this Article seeks to illuminate the differences between objections to government programs that employ race in a way that reallocates resources and objections to race-conscious government action that are premised primarily on notions of expressive harm.

on nonminority voters.¹⁶ Similarly, a school district may seek to achieve or maintain racial integration through the use of race-conscious student assignment plans, under which the race of all students is equally considered and all students receive a spot in the public schools.¹⁷ Likewise, a city may act in a race-conscious manner by suspending all promotions until they can be made in a manner that does not needlessly exclude minority applicants.¹⁸ These situations all differ from traditional affirmative action in that they do not distribute a limited resource in a race-conscious manner. The objection to such programs therefore cannot be that one person received something that another did not because of race. Rather, the objection is to government race consciousness itself and the message sent thereby.¹⁹

The Court's colorblindness jurisprudence, by deploying the same legal rhetoric and doctrine to examine these different situations, wrongly treats these two categories of cases as constitutionally equivalent. The doctrine in effect means that the government presumptively violates the Constitution whenever its actions convey the message that race still matters in our society.

The colorblindness doctrine is inconsistent with the Court's doctrine in other areas. First, in cases involving alleged dignitary or expressive harms to racial minorities, the Court has consistently held that such harms do not, standing alone, violate the Equal Protection Clause or even warrant heightened judicial scrutiny.²⁰ Second, the Court's colorblindness doctrine is inconsistent with the rationales underlying the government speech doctrine of the First Amendment. Under the government speech doctrine, a government entity is not required to remain neutral when it expresses its own views.²¹ This Article argues that the Court is functionally analyzing race-conscious government action as the expression of a message. Rather than purporting to treat such messages as denials of equal treatment, the Court should instead use government speech principles to inform its equal protection analysis in such cases.

16. See *Shaw*, 509 U.S. at 657–58 (holding that strict scrutiny applied to a state legislature's decision to create a majority black voting district). The fact that minority voters would have a better opportunity to elect representatives of their choice cannot be seen as a “disadvantage” to nonminority voters unless nonminorities' votes are somehow diluted, which was not the case in *Shaw*. See *infra* notes 49–63 and accompanying text (discussing *Shaw*).

17. See *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 711–12 (2007) (striking down race-conscious voluntary school integration plans).

18. See *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009).

19. The lack of a tangible injury raises the question of whether the plaintiffs in such cases should even have standing to sue. This Article addresses the issue of standing as it relates to expressive harms and the colorblindness doctrine in Part IV, *infra*.

20. See *infra* Part II for a discussion of such cases.

21. See *infra* Part III.A for a discussion of the government speech doctrine.

This Article distinguishes the expressive harms of government race consciousness from tangible harms such as differential treatment in the distribution of a limited resource. To be sure, the law recognizes expressive harms as injuries in a variety of contexts, for example under the First Amendment's Establishment and Free Speech Clauses and in the law of defamation. Thus, when speaking of race consciousness as an expressive harm, this Article does not use that term pejoratively to connote the lack of any effect. Rather, the effect is one that is psychological or dignitary.²² Where the harm alleged from government race consciousness is primarily expressive and nonsubordinating (that is, it does not result in differential treatment, racialized distribution of a limited resource, or racial stigmatization to any appreciable degree), this Article argues that First Amendment principles can be helpful in assessing whether the expression amounts to a constitutional injury.²³

Part I of this Article examines the Court's strict colorblindness cases and reveals that the Court's reasoning in such cases revolves around a narrative condemning the message such action expresses. Part II demonstrates that only recently has the Court held that race-conscious government action violates the Equal Protection Clause regardless of tangible harm or unequal treatment. In earlier equal protection cases involving expressive harms to racial minorities, the Court consistently rejected such claims unless they were accompanied by unequal treatment, stigma, or some significant tangible harm. Part III explains the government speech doctrine and argues that the Court should employ First Amendment principles to inform its analysis in the colorblindness cases. Part III also articulates limitations on this theory of race consciousness as government speech. Part IV explains the benefits of applying the speech paradigm to race-conscious government action, including that it would be intellectually honest, consistent with the Court's borrowing of equal protection concepts in free speech cases, and more likely to result in such programs being upheld. This Article concludes with a call for epistemic modesty by the Court. The Court should not lightly disregard the judgment of democratically accountable actors that race consciousness sometimes remains necessary to overcome persistent

22. Cf. Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1527 (2000) (stating that "[a] person suffers expressive harm when she is treated according to principles that express negative or inappropriate attitudes toward her").

23. I do not here address whether hate speech should be protected by the First Amendment, although I acknowledge that the harm of hate speech is often primarily expressive.

racial inequality. At a minimum, it should inform its theory of expressive harm in the strict colorblindness cases with traditional First Amendment principles to allow democratic space for competing messages regarding the continued salience of race.

I. THE EXPRESSIVE HARM THEORY OF THE COLORBLINDNESS DOCTRINE

In his famous dissent in *Plessy v. Ferguson*,²⁴ Justice Harlan declared that “[o]ur [C]onstitution is color-blind, and neither knows nor tolerates classes among citizens.”²⁵ The Court’s contemporary equal protection doctrine purports to take this statement literally and holds that any governmental use of race is presumptively unconstitutional. Several justifications are offered for the colorblindness doctrine. First, supporters of the doctrine argue that the doctrine is driven by constitutional text: The words “equal protection” mean that the government must provide formal equal treatment to all individuals, regardless of purpose or underlying differences in circumstances.²⁶ Second, proponents of the colorblindness doctrine purport to rely on the moral force of constitutional history. The colorblindness doctrine, according to this argument, is the culmination of the hard-fought battle to ensure race neutrality in the law. Absolute government neutrality on issues of race, it is argued, was what Justice Harlan advocated in *Plessy*,²⁷ what civil rights lawyers and activists urged in the

24. 163 U.S. 537 (1896).

25. *Id.* at 559 (Harlan, J., dissenting).

26. *See, e.g., Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 780 (2007) (Thomas, J., concurring) (stating, in a case striking down voluntary school integration plans, that “[i]n place of the color-blind Constitution, the dissent would permit measures to keep the races together and proscribe measures to keep the races apart . . . [and that] no such distinction is apparent in the Fourteenth Amendment”); *Fullilove v. Klutznick*, 448 U.S. 448, 526 (1980) (Stewart, J., dissenting) (“The command of the equal protection guarantee is simple but unequivocal. In the words of the Fourteenth Amendment: ‘No State shall . . . deny to *any* person . . . the equal protection of the laws.’ Nothing in this language singles out some ‘persons’ for more ‘equal’ treatment than others.” (emphasis in original)); John Marquez Lundin, *The Call for a Color-Blind Law*, 30 COLUM. J.L. & SOC. PROBS. 407, 441 (1997) (arguing that the text of the Equal Protection Clause supports the colorblindness doctrine because “it is perfectly clear from the text that the rights granted by the amendments are general and unqualified [and that t]here is thus no textual support for the argument that these rights apply differently to people of different races”).

27. *See, e.g., Parents Involved*, 551 U.S. at 772 (Thomas, J., concurring) (“My view of the Constitution is Justice Harlan’s view in *Plessy*: ‘Our Constitution is color-blind, and neither knows nor tolerates classes among citizens.’”).

1950s and 1960s,²⁸ and what ultimately came to be the law of the land in *Brown v. Board of Education*.²⁹

Legal scholars have criticized these justifications for the colorblindness doctrine as lacking support in the text³⁰ or the original intent³¹ of the post-Civil War constitutional amendments. Critics also charge that the colorblindness doctrine misreads Justice Harlan's dissent in *Plessy*,³² the arguments of civil

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28. See, e.g., *id.* at 747 (plurality opinion) (quoting, as support for the colorblindness doctrine, the statement of counsel Robert Carter at oral argument in *Brown* that “[w]e have one fundamental contention which we will seek to develop in the course of this argument, and that contention is that no State has any authority under the equal-protection clause of the Fourteenth Amendment to use race as a factor in affording educational opportunities among its citizens”).
29. 347 U.S. 483 (1954); see, e.g., *Parents Involved*, 551 U.S. at 746 (“In *Brown v. Board of Education*, we held that segregation deprived black children of equal educational opportunities . . . It was not the inequality of the facilities but the fact of legally separating children on the basis of race on which the Court relied to find a constitutional violation in 1954.” (citations omitted)).
30. As Justice Scalia noted, the bare text of most constitutional provisions cannot answer most interpretive questions. “In textual interpretation, context is everything, and the context of the Constitution tells us . . . to give words and phrases an expansive rather than narrow interpretation—though not an interpretation that the language will not bear.” ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 37 (1997). To posit that the words “equal protection of the law” always, only, and ineluctably mean formal equal treatment requires divorcing those words from the context in which they were written. But even putting aside context for the moment, the text itself does not conclusively answer the pertinent question. It is, after all, the Equal Protection Clause, not the Equal Treatment Clause. Had the Reconstruction Framers meant to require only formal governmental “treatment,” they presumably would have chosen to use that word in the text. Moreover, the word they did use—“protection”—implies, *inter alia*, “[t]hat which . . . preserves from injury.” WEBSTER’S AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1st ed. 1828), available at <http://1828.mshaffer.com>. Under this reading, the government could therefore seek to “protect” rational minorities “equally” by enacting laws to prevent or remedy the harms that fall on them *particularly* and that would remain unredressed absent government action.
31. See, e.g., *Parents Involved*, 551 U.S. at 829 (Breyer, J., dissenting) (citing an array of race-conscious remedial programs enacted during Reconstruction for the proposition that “those who drafted [the Fourteenth] Amendment . . . would have understood the legal and practical difference between the use of race-conscious criteria . . . to keep the races apart, and the use of race-conscious criteria . . . to bring the races together”); Christopher W. Schmidt, *Listening to History? Parents Involved, Brown, and the Colorblind Constitution*, Legal Workshop (Apr. 30, 2009), based on Christopher W. Schmidt, *Brown and the Colorblind Constitution*, 94 CORNELL L. REV. 203, 206 (2008) (arguing that the colorblindness doctrine has “little basis in the original meaning of the Fourteenth Amendment [and that t]he legislators who in 1866 drafted the Amendment also passed distinctly color-conscious legislation designed to help the newly freed slaves”); see also Ian F. Haney López, “A Nation of Minorities”: Race, Ethnicity, and Reactionary Colorblindness, 59 STAN. L. REV. 985, 993 (2007) (“[T]he Congress which drafted the Fourteenth Amendment also enacted numerous laws specifically benefiting blacks.”).
32. See, e.g., Neil Gotanda, *A Critique of “Our Constitution Is Color-Blind,”* 44 STAN. L. REV. 1, 39 (1991) (characterizing Justice Harlan’s dissent as “rejecting the majority’s view that racial segregation is unconnected to oppression” and “refusing to adopt the [majority’s] rigid legalism”); Cedric Merlin Powell, *Blinded by Color: The New Equal Protection, the Second Deconstruction, and Affirmative Inaction*, 51 U. MIAMI L. REV. 191, 203 (1998) (“The theoretical allure of colorblindness begins with an acontextual examination of Justice Harlan’s dissent in *Plessy*: no mention is made of Justice Harlan’s

rights activists,³³ and the Court's decision in *Brown*.³⁴ Some scholars further contend that the Court's colorblindness doctrine is really an ideology serving to ratify and perpetuate existing racial hierarchies.³⁵ This Article does not attempt to resolve these debates. Rather, this Article argues that the contemporary colorblindness doctrine is best understood as the Court condemning certain government messages that contradict postracialism.

Members of the Court have explicitly invoked a theory of expressive harm in striking down remedial or diversifying government action even where no tangible harm occurred. In *Parents Involved in Community Schools v. Seattle School District No. 1*,³⁶ for example, the Court held that two school districts' voluntary efforts to maintain public school integration violated the Equal Protection Clause. In *Parents Involved*, the Seattle and Louisville school districts sought to prevent de facto segregation by adopting plans that took account of race, among other factors, in assigning students to particular schools. Although the plans differed somewhat, both districts sought to ensure that the racial composition of any given school fell within a broad range of the

concern with racial subordination [and] no reference is made to how the concept of race shaped his vision of constitutional equality . . .”).

33. See, e.g., Christopher W. Schmidt, *Brown and the Colorblind Constitution*, 94 CORNELL L. REV. 203, 238 (2008) (“Even if the NAACP . . . briefs in *Brown* led with calls for a colorblind interpretation of the Fourteenth Amendment, the bulk of these briefs were dedicated to demonstrating the dangers of a racial caste system and the harms of segregated schools to children To now portray the NAACP as embracing one claim to the exclusion of the other distorts the historical record.”).
34. See, e.g., Reva Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over Brown*, 117 HARV. L. REV. 1470, 1481–83 (2004) (noting that *Brown*'s reasoning rested on the harms of segregation in public schools, not the condemnation of all racial classifications as per se unconstitutional because, inter alia, the Supreme Court was not yet prepared to embrace the implications that a strict colorblindness principle would have had for a variety of other laws, including antimiscegenation statutes).
35. Professor Siegel, for example, suggests that the current state of equal protection doctrine can be seen as “preservation-through-transformation.” Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1113 (1997) (citing Reva B. Siegel, “*The Rule of Love*”: *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2178–87 (1996)). When a prior legal regime for maintaining racial hierarchies becomes discredited (for example, *Plessy*'s “separate but equal” doctrine), a new rhetoric is developed (for example, colorblindness) that formally disavows that prior regime. The rhetorical or doctrinal distancing from the old regime creates a narrative of progress, which masks the fact that substantive change may be much more limited than the new rhetoric or doctrine suggests. See generally *id.* at 1113–14; cf. Gotanda, *supra* note 32, at 2 (1991) (“[T]he United States Supreme Court's use of color-blind constitutionalism—a collection of legal themes functioning as a racial ideology—fosters white racial domination.”).
36. 551 U.S. 701 (2007).

districts' overall racial composition.³⁷ If a student's assignment to particular school would cause its racial composition to exceed the relevant guidelines, the student would be assigned to a different school. Parents in both districts sued, alleging that the plans violated the Equal Protection Clause. The Court, in a plurality opinion by Chief Justice Roberts and a separate concurring opinion by Justice Kennedy, found the plans unconstitutional.

The Court's reasoning in *Parents Involved* was based entirely on notions of expressive harm.³⁸ The plurality condemned such programs as "demean[ing]"³⁹ the individuals subject to them, because they "promote[d],"⁴⁰ "reinforce[d],"⁴¹ and "endorse[d]"⁴² race consciousness. The plurality further stated that government race consciousness inevitably causes hostility, contributes to stereotypes regarding racial inferiority, and reinforces the idea that individuals should be "judged by ancestry instead of by [their] own merit and essential qualities."⁴³ Of these concerns, the first two, hostility and stereotypes, are clearly expressive in nature. The final rationale involves a rhetorical sleight of hand. School integration plans cannot judge schoolchildren based on their race. Because public school assignments are not based on merit, no judgment of an individual's abilities or worth is involved in making such assignments. What the plurality found objectionable therefore could not have been that the plans at issue themselves involved a race-based judgment, but instead that, through their expressive content, such plans reinforce the perception that race still matters. Whether the government action reinforced certain messages, then, was at the core of the plurality's concerns.

Justice Kennedy, who provided the fifth vote for the outcome in *Parents Involved*, even more explicitly relied on a theory of expressive harm in his

37. Of particular importance to both the plurality and to Justice Kennedy in *Parents Involved* was the fact that each district's guidelines defined the diversity it sought to maintain by reference to the categories "white/non-white" (in Seattle) and "black/other" (in Louisville). *Id.* at 727. These Justices considered this to be proof that the plans were not narrowly tailored to achieve racial diversity:

The districts offer no evidence that the level of racial diversity necessary to achieve the asserted educational benefits happens to coincide with the racial demographics of the respective school districts—or rather the white/nonwhite or black/other balance of the districts, since that is the only diversity addressed by the plans.

Id. (internal quotation marks omitted).

38. An expressive harm can be defined as an alleged harm that "results from the ideas or attitudes expressed through a governmental action, rather than from the more tangible or material consequences that action brings about." 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, 506 (1993).

39. 551 U.S. at 727.

40. *Id.* at 746.

41. *Id.*

42. *Id.*

43. *Id.* (internal quotation marks omitted).

concurring opinion. Justice Kennedy disagreed with the plurality's position that achieving or maintaining racial integration in the public schools can never be a compelling interest in its own right.⁴⁴ However, he voted with the plurality to strike down the plans at issue because they explicitly sent a racial message by their use of express racial categories to determine student assignments. According to Justice Kennedy, "[G]overnmental classifications that command people to march in different directions based on racial typologies can cause a new divisiveness On the other hand, race-conscious measures that do not rely on differential treatment based on [express] individual classifications present these problems to a lesser degree."⁴⁵ Justice Kennedy accordingly stated that a school integration plan that was indisputably race conscious but facially race neutral should not even trigger strict scrutiny:

School boards may pursue the goal of bringing together students of diverse backgrounds and races through other means, including strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race. These mechanisms are race conscious but do not lead to different treatment based on a classification that tells each student he or she is to be defined by race, so it is unlikely any of them would demand strict scrutiny to be found permissible.⁴⁶

For Justice Kennedy, then, we are allowed to see the elephant in the room but not to speak of it. This approach is the apotheosis of race as speech: An expressive harm cannot be inflicted if no message is expressed.⁴⁷ In sum, the true

44. The plurality held that maintaining or achieving racial diversity for its own sake is only a compelling government interest when a school district is seeking to eliminate the present effects of de jure segregation. *See id.* at 720–21 (noting that neither district was currently subject to a judicial finding of maintaining de jure segregation and therefore could not rely on remedying the effects of de jure segregation as a compelling interest). Justice Kennedy and the dissenting Justices disagreed, finding that “[d]iversity, depending on its meaning and definition, is a compelling educational goal that a school may pursue” even absent de jure segregation. *Id.* at 783 (Kennedy, J., concurring).

45. *Id.* at 797.

46. *Id.* at 789.

47. To the extent that a message is thought to be harmful because of the social meaning it carries, that meaning can be derived from what the speaker intends to communicate, what the listener ascribes to the communication, some objective measure of meaning, or some combination of all three. *See* Kelly Sarabyn, *Racial and Sexual Paternalism*, 19 *GEO. MASON U. C.R. L.J.* 553, 558 (2009). In any case, no meaning can be ascribed to a message if the message remains unexpressed, which seems to have been Justice Kennedy's point in *Parents Involved*.

harm perceived by both the plurality and Justice Kennedy in *Parents Involved* is expressive in nature.⁴⁸

*Shaw v. Reno*⁴⁹ similarly found the expressive component of government race consciousness sufficient to state an equal protection claim. In *Shaw*, the North Carolina legislature created a majority black voting district in order to remedy vote dilution⁵⁰ and to ameliorate the present effects of past voting discrimination in North Carolina.⁵¹ The district had an unusual shape because traditional district lines would not have achieved a majority black district due to the geographic dispersion of the black population.⁵² The local Republican Party and individual white voters sued, alleging that the state's creation of the district violated the Equal Protection Clause.

As in *Parents Involved*, there was no allegation in *Shaw* that the government's actions caused a tangible harm. The Supreme Court accepted the district court's findings of fact that the race-conscious redistricting had neither the purpose nor the effect of diluting white voters' voting strength or otherwise discriminating against them.⁵³ Indeed, as commentators have explained:

Under the statewide redistricting plan [in *Shaw*], white voters still constituted a majority in ten, or eighty-three percent, of the twelve congressional districts. With effective control of more than a proportionate share of seats, white voters in North Carolina could not prove, and did not try to prove, that the redistricting plan diluted their relative voting power in intent or effect.⁵⁴

48. At best, the plurality's opinion alluded to two concrete disadvantages imposed by the school assignment plans: (1) one student's parents thought he would fare better at their first-choice school in light of his attention deficit hyperactivity disorder and dyslexia; and (2) another student would have to go to a school farther away from his home. *Parents Involved*, 551 U.S. at 713–14, 717. The plurality's reasoning, however, did not turn upon either of these facts; rather, it rested on the alleged expressive harm.

49. 509 U.S. 630 (1993).

50. Vote dilution occurs when a district form or voting procedure "operate[s] to minimize or cancel out the voting strength of racial minorities," for example, by submerging a minority group within a larger white population that consistently votes as a bloc to defeat the minority group's preferred candidates. *Thornburg v. Gingles*, 478 U.S. 30, 47 (1985) (citations and internal quotation marks omitted).

51. *Shaw*, 509 U.S. at 655–56.

52. *Id.* at 634.

53. *Id.* at 638–39, 641.

54. Pildes & Niemi, *supra* note 38, at 494; see also Deborah Hellman, *The Expressive Dimension of Equal Protection*, 85 MINN. L. REV. 1, 27 (2000) ("In *Shaw*, there were no allegations of vote dilution, thus no concrete harm to white voters as a result of the oddly shaped majority-minority district."). To be clear, the redistricting did have a consequence: White voters would no longer be guaranteed to win all the seats even if they voted as a bloc. But equal protection does not guarantee a right for a single group to perpetually win a disproportionate share of seats. And in any event, the Court's more conservative Justices have insisted that equal protection only protects individuals, not groups. See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 239 (1995) (Scalia, J., concurring in part and

Nonetheless, the *Shaw* Court found that the redistricting triggered strict scrutiny. It did so based solely on what the Court perceived to be the impermissible message of the legislature's conduct.⁵⁵ Redistricting "that is so bizarre on its face that it is unexplainable on grounds other than race,"⁵⁶ the Court held, is presumptively unconstitutional. The reason is not because such a district necessarily causes a concrete injury to any voter, but because of the signal it sends. In other words, "appearances do matter."⁵⁷ The appearance of such a district, according to the Court, "reinforces the *perception* that members of the same racial group . . . think alike [and] share the same political interests . . ."⁵⁸ Moreover, the Court stated, "[t]he *message* that such districting sends to elected representatives is equally pernicious"⁵⁹ because it encourages them to think of their responsibilities only in terms of a single racial group. The Court further reasoned that race-conscious redistricting is constitutionally suspect in all circumstances because it is "divisive,"⁶⁰ creates "antagonisms,"⁶¹ and is "at war with the democratic ideal" of "multiracial, multireligious communities."⁶² The Court

concurring in the judgment) ("Individuals who have been wronged by unlawful racial discrimination should be made whole; but under our Constitution there can be no such thing as either a creditor or a debtor race. That concept is alien to the Constitution's focus upon the individual . . ."). The only injury any individual white voter could have alleged in *Shaw* was the expressive harm of government race consciousness.

55. The Court attempted to analogize the facts of *Shaw* to *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), which involved redistricting that changed the boundaries of the city of Tuskegee, Alabama, "from a square to an uncouth twenty-eight-sided figure in a manner that was alleged to exclude black voters, and only black voters, from the city limits." *Shaw*, 509 U.S. at 640 (internal quotation marks omitted). The *Gomillion* Court held that although the redistricting statute was neutral on its face, the plaintiffs had stated a prima facie equal protection claim because the redrawn district's shape was inexplicable on any ground other than racial segregation. *Gomillion*, 364 U.S. at 341. *Gomillion*, however, unlike *Shaw*, involved not just race consciousness but also a concrete injury from the race-conscious action. In *Gomillion*, the result was to exclude virtually all black voters from the city's boundaries, thereby depriving them of the ability to vote on city matters. See *id.* Nothing remotely similar was alleged in *Shaw*: All voters could still vote in the relevant elections. See *Shaw*, 509 U.S. at 681–82 (Souter, J., dissenting) (arguing that the difference between *Shaw* and other "affirmative action" cases was that in those other cases, race was used "to the advantage of one person . . . at the obvious expense of a member of a different race. . . [and] by contrast, the mere placement of an individual in one district instead of another denies no one a right or benefit provided to others").
56. *Shaw*, 509 U.S. at 644 (internal quotation marks omitted).
57. *Id.* at 647.
58. *Id.* (emphasis added).
59. *Id.* at 648 (emphasis added).
60. *Id.* (quoting *Wright v. Rockefeller*, 376 U.S. 52, 66 (1964) (Douglas, J., dissenting)).
61. *Id.* (quoting *Wright*, 376 U.S. at 67 (Douglas, J., dissenting)).
62. *Id.* at 648–49 (quoting *Wright*, 376 U.S. at 67 (Douglas, J., dissenting)); see also Pildes & Niemi, *supra* note 38, at 501 ("For the [*Shaw*] Court, what distinguishes 'bizarre' race-conscious districts is the signal they send out that, to government officials, race has become paramount and dwarfed all other, traditionally relevant criteria. . . . [This] creates the social impression that one legitimate value has come to dominate all others.").

condemned government race consciousness as “reinforc[ing] the belief, held by too many for too much of our history, that individuals should be judged by the color of their skin.”⁶³

Ricci v. DeStefano,⁶⁴ although nominally decided solely on statutory grounds,⁶⁵ also applied the Court’s strict colorblindness doctrine. In *Ricci*, the city of New Haven administered a qualifying exam to determine eligibility for promotions to lieutenant or captain in the fire department.⁶⁶ The test, combined with civil service rules and union agreements governing promotions, resulted in significant racial disparities in who would be eligible for promotion. Out of seventy-seven firefighters who took the lieutenant’s exam, ten would have been eligible for promotion, all of them white. Out of forty-one firefighters who took the captain’s exam, nine would have been eligible for promotion—seven whites and two Latinos. No blacks were eligible for promotion to either captain or lieutenant.

Mindful of the racial disparity that would result from the promotions and concerned about liability under the disparate impact provisions of Title VII of the Civil Rights Act of 1964,⁶⁷ the city’s attorney urged the city not to certify the test results until it could explore “whether there are other ways to test for [the promotions] that are equally valid with less adverse [racial] impact.”⁶⁸ The city held public hearings regarding the issue and ultimately decided not to certify the results. Thus, no promotions were made.⁶⁹

The disappointed firefighters who expected a promotion sued, alleging that the city’s actions violated the disparate treatment provisions of Title VII

63. *Id.* at 657. Again, as in *Parents Involved*, assigning voters to the district at issue in *Shaw* involved no judgment of an individual’s worth or merit.

64. 129 S. Ct. 2658 (2009).

65. Because the Court concluded that the case could be fully resolved on Title VII grounds, it technically did not reach the constitutional question. *Id.* at 2681. *Ricci* nonetheless borrowed from constitutional doctrine in at least two ways in reaching its holding. First, as explained below, it derived the strong basis in evidence standard from its earlier equal protection cases, not its Title VII jurisprudence. Second, the Court’s language and reasoning throughout the opinion was reflective of equal protection doctrine. See Richard Primus, *The Future of Disparate Impact*, 108 MICH. L. REV. 1341, 1354 (2010) (“Despite the Court’s professed intention to avoid equal protection issues, the *Ricci* premise is properly understood as a constitutional proposition as well as a statutory one.”).

66. *Ricci*, 129 S. Ct. at 2664.

67. Title VII prohibits both “disparate treatment” (intentional discrimination) and “disparate impact” (racial disparities caused by facially neutral employment practices). See 42 U.S.C. § 2000e-2(a)(1), (k) (2006).

68. *Ricci*, 129 S. Ct. at 2670 (citations omitted) (internal quotation marks omitted).

69. The city’s Civil Service Board was responsible for certifying the list of applicants who passed the test, from which the candidates for promotion would be chosen. *Id.* at 2665. At the end of a series of public hearings, the Board split 2–2 with regard to whether to certify the test results, with the consequence that the list was not certified and no promotions could be made. *Id.* at 2671.

because they were race conscious. The Supreme Court agreed, holding that of Title VII's two antidiscrimination provisions—disparate impact and disparate treatment—the latter generally trumps the former. Borrowing from its affirmative action cases under the Equal Protection Clause,⁷⁰ the Court held that Title VII generally prohibits an employer from “tak[ing] adverse employment actions because of an individual’s race”⁷¹ in order to voluntarily correct for a cognizable disparate impact on persons of a different race. Rather, the employer must prove not only that the business practice at issue causes a substantial racial disparity, but also that the employer has a strong basis in evidence to believe it would lose a disparate impact lawsuit if one were brought.⁷²

Ricci is relevant for present purposes because of its connection to the Court’s equal protection jurisprudence. Title VII requires that an employee suffer a tangible “adverse employment action” in order to state a claim.⁷³ The Court’s strict colorblindness doctrine, however, does not. Rather, *Ricci*’s constitutionally influenced reasoning found the injury in the expressive component of government race consciousness.⁷⁴

Given that no promotions were made, there was no formal unequal treatment in *Ricci*.⁷⁵ Contrary to the popular narrative of *Ricci*, which blamed raw

70. *Id.* at 2675–76 (setting out the equal protection standard “that certain government actions to remedy past racial discrimination . . . are constitutional only where there is a strong basis in evidence that the remedial actions were necessary,” and applying that standard to Title VII (internal quotation marks omitted)).

71. *Id.* at 2673.

72. As the Court explained, the existence of a statistically significant racial disparity establishes a prima facie Title VII disparate impact case. However, it does not establish liability

because the City could be liable for disparate-impact discrimination only if the examinations were not job related and consistent with business necessity [the defenses to disparate impact liability], or if there existed an equally valid, less-discriminatory alternative that served the City’s needs but that the City refused to adopt [the plaintiff’s rebuttal if such defenses are proved].

Id. at 2678.

73. *Id.* at 2673; *see also* *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67 (2006) (finding that Title VII’s antiretaliation provision requires a tangible “injury or harm,” either inside or outside of the workplace).

74. Understanding these cases as premised on expressive harms also helps explain the apparent inconsistency between Justice Kennedy’s concurrence in *Parents Involved*, approving the use of race-conscious but facially neutral measures, and his opinion for the Court in *Ricci*. If the message sent by government race consciousness, rather than the race consciousness itself, is the constitutional injury, then such an injury occurred in *Ricci* because the city’s actions expressly communicated its racial concerns. By contrast, race-conscious but facially neutral school integration measures, such as the location of a new magnet school, do not expressly send a message about race. *Cf.* *Primus*, *supra* note 65, at 1372–74 (positing a “visible victims” reading of *Ricci* under which the harm would be the “divisive social meaning” of the city’s actions).

75. *See Ricci*, 129 S. Ct. at 2696 (Ginsburg, J., dissenting) (“[The city officials] were no doubt conscious of race . . . but this did not mean they had engaged in racially disparate treatment. . . . All

racial politics for denying the disappointed firefighters the promotions they had earned, the plaintiffs did not actually have a vested right to promotion. At most, they, like all the other firefighters, were deprived of the opportunity to be considered for promotions at that time based on the results of that test.⁷⁶ Thus, unlike remedial or diversifying affirmative action programs that involve the distribution of a limited resource, the city's action in *Ricci* did not allocate a resource on the basis of race.⁷⁷

There was also no claim in *Ricci* that the city's actions subordinated or stigmatized the disappointed firefighters because of their race, even if they were formally treated equally.⁷⁸ What was left, then, as in *Shaw* and *Parents Involved*,

the test results were discarded, no one was promoted, and firefighters of every race will have to participate in another selection process to be considered for promotion." (alterations in original omitted) (internal quotation marks omitted)); see also Helen Norton, *The Supreme Court's Post-Racial Turn Towards a Zero-Sum Understanding of Equality*, 52 WM. & MARY L. REV. 197, 245 (2010) ("Mr. Ricci was not treated differently than any other firefighter based on race, and in fact was not treated differently than any other firefighter at all: the test results were discarded for all, regardless of race, and no one was promoted, regardless of race."). Indeed, it was primarily for this reason that the district court rejected the plaintiffs' equal protection claim in *Ricci*. See *Ricci v. DeStefano*, 554 F. Supp. 2d 142, 160–62 (D. Conn. 2006) (rejecting the plaintiffs' equal protection claim because, inter alia, no unequal treatment occurred). *Ricci* is therefore in substantial tension with the Court's earlier decision in *Palmer v. Thompson*, 403 U.S. 217 (1971), which held that some actual differential treatment must occur in order for an equal protection injury to exist. *Palmer* is discussed in detail in Part II, *infra*.

76. *Ricci*, 554 F. Supp. 2d at 160 ("[A]pplication of the [civil service rules] would [only] give top scorers an *opportunity* for promotion, depending on the number of vacancies, but no *guarantee* of promotion; it is even conceivable that the applicant with the highest score never would be promoted." (emphasis in original) (internal quotation marks omitted)). The higher-scoring test takers were differently situated from those who scored lower in the following sense: Under the civil service rules, they may have had a greater hope of being promoted if vacancies were available. In other words, a sufficiently high score was a necessary, but not sufficient, condition for promotion. Accordingly, those firefighters with higher scores perhaps had a greater hope of promotion than those with lower scores. This attenuated hope, however, is not the equivalent of a vested right to promotion. To the extent those firefighters were deprived of something, it was the expectation that promotions would continue to be made without regard to the existing pattern of minority exclusion.
77. As Justice Ginsburg noted in dissent, it is for this reason that "[t]his litigation does not involve affirmative action" as traditionally defined. *Ricci*, 129 S. Ct. at 2700 (Ginsburg, J., dissenting). The equal protection cases from which the *Ricci* Court drew the strong basis in evidence standard all involved traditional affirmative action measures by which the government, for putatively worthy goals, distributed a benefit on the basis of race. *Ricci* is therefore not only in tension with cases like *Palmer v. Thompson*, but also with the very precedents upon which it purported to rely.
78. As discussed in Part II, *infra*, this Article contends that government action imposing racial stigma is a proper area for robust judicial review under the Equal Protection Clause. Stigmatic harms are those messages and practices that have over time and in historical context acquired a defined social meaning of inferiority or other negative traits associated with a particular characteristic, such as race. See generally Lenhardt, *supra* note 5, at 813–48 (describing the aspects of racial stigma). By way of illustrating the distinction between stigmatic harm and other expressive harms, this Article in Part II, *infra*, discusses in detail the differences between the alleged harm at issue in *Ricci* and that at

was an expressive harm.⁷⁹ The disparate impact provisions of Title VII require that employers be cognizant of even unintentional racial disparities, with an eye toward whether they have been caused by “needlessly exclusionary”⁸⁰ business practices. It is that race consciousness—and more specifically, the message sent by government action to correct such disparities—that violated the Court’s colorblindness doctrine.⁸¹

Parents Involved, *Shaw*, and *Ricci* hold that the Equal Protection Clause is presumptively violated whenever the government acts in a race-conscious manner, even if there is no unequal treatment or tangible injury, because such action allegedly expresses a divisive social message or provokes resentment. As is more fully developed in Part III, this Article contends that in the absence of concrete injury, differential treatment, or racial stigmatization, the Supreme Court should leave debates about social meaning to the democratic process. At a bare minimum, however, the Court should be consistent regarding when expressive harms, standing alone, violate the Equal Protection Clause. As demonstrated in the following Part, notwithstanding the Court’s solicitude for claims of expressive harm in the affirmative action context, it has rejected such claims when they involve the stigmatization of racial minorities unless they are accompanied by some tangible harm or unequal treatment.

II. EXPRESSIVE HARMS TO RACIAL MINORITIES (OR UNEQUAL PROTECTION)

The contrast between the Court’s willingness to accept claims involving primarily expressive harms in the context of affirmative action and its disregard

issue in *Brown v. Board of Education*. Although both appear to present circumstances in which the expressive component of race-conscious action alone was sufficient to create an equal protection harm regardless of formal equality of treatment, I argue that the cases in context are profoundly different. Most notably, the government’s race-conscious segregation in *Brown* caused stigmatization of black schoolchildren, which affected their educational opportunities. By contrast, the plaintiffs in *Ricci* did not suffer racial stigmatization and/or tangible harm caused thereby.

79. See generally Norton, *supra* note 75, at 249–50 (discussing *Ricci* and suggesting, inter alia, that the case can be understood as one about social meaning). See also Primus, *supra* note 65, at 1371 (stating that the Court’s concern in such cases “is a concern about social meaning . . . [that] the government sees people as members of racial groups rather than as individuals”).

80. *Ricci*, 129 S. Ct. at 2700 (Ginsburg, J., dissenting).

81. Indeed, Justice Scalia’s concurrence in *Ricci* explicitly raised the connection between the Court’s equal protection colorblindness jurisprudence and its decision in *Ricci*. He argued that the theory of disparate impact liability requires employers to act in a race-conscious manner in this sense: In order to avoid or remedy a racially disparate impact, one must first notice the racial disparity. Justice Scalia suggested that since the Court’s precedents generally prohibit the government itself from noticing race, it may also be unconstitutional for the government to require others to do so. See *id.* at 2682 (Scalia, J., concurring).

of such claims when premised upon subordination of minorities is striking. Both situations involve claims that the social meaning of government action inflicts an expressive harm. In the cases discussed in the previous Part, the alleged harm is white resentment, divisiveness, and the contradiction of postracialism that results from the government's race-conscious action intended to aid racial minorities. In the cases discussed in this Part, the alleged harm is stigmatization of racial minorities by virtue of government action that treats them as inferior, undesirable, dangerous, or threatening to white purity. One need not believe that the expressive harms in the latter category are necessarily more significant than those in the former to think that a doctrine premised on expressive harm would presumably treat both similarly. Yet the Court has consistently rejected constitutional claims based primarily on expressive harms suffered by racial minorities.⁸²

In *Memphis v. Greene*,⁸³ for example, the City of Memphis, at the request of residents of a predominantly white area, closed a street running through their neighborhood. The result of the street closing was to separate the white area from the African American area bordering it. Residents of the African American neighborhood sued, alleging two distinct theories. The first was that the street closing violated 42 U.S.C. § 1982⁸⁴ by impairing their property interests. The Court rejected this claim, finding no concrete impairment of their property interests, such as depreciation of the economic value of their property, caused by the street closing. Plaintiffs separately argued that the street closing violated the Thirteenth Amendment⁸⁵ as an expressive harm imposing a "badge or incident of slavery,"⁸⁶ whether or not it inflicted a tangible economic harm upon individual residents of the black neighborhood. Plaintiffs' Thirteenth Amendment theory was that the separation of the neighborhoods conveyed a stigmatizing message of blacks as "undesirable"⁸⁷ persons whose presence would

82. As discussed toward the end of this Part, not even in *Brown v. Board of Education*, 347 U.S. 483 (1954), did the Supreme Court find that the expressive harm of de jure segregation standing alone violated equal protection.

83. 451 U.S. 100 (1981).

84. Section 1982 provides that "[a]ll citizens of the United States shall have the same right . . . to inherit, purchase, lease, sell, hold, and convey real and personal property." 42 U.S.C. § 1982 (2006).

85. U.S. CONST. amend. XIII.

86. In addition to prohibiting literal slavery and involuntary servitude, the Thirteenth Amendment has been interpreted to prohibit "badges and incidents of slavery," that is, the lingering vestiges of the slave system. *See, e.g.*, *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 413 (1968) (holding that the Thirteenth Amendment empowered Congress to enact legislation prohibiting private housing discrimination).

87. *Greene*, 451 U.S. at 109.

disrupt and devalue the “tranquil[]”⁸⁸ white neighborhood. Plaintiffs also submitted expert testimony regarding the negative psychological effects of the resultant segregation on black residents, who would likely see the street closing as a “monument to racial hostility.”⁸⁹

The Court, while accepting that the Thirteenth Amendment reaches the badges and incidents of slavery,⁹⁰ rejected the argument that the harm in *Greene* amounted to a violation of the Thirteenth Amendment. The Court characterized the real-world impact of the street closing as de minimis because, in the Court’s view, it amounted to a mere inconvenience to black residents.⁹¹ The lack of a substantial impairment of a tangible interest, according to the Court, left only the expressive harm of de facto segregation. The Court dismissed the significance of that injury in a single sentence: “To regard [the street closing] as a form of stigma so severe as to violate the Thirteenth Amendment would trivialize the great purpose of that charter of freedom.”⁹² The Court found this to be the case despite significant evidence in the record regarding the racialized⁹³ context of the decision to close the street,⁹³ including the district court’s factual finding that the white neighborhood had been developed “as an exclusive residential neighborhood for white citizens and [that] these characteristics have been maintained.”⁹⁴ Under *Greene*, then, expressive harms to racial minorities are constitutionally trivial when unaccompanied by any substantial effect on their material interests.⁹⁵

88. *Id.* at 119.

89. *Id.* at 140 (Marshall, J., dissenting).

90. *Id.* at 124–25 (majority opinion). More precisely, the Court stated that the Thirteenth Amendment empowers Congress to enact legislation prohibiting the badges and incidents of slavery; it left open the question of whether the Thirteenth Amendment itself, absent such legislation, also reaches the badges and incidents of slavery. *Id.* at 125–26. For a full discussion of this issue, see, for example, William M. Carter, Jr., *Race, Rights, and the Thirteenth Amendment: Defining the Badges and Incidents of Slavery*, 40 U.C. DAVIS L. REV. 1311 (2007); Jennifer Mason McAward, *The Scope of Congress’s Thirteenth Amendment Enforcement Power After City of Boerne v. Flores*, 88 WASH. U. L. REV. 77 (2010).

91. *Greene*, 451 U.S. at 111–12, 119 (stating that although “the motorists who will be inconvenienced by the closing are primarily black, the extent of the inconvenience is not great” and that “[t]he closing has not affected the value of property owned by black citizens, but it has caused some slight inconvenience to black motorists”).

92. *Id.* at 128.

93. *See id.* at 137–47 (Marshall, J., dissenting) (summarizing the trial testimony and findings of fact, and noting that “[t]he city of Memphis has an unfortunate but very real history of racial segregation”).

94. *Id.* at 137; *see also* David Tyler, *Traffic Regulation or Racial Segregation? The Closing of West Drive and Memphis v. Greene (1981)*, 66 TENN. HIST. Q. 56 (2007), available at http://dlynx.rhodes.edu/jspui/bitstream/10267/2400/1/Hollywood_springdale_David_Tyler.pdf (describing in detail the history of racial segregation and hostility in the era leading up to *Greene*).

95. Plaintiffs also alleged that the city’s actions violated the Equal Protection Clause. The Court rejected this claim, holding that “the absence of proof of discriminatory intent forecloses any claim that the

*Palmer v. Thompson*⁹⁶ provides another example of the Court's disdain for expressive harms when suffered by racial minorities. In *Palmer*, residents of Jackson, Mississippi, sued the city for maintaining segregated public facilities.⁹⁷ In response to a ruling that such facilities violated the Equal Protection Clause, the city desegregated its public parks, auditoriums, zoo, and golf courses.⁹⁸ However, the city refused to desegregate its public swimming pools, choosing instead to close them all.⁹⁹

The plaintiffs in *Palmer* filed a subsequent lawsuit seeking to enforce the desegregation decree by requiring the city to reopen the pools. Plaintiffs alleged that the city's action violated both the Equal Protection Clause and the Thirteenth Amendment because it amounted to an official expression of the message that blacks were "so inferior that they [were] unfit to share with whites this particular type of public facility."¹⁰⁰ The historical and factual context¹⁰¹ of this message could not have been lost on the Court; indeed, much of it was directly presented in the petitioners' briefs and affidavits.¹⁰² Mississippi was one of the strongholds of Jim Crow.¹⁰³ Due to Jackson's staunch

official action challenged in this case violates the Equal Protection Clause" *Greene*, 451 U.S. at 119.

96. 403 U.S. 217 (1971).

97. *Id.* at 218–19 (describing the procedural history of the case).

98. *Id.* at 219.

99. *Id.*

100. *Id.* at 266 (White, J., dissenting). Given that the city agreed to desegregate all its public facilities other than swimming pools, it seems likely that city officials and white residents found something about associating with blacks in this context to be particularly objectionable. It is reasonable to suppose that stereotypes regarding black cleanliness and of African American men as hypersexualized predators created especially heightened resistance to integrating the pools. See generally JEFF WILTSE, *CONTESTED WATERS: A SOCIAL HISTORY OF SWIMMING POOLS IN AMERICA* 154–80 (2007) (discussing the history of and resistance to efforts to desegregate municipal swimming pools). See also GEORGE M. FREDRICKSON, *THE BLACK IMAGE IN THE WHITE MIND: THE DEBATE ON AFRO-AMERICAN CHARACTER AND DESTINY 1817–1914*, at 252 (1987); A. LEON HIGGINBOTHAM, JR., *IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD* 41–47 (1978); Martha A. Myers, *The New South's "New" Black Criminal: Rape and Punishment in Georgia, 1870–1940*, in *ETHNICITY, RACE, AND CRIME* 145, 146 (Darnell F. Hawkins ed., 1995).

101. I provide such context here not as an historical exercise but because, as the Court has recently reiterated, "Context matters when reviewing race-based governmental action under the Equal Protection Clause." *Grutter v. Bollinger*, 539 U.S. 306, 327 (2003).

102. See Brief for Petitioners at 4, *Palmer*, 403 U.S. 217 (No. 107), 1970 WL 136648, at *4 ("The City of Jackson and the State of Mississippi have for many years maintained a steel-hard, inflexible, undeviating official policy of segregation." (quoting *United States v. City of Jackson*, 318 F.2d 1, 5 (5th Cir. 1963)) (internal quotation marks omitted)).

103. See, e.g., TAYLOR BRANCH, *PARTING THE WATERS* 482–91 (1988) (describing Mississippi's segregationist policies).

maintenance of an official policy of segregation, civil rights activists targeted the city for Freedom Rides in 1961.¹⁰⁴ The Freedom Rides were aimed at testing the legal force of the Supreme Court's decision in *Boynton v. Virginia*,¹⁰⁵ which held segregation in interstate passenger transportation facilities to be illegal. The city responded by beating, arresting, and jailing Freedom Riders.¹⁰⁶ These events occurred one year prior to the filing of the lawsuit in *Palmer*.

One year after the desegregation lawsuit in *Palmer* was filed, Medgar Evers, the National Association for the Advancement of Colored People (NAACP) Field Secretary for Mississippi, was assassinated at his home in Jackson by a white supremacist named Byron De La Beckwith.¹⁰⁷ Despite overwhelming evidence of Beckwith's guilt, all-white juries twice deadlocked, leading to mistrials.¹⁰⁸ During the second trial, Ross Barnett, a former governor of Mississippi and an ardent segregationist,¹⁰⁹ strode into the courtroom and shook Beckwith's hand in a show of support.¹¹⁰

Palmer, like *Greene*, involved a message with a clear text, context, and subtext. The message's text was unmistakable. Integrating the swimming pools was a line the city would not cross because of white residents' revulsion at associating with blacks in intimate settings. The message's context, as described above, involved a city and a state wielding official power to maintain apartheid. The message's subtext was equally clear: Blacks were unfit for such association because they were inferior, unclean, and dangerous. Indeed, the semiotic function of de jure segregation was as important as its instrumental purpose of keeping the races physically separate.¹¹¹ The *Palmer* Court nonetheless rejected

104. See RAYMOND ARSENAULT, FREEDOM RIDERS: 1961 AND THE STRUGGLE FOR RACIAL JUSTICE 251–94 (2006).

105. 364 U.S. 454 (1960).

106. See BRANCH, *supra* note 103, at 482 (describing the treatment of Freedom Riders in Mississippi, including Jackson); see also Interview by Charlene Thompson With Hillman Frazier in Jackson, Miss. (Aug. 5, 1998), available at <http://mshistory.k12.ms.us/articles/60/index.php?s=extra&id=258> ("Allen C. Thompson [the mayor of Jackson during the Freedom Rides and the *Palmer v. Thompson* litigation] was . . . known for the famous Thompson Tank. He used that to arrest the marchers at the time. And also he used the police force and the fire department to spray the marchers at the time.").

107. See generally ADAM NOSSITER, OF LONG MEMORY: MISSISSIPPI AND THE MURDER OF MEDGAR EVERS (1994). See also TAYLOR BRANCH, PILLAR OF FIRE: AMERICA IN THE KING YEARS 108 (1998) (discussing Evers's assassination).

108. NOSSITER, *supra* note 107, at xiv.

109. Among other matters, Barnett had been held in contempt of court for obstructing the court-ordered desegregation of the University of Mississippi. See *Meredith v. Fair*, 328 F.2d 586 (5th Cir. 1962) (en banc).

110. NOSSITER, *supra* note 107, at 108–09.

111. See Anderson & Pildes, *supra* note 22, at 1528 ("Racial segregation sends the message that blacks are untouchable, a kind of social pollutant from which 'pure' whites must be protected. . . . Once

the plaintiffs' Thirteenth Amendment argument, stating that accepting their claim would require the Court to "severely stretch [the Thirteenth Amendment's] short simple words and do violence to its history."¹¹²

The Court also rejected the plaintiffs' equal protection claim, reasoning that no denial of equal protection occurred because all persons were treated equally. The effect of the city's action was that the public pools were closed to all citizens, regardless of race. The key to the equal protection inquiry, according to *Palmer*, is the "actual effect"¹¹³ of the government action. The Court held that absent some action "affecting blacks differently from whites,"¹¹⁴ the Equal Protection Clause provides no relief, notwithstanding the government's motivation or dignitary harms caused by the government's action.¹¹⁵

While *Palmer* and *Greene* are older cases, and *Palmer's* highly formalistic view of equal protection has been criticized,¹¹⁶ the Court has neither overruled nor disclaimed these cases. Indeed, the Court's more conservative Justices have, until *Ricci*, adhered to the view that some actual differential treatment is required to state an equal protection claim. Justice Scalia wrote:

[I]t could be argued that discrimination is not legitimated by being applied, so to speak, indiscriminately; that the unlawfulness of treating one person differently on irrelevant grounds is not erased by subjecting everyone else to the same unlawfulness. The response to this is . . . "treated differently" [is] only pertinent . . . in the sense of being deprived of any benefit[,] subjected to any slight or obloquy [or] [d]eprecat[ing] [the person's] group, and thereby stigmatiz[ing] his own personality.¹¹⁷

people share an understanding that segregation laws express contempt for blacks, these laws constitute blacks as an 'untouchable,' stigmatized caste."); Reginald Oh, *Interracial Marriage in the Shadows of Jim Crow: Racial Segregation as a System of Racial and Gender Subordination*, 39 U.C. DAVIS L. REV. 1321, 1324 (2006) ("The systematic physical and social separation of the white and black races was fundamental to maintaining a social system of white supremacy and black inferiority.").

112. *Palmer v. Thompson*, 403 U.S. 217, 226 (1971).

113. *Id.* at 225.

114. *Id.*

115. As an example of such a cognizable effect, the Court cited *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), wherein "the Alabama Legislature's gerrymander of the boundaries of Tuskegee excluded virtually all Negroes from voting in town elections." *Palmer*, 403 U.S. at 225.

116. See, e.g., William M. Carter, Jr., *A Thirteenth Amendment Framework for Combating Racial Profiling*, 39 HARV. C.R.-C.L. L. REV. 17, 33-36 & nn.85-96 (2004) and authorities cited therein.

117. *Powers v. Ohio*, 499 U.S. 400, 424 (1991) (Scalia, J., dissenting) (internal quotation marks omitted). In *Powers*, the Court extended its holding in *Batson v. Kentucky*, 476 U.S. 79 (1986), to encompass race-based peremptory jury challenges where the defendant and the excluded juror are of different races. The Court reasoned that the defendant in such cases had a kind of third-party standing to object to the racialized treatment of the stricken juror, despite the fact that the

*Brown v. Board of Education*¹¹⁸ is often misunderstood as resting solely on the expressive harm of racial segregation. To be sure, in holding de jure segregated public schools to be unconstitutional, the *Brown* Court reasoned that such schools “denot[ed] the inferiority of the negro group.”¹¹⁹ Segregated schools denoted black inferiority because state-sponsored physical separation of the races had a stigmatizing social meaning as to blacks.¹²⁰ However, stigmatization flows not merely from the expression of a message of race consciousness, but from the content and context of such a message.¹²¹ State-sponsored segregation imposed a stigma, harkening back to the Slave Codes and Black Codes,¹²² of blacks as “inferior and degraded”¹²³ in order to maintain white supremacy.¹²⁴ *Brown*’s concern with social meaning, then, was not with race as an abstraction, but with the imposition of racial stigma throughout American history as a means of subordinating blacks and reinforcing white supremacy.

Brown did hold state-sponsored segregation in public schools to be unconstitutional because of the psychological damage to black schoolchildren.¹²⁵ The Court found the stigmatizing harm of segregation to violate the Equal Protection Clause despite evidence “that the Negro and white schools involved have been equalized, or are being equalized, with respect to buildings, curricula, qualifications and salaries of teachers, and other ‘tangible’ factors.”¹²⁶ But even

defendant himself would presumably suffer no prejudice by having a juror of his own race seated on the jury. *Powers*, 499 U.S. at 410–11. Justice Scalia dissented because, in his view, race-based peremptory challenges are based on the “undeniable reality . . . that all groups tend to have particular sympathies and hostilities—most notably, sympathies . . . towards their own group members.” *Id.* at 424 (Scalia, J., dissenting). Because, Justice Scalia reasoned, “that reality is acknowledged as to *all* groups, and forms the basis for peremptory strikes as to *all* of them,” there is neither unequal treatment nor opprobrium or stigma. *Id.*; see also *United States v. Armstrong*, 517 U.S. 456, 465 (1996) (holding that under “ordinary equal protection standards . . . , [in order to] establish a discriminatory effect in a race case, the claimant must show that similarly situated individuals of a different race were not prosecuted”).

118. 347 U.S. 483 (1954).

119. *Id.* at 494.

120. See Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 *YALE L.J.* 421, 427 (1960) (“[T]he social meaning of segregation is the putting of the Negro in a position of walled-off inferiority . . .”).

121. See, e.g., Lenhardt, *supra* note 5, at 848–64 (discussing the historical and social science evidence regarding the role of context in the imposition of racial stigma).

122. For a discussion of the Slave Codes and Black Codes, see Carter, *supra* note 116, at 56–68.

123. *Plessy v. Ferguson*, 163 U.S. 537, 560 (1896) (Harlan, J., dissenting).

124. Black, *supra* note 120, at 424–25 (“The South fought to keep slavery, and lost. Then it tried the Black Codes, and lost. Then it looked around for something else and found segregation. The movement for segregation was an integral part of the movement to maintain and further ‘white supremacy’ . . .”).

125. *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954).

126. *Id.* at 492.

Brown's holding on this point did not go as far as the contemporary Court's strict colorblindness doctrine. *Brown's* holding regarding the psychic injury to black schoolchildren was premised on the fact that the stigmatization interfered with their educational opportunities. The *Brown* Court stated:

Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law, for the policy of separating the races is usually interpreted as denoting the inferiority of the Negro group. A sense of inferiority *affects the motivation of a child to learn*. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of negro children and to *deprive them of some of the benefits they would receive* in [an] integrated school system.¹²⁷

In *Brown*, then, the Court found that public school segregation violated the Equal Protection Clause because segregation's message (black inferiority) occurred in a context (the history of racial subjugation) where it imposed a dignitary harm (stigma) having concomitant effects (psychic injury and diminution of educational opportunity).¹²⁸ By contrast, in *Palmer* and *Greene*, although many of these same elements were present, the Court found that the absence of tangible harm or unequal treatment rendered equal protection unavailing.

*Loving v. Virginia*¹²⁹ is the closest the Court has come to accepting a claim of expressive harm in a case involving subordination of racial minorities. In *Loving*, the Court held that Virginia's prohibition of marriages between whites and nonwhites was unconstitutional. The state argued that its laws did not violate the Equal Protection Clause because the statutes "punish[ed] equally both the white and the Negro participants in an interracial marriage."¹³⁰ Thus, the state argued, no unequal treatment occurred. The Court rejected the argument that this formal equal treatment immunized the statute from strict

127. *Id.* at 494 (alterations in original omitted) (emphasis added); *cf.* *Shaw v. Reno*, 509 U.S. 630, 682 n.4 (Souter, J., dissenting) (distinguishing *Shaw* from *Brown* by noting that "a principal consequence of school segregation was inequality in educational opportunity provided, whereas use of race (or any other group characteristic) in districting does not, without more, deny equality of political participation").

128. *But see* Anderson & Pildes, *supra* note 22, at 1543–45 (arguing that desegregation cases subsequent to *Brown* did not expressly rely on the consequences of racial stigmatization in holding segregation in other public facilities unconstitutional); Hellman, *supra* note 54, at 10 (arguing that, although *Brown's* holding is grounded on segregation's psychic damage and educational harm, "[t]he state may not adopt policies that express a message of unequal worth . . . [regardless of] whether the state action causes [such] concrete harm to identifiable people").

129. 388 U.S. 1 (1967).

130. *Id.* at 8.

scrutiny. The Court stated, “[W]e reject the notion that the mere equal application of a statute containing racial classifications is enough to remove the classifications from the Fourteenth Amendment’s proscription of all invidious racial discriminations.”¹³¹

The *Loving* Court did condemn antimiscegenation laws as unconstitutional “endorsement[s] of the doctrine of White Supremacy,”¹³² regardless of the fact that both whites and nonwhites were subject to punishment for violating these laws. Such laws, however, did much more than express an abstract ideology of “color-consciousness.”¹³³ As the Court has noted in its Establishment Clause cases, whether a particular government action can be seen as an endorsement of an unconstitutional message depends on the context.¹³⁴ The context of *Loving* included the fact that Virginia’s antimiscegenation laws were originally enacted as part of its Racial Integrity Act of 1924, which was “passed during the period of extreme nativism which followed the end of the First World War.”¹³⁵ Antimiscegenation laws, moreover, cannot be separated from the historical fact that they served both as reflections of and inspirations for one of the most common pretexts for lynchings: The charge that a black man had directed romantic attention at a white woman.¹³⁶ In contrast to voluntary efforts to maintain public school integration (*Parents Involved*), or to provide an opportunity for racial diversity in democratic representation (*Shaw*) or in supervisory positions in public safety forces (*Ricci*), the context of *Loving* rendered the message of antimiscegenation laws unmistakably one of white supremacy, not merely race consciousness.

131. *Id.* (internal quotation marks omitted).

132. *Id.* at 7.

133. The message of the antimiscegenation laws was not race consciousness, but rather protecting white purity, as evidenced by the fact that those laws prohibited only interracial marriages in which one of the partners was white. They did not, for example, prohibit marriages between blacks and Latinos. *Id.* at 11 n.11.

134. *See, e.g.*, *Zelman v. Simmons-Harris*, 536 U.S. 639, 655 (2002) (stating, in upholding an Ohio program providing publicly funded school vouchers that could be used at religious schools, that the “endorsement inquiry” depends upon “the history and context” underlying a challenged program” (quoting *Good News Club v. Milford Cent. Sch.*, 538 U.S. 98, 119 (2001))).

135. *Loving*, 388 U.S. at 6.

136. *See, e.g.*, DORA APEL, *IMAGERY OF LYNCHING: BLACK MEN, WHITE WOMEN, AND THE MOB* 44 (2004) (stating that “[a]nti-miscegenation laws supported lynch law in seeking to maintain white social domination through the prevention of intermixing and the resultant ‘racial blurring’”); N. Jeremi Duru, *The Central Park Five, the Scottsboro Boys, and the Myth of the Bestial Black Man*, 25 *CARDOZO L. REV.* 1315, 1327 (2004) (“[L]ynchings were generally justified as appropriately responsive to attacks on white womanhood and were motivated by a fear of the black man’s mythic sexual savagery.”).

Moreover, the harm inflicted by antimiscegenation laws was far from merely expressive. Such laws criminalized marriages between whites and nonwhites and violations carried substantial criminal penalties. Virginia, for example, made such marriages felonies carrying a sentence of imprisonment between one and five years.¹³⁷ The Court clearly considered the criminal consequences of antimiscegenation laws to be particularly inimical to the Equal Protection Clause, stating that it “[could not] conceive of a valid legislative purpose which makes the color of a person’s skin the test of whether his conduct is a criminal offense.”¹³⁸ Moreover, in addition to imposing criminal penalties, antimiscegenation laws also infringed upon the freedom to marry, which the Court has “recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.”¹³⁹ This fundamental due process right, the Court held, “[may] not be restricted by invidious racial discrimination[.]”¹⁴⁰ *Loving* then, like *Brown*, presented a case of stigma, which arose from the historical and contemporaneous context and was connected to tangible injuries.

In summary, the Court’s strict colorblindness doctrine in cases such as *Shaw*, *Parents Involved*, and *Ricci* departs dramatically from its doctrine in prior cases. In cases such as *Palmer* and *Greene*, the Court has rejected claims of primarily expressive harms when the harm involved the alleged stigmatization or subordination of racial minorities.¹⁴¹ Rather, it has held, substantial harm in the

137. See *Loving*, 388 U.S. at 4. The Lovings, for example, pleaded guilty and were each sentenced to one year in prison. The trial court, however, suspended their sentences on the condition that they leave Virginia and not return together for twenty-five years. *Id.* at 3.

138. *Id.* at 11 (internal quotation marks omitted); see also *id.* at 13 (Stewart, J., concurring) (writing separately to reiterate his belief that “it is simply not possible for a state law to be valid under our Constitution which makes the criminality of an act depend upon the race of the actor” (internal quotation marks omitted)).

139. *Id.* at 12 (majority opinion).

140. *Id.*

141. I recognize that certain Justices, most notably Justice Thomas, believe that government race consciousness inevitably stigmatizes racial minorities. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 373 (2003) (Thomas, J., concurring in part and dissenting in part) (arguing that affirmative action programs stigmatize racial minorities because “[t]hese programs stamp minorities with a badge of inferiority and may cause them to develop dependencies or to adopt an attitude that they are entitled to preferences” (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 241 (1995) (Thomas, J., concurring in part and concurring in judgment))). If that were invariably (or even frequently) the case, one would expect to more often see racial minorities, rather than whites, as plaintiffs in cases challenging affirmative action programs. Moreover, the assumption that affirmative action programs stigmatize racial minorities is most often framed as involving self-doubt as to whether one deserved something based on one’s own merit or instead received it because of race. Whatever force that argument may have in other contexts, it is inapposite here. It is difficult to see how government race consciousness that does not involve the allocation of a tangible resource or benefit, one that would otherwise ordinarily be distributed based on nonracial factors, could lead to this sort of stigma being imposed on racial minorities. It is doubtful, for example,

form of material disadvantage or differential treatment must also exist. The Court has, however, accepted claims of primarily expressive and nonstigmatizing harms when those claims have been directed against government programs designed to achieve or maintain racial diversity or to improve the lives of people of color. The Court has accepted such claims regardless of whether the plaintiffs suffered unequal treatment or a tangible injury. This Part does not take a position as to whether expressive harms should or should not ever be sufficient to establish an equal protection claim in all circumstances. Rather, the point is that the Supreme Court—even in *Brown*—has consistently required some concrete injury or differential treatment when claims by racial minorities are at issue, whereas the Court appears to accept claims of expressive harm when made by opponents of affirmative action. “Appearances,”¹⁴² it seems, matter most to the Court when they draw attention to continued racial inequities and thereby convey a message in contradiction to postracialism as a fait accompli.

III. RACE CONSCIOUSNESS AS GOVERNMENT SPEECH

The discussion in the preceding Parts makes visible the implicit metaphor on which the Court has relied in its strict colorblindness cases. Although the Court speaks in terms of unequal treatment in these cases, the Court is truly analyzing such cases as involving a form of forbidden speech. As discussed in Part I, cases such as *Parents Involved*, *Shaw*, and *Ricci* invalidate government action when it conveys a message that racial inequality persists. Yet the Court has been highly selective with regard to when the expressive content of government action conveying racial messages is by itself sufficient to violate the Equal Protection Clause. As Part II demonstrates, the Court has only found this to be the case when the claims attack government action that seeks to address racial inequality. When government action stigmatizing racial minorities has been

that children of color in the Seattle and Louisville school districts at issue in *Parents Involved* were plagued by self-doubt as to whether they had earned the right to be assigned to a given public school. Finally, recent empirical research casts serious doubt on the claim that racial minorities view affirmative action programs as stigmatizing. See Deirdre M. Bowen, *Brilliant Disguise: An Empirical Analysis of a Social Experiment Banning Affirmative Action*, 85 IND. L.J. 1197, 1199 (2010) (describing a national study seeking to gauge whether racial minorities experienced affirmative action as stigmatizing, and concluding that, while “one would anticipate that underrepresented minority students attending school in the states that [ban] race-based admissions would suffer lower rates of internal and external stigma as well as less hostility in the form of racism from nonminority students . . . [i]n fact, the opposite is true, [and u]nderrepresented minority students in states that permit affirmative action encounter far less hostility and internal and external stigma than students in anti-affirmative action states”).

142. *Shaw v. Reno*, 509 U.S. 630, 647 (1993).

involved, the Court has never accepted the notion that government messages by themselves violate equal protection. Rather, the Court has expressly held in cases such as *Palmer* and *Greene* that some unequal treatment or substantial tangible harm must accompany the objectionable message.

Unpacking the colorblindness doctrine therefore reveals that it is not about discrimination in the usual equal protection sense of unequal treatment, subordination, stigmatization, or disadvantage. Rather, it is about the Court mandating a particular vision of the role that race plays in contemporary American society, a vision that condemns certain messages regarding race while permitting others. The strict colorblindness doctrine has codified in constitutional law the narrative that “we have overcome” and eliminated discursive and democratic space for the competing narrative that “we shall overcome.”

The strict colorblindness doctrine treats any remedial or diversifying government race consciousness as constitutionally suspect because of its message alone. The message of such government action is condemned because it is counter to what the Court has found to be a more important message. That message can be characterized in a variety of ways: liberal individualism,¹⁴³ postracialism,¹⁴⁴ antipaternalism,¹⁴⁵ or antibalkanization.¹⁴⁶ The fact remains that by elevating the message to a constitutional principle in the guise of equal protection, “the Court has taken sides in the culture war [about race], departing

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143. See *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 730 (2007) (plurality opinion) (stating that equal protection embodies “the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class” (quoting *Miller v. Johnson*, 515 U.S. 900, 911 (1995)) (internal quotation marks omitted)); López, *supra* note 31, at 989 (noting that opponents of affirmative action programs argue that such programs “undermin[e] liberal notions of individual merit”). However, as this Article points out, not all instances of government race consciousness involve the allocation of material resources or impose a disadvantage based on race. The strict colorblindness doctrine therefore cannot be grounded solely upon the alleged subversion of individual merit. Cf. *Parents Involved*, 551 U.S. at 834 (Breyer, J., dissenting) (distinguishing the case from earlier “affirmative action” cases because the student assignment plans did not involve “the use of race to decide who will receive goods or services that are normally distributed on the basis of merit and which are in short supply”); Cristina M. Rodríguez, *Against Individualized Consideration*, 83 IND. L.J. 1405, 1417 (2008) (arguing that “merit” is not a meaningful concept when considering assignment to general elementary and secondary public schools).
144. See generally Cho, *supra* note 3 (analyzing postracial ideology that marginalizes race as a basis for policymaking).
145. See generally Sarabyn, *supra* note 47 (tracing the history and evolution of paternalism in equal protection jurisprudence).
146. See generally Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278 (2011) (identifying the antibalkanization principle as an independent doctrinal middle ground between colorblindness theory and antistatutory theory, under which government action violates the Equal Protection Clause when it is seen as causing divisiveness and threatening social cohesion).

from its role of assuring, as neutral observer, that the democratic rules of engagement are observed.”¹⁴⁷ Accordingly, this Article now turns to the doctrinal ground where battles about the values expressed by competing messages are usually fought: the First Amendment.

A. The Government Speech Doctrine

The government speech doctrine is a fairly recent development in First Amendment law.¹⁴⁸ The Supreme Court has stated that “[a] government entity has the right to speak for itself. It is entitled to say what it wishes, and to select the views that it wants to express.”¹⁴⁹ Thus, the government speech doctrine operates as an exception to the usual First Amendment requirements of government content and viewpoint neutrality.¹⁵⁰ Government entities may express or promote their own messages. The key to the doctrine is that the speech must be the government’s own.¹⁵¹ If the government disfavors or endorses private speech, the usual First Amendment rules of content and viewpoint neutrality apply.

The Court has offered two main rationales for the government speech doctrine. First, the doctrine recognizes that the effective functioning of government sometimes requires it to express or promote its own viewpoints through its policies.¹⁵² Indeed, the Court has stated, “It is not easy to imagine how government could function if it lacked this freedom.”¹⁵³ Government

147. *Lawrence v. Texas*, 539 U.S. 558, 602 (2003) (Scalia, J., dissenting) (criticizing the majority for finding unconstitutional a Texas law criminalizing certain homosexual conduct and overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986)). I do not share Justice Scalia’s belief that the Court should avoid ruling on contentious social issues even when they involve discrimination against minorities, nor do I believe that the Court’s decision in *Lawrence* was wrong. Indeed, in *Lawrence*, the Court was presented not just with an expressive harm to gays, but also a concrete disadvantage imposed upon them, criminal prosecution. Rather, I quote his dissent in *Lawrence* to point out that, in the debate over colorblindness versus positive color consciousness, the Court has taken a side rather than acting as a neutral observer of the democratic debate about race.

148. *Pleasant Grove City, Utah v. Summum*, 129 S. Ct. 1125, 1139, 555 U.S. 460 (2009) (Stevens, J., concurring) (describing the government speech doctrine as “recently minted”).

149. *Id.* at 1131 (majority opinion) (internal citations, alteration, and quotation marks omitted).

150. See Helen Norton & Danielle Keats Citron, *Government Speech 2.0*, 87 DENVER U. L. REV. 899, 901 (2010) (stating that the doctrine is “a defense to First Amendment challenges by plaintiffs who claim that the government has impermissibly excluded their expression based on viewpoint”).

151. See, e.g., *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 559 (2005) (“In all of the cases invalidating exactions to subsidize speech, the speech was, or was presumed to be, that of an entity other than the government itself.”); *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 541 (2001) (“We have said that viewpoint-based funding decisions can be sustained in instances in which the government is itself the speaker . . .”).

152. See *Johanns*, 544 U.S. at 559 (“[S]ome government programs involve, or entirely consist of, advocating a position.”).

153. *Summum*, 129 S. Ct. at 1131.

entities routinely express certain messages rather than others. A requirement of absolute neutrality regarding the government's own speech would be untenable. The government, for example, can spend funds to promote its own message of honoring military veterans without being required to spend similar funds honoring the country's wartime enemies.¹⁵⁴ The Court has held that the First Amendment allows such selectivity, provided that the government does not suppress competing private speech or violate another constitutional provision in effectuating its own speech.¹⁵⁵

The second rationale for the government speech doctrine relates to democratic accountability. Strict judicial review is applied when the government engages in content or viewpoint discrimination regarding private speech because such suppression or favoritism is usually a sign of a defect in the democratic process.¹⁵⁶ When the government privileges or punishes private speech, it is generally because the disfavored speaker or the message is one that the government dislikes, disagrees with, or finds dangerous.¹⁵⁷ Thus, either the speaker or the speech is presumed to be the kind of "discrete and insular minority" for which heightened scrutiny is appropriate since the speaker cannot effectively protect him or herself through the political process.¹⁵⁸ By contrast, the Court has stated, "When the government speaks, for instance to promote its own policies or to advance a particular idea, it is, in the end, accountable to the electorate and the political process for its advocacy."¹⁵⁹ Thus, the government speech doctrine holds that there is no need for a judicial check on the government's own speech

154. *Cf.* *Rust v. Sullivan*, 500 U.S. 173, 194 (1991) (stating by way of analogy, in rejecting a First Amendment challenge to federal regulations prohibiting funding recipients from promoting or discussing abortion, that "[w]hen Congress established a National Endowment for Democracy to encourage other countries to adopt democratic principles, it was not constitutionally required to fund a program to encourage . . . communism and fascism" (citation omitted)).

155. *See, e.g., Sumnum*, 129 S. Ct. at 1139 (Stevens, J., concurring) ("[E]ven if the Free Speech Clause neither restricts nor protects government speech, government speakers are bound by the Constitution's other proscriptions, including those supplied by the Establishment and Equal Protection Clauses.").

156. *See generally* JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 135–79 (1980) (discussing "process defect theory" as a reason for judicial intervention on behalf of minorities).

157. For the argument that laws suppressing speech "pose the inherent risk that the Government seeks . . . to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion," see *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 641 (1994).

158. *Cf.* *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938) (recognizing without deciding that "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry").

159. *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 235 (2000).

because such speech is presumably both generated by and subject to correction through normal political processes.¹⁶⁰

*Rust v. Sullivan*¹⁶¹ is considered to be the first major Supreme Court case applying the government speech doctrine.¹⁶² *Rust* involved a First Amendment challenge to regulations that prohibited programs that received federal family planning funds from providing abortion-related services.¹⁶³ The regulations conditioned funding on recipients refraining from engaging in a variety of pro-choice expressive activity.¹⁶⁴ The Court ruled that the First Amendment did not forbid the government from choosing to fund certain programs to the exclusion of others in order to advance its own message. The Court reasoned that the regulations did not punish, proscribe, or privilege private speech based on its viewpoint, but were instead a constitutionally permissible instance of the government using public funds to promote the government's own anti-abortion speech.

In *Legal Services Corp. v. Velasquez*,¹⁶⁵ by contrast, the Court found the government speech doctrine inapplicable. *Velasquez* concerned restrictions imposed on recipients of federal funding from the Legal Services Corporation (LSC) to provide legal services to the indigent. The restrictions prohibited grantees from engaging in legal representation aimed at challenging existing welfare law.¹⁶⁶ Thus, the speech at issue was that of attorneys representing their

160. See, e.g., *Sumnum*, 129 S. Ct. at 1132 (justifying the government speech doctrine in terms of democratic accountability and stating that “[i]f the citizenry objects [to a governmental message], newly elected officials later could espouse some different or contrary position” (internal quotation marks omitted)). Transparency is an underlying assumption of the political accountability rationale for the government speech doctrine because the political process can only function as a check on government speech if a reasonable recipient of the speech would know that the speech is the government's. See, e.g., Gia B. Lee, *Persuasion, Transparency, and Government Speech*, 56 HASTINGS L.J. 983, 988 (2005) (stating that “[w]hen the government participates in public debate, it should make the fact of its participation transparent”); Norton & Citron, *supra* note 150, at 902 (“The public can assess government's positions *only* when the public can tell that the government is speaking.”). In the kinds of cases with which this Article is concerned, it is likely to be clear that the government is the speaker. Private parties do not, for example, enact legislation, hire or promote public employees (*Ricci*), determine public school assignments (*Parents Involved*), or engage in redistricting (*Shaw*). The transparency and accountability rationales for the government speech doctrine will therefore usually be satisfied in such cases.

161. 500 U.S. 173 (1991).

162. While the *Rust* Court did not use the term government speech in its analysis, the Court has subsequently pointed to *Rust* as the genesis of the government speech doctrine. See Norton & Citron, *supra* note 150, at 904 (“The Supreme Court identifies *Rust v. Sullivan* as the beginning of its government speech jurisprudence.”).

163. See *Rust*, 500 U.S. at 178–81 (describing the regulations in detail).

164. See *id.* at 179–81.

165. 531 U.S. 533 (2001).

166. *Id.* at 538 (describing the relevant statutory and regulatory provisions).

clients. Various LSC grantees and clients sued, alleging that the restrictions violated the First Amendment. The government argued that the restrictions were permissible under *Rust*. The Court disagreed, distinguishing *Rust* as involving the government promoting its own message by transmitting it through private speakers.¹⁶⁷ *Velasquez*, in the Court's view, instead involved government facilitation of private speech, not the harnessing of private speech to promote a government message. The Court reasoned that selectively funding private speech for its own sake runs the risk that the government has done so to suppress dangerous or disfavored ideas. When the government itself speaks or promotes its own message by subsidizing private speech, however, it is functioning as another speaker in the marketplace of ideas and ultimately remains accountable to the voters if they disagree with the message.¹⁶⁸ In short, when promoting the government's own message is the goal and subsidizing private speech is the means, the government speech exception applies. When promoting or suppressing private speech is the goal, the government speech exception does not apply.

The *Velasquez* Court rejected the government speech argument, stating that "[t]he lawyer is not the government's speaker."¹⁶⁹ Indeed, in a suit challenging existing welfare law on behalf of a client, the attorney's speech would be in opposition to the government's position. Accordingly, the Court held, "[t]he advice from the attorney to the client and the advocacy by the attorney to the courts cannot be classified as governmental speech even under a generous understanding of the concept."¹⁷⁰ Rather, the effect of the funding restriction was to curtail private speech, that is, to "insulate current welfare laws from constitutional scrutiny and certain other legal challenges, [thereby] implicating central First Amendment concerns."¹⁷¹ The funding restrictions were therefore subject to the traditional First Amendment prohibition of viewpoint discrimination and found unconstitutional.¹⁷²

*Pleasant Grove City, Utah v. Summum*¹⁷³ is the Court's most recent government speech case. *Summum* involved a public park containing fifteen

167. *See id.* at 548 ("[I]n the context of [the LSC] statute there is no [governmental] message of the kind recognized in *Rust* and which sufficed there to allow the Government to specify the advice deemed necessary for its legitimate objectives. This serves to distinguish [it] from any of the . . . restrictions upheld in *Rust* . . .").

168. *Id.* at 541–42.

169. *Id.* at 542.

170. *Id.* at 542–43.

171. *Id.* at 547.

172. *Id.* at 548–49 (holding that "[w]here private speech is involved, even Congress' . . . funding decision[s] cannot be aimed at the suppression of ideas thought inimical to the Government's own interest").

173. 129 S. Ct. 1125, 555 U.S. 460 (2009).

permanent displays, of which at least eleven were donated to the park by private persons or groups.¹⁷⁴ The monuments included historical items, such as an historic granary, the city's first fire station, and a September 11th monument, as well as a Ten Commandments monument that the Fraternal Order of Eagles donated in 1971.¹⁷⁵ Summum, a religious organization, wished to donate a monument containing its "Seven Aphorisms," which were religious tenets.¹⁷⁶ The proposed monument was to be "similar in size and nature" to the existing Ten Commandments monument.¹⁷⁷ The city refused Summum's donation, citing its policy that monuments in the park were limited to those relating to the city's history or donated by groups with "longstanding ties" to the community.¹⁷⁸

Summum sued, alleging that the city violated the Free Speech Clause by distinguishing between the religious monuments that it would accept—the Ten Commandments—and those that it would reject—the Seven Aphorisms—based on content and/or the speaker's identity.¹⁷⁹ The Court rejected this claim, holding that the display of permanent monuments in a public park on city-owned property fell within the government speech doctrine.¹⁸⁰ The Court stated that a government entity "has the right to speak for itself [and] is entitled to say what it wishes, and to select the views that it wants to express. Indeed, it is not easy to imagine how government could function if it lacked this freedom."¹⁸¹

Although the *Summum* Court did not embrace a single bright-line rule, it unanimously held that the monument display had the attributes of government speech. While admitting "there may be situations in which it is difficult to tell whether a government entity is speaking on its own behalf,"¹⁸² the Court found that it was clear that the placement of monuments in the park amounted to government speech. The Court held that visitors to the park would likely perceive the monuments as expressing a government message and that the government in

174. *Id.* at 1129.

175. *Id.*

176. *Id.* at 1129–30. Although *Summum* had Establishment Clause overtones, the only issue before the Court was the Free Speech Clause claim. *See id.* at 1130 (noting that after losing in the district court, "[Summum] appealed, pressing solely its free speech claim").

177. *Id.* at 1129.

178. *Id.* at 1130.

179. *Id.* at 1129–30.

180. *Id.* at 1134 ("In this case, it is clear that the monuments in Pleasant Grove's Pioneer Park represent government speech."); *see also id.* at 1131 ("If [the city and local officials] were engaging in their own expressive conduct, then the Free Speech Clause has no application.").

181. *Id.* at 1131 (citations and internal quotation marks omitted).

182. *Id.* at 1132.

fact established and fully controlled that message.¹⁸³ Accordingly, the Court found the government speech exception satisfied.

B. Applying the Speech Paradigm to Government Race Consciousness

While the government speech doctrine has been criticized,¹⁸⁴ this Article takes the doctrine as it stands and demonstrates its relevance to the Court's colorblindness jurisprudence. This Subpart first addresses how government action of the kind at issue in *Shaw*, *Parents Involved*, and *Ricci* can be considered a form of symbolic speech. It then applies government speech principles to specific examples of government race consciousness.

1. Race Consciousness as Expressive Conduct

The First Amendment's Free Speech Clause only prohibits abridgment of "speech."¹⁸⁵ It is well established, however, that the First Amendment also applies to symbolic speech or expressive conduct.¹⁸⁶ The First Amendment, does not, however, protect all conduct that has an expressive component.¹⁸⁷ The Court has identified three factors to be considered in determining whether conduct has a sufficient expressive component to be treated as speech: (1) whether the conduct was performed with "[a]n intent to convey a

183. See *id.* at 1132–37 (noting, inter alia, that the city exercised complete authority over the contents of the park and that governments have historically used public monuments to express government messages and have done so selectively).

184. See, e.g., Erwin Chemerinsky, *Moving to the Right, Perhaps Sharply to the Right*, 12 GREEN BAG 2D 413, 427 (2009) (critiquing the government speech doctrine because it could lead the government to engage in "blatant viewpoint discrimination simply by adopting private speech as its own"); Steven G. Gey, *Why Should the First Amendment Protect Government Speech When the Government Has Nothing to Say?*, 95 IOWA L. REV. 1259, 1262–63 (2010) (criticizing the government speech doctrine, and arguing, inter alia, that "it is unclear . . . why the government should have the affirmative First Amendment right to speak, since the structural function of the First Amendment is to limit government power"); Norton & Citron, *supra* note 150, at 917 (criticizing the doctrine for its lack of clarity, and stating that "the Supreme Court has yet to articulate a clear rule for parsing government from private speech," thereby leading to confusion in the lower courts).

185. U.S. CONST. amend. I; see also *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (stating that "[t]he First Amendment literally forbids the abridgment only of speech" (internal quotation marks omitted)).

186. *Johnson*, 491 U.S. at 404 (finding flag burning to be expressive conduct protected by the First Amendment, and stating that the Court has "long recognized that [the First Amendment's] protection does not end at the spoken or written word . . . [and] we have acknowledged that conduct may be sufficiently imbued with elements of communication to fall within the scope of the First [Amendment]" (citations and internal quotation marks omitted)).

187. See, e.g., *Wisconsin v. Mitchell*, 508 U.S. 476, 484 (1993) (stating that the Court's cases "reject the view that an apparently limitless variety of conduct can be labeled speech whenever the person engaging in the conduct intends thereby to express an idea" (internal quotation marks omitted)).

particularized message;¹⁸⁸ (2) whether “the likelihood was great that the message would be understood by those who viewed it;”¹⁸⁹ (3) in light of the context in which the conduct occurred.¹⁹⁰ Thus, the test for expressive conduct contains subjective and objective elements, the latter of which is to be assessed contextually.

Much has been written about the expressive function and social meaning of the law.¹⁹¹ One can think of government action as existing along a spectrum in terms of expressive content, from those laws that are almost purely instrumental to those that are almost solely expressive. Laws that prohibit running red lights—a classic *malum prohibitum* scenario, in which the prohibition serves the purely instrumental purpose of regulating traffic flow—have no significant expressive component. No moral condemnation or other expressive content attaches to the prohibition. In contrast, consider a law that prohibits non-Christian displays in a city’s public square. The government action is almost wholly expressive; it serves no instrumental purpose.¹⁹² The resultant Establishment Clause harm would be dignitary or expressive in nature.

The fact that some government action has an expressive component, however, does not mean that all such government action will be considered

188. *Johnson*, 491 U.S. at 404 (alteration in original) (internal quotation marks omitted).

189. *Id.* (internal quotation mark omitted).

190. *See id.* at 405 (“We have not automatically concluded . . . that any action taken with respect to our flag is expressive. Instead, in characterizing such action for First Amendment purposes, we have considered the context in which it occurred.”); *see also* *Spence v. Washington*, 418 U.S. 405, 410 (1974) (holding that, in applying the expressive conduct analysis, “the context in which a symbol is used for purposes of expression is important, for the context may give meaning to the symbol”).

191. *See, e.g.*, Anderson & Pildes, *supra* note 22, at 1533 (“[E]xpressive considerations . . . apply throughout much of American constitutionalism.”); Deborah L. Brake, *When Equality Leaves Everyone Worse Off: The Problem of Leveling Down in Equality Law*, 46 WM. & MARY L. REV. 513, 579 (2004) (“[T]he expressive force of law and other government action shapes social meaning [and] this influence on social meaning may affect individual and collective behavior wholly apart from the sanctions of law enforcement.”); Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 951 (1995) (“Any society or social context has . . . social meanings—the semiotic content attached to various actions, or inactions, or statuses, within a particular context.”); Primus, *supra* note 65, at 1347 (“Symbolism and social meaning have always shaped the law of equal protection”); Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2051 (1996) (“There can be no doubt that law, like action in general, has an expressive function. . . . Many debates over the appropriate content of law are really debates over the statement that law makes, independent of its (direct) consequences.”).

192. Maximizing the use of limited public space in the way the government believes best could be characterized as an instrumental purpose. But the government would be basing its judgment about the best use of public space on the expressive value of non-Christian displays. *Cf. Pleasant Grove City, Utah v. Summum*, 129 S. Ct. 1125, 1139, 1134, 555 U.S. 460 (2009) (noting that, in deciding what monuments to display on limited public land, “[g]overnment decisionmakers select the monuments that portray what they view as appropriate for the place in question, taking into account such content-based factors as esthetics, history, and local culture”).

expressive conduct under the First Amendment. First Amendment analysis requires sensitive and value-laden judgments as to whether certain expression should be treated as speech.¹⁹³ The approach this Article suggests would therefore require a case-by-case determination of whether particular government action is expressive conduct under the First Amendment.

Applying the expressive conduct analysis to the facts of the Court's strict colorblindness cases is revealing. Recall that *Ricci v. DeStefano*¹⁹⁴ involved the efforts of public officials to prevent a racially disparate impact with regard to who would be eligible for promotion to supervisory positions in the New Haven fire department. The officials put all promotions on hold until they could develop an alternative process that would not create such a disparate impact. The facts revealed three reasons for the city officials' actions. First, they sought to avoid legal liability: They believed the disparate impact would violate Title VII.¹⁹⁵ Second, they were concerned about distributive justice: They believed it was substantively unfair to needlessly exclude racial minorities from the higher pay and greater prestige of supervisory positions.¹⁹⁶ Third, they were concerned about the symbolic legitimacy of the safety forces: They wished to avoid the perception of racial inequity created by a situation where "New Haven, a city in which African-Americans and Hispanics account for nearly 60 percent of the population, [would] be served—as it was in the days of undisguised discrimination—by a fire department in which members of racial and ethnic minorities are rarely seen in command positions."¹⁹⁷

The expressive conduct analysis first asks whether the conduct at issue was performed with an intent to convey a specific message. Expressive concerns clearly motivated the city's actions. For example, the district court in *Ricci* made the following findings of fact:

[The city's actions were motivated by] the following concerns: that the test had a statistically adverse impact on African-American and Hispanic

193. See, e.g., ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 1208 (3d ed. 2009) ("Because even for originalists there is little guidance from history or the framers' intent as to the meaning of the First Amendment [beyond the prohibition on prior restraints and rejection of the crime of seditious libel], the Supreme Court inescapably must make value choices as to what speech is protected.")

194. 129 S. Ct. 2658 (2009).

195. *Id.* at 2695 (Ginsburg, J., dissenting) (describing city officials' concerns that "[e]ven if the exams were 'facially neutral,' significant doubts had been raised about whether they properly assessed the key attributes of a successful fire officer," thereby potentially leading to disparate impact liability).

196. *Id.* at 2670 (majority opinion) (citing city officials' concerns that going forward with promotions would result in "black and Hispanic candidates [being] disproportionately excluded from opportunity" and that "there [were] more appropriate ways to assess one's ability to serve as a captain or lieutenant" (internal quotation marks omitted)).

197. *Id.* at 2690 (Ginsburg, J., dissenting).

examinees; that promoting off of this list would *undermine their goal of diversity* in the Fire Department and *would fail to develop managerial role models* for aspiring firefighters; that it would subject the City to *public criticism*; and that it would likely subject the City to Title VII lawsuits from minority applicants that, *for political reasons*, the City did not want to defend.¹⁹⁸

The appearance of diversity, the visibility of role models, and the desire to avoid public criticism and remain in the favor of an important political constituency¹⁹⁹ are all expressive in nature. Thus, the city's intent to communicate certain messages was clearly critical in its decision.

Moreover, Justice Alito's concurring opinion in *Ricci* made much of the fact that, in his view, the city refused to certify the test results not for the instrumental purpose of avoiding Title VII liability but instead for expressive reasons—to please the black community because an influential African American pastor had illegitimately “captured” the political process.²⁰⁰ Additionally, as the majority opinion recognized, the issue of the representativeness of the fire department was so contentious precisely because “firefighters prize their promotion to and within the officer ranks [and] an agency's officers command respect within the department and in the whole community.”²⁰¹

The expressive conduct analysis next requires an assessment of whether “the likelihood was great that the message would be understood by those who viewed it”²⁰² in light of the context.²⁰³ The question of an audience's comprehension

198. *Ricci v. DeStefano*, 554 F. Supp. 2d 142, 162 (D. Conn. 2006) (emphasis added).

199. I do not suggest that government action should be insulated from equal protection scrutiny simply because it is undertaken to avoid public criticism or retain the favor of voters. To the contrary, in cases where such actions result in unequal treatment, subordination, or stigma, I would argue that they do implicate the Equal Protection Clause. See, e.g., Benjamin Schwarz, *Insidious Weakness*, ATLANTIC MONTHLY, May 1998, <http://www.theatlantic.com/past/docs/issues/98may/weak.htm> (discussing the career of Orval Faubus, governor of Arkansas during the Little Rock school integration crisis in 1957, and stating that his actions in opposing the integration of Little Rock Central High School were largely motivated by political expediency and electoral concerns). As discussed in Part II, however, I do not believe that the city's actions in *Ricci* resulted in unequal treatment, subordination, or stigma.

200. *Ricci*, 129 S. Ct. at 2685 (Alito, J., concurring) (arguing that the city's actions were not truly intended to avoid disparate impact liability, but that instead one could “infer that city officials worked behind the scenes to sabotage the promotional examinations because they knew that, were the exams certified, the Mayor would incur the wrath of [Reverend] Kimber and other influential leaders of New Haven's African-American community” (quoting *Ricci*, 554 F. Supp. 2d at 162)). Justice Alito's imagery of radical black “wrath” and “sabotage” was both unfairly pejorative and unnecessarily inflammatory (pun intended). The characterization of the black community's successful political advocacy as amounting to sinister subversion of the political process falsely equated “political considerations with unlawful discrimination.” *Id.* at 2709 (Ginsburg, J., dissenting).

201. *Id.* at 2664 (majority opinion).

202. *Texas v. Johnson*, 491 U.S. 397, 404 (1989).

of a message is complex. The social meaning of a message can be defined as “the meaning that a competent participant in the society in question would see in that event or expression.”²⁰⁴ But equally competent audiences can reasonably take different messages from the same communication or expressive act.²⁰⁵ Moreover, the necessary consideration of the context in which the communication takes place further complicates the question.²⁰⁶ Nonetheless, it is likely that all of the relevant audiences²⁰⁷ in New Haven would have understood that the city was expressing a message of racial egalitarianism by its refusal to certify test results that would exacerbate a visible racial disparity between the supervised and their supervisors.²⁰⁸

203. See *Spence v. Washington*, 418 U.S. 405, 410 (1974).

204. Mary Jean Dolan, *Government Identity Speech and Religion: Establishment Clause Limits After Sumnum*, 19 WM. & MARY BILL RTS. J. 1, 52 (2010) (quoting CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, *RELIGIOUS FREEDOM AND THE CONSTITUTION* 127 (2007)) (internal quotation marks omitted).

205. The critical race theory insight of perspectivalism, for example, insists that race, culture, gender, sexual orientation, political affiliation, and other group identities should matter a great deal in determining social meaning. See, e.g., RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY: AN INTRODUCTION* 55 (2001). The insight that one’s mode of cognition may be strongly affected by group identity is not limited to critical race theorists. For example, a recent empirical study reveals substantial group differences in the perceived meaning of the same communication. In *Scott v. Harris*, 550 U.S. 372 (2007), the Supreme Court affirmed summary judgment in favor of a police officer who was sued for ending a high-speed chase by ramming his police car into the fleeing vehicle, causing serious injuries to the suspect. The Court found, based on a video recording of the chase, that “no reasonable juror” could believe other than that the decision to use deadly force was justified. In the study, the same video was shown to a diverse group of approximately 1350 laypeople. See Dan M. Kahan, David A. Hoffman & Donald Braman, *Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837 (2009). The study found, inter alia, that when shown the video, substantial majorities agreed with the Court’s resolution of the facts, but that “African Americans, low-income workers, and residents of the Northeast, for example, tended to form more pro-plaintiff views of the facts than did the Court. So did individuals who characterized themselves as liberals and Democrats.” *Id.* at 841.

206. A straightforward example is the difference in meaning likely to be ascribed to a common racial epithet when uttered in the context of, for example, a rap song, versus a stranger of a different race directing the same word at an African American personally. Similarly, it is likely that a different meaning would be ascribed to a swastika viewed as part of a documentary about World War II than one spray-painted on the wall of a synagogue. For a sophisticated examination of the role of context in ascribing social meaning to government action, see generally B. Jessie Hill, *Putting Religious Symbolism in Context: A Linguistic Critique of the Endorsement Test*, 104 MICH. L. REV. 491 (2005).

207. There were at least four relevant audiences in *Ricci*: black and Latino residents of the city; black and Latino rank-and-file firefighters; white residents; and white rank-and-file firefighters.

208. As discussed *infra* in notes 224–231 and accompanying text, the matter of whether to make the promotions in *Ricci* was widely debated in New Haven prior to the decision being made, and various city officials communicated their concerns regarding the racial disparity.

The reaction to this message was in large part the reason why the disappointed firefighters fought the city all the way to the Supreme Court. The message of racial egalitarianism conflicted with their fundamental beliefs about liberal individualism. For example, in his testimony at Justice Sotomayor's U.S. Senate confirmation hearings, Frank Ricci, the lead plaintiff in *Ricci*, criticized the Second Circuit's opinion upholding the city's actions, stating that "[t]he lower court's belief that citizens should be reduced to racial statistics is flawed. It only divides people who don't wish to be divided along racial lines."²⁰⁹ He continued, "When we finally won our case [at the Supreme Court] and saw the messages we received from every corner of the country, we understood that we did something important together. We sought basic fairness and evenhanded enforcement of the laws, something all Americans believe in."²¹⁰ By contrast, given the history and context of racial exclusion in fire, police, and other safety forces nationally as well as in New Haven,²¹¹ it seems likely that black and Latino firefighters and residents of the city would have understood the city's action as expressing a message of racial inclusion and the disavowal of the exclusionary policies of the past.²¹²

Similarly, the school boards' actions in *Parents Involved* are amenable to an expressive conduct analysis. The boards had at least two purposes in adopting their policies. First, the boards sought to maintain integrated schools as a means of achieving the educational goal of cross-racial socialization, following the reasoning of Justice Marshall's admonition in *Milliken v. Bradley* that "unless our children begin to learn together, there is little hope that our people

209. Transcript, *Frank Ricci Testifies at Sonia Sotomayor's Confirmation Hearings*, WASH. POST, July 16, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/07/16/AR2009071603090.html>.

210. *Id.*

211. See Cheryl I. Harris & Kimberly West-Faulcon, *Reading Ricci: Whitening Discrimination, Racial Test Fairness*, 58 UCLA L. REV. 73, 88–89 (2010) (describing this history, and noting that New Haven "had been repeatedly and successfully sued by African Americans and Latinos over its hiring and promotional practices—virtually all facially race neutral—that operated to shut nonwhites out. . . . [and that o]vert and intentional racial exclusion and segregation remained pervasive in many urban fire departments even decades after *Brown*"); Ann C. McGinley, *Ricci v. DeStefano: A Masculinities Theory Analysis*, 33 HARV. J.L. & GENDER 581, 588–95 (2010) (tracing the history of exclusion of white women and racial minorities from firefighting jobs in New Haven and other urban fire departments and the resultant desegregation and discrimination lawsuits).

212. See, e.g., *Ricci v. DeStefano*, 554 F. Supp. 2d 142, 150 (D. Conn. 2006) ("Plaintiffs' theory is that [city officials] urged the [civil service board] not to certify the results in the interest of pleasing minority voters and other constituents in New Haven whose priority was increasing racial diversity in the ranks of the Fire Department.").

will ever learn to live together.”²¹³ Second, the boards sought to convey a message by the actions taken to maintain integration. As the Seattle school board’s website stated at the time, the board believed that the “emphasizing [of] individualism as opposed to a more collective ideology” is a form of “cultural racism” and stated that the district had no intention “to hold onto unsuccessful concepts such as [a] . . . colorblind mentality.”²¹⁴ In short, a message of racial egalitarianism triumphed over the competing messages of colorblindness and/or liberal individualism in the court of public opinion in Seattle, as expressed in the policies of its school board. Indeed, the Supreme Court quoted the foregoing language “in contrast”²¹⁵ to the Court’s preferred message that “[a]t the heart of the Constitution’s guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class.”²¹⁶

As in *Ricci*, the context of *Parents Involved* makes it highly likely that the relevant audiences understood the school boards’ messages. That context involved the Seattle and Louisville school districts’ struggles to prevent school resegregation, due to the long history and continued effects of de jure and de facto school and residential segregation in those cities.²¹⁷ In Seattle, as noted above, the school board’s message was stated explicitly in official communications, making it unlikely that it could be misunderstood, either by supporters or opponents. In Louisville, the community largely rallied behind the school integration plan,²¹⁸ in support of the message sent by the state’s reputation,

213. 418 U.S. 717, 783 (1974) (Marshall, J., dissenting); *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 725 (2007) (plurality opinion) (“Each school district argues that educational and broader socialization benefits flow from a racially diverse learning environment.”).

214. 551 U.S. at 731 n.14 (second alteration in original) (quoting the board’s website).

215. *Id.*

216. *Id.* at 730 (alterations in original) (quoting *Miller v. Johnson*, 515 U.S. 900, 911 (1995)) (internal quotation marks omitted).

217. See *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 137 F. Supp. 2d 1224, 1225 (W.D. Wash. 2001) (upholding Seattle’s school assignment plan, and finding that “[f]or over thirty years the Seattle School District has made efforts to ameliorate the often pernicious consequences of the racial isolation in its schools that would, but for those efforts, track the racial segregation of the city’s housing patterns”), *rev’d and remanded*, 551 U.S. 701; *Hampton v. Jefferson Cnty. Bd. of Educ.*, 72 F. Supp. 2d 753, 755–67 (W.D. Ky. 1999) (describing in detail the history of segregation in Louisville public schools).

218. For example, a 2001 survey found that over 80 percent of parents in the Louisville/Jefferson County school district supported the desegregation plan at issue in *Parents Involved*. Chris Kenning, *Supreme Court to Hear Jefferson’s School Suit*, LOUISVILLE COURIER-J., June 6, 2006, at A1; see also Meaghan Hines, Note, *Fulfilling the Promise of Brown? What Parents Involved Means for Louisville and the Future of Race in Public Education*, 83 NOTRE DAME L. REV. 2173, 2218 (2008) (citing local news reports and letters to newspapers for the proposition that “many Jefferson County parents and students demonstrated their disappointment after [the Supreme Court’s

and the city's image in particular, as one of the most integrated areas for blacks in the country.²¹⁹

As the preceding analysis demonstrates, race-conscious government action will often be sufficiently communicative to be considered expressive conduct.²²⁰ Indeed, given that the Court's strict colorblindness cases speak primarily in terms of expressive harms, those cases implicitly assume that such action is primarily expressive. The next Part of this Article analyzes such action using government speech principles.

2. Race Consciousness as Government Speech: Application

At this point, the premise of this Article bears repeating: When the government's race consciousness does not result in the redistribution of limited resources, disparate treatment, subordination, or other racialized tangible harm, any harm at issue is primarily expressive. When race-conscious government action allegedly inflicts harm that is primarily expressive and nonstigmatic, First Amendment principles should inform the equal protection analysis. Because such messages regarding the continued salience of race are both generated by and subject to correction through the political process, government speech principles counsel against allowing individuals to transform their disagreements with those messages into constitutional claims.²²¹

In determining when the government speech doctrine applies, the Court has considered the degree of government control over the message and whether listeners would be likely to attribute the message to the government.²²² Both factors are present in cases like *Ricci*, *Parents Involved*, and *Shaw*. When the government undertakes a race-conscious policy such as public school integration,

ruling in *Parents Involved*], imploring the school district to continue its efforts to instill its students with an appreciation for diversity").

219. See Hines, *supra* note 209, at 2218 (stating that Louisville's busing policy had been "lauded as the source of Kentucky's 2001 status as the most integrated state for blacks").

220. For the sake of length, I have purposefully omitted an expressive conduct analysis of *Shaw v. Reno*, 509 U.S. 630 (1993). Suffice it to say that (1) the Court treated the case as one involving solely an expressive harm, and (2) I believe the redistricting in *Shaw* had sufficient expressive content to meet the expressive conduct test.

221. This Article does not take a position as to whether individuals in such circumstances should ever have standing to sue. Rather, even assuming that an expressive harm is sufficient to confer standing under the Equal Protection Clause, this Article argues that such claims should fail on the merits in the circumstances described herein, subject to the limitations discussed in Part III.B.3, *infra*. This is consistent with the Court's analysis in cases such as *Rust* and *Summum*, wherein the Court found (or assumed) standing but held that the plaintiffs' claims failed because of the government speech doctrine.

222. See, e.g., *Pleasant Grove City, Utah v. Summum*, 129 S. Ct. 1125, 1132–37, 555 U.S. 460 (2009).

diversification of a public fire department, or the establishment of black-majority voting districts, the government fully controls such action. Moreover, unlike a case such as *Summum*, in which the government incorporated private speech into its own message, there is no risk of misattribution of the message. The speech is clearly the government's own. Additionally, the underlying rationales for the government speech doctrine apply with equal force to the Court's strict colorblindness cases. Government entities, such as school boards, legislatures, and municipalities, should be able to express messages and take positions regarding racial equality, just as they routinely do regarding other contentious matters of social policy.²²³ To the extent that individuals disagree with such messages, they can use the political process to change them.

To take one example, applying government speech principles to the facts of *Ricci* would result in the city's actions being upheld. As discussed fully above, one of the primary rationales for the government speech doctrine is that when an individual's primary objection to government action is grounded in disagreement with the message such action sends, the proper remedy is to change the government speech through the political process rather than through the courts. It is clear that the political process actually functioned properly in *Ricci*. Government officials made the decision not to certify the test results by taking into account the kinds of input from citizens that are the workings of ordinary politics. New Haven's procedures required that the Civil Service Board (CSB) certify a list of applicants who would be eligible for civil service positions. Once the controversy over the test results erupted, the CSB, which is an

223. Examples include messages regarding abortion, war, drug policy, homosexuality, and religion. *See, e.g.,* *Hein v. Freedom From Religion Found., Inc.*, 551 U.S. 587, 593–94 (2007) (quoting the Executive Order establishing the White House Office of Faith-Based and Community Initiatives for the purpose of ensuring that “private and charitable community groups, including religious ones . . . have the fullest opportunity permitted by law to compete on a level playing field [for federal funds]”); *Rust v. Sullivan*, 500 U.S. 173 (1991) (abortion); Andy Birkey, *Minneapolis City Council Passes Resolution Denouncing Uganda's Anti-Homosexuality Bill*, MINN. INDEP., Dec. 18, 2009, <http://minnesotaindependent.com/52186/minneapolis-city-council-passes-resolution-denouncing-ugandas-anti-homosexuality-bill> (describing a city council resolution opposing a Ugandan bill that would impose harsh criminal penalties for homosexual conduct); *Bloomington Resolutions Oppose Iraq War, Patriot Act, Seek Higher Minimum Wage*, DEMOCRACY NOW, May 6, 2005, http://www.democracynow.org/2005/5/6/bloomington_resolutions_oppose_iraq_war_patriot (discussing municipal resolution opposing the U.S. invasion of Iraq); Scott Mobley, *Redding Council Votes to Oppose Legalizing Marijuana*, REDDING RECORD-SEARCHLIGHT, Aug. 3, 2010, <http://www.redding.com/news/2010/aug/03/redding-council-votes-oppose-legalizing-marijuana> (discussing a city resolution opposing California Proposition 19, which would have legalized possession of marijuana).

“autonomous body of City of New Haven citizens,”²²⁴ held a series of five open hearings at which members of the public as well as government officials spoke for and against certifying the results.²²⁵ The CSB heard testimony “from test takers, the test designer, subject-matter experts, City officials, union leaders, and community members,”²²⁶ including individuals and organized interest groups, such as the International Association of Black Professional Firefighters. In addition to the transparency of the process, the matter was in public view and part of the public discourse in New Haven at the time.²²⁷ Moreover, the city’s Board of Aldermen (the elected city council) was briefed on the situation, providing another outlet for community input and participation.²²⁸ In short, *Ricci* involved a public matter roundly debated in public fora that provided opportunities for democratic engagement. At the end of the process, democratically accountable officials took a position on a political controversy.

The political process in *Ricci* also likely would have been perceived as functioning properly. The disappointed firefighters did not claim that the city’s action stigmatized them, nor were they or their allies effectively shut out of the political process. Whites were well represented in city government and the final decision on certification—a 2–2 split by the CSB—belies the impression of minority subversion or capture of the city government.²²⁹ It may be true that

224. *Civil Service*, CITY OF NEW HAVEN HUMAN RESOURCES, <http://www.cityofnewhaven.com/HumanResources/CivilService.asp> (last visited Sept. 27, 2011).

225. See Joint Appendix, *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009) (Nos. 07-1428, 08-328) (providing transcripts of the hearings). Notably, these hearings were held over the initial protest of Reverend Kimber, who apparently would have preferred that the Board of Fire Commissioners first have the opportunity to meet privately with the CSB. *Ricci*, 129 S. Ct. at 2685 (Alito, J., concurring) (stating that “Reverend Kimber protested the public meeting, arguing that he and the other fire commissioners should first be allowed to meet with the CSB in private”). This fact does much to dispel the notion that the process operated through secret back-room dealing.

226. *Ricci*, 129 S. Ct. at 2692 (Ginsburg, J., dissenting) (summarizing the hearings).

227. For example, the issue was thoroughly covered in the local media. See, e.g., William Kaempffer & Angela Carter, *City Fire Tests Have No Easy, Cheap Fix*, NEW HAVEN REG., Feb. 2, 2004, <http://www.nhregister.com/articles/2004/02/02/import/10901527.txt>; William Kaempffer, *Fire Department Sure to Be Sued Over Exams*, NEW HAVEN REG., Feb. 6, 2004, <http://www.nhregister.com/articles/2004/02/06/import/10927406.txt> [hereinafter Kaempffer, *Fire Department Sure to Be Sued*]; William Kaempffer, *Fire Exams Pose Problems, City Lawyer Says*, NEW HAVEN REG., Jan. 23, 2004, <http://www.nhregister.com/articles/2004/01/23/import/10855004.txt>; William Kaempffer, *Firefighters Say Tests for Promotions Are Flawed*, NEW HAVEN REG., Jan. 21, 2004, <http://www.nhregister.com/articles/2004/01/21/import/10840559.txt>.

228. See Kaempffer & Carter, *supra* note 227 (describing the reaction of aldermen to the situation).

229. At the time of the decision regarding whether to certify the test results, the CSB had three white members, one Latino member, and one black member. See Kaempffer, *Fire Department Sure to Be Sued*, *supra* note 227. The one black member was recused from the hearings and the vote because her brother was a New Haven firefighter and a candidate for promotion. *Ricci v. DeStefano*, 554 F. Supp. 2d 142, 150 n.5 (D. Conn. 2006). The New Haven Board of Aldermen at that time was comprised of twelve white members, twelve black members, five Latino members, and one Asian

blacks and Latinos were “a politically important racial constituency”²³⁰ in New Haven, that a local black minister apparently had the ear of the mayor,²³¹ and that city officials and the CSB were persuaded for political reasons not to certify the test results. Nonetheless, it is difficult to see how these facts could amount to a systemic defect in New Haven’s democratic processes, unless successful political advocacy is grounds for judicial suspicion. The allegedly offensive message expressed by the city’s actions in *Ricci* was amenable to correction through democratic means. Government speech principles would therefore counsel that concerns about the social meaning of the city’s actions be left to the democratic process.

Looking forward, the approach suggested in this Article should be applied in future cases where individuals claim nonstigmatizing expressive harm from race-conscious government action. For example, the federal census and similar state procedures have been attacked for violating equal protection because they collect racial data. From a strict colorblindness perspective, it is irrelevant that collecting such information is vital to enforcing antidiscrimination laws and addressing racial disparities in areas such as health and education.²³² Nor would it matter that collecting such information does not inflict a tangible injury on any individual. Under the strict colorblindness doctrine, such measures would be considered constitutionally suspect simply because they are race conscious.²³³ The colorblindness doctrine, taken to its

member. Telephone Interview by Jonathan Mayer With Albert Lucas, Dir. of the Office of Legislative Servs. for New Haven, Conn. (July 28, 2011).

230. *Ricci*, 129 S. Ct. at 2688 (Alito, J., concurring).

231. *Id.* at 2684.

232. Among other matters, racial and ethnic data is used by the Justice Department to make determinations about compliance with the Voting Rights Act and by private plaintiffs in Voting Rights Act litigation. See *Recommendations From the Interagency Committee for the Review of the Racial and Ethnic Standards to the Office of Management and Budget Concerning Changes to the Standards for the Classification of Federal Data on Race and Ethnicity*, U.S. CENSUS BUREAU, July 9, 1997, http://www.census.gov/population/www/socdemo/race/Directive_15.html (explaining that claims of vote dilution under Section 2 of the Voting Rights Act and requests for preclearance under Section 5 of the Act for changes to voting procedures “are usually determined by reference to decennial census data on race and ethnicity”); *Language Use: Frequently Asked Questions*, U.S. CENSUS BUREAU, <http://www.census.gov/hhes/socdemo/language/about/faqs.html> (last updated Nov. 15, 2010) (explaining that “[o]ne of the main purposes of collecting information on languages is for Voting Rights determination [and i]nformation about languages spoken at home and English-speaking ability is used to determine bilingual election requirements under the Voting Rights Act”). Such information is also used to determine compliance with various provisions of the federal No Child Left Behind Act, 20 U.S.C. §§ 6301–7941 (2006). See, e.g., *id.* § 6301(3) (stating that a purpose of the Act is “closing the achievement gap between high- and low-performing children, especially the achievement gaps between minority and nonminority students”).

233. See, e.g., Siegel, *supra* note 34, at 1470–71 (discussing the 2003 “Racial Privacy Initiative” (Proposition 54) in California, which would have prohibited the state from collecting data on race,

logical conclusion, similarly threatens a variety of other government programs, such as minority outreach programs²³⁴ or government data collection to identify racial disparities,²³⁵ that are race conscious but do not operate to disadvantage or stigmatize nonminorities.

ethnicity, color, or national origin); Alex Seitz-Wald, *Beck: The Census Is the Government's Attempt to Increase Slavery*, THINKPROGRESS.ORG, Mar. 9, 2010, <http://thinkprogress.org/2010/03/09/beck-census-slavery> (discussing a popular television commentator's opposition to the collection of census data regarding respondents' race). Lest the reader believe that opposition to the collection of such data is far-fetched or limited to fringe opinion, it is worth noting that supporters of Proposition 54 couched their arguments explicitly in constitutional terms and that the measure, although defeated, was supported by a third of the voters. See Siegel, *supra* note 34, at 1470–71 (quoting press releases and other public statements by Proposition 54's supporters to contend that they “[s]ummon[ed] Thurgood Marshall's arguments in *Brown*, the legacy of Martin Luther King, Jr., and the memory of slavery and segregation, [in arguing] that the anticlassification commitments of *Brown* required an end to the kind of racial data collection that has long been used to enforce the nation's antidiscrimination laws”); see also Ritu Kelotra, *Civil Rights Groups: Proposition 54 Defeat Is Victory for All*, LEADERSHIP CONF., Oct. 8, 2003, <http://www.civilrights.org/equal-opportunity/proposition-54/civil-rights-groups-proposition-54-defeat-is-victory-for-all.html> (noting that the measure was defeated 64 to 36 percent).

234. See, e.g., *Minority and Women Outreach Program*, FED. DEPOSIT INS. CORP., <http://www.fdic.gov/buying/goods/mwop/index.html> (last updated Apr. 14, 2009) (describing the Federal Deposit Insurance Corporation's Minority and Women Outreach Program, which seeks to “ensure the inclusion, to the maximum extent possible, of minorities and women . . . in all contracts entered into by the FDIC” by providing outreach, education, and networking for firms owned by minorities and women); Brent Staples, Editorial, *The Country Can Learn a Lesson From These Students*, N.Y. TIMES, Dec. 6, 2010, at A26 (discussing the Annual Biomedical Research Conference for Minority Students, which is sponsored by the National Institute of General Medical Sciences (a division of the federal National Institutes of Health) and aims to increase the participation of underrepresented racial minorities in the sciences). The threat to such programs from a strict colorblindness principle is not hypothetical. In *Hi-Voltage Wire Works, Inc. v. City of San Jose*, 12 P.3d 1068 (Cal. 2000), the California Supreme Court held that a city program mandating that government contractors conduct minority and women's outreach violated California Proposition 209, which generally forbids government consideration of race. The court stated that the program illegally required contractors to treat minority and women subcontractors “more advantageously by providing them notice of bidding opportunities, soliciting their participation, and negotiating for their services, none of which they must do for non-[minority or women subcontractors]. The fact that prime contractors are not precluded from contacting non-[women or minority firms] is irrelevant.” *Id.* at 1084; see also Devon W. Carbado & Cheryl I. Harris, *The New Racial Preferences*, 96 CALIF. L. REV. 1139, 1144 n.19 (2008) (noting that the University of California ended various minority outreach programs after the enactment of California Proposition 209).
235. For example, in order to detect racial profiling, many states require the collection of racial data on traffic stops and other law enforcement encounters. See Paul Heaton, *Understanding the Effects of Antiprofiling Policies*, 53 J.L. & ECON. 29, 29 (2010) (“By 2007, a total of 25 states had enacted legislation requiring police agencies to collect data on the race of motorists involved in traffic stops, with selected police departments in 22 other states voluntarily agreeing to collect such data.”). Similarly, Executive Order 12,898, issued by President Clinton, requires federal agencies to make environmental justice part of their mission “by identifying and addressing . . . disproportionately high and adverse human health or environmental effects of [their programs] on minority populations” 3 C.F.R. § 859 (1995).

All of these measures, like the government action in *Shaw*, *Ricci*, and *Parents Involved*, involve government race consciousness. None of them, like *Shaw*, *Ricci*, and *Parents Involved*, cause tangible harm, inflict stigma, or distribute limited resources unequally.²³⁶ Such programs do, through the government's attentiveness to continued racial disparities and exclusion, contradict postracialism. Rather than seeing these programs as discrimination against whites, the theory of this Article would hold that the analysis of such programs should be informed by First Amendment principles. Under those principles, objection to the expressive content of such government action would not by itself state a constitutional claim.

3. Race Consciousness as Government Speech: Limitations

The government speech doctrine is not and should not be without limitation, either generally or specifically in the context of race-conscious government action. Several limitations on the government speech doctrine are especially pertinent to the theory of this Article. The first is that the government speech doctrine does not apply when the government's expression violates some constitutional provision other than the First Amendment.²³⁷ There is therefore an apparent tautology: The government speech doctrine does not apply when the government's action violates another constitutional provision, and the strict colorblindness doctrine holds that government expression of racial messages always violates the Equal Protection Clause. As discussed earlier,²³⁸ however, the expressive content of race-conscious government action traditionally has not been sufficient by itself to state a claim under the Equal Protection Clause. The Equal Protection Clause therefore should not preclude the use of government speech principles in such cases. Moreover, this Article is not arguing that cases

236. It is of course true that in a world of limited resources, every dollar spent on, for example, minority outreach programs, enforcement of civil rights laws, or collecting data to monitor racial discrimination and disparities could be spent elsewhere. But generalized grievances regarding government spending priorities are generally nonjusticiable. *See, e.g., Allen v. Wright*, 468 U.S. 737 (1984) (holding that parents of African American public school students lacked standing to bring a claim alleging that the IRS improperly failed to terminate tax-exempt status of racially discriminatory private schools). When I speak of distributing limited resources, I have in mind discrete decisions regarding allocation of a specific government resource to one person rather than another, such as admission of certain students to a university, or the award of a particular government benefit (for example, employment or government funds) to a specific individual.

237. *See Pleasant Grove City, Utah v. Sumnum*, 129 S. Ct. 1125, 1139, 555 U.S. 460 (2009) (Stevens, J., concurring) (“[E]ven if the Free Speech Clause neither restricts nor protects government speech, government speakers are bound by the Constitution’s other proscriptions, including those supplied by the Establishment and Equal Protection Clauses.”).

238. *See supra* Part II.

involving objections to the social meaning of positive government race consciousness be analyzed under the formal doctrinal rubric of the government speech doctrine. Rather, this Article argues that the principles and policies of the government speech doctrine should be incorporated into equal protection doctrine in such cases. Thus, equal protection would not act as an external check on the government speech doctrine; instead, government speech principles would inform and moderate the colorblindness doctrine.

Incorporating government speech principles into equal protection analysis would not be appropriate, however, when the government acts in a race-conscious manner to distribute benefits or engage in actual differential treatment, or when the expressive content of the government's action causes racial stigmatization. As stated at the beginning of this Article, the theory posited here would not apply in cases involving the race-conscious and zero-sum distribution of inherently limited resources, such as money or seats at a university.²³⁹

Second, using government speech principles to inform equal protection doctrine would be inappropriate when the message at issue is not in fact the government's own or would not reasonably be perceived as the government's own. When, for example, the government's speech has been captured (or would reasonably be perceived as captured) by private parties, government speech principles should not apply. Thus, if it were true in *Ricci*—which it was not—that city officials declined to make any promotions because the allegedly subversive black minister evoked by Justice Alito's concurrence²⁴⁰ had illegitimately captured the political process, then government speech principles would have no place in the analysis. The government speech doctrine only exempts the government's speech from First Amendment scrutiny when it is truly and transparently the government's own, generated through normal political processes.²⁴¹

Additionally, the approach this Article advocates should not apply when the message sent by race-conscious government action is alleged to have a significant injurious effect beyond or in addition to expressive harm. For example,

239. Thus, while I believe that cases such as *Adarand*, *Gratz*, and *Bakke* were incorrectly decided, I do not quarrel with the applicability of traditional equal protection doctrine in such cases.

240. See *supra* Part III.B.1, discussing Justice Alito's concurrence in *Ricci*.

241. See *Summum*, 129 S. Ct. at 1131 (“A government entity has the right to speak for *itself*. It is entitled to say what *it* wishes, and to select the views that *it* wants to express.” (emphasis added) (citations, alteration, and internal quotation marks omitted)); *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 541 (2001) (“We have said that viewpoint-based funding decisions can be sustained in instances in which the government is itself the speaker . . .”). Moreover, as discussed earlier, the political process rationale for the government speech doctrine also implicitly requires that it be clear that the speech is the government's. See *Lee*, *supra* note 160, at 988–89 (arguing that the government speech doctrine should only apply where it is transparent that the government is the speaker); Norton & Citron, *supra* note 150, at 902, 936 (same).

certain government messages can be so racially silencing or hostile that they have the effect of excluding a group from the very political processes that could change the message. Government hate speech can carry a sufficiently strong social meaning of official racial hostility that members of certain racial groups are effectively excluded from participation in the political process. Thus, some scholars have argued that prominent and official government displays of the Confederate Flag violate the First and Fourteenth Amendments because of their racially exclusionary effect.²⁴² In such cases, the message creates the kind of process defect traditionally justifying strict scrutiny under the Equal Protection Clause.²⁴³ That same process defect would also undermine one of the primary rationales for the government speech doctrine—that the objectionable speech is generated by and subject to correction through political processes in which the objecting individuals can fully participate.²⁴⁴ No such racial silencing or process defect is apparent in the Court’s strict colorblindness cases.

IV. BENEFITS OF THE SPEECH PARADIGM IN ANALYZING RACE-CONSCIOUS GOVERNMENT ACTION

The preceding discussion demonstrates that the Court’s strict colorblindness cases are based on notions of the expressive harms caused by government action in contradiction to postracialism. This final Part addresses on its

242. See, e.g., Alexander Tsesis, *The Problem of Confederate Symbols: A Thirteenth Amendment Approach*, 75 TEMP. L. REV. 539, 609 (2002) (arguing that “[t]he civil rights gained through the Reconstruction Amendments . . . trump government speech” because “the incorporation of Confederate imagery into state symbolism . . . draws meaning from a history in which the Confederacy stifled the voices of blacks and abolitionists”); James Forman, Jr., Note, *Driving Dixie Down: Removing the Confederate Flag From Southern State Capitals*, 101 YALE L.J. 505, 515 (1991) (stating that “[t]he selection of an exclusionary symbol to fly above the state capitol is harmful in part because of the effect it may have on the desire and ability of the excluded to participate in the political and legal processes”); cf. Sarabyn, *supra* note 47, at 559 (positing the following hypothetical: “Consider if Congress established a policy of donning [Ku] Klux Klan outfits for official business. This policy expresses a belief in white supremacy . . . and the policy poses no physical or behavioral harm to black citizens. Yet, it appears to violate the command of equal protection” because of its social meaning and effect.”).

243. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (recognizing without deciding that “prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry”).

244. *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 235 (2000) (“When the government speaks, for instance to promote its own policies or to advance a particular idea, it is, in the end, accountable to the electorate and the political process for its advocacy.”).

own merits the benefits of using First Amendment principles to inform the Court's strict colorblindness doctrine.

There are both benefits and dangers to constitutional borrowing; that is, the practice of transplanting legal doctrines developed in one area of constitutional law into another.²⁴⁵ Although a full examination of constitutional borrowing is beyond the scope of this Article, some of the risks include intellectual incoherence,²⁴⁶ unprincipled selectivity in deciding what and when to borrow,²⁴⁷ and possible unintended or unanticipated consequences for the borrowed-from area.²⁴⁸

Despite these concerns, borrowing from First Amendment doctrine is particularly appropriate here for several independent reasons. First, the Court has already borrowed extensively from equal protection doctrine in its First Amendment cases. The Court has held that content-based restrictions on speech

245. "A person engages in borrowing when, in the course of trying to persuade someone to adopt a reading of the Constitution, that person draws on one domain of constitutional knowledge in order to interpret, bolster, or otherwise illuminate another domain." Nelson Tebbe & Robert L. Tsai, *Constitutional Borrowing*, 108 MICH. L. REV. 459, 463 (2010).

246. *R.A.V. v. City of St. Paul, Minnesota*, 505 U.S. 377 (1992), provides an example of the incoherence that can be caused by borrowing. In *R.A.V.*, Justice Scalia's majority opinion struck down a hate speech ordinance on the ground that the law violated the First Amendment as an impermissible content-based distinction within a category of unprotected speech. In reaching this conclusion, the opinion borrowed concepts from equal protection doctrine to inform its interpretation of the First Amendment in several ways. First, the opinion spoke repeatedly of "content discrimination," rather than "content-based distinctions." See, e.g., *id.* at 388 (emphasis added). Framing the issue as one of discrimination between types of speech allowed the Court to import the equal protection concept that similarly situated people (or speech) must be treated the same. Because, for example, the law punished race- or gender-based hate speech, but not hate speech directed at political affiliation, it impermissibly discriminated against the latter speech. The incoherence comes in *R.A.V.*'s result. In order to comply with *R.A.V.*'s holding, the government must punish all expression falling within a category of unprotected speech or none at all. Thus, *R.A.V.*'s borrowing of equal protection concepts created a doctrine under which more speech must be restricted, contrary to prior doctrine and one's First Amendment intuitions. See *id.* at 401 (White, J., concurring) (stating that under the majority's reasoning, "[s]hould the government want to criminalize certain fighting words, the Court now requires it to criminalize all fighting words," which is "at odds with common sense and with our jurisprudence as well").

247. *R.A.V.* again provides an example. Having borrowed equal protection concepts, one would expect the Court's analysis to rest almost entirely on the application of strict scrutiny, that is, whether the law used narrowly tailored means in furtherance of a compelling government interest. The Court's analysis instead rested almost entirely on the law's failure to meet any of a series of exceptions to the requirement of content neutrality developed in prior First Amendment cases. When the Court finally mentioned strict scrutiny, it did so cursorily in the last paragraph of the opinion. And, as Justice White's concurrence noted, rather than actually applying strict scrutiny, the majority opinion seemed to assume ex ante that "a narrowly drawn, content-based ordinance could never pass constitutional muster if the object of that legislation could be accomplished by banning a wider category of speech. This appears to be a general renunciation of strict scrutiny review, a fundamental tool of First Amendment analysis." *Id.* at 404.

248. For a more detailed discussion of the risks of constitutional borrowing, see Tebbe & Tsai, *supra* note 245, at 469–71.

are to be analyzed using strict scrutiny, while content-neutral restrictions are to be analyzed using intermediate scrutiny.²⁴⁹ Thus, applying First Amendment principles to inform the colorblindness analysis would be following the channel the Court's precedents have already carved, but in reverse. There is no apparent reason why this channel should flow in only one direction. If equal protection principles are useful in ascertaining when government discrimination against certain speech violates the First Amendment, then First Amendment principles can be equally useful in determining when the government's expression of messages contradicting postracialism amounts to discrimination in violation of the Equal Protection Clause.

Second, the Court has in fact already borrowed from the First Amendment in at least two seminal equal protection cases. In *Regents of the University of California v. Bakke*,²⁵⁰ Justice Powell's opinion relied heavily on First Amendment principles of academic freedom in finding that the "the attainment of a diverse student body . . . is a constitutionally permissible goal for an institution of higher education."²⁵¹ The opinion stated that "[a]cademic freedom . . . long has been viewed as a special concern of the First Amendment. The freedom of a university to make its own judgments as to education includes the selection of its student body."²⁵² In *Grutter v. Bollinger*,²⁵³ the Court, citing Justice Powell's opinion in *Bakke*, found that even under strict scrutiny, it owed some degree of deference to the University of Michigan Law School's consideration of race in admissions decisions. The Court reasoned that "the Law School's educational judgment that [racial] diversity is essential to its educational mission is one to which we defer,"²⁵⁴ in light of universities' "expansive freedoms of speech and thought [grounded in the First Amendment]."²⁵⁵ Accordingly, there is precedent for borrowing First Amendment principles to inform equal protection doctrine.²⁵⁶

249. See, e.g., *Republican Party of Minn. v. White*, 536 U.S. 765, 774–75 (2002) (applying strict scrutiny to a state law prohibiting candidates for judicial elections from announcing their views on disputed legal or political issues); *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994) ("[T]he most exacting scrutiny [applies] to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content In contrast, regulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny. . . ." (citations omitted)).

250. 438 U.S. 265 (1978).

251. *Id.* at 311–12.

252. *Id.* at 312.

253. 539 U.S. 306 (2003).

254. *Id.* at 328.

255. *Id.* at 329.

256. To be clear, I am not suggesting that government race consciousness outside of the university context should enjoy the protections of academic freedom. Nor am I suggesting that, even in the university context, state universities should be entitled to deference to make racially exclusionary

Third, forthrightly incorporating First Amendment principles would better reflect the reality of the Court's strict colorblindness jurisprudence. As discussed throughout this Article, the Court's strict colorblindness cases are explicitly grounded in the Court's condemnation of the message that it believes race-conscious government action sends. The Court's cases condemn the semiotics of the "appearances"²⁵⁷ and "perception[s]"²⁵⁸ created by government "endorse[ment]"²⁵⁹ of certain "message[s]."²⁶⁰ Framing all instances of government color consciousness as a matter of discrimination obscures the fact that the Court's underlying concern is with social meaning, not equal treatment. The value and effect of government messages is a quintessential First Amendment issue.²⁶¹

Fourth, a First Amendment perspective helps solve the riddle of standing in the Court's strict colorblindness cases. If cases such as *Shaw*, *Parents Involved*, or *Ricci*²⁶² are reconceptualized as involving expressive harms rather than unequal treatment, it becomes easier to understand the nature of standing in those cases. Standing requires proof of injury in fact, causation, and redressability.²⁶³ The injury in fact in such cases, as this Article explains, cannot be unequal treatment. However, in cases where the constitutional injury is expressive harm, such as in free speech or Establishment Clause claims, the injury is the

decisions under the guise of academic freedom. Among other concerns, extending this idea to its logical extreme would require a court to defer to a state university's judgment that refusing to admit racial minorities would further its academic mission. Finally, I am not arguing here that Justice Powell's opinion in *Bakke* and the majority's opinion in *Grutter* necessarily struck the correct balance between strict scrutiny and academic freedom. See, e.g., *id.* at 362 (Thomas, J., dissenting) (arguing that "under strict scrutiny, the Law School's assessment of the benefits of racial discrimination . . . are not entitled to any sort of deference, grounded in the First Amendment or anywhere else"). My only point with regard to *Grutter* and *Bakke* is that they provide precedent for borrowing First Amendment principles in equal protection cases.

257. *Shaw v. Reno*, 509 U.S. 630, 647 (1993).

258. *Id.*

259. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 746 (2007) (plurality opinion) (internal quotation marks omitted).

260. *Shaw*, 509 U.S. at 648.

261. See, e.g., Norton & Citron, *supra* note 150, at 902 (arguing that, to the extent government speech has value, that value "springs primarily from its capacity to inform the public of its government's principles and priorities").

262. As previously noted, *Ricci*'s holding technically involved only Title VII, not the Equal Protection Clause. See Part I, *supra*, discussing the facts and reasoning of *Ricci*. If anything, the case for standing under Title VII was even weaker than it would have been under equal protection, given that Title VII explicitly requires that a plaintiff have suffered disparate treatment, which plaintiffs in *Ricci* did not. See *supra* Part I.

263. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992).

government's failure to remain neutral on the subject matter in question.²⁶⁴ Thus, if Congress were to compel observance of Christianity as the official religion of the United States, presumably standing would exist despite the fact that all persons are being treated equally because all are compelled to worship. Similarly, in the strict colorblindness cases, the Court has implicitly created a rule of standing under which the injury is the government's failure to remain neutral on the issue of racial inequality.²⁶⁵

Fifth, informing the colorblindness doctrine with First Amendment principles would better accord with democratic self-governance. As currently construed and applied by the Supreme Court, equal protection doctrine is "difference-disrespecting."²⁶⁶ It finds no doctrinal relevance in underlying differences in government purposes or the social reality of the groups and individuals affected by government action.²⁶⁷ Thus, "[i]n attempting to be colorblind, the judiciary often garners results that not only ignore the real disparities between whites and blacks but evaluate blacks by implicitly white standards."²⁶⁸ An example is the Court's application of strict scrutiny to racial classifications adopted by a white majority to the benefit of a racial minority—that is, affirmative action plans. Under the traditional justifications for strict scrutiny, such action would

264. See Hellman, *supra* note 54, at 42 (arguing that standing in these cases makes sense in light of the nature of expressive violations: "The state may not express that some people are less worthy than others (Equal Protection) or that some religious beliefs are superior to others (Establishment Clause). The violation is the failure by the state to comply with this prohibition; it does not require that any person be harmed thereby.").

265. Viewing the Court's strict colorblindness cases as involving expressive harms is more sensible as matter of standing than viewing them as involving unequal treatment, but it does not completely resolve the issue of standing in those cases. For example, the lack of unequal treatment or tangible injury calls into question whether the plaintiffs in those cases suffered the kind of particularized harm necessary for standing. In *Allen v. Wright*, 468 U.S. 737 (1984), for example, the Court held that parents of African American public school students lacked standing to challenge the IRS's failure to terminate racially discriminatory private schools' tax-exempt status. The Court reasoned that "the stigmatizing injury often caused by racial discrimination" was insufficient alone to confer standing because "such injury accords a basis for standing only to those persons who are *personally denied equal treatment* by the challenged discriminatory conduct." *Id.* at 755 (emphasis added) (internal quotation marks omitted). For further discussion of standing in equal protection cases involving expressive harms, see generally Samuel Issacharoff & Pamela S. Karlan, *Standing and Misunderstanding in Voting Rights Law*, 111 HARV. L. REV. 2276 (1998); Note, *Expressive Harms and Standing*, 112 HARV. L. REV. 1313 (1999); see also Pildes & Niemi, *supra* note 38, at 513–16 (discussing the issue of standing in *Shaw*).

266. Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 830 (2002) (discussing various ways in which equal protection doctrine manifests an "assimilationist bias" or disrespects difference).

267. See, e.g., *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 741 (2007) (plurality opinion) ("Our cases clearly reject the argument that motives affect the strict scrutiny analysis.").

268. Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of "Don't Ask, Don't Tell"*, 108 YALE L.J. 485, 503 (1998).

not trigger heightened judicial suspicion. When a numerical and electoral majority that has not faced a history of subordination or stigmatization has freely chosen to disadvantage itself for what it sees as a greater social good, that majority is able to remedy its situation through the ballot box. There would presumably be no need for a judicial check on the majoritarian process because the self-disadvantaging group is the majority.²⁶⁹ The Court, however, has held that the Equal Protection Clause mandates “consistency: ‘[T]he standard of review [of race-conscious action] is not dependent on the race of those burdened or benefited by a particular classification.’”²⁷⁰

By contrast, First Amendment doctrine is understood to be “difference-respecting.”²⁷¹ It protects pluralism of opinion on contested matters of social importance because it values the formulation of social policy through a dialogic process.²⁷² Thus, informing equal protection doctrine with First Amendment principles in cases where the message of government race consciousness is the predominant injury would allow room for the democratic process to function.²⁷³ Indeed, a fundamental premise of the government

269. Cf. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 495 (1989) (plurality opinion) (stating that “[i]f one aspect of the judiciary’s role under the Equal Protection Clause is to protect discrete and insular minorities from majoritarian prejudice or indifference, some maintain that these concerns are not implicated when the white majority places burdens upon itself,” but rejecting that argument on the facts of the case (citations and internal quotation marks omitted)).

270. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 224 (1995) (first alteration in original) (quoting *Croson*, 488 U.S. at 494).

271. Yoshino, *supra* note 266, at 830.

272. See Robert C. Post, *Racist Speech, Democracy, and the First Amendment*, 32 WM. & MARY L. REV. 267, 281–82 (1991) (“The will of the community, in a democracy, is always created through a running discussion between majority and minority . . . [that] subjects the political and social order to public opinion, which is the product of a dialogic communicative exchange open to all.” (internal quotation marks omitted)). Indeed, current First Amendment doctrine values pluralism of opinion so strongly that it protects hate speech, which scholars have suggested is more akin to an assault than an opinion and therefore has little social value. See, e.g., Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133 (1982).

273. This should be particularly important for those Justices who most stridently proclaim the importance of judicial modesty and deference to legislatures. See, e.g., *Sosa v. Alvarez-Machain*, 542 U.S. 692, 750 (2004) (Scalia, J., concurring) (criticizing the Court’s alleged counter-majoritarianism and stating that “[t]his Court seems incapable of admitting that some matters—any matters—are none of its business” (emphasis in original)); *United States v. Virginia*, 518 U.S. 515, 567 (1996) (Scalia, J., dissenting) (“The virtue of a democratic system with a First Amendment . . . is destroyed if the smug assurances of each age are removed from the democratic process and written into the Constitution.”); *Romer v. Evans*, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting) (“This Court has no business imposing upon all Americans the resolution [of the debate about the morality of homosexuality] favored by the elite class from which the Members of this institution are selected . . .”).

speech doctrine is that when individuals' only objection is to the government's message, their remedy lies in the political process, not the courts.²⁷⁴

Finally, a First Amendment understanding could help shift the Court's analysis in such cases from platitudes aimed at ending the discussion²⁷⁵ to a substantive debate that is "uninhibited, robust, and wide-open"²⁷⁶ regarding the role race still plays in American society. Much like the government officials in *New York Times Co. v. Sullivan*²⁷⁷ who sought to use the law of libel to squelch discussion of racial inequality,²⁷⁸ the Court's strict colorblindness doctrine shuts down any substantive discussion of the propriety of the government acknowledging or correcting racial inequality. To be sure, there is a real debate to be had. Even if one believes that racial disparities are real and substantial, many questions remain as to what government action, if any, should follow from that fact. The strict colorblindness doctrine inhibits that debate, falsely "level[ing] the discursive playing field" by placing those who notice and seek to correct racial inequities "in the same moral category as someone who consciously perpetuates racial inequities."²⁷⁹

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274. *Pleasant Grove City, Utah v. Summum*, 129 S. Ct. 1125, 1132, 555 U.S. 460 (2009) ("If the citizenry objects [to a governmental message], newly elected officials later could espouse some different or contrary position." (internal quotation marks omitted)); *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 235 (2000) ("When the government speaks, for instance to promote its own policies or to advance a particular idea, it is, in the end, accountable to the electorate and the political process for its advocacy.").
275. *See, e.g., Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007) (plurality opinion) ("The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."); *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 511 (2006) (Roberts, C.J., concurring in part, concurring in the judgment in part, and dissenting in part) (stating, in a vote dilution case, that "[i]t is a sordid business, this divvying us up by race"); *Adarand*, 515 U.S. at 239 (Scalia, J., concurring in part and concurring in the judgment) ("In the eyes of government, we are just one race here. It is American.").
276. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).
277. 376 U.S. 254.
278. In *Sullivan*, a public official in Montgomery, Alabama, sued private individuals and the *New York Times* for publishing an advertisement soliciting funds for civil rights activities and for the legal defense of Martin Luther King, Jr. The lawsuit alleged libel premised on inaccurate factual statements in the advertisement, which criticized the segregationist and racist policies and actions of Montgomery public officials. The Supreme Court held that, in order to protect the freedoms of speech and of the press, a public official alleging libel over criticism of his official conduct must prove that an allegedly defamatory statement was made with "actual malice—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* at 280 (internal quotation marks omitted).
279. Cho, *supra* note 3, at 1594–95; *see also* Barnes, Chemerinsky & Jones, *supra* note 3, at 976 (arguing that postracialism and calls for absolute colorblindness in the law "allow[] those who oppose affirmative action or the continuation of race-based remedies . . . to take the moral high ground; they are the ones who have moved on to a new, more enlightened era, while those who are trying to continue race-conscious remedies are mired in the past").

Under the colorblindness doctrine, the Court need not engage the debate beyond a search for race consciousness and the strident condemnation thereof. The Court has embraced a kind of heckler's veto theory, long formally discredited in free speech jurisprudence, whereby the fact that government attention to racial inequality offends some individuals or allegedly creates divisiveness is sufficient to prohibit the message.²⁸⁰ Informing equal protection jurisprudence with First Amendment principles, by contrast, would invoke a forthright balancing of the competing visions of the common good embodied by colorblindness versus remedial or diversifying color consciousness. Under this approach, government officials could reject colorblindness and seek to promote a message of positive color consciousness with the same vigor as the other messages they promote in the public sphere, rather than disavowing or hiding their antisubordination goals in order to avoid running afoul of the Court's colorblindness doctrine.

CONCLUSION

The question of whether race still matters enough to justify government intervention is subject to debate. I believe that it does. Admittedly, it is not irrational to believe the opposite: that government attention to racial inequality is a cure worse than the disease. But that is an opinion, not a legal doctrine; it is a point of view masquerading as jurisprudence.²⁸¹ Moreover, it is not a belief that

280. I am not using the term heckler's veto in a strict First Amendment sense, which involves the concern that the government may silence a private speaker ostensibly to protect him or her from a hostile audience. *See, e.g.*, HARRY KALVEN, JR., *THE NEGRO AND THE FIRST AMENDMENT* 140 (1965) (describing the concern about the heckler's veto as follows: "If the police can silence the speaker, the law in effect acknowledges a veto power in hecklers who can, by being hostile enough, get the law to silence any speaker of whom they do not approve."). Here, of course, my concern is not that the government will silence a private speaker due to a heckler's veto. Rather, it is that the heckler's veto consists of the divisiveness that government attention to racial inequality allegedly causes, which is sufficient to silence the government under the Court's colorblindness doctrine. The anticipated reaction of a few operates to silence the many who have adopted such policies through their democratically elected representatives, even where such policies cause no harm beyond offense at the message expressed.

281. I am highly skeptical, both as a scholar and as an African American, that colorblindness accurately describes the current state of either our minds or our society. *See, e.g.*, Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 *UCLA L. REV.* 465 (2010) (arguing that scientific evidence from the field of implicit social cognition establishes that colorblindness as a description of human behavior is empirically unsound); *see also supra* note 5 and accompanying text (discussing continued racial disparities in the allocation of wealth, resources, and opportunities). I am also aware, however, that differences in cultural cognition may lead to different views regarding the prevalence of racial discrimination and inequality. *See, e.g.*, The Cultural Cognition Project at Yale Law School, <http://www.culturalcognition.net> (last visited July 24, 2011); *see also* Charles M. Blow, Op-Ed, *A Nation of Cowards?*, *N.Y. TIMES*, Feb. 20, 2009, at

the Constitution requires the elected branches of government to hold. The Equal Protection Clause should not be interpreted to prevent democratically accountable government entities from taking cognizance of racial inequality simply because doing so expresses a message with which some Justices on the Supreme Court disagree.

A21 (citing polling data revealing that “72 percent of whites thought that blacks overestimated the amount of discrimination against them, while 82 percent of blacks thought that whites underestimated the amount of discrimination against blacks”).