Neutrality of the Equal Protection Clause

by K.G. JAN PILLAI*

I. Introduction

The brief interlude of effective race-wide remedies within Equal Protection jurisprudence is almost over. The Supreme Court has decisively abandoned the anticaste principle[1] of the Equal Protection Clause in favor of the colorblind principle.[2] Our pluralistic society, which conscientiously strives to navigate the terrain of racial and gender inequality, now depends exclusively on the safe and successful auto-piloting of a colorblind constitution. Encoded in the principle of colorblindness is the concept of neutrality that mandates absolute government impartiality toward individuals and groups without regard to their race, color, ethnicity, gender or disabilities. However, neutrality still remains an amorphous concept in equal protection jurisprudence. The Court's unwillingness or inability to clearly articulate, and faith-

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1. *See* Cass Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410 (1994) (arguing that the most sensible reading of the Equal Protection Clause would prohibit only governmental actions that subjugate or subordinate racial groups, and not remedial actions that help groups subjected to discrimination and subordination). Professor Laurence Tribe made a similar argument in his constitutional law treatise. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 16-21 (2d ed. 1988). The anticaste principle has been recognized by the Supreme Court on several occasions. *See, e.g.*, Strauder v. Virginia, 100 U.S. 303, 307 (1880) (the pervading purpose of the Civil War Amendments was to outlaw discrimination against a once-enslaved race); Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 243 (1995) (Stevens, J., dissenting) ("There is no moral or constitutional equivalence between a policy that is designed to perpetuate a caste system and one that seeks to eradicate racial subordination.").

2. The colorblindness principle is also known as the anti-discrimination principle. The principle is typically stated by Chief Justice Rehnquist as: "Racial classifications are antithetical to the Fourteenth Amendment whose 'central purpose' [was] 'to eliminate racial discrimination emanating from official sources in the States.'" Shaw v. Hunt, 517 U.S. 899, 907 (1996), *quoted in* McLaughlin v. Florida, 379 U.S. 184, 192 (1964). For a recent reference to the distinction between colorblindness and racial subordination, see Kathleen M. Sullivan, *The Future of Affirmative Action: After Affirmative Action*, 59 OHIO ST. L.J. 1039, 1040 (1998).

fully adhere to, the concept of neutrality has rendered the realization of the laudable ideal of a colorblind constitution problematic if not impossible.

In several government arenas where race-wide remedial measures were once considered both necessary and appropriate, the colorblind principle has created profound and harmful inroads. For example, the Supreme Court has systematically outlawed race-based affirmative action programs in the public arena such as public contracting,[3] government employment,[4] and state-funded educational institutions,[5] except in the most unlikely instances where the use of racial criteria could be justified under strict scrutiny,[6] have all been victims of the Court's colorblind policy interpretations. Likewise, the colorblindness principle permits many school districts to sidestep the burden of complying with court-ordered desegregation plans.

In the case of school desegregation, the Supreme Court allows districts to extricate themselves from desegregation orders in three

3. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (invalidating, under strict scrutiny, minority contract set-asides by the city of Richmond); Adarand Constructors, 515 U.S. at 200 (holding a race-conscious affirmative action program in public contracting established by a federal statute unconstitutional, despite the power of Congress to enforce the Fourtheenth Amendment under § 5 of the Equal Protection Clause).

4. *See* Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986) (invalidating a collectively bargained preference to minority teachers in the event of layoff); Taxman v. Board of Educ. of Piscataway, 91 F.3d 1547 (3d Cir. 1996) (en banc), *cert. granted*, 117 S. Ct. 2506 (1997), *cert. denied*, 521 U.S. 1117 (invalidating the School Board's use of race-conscious criteria to choose which of two equally qualified tenured teachers to terminate, pursuant to its affirmative action plan—the circuit court applied strict scrutiny as required by the Supreme Court). In *Taxman*, the case was settled and the parties submitted a joint motion to the U.S. Supreme Court seeking dismissal of the case.

5. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978). Justice Powell's controlling opinion in the case recognized consideration of race as a plus factor in evaluating candidates for admission to the extent it served the university's educational goal of achieving diversity. However, after the strict scrutiny standard gained a strong foothold in the Court's equal protection jurisprudence, lower federal courts have rejected diversity as a rationale for race-based decisions of educational institutions. *See* Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996), *cert. denied*, 518 U.S. 1033 (1996). *See also* Podberesky v. Kirwan, 956 F.2d 52 (4th Cir. 1992) (striking down a University of Maryland scholarship made available only to African American candidates for admission).

6. In *City of Richmond*, for the first time, a majority of the Supreme Court adopted the strict scrutiny standard for evaluating racial classifications. Strict scrutiny requires the government to demonstrate that a race-based program is narrowly tailored to achieve a compelling governmental interest. Professor Gerald Gunther characterized strict scrutiny as "'strict' in theory and fatal in fact." Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972). Justice O'Connor tried to "dispel the notion" that strict scrutiny is fatal in her *Adarand* opinion. *See* Adarand Constructors, 515 U.S. at 237. *Accord Adarand*, 515 U.S. at 239 (Scalia, J., concurring in part and in the judgment).

circumstances. School districts may relieve themselves of desegregation mandates by showing a good faith effort "to the extent practicable"[7] to eliminate past discrimination, by showing that the causal link between the past *de jure* segregation and its vestiges has become attenuated,[8] or by showing that remedial plans have been in place too long to justify continued judicial intervention into autonomous decisionmaking by local school authorities.[9]

The colorblindness principle has also led the Court to invalidate a series of state legislative redistricting plans designed to increase minority representation in the national legislature.[10] The Court has found constitutional malady in several noncompact,[11] redistricting plans because they were either "unexplainable in terms other than race"[12] or because the Court found that "race was the predominant factor motivating the drawing" of those districts.[13]

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7. Board of Educ. v. Dowell, 498 U.S. 237 (1991) (terminating a desegregation decree after finding compliance in good faith since the decree was entered and the vestiges of past discrimination had been eliminated to the extent practicable). *Accord* Missouri v. Jenkins, 515 U.S. 70 (1995).

8. *See* Freeman v. Pitts, 503 U.S. 467, 496 (1992) (holding that a federal district court could relinquish supervision and control of school districts in incremental stages before full desegregation compliance was achieved, as the *de jure* violation became more remote. Further, demographic changes intervened in shaping the racial composition of the student population and the causal link between current conditions and past violations had become "more attenuated," especially since the school district had "demonstrated its good faith").

9. *See* Missouri v. Jenkins, 515 U.S. 70, 102 (1995) (O'Connor, J., concurring) (citing Freeman v. Pitts, 503 U.S. 467, 489 (1992)) (admonishing the district court to bear in mind that its end purpose is not only to remedy the violation "to the extent practicable," but also "to restore state and local authorities to the control of a school system that is operating in compliance with the Constitution").

10. *See* Shaw v. Reno, 509 U.S. 630 (1993); Shaw v. Hunt, 517 U.S. 899 (1995); Bush v. Vera, 517 U.S. 952 (1995); Miller v. Johnson, 515 U.S. 900 (1995).

11. *See* Shaw, 509 U.S. at 637 (invalidating North Carolina's reapportionment scheme on the ground that it arbitrarily created legislative district with majority black voters "'without regard to any other considerations, such as compactness, continguousness, geophraphical boundaries, or political subdivision' with the purpose 'to create Congressional Districts along racial lines'").

12. *Id.* at 644 (quoting Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 266 (1977) (accepting the argument of challengers to a redistricting plan that the legislation was so bizarre on its face that it was "unexplainable on grounds other than race"). *Accord* Bush v. Vera, 517 U.S. 952, 972 (1996) (finding that the "contours of Congressional District 30 are unexplainable in terms other than race").

13. Miller v. Johnson, 515 U.S. 900, 917 (1995) (invalidating a Georgia redistricting plan on the ground that race was the "predominant, overriding factor" motivating the drawing of the district, even though other traditional race-neutral districting principles were also influencing the redistricting, *id.* at 921). *Accord* Abrams v. Johnson, 521 U.S. 74, 119 (1997) (approving the district court's remedial redistricting plan which contained one black majority district in Georgia, instead of the two black majority districts proposed in the state legislature's redistricting plan. Justice Breyer, joined by Justices Stevens, Souter,

While making these momentous decisions, the Court was mindful of the current state of racial discrimination and inequality in American society. Even while stretching the colorblind doctrine to require race-specific remedial programs established by Congress[14] to undergo strict judicial scrutiny,[15] the Court acknowledged that "[t]he unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality. . . ."[16] Similarly, although the Court invalidated a minority contract set aside by the city of Richmond—a city with a majority black population, in which its black entrepreneurs received less than 3% of city contracting dollars—the Court also had "no doubt that the sorry history of both private and public discrimination in this country has contributed to a lack of opportunities for black entrepreneurs."[17] After making these factual observations in these and other social contexts,[18] the Court made clear that it was not oblivious to longstanding and persistent racial discrimination. The Court, however, then proceeded to alert all levels of government to abandon race-referenced remedies that are at odds with a colorblind constitution[19] and mandated the creation of legally acceptable alternatives to combat the problems of racial biases and imbalances.[20]

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and Ginsburg, dissented, stating that the majority, "by focusing upon what it considered to be unreasonably pervasive positive use of race as a redistricting factor, has created a legal doctrine that will unreasonably restrict legislators' use of race, even for the most benign, or antidiscriminatory purposes.").

14. Congress has the authority to establish such programs by virtue of its enforcement power under the Fourteenth Amendment. *See* U.S. CONST. amend. XIV § 5.

15. *See* K.G. Jan Pillai, *Phantom of the Strict Scrutiny*, 31 NEW ENG. L. REV. 397 (1997).

16. Adarand Constructors, 515 U.S. at 237.

17. Croson, 488 U.S. at 499. The city of Richmond established a 30% contract set aside for minorities. *See id.* at 477. The Court found that the government failed to demonstrate a compelling interest and that the program was not narrowly targeted to remedy the alleged discrimination in the contracting business. *See id.* at 496.

18. *See* Jenkins, 515 U.S. at 112-13 (O'Connor, J., concurring) ("The unfortunate fact of racial imbalance and bias in our society, however pervasive or invidious, does not admit of judicial intervention absent a constitutional violation." In the case, the Court repudiated a court-ordered desegregation plan on the ground that the district court was not able to "justify its transgression" in designing the plan to create "desegregation attractiveness" so as to make the segregated schools attractive to students from suburbs).

19. *See Croson*, 488 U.S. at 492 (stating that state or local subdivision has the authority to eradicate the effects of discrimination, but the authority must be exercised "within the constrainsts of §1 of the Fourteenth Amendment").

20. *See id.* at 494 ("States and their local subdivisions have many legislative weapons at their disposal both to punish and prevent discrimination and to remove arbitrary barriers to minority advancement [without resorting to racial classifications].").

Realizing the Supreme Court's colorblind jurisprudence has "alter[ed] the playing field [of race-specific remedies] in some important respects,"[21] the nation's policymakers have begun their search for race-neutral alternatives. Some have abandoned race-specific remedies entirely and others have scaled them down or made operational changes to make the remedies less objectionable. Among the institutions that have ended race-based programs are the Boston School District, the University of Washington and the University of Texas. The Boston School Committee voted to end the city's 25-year-old court ordered busing integration program.[22] According to the superintendent of Boston schools, the immediate reason for ending the program was the awareness of "the tenor of court decisions around the land, with respect to use of race in student assignment plans."[23]

Haunted by a reverse discrimination class-action lawsuit and the passage of an anti-affirmative action statewide referendum in 1998, the University of Washington likewise announced that the school was "regretfully suspending its 30-year practice of race-conscious admissions."[24] Although the decision will considerably reduce the percentage of minority students who constitute about 8% of the total student population, the University has not devised a more equitable substitute plan.[25]

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21. Adarand Contructors, 505 U.S. at 237 (majority opinion of Justice O'Connor).

22. *See* Carey Goldberg, *Busing's Day Ends: Boston Drops Race in Pupil Placement*, N.Y. TIMES, July 15, 1999, at A1, A14 (the Boston School Committee voted 5 to 2 to end race-based busing and to return to the system of neighborhood schools).

23. *Id.* (quoting superintendent Thomas W. Payzant). The Committee voted "under pressure" from a pending lawsuit that challenged the busing program as racially discriminatory against white children. In 1998, the federal courts struck down the race-based admission policy of the prestigious Boston Latin School. In a news conference the mayor of Boston stated:

> [W]e are united in our belief that a lengthy court battle over assignment policies would only further distract us from our most important challenge: raising the level of excellence for every student and every school, all 129 schools in Boston.

Id. at A14. It should be noted that since the implementation of the busing plan, "white flight" to the suburbs has reduced the percentage of white students in Boston public schools from 52% in 1974 to 16% in 1999. The current student population is comprised of 49% black, 26% Hispanic, 9% Asian and 16% white students. Some predict that the end of race-based busing would lead to "resegregation." *Id.*

24. Ethan Bronner, *U. of Washington Will End Race-Conscious Admissions*, N.Y. TIMES, Nov. 7, 1998, at A12.

25. The University's decision would have a serious impact on the American Indians of the state of Washington. The University's student undergraduate population, prior to the suspension, was comprised of 2.8% black, 4% Hispanic and 1.5% American Indian students. The University only promised that it was "determined to do everything . . . within the law to maintain diversity of the student body." *Id.*

Unlike Washington State, Texas—prevented by the Fifth Circuit Court of Appeals from continuing race-conscious admission practices at the Texas University School of Law[26]—adopted a law that requires each of the state's public undergraduate institutions to admit all applicants with a grade point average in the top ten percent of their high school graduating class.[27] Texas lawmakers hope that its "ten percent solution" will reverse the dramatic decline in minority enrollment that the state's colleges and universities experienced in the wake of the circuit court decision.[28] Experienced academics William Bowen and Derek Bok predict that such class-based programs "will not have appreciable effects on racial diversity (and could also be very costly and harmful to academic standards, depending on how they are implemented)."[29] Racial diversity is arguably an acceptable goal for a university to pursue.[30] Seemingly, a university would want to pursue that goal in the most efficient manner possible. Texas' race-neutral policy happens to be the least efficient means of achieving that goal.[31] Moreover, skeptics persuasively argue that class-based affirmative action predominantly fails in achieving the core objective of race-conscious affirmative action: remedying the lingering effects of past and present racial discrimination.[32]

26. *See* Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996), *cert. denied*, 518 U.S. 1033 (1996). The *Hopwood* decision has been criticized as incompatible with the Supreme Court's decision in *Regents of the Univeristy of California v. Bakke*, 438 U.S. 265 (1978), in which the controlling opinion of Justice Powell permitted use of race as a "plus" factor in admissions for the purpose of promoting diversity. The *Hopwood* court maintained that Justice Powell's solitary opinion favoring diversity never commanded a majority of the Supreme Court. *See* Hopwood, 78 F.3d at 944. For a critique of *Hopwood*, see Lackland H. Bloom, Jr., *Hopwood, Bakke and the Future of the Diversity Justification*, 29 TEX. TECH. L. REV. 1, 72 (1998) (stating that Justice Powell's opinion in *Bakke* "provided a wise and constitutional means of reconciling the quest for a colorblind society with the reality of a race-conscious one . . . . As such *Hopwood* was wrong to reject it.").

27. *See* TEX. EDUC. CODE ANN. § 51.803 (West Supp. 1999).

28. *See The Diversity Project in Texas*, N.Y. TIMES, Nov. 27, 1999, at A4.

29. WILLIAM G. BOWEN & DEREK BOK, THE SHAPE OF THE RIVER: LONG TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS 288 (1998).

30. *See Bakke*, 438 U.S. at 312 (opinion of Justice Powell stating that a university has a First Amendment right to pursue the goal of diversity).

31. *See* Sullivan, *supra* note 2, at 1054 (stating that "[i]t would seem perverse to require, as a matter of constitutional law, that a permissible goal be sought by the least efficient alternative means").

32. *See* Deborah C. Malamud, *Assessing Class-Based Affirmative Action*, 47 J. LEGAL EDUC. 452, 464-71 (1997); K. ANTHONY APPIAH & AMY GUTMANN, COLOR CONSCIOUS: THE POLITICAL MORALITY OF RACE 138-42 (1996). One of the skeptics, however, saw a "silver lining in the effort to find alternatives" by the state of Texas, even though the rejection of the traditional affirmative action is very troubling in many ways. David Orentlicher, *Affirmative Action and Texas' Ten Percent Solution: Improving Diversity and*

The Clinton Administration stands firmly in its belief that race-neutral means are an inadequate substitute for race-specific affirmative action plans. After a comprehensive review of all existing race-based federal programs,[33] President Clinton concluded that "affirmative action remains a useful tool for widening economic and educational opportunity"[34] and that "evidence suggests, indeed, screams that [the] day [to retire affirmative action] has not come."[35] In 1995, the President proposed a two-prong strategy to see that the law delivers "fairness for everyone" exactly as "the law does require."[36] First, he embraced a "Mend it, but don't end it" slogan, advocating a streamlining rather than a dismantling of race-based affirmative action programs.[37] Second, the President renewed his Administration's commitment "to vigorous, effective enforcement of laws prohibiting discrimination."[38]

President Clinton is more knowledgeable about the nation's history of race discrimination and its disabling effects on minorities than many of his modern predecessors.[39] The President's support for af-

Quality, 74 NOTRE DAME L. REV. 181, 210 (1998) (arguing that the ten percent solution may have the potential to improve public school education and discourage the affluent from sending their children to the best or more expensive private schools).

33. *See Affirmative Action Review: Report to the President* (visited Feb. 26, 2000) <http://www.whitehouse.gov/WH/EOP/OP/html/aa/aa-index.html>. The review was triggered by the Supreme Court decision in *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), that held federal race-conscious programs would be subject to strict scrutiny. The review was directed by George Stephanopoulos, Senior Advisor to the President for Policy and Strategy.

34. Remarks of President Clinton at the National Archives and Records Administration, 2 PUB. PAPERS 1106 (July 19, 1995) [hereinafter *Remarks of President Clinton*].

35. *Id.* at 1113.

36. Memorandum on Affirmative Actions for Heads of Executive Departments and Agencies, 2 PUB. PAPERS 1114 (July 19, 1995) [hereinafter *Memorandum on Affirmative Action*].

37. *Remarks of President Clinton, supra* note 34, at 1113. The President issued a directive to the agencies and department to eliminate or modify any programs that use race, ethnicity or gender as a consideration, if the policy falls into the following "policy principles": a) creates a quota; (b) creates preferences for unqualified individuals; (c) creates reverse discrimination; or (d) continues even after its equal opportunity purposes have been achieved. *See Memorandum on Affirmative Action, supra* note 36, at 1114.

38. *Remarks of President Clinton, supra* note 34, at 1114. Note also that the President sought $695 million for civil rights enforcement in his budget request for 2001, an increase of 13 percent over the budget for the year 2000. *See Clinton Seeks Increase in Civil Rights Budget*, N.Y. TIMES, Jan. 16, 2000, at A26.

39. *See generally* PRESIDENT BILL CLINTON, BETWEEN HOPE AND HISTORY: MEETING AMERICA'S CHALLENGES FOR THE 21ST CENTURY (1996). The President's commitment to racial and gender equality is evident from the fact that he has "appointed more women and minorities to the Federal bench than [his last three] predecessors combined." 1 PUB. PAPERS 295 (March 3, 1995).

firmative action is a natural outgrowth of his convictions. His policy initiatives on race, such as the creation of the President's Advisory Board on Race,[40] are testaments to his commitment to racial equality. An affirmative action make-over, however, is not likely to pacify the adherents of colorblind jurisprudence within the federal judiciary. Since the *Adarand* decision, the Clinton Administration has lost every case in which it has sought the Supreme Court's imprimatur of race-conscious programs.[41] According to the Court, the dispensing of benefits or imposing of burdens by the government based on considerations of race is incompatible with the Equal Protection Clause and its "central mandate" which "is racial neutrality in governmental decisionmaking."[42] The Clinton Administration should, therefore, concentrate its efforts on the second prong of its strategy and implement the vigorous and effective enforcement of the nation's anti-discrimination laws.

Opponents of race-based affirmative action have long maintained that the best and most constitutional means of achieving racial equality is effective and impartial enforcement of anti-discrimination laws. To drive home their point, some have even advocated that racial discrimination in violation of anti-discrimination law should be subjected to both civil and criminal penalties.[43] There is much disagreement concerning the appropriate means for eradicating racial discrimination, but there is little disagreement surrounding racism's pervasive existence and its adverse effects on societal well-being. The President's Advisory Board on Race, after its year long, high profile investigation, found that at the end of the 20th Century "[t]he color of

40. *See* Exec. Order No. 13,050, 62 Fed. Reg. 32,987 (1997).

41. The Administration unsuccessfully sought approval of redistricting legislation in Georgia, *Miller v. Johnson*, 515 U.S. 900 (1995), in Texas, *Bush v. Vera*, 517 U.S. 952 (1996), and in North Carolina, *Shaw v. Hunt*, 517 U.S. 899 (1996). As a result of the Supreme Court's disapproval of race-based redistricting, Georgia reduced the number of black-majority districts from 3 to 1. *See* Abrams v. Johnson, 521 U.S. 74 (1997). North Carolina reduced the population of the disapproved district from a majority-black district to 47 percent black district. *See* Hunt v. Cromartie, 526 U.S. 541 (1999).

The Supreme Court also rejected the Administration's request to review the Fifth Circuit decision in *Hopwood v. Texas*, 518 U.S. 1033 (1996) and the Ninth Circuit decision in *Coalition for Economic Equality v. Wilson*, 122 F.3d 692 (9th Cir. 1997).

42. *Miller*, 515 U.S. at 904 (citing Loving v. Virginia, 388 U.S. 1, 11 (1967); McLaughlin, 379 U.S. at 191-192; and Brown v. Board of Educ., 347 U.S. 483 (1954)).

43. *See* Shelby Steele, *Affirmative Action Must Go*, N.Y. TIMES, March 1, 1995, at A19. "To my mind there is only one way to moral authority for those of us who want affirmative action done away with: to ask that discrimination by race, gender or ethnicity be a criminal offense, not just civil. If someone can go to jail for stealing my car stereo, he ought to do considerably more time for stifling my livelihood and well-being by discriminating against me. This means there will be many trials and lawsuits, so be it." *Id.*

one's skin continues to affect an individual's opportunities to receive a good education, acquire the skills to get and maintain a good job, have access to equal health care, and receive equal justice under the law."[44] In our multi-racial democracy, remedying such a regrettable condition must be prioritized. If race-based affirmative action is constitutionally suspect, and class-based alternatives are off-target and inadequate, then the only available legal means to racial equality is resolute and impartial enforcement of anti-discrimination laws.

Thus, the question thrust to the forefront of our remedial jurisprudence is whether, and how optimally, the law empowers the victims of racial discrimination to fend for themselves through normal recourse of our judicial system. The prevailing equal protection jurisprudence is, in many respects, discriminator-friendly. Substantively, the only misconduct actionable under the Equal Protection Clause is intentional discrimination[45]—a limitation that exonerates the increasingly more complex and subtle forms of contemporary discrimination.[46] Procedurally, the Supreme Court has made the task of proving intentional discrimination—in the absence of some so-called "smoking gun" evidence—extremely difficult.[47] The most pernicious proce-

44. ONE AMERICA IN THE 21ST CENTURY: FORGING A NEW FUTURE, THE PRESIDENT'S INITIATIVE ON RACE: THE ADVISORY BOARD'S REPORT TO THE PRESIDENT 35 (U.S. Gov't Printing Office 1998).

45. *See* Washington v. Davis, 426 U.S. 229, 239-42 (1976); Keyes v. School Dist. No. 1, 413 U.S. 189, 208-09 (1973) (stating that intent to segregate is necessary to establish liability for school segregation); Freeman v. Pitts, 503 U.S. 467, 494 (1992) (racial imbalance in schools could be remedied only if the school engaged in *de jure* segregation).

46. *See* Kimberle Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1384 (1988) (stating "the belief that racial exclusion is illegitimate only where the 'White Only' signs are explicit . . . makes it difficult" to tackle problems of underlying racism in society); Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1055 (1978) (arguing that the intent requirement permits the discriminator to escape liability just by "showing that the action was taken for a good reason, or for no reason at all"); *see also* Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987) (arguing that racism, often unintentional and even unconscious, cannot be comprehended by the intent requirement).

47. *See, e.g.*, the procedural rules established by the Supreme Court for proving intentional discrimination in the context of employment. More than a quarter century ago, the Supreme Court in a landmark case, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), unanimously prescribed a formulaic way to evaluate evidence of intentional discrimination. The *McDonnell Douglas* framework was summarized by the court in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981) as follows:

> First, the plaintiff has the burden of proving by a preponderance of evidence a prima facie case of discrimination. Second, if the plaintiff successfully proves the prima facie case, the burden shifts to the defendant to articulate some legitimate, nondiscriminatory reason for employee's rejection. Third, should the defendant

dural barrier to effective enforcement in the post-affirmative action era is the rule of *Washington v. Davis*[48] which ordains that, absent proof of invidious purpose or intent, a facially neutral law or government practice would not violate the equal protection principle even if it imposed disproportionate burdens on racial minorities. This pernicious limiting rule shelters systemic racial discrimination from judicial cognizance and remediation at the initiative of individual victims.

This Article is not intended to take issue with the enforcement–handicapping intent rule as such, even though the rule's corrosive impact on equality jurisprudence is interspersedly discussed. The sole focus of the Article, rather, is the dispositive role that the rule of *Washington v. Davis* assigns to facial neutrality and the rule's stifling effect on meaningful judicial review. The basic premise of the Article is that if the "central mandate" of the colorblind Equal Protection Clause is "racial neutrality in governmental decisionmaking,"[49] the burden of establishing neutrality should always remain with the government. A law which disproportionately disadvantages a racial minority should be deemed prima facie unneutral toward the disadvantaged minority and should be treated as such unless the government proves otherwise. Instead of requiring the government to prove the neutrality of the racially disadvantaging law, the *Davis* rule improperly saddles the members of the disadvantaged minority with the unwarranted burden of proving the government's discriminatory intent. In the case of racially disadvantageous laws, the real issue is not whether the law purposefully discriminates, rather it is whether

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carry this burden, the plaintiff must then have an opportunity to prove by preponderance of evidence that the legitimate reason offered by the defendant were not its true reasons, but were a pretext for discrimination.

In a 5 to 4 decision, the Supreme Court in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993), changed the *McDonnell Douglas* framework. The majority opinion written by Justice Scalia held that the defendant, faced with a prima facie case of discrimination, has only the "burden of production," a burden "to come forward with some response." *Id.* at 509. If the defendant satisfies this burden, then the burden shifts back to the plaintiff who must persuade the trier of fact "that the defendant intentionally discriminated against the plaintiff." *Id.* at 507. Plaintiff cannot succeed simply by proving that the employer's proffered reason is pretextual or false. The dissenters, in an opinion by Justice Souter, complained that the majority "destroyed a framework carefully crafted in precedents" and made it tremendously difficult for a victim of discrimination lacking direct evidence to prove his/her case. *Id.* at 525 (Souter, J., joined by Justices White, Blackmun, and Stevens, dissenting).

48. 426 U.S. 229, 239 (1976). *See also* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 264-65 (1977) (stating that "[o]ur decision [in *Washington v. Davis*] made it clear that official action will not be held unconstitutional solely because it results in a racially disproportionate impact").

49. Miller v. Johnson, 515 U.S. 900 (1995).

the law is truly neutral. A law can be non-neutral without being purposefully discriminatory and non-neutrality—without more—can be at odds with the colorblind Equal Protection Clause. Therefore, the core issue in judicial review of a law that disproportionately disadvantages racial minorities is its neutrality and not the evil intent or purpose of the lawmakers. The concept of neutrality is so elusive, and at times even ephemeral, that it cannot be taken for granted from the facial appearance of the law.

Our analysis of the Supreme Court's neutrality jurisprudence begins with a discussion of the *Davis* rule's requirement of purposeful discrimination and the rule's bypasses of the neutrality inquiry into race disadvantaging laws. This segment also makes a comparison between *Davis* rule neutrality and the universal concept of neutrality formulated by the law of nations. In order to illustrate the danger of leaving the concept of neutrality in the present state of doctrinal indeterminacy, Part III analyzes federal court litigation concerning California Proposition 209. Using racial profiling in New Jersey as an example of discriminatory impact, Part IV further demonstrates that even blatant discriminatory enforcement practices could be easily hidden behind facial neutrality. This section further demonstrates that piercing the neutrality veil with proof of purposeful discrimination is a nearly impossible task. Part V examines the Supreme Court's neutrality inquiry in First Amendment cases and proposes that the Court should at least conduct the same kind of inquiry into facial neutrality in Equal Protection cases. The concluding section urges the Supreme Court to take adventurous initiatives to define neutrality in terms of verifiable impartiality, not only to provide justice to racial minorities in the post-affirmative action era but also to rid the emerging colorblind equal protection jurisprudence of suspicions of judicial partiality.

II. The Damage Free Impact

A. The Davis Trilogy

From the perspective of racial minorities, the most serious impediment to effective enforcement of the Equal Protection Clause is the rule of *Washington v. Davis*.[50] Established during the heyday of affirmative action,[51] the rule requires a showing of "discriminatory pur-

50. 426 U.S. 229 (1976).

51. *See* Michel Selmi, *Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric*, 86 GEO. L.J. 279, 339 (1997) ("The Court's incongruous approach to dis-

pose" to invalidate "a law, neutral on its face and serving ends otherwise within the power of government to pursue," even if the law produces adverse disproportionate impact on racial minorities.[52] The rule was successively reaffirmed in two other cases. In *Village of Arlington Heights v. M.H.D. Corp.*,[53] the Court held the racially discriminatory effect of the village's zoning decision would be "without independent constitutional significance" unless there was a showing that "discriminatory purpose was a motivating factor" in the decision.[54] The Court also expressed its willingness to find an equal protection violation in the rare situation in which "a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face."[55]

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crimination is perhaps best explained by the fact that its doctrine came of age in the 1970's, in the shadow of affirmative action.").

52. *Id.* at 279. In *Davis*, unsuccessful black candidates challenged the validity of a written verbal ability test used by the D.C. Police Department to screen their recruits on the ground that the test had a "highly discriminatory impact in screening out black candidates" and that the test bore no relationship to on-the-job performance of recruits. Davis v. Washington, 348 F. Supp. 15, 16 (D.D.C. 1972). The failure rate of black candidates who took the test over a 3 year period was more than four times as high as the failure rate of whites (5.7% to 13%). Davis v. Washington, 512 F.2d 956, 958-59 (D.C. Cir. 1975). Plaintiffs did not claim "intentional discrimination or purposeful discriminatory acts." Davis v. Washington, 348 F. Supp. 15, 16 (D.D.C. 1972). The District Court, upholding the test, stated that the Department made "a vigorous, systematic, and persistent affirmative effort to enroll black policemen." *Id.* at 17. The Court of Appeals reversed, holding the "racially disproportionate impact" cast a heavy burden on the Department to prove the test was actually related to job performance. *Id.* at 15. The Court relied on *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), a Title VII case in which the Supreme Court recognized a disparate impact cause of action under Title VII holding that "[i]f an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited." *Id.* at 431.

53. 429 U.S. 252 (1977). The case involved a challenge to the village's zoning decision that prevented construction of low-cost housing on the ground that the decision had a disproportionate impact on racial minorities. The village claimed its decision was motivated by a desire to "protect property values and the integrity of the village's zoning plan." *Id.* at 259. The Supreme Court held that "[p]roof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." *Id.* at 265. The Court suggested that the "purpose" can be proven by a "sensitive inquiry into such circumstantial and direct evidence of intent as may be available," such as historical background, departure from normal procedures, and legislative and administrative history. *Id.* at 266.

54. *Id.* at 270-71.

55. *Id.* at 266. The Court was compelled to carve out the exception to accommodate a few prior cases that held historic significance. The Court cited *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Guinn v. United States*, 238 U.S. 347 (1915); *Lane v. Wilson*, 307 U.S. 268 (1939); and *Gomilllion v. Lightfoot*, 364 U.S. 339 (1960).

Nevertheless, the Court seemed to tighten the *Davis* rule further when it held in *Personnel Administrator of Massachusetts v. Feeney*[56] that facially neutral laws that produce even the most severe forms of discriminatory impact were made impervious to judicial review without proof of purposeful discrimination. In *Feeney*, a facially neutral law providing an absolute preference to veterans for state civil service jobs was challenged as violative of the Equal Protection Clause solely on the basis of the law's disproportionate exclusionary impact on women's employment opportunities. Although evidence revealed the stark reality that over ninety-eight percent of the state's veterans were men[57] and that the severe underrepresentation of women in the veterans population was the direct result of the long standing exclusionary practices of the Armed Services,[58] the Court found the law valid absent a showing of "gender-based discriminatory purpose."[59] Of course, it would be utterly unreasonable for anyone to argue that veterans' preference designed to reward service and sacrifice has a gender-based discriminatory purpose. It would not be unreasonable to suggest the legislature retained knowledge or foresight concerning the inevitable adverse consequences of the seemingly neutral preference system. The Court ruled discriminatory purpose required "more than intent as volition or intent as awareness of consequences."[60] A showing of discriminatory purpose requires a showing that the legislature adopted a preference law "at least in part 'because of,' not merely 'in spite of,', its adverse effect" on women.[61] The Court also made clear that it was not unduly concerned about the prospect of perpetuating the disproportionate impact of facially neutral laws or about the feasibility of achieving the law's neutral ends by less discriminatory means.[62]

56. 442 U.S. 256 (1979).

57. *See id.* at 271 ("The impact of the veterans' preference law upon the public employment opportunities of women has thus been severe.").

58. The Court stated that "[t]he enlistment policies of the Armed Services may well have discriminated on the basis of sex .... But the history of discrimination against women in the military is not on trial in this case." *Id.* at 278.

59. *Id.* at 280.

60. *Id.* at 279.

61. The Court recited the holding in the *Arlington Heights* case stating that it upheld a zoning board decision implementing a neutral zoning policy regardless of its effect "that tended to perpetuate racially segregated housing pattern." *Id.* at 273.

62. In his dissent, Justice Marshall argued that the state could have accomplished its legislative goal by a streamlined preference for veterans thereby reducing its disastrous impact on women. *See id.* at 285 (Marshall, J., joined by Justice Brennan, dissenting). The majority stated: "The calculus of effects, the manner in which a particular law reverberates in a society, is a legislative and not a judicial responsibility." *Id.* at 272.

Unquestionably, the *Davis* trilogy has rendered the Equal Protection Clause impact-blind. If a law is facially neutral, its disproportionate impact on racial minorities (or women) is constitutionally irrelevant, regardless of the foreseeability and severity of the impact or its convincing potential to perpetuate racially discriminatory patterns of behavior. *Davis* marks the first time the Supreme Court prescribed purposeful discrimination as the sole antidote to the disparate racial impact of a facially neutral law[63] and, therefore, calls into question the precedents relied upon by the Supreme Court.

The *Davis* rule rests squarely on the judicial apprehension that a contrary rule demanding compelling justification for impact-producing neutral laws "would be far-reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white."[64] The Court presented no empirical evidence to support the feared parade of horribles.[65] Of course, had the Court scanned the entire history of the Equal Protection Clause, spanning over a century, the Court would not have found any evidence of racial minorities making massive Equal Protection-based attacks on the nation's revenue and regulatory laws. Furthermore, in the past, the Court has emphatically stated that general statutes serving neutral ends are not by any means immune from the limitations created by constitutionally guaranteed individual rights and privileges.[66]

63. For a discussion of prior case law, see *Making the Violation Fit the Remedy: The Intent Standard and Equal Protection Law*, 92 YALE L.J. 328 (1982).

64. Washington v. Davis, 426 U.S. 229, 248 (1976).

65. The Court quoted three theoreticians: Frank I. Goodman, *De Facto School Segregation: A Constitutional and Empirical Analysis*, 60 CAL. L. REV. 275, 300 (1972); William Silverman, *Equal Protection, Economic Legislation, and Racial Discrimination*, 25 VAND. L. REV. 1183 (1972); and Harold Demsetz, *Minorities in the Market Place*, 43 N.C. L. REV. 271 (1965).

66. *Marchetti v. United States*, 390 U.S. 39 (1968), is an excellent illustration. The case involved the constitutionality of a federal wagering statute that imposed an obligation to annually register with the IRS and to pay an occupational tax on businesses accepting wagers. The registrants are required to keep detailed records of their operation, including names and addresses of employees and agents, and to provide certified copies of the records, upon request, to any state. The state of Connecticut made gambling and wagering punishable by criminal penalties. Marchetti refused to register because he feared the information given in a registration statement could be used by Connecticut to prosecute him. He was convicted in a federal court under indictments that charged violation of the federal wagering tax statute (i.e., for failure to register and for evading payment of the annual occupational tax). Marchetti challenged the conviction on the ground that it violated his privilege against self-incrimination guaranteed by the Fifth Amendment. The Supreme Court, in a 7-2 decision, invalidated the law. The Court stated:

Like any other rule of constitutional adjudication, the *Davis* rule has its own ardent supporters and virulent critics. The rule of impact-blindness was, in fact, instigated by some influential writers who consider the rule the bulwark of a color-blind constitution.[67] In the abstract, the rule has the appearance of elegance and simplicity. In reality, the rule is more of a theory of litigation avoidance than a truth-seeking tool of constitutional adjudication. The fundamental flaw of the *Davis* rule of intent, as accurately diagnosed by Professor Alan Freeman, is that it is molded entirely from the perspective of the perpetrator of racial discrimination rather than from the perspective of its victims.[68] By adopting the rule, the Court has in effect "move[d] the line defining *de jure* discrimination from that which has been caused by law to that which has been intentionally caused by law."[69]

> The issue before us is *not* whether the United States may tax activities which a State or Congress has declared unlawful . . . . The issue is instead whether the methods employed by Congress in the federal wagering tax statutes are, in this situation, consistent with the limitations created by the privilege against self-incrimination guaranteed by the Fifth Amendment.

Id. at 44. Moreover, "[t]he Constitution of course obliges this Court to give full recognition to the taxing powers and to measures reasonably incidental to their exercise. But we are equally obliged to give full effect to the constitutional restrictions which attend the exercise of those powers." *Id.* at 58.

67. The *Davis* Court was influenced by the writings of John Hart Ely who argued that the intent rule is essential to assure the color blindness of the Constitution. He wrote in 1970: "Of course, the suggestion that a showing of disproportionate racial impact, whether intended or not, should trigger judicial review has extremely far-reaching implications. There are many towns and voting districts throughout the United States whose residents are predominantly or exclusively white (not to mention those whose residents are largely Protestant, Catholic, conservative, Republican or Democratic), and a number of them are abutted by largely Negro (or whatever) communities. The implication for laws that concern subjects other than districting are probably even more far-reaching." John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1256 (1970). The *Davis* Court based its rule of purposeful discrimination on Ely's "far-reaching" implication rationale. Professor Theodore Eisenberg would support an effect-based cause of action under the Equal Protection Clause, but is still concerned about its implication on judging individuals on the basis of their merits. *See* Theodore Eisenberg, *Disproportionate Theory of the Constitutional Ban Against Racial Discrimination*, 15 SAN DIEGO L. REV. 1041 (1978). *See also* J. Morris Clark, *Legislative Motivation and Fundamental Rights in Constitutional Law*, 15 SAN DIEGO L. REV. 953 (1978).

68. *See* Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine.* 62 MINN. L. REV. 1049, 1052-53 (1978) ("The perpetrator perspective sees racial discrimination not as conditions, but as actions, or series of actions, inflicted on the victim by the perpetrator. The focus is more on what particular perpetrators have done or are doing to some victims than it is on the overall life situation of the victim class.").

69. Gayle Binion, *"Intent" and Equal Protection: A Reconsideration*, 397 SUP. CT. REV. 397, 401 (1983).

The adverse effects of the *Davis* rule on the interests of racial minorities are well articulated by knowledgeable scholars. Some of the negative implications are worth reciting. The requirement that a victim of discrimination prove the evil intent of the perpetrator operates as a nearly insurmountable burden that in most cases cannot be met without "smoking gun evidence." As a result, victims of discrimination are discouraged from seeking judicial remedies.[70] The intent rule miserably fails to both capture the most pervasive forms of unconscious and subtle discrimination[71] and to address parallel and alternative conceptions of discrimination.[72] The requirement of purposeful discrimination relegates the judiciary to "play a severely diminished role in ameliorating racial inequities."[73] Indeed, the judiciary has become somewhat insensitive to minority interests by being "reluctant in nearly every case to acknowledge either existence or importance of illicit intent, unless it has been unable to imagine any other explanation for the challenged policy."[74]

The most pernicious aspect of the *Davis* rule is its rejection of a cause of action based on the disproportionate racial impact of facially neutral laws. The Court could have permitted victims of racial discrimination to sue either under a theory of disparate impact or a theory of disparate treatment just as it has done under Title VII employment discrimination cases.[75] Under the disparate impact stan-

70. *See* Theodore Eisenberg & Sheri Lynn Johnson, *The Effects of Intent: Do We Know How Legal Standards Work?* 86 CORNELL L. REV. 1151 (1991). The "striking finding" of the authors' empirical study was that there was low volume of intent litigation. The authors stated "The Supreme Court's standard takes its toll not through an unusually high loss rate for those plaintiffs reaching trial or appeal, but by deterring victims from even filing claims." *Id.* at 1153. The authors arrived at those findings after analyzing all federal district court and appellate court opinions published in the 12 years following *Davis*. As to the type of evidence needed: "Intent claimant needs 'smoking gun' evidence of discrimination to prevail. Subtler methods of proof, though approved in *Arlington Heights*, rarely carry the day." *Id.* at 1187-88.

71. *See* Lawrence, *supra* note 46; Benjamin Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899 (1993).

72. The alternative conceptions of discrimination includes stigma, subordination, second-class citizenship, and lack of impartiality. *See* David A. Strauss, *Discriminatory Intent and the Taming of Brown*, 56 U. CHI. L. REV. 935 (1989).

73. Michael J. Perry, *The Disproportionate Impact Theory of Racial Discrimination*, U. PA. L. REV. 540, 588 (1977).

74. Binion, *supra* note 69, at 457.

75. Under Title VII of the Civil Rights Act of 1964, an employment discrimination suit can be brought either under a disparate treatment theory which requires proof of employer-intent, or in the alternative, under a disparate impact theory which requires statistical showing of disproportionate effect on protected groups. *See* 42 U.S.C. §§ 2000e-§§ 2000e-17 (West 1999).

dard established by the Court in *Griggs v. Duke Power Co.*,[76] and statutorily affirmed by Congress,[77] any employment policy, practice or criteria that has a disproportionate impact on a protected group such as racial minorities must be justified by showing that the policy, practice or criteria is job related and consistent with business necessity.[78] The theory of disparate treatment requires the aggrieved employee to prove the discriminatory intent of the employer.

The two standards of employment discrimination—disparate treatment and disparate impact discrimination—have amicably co-existed under the roof of Title VII for nearly three decades. The disparate impact standard should similarly co-exist with the discriminatory intent standard under the Equal Protection Clause. There is a compelling reason to create the coexistence. In a post-affirmative action era, litigation grounded on disproportionate impact can be a potent vehicle, probably the only vehicle, for the vindication of group grievances brought on behalf of racial minorities. "Racial group" is the primary referent in a disparate racial impact claim. Even though the relevant racial group is not entitled to group-wide relief, the individual plaintiff in disparate impact litigation makes the claim of discrimination as a member of his or her racial group. By bringing in statistical inter-group disparities, the plaintiff not only proves that she has been personally subjected to discriminatory treatment, but also reveals the underlying prejudices and stereotypes that prompted such treatment.[79] Successful disparate impact litigation thus exposes widespread discriminatory practices that warrant group-focused remedial action by the discriminator. In this sense, disparate impact litigation could be considered a prophylactic device that might, in the long run, obviate the need for race-based affirmative action remedies.

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76. 401 U.S. 424 (1971). The Court held that employment "practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices." *Id.* at 430.

77. In 1989, the Court tried to change some aspects of the *Griggs* rule in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1982). Congress "overruled" the *Wards Cove* decision by enacting the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, and statutorily reinstated the disparate impact cause of action. *See* 42 U.S.C. §§ 2000e-§§ 2000e-17 (West 1999).

78. *See* Civil Rights Act of 1991, 42 U.S.C.A. § 1981.

79. Stereotypes, racial or sexual, are a "set of attributes ascribed to a group and imputed to its individual members because they belong to that group." Mary F. Radford, *Sex Stereotyping and the Promotion of Women to Positions of Power*, 41 HASTINGS L.J. 471, 487 (1990) (quoting M. E. Heilman, *Sex Bias in Work Settings: The Lack of Fit Model*, *in* ORGANIZATIONAL BEHAVIOR 269, 271 (1983).

Astonishingly, the Supreme Court has never bothered to authenticate the *Davis* rule by reference to the intent or history of the Equal Protection Clause. Justice White, the architect of the *Davis* rule, seemed to have "second thoughts" about its desirability.[80] Six months after *Davis*, in the *Arlington Heights* case, he declined to join all the other justices of the *Washington v. Davis* majority to reaffirm the rule.[81] Most critics have found the *Davis* rule improper or ill fitting within the equality jurisprudence and suggest several avenues to smooth the rough edges of the rule without repudiating it entirely. First, critics suggest expanding the definition of intent to include—in addition to purpose—knowledge, negligence and recklessness.[82] Second, they propose assigning accountability for foreseeable consequences of actions taken with or without intent.[83] Finally, the critics suggest imposing liability for unintentional disproportionate impact reasonably attributable to race.[84] The Court has not shown any inclination to accept any of the suggested changes. The Court's current doctrine of equality exudes so much pessimism concerning race relations that some scholars have regrettably concluded that "it may be too late to expect the Court to change."[85] Realistically, it would be prudent to accept the disproportionate impact-discriminatory purpose rule of *Davis* as a *fait accompli* and to implore judicial solicitude for relinquishing its frivolous method of the rule's implementation.

B. Neutral's Obligation to Prove Neutrality

The rule of *Washington v. Davis* is entirely built on the doctrinal foundation of neutrality. A facially neutral law is shielded from Equal Protection challenge because it is presumed to be nondiscriminatory.

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80. 4 THE JUSTICES OF THE SUPREME COURT: THEIR LIVES AND MAJOR OPINIONS 1586 (Leon Friedman & Fred L. Israel eds., 1997).

81. *Id.* ("In footnote twelve of the *Washington v. Davis* opinion, Justice White had specifically disapproved of the approach which the Seventh Circuit Court of Appeals had taken in *Arlington Heights*, thus anticipating the reversal by the Supreme Court seven months later. But Justice White nevertheless dissented when the legal issue involved in *Arlington Heights* was finally presented to the Supreme Court.").

82. *See* Pamela S. Karlan, *Discriminatory Purpose and Mens Rea: The Tortured Argument of Invidious Intent*, 93 YALE L.J. 111 (1983).

83. *See* William E. Boyd, *Purpose and Effect in the Law of Race Discrimination: A Response to* Washington v. Davis, 57 U. DET. J. URB. L. 707, 741 (1980); Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 J. PHIL. & PUB. AFF. 107 (1976).

84. *See* Theodore Eisenberg, *Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication*, 52 N.Y.U. L. REV. 36, 57 (1977).

85. Selmi, *supra* note 51, at 350; *see also* Neil Gotanda, *A Critique of "Our Constitution in Color-blind,"* 44 STAN. L. REV. 1 (1991).

A law can be called nondiscriminatory only if it is impartial,[86] treating similarly situated persons alike without favoring one over the other. A nondiscriminatory law is, by definition, neutral. Therefore, the *Davis* rule says that a facially neutral law is in compliance with the Equal Protection Clause because the law is presumed to be neutral. If anyone wants to challenge the presumption, the challenger has to not only show that the law is non-neutral, but also that the law is made non-neutral purposefully. Thus, neutrality is central to the *Davis* rule and, if neutrality were taken out of the equation, the rule would collapse for lack of foundation.

Neutrality is not a self-defining term. In fact, it is a complex concept, a "coat of many colors."[87] Given the centrality of the concept in Equal Protection jurisprudence, it becomes incumbent on the Supreme Court to define the meaning and contours of neutrality. John Hart Ely, who ventured to read the Fourteenth Amendment "only to require [governmental] 'neutrality' toward [racial minorities]" and not to "favor" them, immediately attached a rider that "[t]he difficult question is what neutrality ought to mean in this context."[88] There is general agreement that the government cannot classify people on the basis of their race or gender for imposing burdens or granting benefits without violating neutrality. There is no consensus on the question whether governmental action that disproportionately disadvantages racial minorities or women would comport with the neutrality principle.

The disagreement on the question stems at least in part from a serious lack of understanding of the traditional and generally accepted meaning and rationale of neutrality as a precept used in legal discourse. Neutrality is a mature and well-understood concept in international law. It is worthwhile for our judiciary to look to international law for some much needed insight and guidance. Generally, neutrality in international law is the war time status of neutral nations "who take no one's part, remaining friends common to both parties, and not

86. For a full description of the identity of the discriminatory intent test and the concept of impartiality, see Strauss, *supra* note 72, at 937 ("Both its strengths and weaknesses lie in the fact that the discriminatory intent test reflects a requirement of impartiality: according to the discriminatory intent standard, invidious discrimination consists of a failure to be impartial.").

87. Board of Educ. v. Allen, 392 U.S. 236, 249 (1968) (Harlan, J., concurring).

88. Ely, *supra* note 67, at 1256. According to Ely, the neutrality requirement would bar government classifications based on race, but only bar those actions disproportionately disadvantaging racial minorities with intent to disadvantage, fearing that, otherwise, the Fourteenth Amendment would be construed as an "affirmative command of racial balance." *Id.* at 1256, 1257.

favoring the armies of one of them to the prejudice of the other."[89] General international law imposes on a neutral nation the duty to fulfill its obligations and exercise its rights "in an equal (that is, impartial or nondiscriminatory) manner toward all belligerents."[90] In addition to the duty of impartiality, the neutral has an obligation "of almost equal importance" to abstain from furnishing forbidden goods and services to either belligerent. The legal significance of the neutral's status of nonparticipation in the war is that "it brings into operation rules for the regulation of neutral-belligerent relations,"[91] a set of rules that stipulate "what a neutral power must do and not do to remain neutral."[92]

Neutral states are obliged to exercise due diligence for the purpose of preventing violations of their neutrality by either belligerent. According to the rules recognized by the United States, "the due diligence of a neutral must be in proportion to the risks to which either belligerent may be exposed from failure to fulfill the obligations of neutrality on his part."[93] Violations of neutrality, committed intentionally or by culpable negligence are international delinquencies for which the neutral may be held responsible for losses sustained by the damaged belligerent. Neutrals' obligations of impartiality and nonparticipation have always been subject to surveillance and verification through generally recognized mechanisms, such as visit and search of neutral vessels to see whether they carry contraband of war. Mere declarations of neutrals that they did not carry contraband need not give them immunity from visit and search.[94] During both world wars,

89. H. LAUTERPACHT, OPENHEIM'S INTERNATIONAL LAW 626 (7th ed. 1952) (definition by Vattel).

90. HANS KELSEN & ROBERT TUCKER, PRINCIPLES OF INTERNATIONAL LAW 156 (2nd ed. 1967).

91. *Id.* at 154. Some of the basic rules that regulate the neutral belligerent relations are codified in the Hague Convention XIII (1907).

92. ALAN MONTEFIORE, NEUTRALITY AND IMPARTIALITY 131 (Cambridge Univ. Press 1975). Montifiore defines neutrality "in terms of an agent's doing his best to help or to hinder to an equal degree all the parties concerned in any situation of competition or conflict." *Id.* at 6.

93. LAUTERPACHT, *supra* note 89, at 757. The rule was established by the Treaty of Washington entered into by the United States and Great Britain on May 8, 1871. The rules are known as "The Three Rules of Washington." *See id.* at 715.

94. Great Britain and other nations rejected the First Armed Neutrality of Netherland in 1756 (in a war between France and England), and the second Armed Neutrality of Russia in 1780 (during the Napoleanic War). Under "Armed Neutrality," the belligerents should not have a right of visit and search in case the commanding officer of a warship under whose convoy neutral merchant vessels were sailing, should declare that the convoyed vessels did not carry contraband of war. *See* LAUTERPACHT, *supra* note 89, at 627-31.

belligerents seized goods immediately destined to neutral ports on the ground that they were contraband of war ultimately destined for enemy territory. To determine ultimate destination, the belligerents established "a detailed and complex set of presumptions governing hostile destination that the neutral trader must refute."[95] In sum, the onus of establishing impartiality and nonparticipation rested on the neutral rather than on the parties in conflict.

On a superficial level, the core requirement of neutrality under the Equal Protection Clause is impartiality just as it is the core requirement under international law. To a degree uncommon in international law, the Equal Protection neutrality relieves the neutral from its primary and incessant burden of establishing its own impartiality. Under the *Davis* rule, the neutral's self-serving assertion of neutrality imposes on the challenger the burden of establishing the professed neutral's lack of impartiality. To make matters worse, the reverse burden requires the challenger to demonstrate that the neutral is deliberately partial.[96] When juxtaposed with the international law standard, the Equal Protection neutrality's claim of impartiality is irreparably undermined when the government and judiciary condone neutral behavior that disproportionately impacts minority groups. The very essence of neutrality is the neutral's obligation not to disproportionately prejudice or favor any of the competing interests or contending parties among whom it assumes the position of a neutral. In international law parlance, the Equal Protection neutrality would amount to nothing more than a misnomer.

C. The Doctrinal Quagmire

Equal protection neutrality, in its present formulation, is doctrinally abstract and substantively incoherent. It is a concept without any clearly delineated structure or objectively defined meaning and, as a result, Equal Protection neutrality is easily susceptible to whimsical and contradictory interpretations by judges of divergent philosophical and political persuasions. The current ambiguities and uncertainties stem from the failure of the Supreme Court to make absolute and verifiable impartiality the touchstone of neutrality. Until neutrality is properly anchored in the principle of impartiality and a satisfactory analytic framework is devised to verify impartiality, Equal Protection neutrality will remain ill-matched to the critical task it is

95. KELSEN & TUCKER, *supra* note 90, at 165.

96. As stated earlier, in international law, a neutral is liable for breaches of neutrality committed intentionally or negligently.

assigned to perform. The desirable transformation of the neutrality into a mature and sophisticated concept worthy of its status in the color-blind jurisprudence will not be possible until the Court renounces its practice of giving universal and uncritical deference to facial neutrality.

Systematic analysis of facial neutrality, especially of race-disadvantaging laws, can be considered a logical outgrowth of the Supreme Court's color-blind doctrine. Probing facial neutrality to uncover concealed racial discrimination is perfectly consistent with the strict scrutiny of racial classifications. As repeatedly stated by the Court, "the purpose of strict scrutiny is to 'smoke out' illegitimate uses of race."[97] Looking behind the veil of facial neutrality, a court may also find that a law "neutral in origin has been subverted to invidious purposes."[98] Even when the neutrality inquiry reveals only lack of governmental impartiality towards particular racial groups and not government participation in invidious discrimination, the mere exposure of such impartiality will signify the Supreme Court's unwavering commitment to vigorous enforcement of the principles of racial equality and governmental neutrality in the post-affirmative action era.[99]

By subjecting facially neutral race-disadvantaging laws to careful judicial analysis, the Court will only be bringing its equal protection jurisprudence to the level of sophistication that its First Amendment jurisprudence has already attained. As explained in Part III, the Court has formulated a framework to examine the impartiality of facially neutral laws impinging on rights protected by the First Amendment. Under that framework, the evidentiary burden for proving neutrality remains on the government, rather than on the party challenging the law's constitutionality. The Court's failure to adopt a similar framework for neutrality analysis in equal protection cases is unexplainable on any principled basis and is likely to fuel the prevailing suspicion that the Court's equal protection neutrality is a

97. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) ("Indeed, the purpose of strict scrutiny is to 'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool."). The same statement was repeated in *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 225-26 (1995).

98. Roger v. Lodge, 458 U.S. 613, 626 (1982) (citing Zimmer v. McKeithen 485 F.2d 1297 (5th Cir. 1973)).

99. The exposure of governmental impartiality towards a particular racial group will also constitute an appropriate warning to the government that it should start looking for alternatives to accomplish its legitimate legislative goals which may diminish or lessen the adverse impact on minorities.

concept of convenience primed for one-way application against the interests of racial minorities.[100]

There is no need to establish a system of indiscriminate and automatic inquiry into each and every facially neutral law. Some categories of facially neutral laws could be safely exempted from any inquiry absent showing of prohibited racial purpose.[101] Any non-exempt facially neutral law that bears more heavily on one race than another should, however, trigger judicial scrutiny of the law's impartiality. Disparate impact-producing neutrality is an oxymoron. A facially neutral law that impacts disproportionately on a minority race is not impartial and, therefore, is not presumptively neutral. The loss of the neutrality shield ipso facto renders the law reviewable at the behest of the disadvantaged minority.

Of course, the mere discovery of lack of impartiality of a facially neutral law need not entitle the disparately impacted racial group to judicial remedies. If the neutrality inquiry reveals that the object or purpose of a law is racial discrimination, the law will be subject to strict scrutiny and the proponents of the law will be required to demonstrate that the law is narrowly tailored to further a compelling

100. The validity and effectiveness of the principle of race neutrality in equal protection jurisprudence are subjects of intense scholarly debate. *See e.g.*, RANDALL KENNEDY, RACE, CRIME AND THE LAW (1997) (advocating race neutrality by treating persons strictly on the basis of conduct rather than color in the context of criminal law enforcement); Sheri Lynn Johnson, *Respectability, Race Neutrality, and Truth*, 107 YALE L.J. 2619, 2622 (1998) (criticizing Professor Kennedy's doctrinal commitment to race neutrality and arguing "that the prevailing doctrine of race neutrality has cabined the search for solutions to issues of racial fairness by labeling them nonissues").

The Supreme Court seems to apply a double standard in the application of its fledgling neutrality principle. It is adamantly opposed to deviations from absolute governmental impartiality when judging the constitutionality of race-advantaging laws such as affirmative action, school desegregation, and legislative redistricting—a position in total harmony with the traditionally accepted notion of neutrality. The proponents of race-advantaging laws have the burden to justify, under strict scrutiny, even the slightest deviations from impartiality. In contrast, the Court applies a relaxed standard of neutrality to race-disadvantaging laws. Facial appearance of neutrality of generally applicable laws alone will suffice the constitutional requirement of impartiality even when the law produces a disproportionate impact on racial minorities. In addition, the victims of the impact seeking judicial relief are required to demonstrate the deliberate partiality of the law's proponent in order to succeed.

101. General purpose laws such as revenue, custom and immigration laws, and most regulations concerning health and safety would fall into these exempt categories. They should be exempt from subterranean judicial inquiry partly because they are vulnerable to more frivolous neutrality challenges by more potential plaintiffs than any other categories of laws. They should be immune from neutrality challenges for the additional reason that they are seldom racially targeted and in the event they are, the solution could be through the political, rather than the judicial, process.

interest.[102] If the law's deviation from impartiality is not attributable to racial bias, a reviewing court inclined to provide racial justice will have at least two options to consider. It could either grant relief to the disadvantaged racial group under the theory of disparate impact as the Supreme Court has done under Title VI and VII of the Civil Rights Act of 1964,[103] or the Court could require the proponents of the facially neutral law to justify its lack of impartiality by providing a race-neutral explanation that is reasonably trustworthy and non-pretextual.[104] The requirement of race-neutral explanations will have both short term and long term consequences. In the short term, the

102. Unlike the rule of *Washington v. Davis*, 426 U.S. 229 (1976), the strict scrutiny will be triggered here without the disadvantaged minority having to prove discriminatory intent of the law's proponents.

103. Disparate impact as a basis for providing remedies in damages was recognized by the Supreme Court in *Griggs v. Duke Power Co.*, 401 U.S. 424, 436 (1971), and the Court's subsequent effort to modify the *Griggs* cause of action was rebuffed by Congress, enacting the Civil Rights Act of 1991. The Court, in a disparate impact suit under Title VI, granted only injunctive and noncompensatory relief, requiring proof of discriminatory intent for receiving monetary damages, on the ground that Title VI defendant's obligations were contractual in nature and therefore subject to renouncement at the option of the defendant. *See* Guardians Ass'n v. Civil Serv. Comm'r of N.Y., 463 U.S. 582 (1983) (plurality opinion of Justice White).

104. "Race-neutral explanation" is a vastly misused term in the anti-discrimination law of the Supreme Court. In 1973, the Court established a framework for inquiry into claims of intentional employment discrimination on grounds of race. First, that the employee-plaintiff establish a prima facie case; second, that the employer offer a race-neutral explanation for the employment action; and third, that the employee show that the employer's explanation was not the true reason, but was a pretext for discrimination. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1987). In 1993, the Court, in a 5 to 4 decision, ruled that the employer's showing that the employer's race-neutral explanation was pretexual would not be enough to get relief. Rather the employee has to prove that racial discrimination was the motive of the employer, regardless of the truthfulness of the proffered explanation. *See* St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993) (majority opinion of Justice Scalia). Four dissenting Justices, led by Justice Souter, complained that the majority's new burden allocation will not only make it difficult for employees to prove discrimination, but also permit the employer to present false evidence in the Court.

In a similar vein, the Supreme Court recently altered the rules for challenging racially-motivated peremptory challenges under the Equal Protection Clause. In *Batson v. Kentucky*, 476 U.S. 79 (1986), the Court created a three-step, burden-allocating procedure to determine whether a prosecutor's exercise of peremptory challenges was race-based. The second step required the prosecutor to articulate a race-neutral explanation. In 1995, the Court in *Purkett v. Elem*, 514 U.S. 765, held that the race-neutral explanation proffered by a prosecutor need not be "persuasive or even plausible." *Id.* at 768. Justice Stevens, joined by Justice Breyer, in dissent, complained that the new rule made the *Batson* requirement a "meaningless charade" and that "[i]t would take little effort for prosecutors who are of such a mind to adopt role 'neutral explanations' which bear facial legitimacy but conceal a discriminatory motive." *Id.* at 773. *See also* David A. Stephen, *True Lies: The Role of Pretext Evidence Under* Batson v. Kentucky *in the Wake of* St. Mary's Honor Center v. Hicks, 94 MICH. L. REV. 488 (1995); Tracy Choy, *Branding Neutral Explanations Pretexual*

law's defender will be tempted to explore the availability of alternatives that might narrow or eliminate the disparate racial impact—a measure of the future reasonableness of the law.[105] In the long term, the defendant who is already put on notice of the lack of impartiality of a facially neutral law could be held liable for knowing and deliberate indifference to the law's adverse impact on racial minorities.[106]

III. The Neutrality Mirage

A. The Neutral Position

Despite its centrality in equal protection jurisprudence, neutrality remains an elusive concept with fuzzy perimeters and undefined content. The meaning of neutrality is entirely dependant on the predilections and value judgments of the interpreter. Equal Protection neutrality is such an open-ended phenomenon that it even enables judges to paint a neutral face on a law that plainly and literally classifies on the basis of race or gender. The convoluted litigation concerning the constitutionality of the California Civil Rights Initiative, popularly known as Proposition 209, yields this type of absurd interpretation of neutrality.

In 1996 California voters, by a margin of 54 to 46 percent, adopted Prop. 209 as an amendment to the state constitution. Prop. 209, in relevant part, provided that the state "shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the opera-

Under Batson v. Kentucky: An Examination of the Role of the Trial Judge in Jury Selection, 48 HASTINGS L.J. 577 (1997).

A race-neutral explanation, contemplated in this article, for lack of impartiality shown after the neutrality inquiry should be credible. This neutral explanation here means something substantially different from the contorted meaning currently given to the term in *Purkett.*

105. The Supreme Court has consistently stated in the affirmative action cases that the lack of adequate consideration of race-neutral alternatives was an indication of the unreasonableness of race-disadvantaging laws. This remedy is very much akin to that fashioned by the Court to deal with sexual harassment cases.

106. The Supreme Court has implied a private right of action for damages under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.*, for sexual harassment of a student by one of the teachers of the defendant school district. The Court in *Gebser v. Lago Vista Independent School District*, 524 U.S. 274 (1998), held that the school district would be liable if it had actual notice of the harassment and it was deliberately indifferent to the teacher's misconduct. *See also* Davis v. Monroe County Bd. of Educ., 526 U.S. 629 (1999) (holding the school district liable in damages for student-on-student sexual harassment on same grounds as in *Gebser*); Commissioner v. Brown, 520 U.S. 397 (1997) (requiring showing of deliberate indifference to impose liability on a municipality for violation of 42 U.S.C. § 1983).

tion of public employment, public education, or public contracting."[107] The prohibition against discrimination and preference did not apply to programs that may be required to be established or maintained to avoid "loss of federal funds to the state."[108] Since Prop. 209 was by its terms "self-executing," it automatically invalidated conflicting race and gender conscious affirmative action programs established by both the state's public educational institutions and the state's hundreds of cities, counties and special districts.[109]

Racial minorities and others aggrieved or adversely affected by Prop. 209 challenged its constitutionality in *Coalition for Economic Equality v. Wilson*.[110] The crucial question in the litigation was whether Prop. 209 contained racial and gender classifications that deserved strict scrutiny analysis or whether Prop. 209 was simply an innocuous neutral law raising no serious constitutional concern. Judging from the plain language of Prop. 209 the answer seemed deceptively simple. Prop. 209, in fact, contains a facial classification based on race and gender. The proposition singles out racial and gender preferences as the sole object of its prohibition, while leaving unscathed preferences based on other criteria, such as age, disability and veteran's status. Since the prevailing equal protection jurisprudence of the Supreme Court is resolutely classification-driven, Prop. 209 "ought to receive strict scrutiny, and so scrutinized, the [law] should have a difficult time"[111] to pass constitutional muster.

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107. CAL. CONST. art. I, § 31(a).

108. CAL. CONST. art. I, § 31(e). This provision was designed to avoid conflicts between Prop. 209 and Title VI of the Civil Rights Act of 1964 which prohibits discrimination in federally funded programs. Prop. 209 also stated that it shall not be interpreted "as prohibiting bonafide qualifications based on sex which are reasonably necessary to the normal operation of public employment, public education or public contracting." CAL. CONST. art. I, § 31(c).

109. The vast local government network of California is comprised of 500 cities, 58 counties and 5000 special districts. *See* Jenna Ward, *Plaintive About Prop. 209*, THE RECORDER, DEC. 5, 1997, at 7 (citing Note, *The Constitutionality of Proposition 209 As Applied*, 111 HARV. L. REV. 2081, 2082 n.11 (1998)).

110. 122 F.3d 692 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 397 (1997).

111. Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427, 470 (1997). Professor Rubenfeld advocated the position that "[t]he Constitution permits [race-conscious] affirmative action because affirmative action does not force a second-class status or citizenship on anyone." In the same vein, he concludes that Prop. 209, in spite of its racial classification should not trigger heightened scrutiny because it "is not an untouchability law . . . because it denies no rights to minorities or women that it bestows upon whites or men." *Id.* For a forceful argument in support of subjecting Prop. 209 to strict scrutiny analysis because of the law's facially racial classification, *see* Girardeau A. Spann, *Proposition 209*, 47 DUKE L.J. 187, 247(1997).

Despite the clear facial classification of Prop. 209, both the district court and the court of appeals chose to go beyond the plain language in search of the law's purpose and effects. Surprisingly, both courts arrived at the same conclusion, albeit for different reasons, and found that Prop. 209 was "facially neutral."[112] The legal alchemy that transformed the facially explicit race and gender classification into facial neutrality may be somewhat mysterious, however, the transformation graphically illustrates the doctrinal vacuousness of Equal Protection neutrality.

B. Confusion of the District Court

The analytical confusion on the classification issue visibly permeated the district court's decision. The court, contradicting itself, stated that the plain language of Prop. 209 "concededly contains no classification on its face"[113] and then concluded "that the initiative 'plainly rests on distinctions based on race.'"[114] Emphasizing that the purposes of Prop. 209 were to eliminate race and gender conscious affirmative action programs and to prevent their creation in the future, the Court found that the law "was enacted 'because of', not merely 'in spite of' its adverse effects upon affirmative action", and therefore, "the measure was effectively drawn for racial purposes."[115] The court also found that Prop. 209, despite its facial neutrality, violated the Equal Protection Clause because it restructured the political process. This restructuring disadvantages minorities and women seeking affirmative action programs by removing the authority to create such programs from state and local government to a "new and remote level of government," namely the state constitution.[116]

In support of the theory that Prop. 209 resulted in unconstitutional political restructuring, the court relied on two Supreme Court cases, *Hunter v. Erickson* and *Washington v. Seattle School District.* In *Hunter*, the Court considered the constitutionality of an amendment to the Akron city charter that prevented the city council from implementing any ordinance dealing with racial and religious discrimination in housing without the approval of the voters of Akron. The Court

112. 946 F. Supp. 1480, 1502 (N.D. Cal. 1996); 122 F.3d 692, 702 (9th Cir. 1997).

113. Coalition of Econ. Equality v. Wilson, 946 F.Supp. 1480, 1502 (1996).

114. *Id.* at 1508 (quoting Washington v. Seattle Sch. Dist., 458 U.S. 457, 485 (1982)).

115. *Id.* at 1506 (citing Seattle Sch. Dist., 458 U.S. at 471).

116. *Id.* The court noted that after the passage of Proposition 209, supporters and advocates of race and gender-based affirmative action would "face the considerably more daunting task of mounting a statewide campaign to amend the California Constitution" which would cost millions of dollars. *Id.* at 1499.

struck down the amendment as violative of the Equal Protection Clause because "although the law on its face treats Negro and White, Jew and gentile in an identical manner, the reality is that the law's impact falls on the minority" by placing a "special burden" on them "within the governmental process."[117] At issue in *Seattle School District* was the constitutionality of a statewide initiative (Initiative 350) that barred school boards from assigning students to attend schools outside their neighborhoods. The Court found that "despite its facial neutrality there [was] little doubt that the initiative was drawn for racial purposes"—to prevent desegregative busing.[118] The Court held that the initiative violated the Equal Protection Clause because it removed "the authority to address a racial problem - and only a racial problem - from the existing decisionmaking body in such a way as to burden minority interests."[119]

The district court in *Coalition for Economic Equality v. Wilson* used the *Seattle-Hunter* analysis to determine whether the "facially neutral" Prop. 209 "single[d] out race and gender issues for unique political burdens" and therefore created a "suspect classification."[120] Those determinations concerning Prop. 209, however, could have been easily made without the aid of the *Seattle-Hunter* analysis. First, Prop. 209 was not facially neutral;[121] Prop. 209 contained a facially suspect classification. Second, Prop. 209 did not impose unique political burdens on racial minorities and women.[122] To the extent that racial and gender preferences were permitted or mandated by the Federal Constitution, they remained unaffected by Prop. 209. Minori-

117. Hunter v. Erickson, 393 U.S. 385, 391 (1969). The Court explained, "[t]he majority needs no protection against discrimination and if it did, a referendum might be bothersome but no more than that." *Id.*

118. Seattle Sch. Dist., 458 U.S. at 471.

119. *Id.* at 474.

120. 946 F. Supp. at 1503. The court rejected defendant's argument against the *Seattle-Hunter* analysis stating that they "cannot use Proposition 209's facial neutrality as a shield against the application of the *Seattle-Hunter* analysis; it is precisely the measure's facial neutrality that makes the application of these cases appropriate." *Id.* at 1502.

121. For a comprehensive articulation of the fallacy of the neutrality argument, see Girardeau A. Spann, *Proposition 209*, 47 DUKE L.J. 187; Neil Gotanda, *Failure of the Color-Blind Vision: Race, Ethnicity and the California Civil Rights Initiative*, 23 HASTINGS CONST. L.Q. 1135 (1996).

122. For a forceful argument that Prop. 209 imposed unequal political burden on minorities and women, see Vikram Amar & Evan Caminker, *Equal Protection, Unequal Political Burdens, and the CCRI*, 23 HASTINGS CONST. L.Q. 1019 (1996). Surprisingly, the Ninth Circuit "accept[ed] without questioning the district court's findings that Proposition 209 burdens members of insular minorities . . . who otherwise would seek to obtain race-based and gender-based preferential treatment from local entities." Coalition for Econ. Equality v. Wilson, 122 F.3d 692, 705 (9th Cir. 1997).

ties and women would not be restricted from benefiting from legislation that incorporated those legitimate preferences enacted at any level of government. Therefore, if Prop. 209 offended the Equal Protection Clause, it was not because the law reordered the political process, but because either its facial classification or its intentionally produced disproportionate impact on minorities and women would not survive equal protection scrutiny.[123] It was quite unnecessary for the court to engage in the convoluted *Seattle-Hunter* analysis for finding an equal protection violation,[124] especially in light of the court's alternative finding that Prop. 209 violated the Supremacy Clause of the Federal Constitution.[125] The court should have been mindful that its decision would stand or fall solely on the soundness of the legal rationale on which it chose to premise its decision.

C. Artful Obfuscation of the Ninth Circuit

The *Seattle-Hunter* analysis further made it easier for the Ninth Circuit to reverse, in its entirety, the *Coalition for Economic Equality v. Wilson* decision.[126] The appeals court rejected the *Seattle-Hunter* analysis as inapposite to Prop. 209's constitutionality and asserted that *Crawford v. Board of Education*[127] was the controlling precedent. In

123. Since the court characterized Prop. 209 as "facially neutral," the proper approach would have been to analyze it under the rule of *Washington v. Davis*, 426 U.S. 229 (1976), and *Personnel Administrator v. Feeney*, 442 U.S. 256 (1979), that required a showing of intentional discrimination to invalidate a facially neutral law that has a disproportionate impact on minorities and women. The district court has already found that Prop. 209 disproportionately burdened minorities and women, and that it was enacted "because of" and not simply "in spite of" its disparate impact. Therefore, it was quite unnecessary to subject Prop. 209 to the *Seattle-Hunter* analysis.

124. There is substantial doubt concerning the continued viability of the *Seattle-Hunter* doctrine in light of the Supreme Court's constantly changing equal protection jurisprudence. For writings expressing such skepticism, see Derrick A. Bell, Jr., *California's Proposition 209: A Temporary Diversion on the Road to Racial Disaster*, 30 LOY. L.A. L. REV. 1447, 1461 (1997) ("Reluctantly, I would then express doubt as to their [*Hunter* and *Seattle School District*] continued viability . . . ."); Martin D. Carcieri, *A Progressive Reply to the ACLU on Proposition 209*, 39 SANTA CLARA L. REV. 141, 172 (1998) ("[E]ven if [District Court] Judge Henderson used *Seattle School District* in a legitimate manner, it is a sixteen-year-old, five-to-four decision by a much more liberal court than the Court sitting today."); Jeffrey Rosen, *Stare Indecisis*, THE NEW REPUBLIC, Dec. 23, 1996, at 16 ("[L]ike dinner guests that have overstayed their welcome, unconvincing Supreme Court opinions [like *Seattle School District*] tend to linger long after their shortcomings have been exposed.") (citing 39 SANTA CLARA L. REV. 141, 172 (1998)).

125. The court found that Prop. 209 conflicted with Title VII of the Civil Rights Act of 1964 that preempted Prop. 29 in the area of employment law. *See* Wilson, 946 F. Supp. at 1503.

126. 122 F.3d 692 (9th Cir. 1997), *cert. denied*, 522 U.S. 963 (1997).

127. *Crawford*, 458 U.S. 527 (1982), was a companion case to *Washington v. Seattle School District*, 458 U.S. 457 (1982).

Crawford, the Supreme Court upheld an amendment to the California Constitution (Proposition I) that curtailed the authority of state courts to order school busing where busing was not strictly required by the Fourteenth Amendment. The Court, rejecting an equal protection challenge by minority students, held that the constitutional amendment was a "mere repeal of race-related legislation" and that, despite its potentially discriminatory effect on desegregative busing,[128] the amendment did not embody "a presumptively invalid racial classification."[129]

In *Wilson*, the Ninth Circuit dismissed the political impediment theory of the *Seattle-Hunter* cases, emphasizing that individuals have equal protection rights only "against political obstructions to equal treatment" but not "against political obstruction to preferential treatment."[130] The appellate court, mimicking the *Crawford* opinion, asserted that Prop. 209 merely repealed race and gender related "'legislation or policies that were not required by the Federal Constitution in the first place.'"[131] The court explicitly found no race-gender classification in Prop. 209, and theorized that "[a] law that prohibits the state from classifying individuals by race or gender a fortiori does not classify individuals by race or gender."[132] Not only did the court treat Prop. 209 as a law addressing race and gender related matters in a "neutral fashion," but the court also viewed Prop. 209 as an exact replica of the Equal Protection Clause of the Fourteenth Amendment.[133]

The Supreme Court's *Crawford* decision lends no support to the Ninth Circuit's assertion that Prop. 209 was nothing more than a restatement of the Equal Protection Clause. Prop. 209's indiscriminate prohibition against racial and gender preferences tracked neither the language nor interpretation of the Equal Protection Clause. Even the

128. Crawford, 458 U.S. at 539 (stating that racially discriminatory effect devoid of a discriminatory purpose would not be unconstitutional).

129. *Id.* at 539. The Court stated that unlike the law in *Seattle School District*, under the amendment in *Crawford*, the school districts remained free to adopt student reassignment and busing plans to effectuate needed desegregation. *Id.* at 536 n.12.

130. Wilson, 122 F.3d at 708. The court also made the point that *Seattle-Hunter* decisions that dealt with "group rights" are irreconcilable with the more recent equal protection cases that emphasize that equal protection is a personal right of the individual. *Id.* at 704-05.

131. *Id.* at 706 (quoting Crawford, 458 U.S. at 538).

132. *Id.*

133. *Id.* at 709. The court stated that, "[a]s in *Crawford*, '[i]t would be paradoxical to conclude that by adopting the Equal Protection Clause of the Fourteenth Amendment, the voters of the State thereby had violated it.'" *Id.* (quoting Crawford, 458 U.S. at 535).

Supreme Court's *Adarand* decision,[134] which the circuit court readily espoused and adored, renders preferences for remedying identified discrimination constitutionally permissible. Prop. 209's blanket prohibition against preferences literally conflicts even with the most rigid interpretation of the Equal Protection Clause. In sharp contrast to Prop. 209, Proposition I, upheld in *Crawford*, specifically stated that its prohibition against school busing did not apply to desegregative busing required by the Equal Protection Clause of the Fourteenth Amendment.[135] Surprisingly, the circuit court's opinion in *Wilson* is totally bereft of any credible explanation for condoning a state prohibition of preferences that may be required by the United States Constitution. Instead, the court chose to trivialize the grave implications of barring such permissible race or gender conscious preference when it stated that the "Fourteenth Amendment . . . does not require what it barely permits."[136] The court should have realized that what the Constitution barely permits is still constitutional and that the reason the Constitution barely permits race or gender based preference is because it is sometimes required by the Constitution itself. A state has no constitutional standing to ban such preference.[137]

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134. 515 U.S. 200 (1995).

135. Proposition I stated in relevant part:

> In enforcing [Proposition I] or any other provision of [the California] Constitution, no court of this state may impose upon the State of California or any public entity board or official any obligation or responsibility with respect to the use of pupil school assignment or pupil transportation, (1) except to remedy a specific violation by such party that would also constitute a violation of the Equal Protection Clause of the 14th Amendment to the United States Constitution, and (2) unless a federal court would be permitted under federal decisional law to impose that obligation or responsibility upon such party to remedy the specific violation of the Equal Protection Clause of the 14th Amendment of the United States Constitution.

CAL. CONST. art. I § 7(a) .

136. Coalition of Econ. Equality v. Wilson, 122 F.3d 692, 709 (9th Cir. 1997) ("The Fourteenth Amendment, lest we lose sight of the forest for the trees, does not require what it barely permits."). The Court apparently believed that the State was free to ban such preferences altogether, stating that the fact "the Constitution permits the rare race-based or gender-based preference hardly implies that the state cannot ban them altogether. States are free to make or not make any constitutionality permissible legislative classification." *Id.* at 708.

137. Decisions of the United States Supreme Court have established a firm rule that States have no authority to prevent remedies sanctioned by the U.S. Constitution. *See, e.g.*, North Carolina State Bd. of Educ. v. Swann, 402 U.S. 43, 45-46 (1971) (striking down a facially neutral anti-busing law, a unanimous Supreme Court held that the law "would deprive school authorities of the one tool absolutely essential to fulfillment of their constitutional obligation to eliminate existing dual school system," and, therefore, that the "state policy must give way when it operates to hinder vindication of federal constitutional guarantees."). It is also well established by the Court that states have an affirmative duty to take whatever steps might be necessary to eliminate "root and branch" the effects of their

In the context of public employment, Prop. 209 has encountered serious conflicts with Title VII of the Civil Rights Act of 1964. The Supreme Court has long recognized that "Congress intended voluntary compliance to be the preferred means of achieving the objectives of Title VII."[138] For the purpose of eliminating manifest racial and gender imbalances in traditionally segregated job categories, voluntarily established race and gender specific affirmative action programs are considered perfectly legal and appropriate under Title VII.[139] An "employer adopting a [voluntary affirmative action] plan need not point to its own prior discriminatory practices nor even to evidence of an 'arguable violation' on its part."[140] As Justice O'Connor stated in *Johnson v. Transportation Agency*, no case decided under the Equal Protection Clause or Title VII places a burden on employers to prove that they actually discriminated against women and minorities in order to justify race or gender conscious affirmative action.[141] These permissive rules are designed to give maximum latitude to employers who are "trapped between the competing-hazards of liability to nonminorities if affirmative action is not taken to remedy apparent employment discrimination and liability to nonminorities if affirmative action is taken."[142] Under these rules, public employers desiring to establish race and gender specific affirmative action enjoy as much discretion as their counterparts in the private sector.[143]

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past discriminatory practices. *See* Green v. County Sch. Bd., 391 U.S. 430 (1968). The constitutional obligation of a state to eradicate racial discrimination would not be satisfied by simply establishing race-neutral policies. *See* United States v. Fordice, 505 U.S. 717 (1992).

138. Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501, 515 (1986).

139. *See* United Steelworkers v. Weber, 443 U.S. 193 (1979); Johnson v. Transportation Agency, 480 U.S. 616 (1987).

140. *Johnson,* 480 U.S. at 630 (majority opinion by Justice Brennan, citing the concurring opinion of Justice Blackmun in *Weber*, 443 U.S. at 209).

141. *See id.* at 652 (O'Connor, J., concurring).

142. *Id.* at 652 (O'Connor, J., concurring) (citing Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 291 (1986)). *See also* United Steel Workers v. Weber, 443 U.S. 193, 210 (1979) (Blackmun, J., concurring) (stating that employers facing Title VII disparate impact liability are forced to walk "a high tightrope without a net beneath them").

143. The Supreme Court has passed up every opportunity to set different employment discrimination rules for public and private employers. *See e.g.,* Johnson v. Transp. Agency, 480 U.S. 616 (1987) (deciding validity of voluntary affirmative action of a public employer under rules established for private employer); United States v. Paradise, 480 U.S. 149, 167 (1987) (plurality opinion) (approving a court-imposed employment quota stating that the "Government unquestionably ha[d] a compelling interest in remedying past and present discrimination by a state actor").

Uniform employment discrimination rules for public and private employers is unavoidable. As Justice O'Connor stated in *Wygant*, public employers who have the constitu-

Prop. 209's absolute prohibition of race and gender based employment preferences deprives public employers of their discretion to establish the affirmative action programs that the Supreme Court considers vital to the achievement of Title VII's purposes. The district court, therefore, correctly found that Prop. 209 was pre-empted by Title VII. The Ninth Circuit reversed the district court on its erroneous understanding that Prop. 209 was "entirely consistent" with the "plain language of Title VII."[144] In so doing, the circuit court totally ignored the Supreme Court's time-tested interpretations that inform the meaning of Title VII's plain language.

D. Inadvertent Unmasking of the Neutrality Face

What is most amazing about the *Wilson* litigation is not that the two state courts reached diametrically opposed decisions based on the same mostly uncontested factual findings, but that both courts thought it expedient to paint a mask of neutrality on the face of Prop. 209 to reach those decisions. It was intuitively apparent to anyone that the purpose of Prop. 209 was to eliminate existing, and prevent the establishment of future, race and gender-based affirmative action programs throughout the state of California. The law's immediate and predictable effect was to deprive racial minorities and women educational, employment and contracting opportunities that would have been available to them by virtue of those programs. The Ninth Circuit's assertion that Prop. 209 was a neutral law enacted for a neutral purpose was purely specious. Inferred from its own admissions, the court "accept[ed] without questioning the district court's findings that Prop. 209 burdens members of insular minorities . . . who otherwise would seek to obtain race-based and gender-based preferential treatment from local entities."[145] A law that imposes burdens on minorities, and only on minorities, by definition, is not neutral.

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tional duty to take affirmative steps to eliminate the continuing effects of discrimination should be permitted to take remedial action, as the private employers who have no similar constitutional duty are permitted to take. 476 U.S. 267, 291 (1986) (O'Connor, J., concurring in part and concurring in the judgment).

144. Coalition for Econ. Equality v. Wilson, 122 F.3d 692, 710 (9th Cir. 1997). Whether employers are permitted to establish remedial affirmative action to deal with their own past or present discriminatory employment practices is a question that cannot be answered by looking at the plain language of Title VII alone. *See Constitutionality of Proposition 209 As Applied*, 111 HARV. L. REV. 2081, 2098 (stating that the Ninth Circuit by examining the preemption issue without "grappl[ing] with the Supreme Court's emphasis on the importance of voluntary affirmative efforts to achieve Title VII's purpose," evaded the real issue raised by Prop. 209, namely, whether 209 permits to "lock in the vestiges of past discrimination by disabling violators from complying with the Constitution and Title VII").

145. *Wilson*, 122 F.3d at 705.

The admission most menacing to the credibility of the court's neutrality claim was made, rather obliquely, in a footnote. Note 18 of the circuit court's opinion stated that "[t]o the extent that Prop. 209 prohibits race and gender preferences to a greater degree than the Equal Protection Clause, it provides greater protection to members of the gender and races otherwise burdened by the preference."[146] It went on to point out the "sovereign rights" of states to provide "individual liberties more expansive than those conferred by the Federal Constitution."[147] The admission that Prop. 209 prohibited preferences to a "greater degree than the Equal Protection Clause contradicted the court's refrain that the law was just a restatement of the Equal Protection Clause."[148] The most poignant issue raised by note 18 is whether a state law can provide, consistent with the Equal Protection Clause, "greater protection" to the white majority and male gender burdened by the preference. By declining to review the Ninth Circuit's decision, the Supreme Court has passed up the opportunity to rule on the question. It is clear that California cannot be permitted to confer greater protection to any race or gender because, by adopting Prop. 209, the state had prohibited itself conferring the greater protection. Of course, states are free to provide greater rights to their citizens, but they cannot provide fewer rights than ensured by the Federal Constitution and laws.[149] California, through Prop. 209, has done just that by depriving minorities and women of their right, under the Equal Protection Clause and Title VII, to receive the benefit of remedial affirmative action programs that would compensate for past discrimination.

Instead of declassifying the facially explicit race and gender classification of Prop. 209 the *Wilson* courts should have examined its validity under strict scrutiny. The Supreme Court has repeatedly stated that "the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular

146. *Id.* at 709.

147. *Id.* (citing Prune Yard Shopping Ctr. v. Robins, 447 U.S. 74, 81 (1980)).

148. For instance, the Court stated earlier in the opinion that "[a]s in *Crawford* it would be paradoxical to conclude that by adopting the Equal Protection Clause, the voters of the state thereby had violated it." *Wilson*, 122 F.3d at 709 (citing *Crawford*, 458 U.S. at 535).

149. The Ninth Circuit failed to adequately address the crucial question whether the state can legitimately ban race and gender based affirmative action so categorically without impermissibly disclaiming its constitutional duty to eradicate and remedy the effects of past discrimination. *See* United States v. Fordice, 505 U.S. 717 (1992); Romer v. Evans, 517 U.S. 620 (1996).

classification,"[150] rather an important purpose of strict scrutiny is to ensure that "there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype."[151] To survive strict scrutiny, California would have to demonstrate that Prop. 209 is a narrowly tailored law needed to achieve a compelling state interest. More specifically, the state must either show that the categorical ban on racial and gender-based affirmative action is necessary to provide "greater protection to the gender and race burdened by the preference" of the state interest as seen by the Ninth Circuit—or that it is necessary to promote abstract universal equality—the purported compelling state interest. California could very well pass strict scrutiny if it presents sufficient evidence to show that racial and gender preferences impose undue burden on the majority whites and males.[152] According to Justice O'Connor, even clearly remedial affirmative action plans would be unconstitutional if they "impose disproportionate harm on the interests, or unnecessarily trammel the rights, of innocent individuals directly and adversely affected by a plan's racial preference."[153] She maintains that this is one of the "core principles" where there is general agreement among the members of the Supreme Court.[154] Providing proof of such a disproportionate burden may be a daunting task but strict scrutiny demands nothing less. Allowing a facially explicit racial and gender classification to bypass strict scrutiny under the cover of neutrality should never be a constitutionally viable option.[155]

IV. Discriminator's Neutral Safe Harbor

A. Echoes Across Legal Frontiers

Cast in the role of the unyielding gatekeeper of judicial review, facial neutrality has demonstrated its capacity to provide fortified constitutional sanctuaries to wide-ranging governmental decisions that

150. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 224 (1995) (Scalia, J., concurring) (citing Richmond v. J.A. Croson Co., 448 U.S. 469, 494 (1989)) (plurality opinion).

151. *Id.* at 215 (citing *Croson*, 488 U.S. at 493, plurality opinion of Justice O'Connor).

152. *See* K.G. Jan Pillai, *Affirmative Action: In Search of a National Policy*, 2 TEMPLE POL. & CIV. RTS. L. REV. 1, 13-22 (1992).

153. Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 287 (1986) (O'Connor, J., concurring).

154. *Id.* at 287.

155. For forceful arguments in favor of strict scrutiny, see Girardeau A. Spann, *Proposition 209*, 47 DUKE L.J. 187, 248 (1997) ("The application of heightened scrutiny provides the only way to prevent a race or gender classification from evading detection by masquerading as something other than a race or gender classification—which is precisely what Proposition 209 seems successfully to have done before the court of appeals.").

unabashedly disadvantage, and even discriminate against, racial minorities. There is mounting evidence that environmental, healthcare and law enforcement decisions, ostensibly made under facially race-neutral criteria, impose inequitable and disproportionate burdens on the socio-economic well-being of racial minorities.[156] In most such cases, the affected minorities can easily demonstrate the biased character of the purported facial neutrality, as well as the disproportionality of its impact. Affected minorities, however, invariably end up without legal remedy because of their inability to pinpoint or prove the race-targeting motivation or purpose of the decisionmaker as required by the prevailing neutrality jurisprudence.

Racial minorities across the country have found themselves in this impossible predicament whenever they have sought judicial remedies for racially disadvantaging environmental practices. These practices are now rather charitably and euphemistically dubbed "environmental racism."[157] There is undisputed evidence that a disproportionate number of communities heavily inhabited by African Americans and Hispanics are also home to solid waste landfills and other hazardous waste disposal facilities that expose the inhabitants to toxic chemicals and pollutants that cause cancer, birth defects and neurological disorders.[158] Sporadic efforts by the affected communities to secure environmental equality and justice under the Equal Protection Clause have been rebuffed by the federal courts solely for failure to prove the requisite discriminatory purpose.[159] The govern-

156. *See supra* notes 163-190 and accompanying text.

157. Jill E. Evans, *Challenging the Racism in Environmental Racism: Redefining the Concept of Intent*, 40 ARIZ. L. R. 1219 (1998). Environmental racism is defined as "distinct and identifiable racially-based conduct resulting in an inequitable distribution of environmental burdens on minority communities." *Id.* at 1221. *See also* ROBERT D. BULLARD, DUMPING IN DIXIE 8 (1994) ("Residential segregation today makes people of color vulnerable to toxic 'attacks' in much the same way that segregation in the 19th Century had African-Americans vulnerable to less subtle attacks."); Gerald Torres, *Introduction: Understanding Environmental Racism*, 63 U. COLO. L. REV. 839 (1992) (emphasizing the concepts of subordination and domination as integral to environmental racism).

158. *See* Regina Austin & Michel Shill, *Black, Brown, Red and Poisoned*, *in* UNEQUAL PROTECTION, ENVIRONMENTAL JUSTICE AND COMMUNITIES OF COLOR (Robert D. Bullard ed., 1994); Marianne Lavelle & Marcia Coyle, *Unequal Protection: The Racial Divide in Environmental Law*, 15 NAT'L L. J. 3 (1992).

159. *See* Bean v. Southwestern Waste Management Corp., 482 F. Supp. 673 (S.D. Tex. 1979), *aff'd without opinion*, 782 F.2d 1038 (5th Cir. 1986); R.I.S.E., Inc. v. Kay, 768 F. Supp. 1144 (E.D. Va. 1991); East Bibb Twiggs Neighborhood Ass'n v. Macon-Bibb County Planning & Zoning Comm'n, 706 F. Supp. 880 (M.D. Ga. 1989), *aff'd by* 896 F.2d 1264 (11th Cir. 1989). *See also* Paul Mohai & Bunyon Bryant, *Environmental Racism: Reviewing the Evidence*, *in* RACE AND THE INCIDENCE OF ENVIRONMENTAL HAZARDS: A TIME FOR DISCOURSE 163 (Paul Mohai & Munyon Bryant eds., 1992).

ment entities that determine the location and feasibility of waste facilities invariably use facially race-neutral site selection criteria despite the fact that the criteria more often than not correlate to minority communities.[160]

Searching for discriminatory purpose in site selection of waste disposal facilities is a futile pursuit,[161] even for a court sympathetic to a plaintiff alleging environmental racism. The federal court decision *Bean v. Southwestern Waste Management Corporation*[162] is an appropriate illustration. The plaintiffs in *Bean* challenged the Texas Department of Health's ("TDH") grant of a permit to operate a waste disposal facility in their predominantly black community, alleging that the permit decision was "part of a pattern or practice"[163] of racial discrimination by TDH in selecting solid waste sites. The Northwest Manor in Houston, the proposed landfill site, close to a predominantly black high school and a residential neighborhood, was selected on the heels of a decision eight years earlier to reject such a facility in the same general area when the school and neighborhood were predominantly white.[164] In fact, out of the thirteen waste disposal facilities owned and operated by the city during the previous five decades, twelve were located in predominantly black neighborhoods.

The district court found the permit decision "unfortunate," "insensitive," and not consistent with prudent "[l]and use considerations."[165] The Court stated that it "simply [did] not make sense to put a solid waste site so close to a high school . . . or so close to a residential neighborhood" and that it "might very well have denied [the] permit" if it were in the position of TDH.[166] However, the court was

160. *See* Benjamin A. Goldman et al., *Toxic Waste and Race Revisited: An Update of the 1987 Report on the Racial and Socioeconomic Characteristics of Communities With Hazardous Waste Sites*, *in* ENVIRONMENTAL PROTECTION AND JUSTICE 169 (Kenneth A. Manaster ed., 1995).

161. *See* Richard J. Lazarus, *Distribution in Environmental Justice: Is There a Middle Ground*, 9 ST. JOHN'S J. LEGAL COMMENT 481 (1994) (arguing that environmental decisions are dependant on multiple variables, including economics, politics and race).

162. 482 F. Supp. 673 (S.D. Tex. 1979), *aff'd without opinion*, 782 F.2d 1038 (5th Cir. 1986).

163. *Id.* at 677.

164. In 1970, the permit to build the facility was rejected on the ground that it would be too close to the school, present unreasonable health hazards, and reduce property values. In 1978 when the new facility was permitted, such concerns simply vanished. *See* Robert D. Bullard, *Environmental Racism and 'Invisible' Communities*, 96 W. VA. L. REV. 1037, 1038-39 (1994).

165. Bean, 482 F. Supp. at 679, 680.

166. *Id.* at 680.

hamstrung by the legal requirement of purposeful discrimination which the plaintiffs unfortunately failed to meet in the case.

The *Bean* case demonstrates that evidence of a disproportionate concentration of hazardous waste disposal facilities in minority communities may not lead a court to draw inferences of discriminatory purpose by government decisionmakers.[167] It is difficult for plaintiffs seeking environmental justice to isolate and highlight racially motivated purpose in siting decisions claimed to have been made with consideration to indistinguishably blended race-neutral factors and criteria. The courts inclined to protect minority communities from environmental predations will remain frustrated so long as they continue to search for the elusive and nebulous discriminatory purpose in deciding the location of waste facilities. Thus, it would have made more sense if the *Bean* Court, instead of looking for discriminatory purpose or discriminatory effect, had made an empirical analysis of the substance of neutrality when the government (TDH) claimed that its permit decision was made according to a facially race-neutral criteria. The government would then have had a difficult time in explaining the accumulation of hazardous waste facilities in predominantly minority communities as a simple coincidence or the unfortunate outcome of a truly neutral process.[168] Unless and until the courts adopt such a constructive analysis, "plaintiffs pursuing environmental racism claims [will be] left holding the garbage bag."[169]

The pervasive use of facially neutral criteria that are intentionally or inadvertently used to make race disadvantaging decisions is not the exclusive preserve of environmental laws. The practice is widely prev-

167. In the *Bean* case, the Court could have easily drawn the inference of racially discriminatory purpose in granting the permit. As Professor Bullard has observed: "Black Houstonians did not follow the garbage dumps and incinerators . . . . The racial character of these neighborhoods was established *before* the waste facilities were sited." Bullard, *supra* note 164, at 1040 (emphasis in original).

168. Some scholars forcefully argue that the courts should apply a modified intent standard or a suitable substitute standard in evaluating claims of environmental racism. *See* Kathy Seward Northern, *Battery and Beyond: A Tort Law Response to Environmental Racism*, 21 WM. & MARY ENVTL. L. & POL'Y REV. 485, 583 (1997) (proposing a new category of "environmental racism tort" in which intent would be inferred where the defendant acts with substantial certainty "that its decisions to site the facility will result in a minority community shouldering more than its proportionate share of the city, state, region or nation's environmental burden"); Evans, *supra* note 157, at 1221-22, 1297 (proposing "expansion of the intent standard established . . . in *Washington v. Davis* consistent with the expansive historical interpretation of intent in civil tort law," i.e., determining purpose of a governmental action "by those natural and probable consequences that are substantially certain to occur").

169. Leslie Ann Coleman, Comment, *It's the Thought that Counts: The Intent Requirement in Environmental Racism Claims*, 25 ST. MARY'S L.J. 447, 492 (1993).

alent in the delivery of health care[170] and in criminal law enforcement. Just as in environmental decisionmaking, it is generally hard to prove racial intent or motivation[171] in medical decisionmaking because of the fungibility of the variables that constitute expert medical justification.[172] While it is not impossible to discern racial bias in medical and environmental decisionmaking,[173] it is almost impossible to crack open the facial neutrality of criminal law enforcement decisions and to expose any underlying racial bias. Traditionally, criminal law enforcement is insulated from challenges based on racial discrimination by the doctrine of prosecutorial discretion.[174]

B. The Case of Racial Profiling: The New Jersey Example

The New Jersey State police have been stopping and searching black and Hispanic motorists in disproportionate numbers on the New Jersey Turnpike for years.[175] The practice, known as racial profiling, has been repeatedly condemned by minority communities, civil rights leaders and state and federal legislators representing New Jersey. State officials responsible for law enforcement have always denied

170. *See* Marian E. Gormick et al., *Effects of Race and Income on Mortality and Use of Services Among Medicare Beneficiaries*, 335 New Eng. J. Med. 791 (1996) (describing the findings of a study conducted by a team of investigators affiliated with the Health Care Financing Administration using data concerning more than 26 million medicare beneficiaries. The study revealed pervasive racial inequities in the delivery of health care services). *See also* Louis W. Sullivan, *From the Secretary of Health and Human Services*, 266 JAMA 2674 (1991) ("I contend that there is clear, demonstrable, undeniable evidence of discrimination and racism in our health status of the general population has increased, black health status has actually declined. This decline is not in one or two health categories, it is across the board, from an infant mortality rate for blacks that is double than for whites to a life expectancy for black Americans that is 6 years less than that for white Americans.").

171. *See* Barbara A. Noah, *Racial Disparities in the Delivery of Health Care*, 35 SAN DIEGO L. REV. 135, 164 (1998).

172. *See Developments in the Law - Medical Technology and the Law*, 103 Harv. L. Rev. 1519, 1636 (1990) ("[F]actors that are admittedly relevant in determining whether a particular patient will be a good transplant recipient, such as occupation, educational level, and family environment, might be used as yardsticks of social worth or means by which unconscious stereotypes influence patient selection.").

173. Significantly, minorities disproportionately affected by facially neutral programs run or funded by the federal government may, in limited circumstances, be eligible for administrative remedies from funding agencies. Title VI of the Civil Rights Act of 1964 prohibits racial discrimination by recipients of federal funds. Moreover, the implementing regulations of funding agencies invariably prohibits disparate racial impact in the administration or access to the funded programs.

174. *See Development in the Law - Race and Prosecutor's Charging Decisions*, 101 HARV. L. REV. 1520, 1521 (1988).

175. *See Whitman Says Troopers Used Racial Profiling*, N.Y. TIMES, April 21, 1999, at A1 (Christine Todd Whitman is the Governor of New Jersey).

that the practice ever existed and claimed that any perceived racial disproportionality was incidental to race-neutral enforcement of the state's drug and narcotics laws. The Superior Court of New Jersey, in a criminal case,[176] ruled that state police "engaged in *intentional and purposeful racial discrimination* through a de facto policy of selectively stopping motor vehicles driven by African-American citizens in a disproportionate manner to that of Caucasian citizens."[177] Judge Robert Francis granted the criminal defendants' motion to suppress evidence on the ground of racially selective prosecution. The state appealed the interlocutory ruling to the Superior Court of New Jersey.

In a voluminous brief filed with the Superior Court, the state attorney general argued for the reversal of Judge Francis's ruling on the ground that the defendants failed to discharge their "heavy burden"[178] of proving discriminatory effect and discriminatory purpose. In addition to highlighting the deficiencies of the statistical evidence proffered by the defendants in the case, the state claimed that the defendants "utterly failed to prove discriminatory effect since they did not identify any similarly situated Caucasian individuals who were not prosecuted" and thus, failed to "demonstrate a pattern of non-enforcement of the motor vehicle laws against non-blacks."[179] As to the requirement of discriminatory purpose, the state, citing the *Davis* case trilogy, insisted that the defendants failed to "relentlessly document the existence of a conscious and deliberate discriminatory purpose based on some unconstitutional category."[180] The state further ar-

176. *See State of New Jersey v. Soto*, 324 N.J. Super. 66, 734 A.2d 350 (1996).

177. Brief of Attorney General of New Jersey in *State of New Jersey v. Pedro Soto, et. al.*, No. A-5334-95T3 (filed October 21, 1997), at 4 (emphasis in the original). The brief and reply brief comprise 172 pages. [hereinafter *Brief of Attorney General*].

178. Asserting that selective prosecution or selective enforcement claims are inconsistent with the presumptive validity of prosecutorial discretion, the state insisted that the defendants making such claims have a heavy burden of proof to overcome the presumption. In support of its position, the state cited *United States v. Armstrong*, 517 U.S. 456 (1996). The state underscored the near impossibility of overturning a prosecutorial decision by stating that "[b]efore *Armstrong*, there had not been a *single* reported federal case of a dismissal for race-based selective prosecution since 1886, when the Supreme Court reversed the conviction of a Chinese laundry operator in *Yick Wo v. Hopkins*, 118 U.S. 356 (1886)." *Brief of Attorney General, supra* at 177, at 34-35 (the quote was from David Cole, *See No Evil, Hear No Evil*, 145 N.J. L.J. 844, August 26, 1996 - with emphasis added).

179. *Brief of Attorney General, supra* note 177, at 64, 87. The state argued that to prove discriminatory effect the defendants were required to prove both elements under the law established by the Supreme Court in *United States v. Armstrong*, 517 U.S. 456 (1996). The requirements were apparently extrapolated from the Court's statement that "[t]o establish a discriminatory effect in a race case the claimant must show that similarly situated individuals of a different race were not prosecuted." *Id.* at 1487.

180. *Brief of Attorney General, supra* note 177, at 97.

gued that discriminatory purpose could be established only with "tangible affirmative evidence clearly demonstrating [the state agency's] actual and active support for the discriminatory action in question"[181] and that it could not simply be inferred from the existence of disproportionate impact.[182]

Racial profiling became an incendiary political issue in 1998 when New Jersey state troopers stopped four unarmed non-white men traveling on the turnpike to a basketball game and, following an altercation, shot the group 11 times. The incident triggered an investigation by the United States Department of Justice who, in turn, threatened the state with litigation to enforce the federal civil rights laws. Forced into a corner, the state finally investigated the alleged discriminatory law enforcement policies and procedures, and produced an interim report that conceded that racial profiling was "real-not imagined" in the state of New Jersey.[183] The report not only found "willful misconduct by a small number of state police members" but also "more common instances of possible de facto discrimination by officers who may be influenced by stereotypes and may thus tend to treat minority motorists differently during the course of routine traffic stops, subjecting them more routinely to investigative tactics and techniques that are designed to ferret out illicit drugs and weapons."[184] The report, though written in somewhat circumlocutory language and "legalistic tone"[185] and presented in conjunction with the release of the final report, forced the Governor to admit that racial and gender discrimination permeated the state police department.[186]

181. *Id.* at 105-106. The state claimed that the state agency cannot be held accountable simply because it is alleged to have knowledge of the profiling.

182. *Id.* at 90. The state cited *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 ("Absent a pattern as stark as that in *Gomillion v. Lightfoot*, [364 U.S. 339 (1960)] or *Yick Wo v. Hopkins*, [118 U.S. 356 (1886)], impact alone is not determinative and the Court must look to other evidence.").

183. *Interim Report of the State Police Team Regarding Allegations of Racial Profiling*, presented by the Attorney General of New Jersey on April 20, 1999 [hereinafter *The Report*].

184. *Id.* at 7.

185. Civil rights leaders, though heartened by the state's admission of discrimination, wanted the report to document the "pervasive and systemic" "culture of racism" of state troopers. David Herszenhorn, *Reversal Has Some Questioning Attorney General's Motives*, N.Y. TIMES, April 21, 1999, at B8.

186. *See* David Kocieniewski, *Bias Permeates the State Police, Whitman Admits*, N.Y. TIMES, July 3, 1999, at A1 (the Governor's admission came at the heels of the Attorney General's final report on racial profiling. Blacks and Hispanics make up 14% and women 3% of the state's 2,700-member police force. The report showed that the minorities and women on the force are often subjected to discrimination and harassment that resulted in a number of lawsuits). In March 1999, the Governor dismissed the Chief of the State Police

As a result of the state's admission of racial profiling, the state attorney general withdrew the state's appeal pending in the Superior Court. Absent the state's confession, the victims of racial profiling would have little chance of proving the requisite purposeful discrimination, and their own complaint would likely languish in state and federal courts for many more years. It should be noted that the state's investigative reports steadfastly maintain that the state drug and narcotics laws and policies are neutral and the racial profiling was simply a matter of unfortunate coincidence. Nevertheless, the state rightly acknowledged in its report that the effect of racially disparate treatment "whether obvious or subtle, or intentional or not, is to engender feelings of fear, resentment, hostility, and mistrust by minority citizens."[187] The fact remains that the *Davis* rule of the U.S. Supreme Court plays a significant role in perpetuating such effects in New Jersey and across the country.[188]

V. First Amendment Neutrality

A. Gems in the Backyard

To learn about the complex dimensions and intricacies of neutrality, we need not look beyond the contours of the Supreme Court's First Amendment jurisprudence. The concept of neutrality is firmly embedded in the prevailing doctrinal formulations of the Court both under the Free Speech and Religion Clauses. The experience gained from the sustained and widespread application of neutrality to the First Amendment provides invaluable insight into the inadequacies of the Court's neutrality analysis under the Equal Protection Clause. There is no sound justification for not using identical neutrality analysis for the First Amendment and the Fourteenth Amendment. Not only do the rights and liberties secured by both Amendments occupy high positions on the scale of constitutional values, but the role of the antidiscrimination principle—the principle underpinning neutrality

for making racially prejudicial remarks. *See Whitman Dismisses State Police Chief for Race Remarks,* N.Y. TIMES, March 1, 1999, at A1.

187. *The Report, supra* note 183, at 7.

188. Recently some members of Congress proposed legislation to provide funds to states to conduct investigations of alleged racial profiling. *See Getting the Facts on Racial Profiling*, N.Y. TIMES, June 11, 1999, at A32; H.R. 1443, 106th Cong. (1999). A bill to provide for the collection of data on traffic stops was introduced in the 106th Congress, 1st Session, on April 15, 1999 by Rep. John Conyers, Jr. of Michigan and 21 other co-sponsors. President Clinton has already ordered investigation on suspected racial profiling by federal agencies including customs, immigration and drug enforcement. *See* Steven A. Holmes, *Clinton Orders Investigation on Possible Racial Profiling*, N.Y. TIMES, June 10, 1999, at A22.

and safeguarding rights and liberties from governmental infringement—remains practically the same.

B. Neutrality Under the Free Speech Clause

The Supreme Court's Free Speech jurisprudence is built on a content-based/content-neutral distinction. Content-based restrictions on protected "high-value"[189] speech are strictly scrutinized and are generally held unconstitutional.[190] Content-neutral restrictions that limit protected high-value speech "without regard to the content or communicative impact of the message conveyed"[191] are reviewed under a variety of less stringent standards.[192] The "operative core"[193] or the "organizing principle"[194] of the Court's Free Speech jurisprudence is the categorical requirement of content neutrality.

Since the Court assigned pivotal significance to content neutrality it has encountered recurring problems in figuring out its precise meaning. The most telling statement the Court has made concerning this problem is that "[d]eciding whether a particular regulation is content

189. Geoffrey R. Stone, *Content Neutral Restrictions*, 54 U. CHI. L. REV. 46, 48 (1987). The Court's free speech jurisprudence is also premised on a division of all speech into three categories. Some speech acts such as threats, bribes, wagering, price-fixing and criminal conspiracy are entirely outside the purview of the First Amendment. *See* Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265 (1981). All speech covered by the First Amendment is either protected or unprotected. The general rule is that most speech covered by the First Amendment is protected. Some rare species of speech such as obscenity and fighting words fall into the unprotected category. *See* Harry Kalven, *The Metaphysics of the Law of Obscenity*, 1960 SUP. CT. REV. 1. Recently, the Court in *R.A.V. v. St. Paul* held that "fighting words" can be restricted only on a content-neutral, nondiscriminatory basis. 505 U.S. 377, 403-404 (1992).

190. *See* First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978) (striking down a state criminal statute that prohibited business corporations from making contributions or expenditures to influence the outcome of a vote on any question submitted to voters on the ground that the corporations have a First Amendment right to express views on issues of public importance without proving that the issues affected the corporation's business); Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley, 454 U.S. 290 (1981) (holding that an ordinance placing limitation of $250 on contributions to committees formed to support or oppose ballot measures submitted to popular vote contavened the First Amendment rights of association and expression).

191. Stone, *supra* note 189, at 48.

192. *See id.* On the other hand, content-based restrictions "limit communication because of the message it conveys." *Id.* at 47.

193. Richard H. Fallon, Jr., *Sexual Harassment, Content Neutrality, and the First Amendment: The Dog that Didn't Bark*, 1994 SUP. CT. REV. 1, 22 ("The master rule on which judges and theorists predominantly converged was the requirement of content neutrality, conceived largely as the antithesis of ad hoc balancing of free speech interests on the one hand against the interests favoring regulation on the other.").

194. Susan H. Williams, *Content Discrimination and the First Amendment*, 139 U. PA. L. REV. 615, 617 (1991).

based or content neutral is not always a simple task."[195] Frequently, the Justices take diametrically opposite positions on the subject. Consider, for instance, the sharply divergent views of the Justices on neutrality in *F.C.C. v. League of Women Voters of California*.[196] The issue in the case was whether a federal statute that forbade "editorializing" by "noncommercial educational broadcasting stations" that receive federal grants through the Corporation for Public Broadcasting[197] was a law "abridging the freedom of speech, or of the press."[198] The Court's majority, led by Justice Brennan, held that the statute's "ban [was] defined solely on the basis of the content of the suppressed speech"[199] and that the content-based regulation restricted speech both in terms of viewpoints and the subject matter.[200] The Court found the law a "purest example" of a First Amendment violation.

Four Justices disagreed. Justice Rehnquist and two of his colleagues found Congress' prohibition on editorializing "strictly neutral."[201] In their view, the prohibition had not singled out "editorial views of one particular ideological bent"[202] or prevented public stations from airing programs "dealing with controversial subjects so long as [station] management itself does not expressly endorse a particular viewpoint."[203] They found nothing in the First Amendment that made the law unconstitutional. Justice Stevens, in a separate dissent, found "greatest significance"[204] in the fact that "the statutory restriction [was] completely neutral in its operation"[205] in that it prohibited "all editorials without any distinction being drawn concerning the subject matter or the point of view that might be expressed."[206]

195. Turner Broad. Sys. v. F.C.C., 512 U.S. 622, 642 (1994).

196. 468 U.S. 364 (1984).

197. Public Broadcasting Amendments Act of 1981, Pub. L. No. 977-35, 95 stat. 730 (1981).

198. U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .").

199. F.C.C. v. League of Women Voters of Cal., 468 U.S. 364, 383 (1984).

200. *See id.* at 383-84. The Court found that the restriction was "specifically directed at a form of speech - namely, the expression of editorial opinion—that lies at the heart of the First Amendment protection." *Id.* at 381. The Court thought that in order to determine whether a particular statement of station management constitutes "editorial" proscribed by the law, enforcement authorities must examine the content of the message. *See id.* at 383.

201. *Id.* at 408 (Rehnquist, J., joined by the Chief Justice and Justice White, dissenting).

202. *Id.* at 407.

203. *Id.* at 407-08. Justice Rehnquist also noted that "Congress has not prevented station management from communicating its own views on those subjects through any medium other than subsidized public broadcasting." *Id.* at 408.

204. *Id.* at 413 (Stevens, J., dissenting).

205. *Id.*

206. *Id.*

While the Justices in *League of Women Voters* fundamentally disagreed over the meaning of government neutrality,[207] both the majority and the dissent sought to rationalize their respective positions by spinning the facial language of the statute differently. In so doing, the Justices engaged in a process of ad hoc balancing of the free speech/free press interests on the one hand and the government's regulatory interests on the other[208]—the very process the categorical rule of content neutrality was designed to avoid.[209] They did not resort to any particular framework or inquiry that could help demarcate the content-based/content-neutral distinction.

There are indications that the Court has finally discarded this ad hoc balancing and embraced a more sophisticated and predictable approach to the analysis of content neutrality. To determine content neutrality, the Court is now willing to look beyond a law's facial neutrality or governmental assertions of neutral purpose to ascertain "whether the government has adopted a regulation of speech because of [agreement or] disagreement with the message it conveys."[210] The Court articulated its new method of analysis in *Turner Broadcasting System, Inc. v. F.C.C.*[211] In this case, the Court decided the constitutionality of the "must-carry provisions" of a federal statute that required cable television systems to devote a portion of their channels to the transmission of local broadcast television programs.[212]

Designed to create a competitive balance between cable operators and over-the-air broadcast television stations, the must-carry pro-

207. Thaddeus J. Burns, *Neutral-Principle Theory and First Amendment Adjudication*, 24 MEM. ST. U.L. REV. 7, 15 (1993) (stating that in *League of Women Voters* the Justices fundamentally disagreed over the definition of government neutrality).

208. By balancing, the majority found that while "Government's interest in ensuring balanced coverage of the public issues is plainly both important and substantial," *League of Women Voters*, 468 U.S. at 378, the proscription on editorializing was "not sufficiently tailored to the harms it seeks to prevent to justify its substantial interference with broadcasters' speech", *id.* at 392, which "has always rested on the highest rung of the hierarchy of First Amendment values." *Id.* at 381.

On the other side, Justice Rehnquist found that the prohibition on editorializing was just a condition attached to a federal subsidy. In his opinion, "the condition imposed has a rational relationship to Congress' purpose in providing the subsidy", and "it is not primarily 'aimed at the suppression of dangerous ideas.'" *Id.* at 407.

209. *See* Fallon, *supra* note 193, at 22 (citing JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 110-116 (1980)).

210. Turner Broad. Sys. v. F.C.C., 512 U.S. 622, 642 (1994) (citing Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)).

211. 512 U.S. 622 (1994).

212. The "must-carry" provisions contained in sections 4 and 5 of the *Cable Television Consumer Protection and Competition Act* of 1992 were challenged on the ground that they abridged the freedom of speech or of the press in violation of the First Amendment.

visions challenged in the case were enacted by Congress as antitrust and fair trade practice legislation. By requiring cable systems to set aside a portion of their channels for local broadcasters, the must-carry provisions burdened the speech interests of cable operators, while bestowing tangible competitive benefits on local broadcasters. The Supreme Court agreed with the district court finding that the "must-carry [provisions], on their face, impos[ed] burdens and confer[red] benefits without reference to the content of speech."[213]

The Supreme Court refused to stop its inquiry on the basis of mere facial neutrality, stating that "even a regulation neutral on its face may be content based if its manifest purpose is to regulate speech because of the message it conveys."[214] Accordingly, the Court proceeded to examine the design, scope and operation[215] of the contested provisions and arrived at the conclusion that "the purposes underlying [their] enactment . . . are unrelated to the content of speech,"[216] and that "[r]ather, they are meant to protect broadcast television from what Congress determined to be unfair competition by cable systems."[217] The Court specifically ruled out any consideration of "alleged illicit legislative motive"[218] as a factor in ascertaining the purpose or determining the constitutionality of the legislation.[219]

C. Facial Neutrality and the Religion Clauses

Neutrality is not an isolated concept consigned to the Free Speech Clause. By declaring that neither a state nor the federal government can favor one religion over another, or believers over non-believers,[220] the Court has long made neutrality an inseparable part of

213. *Turner Broadcasting System*, 512 U.S. at 643.

214. *Id.* at 645 (opinion of the Court delivered by Justice Kennedy and joined by Chief Justice Rehnquist and Justices Blackmun, Stevens and Souter).

215. *See id.* at 647-49.

216. *Id.* at 647.

217. *Id.* at 652.

218. *Id.*

219. *See id.* (stating that the Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive, citing United States v. O'Brien, 391 U. S. 367, 391 (1968)).

220. The Court first articulated the neutrality concept in the context of the Establishment Clause, in *Everson v. Board of Education*, 330 U.S. 1 (1947), stating "[n]either a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another." *Id.* at 15. [The First] Amendment requires the state to be neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary." *Id.* at 18. The Court reaffirmed the neutrality requirement of the Establishment Clause in later cases. *See, e.g.*, Rosenberger v. Rector and Visitors of the Univ. of Va., 515 U.S. 819 (1995); Agnosti v. Felton, 521 U.S. 203 (1997). The Court imposed the requirement of neutrality

the religion clauses.[221] The Court has come to recognize that "[a] proper respect for both the Free Exercise and the Establishment Clauses compels the state to pursue a course of 'neutrality' toward religion."[222]

D. The Establishment Clause

Neutrality serves as the mediating principle that maintains the balance between the competing demands of the religion clauses. The reconciliation of the proverbial conflict[223] between the Establishment Clause that favors a wall of separation between church and state, and the Free Exercise Clause that occasionally requires the state to accommodate religious interests and institutions in the administration of public social welfare programs, necessitates neutral rules to govern church-state relations.[224] The conflict between the notions of state's noninvolvement in religion and its obligation of impartiality toward religion is also embedded in the Establishment Clause, as interpreted

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under the Free Exercise Clause as well. *See, e.g,.* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah; 508 U.S. 520 (1993).

There is considerable disagreement among respected scholars as to whether the Establishment Clause erects an impenetrable wall of separation between the state and religion. *See, e.g.*, Philip B. Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1, 46 (1961) ("[T]he First Amendment prohibits . . . a subsidy where it is granted because of the religious nature of the activity conducted."); Mark Tushnet, *"Of Church and State and the Supreme Court": Kurland Revisited*, 1989 SUP. CT. REV. 373, 384 ("For Kurland, it went almost without saying that any sort of accommodation of religion as such [by the state] was impermissible.").

In the opinion of Professor Cass R. Sunstein, the neutrality concept may be inconsistent with the Establishment Clause. "[T]he Constitution is not neutral as between religion and non- religion. Under the establishment clause, the government is prohibited form benefitting religion, although benefits to others are perfectly acceptable." CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 307 (1993).

221. *See* U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .").

222. Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 512 U.S. 687, 696 (1994) (citing Committee for Public Ed. & Religions Liberty v. Nyquist, 413 U.S. 756, 792-793 (1973)).

223. *See* Suzanna Sherry, Lee v. Weisman: *Paradox Redux*, 1992 SUP. CT. REV. 123, 147, 149 ("[I]t is not possible simultaneously to implement the core values of both religion clauses . . . . The time has come to admit the conflict and to make an honest choice.").

224. *See* Abner S. Greene, *The Political Balance of the Religion Clauses*, 102 YALE L.J. 1611, 1663 (1993) (suggesting that in order to treat religion fairly, the courts need to balance the burden imposed by the Establishment Clause on religion with the treatment favoring religion under the Free Exercise Clause); Jesse H. Choper, *The Free Exercise Clause: A Structural Overview and an Appraisal of Recent Developments*, 27 WM. & MARY L. REV. 943 (1986) (stating that the Court, while holding a law unconstitutional if its purpose is to aid religion under the Establishment Clause, should at times require the state to aid religion under the Free Exercise Clause).

by the Supreme Court.[225] The conflict quite frequently and most noticeably manifests itself in cases involving governmental aid to education. The permissible limit of governmental assistance to sectarian institutions under the neutrality mandate of the Establishment Clause has been a recurrent issue. After years of inconsistent and ambiguous decisions,[226] the Court finally, in *Lemon v. Kurtzman*,[227] articulated a three-part test to evaluate claims under the Establishment Clause.

Under the *Lemon* test, in order to survive an Establishment Clause challenge, a state law should have three attributes: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . .; finally, the statute must not foster 'an excessive government entanglement with religion.'"[228] Even though the *Lemon* test does not directly speak of neutrality, the test is built on prior cases that emphasize neutrality[229] and, in substance, it "retained the centrality of neutrality in Establishment Clause doctrine."[230]

225. The conflict was highlighted in *Everson v Board of Education*, 330 U.S. 1 (1947), the first case decided under the Establishment Clause. The case involved a challenge to a resolution of a New Jersey township providing for the transportation of pupils to both public and parochial schools. Justice Black's majority opinion for the Court stressed that the Establishment Clause "was intended to erect 'a wall of separation between the Church and State,'" but went on to uphold the transportation program to parochial schools to make sure that the Court did "not inadvertently prohibit New Jersey from extending its general state law benefits to all its citizens without regard to their religious belief." *Id.* at 16. Justice Black further stated: "That Amendment requires the state to be a neutral in its relations with believers . . . and non-believers." *Id.* at 18. Five years after *Everson*, the Court unambiguously articulated the state's obligation to accommodate the needs of students of religious institution. In *Zorach v. Clauson*, 343 U.S. 306 (1952), the Court approved a New York City program which gave "release time" to students of public schools to allow them to attend religious instructions outside of the school building, holding that government encouragement of religious instruction in cooperation with religious institutions did not violate the Establishment Clause because such accommodation of the students' "spiritual needs" followed "the best of our tradition," and avoided the showing of "a callous indifference to religious groups." *Id.* at 314.

226. *See* DANIEL A. FARBER, THE FIRST AMENDMENT 268 (1998) (stating that in the 20 years after *Everson* the Court oscillated between the ideal of strict separation of church and state, and the ideal of accommodation of religious institutions and interests).

227. 403 U.S. 602 (1971). Applying the three-part test, the Court invalidated two state laws that provided partial funding for teacher salaries at parochial schools.

228. *Id.* at 612-613.

229. The *Lemon* test relied heavily on two cases that extensively subscribed to the neutrality concept: *Abington School District v. Schempp*, 374 U.S. 203 (1963), and *Waltz v. Tax Commissioner*, 397 U.S. 664 (1970), even though the *Lemon* case itself referred to neutrality only in passing.

230. John T. Valauri, *The Concept of Neutrality in Establishment Clause Doctrine*, 48 PITT. L. REV. 83, 130 (1986) (also stating that "[a]lthough *Lemon* mentioned neutrality only briefly, it nevertheless embodied the conceptual structure and problems of neutrality").

Despite the Justices' disagreement about its operational details, sometimes to the extent of leading them to opposite results, the *Lemon* test has endured as the Supreme Court's formula for deciding Establishment Clause cases. The Court continues to inquire whether the government, in allocating aid purportedly on the basis of neutral, secular criteria that neither favor nor disfavor religion and in making funds available to both secular and religious educational institutions, acted with the *purpose* of advancing or inhibiting religion or whether the aid has the *effect* of advancing or inhibiting religion.[231] The Court will examine the purpose and effect of the aid program in excruciating detail even when the program is described as neutral. In the words of Justice Souter, "[i]f a scheme of government aid results in support for religion in some substantial degree, or in endorsement of its value, the formal neutrality of the scheme does not render the Establishment Clause helpless . . . ."[232]

The Supreme Court consistently recognizes that the Establishment Clause will not permit a state "to hide behind" a law neutral in form and "remain studiously oblivious to [its] effects."[233] If the challenged governmental law or action does not involve direct or indirect public funding to private religious schools, determining neutrality will not be an easy task. *Board of Education of Kiryas Joel Village School District v. Grumet*[234] is a case on point. The case involved a New York law that created a public school district for the village of Kiryas Joel,

231. *See* Agostini v. Felton, 521 U.S. 203, 222-23 (1997) (stating that the Court continues to adhere to the *Lemon* test to inquire "whether the government acted with the purpose of advancing or inhibiting religion" and "whether the aid has the 'effect' of advancing or inhibiting religion"). The majority in *Agostini* used three primary criteria "to evaluate whether government aid has the effect of advancing religion: [1)] it does not result in government indoctrination; [2) it does not] define its recipients by reference to religion; and [3) it does not] create an excessive entanglement." *Id.* at 234. In *Agostini*, the majority opinion written by Justice O'Connor upheld a federally funded program providing supplemental, remedial instruction to disadvantaged children on a *neutral basis* even though the instruction was given in sectarian school premises by government employees pursuant to a program containing safeguards. *See id.* at 2016. Four dissenting justices found that the aid constituted direct state aid to religious institutions and thus, violated "the Establishment Clause's central prohibition against religious subsidies by the government." *Id.* at 241. The dissenters also used the *Lemon* test in their analysis.

232. *Id.* at 253 (Souter, J., joined by Justices Stevens and Ginsburg, and Breyer in part, dissenting).

233. Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753, 777 (1995) (O'Connor, J., joined by Justices Souter and Breyer, concurring in part and concurring in judgment); Rosenberger v. Rector and Visitors of the Univ. of Va., 515 U.S. 819, 878 (1995) (Souter, J., joined by Justices Stevens, Ginsburg, and Breyer, dissenting).

234. 512 U.S. 687 (1994).

populated exclusively by the Satmar Hasidic sect.[235] Satmar parents, for religious reasons, refused to send children outside their village to receive special educational services provided under the federal Individuals with Disabilities Education Act (IDEA). The Supreme Court prohibited New York from providing IDEA services to Satmar children on their religious school premises.[236] As a result, the creation of a special public school district became the only alternative to accommodate the needs of the Satmar children. The school district, like any other in the state of New York, was to be "under the control of a board of education" elected by the voters of the village of Kiryas Joel.[237] The law that created the Kiryas Joel school district was then challenged as an unconstitutional establishment of religion. Applying the *Lemon* test, the state courts found the law unconstitutional.

Affirming the lower courts, the U.S. Supreme Court, by a six to three majority, held that the statute "fail[ed] the test of neutrality"[238] because it allocated civil authority to the school district using a "religious criterion."[239] Since the boundaries of the public school district coincided with those of the village of Kiryas Joel, the enclave of the Satmar sect, the Justices found the creation of the district tantamount to allocation of political power to a religious community with no assurance that the governmental authority would be exercised in a religiously neutral way.[240] The fact that "New York allows virtually any group of residents to incorporate their own village, with broad powers of self-government"[241] did not make the law neutral or non-discrimi-

235. The Satmar Hasidic sect practices a strict form of Judaism. The members of the sect refuse to follow the way of living of the rest of society, and strictly guard against assimilating into it. "They interpret the Torah strictly; segregate the sexes outside the home; speak Yiddish as their primary language; eschew television, radio and English language publications; and dress in distinctive ways that include head coverings and special garments for boys and modest dresses for girls. Children are educated in private religious schools . . . [where] most boys receive . . . limited exposure to secular objects and most girls [are prepared at their special schools] for their roles as wives and mothers." *Id.* at 691.

236. *See* Aguilar v. Felton, 473 U.S. 402 (1985); *see also* School Dist. of Grand Rapids v. Ball, 473 U.S. 373 (1985) (holding that providing public funding to classes held on religious school premises violate the Establishment Clause).

237. 512 U.S. 687, 693 (1994) (citing 1989 N.Y. Laws, ch. 478).

238. *Kiryas Joel Village*, 512 U.S. at 709. The substantive portions of Justice Souter's opinion for the Court were joined by Justices Blackmun, Stevens, O'Connor and Ginsburg who all wrote concurring opinions. Justice Kennedy wrote a separate concurring opinion in which he maintained that the law drew political boundaries by using a religious criterion. *See id.* at 728. Justice O'Connor found a "legislative drawn religious classification" in the law. *Id.* at 716.

239. *Id.* at 702.

240. *See id.* at 703.

241. *Id.* at 712 (O'Connor, J., concurring in part and concurring in the judgment).

natory. The uncertainty and unpredictability of similarly situated groups seeking incorporation of special villages, and the unreviewability of a legislature's failure to enact a special law in the future,[242] further influenced the Supreme Court's decision.

Justice Scalia, joined by Justice Thomas and Chief Justice Rehnquist, wrote a scathing dissent. Justice Scalia asserted the school to be a public school specifically designed to provide a public secular education to handicapped students who happened to share the same religion. In his opinion, the majority decision was based on the "novel proposition" that any group of residents of New York "can be invested with political power, but not if they all belong to the same religion."[243] Justice Scalia insisted that the law that created the school district was "facially neutral" and that it could not be invalidated without first showing that "the legislators were aware that religion caused the problem addressed and that the legislature's proposed solution was motivated by a desire to disadvantage or benefit a religious group (i.e., to disadvantage or benefit them because of their religion)."[244] In his view, the law was facially neutral because it extended educational benefits to one area of the state where it was not effectively distributed, regardless of whether the reason for the ineffective distribution could be traced to the Satmar religion.[245]

It is reassuring that six Justices of the Court declined Justice Scalia's invitation to become fiction writers. It would have been utterly unrealistic for the Court to rule that a special law enacted for the specific purpose of bestowing autonomous governmental authority to a religious sect with no reliable safeguards against religious favoritism was neutral simply because the law was phrased in neutral terms. Justice Scalia agreed with Justice Souter that the boundaries of Kiryas Joel village were drawn at the time of incorporation "so as to exclude all but Satmars"[246] and that the special school district coincided with

242. *See id.* at 703.

243. *Id.* at 736 (Scalia, J., joined by the Chief Justice and Justice Thomas, dissenting).

244. *Id.* at 738, 741.

245. *See id.* at 741. Justice Scalia, invoking analogy from an Equal Protection case that held "facially race-neutral laws can be invalidated on the basis of their effects only if 'unexplainable on grounds other than race,'" asserted that the special school district law cannot be invalidated on the "mere basis of its asserted religiously preferential (or discriminatory) effects." *Id.* at 738 (citing Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 266 (1977)). In effect, Justice Scalia rejected the *Lemon* test of purpose and effect.

246. *Id.* at 742-43.

the village boundaries.[247] In Justice Scalia's opinion, both the village and the school district were created to meet the "distinctive secular needs or desires of citizens who happened to be Satmars."[248] The exclusive village and school district were created solely to seclude the Satmar for religious reasons. Therefore, it would be a remarkable stretch to say, paraphrasing Justice Scalia, that the laws were created to meet the secular needs and desires of Satmars as citizens.

Justice Scalia's main argument in favor of the law that created the special school district is that it is a facially neutral law deserving a strong presumption of validity "because the law involves no public aid to private schools and does not mention religion."[249] Under that presumption, the law cannot be invalidated without showing that it was "motivated by a desire to disadvantage or benefit a religious group."[250] Justice Scalia's theory, as applied to the special school district, is riddled with serious contradictions. First, it is clear that, notwithstanding the avoidance of religious reference on the surface, the special school district law was created to educate Satmar children who were prevented from being educated elsewhere solely because of their religion and religious way of life. Second, if a facially neutral law can be invalidated on a showing that it was motivated to benefit a religious group, a showing of that sort was clearly made in the Satmar case. Justice Scalia, for instance, spent several pages arguing that the law should have been considered a permissible religious accommodation under the religion clauses. "When a legislature acts to accommodate religion, particularly a minority sect," he stated, "it follows the best of our traditions.'"[251] To "accommodate" means "to do a favor or service for" according to the American Heritage Dictionary.[252] The school district law specifically designed to accommodate and benefit a religious sect should, therefore, be invalid under Justice Scalia's facial neutrality theory. Finally, Justice Scalia's radical and divergent

247. *See id.* at 742 ("Whether or not the reason for the ineffective distribution had anything to do with religion, it is a remarkable stretch to say that the Act was motivated by a desire to favor or disfavor a particular religious group.").

248. *Id.* Quoting Justice Souter's statement that "[i]t is undisputed that those who negotiated the village boundaries when applying the general village incorporation statute drew them so as to exclude all but Satmars," *id.* at 699, Justice Scalia simply stated: "It is indeed." He then went on to say that there was a secular reason to support the boundary-drawing. *Id.* at 742-743.

249. *Id.* at 752.

250. *Id.* at 741.

251. *Id.* at 744 (citing Zorach v. Clauson, 343 U.S. 306, 314 (1952)). He also cited Art VI, cl. 3 of the U.S. Constitution to point out that the "Constitution itself contains an accommodation of sorts." *Id.*

252. AMERICAN HERITAGE DICTIONARY 62 (2d College ed. 1982).

decision in *Employment Division v. Smith*,[253] in which he formulated the restrictive theory of facial neutrality, has considerably diminished the judicial protection of the rights of minority religious sects. Scalia's solicitude for the Satmar religious sect, though commendable, is therefore not convincingly neutral. The majority made the no-nonsense argument that the special school district law failed the neutrality test of the religion clauses by crossing the line from permissible accommodation to impermissible establishment. Nothing that Justice Scalia stated either factually or logically refuted the majority's objective finding.

The Supreme Court's conclusion that the Kiryas Joel Village School District failed the Establishment Clauses's test of neutrality was supported by five Justices.[254] The Justices, however, failed to reach consensus as to the role that the *Lemon* test played in reaching that result. While Justice Blackmun wrote a concurring opinion to emphasize "the general validity of the basic principles stated in *Lemon*,"[255] Justice O'Connor's concurring opinion pointed out that the Establishment Clause cases fall into different categories seldom amenable to any one grand unitary test and that there is a need to evolve varied approaches by freeing the case law "from the *Lemon* test's rigid influence."[256] The three dissenting Justices maintained that the *Lemon* test was "utterly meaningless" in much of its application, and that there were sound reasons for its abandonment.[257] In spite of all the misgivings, Justice Blackmun was emphatic that Justice Souter's plurality opinion was based on the analysis under the second (primary effect) and third (entanglement) prongs of the *Lemon* test.[258]

Despite the recurrent internal disagreements, the Court seems to hang on to the *Lemon* test, presumably because of the difficulty in

253. 494 U.S. 872 (1990). Justice Scalia's majority opinion rejected established precedents and held that a generally applicable facially neutral law having a disproportionate impact on religious minorities need not be justified by the state by showing a "compelling interest" unless the law is motivated by an intent to discriminate. Congress overruled the Court by enacting the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. § 2000 bb et seq., which required the Court to reinstate the compelling interest test. The Court invalidated RFRA on 14th Amendment grounds.

254. Justices Blackmun, Stevens, O'Connor, and Ginsburg agreed with the plurality opinion of Justice Souter on the neutrality issue.

255. *Kiryas Joel Village*, 512 U.S. at 710 (Blackmun, J., concurring).

256. *Id.* at 721 (O'Connor, J., concurring).

257. *Id.* at 751 (Scalia, J., joined by the Chief Justice and Justice Thomas, dissenting). Justice Scalia is an ardent critic of the *Lemon* test. He once stated that the test is a "ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried." Lamb's Chapel v. Center Monriches Union Free Sch. Dist., 508 U.S. 384, 397-401 (1993) (Scalia, J., concurring).

258. *See* 512 U.S. at 710 (Blackmun, J., concurring).

devising an alternative.[259] The *Kiryas Joel Village* case demonstrates, however, that the *Lemon* test is analytically incoherent with respect to the specific issue of Establishment Clause neutrality when state aid to religion involves no public funding. The test is obviously inappropriate, and the test's entanglement prong even irrelevant to the adjudication of claims of state animosity and discrimination against minority religion under the Free Exercise Clause.[260] The neutrality issues that arise in the context of such claims have more to do with selection of the standard of judicial review than with the permissible dimensions of church-state relations.

E. The Free Exercise Clause

Ever since the Supreme Court's decision in *Employment Division v. Smith*,[261] the concept of neutrality has assumed a critical role in Free Exercise jurisprudence. In that case, the Court, by a bare majority, held that the Free Exercise Clause did not require Oregon to grant Native American Church members an exemption from the state's criminal drug laws for their sacramental use of peyote. The Court, disregarding three decades of established precedent,[262] ruled that a facially neutral law of general applicability need not be justified by a compelling governmental interest even if the law has the incidental

259. The Court adhered to the *Lemon* test in its entirety in *Agostini v. Felton*, 521 U.S. 203 (1997). The majority opinion of Justice O'Connor was joined by Chief Justice Rehnquist and Justices Scalia, Thomas and Kennedy. The dissenting opinion of Justice Souter joined by Justices Stevens, Ginsburg, and in part by Breyer only disagreed with the majority for not applying the *Lemon* test in a way they thought correct and proper.

260. In contrast, Establishment Clause claims typically raise questions as to whether the state has aided religion too little or too much in a way that effect a symbolic union of church and state. The *Lemon* test effectively prevents such union from happening. *See* John T. Valauri, *The Concept of Neutrality in Establishment Clause Doctrine*, 48 U. PITT. L. REV. 83, 144 ("The total effect of the three *Lemon* prongs is to bar most aids and accommodations to religion.").

261. 494 U.S. 872 (1990).

262. *See* Bonnie I. Robin-Vergeer, *Disposing of the Red Herrings: A Defense of the Religious Freedom Restoration Act*, 69 SOUTH CAL. L. REV. 589, 602-03 (1996) ("[T]he Court unraveled three decades of precedent which, for the most part, applied the compelling government interest test to free exercise claims—albeit with mixed results.").

In *Wisconsin v. Yoder*, 406 U.S. 205 (1972), the Court held: "A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for government neutrality if it unduly burdens the free exercise of religion." *Id.* at 220. Justice Scalia's majority opinion in *Smith* characterized cases like *Yoder* as "hybrid" decisions, but Justice O'Connor's dissenting opinion maintained that those cases were consistently considered "as part of the mainstream of our free exercise jurisprudence." *Smith*, 494 U.S. at 896 (O'Connor J, joined by Justices Brennan, Marshall, and Blackmun, dissenting).

effect of burdening a particular religious practice.[263] Four dissenting justices, led by Justice O'Connor, found "nothing talismanic about neutral laws of general applicability . . . [because] laws neutral toward religion can coerce a person to violate his religious conscience or intrude upon his religious duties just as effectively as laws aimed at religion."[264] The majority insisted that by permitting an individual to escape from the obligation to obey neutral and generally applicable laws based on his religious belief would make him "a law unto himself"—"a constitutional anomaly."[265]

While the *Smith* rule abruptly elevated the concepts of neutrality and general applicability to a level that conferred constitutional sanctity on laws that burden free exercise of religion, the rule itself did not define those concepts. Instead, the Court assumed that the concepts are self-explanatory. Yet the Court's experience since the *Smith* case has brought home the old warning that self-serving facial characterizations of law can be elusive and even misleading at times. In *Church of the Lukumi Babalu Aye v. City of Hialeah*,[266] the challenged health and sanitary regulations of the city that had masqueraded as neutral laws of general applicability failed to meet the requirements of the *Smith* rule.[267] As a result, the Court felt compelled to lay down a framework for analyzing claims of neutrality and general applicability.

The impugned laws of the city of Hialeah prohibited the adherents of Santeria faith from performing their religious ritual of animal sacrifice. The city insisted that the intent behind the sacrifice prohibition was to protect public health, peace and public morality, and was enforceable against any and all who engaged in the practice of sacrifice.[268] When the laws were challenged by the members of the Santeria religion under the Free Exercise Clause, the federal district court found that the laws did not target religious conduct "on their face"[269] and that the laws' effect on the plaintiffs' religious conduct was "'incidental to [their] secular purpose and effect'"[270] The District Court found the city had four compelling interests in enacting the pro-

263. *See Smith*, 494 U.S. at 896 (O'Connor, J., dissenting); *see also* Robin-Vergeer, *supra* note 262, at 601 n.39.

264. *Smith*, 494 U.S. at 901 (O'Connor J, joined by Justices Brennan, Marshall, and Blackmun, dissenting).

265. *Id.* at 885-86 (majority opinion of Justice Scalia).

266. 508 U.S. 520 (1993).

267. *See id.* at 531-32.

268. *See id.* at 535-36.

269. *Id.* at 529.

270. *Id.* at 529 (citing Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 723 F. Supp. 1467, 1483-84 (S.D. Fla. 1988)).

hibition: first, animal sacrifices presented a substantial health risk; second, the practice was likely to inflict emotional injury to children who witnessed it; third, and interest in protecting animals from cruel and unnecessary killing; and fourth, the city's interest in restricting the sacrifice of animals to areas zoned for slaughterhouse uses.[271] The Court of Appeals for the Eleventh Circuit affirmed the decision in a one paragraph per curiam opinion.[272] The Supreme Court reversed, holding that the challenged laws "fail[ed] to satisfy the *Smith* requirements" of neutrality and general applicability.[273]

The Supreme Court summarily rejected the city's contention that judicial "inquiry must end with the text of the laws at issue," declaring that "[f]acial neutrality is not determinative."[274] The Court then established a framework to ascertain whether a law has met the quintessential requirements of neutrality and general applicability. The key to the neutrality inquiry is to decipher the object or purpose of the law. The Court emphasized that "if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral."[275] To determine the object of the law, the Court would not only meticulously examine its text to discern language with religious connotations,[276] but also assess "the effect of [the] law in its real operation."[277] When a law implicates multiple concerns unrelated to religion, the object inquiry should ascertain whether the law "proscribe[s] more religious conduct than is necessary to achieve [its] stated ends."[278] Justices Kennedy and Stevens even suggested that the Court could even resort to "an equal protection mode of analysis" to determine any possible discriminatory object of a law "from both direct and circumstantial evidence."[279]

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271. *See id.* at 529-30.

272. *See* 936 F.2d 586 (1991).

273. 508 U.S. at 532 (plurality opinion of Justice Kennedy, joined by the Chief Justice and Justices Scalia, Thomas and White).

274. *Id.* at 534.

275. *Id.* at 533 (citing Employment Div. v. Smith, 494 U.S. 872, 878-79 (1990)).

276. *See id.* at 533-34. "To determine the object of a law, we must begin with its text, for the minimum requirement of neutrality is that a law not discriminate on its face. A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernable from the language or context." *Id.* at 533.

277. *Id.* at 535.

278. *Id.* at 538. The Court noted that the challenged laws of the city of Hialeah implicated multiple concerns unrelated to religious animosity, for example, cruelty to animals, and health hazards from improper disposal. It found that the laws, when considered together, disclosed "an object remote from these legitmate concerns." *Id.* at 535.

279. *Id.* at 540.

As a result of its thorough neutrality inquiry, the Court arrived at the conclusion that the challenged laws of the city of Hialeah "had as their object the suppression of religion" and, therefore, were not neutral.[280] The inquiry led the Court to find that the facially neutral laws "were gerrymandered with care to proscribe religious killings of animals but to exclude almost all secular killings," and that they suppressed much more religious conduct than was necessary to achieve the asserted legitimate interests of the city.[281] The Court also made the additional inquiry into the overlapping concept of general applicability[282] and found that the laws were "underinclusive" since they tried to advance the city's interests in protecting public health and preventing cruelty to animals solely by prohibiting religious practices of Santeria believers, instead of imposing the prohibition on the society as a whole.[283] Having found the challenged religion-burdening laws of the city wanting neutrality and general applicability, the Court ruled that they "must undergo the most rigorous scrutiny"[284] and be justified by showing that they were measures narrowly tailored to achieve "'interests of the highest order.'"[285]

The *City of Hialeah* case is refreshing because it offers a schematic framework to analyze claims of neutrality for religion-burdening laws. The framework permits the courts to examine the substratum of facially neutral laws to ascertain their true object and the laws' operational effect on the free exercise of religion. According to the plurality opinion of Justice Kennedy, the neutrality inquiry could even extend to the subjective motivation of the lawmakers.[286] Significantly, the entire neutrality inquiry precedes the decision on the standard of constitutional review. The government interested in

280. *Id.* (citing Personnel Admin. of Mass. v. Feeney, 442 U.S. 256 (1979), a case concerning facial neutrality and the Equal Protection Clause, Justice Kennedy stated that objective factors such as historical background, legislative and administrative history, and statements made by decisionmaking bodies, might bear on the question of discriminatory object). Thus, it is clear that by "object" or "purpose", Justice Kennedy meant "intent" or "motivation."

281. *Id.* at 542.

282. Justice Scalia and the Chief Justice expressed their willingness to "frankly acknowledge" that the terms neutrality and general applicability "substantially overlap." *City of Hialeah*, 508 U.S. at 557 (Scalia, J., joined bythe Chief Justice, concurring in part and concurring in the judgment).

283. *See id.* at 543. In addition, the Court found a pattern of hostility toward the Santeria religion from a variety of actions and statements of the city and members of the city council. *See id.* at 541.

284. *Id.* at 546. This holding was supported by seven Justices.

285. *Id.*

286. *See id.* at 543-46 (citing McDaniel v. Paty, 435 U.S. 618, 628 (1978), and Wisconsin v. Yoder, 406 U.S. 205, 215 (1972)).

avoiding strict judicial scrutiny should, therefore, shoulder the entire burden of establishing the neutrality of the challenged facially neutral, religion-burdening law.

F. The New Doctrinal Twins

The in-depth judicial inquiry into the substance of facial neutrality in the *City of Hialeah* case was more than a matter of simple logic and common sense. The inquiry was dictated by the Supreme Court's constitutional responsibility to safeguard individual rights and liberties from the threat of governmental action. The Justices would have abdicated that responsibility had the Court accepted the city's claim of neutrality at its face value. The Court's obligation to explore beyond surface neutrality would not have been materially different if it was presented with facially neutral laws that impacted adversely on a racial group rather than a religious group. Similarly, the inquiry would not be different if the case for adjudication was framed as a violation of the Equal Protection Clause, rather than a violation of the Free Exercise Clause. The proposition that the schematic analysis of facial neutrality is easily transferable from the Free Exercise Clause to the Equal Protection Clause does not rest entirely on deductive reasoning. The proposition stems directly from the Court's emerging analytical approach that assigns identical scope to the Free Exercise and the Equal Protection Clauses.

The idea that the two clauses should be treated similarly has been afloat for several decades. Starting in the early 1960s, a few constitutional law theorists began articulating the doctrinal similarity between the First and Fourteenth Amendments. Prominent among the scholars, Professor Philip Kurland suggested that the "freedom and separation clauses [of the First Amendment] should be read as a single precept that the government cannot" use a "classification in terms of religion either to confer a benefit or to impose a burden."[287] Under the Kurland concept, the Religion Clauses, just like the Equal Protection Clause, require the government to pursue a policy of non-discrimination, namely a policy of total neutrality in matters of religion. Stated more succinctly by another theorist, Leo Pfeffer, "the [F]irst [A]mendment requires government to be 'religion-blind' as the [F]ourteenth requires it to be colorblind."[288]

The non-discrimination or neutrality principle has been widely criticized as a misguided concept that would eviscerate or emasculate

287. Philip B. Kurland, *supra* note 220, at 6.

288. Leo Pfeffer, *Religion-Blind Government*, 15 STAN. L. REV. 389, 392 (1963).

the Free Exercise Clause.[289] The Supreme Court appeared to consider the principle inapposite to the ideals of the Free Exercise Clause, at least until it abruptly changed course in *Employment Division v. Smith*.[290] Prior to the *Smith* decision, the Court consistently read the clause as permitting, and sometimes requiring, the government to accommodate religious practices.[291] Under the standard of constitutional scrutiny that the Court "painstakingly" developed over the years, a state statute that burdens the free exercise of religion or a state's refusal to grant a religious exemption must be "justified by a compelling interest that cannot be served by less restrictive means."[292] Yet the very idea of accommodation is the antithesis of neutrality. Accommodation negates neutrality because accommodation requires disparate treatment. Therefore, at least conceptually, neutrality and accommodation are mutually exclusive. The law of employment discrimination is rife with graphic illustrations of the inherent contradiction between accommodation and neutrality or non-discrimination.[293]

Title VII of the Civil Rights Act of 1964 prohibits employers from making discriminatory employment decisions on the basis of race, color, religion, sex or national origin.[294] The prohibition has been interpreted as requiring employers to "neutrally"[295] adopt employment policies and workplace rules. In 1972, Congress amended the statute

289. *See* Stephen Pepper, *Reynold, Yoder and Beyond: Alternatives for the Free Exercise Clause*, 1981 UTAH L. REV. 309, 347 (the "primary weaknesses [of the nondiscrimination principle] are an absence of support in the text or history of the clauses and its evisceration of the free exercise clause"); Gail Merel, *The Protection of Individual Choice: A Consistent Understanding of Religion Under the First Amendment*, 45 U. CHI. L. REV. 805, 808-09 (1978) (the coherence and simplicity that the Kurland principle of neutrality seeks to bring to the religion-clause doctrine can be achieved "only at a cost of almost total emasculation of the free exercise provision").

290. 494 U.S. 872 (1990).

291. *See, e.g.*, Hobbie v. Unemployment Appeals Comm'n of Fla., 480 U.S. 136, 144-145 (1987) ("[G]overnment may (and sometimes must) accommodate religious practices and . . . it may do so without violating the Establishment Clause.").

292. *Smith*, 494 U.S. at 907 (Blackmun, J., joined by Justices Brennan and Marshall, dissenting). "This Court over the years painstakingly has developed a consistent and exacting standard to test the constitutionality of a state statute that burdens the free exercise of religion." *Id.* (citing Hernandez v. Comm'r, 490 U.S. 680, 699 (1989); Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 141 (1987); Bowen v. Roy, 476 U.S. 693, 732 (1986); United States v. Lee, 455 U.S. 252, 257-58 (1982); Thomas v. Review Bd., 450 U.S. 707, 718 (1981); Wisconsin v. Yoder, 406 U.S. 205, 215 (1972); and Sherbert v. Verner, 374 U.S. 398, 406 (1963)).

293. For a comprehensive discussion of the contradiction, see Karen Engle, *The Persistence of Neutrality: The Failure of the Religious Accommodation Provision to Redeem Title VII*, 76 TEX. L. REV. 317 (1997).

294. *See* 42 U.S.C. § 2000e (1994).

295. Engle, *supra* note 293, at 320.

to require employers to "reasonably accommodate" religious practices and observances of employees unless such accommodation imposes "undue hardship" on the employer's business.[296] Thus, by allowing preferential treatment on religious grounds, Title VII now mandates occasional departures from the neutrality principle.

Despite the unambiguous statutory directive, Courts tend to nullify the accommodation duty of employers by means of an extremely restrictive interpretation of "undue hardship." In *TWA v. Hardison*,[297] the Supreme Court seemed to uphold neutrality at the expense of religious accommodation. In that case, employee Hardison was not permitted to take Saturday off for observance of Sabbath as required by his religion, the Worldwide Church of God. The employer maintained that Hardison was ineligible for the privilege under the seniority system contained in a collective-bargaining agreement. Emphasizing that the paramount purpose of Title VII was the elimination of discrimination in employment, the Court expressed its preference for the employer's allocation of the burdens of weekend work according to criteria established by a "neutral" seniority system over the allocation of "days off in accordance with the religious needs of its employees."[298] In *Hardison*, the Court held that the results of the latter system discriminated against other employees who may have strong non-religious reasons for not working on weekends.[299] In order to provide a statutory basis for its holding, the Court stated that "[t]o require TWA to bear more than a de minimus cost in order to give Hardison Saturdays off is an undue hardship."[300]

In the sphere of public employment, the Supreme Court seems to conflate religious accommodation and equal treatment. Public employers who are subject to legal obligations both under Title VII and the Free Exercise Clause need not show any undue hardship to justify failure to provide religious accommodation if the failure is based on a neutral or non-discriminatory employment policy. The maintenance of a neutral policy constitutes "reasonable accommodation." In *Ansonia Board of Education v. Philbrook*,[301] for instance, the Court found that the school board's refusal, consistent with its collective-

296. *See* Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, §2(7) 86 Stat. 103 (codified as amended at 42 U.S.C. § 2000e(j) (1994)).

297. 432 U.S. 63 (1977).

298. *Id.* 80-81.

299. *See id.* at 81. The Court added that "Title VII does not contemplate such unequal treatment." *Id.*

300. *Id.* at 84.

301. 479 U.S. 60 (1986).

bargaining agreement with the teachers' union, to grant three days of paid leave for religious observance to a teacher was reasonable enough to satisfy the board's accommodation obligation because the law "did not impose a duty on the employer to accommodate at all costs."[302]

The Court's commitment to the non-discrimination principle rather than to religious accommodation was explicit in Justice Steven's concurring opinion. He noted that plaintiff Philbrook did not contend that he received fewer days of paid leave than members of other religious faith or than teachers who had no religious obligations on school days. Rather, Philbrook's argument was that the available six-day paid leave was inadequate to serve his mandated religious observances while the same leave was quite adequate for teachers with no or different religious commitments. According to Justice Stevens, Philbrook's argument rested on the premise that "[his] special, that is, religious, needs entitle him to extraordinary treatment" and, therefore, it stated a "grievance against equal treatment rather than a claim that he has been the recipient of unequal treatment."[303] Justice Stevens clearly equated religious accommodation with preferential treatment—a violation of the non-discrimination principle.

The lower courts interpreted the Supreme Court's statements requiring an employer to bear more than a de minimis accommodation but less than accommodation at all costs, as a signal to get rid of the accommodation obligation in its entirety. The Third Circuit adopted this approach in *United States v. Board of Education for the School District of Philadelphia.*[304] In the case, the court held that the school board and the Commonwealth of Pennsylvania had no duty to accommodate a Muslim teacher by allowing her to wear religious attire in the classroom in violation of the state garb statute.[305] The district court found that "anti-Catholicism was a significant factor in the pas-

302. *Id.* at 70 (citing TWA v. Hardison, 432 U.S. 63 (1977)). The Court remanded the case for a decision as to whether the collective bargaining agreement could be construed to allow Philbrook to use "personal business leave" for religious purposes. *See id.*

303. *Id.* at 79 (Stevens, J., concurring in part and dissenting in part).

304. 911 F.2d 882 (3rd Cir. 1990).

305. *See id.* at 885. The Garb Statute, enacted in 1895 as Public Law No. 282 provided:

> [N]o teacher in any public school shall wear in said school or while engaged in the performance of his duty as such teacher any dress, mark, emblem or insignia indicating the fact that such teacher is a member or adherent of any religious order, sect or denomination.

Id. Violation of the statute would disqualify the teacher from teaching and subject the school official to a misdemeanor charge which upon conviction would entail fines and loss of the official's job. *Id.*

sage of the [Garb Statute] of 1895."[306] The appeals court disregarded the alleged impermissible motivation behind the statute as irrelevant since it "bans *all* religious attire and is being enforced in a non-discriminatory manner with respect to the Muslim teachers as well as Catholics."[307] The EEOC decided that the discharge of the teacher for not complying with the Garb Statute constituted a violation of Title VII.[308] The U.S. Department of Justice argued that the statute was repugnant to Title VII and the Free Exercise Clause.[309] The court concluded that accommodating the teacher's desire to wear religious attire would be "a significant threat to the maintenance of religious neutrality in the public school system" and that, regardless of the ultimate validity of the Garb Statute, requiring the school board to litigate over the motivation behind the statute "would itself constitute an undue hardship."[310] The court dutifully applied the law established by the Supreme Court in *Hardison* and *Philbrook*.[311]

What the employment discrimination cases demonstrate is that, under the prevailing ideology of the Supreme Court, it is extremely difficult for the concepts of neutrality and accommodation to co-exist. The obligation to accommodate is automatically fulfilled by maintaining relevant neutral employment policies that do not discriminate against any religion. Under this reasoning, any religious accommodation may constitute an impermissible preference in violation of the neutrality principle.

The Supreme Court's current Free Exercise Clause jurisprudence is premised on the same kind of logic and reasoning. By declaring in *Employment Division v. Smith*[312] that "a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice,"[313] the Court has categorically espoused the neutrality principle at the expense of the doctrine of religious ac-

306. *School Dist. of Philadelphia*, 911 F.2d at 893.

307. *Id.* at 894.

308. *See id.* at 885.

309. *See id.*

310. *Id.* The Third Circuit applied the Oregon Supreme Court decision in *Cooper v. Eugene School District*, 723 P.2d 298 (Or. 1986), *appeal dismissed*, 480 U.S. 942 (1987), in which a law identical to the Pennsylvania Garb Statute was upheld on the ground that it was "narrowly tailored to the compelling state interest in preserving the appearance of religious neutrality in public schools," even though the law imposed burdens on free exercise rights. *School Dist. of Philadelphia*, 911 F.2d at 888.

311. *See School Dist. of Philadelphia*, 911 F.2d at 886.

312. 494 U.S. 872 (1990).

313. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531 (1993) (citing Employment Div. v. Smith, 494 U.S. 872 (1990)).

commodation. By doing so, the Court "dramatically depart[ed] from well-settled First Amendment jurisprudence,"[314] which mandated that governmental actions having the effect of substantially burdening a religious practice be justified by a compelling governmental interest.[315] *Smith* also marked the first time that the Court accepted the Kurland theory of First Amendment neutrality, which disfavored mandatory accommodation of exemption of activities solely motivated by religious belief from the operation of generally applicable and facially neutral laws.[316] The decision certainly pacified those Kurland disciples who consider religious accommodation a form of "affirmative action" seeking equality of result rather than equality of treatment.[317]

There can be no disagreement with Justice Blackmun's assertion that the *Smith* decision "*treated the Free Exercise Clause as no more than an antidiscrimination principle*,"[318] even if one differs with his complaint that "it ignored the value of religious freedom as an affirmative individual liberty."[319] The decision effectively narrowed, if not eliminated, the doctrinal disparity between the Free Exercise Clause and the Equal Protection Clause. The *Smith* rule is cloned from the rule of *Washington v. Davis*,[320] which held that race-neutral laws that have the effect of disproportionately disadvantaging racial minorities need not be justified by a compelling governmental interest under the Equal Protection Clause. The *Smith* Court announced this historic doctrinal integration of the two Clauses, stating that "[j]ust as we subject to the most exacting scrutiny laws that make classifications based on race . . . so too we strictly scrutinize governmental classifications based on religion."[321]

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314. *Smith*, 494 U.S. at 891 (O'Connor, J., joined by Justices Brennan, Marshall, and Blackmun in part, concurring with judgment).

315. This rule of accommodation was established through a series of established precedents. Most prominent among them are: *Sherbert v. Verner*, 374 U.S. 398 (1963); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); and *Thomas v. Review Bd. of Ind. Employment Security Div.*, 450 U.S. 707 (1981).

316. *See* Tushnet, *supra* note 220, at 402. Tushnet stated: "Under contemporary circumstances, there is little reason to believe that the Court will, though it should, adopt Kurland's approach." *Id.* One year after his prediction, the *Smith* case was decided.

317. *See, e.g.*, David K. Dewolf, *State Action under the Religious Clauses: Neutral in Result or Neutral in Treatment?*, 24 U. RICH. L. REV. 253 (1990). DeWolf's thesis is inspired by the Supreme Court's recent affirmative action cases decided under the Equal Protection Clause.

318. City of Hialeah, 508 U.S. at 578 (emphasis added).

319. *Id.* (Blackmun, J., joined by Justice O'Connor, concurring in the judgment).

320. 426 U.S. 229, 242-48 (1976).

321. Employment Div. v. Smith, 494 U.S. at 886 n.3 (internal cites omitted).

The calibrated congruousness of the religion-blind Free Exercise Clause and the color-blind Equal Protection Clause has been several years in the making.[322] Further, the congruity has been intended to achieve the goal of government neutrality in religious and racial matters. When placed on the monochromatic canvas of the Supreme Court's prevailing jurisprudence, both religion-blindness and color-blindness can be seen as anti-affirmative action doctrines that bar preferential treatment of religious and racial minorities. Now that neutrality has been established as the core of the Free Exercise Clause and the Equal Protection Clause, the Court's inquiry into the neutrality issue should be identical under both Clauses.

VI. Conclusion

Equal protection neutrality is hopelessly adrift. Conceptually, it is ambiguous, having no delineable structure or well defined meaning. This conceptual ambiguity belies its pivotal role in the evolving jurisprudence of a colorblind constitution. As currently applied by the Supreme Court, neutrality operates as a concept of convenience—lenient toward facially neutral laws having a racially disproportionate impact and highly intolerant toward laws advantageous to racial minorities. The achievement of racial and gender equality and fairness in the post-affirmative action era, as envisioned by the colorblind jurisprudence, is primarily dependent on vigorous and impartial enforcement of the anti-discrimination laws. The doctrinal ambiguity of neutrality is, and will continue to be, a major impediment to effective law enforcement.

The road to achieving doctrinal certainty depends on according neutrality the meaning it naturally and intrinsically commands. The Supreme Court can only provide this meaning by recognizing absolute impartiality as the touchstone of neutrality and by establishing a framework for verifying claims of impartiality. In terms of impartiality, the reformation of neutrality requires the Court to change the prevailing rule of facial neutrality. The current rule immunizes a facially neutral law from judicial scrutiny, even when the law impacts disproportionately on racial minorities. At least from the perspective of the affected minorities, the law is not impartial and, therefore, not neutral – neutrality's self-certification of the law notwithstanding.

322. Chief Justice Rehnquist's opinion in *Ansonia Board of Education v. Philbrook*, 479 U.S. 60 (1986), which declared that public employers have no obligation to accommodate religion at all costs was a harbinger of the Court's emerging Free Exercise Clause jurisprudence.

In the post-affirmative action era, racially disadvantaging laws should be a matter of national concern. Not all racially disadvantaging laws are discriminatory, nor do these laws invariably call for judicial relief. Disparate racial impact, however, should be a trigger for judicial exploration of the reasons, and evaluation of the justifications, for the law's deviation from impartiality. As Justice O'Connor observed, "[t]here is nothing talismanic about neutral laws of general applicability" because laws neutral toward religion or race can deprive a person of his or her religious freedom or freedom from discrimination "just as effectively as laws aimed at religion [or racial groups]."[323] Bestowing constitutional sanctity to the facial neutrality of a racially disadvantaging law may be as incongruous as recognizing Switzerland's sale of arms on credit to Nazi Germany as an impeccable act of neutrality.[324]

If the Supreme Court is inclined to reform its neutrality jurisprudence, it needs to systematize its inquiry into claims of impartiality; the inquiries are implicit in self-inscribed facial neutrality. The Court could easily adopt the analytic framework that it has already developed in probing the impartiality of facially neutral laws in the context of the Free Exercise Clause. Methodized analysis under this framework will reveal not only the substance of the claims of impartiality of race disadvantaging facially neutral laws, but also the redeeming attributes that warrant judicial imprimatur of constitutionality. In the process, the reviewing courts will be assuming more responsibility than they currently do in assuring that laws are fair and equitable to all races and segments of our pluralistic society. Until the Court institutes such a systematized scrutiny of the impartiality of race disadvantaging facially neutral laws, the Court's colorblind equal protection jurisprudence will remain marred by suspicions of partiality and racial insensitivity.

323. Cohen v. Cowles Media Co., 501 U.S. 663, 677 (1991) (citing Employment Div. v. Smith, 494 U.S. at 901 (O'Connor, J., concurring in judgment)). Justice O'Connor made the observation in the context of the Free Exercise Clause of the First Amendment, but she also made the inevitable comparison between religious freedom and freedom from race discrimination in the same paragraph of her opinion.

324. *See* Dietrich Schindler, *Neutrality and Morality: Developments in Switzerland and in the International Community*, 14 AM. U. INT'L L. REV. 155, 160 (1998) (conference on Neutrality and Holocaust) (stating that the Swiss action was incompatible with the law of neutrality and that the Swiss practices of 1942 "primarily affected Jews and therefore amounted to a measure of racial discrimination").