Spring 2019

# Equal Protection Design Defects

Jonathan Feingold
*Boston University School of Law*

Recommended Citation

Jonathan Feingold, *Equal Protection Design Defects* , *in* 91 Temple Law Review 513 (2019).
Available at: https://scholarship.law.bu.edu/faculty_scholarship/833

# EQUAL PROTECTION DESIGN DEFECTS

## Jonathan P. Feingold[*]

### ABSTRACT

One can understand constitutional doctrine as a tool designed to effectuate the Constitution and its various provisions. Equal protection doctrine, in turn, comprises a set of Justice-made rules designed to realize the promise of equal protection under the law. The substance of that promise remains a topic of deep contestation. Nonetheless, more than forty years of constitutional jurisprudence have entrenched a vision of constitutional equality that privileges what I refer to herein as the "right to compete." Simply put, the Supreme Court has repeatedly embraced the view that the Equal Protection Clause mandates the government to allocate public benefits—such as employment and admissions—on the basis of a person's individual "merit," irrespective of their race.

Scholars have long critiqued the individualistic and colorblind principles on which this vision rests. Less scholarship, in contrast, has explored whether the doctrine actually gives the Supreme Court what it says it wants. One might assume that it does. Yet growing empirical evidence from domains spanning employment, law enforcement, and education suggests quite the opposite. Specifically, findings from the mind sciences reveal that common facially neutral evaluative tools—such as human judgment, predictive algorithms, and standardized tests—can systematically mismeasure the existing talent and potential (that is, merit) of individuals from negatively stereotyped racial groups. Facially neutral measures of merit, it turns out, may often compromise the right to compete. Equal protection doctrine, which renders facially neutral state action presumptively constitutional, accordingly incentivizes conduct that exacts the precise harm that, according to the Supreme Court, the Fourteenth Amendment is designed to prevent.

### TABLE OF CONTENTS

[*] Research Fellow, BruinX | Special Assistant to the Vice Chancellor, UCLA Equity, Diversity and Inclusion. Jonathan Feingold holds a B.A. from Vassar College and a J.D. from UCLA School of Law. Many thanks for insightful comments, inspiration, and feedback from the UCLA School of Law Advanced Critical Race Theory Workshop, Devon Carbado, Anna Faircloth, Jerry Kang, David Simson, and Noah Zatz. I would also like to thank the editors of the *Temple Law Review* for their thoughtful feedback throughout the editing process.

## INTRODUCTION

In the mid-2000s, self-described "behavioral realist[s]"[1] cohered around the observation that decades of values-based arguments—often mobilizing anticaste or antisubordination visions of constitutional equality—had failed to soften the Supreme Court's hostility toward affirmative action.[2] The behavioral realists, in turn, shifted the debate from values to facts. Instead of contesting the normative commitments that informed the doctrine, behavioral realists mobilized social science to disrupt empirical assumptions embedded in the law.[3]

Little more than a decade later, the results are mixed. On the one hand, the science of implicit bias—central to the behavioral realist canon—is well traveled across legal and lay discourse.[4] Yet even as the science proliferates and the legal scholarship evolves, little suggests that these new facts will motivate doctrinal

---

1.   Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1494 n.21 (2005).

2.   *See, e.g.*, Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of "Affirmative Action,"* 94 CALIF. L. REV. 1063, 1064 (2006). Behavioral realists built upon existing scholarship that challenged empirical assumptions laden in constitutional doctrine. *See, e.g.*, Barbara J. Flagg, *"Was Blind, but Now I See": White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953 (1993) (mobilizing social science literature on "unconscious discrimination" to critique the discriminatory intent rule); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987) (discussing "unconscious racism"); *cf.* Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 N.Y.U. L. REV. 630, 633 (1999) (describing how emerging cognitive biases and heuristics scholarship was "slow in reaching the academic literature").

3.   *See* Kang & Banaji, *supra* note 2, at 1064 (critiquing standard conceptions of discrimination by mobilizing research on implicit social cognitions that "examines those mental processes that operate without conscious awareness or conscious control but nevertheless influence fundamental evaluations of individuals and groups").

4.   *See* Erik J. Girvan, *On Using the Psychological Science of Implicit Bias To Advance Anti-Discrimination Law*, 26 GEO. MASON U. C.R. L.J. 1, 7–9 (2015) (surveying discussions of implicit bias within legal scholarship).

reform.[5] If anything, the Supreme Court's equal protection jurisprudence appears as entrenched as ever—a reality unlikely to change following the appointment of Justice Kavanaugh.[6]

Given the Supreme Court's apparent intractability, one might cast behavioral realism as a bust. It was, after all, intended to spur doctrinal reform where values-based arguments fell short.[7] Such a diagnosis is premature for what remains a nascent legal school of thought. More importantly, evaluating behavioral realism based on doctrinal reform alone overlooks its value as a model of scholarly engagement. Specifically, by disrupting empirical assumptions instead of critiquing normative commitments, behavioral realism offers a vehicle to assess whether activists, scholars, and judges—including Supreme Court Justices—care about what they say they care about.

This Article adopts a behavioral realist approach to interrogate the Supreme Court's long-stated commitment to individual meritocracy in the equal protection context. This commitment can be seen as responsible, at least in part, for the rise of an equal protection doctrine designed to protect what I refer to herein as every person's "right to compete."[8] As I explain in greater detail below, the right to compete reflects a vision of constitutional equality that requires the government to allocate public goods—such as employment or admission—on the basis of a person's individual "merit," irrespective of her race.[9]

Equal protection doctrine, in turn, can be understood as Justice-made rules designed to promote, among other ends, the right to compete. A central feature of contemporary equal protection doctrine is its disparate treatment of facially neutral state action and racial classifications. Facially neutral state action is

---

5. I refer specifically to behavioral realism's impact on the Supreme Court's equal protection jurisprudence. Certain state courts and lower federal courts have shown an interest in aligning the law with the science. *See, e.g.*, Floyd v. City of New York, 959 F. Supp. 2d 540, 580–81 (S.D.N.Y. 2013) ("Other recent psychological research has shown that unconscious racial bias continues to play an objectively measurable role in many people's decision processes."); Commonwealth v. Buckley, 90 N.E.3d 767, 782 n.4 (Mass. 2018) (Budd, J., concurring) (citing behavioral realist scholarship for the proposition that "even people who do not believe themselves to harbor implicit bias may in fact act in ways that disfavor people of color").

6. During his confirmation hearings, Justice Kavanaugh appeared to suggest a preference for colorblind selection criteria. *See* Scott Jaschik, *Kavanaugh Evades Questions on Affirmative Action*, INSIDE HIGHER ED (Sept. 14, 2018), http://www.insidehighered.com/quicktakes/2018/09/14/kavanaugh-evades-questions-affirmative-action [http://perma.cc/7E94-6LN3].

7. *See* Kang & Banaji, *supra* note 2, at 1066 ("[W]e contend that a presentist framing that exposes and responds to pervasive implicit bias—even in those who genuinely believe themselves to be bias-free—provides an independent and compelling case for action.").

8. *See infra* Part I.B.

9. Individual meritocracy is not the only normative commitment that underlies the Supreme Court's equal protection jurisprudence. *See infra* Part I.C. Nonetheless, it has been, and remains, a central and critical normative pillar employed by the Court to justify prevailing doctrinal arrangements. *See infra* Part I.B.

subject to rational basis review and rarely struck down.[10] Racial classifications, in contrast, must satisfy strict judicial scrutiny and rarely survive.[11]

Scholars have long critiqued the principles that animate what I have termed the equal protection right to compete.[12] Less attention, however, has been paid to whether existing doctrine actually promotes this vision of equality. One might presume that it does. Yet empirical findings spanning employment, law enforcement, and education suggest the opposite.[13] Specifically, scholarship from the mind sciences reveals that common facially neutral evaluative tools—such as human judgment, standardized tests, and predictive algorithms—can systematically *mis*measure an individual's existing talent and potential (that is, merit) because of her race.[14] Accordingly, when decisionmakers rely on such "racial mismeasures"[15] to determine whom to hire or admit, they effectively compromise each candidate's right to an individualized, meritocratic, and race-free review.

In short, facially neutral measures of merit may, counterintuitively, jeopardize the right to compete, even as contemporary equal protection doctrine renders the use of such metrics presumptively constitutional.[16] This, in turn, incentivizes the government to employ practices that produce the precise harm that a majority of Justices say the Fourteenth Amendment was designed to prevent. The doctrine, it appears, may not be giving the Supreme Court what it says it wants.

---

10.  *See* Ian Haney-López, *Intentional Blindness*, 87 N.Y.U. L. REV. 1779, 1832 (2012) (noting that the Supreme Court has concluded that "facially race-neutral laws merit almost complete constitutional deference").

11.  *See id.*

12.  *See, e.g.*, Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1135–36 (1997) (describing a modern equal protection "culture that now embraces 'equal opportunity' and 'nondiscrimination'").

13.  See *infra* Section II for a discussion of racial mismeasures. *See, e.g.*, *infra* note 126 for scholarship finding that facially neutral evaluations often produce racial mismeasures.

14.  I refer specifically to research on stereotype threat and implicit bias. *See infra* Parts II.A–B. Stereotype threat refers to the psychological threat that arises when a person fears that poor performance on a task will confirm a negative stereotype about her group. *See* Sam Erman & Gregory M. Walton, *Stereotype Threat and Antidiscrimination Law: Affirmative Steps To Promote Meritocracy and Racial Equality in Education*, 88 S. CAL. L. REV. 307, 312 (2015) (discussing stereotype threat); Claude M. Steele, *A Threat in the Air: How Stereotypes Shape Intellectual Identity and Performance*, 52 AM. PSYCHOLOGIST 613, 619–622 (1997) [hereinafter Steele, *A Threat in the Air*] (discussing early stereotype threat studies). Relative to implicit bias, stereotype threat remains under-mined within legal scholarship. Two April 13, 2019, Westlaw searches reveal the disparate attention received by implicit bias and stereotype threat in legal scholarship. The searches identified 3,012 articles that included "implicit bias" yet only 631 that mentioned "stereotype threat."

15.  See *infra* notes 111–12 and accompanying text for an explanation of the term "racial mismeasures."

16.  *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 226 (1995) (holding that all racial classifications are subject to strict scrutiny); Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 271 (1979) (requiring plaintiffs to establish discriminatory purpose in the context of facially race-neutral state action that has a racially disparate impact).

This Article proceeds in three sections. In Section I, to lay groundwork, I explore how a commitment to the right to compete emerged over more than four decades of Supreme Court equal protection case law. I also tie this commitment to the Supreme Court's disparate treatment of facially neutral state action and racial classifications. In Section II, I draw on social science to introduce and unpack the concept of a racial mismeasure. This review of the social science exposes that, contrary to commonsense assumptions, selection processes that unmindfully rely on facially neutral measures of merit will often deny certain competitors, because of their race, the right to compete. In Section III, I advance the argument that contemporary equal protection doctrine is ill suited to promote the right to compete. To further this line of engagement, I imagine how doctrinal reform would have impacted seminal equal protection decisions.

## I.   EQUAL PROTECTION DESIGN

### A.   *The Basics: A Preference for Facial Neutrality*

Contemporary equal protection doctrine is, at least on the surface, straightforward.[17] Racial classifications—whether invidious or benign—are presumptively unconstitutional and trigger strict judicial scrutiny.[18] Facially neutral state action, absent discriminatory intent, is presumptively constitutional and triggers rational basis review.[19] This disparate treatment of facially neutral state action and racial classifications has been met with considerable critique.[20]

---

17.   Although beyond the scope of this Article, when one pushes a little, equal protection doctrine begins to crack. For instance, notwithstanding the Supreme Court's rhetoric, strict scrutiny does not apply to all state action adopted *because of* its racial impact. *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 789 (2007) (Kennedy, J., concurring) ("School boards may pursue the goal of bringing together students of diverse backgrounds and races through other means, including strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race. These mechanisms are race conscious but do not lead to different treatment based on a classification that tells each student he or she is to be defined by race, so it is unlikely any of them would demand strict scrutiny to be found permissible."). Moreover, strict scrutiny does not apply to suspect descriptions or the Census even though both could be construed as racial classifications. *See* Wisconsin v. City of New York, 517 U.S. 1, 18 (1996) (holding that a Census calculation method that undercounted certain identifiable minority groups was not subject to strict scrutiny); Brown v. City of Oneonta, 221 F.3d 329, 339 (2d Cir. 2000) (holding that law enforcement's reliance on a description of a criminal suspect's race or gender does not violate the Equal Protection Clause); Stephen Menendian, *What Constitutes A "Racial Classification"?: Equal Protection Doctrine Scrutinized*, 24 TEMP. POL. & C.R. L. REV. 81, 96 (2014) (discussing the Supreme Court's inconsistent use of the term "racial classification").

18.   *See, e.g.*, *Adarand*, 515 U.S. at 226; City of Richmond v. J. A. Croson Co., 488 U.S. 469, 490 (1989).

19.   *See* Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265 (1977) ("Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause."); Washington v. Davis, 426 U.S. 229, 242 (1976) ("[W]e have not held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another."); *see also Feeney*, 442 U.S. at 279 ("['Discriminatory purpose'] implies that the

Much of this past critique is warranted, particularly given how contemporary equal protection doctrine has rendered the Fourteenth Amendment more hostile to race-conscious remedies designed to promote integration and racial equality than to facially neutral state action that perpetuates the United States' legacy of segregation and racial inequality. Nonetheless, my aim is different. Rather than critique the vision of constitutional equality on which existing doctrine rests, I am interested in evaluating whether doctrine actually serves its stated purpose. To begin this analysis, I turn first to that purpose, which I term the right to compete.

## B.   *Why Facial Neutrality? To Promote the "Right To Compete"*

As I describe in greater detail below, the Supreme Court's equal protection jurisprudence coheres around a stated commitment to protect every person's right to compete for public goods on the basis of individual merit, irrespective of their race.[21] In this Article, I refer to this principle as the right to compete.[22] This principle emerged within the Supreme Court's adjudication of facially neutral state action and racial classifications.

---

decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group.").

20.   *See* Mario L. Barnes, *"The More Things Change . . .": New Moves for Legitimizing Racial Discrimination in a "Post-Race" World*, 100 MINN. L. REV. 2043, 2096 (2016) (describing works that critique the Supreme Court's deference to facially neutral state action and its hostility toward racial classifications that promote minority rights).

21.   *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 318 n.52, 319–20 (1978) (plurality opinion) ("The denial to respondent of this right to individualized consideration without regard to his race is the principal evil of petitioner's special admissions program. . . . No matter how strong their qualifications, quantitative and extracurricular, including their own potential for contribution to educational diversity, [applicants who are not "Negro, Asian, or Chicano"] are never afforded the chance to compete with applicants from the preferred groups for the special admissions seats. At the same time, the preferred applicants have the opportunity to compete for every seat in the class."); Fullilove v. Klutznick, 448 U.S. 448, 523, 525 (1980) (Stewart, J., dissenting) (noting that "[u]nder our Constitution, any official action that treats a person differently on account of his race or ethnic origin is inherently suspect and presumptively invalid" and that "[u]nder our Constitution, the government may never act to the detriment of a person solely because of that person's race"); *id.* at 547 (Stevens, J., dissenting) ("The ultimate goal must be to eliminate entirely from governmental decisionmaking such irrelevant factors as a human being's race."); Erman & Walton, *supra* note 14, at 352, 359 (arguing that "[m]erit stalks equal protection jurisprudence" as "a shadow interest, treated as compelling but as yet undeclared" and that the "Court is often protective of standardized tests and grades, which it views as generally open, competitive, and relatively accurate predictors of subsequent performance"). Similar principles have informed the Supreme Court's interpretation of statutory regimes such as Title VII of the Civil Rights Act of 1964. *See* Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335–36 n.15 (1977) ("Undoubtedly disparate treatment was the most obvious evil Congress had in mind when it enacted Title VII. . . . '[Title VII] provides that men and women shall be employed on the basis of their qualifications, not as Catholic citizens, not as Protestant citizens, not as Jewish citizens, not as colored citizens, but as citizens of the United States.'" (quoting 100 CONG. REC. 13,088 (1964) (statement of Sen. Humphrey))).

22.   *See* Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville (*Northeastern Florida*), 508 U.S. 656, 666 (1993) (holding that in the presence of a racial classification, a cognizable claim exists even if the plaintiff would not have received the benefit absent the racial classification).

A trio of cases in the 1970s solidified intent doctrine as the standard governing challenges to facially neutral state action.[23] These cases culminated with *Personnel Administrator of Massachusetts v. Feeney*,[24] a 1979 decision that involved a "veterans' preference statute."[25] The statute did not formally differentiate between men and women.[26] Nonetheless, because covered veterans were predominately male, the statute operated "overwhelmingly to the advantage of males."[27] The plaintiff, a woman who was not a veteran, alleged that the law's disparate impact violated the Equal Protection Clause.[28]

The Supreme Court, in a 7-2 decision, rejected the challenge.[29] Writing for the majority, Justice Stewart acknowledged that "many [laws] affect certain groups unevenly" even though the laws themselves treat all individuals equally.[30] Nonetheless, because "the Fourteenth Amendment guarantees equal laws, not equal results," the majority concluded that such laws do not offend the Constitution.[31] Rather, to be deemed unconstitutional, the law must be "traced to a discriminatory purpose."[32]

Although not so named, Justice Stewart's general acceptance of the veterans' preference statute, and disparate impact more generally, is consistent with a vision of equal protection that privileges every person's right to compete. For purposes of the selection process at issue in *Feeney*, merit was defined with respect to veteran status. If an individual had served in the military, they were entitled to the corresponding benefit, irrespective of their gender.[33] Thus, notwithstanding the group-based disparate impact, the statute and its implementation did not offend an individualistic vision of constitutional equality that was beginning to percolate across the Supreme Court's equal protection decisions.

*Feeney* followed on the heels of *Washington v. Davis*[34] and *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,[35] two decisions that similarly upheld facially neutral state action.[36] In *Feeney*, Justice Stewart

---

23.  *See Feeney*, 442 U.S. at 278–79; *Arlington Heights*, 429 U.S. at 265; *Davis*, 426 U.S. at 240.

24.  442 U.S. 256 (1979).

25.  *Feeney*, 442 U.S. at 259; *see* Haney-López, *supra* note 10, at 1828 ("Extending Powell's analysis in *Bakke*, *Feeney* split equal protection into the separate domains now taken for granted, one governing affirmative action and the other discrimination against non-Whites.").

26.  *See Feeney*, 442 U.S. at 280.

27.  *Id*. at 259.

28.  *Id*.

29.  *Id*. at 273.

30.  *Id*. at 271–72.

31.  *Id*. at 273.

32.  *Id*. at 272.

33.  In other words, at the moment of "competition," all candidates had the opportunity to compete on the basis of their existing "merit," here defined as past military service.

34.  426 U.S. 229 (1976).

35.  429 U.S. 252 (1977).

36.  *Feeney*, 442 U.S. at 272 ("But, as was made clear in *Washington v. Davis* and *Arlington Heights v. Metropolitan Housing Dev. Corp.*, even if a neutral law has a disproportionately adverse

situated his reasoning in this then-recent precedent. First, he invoked *Davis*, in which the Supreme Court upheld an employment test that had a disparate impact on African Americans.[37] Justice Stewart noted that according to the *Davis* majority, the employment test did not violate the Constitution because, notwithstanding its racially disparate impact, "there had been no showing that racial discrimination entered into the establishment or formulation of the test."[38] Justice Stewart also drew on *Arlington Heights*, in which the plaintiffs' claim failed because the challenged policy "was shown to be nothing more than an application of a constitutionally neutral zoning policy."[39]

The preference for facially neutral state action seen in these cases can be understood as resting, in part, on the interplay between values and empirical assumptions. As for values, Supreme Court majorities were beginning to privilege an individualistic vision of constitutional equality.[40] As for empirical assumptions, these same Justices presumed that facially neutral classifications, to the extent they produced any harm at all, did so at the group level.[41] Justice Stewart viewed group-based harms as constitutionally suspect in at least one instance: when group-based animus motivates a facially neutral policy.[42] Yet with the exception of such cases, Justice Stewart appeared to presume that facially neutral policies do not, of themselves, offend the Constitution's guarantee of equal protection.[43]

The emergence of this right to compete played a more explicit role in the Supreme Court's treatment of racial classifications. In the year preceding *Feeney*, in *Regents of the University of California v. Bakke*,[44] the Supreme Court struck down the Davis Medical School's admissions program, which set aside 16 of 100

---

effect upon a racial minority, it is unconstitutional under the Equal Protection Clause only if that impact can be traced to a discriminatory purpose." (citations omitted)).

37. *Id.* at 273.

38. *Id.*

39. *Id*. at 274.

40. *See* Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278, 1282–83 (2011) [hereinafter Siegel, *From Colorblindness to Antibalkanization*] ("Race conservatives first invoked colorblindness in cases involving the constitutionality of 'benign' racial classifications, where they insisted that the Constitution's injunction against classifying on the basis of race vindicated values of individualism.").

41. *See* Haney-López, *supra* note 10, at 1828. In the context of facially neutral state action, the Court imagines discrimination to occur, if at all, at the group level. This is apparent in *Feeney*, where the "because of" inquiry arises vis-à-vis the group (Was this policy adopted because of its group-based impact?), not the individual applicant (Was this individual hired because of her identity?). *See Feeney*, 442 U.S. at 279 ("'Discriminatory purpose,' however, implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." (citation omitted)). The one exception being "ostensibly neutral" policies used as an "obvious pretext for racial discrimination." *Id*. at 272.

42. *See Feeney*, 442 U.S. at 272.

43. *See id.* at 271–72.

44. 438 U.S. 265 (1978).

spots for students from "minority" racial groups.[45] Justice Stewart's *Feeney* opinion did not explicitly invoke *Bakke*. This is surprising, in part, because Justice Stewart could have situated his analysis in *Feeney* within Justice Powell's articulation of the underlying constitutional harm at play in *Bakke*.

The litigation was initiated by Alan Bakke, a white man who the Medical School had rejected in two consecutive years.[46] Multiple amici argued that Bakke lacked standing to bring an equal protection claim because he "never showed that his injury—exclusion from the Medical School—w[ould] be redressed by a favorable decision."[47] This assertion rested on two related contentions. First, amici argued that the Medical School's use of race (the set-aside program) did not cause the alleged harm (Bakke's rejections).[48] Second, amici argued that because the set-aside did not cause Bakke's injury, a favorable decision (enjoining the set-aside) would not have remedied that harm.[49]

Justice Powell, who authored the controlling opinion, responded to the amici's concerns about causation and redressability by reframing the relevant constitutional harm.[50] According to Justice Powell, the constitutional injury was not Bakke's rejection.[51] Rather, the Medical School's race-conscious set-aside constituted a cognizable injury in itself, even if Bakke would have been rejected in its absence:

> The constitutional element of standing is plaintiff's demonstration of any injury to himself that is likely to be redressed by favorable decision of his claim. The trial court found such an injury, apart from failure to be admitted, in the University's decision not to permit Bakke to compete for all 100 places in the class, simply because of his race.[52]

As characterized by Justice Powell, the Medical School denied Bakke an "opportunity to compete for every seat in the class,"[53] a cognizable harm even were Bakke "unable to prove that he would have been admitted in the absence of the special program."[54] Or as Justice Powell stated in response to his liberal colleagues, the "principal evil" of the set-aside was that it denied Bakke his

---

45.  *Bakke*, 438 U.S. at 274 (plurality opinion) (explaining that the challenged policy defined "minority" racial groups to include individuals who were "viewed as 'Blacks,' 'Chicanos,' 'Asians,' and 'American Indians'").

46.  *Id*. at 276–77.

47.  *Id.* at 280 n.14. To establish constitutional standing, (1) "the plaintiff must have suffered an 'injury in fact'" (an injury that "is (a) concrete and particularized and (b) 'actual or imminent'"), (2) "there must be a causal connection between" the alleged conduct and harm, and (3) "it must be 'likely'" that a favorable decision would redress the injury. Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992) (citations omitted) (first quoting Whitmore v. Arkansas, 495 U.S. 149, 155 (1990); and then quoting Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 38, 41–43 (1976)).

48.  *Bakke*, 438 U.S. at 280 n.14.

49.  *Id.*

50.  *Id.* at 281 n.14.

51.  *Id.*

52.  *Id.* (citation omitted).

53.  *Id.* at 319–20.

54.  *Id.* at 280–81 n.14.

"right to individualized consideration without regard to his race."[55] In so stating, Justice Powell offered an early articulation of the principle I have termed the right to compete.

In the years since, this principle has ascended across the Supreme Court's equal protection jurisprudence. Roughly a decade after *Bakke* and *Feeney*, in *City of Richmond v. J. A. Croson Co.*,[56] six Justices invoked similar reasoning to strike down Richmond, Virginia's Minority Business Utilization Plan (the Richmond Plan).[57] The Richmond Plan required contractors to subcontract at least 30% of the contract to one or more "Minority Business Enterprises."[58] In an opinion authored by Justice O'Connor, the majority suggested that the race-conscious plan created "tension between the Fourteenth Amendment's guarantee of equal treatment to all citizens, and the use of race-based measures to ameliorate the effect of past discrimination."[59] According to Justice O'Connor:

> The Richmond Plan den[ied] certain citizens the *opportunity to compete* for a fixed percentage of public contracts based solely upon their race. To whatever racial group these citizens belong, their "*personal rights*" to be treated with equal dignity and respect are *implicated by a rigid rule erecting race as the sole criterion* in an aspect of public decisionmaking.[60]

Framed in this way, the majority construed the Richmond Plan as a state intervention that deprived individuals the opportunity to compete in a tournament untainted by race.[61] The policy, accordingly, demanded strict judicial scrutiny—notwithstanding the fact that it comprised an attempt to remedy and redress a legacy of racial discrimination in the Confederacy's former capital.[62]

Roughly fifteen years later, a series of cases challenging racial classifications solidified the primacy of a right to compete within the Supreme Court's equal protection jurisprudence. First, in *Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville*,[63] the Supreme Court examined Jacksonville's "Minority Business Enterprises" set-aside.[64] Similar to the Richmond Plan, Jacksonville's ordinance required that 10% of funds spent annually on city contracts be set aside for minority-owned businesses.[65] An

---

55. *Id.* at 318 n.52; *see also* Grutter v. Bollinger, 539 U.S. 306, 337 (2003) ("The importance of this individualized consideration in the context of a race-conscious admissions program is paramount.").

56. 488 U.S. 469 (1989).

57. *Croson*, 488 U.S. at 477.

58. *Id.*

59. *Id.* at 476–77.

60. *Id.* at 493 (emphasis added).

61. *Id.* at 493–94.

62. *Id.* at 528 (Marshall, J., dissenting) ("It is a welcome symbol of racial progress when the former capital of the Confederacy acts forthrightly to confront the effects of racial discrimination in its midst.").

63. 508 U.S. 656 (1993).

64. *Northeastern Florida*, 508 U.S. at 658, 666.

65. *Id.* at 658.

2019] EQUAL PROTECTION DESIGN DEFECTS association of individuals and firms who did not qualify for the set-aside challenged the ordinance.[66]

Prior to the suit reaching the Supreme Court, the Eleventh Circuit dismissed it on the basis that the plaintiffs lacked standing to challenge the ordinance.[67] According to the court of appeals, the plaintiffs failed to establish that, but for the set-aside, any of their members would have bid successfully for a city contract.[68] The plaintiffs, accordingly, failed to demonstrate that the challenged policy had caused "any injury."[69]

When it received the ensuing appeal, the Supreme Court framed the relevant question as "whether, in order to have standing to challenge the ordinance, an association of contractors is required to show that one of its members would have received a contract absent the ordinance."[70] In an opinion authored by Justice Thomas, the Court concluded that no such requirement exists.[71] Drawing on *Bakke* and *Croson*, Justice Thomas concluded:

> When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing.[72]

Under such facts, the plaintiff need not establish—nor even plead—that she would have received the subject benefit but for the challenged policy.[73] To the contrary, Justice Thomas wrote that "[t]he 'injury in fact' in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit."[74]

---

66. *Id.*

67. Ne. Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville, 951 F.2d 1217, 1219 (11th Cir. 1992) ("Plaintiff is unable to demonstrate injury of an economic nature. While over $14,000,000 in contracts was allocated to minority contractors during the set-aside program's five-year tenure, plaintiff has not demonstrated that, but for the program, any AGC member would have bid successfully for any of these contracts."), *rev'd*, 508 U.S. 656 (1993).

68. *Id.*

69. *Id.* at 1220.

70. *Northeastern Florida*, 508 U.S. at 658.

71. *Id.* at 666. Justice O'Connor, joined by Justice Blackmun, filed the lone dissent and argued that the case should have been dismissed as moot. *See id*. at 669 (O'Connor, J., dissenting).

72. *Id.* at 666 (majority opinion).

73. *See id.*

74. *Id.* Others have revealed that this approach to standing (and causation) has been applied inconsistently across the Court's equal protection case law. *See* Girardeau A. Spann, *Color-Coded Standing*, 80 CORNELL L. REV. 1422, 1461–62 (1995) (arguing that the Supreme Court applies different standing standards as a function of whether the challenged policy promotes the interests of whites or communities of color); *see also* McCleskey v. Kemp, 481 U.S. 279, 293–95 (1987) (rendering statistical evidence of racial discrimination insufficient to establish proof of "purposeful discrimination"); City of Los Angeles v. Lyons, 461 U.S. 95, 105 (1983) (holding that a Black plaintiff who had previously been subjected to a chokehold had failed to establish a case or controversy with the defendant City of Los Angeles that would justify the equitable relief sought); Jonathan P. Feingold & Evelyn R. Carter, *Eyes Wide Open: What Social Science Can Tell Us About the Supreme Court's Use of Social Science*, 112

The Court has since reaffirmed an individual's constitutional right to "compete on an equal footing."[75] Just two years later, in *Adarand Constructors, Inc. v. Pena*,[76] a majority of Justices invoked *Northeastern Florida* to justify extending strict scrutiny to all racial classifications.[77] Specifically, the *Adarand* majority quoted *Northeastern Florida* for the proposition that where government decisionmaking "prevent[s] the plaintiff from competing on an equal footing," the plaintiff "need not allege that he would have obtained the benefit but for the barrier in order to establish standing."[78]

Four years later, in *Texas v. Lesage*,[79] the Supreme Court quieted any lingering doubts about the cognizability of a right to compete claim.[80] *Lesage* featured François Lesage, an "African immigrant of Caucasian descent" who challenged his rejection from a University of Texas Ph.D. program that employed a race-conscious admissions process.[81] The district court dismissed Lesage's claim based on evidence that he would have been rejected even under a colorblind regime.[82] The Fifth Circuit reversed.[83] Pointing to *Adarand*, the Fifth Circuit determined that because Lesage had been rejected during a race-conscious stage of the admissions process, he had "suffered an implied injury"—the inability to "compet[e] on an equal footing."[84]

The Supreme Court used the competing lower court opinions as an opportunity to clarify the law. In a per curiam opinion, the Supreme Court distinguished Lesage's backward-looking claim (which sought money damages and challenged his individual rejection) from a potential forward-looking claim

---

NW. U. L. REV. ONLINE 247, 253–55 (2018) (discussing the conservative Justices' inconsistent causation requirements).

75. *Northeastern Florida*, 508 U.S. at 666.

76. 515 U.S. 200 (1995).

77. *Adarand*, 515 U.S. at 211.

78. *Id.* (alteration in original) (quoting *Northeastern Florida*, 508 U.S. at 667); *see also* Byers v. City of Albuquerque, 150 F.3d 1271, 1276 (10th Cir. 1998) ("These cases all stand for the proposition that when a plaintiff is denied the opportunity to compete on an equal basis because of that plaintiff's race or gender, the denial of the opportunity to compete on equal footing constitutes an injury in fact for standing purposes.").

79. 528 U.S. 18 (1999) (per curiam).

80. *Lesage*, 528 U.S. at 21; *see also* Raj Shah, *An Article III Divided Against Itself Cannot Stand: A Critical Race Perspective on the U.S. Supreme Court's Standing Jurisprudence*, 61 UCLA L. REV. 196, 204 (2013) (describing an apparent contradiction between the Supreme Court's treatment of the plaintiff's claims in *Lesage* and *Fisher v. University of Texas at Austin* (*Fisher I*), 570 U.S. 297 (2013), cases that involved comparable facts).

81. *Lesage*, 528 U.S. at 19.

82. *Id.* at 19–20.

83. *Id.* at 20.

84. Lesage v. Texas, 158 F.3d 213, 222 (5th Cir. 1998) (quoting Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 211 (1995)) ("The injury in cases of this kind is that a 'discriminatory classification prevent[s] the plaintiff from competing on an equal footing.' Thus, even though the district court may have correctly predicted that Lesage suffered no direct injury and therefore incurred no compensatory damages, this scenario does not foreclose the availability of some other relief to which he may be entitled." (alteration in original) (citation omitted) (quoting *Adarand*, 515 U.S. at 211)), *rev'd in part*, 528 U.S. 18 (1999).

(which could have sought injunctive relief and challenged the admissions process itself).[85] The Court explained that "where a plaintiff challenges a discrete governmental decision as being based on an impermissible criterion and it is undisputed that the government would have made the same decision regardless, there is no cognizable injury."[86] In contrast, Lesage could have proceeded under a forward-looking posture that sought to enjoin an admissions process that denied him the right to "compete on an equal footing" with other candidates.[87]

In the context of racial classifications, this concept of a right to compete continues to satisfy standing and causation requirements even where a plaintiff fails to "affirmatively establish that he would receive the benefit in question if race were not considered."[88] Its application has been critical for plaintiffs challenging racial classifications in admissions. *Grutter v. Bollinger*[89] and *Gratz v. Bollinger*,[90] companion cases concerning race-conscious admissions policies at the University of Michigan, offer two notable examples.[91] The same occurred in *Parents Involved in Community Schools v. Seattle School District No. 1*,[92] where the majority identified a right to compete theory of discrimination to justify the plaintiff-parents' rights to sue on their children's behalf.[93] Chief Justice Roberts, writing for the majority, invoked *Adarand* and *Northeastern Florida* to buttress his conclusion that "[a]s we have held, one form of injury under the Equal Protection Clause is being forced to compete in a race-based system that may prejudice the plaintiff."[94]

## C.    Related Concerns: Social Cohesion and Racial Stigma

Before proceeding, it is worth noting two additional concerns that, alongside the right to compete, have often informed the Supreme Court's equal

---

85.  *Lesage*, 528 U.S. at 20–21.

86.  *Id.* at 21.

87.  *Id.* (quoting Ne. Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville (*Northeastern Florida*), 508 U.S. 656, 666 (1993)).

88.  *Id.*; *cf.* Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2022 (2017) ("The express discrimination against religious exercise here is not the denial of a grant, but rather the refusal to allow the Church—solely because it is a church—to compete with secular organizations for a grant." (citing *Northeastern Florida*, 508 U.S. at 666)).

89.  539 U.S. 306 (2003).

90.  539 U.S. 244 (2003).

91.  *See Grutter*, 539 U.S. at 317 ("Petitioner further alleged that her application was rejected because the Law School uses race as a 'predominant' factor, giving applicants who belong to certain minority groups 'a significantly greater chance of admission than students with similar credentials from disfavored racial groups.' . . . Petitioner clearly has standing to bring this lawsuit." (citing *Northeastern Florida*, 508 U.S. at 666)); *Gratz*, 539 U.S. at 262 ("In bringing his equal protection challenge against the University's use of race in undergraduate admissions, Hamacher alleged that the University had denied him the opportunity to compete for admission on an equal basis.").

92.  551 U.S. 701 (2007).

93.  *Parents Involved*, 551 U.S. at 719 ("Moreover, Parents Involved also asserted an interest in not being 'forced to compete for seats at certain high schools in a system that uses race as a deciding factor in many of its admissions decisions.'").

94.  *Id.* (first citing Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 211 (1995); and then citing *Northeastern Florida*, 508 U.S. at 666).

protection jurisprudence: social cohesion and racial stigma.[95] These concerns are not unique to the Supreme Court's conservative Justices.[96] Nor do they necessarily lead to a preference for facially neutral state action over racial classifications.[97] Nonetheless, these concerns have contributed to the Supreme Court's hostility toward racial classifications. This has been facilitated, in part, by two interlocking assumptions. First, the Supreme Court has assumed that racial classifications offend the right to compete by conferring racial "preferences" at

---

95. Certain Justices have also argued that racial classifications are problematic because they undermine the goal of a truly colorblind society. *See id.* at 798 (Kennedy, J., concurring) ("Crude measures of this sort threaten to reduce children to racial chits valued and traded according to one school's supply and another's demand."); *Grutter*, 539 U.S. at 353 (Thomas, J., concurring in part and dissenting in part) ("The Constitution abhors classifications based on race, not only because those classifications can harm favored races or are based on illegitimate motives, but also because every time the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all."). For a more comprehensive overview of the Supreme Court's commitment to social cohesion, see Siegel, *From Colorblindness to Antibalkanization*, *supra* note 40, at 1282. Stigma concerns have also evolved over the past fifty years. *See* Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 494, 566–67 (2003) ("Leading decisions from *Strauder v. West Virginia* to *Brown v. Board of Education* turned at least in part on the anti-egalitarian social meanings of the practices at issue. More recently, in *Adarand*, *Shaw v. Reno*, and *Croson*, the problem of expressive harm has contributed to the unconstitutionality of race-conscious measures intended to benefit historically disadvantaged groups." (footnotes omitted)); *see also* Charles Fried, Metro Broadcasting, Inc. v. FCC*: Two Concepts of Equality*, 104 HARV. L. REV. 107, 125–26 (1990) ("This standard attempts to distinguish between racial distinctions that stigmatize and those whose purpose is inclusive, to bring in groups that have in some sense suffered disadvantage. But this is the Court's benignity conception all over again; it is precisely the point made by both dissenting opinions that playing politics with race is inherently too dangerous to be allowed to go forward on so subjective and indefinite a basis."); Lawrence III, *supra* note 2, at 351 ("Stigmatizing actions harm the individual in two ways: They inflict psychological injury by assaulting a person's self-respect and human dignity, and they brand the individual with a sign that signals her inferior status to others and designates her as an outcast. The stigma theory recognizes the importance of both self-esteem and the respect of others for participating in society's benefits and responsibilities." (footnotes omitted)).

96. The Court's liberal Justices have also expressed anxieties that racial classifications may stigmatize their intended beneficiaries. These concerns appear rooted in the conflation of racial classifications with racial "preferences." *See* United Jewish Orgs. of Williamsburgh, Inc. v. Carey, 430 U.S. 144, 173–74 (1977) (Brennan, J., concurring in part) (suggesting that "preferential treatment may act to stigmatize its recipient groups, for although intended to correct systemic or institutional inequities, such a policy may imply to some the recipients' inferiority and especial need for protection"); *see also id.* at 174 n.3 ("This phenomenon seems to have arisen with respect to policies affording preferential treatment to women: thus groups dedicated to advancing the legal position of women have appeared before this Court to challenge statutes that facially offer advantages to women and not men. This strategy, one surmises, can be explained on the basis that even good-faith policies favoring women may serve to highlight stereotypes concerning their supposed dependency and helplessness." (citation omitted)).

97. *See* Lawrence III, *supra* note 2, at 379 ("An initial difficulty with applying the cultural meaning test arises from the fact that we are not a monolithic culture. There may be instances in which governmental action is given different meanings by two subcultures within the larger culture."); Primus, *supra* note 95, at 580 ("Conversely, and crucially for evaluations of disparate impact laws, many reasonable whites may see race-conscious laws designed to remedy the continuing effects of historical discrimination as carrying meanings other than those that many reasonable nonwhites might see.").

the expense of "innocent" third parties.[98] Second, predicated on the view that such selection processes constitute a deviation from racial neutrality, Justices have voiced the concern that racial classifications will stigmatize their intended beneficiaries and antagonize those from disfavored racial groups.[99]

This interaction was on display in *Bakke*, when Justice Powell opined that "preferential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relation to individual worth."[100] Responding to his liberal colleagues, Powell reiterated:

> *All* state-imposed classifications that rearrange burdens and benefits on the basis of race are likely to be viewed with deep resentment by the individuals burdened. The denial to innocent persons of equal rights and opportunities may outrage those so deprived and therefore may be perceived as invidious. . . . One should not lightly dismiss the inherent unfairness of, and the perception of mistreatment that accompanies, a system of allocating benefits and privileges on the basis of skin color and ethnic origin.[101]

Two years later, Justice Stevens echoed similar sentiment in *Fullilove v. Klutznick*,[102] a case involving a federal minority set-aside program:

> [A] statute of this kind inevitably is perceived by many as resting on an assumption that those who are granted this special preference are less qualified in some respect that is identified purely by their race. Because that perception—especially when fostered by the Congress of the United States—can only exacerbate rather than reduce racial prejudice, it will delay the time when race will become a truly irrelevant, or at least insignificant, factor.[103]

---

98.    *See* Kathleen M. Sullivan, *Sins of Discrimination: Last Term's Affirmative Action Cases*, 100 HARV. L. REV. 78, 84 (1986) ("Once past discrimination provided a justifying purpose for affirmative action measures, those measures might still be overturned, some Justices suggested, if they visited too much punishment on 'innocent third parties.'" (quoting Fullilove v. Klutznick, 448 U.S. 448, 514 (1980) (Powell, J., concurring))).

99.    *See, e.g.¸ Grutter*, 539 U.S. at 373 (Thomas, J., concurring in part and dissenting in part) ("The majority of blacks are admitted to the Law School because of discrimination, and because of this policy all are tarred as undeserving. . . . When blacks take positions in the highest places of government, industry, or academia, it is an open question today whether their skin color played a part in their advancement."); Regents of the Univ. of California v. Bakke, 438 U.S. 265, 298–99 (1978) ("Disparate constitutional tolerance of such [racial] classifications well may serve to exacerbate racial and ethnic antagonisms rather than alleviate them."); *see also* Siegel, *From Colorblindness to Antibalkanization*, *supra* note 40, at 1299 ("Justice O'Connor interprets equal protection so as to promote social cohesion and to avoid racial arrangements that balkanize and threaten social cohesion.").

100.    *Bakke*, 438 U.S. at 298.

101.    *Id.* at 294 n.34.

102.    448 U.S. 448 (1980).

103.    *Fullilove*, 448 U.S. at 545 (Stevens, J., dissenting) (citation omitted); *see also id.* at 547 ("Preferences based on characteristics acquired at birth foster intolerance and antagonism against the entire membership of the favored classes.").

Foreshadowing decades of equal protection case law,[104] these anxieties about racial resentment and stigma help to illuminate the empirical assumptions that adorn the Supreme Court's preference for facially neutral selection processes. But what if these basic empirical assumptions are flawed? What if facially neutral evaluative tools, even if "colorblind," do not offer a fair appraisal of each applicant's existing abilities but rather systematically mismeasure existing talent, preparation, and motivation on a racial basis? This sort of a measurement defect would call into question the logic of a doctrinal regime that privileges facially neutral selection processes on the ground that such tools promote every person's right to compete.

As I discuss in Section II, growing empirical scholarship suggests that such defects may, in fact, be widespread across common facially neutral evaluative tools. The Supreme Court's faith in such instruments may in turn be misplaced. The social science accordingly reveals that contemporary equal protection doctrine may not be giving the Supreme Court what it says it wants.

## II.   RACIAL MISMEASURES: WHEN FACIAL NEUTRALITY FAILS

The Supreme Court has constructed a doctrinal machine that prefers facially neutral selection procedures over racial classifications. Assuming the doctrine is designed to promote the right to compete, one would expect that facially neutral evaluative tools produce "racially neutral results." In this context, I employ the phrase racially neutral results in a limited sense. I mean only that the underlying evaluative instrument measures the same attribute of each competitor with equal accuracy and precision, irrespective of the competitor's race.[105]

In other words, equal protection doctrine rests on the presumption that facially neutral evaluative tools produce racially neutral results. This presumption spans Justices and ideological spectrums,[106] arises within federal

---

104.  *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 241 (1995) (Thomas, J., concurring) ("So-called 'benign' discrimination teaches many that because of chronic and apparently immutable handicaps, minorities cannot compete with them without their patronizing indulgence. Inevitably, such programs engender attitudes of superiority or, alternatively, provoke resentment among those who believe that they have been wronged by the government's use of race. These programs stamp minorities with a badge of inferiority and may cause them to develop dependencies or to adopt an attitude that they are 'entitled' to preferences."); Metro Broad., Inc. v. FCC, 497 U.S. 547, 604 (1990) (O'Connor, J., dissenting) ("[W]hether providing benefits to or burdening particular racial or ethnic groups, [racial classifications] may stigmatize those groups singled out for different treatment and may create considerable tension with the Nation's widely shared commitment to evaluating individuals upon their individual merit."); City of Richmond v. J. A. Croson Co., 488 U.S. 469, 493 (1989) ("Classifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility.").

105.  There are, of course, competing conceptions of "racial neutrality." Within this Article, given my argument that equal protection doctrine disserves the right to compete, I adhere to the conception of "racial neutrality" embedded across contemporary equal protection doctrine.

106.  This includes Justices who defend affirmative action. *See* DeFunis v. Odegaard, 416 U.S. 312, 326 (1974) (Douglas, J., dissenting) ("It thus appears that by the Committee's own assessment, it

antidiscrimination law,[107] and appears within disparate impact theory itself.[108] Yet notwithstanding the ubiquity of this presumption, growing empirical scholarship calls into question this rarely interrogated assumption.[109] As I review in greater detail below, decades of research on implicit bias and stereotype threat reveals that common measures of merit, although facially neutral, fail to produce racially neutral results.[110] Rather, they produce what I term "racial mismeasures,"[111] a concept I use to describe facially neutral tools that predictably and systematically mismeasure merit *because of* an individual's race.[112]

Racial mismeasures fall into two general categories. The first category includes tools susceptible to "shifting standards" defects. This category captures evaluative instruments that, although intended to be neutral and objective, nonetheless produce different "scores" for the same performance. The second

admitted minority students who, by the tests given, seemed less qualified than some white students who were not accepted . . . .").

107.   *See* 42 U.S.C. § 2000e-2(*l*) (2018) ("It shall be an unlawful employment practice for a respondent, in connection with the selection or referral of applicants or candidates for employment or promotion, to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race, color, religion, sex, or national origin.").

108.   *See* Primus, *supra* note 95, at 563–64 ("Nothing in disparate impact doctrine calls for individual employees or applicants to be treated differently from one another on racial grounds at the moment an employment decision is made.").

109.   *See generally* RACHEL D. GODSIL ET AL., PERCEPTION INST., THE SCIENCE OF EQUALITY, VOLUME 1: ADDRESSING IMPLICIT BIAS, RACIAL ANXIETY, AND STEREOTYPE THREAT IN EDUCATION AND HEALTHCARE (2014) (summarizing the implicit bias and stereotype threat research); Anthony G. Greenwald & Mahzarin R. Banaji, *The Implicit Revolution: Reconceiving the Relation Between Conscious and Unconscious*, 72 AM. PSYCHOLOGIST 861 (2017) (distinguishing between implicit and explicit biases).

110.   The implicit bias scholarship is one component of the broad canon of literature on cognitive biases and heuristics. *See, e.g.*, Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCIENCE 1124, 1124–30 (1974) (describing predictable judgment errors); *see also* Monica Biernat & Melvin Manis, *Shifting Standards and Stereotype-Based Judgments*, 66 J. PERSONALITY & SOC. PSYCHOL. 5, 5 (1994) (employing a model that "suggests that subjective judgments of target persons from different social groups may fail to reveal the stereotyped expectations of judges"); Eric Luis Uhlmann & Geoffrey L. Cohen, *Constructed Criteria: Redefining Merit To Justify Discrimination*, 16 PSYCHOL. SCI. 474, 474 (2005) ("For example, decision makers may view the credentials of a specific male applicant as essential to job success and view his areas of weakness as nonessential. Alternatively, they may downplay the importance of a female applicant's areas of expertise and inflate the importance of her areas of weakness.").

111.   I focus on *racial* mismeasures given the centrality of *racial* neutrality within the equal protection context. But as a descriptive matter, measurement defects akin to those described in this Article transcend race. *See generally* Jonathan Feingold, Note, *Racing Towards Color-Blindness: Stereotype Threat and the Myth of Meritocracy*, 3 GEO. J.L. & MOD. CRIT. RACE PERSP. 231 (2011) [hereinafter Feingold, *Racing Towards Color-Blindness*] (describing how stereotype threat can affect individuals from any social category that is negatively stereotyped in the relevant domain).

112.   As a result, racial mismeasures produce race-based Type I and Type II errors. *See* Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. REV. 465, 518 n.251 (2010) ("A Type I error is a false positive, which involves rejecting the null hypothesis when it is in fact true. This is seeing something that is not actually there. A Type II error is a false negative, which involves accepting the null hypothesis when it is in fact false. This is being blind to something that is actually there.").

category includes evaluative instruments susceptible to "uneven conditions" defects. This set of instruments compromises the right to compete because they subject certain performers, because of their race, to materially different conditions during performance (but fail to account for this difference).

Before diving deeper into the topic of racial mismeasures, it may be helpful to make explicit a few basic points. First, my engagement with racial mismeasures is, at its core, designed to illuminate that equal protection doctrine often fails to provide the Supreme Court what it says it wants. For this reason, my contention that racial mismeasures contravene the right to compete is not a concession that this principle offers a doctrinally persuasive or morally satisfying vision of constitutional equality.[113] Second, the claim that an evaluative instrument constitutes a racial mismeasure is distinct from the critique that a particular metric is contextually irrelevant (e.g., it is not job related); that standard conceptions of merit are shallow and function to preserve white interests; and that prevailing notions of racial neutrality fail to account for historical and structural forces that inform an individual's access to resources, networks, and opportunities earlier in time.[114] Even if dissatisfying to some, my engagement with racial mismeasures is intentionally limited. Specifically, by focusing on individuals and their abilities at a specific point in time, the racial mismeasures conversation centers the critical insight that common measures of merit, such as the standard job interview or the SAT, often understate the existing talent and potential of individuals from negatively stereotyped groups.[115] This, in turn, troubles the notion that prevailing doctrinal arrangements promote a vision of constitutional equality that centers the right to compete.

---

113. Other authors have critiqued the notions of merit that travel through Supreme Court jurisprudence and inform the notion of a "right to compete." *See, e.g.*, Randall Kennedy, *Persuasion and Distrust: A Comment on the Affirmative Action Debate*, 99 HARV. L. REV. 1327, 1333 (1986) (explaining that merit is an inherently unstable and contextually specific construct); Deborah L. Rhode, *Myths of Meritocracy*, 65 FORDHAM L. REV. 585, 586 (1996) ("This myth of meritocracy rests on two dominant assumptions: (1) that female lawyers are already achieving close to proportionate representation in almost all professional contexts; and (2) that any lingering disparities are attributable to women's own 'different' choices and capabilities."); Daria Roithmayr, *Deconstructing the Distinction Between Bias and Merit*, 85 CALIF. L. REV. 1449, 1455 (1997) (arguing that merit in the law school admissions context, as constructed, was tied "to the profession's desire to bar entry to immigrants and people of color). My focus on racial mismeasures is also distinct from arguments that challenge a metric's general predictive validity. *See* Michael Selmi, *Testing for Equality: Merit, Efficiency, and the Affirmative Action Debate*, 42 UCLA L. REV. 1251, 1270, 1314 (1995) [hereinafter Selmi, *Testing for Equality*] (noting that "[i]n the best scenario, employment tests provide only limited predictive information so that it is difficult to make confident distinctions among individuals based solely on their test scores" and that "[t]est scores, at best, are imprecise measures of ability, however if used properly they can provide some information to employers"); Kimberly West-Faulcon, *More Intelligent Design: Testing Measures of Merit*, 13 U. PA. J. CONST. L. 1235, 1241 (2011) ("Research demonstrates that the predictive inadequacies of, and scientifically unjustified racial differences in, scores on conventional factorist tests like the SAT may be legally cognizable 'test deficiencies.'").

114. *See* Kimberlé Williams Crenshaw, *Twenty Years of Critical Race Theory: Looking Back To Move Forward*, 43 CONN. L. REV. 1253, 1327–40 (2011).

115. *See infra* Part II.A.

## A. Shifting Standards

Evaluative tools can be understood as machines with inputs and outputs. Take a bathroom scale. The input consists of the weight pressing against the scale. The output consists of the weight (in, for instance, pounds or kilograms) the scale reports back out. If properly calibrated, input and output align; everyone who weighs 160 pounds will see 160 pounds when they step on the scale.[116] But if the scale is not properly calibrated, it will produce a mismeasurement. If it systematically *over*reports 5 pounds, the scale will read 165 pounds even though its current occupant weighs 160 pounds. Assuming a mismeasurement affects everyone equally, irrespective of their race, we can call it a race-*neutral* measurement error.

But consider a scenario in which our scale *over*reports five pounds, but only for Asians, and *under*reports five pounds, but only for Latinos. The measurement error is now race-*dependent*. Asians are lighter than the scale suggests; Latinos are heavier. The scale, because it produces a race-dependent measurement error, constitutes what I refer to as a "shifting standards" racial mismeasure. The bathroom scale, our facially neutral tool, is designed to be race neutral. Nonetheless, it produces scores for the same performance because of an individual's race. If you are Latino, you take a five-pound hit; if you are Asian, you receive a five-pound boost.

Bathroom scales are unlikely to dictate winners and losers in high-stakes competitions for admission or employment. Nonetheless, this example offers a useful analogue to a common tool vulnerable to shifting standards measurement errors: human judgment. The Supreme Court may be correct that human discretion is often a "presumptively reasonable way of doing business."[117] But even if presumptively reasonable, human discretion is far less objective or neutral than we often believe.

Diverse bodies of scholarship have engaged the fallibility of human judgment and decisionmaking. Behavioral law and economics, for instance, is predicated on decades of research that reveals we are not the rational and objective actors we long presumed ourselves to be.[118] Related scholarship on implicit social cognitions—including that on implicit bias—continues to shed light on the reality that our evaluations of a person's performance can be shaped by the performer's social identity, even when it is not our intent.[119]

---

116.   Just because a scale functions properly does not mean it is a useful measure of merit. If a company is hiring computer scientists, it would be hard to justify hiring decisions that turned on candidates' weights. In contrast, weight might be an appropriate metric on a wrestling team that is adding one member to compete in a particular weight class.

117.   Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 355 (2011).

118.   *See* Torben Emmerling, *D.R.I.V.E.: A Practical Framework for Applying Behavioural Science in Strategy* ("At the core of this behavioural trend in strategy lies the insight that humans, in reality, do not behave in line with the assumptions of rationality (e.g., complete and transitive preferences) postulated by standard economic theory." (citation omitted)), *in* THE BEHAVIORAL ECONOMICS GUIDE 2018, at 36, 37 (Alain Samson ed., 2018).

119.   *See* Anthony G. Greenwald & Thomas F. Pettigrew, *With Malice Toward None and Charity for Some: Ingroup Favoritism Enables Discrimination*, 69 AM. PSYCHOLOGIST 669, 669–70 (2014)

Given its ubiquity across legal scholarship, a concise review of implicit bias literature should suffice.[120] The science demonstrates that humans possess systemic and pervasive biases—often in the form of attitudes and stereotypes—about social categories like race, gender, and age.[121] Biases tend to favor majority groups over minority groups.[122] Some biases are implicit, in the sense that they cannot be measured through direct measures such as self-reports.[123] Rather, they must be measured through indirect techniques, such as lexicon exercises and the now well-known Implicit Association Test (IAT).[124] Critically, as documented in hundreds of individual studies and multiple meta-analyses, implicit biases predict disparate treatment as a function of the performer's social identity, particularly in socially salient contexts.[125] The research, in short,

---

(describing the prevalence of ingroup favoritism); Jerry Kang, *Rethinking Intent and Impact: Some Behavioral Realism About Equal Protection*, 66 ALA. L. REV. 627, 629 (2015) [hereinafter Kang, *Rethinking Intent and Impact*] (discussing evidence that implicit biases lead to unintentional disparate treatment).

120.   *See* Girvan, *supra* note 4, at 7–9 (surveying implicit bias within legal scholarship); Tristin K. Green, *The Future of Systemic Disparate Treatment Law*, 32 BERKELEY J. EMP. & LAB. L. 395, 420 (2011) ("The importance of the cognitive turn in the social sciences, including research relying on the [Implicit Association Test], cannot be understated. It has unquestionably advanced our understanding of how discrimination operates and also our thinking about how discrimination might be reduced.").

121.   *See* Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1128 (2012) ("One type of bias is driven by attitudes and stereotypes that we have about social categories, such as genders and races."); Brian A. Nosek et al., *Pervasiveness and Correlates of Implicit Attitudes and Stereotypes*, 18 EUR. REV. SOC. PSYCHOL. 36, 45–57 (2007) (describing age-related, gender-related, and race-related implicit attitudes).

122.   Nosek et al., *supra* note 121, at 41 ("Both implicitly and explicitly, respondents preferred, for example, White, young, abled, straight, and thin people over their complementary categories.").

123.   *See* Greenwald & Banaji, *supra* note 109, at 861–62 (explaining the difference between explicit biases and implicit biases).

124.   *See* Anthony G. Greenwald et al., *Measuring Individual Differences in Implicit Cognition: The Implicit Association Test*, 74 J. PERSONALITY & SOC. PSYCHOL. 1464, 1464–66 (1998) [hereinafter Greenwald et al., *Measuring Individual Differences*]. Members of the public can take any number of IATs at http://www.projectimplicit.org. For a description of the IAT, see generally Anthony G. Greenwald et al., *Understanding and Using the Implicit Association Test: III. Meta-Analysis of Predictive Validity*, 97 J. PERSONALITY & SOC. PSYCHOL. 17, 18 (2009) [hereinafter Greenwald et al., *Meta-Analysis of Predictive Validity*], which describes the Implicit Association Test.

125.   *See generally* Greenwald & Pettigrew, *supra* note 119 (describing the prevalence of in-group favoritism); Jerry Kang et al., *Are Ideal Litigators White? Measuring the Myth of Colorblindness*, 7 J. EMPIRICAL LEGAL STUD. 886 (2010) (observing that pro-white biases predicted more favorable evaluations of white litigators); Allen R. McConnell & Jill M. Leibold, *Relations Among the Implicit Association Test, Discriminatory Behavior, and Explicit Measures of Racial Attitudes*, 37 J. EXPERIMENTAL SOC. PSYCHOL. 435 (2001) (observing correlation between implicit bias and intergroup behavior); Dan-Olof Rooth, *Automatic Associations and Discrimination in Hiring: Real World Evidence*, 17 LABOUR ECON. 523 (2010) (observing correlation between implicit bias and callback decisions); Laurie A. Rudman & Peter Glick, *Prescriptive Gender Stereotypes and Backlash Toward Agentic Women*, 57 J. SOC. ISSUES 743 (2001) (observing that women were punished for performing in counter-stereotypical ways); Christian Unkelbach et al., *The Turban Effect: The Influence of Muslim Headgear and Induced Affect on Aggressive Responses in the Shooter Bias Paradigm*, 44 J. EXPERIMENTAL SOC. PSYCHOL. 1409 (2008) (finding that in a computer game simulation, participants were more likely to shoot at Muslim targets). For competing meta-analyses, both of which observe a correlation between implicit bias and behavior, compare Greenwald et al.,

illuminates that human judgment is susceptible to shifting standards measurement errors and that these errors will predictably function to the benefit of individuals from socially advantaged groups, while penalizing individuals from groups that face negative biases in the relevant domain.[126]

Implicit bias scholarship may dominate headlines, but it comprises a single piece in a broader mosaic of scholarship that reveals the fallibility of human judgment. A separate but related body of literature comes in the form of audit studies.[127] Historically, audit studies were used to uncover covert intentional race discrimination, often in domains such as housing or employment.[128] More recently, audit studies have become a powerful vehicle to expose both intentional and unintentional disparate treatment in contexts involving human discretion.[129]

A 2014 study by Arin Reeves offers a salient example.[130] Reeves invited partners from large law firms to participate in what was presented as a general writing activity.[131] All participants evaluated the same legal memo, which contained a cover letter with information about the author.[132] Half of the

---

*Meta-Analysis of Predictive Validity*, *supra* note 124, at 24, which observed average predictive validity correlation of r = .236 on racially discriminatory behavior, with Frederick L. Oswald et al., *Predicting Ethnic and Racial Discrimination: A Meta-Analysis of IAT Criterion Studies*, 105 J. PERSONALITY & SOC. PSYCHOL. 171, 178 (2013), which reported an effect size of r = .15.

126. *See generally* GODSIL ET AL., *supra* note 109, at 25–26, 34–43 (reviewing studies).

127. The standard audit study is a controlled field experiment in which pairs of testers with comparable qualifications except for a salient dimension of identity (such as race) attempt to, for instance, rent an apartment. *See* Sun Jung Oh & John Yinger, *What Have We Learned from Paired Testing in Housing Markets?*, 17 CITYSCAPE 15 (2015) (reviewing housing market audit studies in the United States and Europe).

128. *See* NAT'L RESEARCH COUNCIL, MEASURING RACIAL DISCRIMINATION 104–10 (Rebecca M. Blank et al. eds., 2004) (reviewing audit study techniques).

129. *See* Steven D. Levitt, *Testing Theories of Discrimination: Evidence from* Weakest Link, 47 J.L. & ECON. 431, 432 (2004) (reviewing audit studies); Devah Pager, *The Use of Field Experiments for Studies of Employment Discrimination: Contributions, Critiques, and Directions for the Future*, 609 ANNALS AM. ACAD. POL. & SOC. SCI. 104, 112 (2007) (reviewing audit studies of racial discrimination in employment); Kevin A. Schulman et al., *The Effect of Race and Sex on Physicians' Recommendations for Cardiac Catheterization*, 340 NEW ENG. J. MED. 618, 621–23 (1999) (employing audit study techniques to expose influence of patient race and sex on physician's management of chest pain).

130. ARIN N. REEVES, NEXTIONS, YELLOW PAPER SERIES 2014-0404, WRITTEN IN BLACK & WHITE: EXPLORING CONFIRMATION BIAS IN RACIALIZED PERCEPTIONS OF WRITING SKILLS (2014), http://nextions.com/wp-content/uploads/2017/05/written-in-black-and-white-yellow-paper-series.pdf [http://perma.cc/LMB6-ZBZF]; *see also* Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable Than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV. 991 (2004) (finding that résumés with white-sounding names were more likely to receive callbacks than resumes with Black-sounding names); Claudia Goldin & Cecilia Rouse, *Orchestrating Impartiality: The Impact of "Blind" Auditions on Female Musicians*, 90 AM. ECON. REV. 715 (2000) (documenting gender-based different standards in the context of orchestra auditions).

131. REEVES, *supra* note 130.

132. *Id.*

participants received a cover letter indicating the author was Black; the other half received a cover letter indicating the author was white.[133]

Reeves did not employ a device such as the IAT to measure the participants' implicit biases.[134] Nonetheless, the study exposed the fallibility of human judgment. Although performance (the memo) was identical across all participants, the memo associated with the white author received more favorable quantitative and qualitative evaluations across general and specific criteria.[135]

Social scientists continue to expose shifting standards through statistical techniques that permit researchers to analyze large data sets.[136] One recent analysis of more than 4.5 million traffic stops in North Carolina provides a pertinent example.[137] In this analysis of real-world data, Stanford researchers interrogated whether, and to what degree, a driver's race predicted whether police would initiate a search following a traffic stop.[138] The researchers observed that Black and Latino drivers were more likely than white drivers to be subject to a search.[139] They also found that Black and Latino drivers were less likely to possess contraband than white drivers.[140]

As the study's authors note, these racial disparities do not, in themselves, confirm that the officers evaluated the same behavior differently because it was theoretically possible that the racial disparities were caused by actual group-based differences in performance.[141] To assess this possibility, the researchers employed a threshold test to determine the level of objective suspicion required by police to search the average driver as a function of race.[142] This targeted analysis revealed that, across jurisdictions, police required roughly twice the level of objective suspicion to search white drivers than Black or Latino

---

133.  *Id.*

134.  *Id.*

135.  *Id.*

136.  Such techniques are not novel to litigation. Title VII systemic disparate treatment plaintiffs, for instance, have long relied on the inferential statistics produced through sophisticated statistical analyses, though not always successfully. *See, e.g.*, Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 356–60, (2011) (considering the plaintiffs' allegation of systemic disparate treatment in promotions); Floyd v. City of New York, 959 F. Supp. 2d 540, 574 (S.D.N.Y. 2013) (analyzing NYPD stop-and-frisk data).

137.  *See* Camelia Simoiu et al., *The Problem of Infra-Marginality in Outcome Tests for Discrimination*, 11 ANNALS APPLIED STAT. 1193, 1202–13 (2017) (employing new statistical analysis to expose that, as a function of suspect race, police required different thresholds of objective evidence of criminality to make probable cause determinations); *see also* Emma Pierson et al., *A Large-Scale Analysis of Racial Disparities in Police Stops Across the United States* (Stanford Computational Policy Lab, Working Paper, 2019) (observing evidence of bias against Black drivers in highway patrol and municipal police stops in an analysis of nearly 100 million traffic stops).

138.  Simoiu et al., *supra* note 137, at 1194.

139.  *Id.* at 1203 (finding relative search rates of 5.4% for Black drivers, 4.1% for Hispanic drivers, and 3.1% for white drivers).

140.  *Id.* (finding that rate of recovery was 29% for Black drivers, 19% for Hispanic drivers, and 32% for white drivers).

141.  *Id.* at 1193.

142.  *Id.* at 1207.

drivers.[143] The observed racial disparities, it turns out, was a function of disparate treatment.

The foregoing examples cohere around the insight that human judgment—even if facially neutral and intended to be colorblind—has the potential to compromise even the most shallow conception of equality.[144] This is not to say that human judgment necessarily leads to racial mismeasures but rather that the risk is ever present.[145]

## B.    *Uneven Conditions*

Distinct from shifting standards defects, "uneven conditions" measurement errors arise when an evaluative tool—or the environment in which it is administered—subjects certain individuals to unique burdens because of their race, yet fails to account for this difference.[146] As a result of the uneven

143.    *Id.* (reporting threshold level of 7% for Black drivers, 6% for Hispanic drivers, and 15% for white drivers).

144.    *See* TONY FABELO ET AL., COUNCIL OF STATE GOV'TS JUSTICE CTR., PUB. POLICY RESEARCH INST., BREAKING SCHOOLS' RULES 45 (2011), http://csgjusticecenter.org/wp-content/uploads/2012/08/Breaking_Schools_Rules_Report_Final.pdf [http://perma.cc/3LK2-JDB3] (observing that even after controlling for 83 variables including socioeconomic status in analysis of over 900,000 elementary school students, Black students remained 31% more likely than white students to be disciplined for discretionary violations); Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. SOC. 937, 959 (2003) ("While the ratio of callbacks for nonoffenders relative to ex-offenders for whites is 2:1, this same ratio for blacks is nearly 3:1. The effect of a criminal record is thus 40% larger for blacks than for whites." (footnote omitted)); Devah Pager et al., *Discrimination in a Low-Wage Labor Market: A Field Experiment*, 74 AM. SOC. REV. 777, 784 (2009) (reporting that in applications to 171 employers, white applicants "received a callback or job offer 31.0 percent of the time, compared with a positive response rate of 25.2 percent for Latinos and 15.2 percent for blacks"); Russell J. Skiba et al., *Unproven Links: Can Poverty Explain Ethnic Disproportionality in Special Education?*, 39 J. SPECIAL EDUC. 130, 135–36 (2005) (reporting that in a midwestern state for the 2000–01 school year, Black students were more likely than other students to be identified as having a disability requiring special education instruction); John M. Wallace, Jr. et al., *Racial, Ethnic, and Gender Differences in School Discipline Among U.S. High School Students: 1991–2005*, 59 NEGRO EDUC. REV. 47, 57 (2008) (reporting that in a longitudinal study of school discipline, "Black boys are . . . 330% (3.3 times) more likely than White boys to be suspended or expelled. . . . Black girls are . . . more than five times more likely than White girls to be suspended or expelled.").

145.    Several factors—from the level of discretion to the ambiguity of behavior—tend to increase the likelihood of biased judgment and decisionmaking. *See* Kang & Banaji, *supra* note 2, at 1096 ("Using subsequent ratings of job performance or training performance as the criteria for measuring the validity of interviews, studies have shown that behavior-based, structured interviews do better than unstructured interviews at predicting on-the-job success."). As a result, one could expect that shifting standards measurement errors are likely to be most relevant when doctrine confers decisionmakers with broad discretion and where the site of decision intersects with salient racial stereotypes. Consider police-civilian interactions, in which stereotypes about criminality are relevant and which occur under a Fourth Amendment regime that bestows considerable deference on law enforcement officers—per legal immunities and indeterminate legal standards (reasonable suspicion and probable cause). *See* Jeffrey Fagan et al., *Stops and Stares: Street Stops, Surveillance, and Race in the New Policing*, 43 FORDHAM URB. L.J. 539, 558 (2016) ("The arguments advancing profiling ran headlong into its constitutional weaknesses, even under a newly capacious Fourth Amendment suspicion standard that invited the substitution of race-based correlates of suspicion for explicit racial categories.").

146.    This concern—that environments subject test takers to different conditions—differs from the claim that a facially neutral test contains biased content that will be more familiar to, and therefore

conditions, the score understates the existing talent of those subjected to the condition while inflating the existing talent of their unburdened counterparts.

To appreciate how uneven conditions measurement errors operate, consider the following two hypotheticals. First, imagine a forty-yard sprint—a facially neutral evaluative tool that measures speed. As with the bathroom scale, the sprint could produce a race-*neutral* measurement error if, for instance, the track contains an incline (when it should be flat) or is riddled with holes (when it should be smooth).[147] Even if a measurement error occurs, the error is race neutral; all runners, regardless of race, confront the relevant problematic conditions.[148] Under an alternative scenario, the sprint could produce a race-*dependent* measurement error if, for instance, all Black runners were forced to run in a lane with the incline and holes, while all white runners had access to a flat and smooth lane. In this scenario, the track no longer provides a race-neutral measure of each runner's speed. Black sprinters would receive a score that *under*states their actual ability; white runners a score that *over*states theirs.

Alternatively, imagine a law school that has identified two finalists for a prestigious endowed chair. Among other criteria, the school cares about scholarly production. To evaluate this attribute, the school measures each candidate's scholarly production over the preceding three years. Over that time, both candidates published three articles of materially equal length and substance and placed the articles in journals of comparable standing.

The evaluative tool—counting publications—is facially neutral and appears meritocratic, void of any measurement error. But during the time in question, the candidates were subject to materially different conditions. Candidate A taught a full course load, which consumed time and resources otherwise available for writing. Candidate B, in contrast, had no teaching requirements; nothing competed with her time for research and writing. The evaluative tool does not account for these different conditions. As a consequence, the tool's output (three publications each) suggests equal publishing talent—that is, equal merit as defined by the law school. But this facial parity is illusory, the result of a tool that failed to account for the uneven conditions under which each candidate performed. Under equal conditions, one would expect Candidate A to outperform Candidate B.

Under the foregoing example, the law school could promote each candidate's right to compete by taking context into account. Specifically, the

---

privilege, individuals from certain racial groups. *See* Erman & Walton, *supra* note 14, at 329 ("Where contexts produce stereotype threat, unmerited racial gaps can result even when test content is fair."). It also differs from general (i.e., not race-specific) predictive validity critiques that advocate for abandoning certain measures of merit because other measures would better predict future performance. *See* West-Faulcon, *supra* note 113, at 1241.

147.   *See* Jonathan Feingold & Doug Souza, *Measuring the Racial Unevenness of Law School*, 15 BERKELEY J. AFR.-AM. L. & POL'Y 71, 73 (2013) (employing track and heckler metaphors to describe the phenomenon of "racial unevenness").

148.   To the extent runners on this track were competing against runners on level and smooth tracks, the uneven conditions across tracks would produce measurement errors that artificially inflated the relative speed of those runners on the faster track. *See* Erman & Walton, *supra* note 14, at 365.

school could recognize that the scores—although facially identical—signal different things about the candidates' respective merit. By accounting for this difference, the school would promote a more individualized and meritocratic process that mitigates the likelihood of conferring Candidate B with an undeserved boost at Candidate A's expense.

The foregoing examples reflect how evaluative tools can compromise merit by failing to account for context—that is, the different conditions under which individuals are forced to perform. The challenge is that, in most high-stakes selection processes, uneven conditions measurement errors will be far less apparent than in the above examples. This includes settings, such as standardized tests, in which students from negatively stereotyped groups are subject to psychological headwinds such as stereotype threat.[149] Stereotype threat describes the psychological threat an individual experiences when poor performance on a task would confirm a negative stereotype about a group to which she belongs.[150] Although far less visible, this psychological threat shares key characteristics with the hole-laden track and full course load.

Albeit still relatively under-mined by legal scholars,[151] stereotype threat comprises one of the most studied psychological phenomena of the past twenty-five years.[152] The seminal stereotype threat studies,[153] administered by Claude Steele and others, were motivated by a desire to explain an unexpected observation: even after controlling for incoming qualifications, Black and Latino college students continued to "underperform" compared to their white counterparts.[154] In other words, even when students were similarly situated but

---

149.    See *infra* notes 153–64 and accompanying text for a review of stereotype threat literature.

150.    *See* Christine R. Logel et al., *Unleashing Latent Ability: Implications of Stereotype Threat for College Admissions*, 47 EDUC. PSYCHOLOGIST 42, 42 (2012); Schmader et al., *supra* note 152, at 336; Steele, *A Threat in the Air*, *supra* note 14, at 622; Claude M. Steele, *Race and the Schooling of Black Americans*, 269 ATLANTIC MONTHLY 68 (1992) [hereinafter Steele, *Schooling of Black Americans*].

151.    This is beginning to change. Recent publications interrogating the relationship between stereotype threat and constitutional doctrine include, for example, Erman & Walton, *supra* note 14, which discusses how the stereotype threat literature troubles basic presumptions about merit embedded in antidiscrimination regimes such as equal protection doctrine; Jonathan Feingold, *Hidden in Plain Sight: A More Compelling Case for Diversity*, 2019 UTAH L. REV. 59, which explores the relationship between stereotype threat and institutional obligations to create academic environments in which all students have equal access to the benefits of university membership; and Feingold, *Racing Towards Color-Blindness*, *supra* note 111, which draws on stereotype threat research to argue that common measures of academic merit—including standardized tests—systematically understate the existing talent of individuals from negatively stereotyped groups.

152.    *See* Toni Schmader et al., *An Integrated Process Model of Stereotype Threat Effects on Performance*, 115 PSYCHOL. REV. 336, 336 (2008).

153.    *See, e.g.*, Claude M. Steele & Joshua Aronson, *Stereotype Threat and the Intellectual Test Performance of African Americans*, 69 J. PERSONALITY & SOC. PSYCHOL. 797 (1995) (observing that stereotype threat compromised the academic performance of African American students).

154.    *See* Steele, *Schooling of Black Americans*, *supra* note 150, at 68; *see also* Ronald G. Fryer Jr. & Steven D. Levitt, *Understanding the Black-White Test Score Gap in the First Two Years of School*, 86 REV. ECON. & STAT. 447, 447 (2004) ("Even after controlling for a wide range of covariates including family structure, socioeconomic status, measures of school quality, and neighborhood characteristics, a substantial racial gap in test scores persists."). Incoming qualifications similarly failed

for race when they entered an institution, something continued to depress the performance of students of color therein. This observation exposed the limitations of common achievement gap theories—including differing levels of preparation, parental levels of education, and socioeconomic status.[155]

The initial studies, now reproduced across hundreds of laboratory and real-world settings, revealed that at least a portion of observable achievement gaps were attributable to stereotype threat, an invisible phenomenon that functions as a cognitive tax on negatively stereotyped students.[156] In a recent overview of the stereotype threat literature, Professors Sam Erman and Gregory Walton explained that stereotype threat functions as an identity-contingent headwind that "causes performance decrements by setting in motion diverse deleterious social-cognitive and affective processes, including physiological stress responses, negative thoughts and emotions, efforts to suppress these psychological reactions, and consequent drains on working-memory efficiency."[157]

One of the most accessible summaries of the stereotype threat science came in two amicus briefs filed on behalf of the University of Texas in *Fisher v. University of Texas at Austin* (*Fisher I*),[158] a lawsuit concerning the University of Texas's race-conscious admissions process.[159] These briefs, submitted by national experts on stereotype threat, explained that in the context of high-stakes tests, such as the SAT or LSAT, stereotype threat is likely to manifest as a race-dependent tax.[160] As a result, such tests will "often underestimate the true academic capacity of members of certain minority groups."[161] This race-dependent harm is both concrete and quantifiable.[162]

---

to explain gender gaps in quantitative fields such as science and math. *See* Gregory M. Walton et al., *Affirmative Meritocracy*, 7 SOC. ISSUES & POL'Y REV. 1, 2–3 (2013).

155. *See* Feingold, *Racing Towards Color-Blindness*, *supra* note 111, at 234–35.

156. *See* Hannah-Hanh D. Nguyen & Ann Marie Ryan, *Does Stereotype Threat Affect Test Performance of Minorities and Women? A Meta-Analysis of Experimental Evidence*, 93 J. APPLIED PSYCHOL. 1314, 1323–26 (2008); *see also* Margaret Shih et al., *Stereotype Susceptibility: Identity Salience and Shifts in Quantitative Performance*, 10 PSYCHOL. SCI. 80, 82 (1999) (finding that Asian American women performed better on a mathematics test when their ethnic identity was activated but worse when their gender identity was activated); Steven J. Spencer et al., *Stereotype Threat and Women's Math Performance*, 35 J. EXPERIMENTAL SOC. PSYCHOL. 4, 7 (1999) (observing the relationship between stereotype threat and women's math performance).

157. Erman & Walton, *supra* note 14, at 325.

158. 570 U.S. 297 (2013).

159. *See* Brief of Experimental Psychologists as Amici Curiae in Support of Respondents at 7–10, Fisher v. Univ. of Texas at Austin (*Fisher II*), 136 S. Ct. 2198 (2016) (No. 14-981) [hereinafter Experimental Psychologists' Brief II]; Brief of Experimental Psychologists as Amici Curiae in Support of Respondents at 23–24, *Fisher I*, 570 U.S. 297 (2013) (No. 11-345) [hereinafter Experimental Psychologists' Brief I].

160. *See* Experimental Psychologists' Brief II, *supra* note 159, at 4.

161. *Fisher II*, 136 S. Ct. at 2234 n.11 (Alito, J., dissenting) (quoting Experimental Psychologists' Brief II, *supra* 159, at 7). As I discuss in Section III, it is unclear if Justice Alito appreciated the Experimental Psychologists' core claim. *See* Logel et al., *supra* note 150, at 42 (explaining that given stereotype threat's prevalence across educational domains, standard measures of merit can

Standardized tests do not, however, account for stereotype threat.[163] Accordingly, when admissions offices treat standardized test scores as race-neutral measures of merit, they naturalize into the selection process illusory and race-dependent differences attributable to environmental contingencies, not actual differences in merit.[164] In so doing, institutions deny students of color an individualized and race-free review (that is, their right to compete), while conferring upon their unburdened peers an unearned racial boost.

## C.   Predictive Algorithms

In addition to human judgment and standardized tests, predictive algorithms constitute a third facially neutral tool susceptible to race-dependent measurement errors. Predictive algorithms broadly capture "any well-defined computational procedure that takes some value, or set of values, as *input*, and produces some value, or set of values, as *output*."[165] Across industries, decisionmakers have begun using algorithms to aid in a variety of selection processes.[166] Given increased access to "big data," alongside the desire for metrics that avoid human biases, predictive algorithms will likely continue to proliferate.[167]

Although algorithms only recently became a fixture of institutional decisionmaking, scholars have already begun to interrogate how these evaluative tools—hailed for their ostensible neutrality and objectivity—may reproduce and

---

"systematically underestimate the[] intellectual ability and potential" of individuals from negatively stereotyped groups).

162.   *See* Joshua Aronson & Thomas Dee, *Stereotype Threat in the Real World*, *in* STEREOTYPE THREAT: THEORY, PROCESS, AND APPLICATION 264, 271–72 (Michael Inzlicht & Toni Schmader eds., 2012); David S. Yeager & Gregory M. Walton, *Social-Psychological Interventions in Education: They're Not Magic*, 81 REV. EDUC. RES. 267, 283 (2011). These studies trouble the presumption that absent discriminatory intent, an exam will necessarily be "administered and scored in an identical fashion for all applicants." Hayden v. Cty. of Nassau, 180 F.3d 42, 48 (2d Cir. 1999).

163.   *See* Rachel D. Godsil, *Reaction to: Color-Blindness and Stereotyping*, 3 GEO. J. L. & MOD. CRITICAL RACE PERSP. 277, 277 (2011) ("My primary question is whether the LSAC might be a more suitable body to engage in the rescaling. The LSAC would seem to have the capacity to engage in a highly refined rescaling in which they weighed a more complex host of variables to determine whether the LSAT score accurately reflected the student's capacities.").

164.   *See* Gregory M. Walton & Steven J. Spencer, *Latent Ability: Grades and Test Scores Systematically Underestimate the Intellectual Ability of Negatively Stereotyped Students*, 20 PSYCHOL. SCI. 1132, 1137 (2009).

165.   THOMAS H. CORMEN ET AL., INTRODUCTION TO ALGORITHMS 5 (3d ed. 2009).

166.   *See* Joshua A. Kroll et al., *Accountable Algorithms*, 165 U. PA. L. REV. 633, 636 (2017) ("The efficiency and accuracy of automated decisionmaking ensures that its domain will continue to expand. Even mundane activities now involve complex computerized decisions: everything from cars to home appliances now regularly executes computer code as part of its normal operation.").

167.   *See* Pauline T. Kim, *Data-Driven Discrimination at Work*, 58 WM. & MARY L. REV. 857, 860 (2017) ("Proponents of the new data science claim that it will not only help employers make better decisions faster, but that it is fairer as well because it can replace biased human decision makers with 'neutral' data. However, as many scholars have pointed out, data are not neutral, and algorithms can discriminate." (footnote omitted)).

mask bias.[168] Two examples deserve mention. First, as Joshua Kroll and colleagues observed, "algorithms that include some type of machine learning can lead to discriminatory results if the algorithms are trained on historical examples that reflect past prejudice or implicit bias, or on data that offer a statistically distorted picture of groups comprising the overall population."[169] In other words, if algorithms rely on criminal statistics that themselves overrepresent particular groups because of racially selective policing, that bias will be reproduced in the algorithm's outputs.[170]

"Second, machine learning models can build in discrimination through choices in how models are constructed."[171] Often, an algorithm must be taught—by humans—how to interpret the data it encounters.[172] Imagine an algorithm that predicts a student's academic ability by looking to prior students' incoming qualifications and academic performance within the university. These data may reveal that certain students, as a function of race, over- or underperform relative to their incoming qualifications. The algorithm has to determine how to interpret those deltas.

Commonsense assumptions would explain any racial disparities vis-à-vis academic performance as reflecting actual group-based differences in terms of existing talent, preparation, and motivation. But such narratives fail to account for environmental forces that subject students to different conditions as a function of identity. When one accounts for context, it reveals that the observed gap—or at least a portion thereof—is illusory; rather than evidencing different abilities, it reflects different conditions.

## D. Neither Intentional Disparate Treatment nor Disparate Impact

As described above, various facially neutral evaluative tools are susceptible to race-dependent measurement errors that mismeasure an individual's existing talent and abilities. As a result, when decisionmakers unmindfully rely on such metrics and imbue a selection process with racial mismeasures, they compromise

---

168. *See* Lee Anne Fennell, *Searching for Fair Housing*, 97 B.U. L. REV. 349, 415 (2017) (citing emerging scholarship on the relationship between algorithms and racial bias).

169. Kroll et al., *supra* note 166, at 680; *see also* Solon Barocas & Andrew D. Selbst, *Big Data's Disparate Impact*, 104 CALIF. L. REV. 671, 708 (2016) ("Models trained on biased samples and mislabeled examples, on the other hand, will result in correspondingly skewed assessments rather than reflect real-world disparities.").

170. *See* Kroll et al., *supra* note 166, at 681 (discussing the NYPD's stop-and-frisk program, which disproportionately targeted Black and Latino young men); *see also* Floyd v. City of New York, 959 F. Supp. 2d 540, 662 (S.D.N.Y. 2013) ("The NYPD has directed officers to target young black and Hispanic men because these groups are heavily represented in criminal suspect data—the reliability of which is questionable—in those areas where the NYPD carries out most of its stops.") Notably, white men stopped during the NYPD's program were, in fact, more likely to be carrying weapons or contraband than either Black or Latino men. *Floyd*, 959 F. Supp. at 559.

171. Kroll et al., *supra* note 166, at 681.

172. *See* Barocas & Selbst, *supra* note 169, at 678 ("[D]ata miners must translate some amorphous problem into a question that can be expressed in more formal terms that computers can parse. . . . Through this necessarily subjective process of translation, data miners may unintentionally parse the problem in such a way that happens to systematically disadvantage protected classes.").

2019]

the principle of the right to compete.[173] This result should trouble Supreme Court Justices who place a premium on individual meritocracy.

Before proceeding, it is worth noting that racial mismeasures, even as they undermine the Supreme Court's stated commitment to a right to compete, do not necessarily constitute intentional discrimination nor produce a racially disparate impact. To appreciate how this is so, consider the following hypothetical.

Imagine that a government employer prohibits dreadlocks.[174] This policy would predictably produce a racially disparate impact because Black candidates are more likely to have dreadlocks than candidates of other races.[175] If the employer adopted the policy *because of* its racial impact, that would constitute intentional discrimination.[176] But assume the employer adopted the policy *in spite of* its disparate impact. There is no intentional discrimination concern. Moreover, so long as the employer accurately identifies who does and does not have dreadlocks, the policy would not implicate a candidate's right to compete. At the moment of decision, the presence or absence of dreadlocks—which constitutes merit in this scenario—determines whether a candidate advances in the hiring process, irrespective of the candidate's race.

Now imagine the employer utilizes fancy facial recognition software to determine which candidates have dreadlocks. The program scans headshots of each applicant. Individuals with dreadlocks are screened out; those without dreadlocks advance. We have a facially neutral evaluative tool that continues to produce a disparate impact, but there is still no right-to-compete concern. But now imagine the program misidentifies some percentage of Black candidates (say, 10%) as having dreadlocks when they do not, and it therefore screens them

---

173. Racial mismeasures can be understood as evaluative tools in which "status causation" is baked into the machine itself. *See* Noah D. Zatz, *Disparate Impact and the Unity of Equality Law*, 97 B.U. L. REV. 1357, 1359 (2017) ("This injury of 'status causation' arises when . . . an individual suffers . . . harm 'because of such individual's race . . . .'" (quoting 42 U.S.C. § 2000e-2(a) (2018))).

174. This hypothetical is rooted in reality. In *EEOC v. Catastrophe Management Services*, 852 F.3d 1018 (11th Cir. 2016), the Eleventh Circuit held that Title VII's prohibition of race discrimination did not extend to an employer's anti-dreadlock policy. *Catastrophe Mgmt. Servs.*, 852 F.3d at 1021.

175. This is not to say that only Black candidates would be affected, just that Black candidates, as a group, would likely be more impacted than other racial groups. Moreover, the policy could have an intersectional impact if, for instance, Black women are more likely to wear their hair in dreadlocks than Black men (or vice versa).

176. Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979). There are at least three broad categories of state action that constitute intentional discrimination: (1) racial classifications, *see* Gratz v. Bollinger, 539 U.S. 244, 253 (2003) (involving an admissions policy that expressly classified students on a racial basis); (2) facially neutral laws intentionally applied in a discriminatory manner, *see* Yick Wo v. Hopkins, 118 U.S. 356 (1886) (involving the racially disparate administration of a facially neutral law); and (3) facially neutral policies adopted because of their racially disparate impact, *see* Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977) (involving a facially neutral policy that produced a racially disparate impact). These latter two categories are often understood as "covert intentional discrimination." *See* Reva B. Siegel, *Race-Conscious but Race-Neutral: The Constitutionality of Disparate Impact in the Roberts Court*, 66 ALA. L. REV. 653, 657–59 (2015).

out when it should not. Only Black candidates, some not all, take this hit; the program accurately identifies dreadlocks on all other races.

The facially neutral hiring process has now been corrupted by a race-based measurement error. The tool—an algorithm—contains a shifting standards defect. Whatever the cause—perhaps the programmers conflated braids with dreadlocks—the program systematically misreads headshots on a racial basis. Certain Black candidates with the same performance (no dreadlocks) as similarly situated competitors are nonetheless evaluated differently. In so doing, the process harms individuals who possess the requisite merit to advance in the hiring process; other candidates receive a commensurate boost because they do not have to compete against all candidates who should have advanced.

This process defect captures the paradigmatic harm of racial mismeasures and contravenes each candidate's interest in a right to compete. As noted above, this deviation from neutrality is not intentional. Moreover, even if the policy (marred by this defect) does not produce a racially disparate impact in terms of ultimate hires, it still undermines the ability of certain candidates to compete on the basis of their individual merit, irrespective of their race.[177]

This reveals that certain policies will contain racial mismeasures concerns even if they do not produce a disparate impact. The reverse is also true: many policies likely to have a disparate impact will not necessarily implicate racial mismeasures concerns.[178] This would include, for instance, the catalog of "tax, welfare, public service, regulatory, and licensing statutes" identified in *Davis*.[179] Many, if not all, will likely produce a disparate impact. Yet few, if any, necessarily involve selection processes that rely on racial mismeasures.[180]

---

177. In this sense, the distinctions between disparate impact and racial mismeasures follow a familiar track—that which the Court's conservatives have used to distinguish disparate impact from disparate treatment. Disparate impact, as a theory of discrimination, focuses on the group and outcomes. *See, e.g.*, *Feeney*, 442 U.S. at 260 (observing that a veterans' preference statute, although gender-neutral, had disparate impact on women relative to men). Disparate treatment, in contrast, focuses on individuals and opportunity. Zatz, *supra* note 173, at 1371 ("Generally speaking, a disparate treatment claim arises whenever an employer makes a decision based on an individual's protected status.").

178. Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977) ("[C]laims that stress 'disparate impact' . . . involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity.").

179. Washington v. Davis, 426 U.S. 229, 248 & n.14 (1976) ("[Scholarship] suggests that disproportionate-impact analysis might invalidate 'tests and qualifications for voting, draft deferment, public employment, jury service, and other government-conferred benefits and opportunities . . . ; [s]ales taxes, bail schedules, utility rates, bridge tolls, license fees, and other state-imposed charges.' It has also been argued that minimum wage and usury laws as well as professional licensing requirements would require major modifications in light of the unequal-impact rule." (omission in original) (second alteration in original) (quoting Frank I. Goodman, *De Facto School Segregation: A Constitutional and Empirical Analysis*, 60 CALIF. L. REV. 275, 300 (1972))).

180. Such policies, and the racial disparities they produce, reflect actual group-based differences that are the product of "societal discrimination." The Supreme Court has deemed "societal discrimination" insufficient to justify racial classifications. *See* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 276 (1986) ("But as the basis for imposing discriminatory *legal* remedies that work against innocent people, societal discrimination is insufficient and over expansive."); Regents of Univ. of

Disparate impact theory often elevates distinct mismeasurement concerns understood in terms of a metric's job-relatedness.[181] Unlike racial mismeasures—which focus on deficiencies in the underlying measurement instrument—job-relatedness concerns are predicated on the notion that the measured attribute (even if accurately measured) is a poor proxy of merit in the given context. This concern comes through in Justice Burger's explication of Title VII in *Griggs v. Duke Power Co.*,[182] one of the most well-known disparate impact decisions:

> Nothing in the Act precludes the use of testing or measuring procedures; obviously they are useful. What Congress has forbidden is giving these devices and mechanisms controlling force unless they are demonstrably a reasonable measure of job performance. Congress has not commanded that the less qualified be preferred over the better qualified simply because of minority origins. . . . What Congress has commanded is that any tests used must measure the person for the job and not the person in the abstract.[183]

Justice Burger noted that testing has its place in employment decisions and that even under Title VII's disparate impact provision, Congress did not require employers to employ the less qualified over the more qualified.[184] Rather, the mandate is that employers rely on metrics related to the underlying job—a concern about job-relatedness, not measurement accuracy. Note that implicit in Justice Burger's statement is faith in the racial neutrality of facially neutral tests. The racial mismeasures concern does not even appear to have pierced the Justice's imagination.

## III.   THE CASE FOR REDESIGNING DOCTRINE

As empirical methods and technologies improve, we will continue to learn about the severity and pervasiveness of racial mismeasures. Even now, existing empirical findings disrupt the assumption that facially neutral evaluative tools produce racially neutral results.

This raises difficult questions for equal protection doctrine, which remains predicated on the fragile presumption that facially neutral selection processes offer a seamless route to even the most basic conception of individual meritocracy. By inoculating facially neutral state action from meaningful judicial review, existing doctrine incentivizes conduct that produces the very harm that a

---

Cal. v. Bakke, 438 U.S. 265, 297 n.36 (1978) (plurality opinion) ("No one denies the regrettable fact that there has been societal discrimination in this country against various racial and ethnic groups.").

181.   Even if one accepts the SAT as a valid metric for college admissions, few would view an SAT score as relevant to a person's qualifications to become a line cook.

182.   401 U.S. 424 (1971).

183.   *Griggs*, 401 U.S. at 436. Stephen M. Rich explained that *Griggs* "presented a situation in which all workers were subjected to the same treatment regardless of race, but a facially neutral practice produced a discriminatory outcome because of externalities concerning the historically subordinated social position of African Americans for which the plaintiff workers were not themselves responsible." Stephen M. Rich, *Against Prejudice*, 80 GEO. WASH. L. REV. 1, 50 (2011).

184.   *Griggs*, 401 U.S. at 436.

majority of Justices believe the Equal Protection Clause was designed to prevent. Equally troublesome, by rendering racial classifications presumptively unconstitutional, the doctrine disincentivizes decisionmakers from taking race-conscious steps to mitigate the harms derivative of race-based measurement errors.[185]

In this final section, I explore how equal protection doctrine—assuming it is designed to promote the right to compete—should respond to the science. To begin, it invites a serious and critical assessment of the rigid divide between facially neutral state action and racial classifications. Doctrinal reform need not entail a complete overhaul of existing doctrine. Still, an equal protection doctrine designed to promote the right to compete warrants two targeted tweaks.

First, in the context of equal protection claims targeting facially neutral state action, one responsive doctrinal reform would be to eliminate the discriminatory intent standard in the context of selection processes that produce a racially disparate impact *and* rely on racial mismeasures. Second, in the context of racial classifications, the Supreme Court should recognize as a compelling interest race-conscious measures designed to ameliorate race-dependent measurement errors laden in the underlying selection process. Were the Supreme Court to adopt the foregoing approach, it would incentivize state actors to reduce their reliance on, and correct for, faulty metrics that compromise basic commitments to racial neutrality and individual meritocracy.

From the perspective of the Supreme Court, the appeal of this shift is twofold. First, it better positions doctrine to promote a central normative foundation of modern equal protection doctrine. Second, an equal protection doctrine attentive to racial mismeasures would not trigger the manageability concerns that have animated anxieties surrounding disparate impact theory.[186] For instance, in *Washington v. Davis*, the Supreme Court expressed concern that disparate impact theory "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."[187] As noted above, a theory of discrimination predicated on racial mismeasures is not coterminous with disparate impact. Thus, equal protection doctrine could better

185. Given doctrine's hostility to racial classifications, which will often be necessary to mitigate the equality harms derivative of racial mismeasures, the opposite may in fact be true. *Cf.* Rich, *supra* note 183, at 87 ("Disparate treatment theory should play an important role in shaping employers' compliance strategies, including diversity initiatives, in order to better fulfill antidiscrimination law's goal of promoting equal employment opportunity.").

186. *See* Washington v. Davis, 426 U.S. 229, 248 (1976) (noting that a disparate impact standard of liability would render constitutionally infirm a set of existing governmental policies); *see also* Jefferson v. Hackney, 406 U.S. 535, 548 (1972) ("The acceptance of appellants' constitutional theory would render suspect each difference in treatment among the grant classes, however lacking in racial motivation and however otherwise rational the treatment might be."); Paul Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 26 (1976) (discussing the "judicial unmanageability of a general rule requiring an extraordinary justification for practices that produce racially disproportionate effects").

187. *See Davis*, 426 U.S. at 248.

respond to racial mismeasures without rendering the foregoing list of government action constitutionally insecure.

Rendering doctrine more responsive to racial mismeasures would also serve distinct separation of powers considerations. In *Croson*, Justice O'Connor suggested that the "Framers of the Fourteenth Amendment . . . desired to place clear limits on the States' use of race as a criterion for legislative action, and to have the federal courts enforce those limitations."[188] Although O'Connor's comments arose in the context of a racial classification, there is little reason to think that the underlying sentiment would not extend to other state action that violates the Fourteenth Amendment's personal equality guarantees.[189]

This could include, for instance, when the government relies on racial mismeasures to allocate public benefits and burdens. One could argue that any abstract commitment to a robust separation of powers is heightened in the context of racial mismeasures, which will predictably benefit racial majorities that hold political, economic, and social power.[190] A doctrinal framework that precludes meaningful judicial intervention will accordingly fall most heavily on individuals who belong to groups that depend most on the courts to enforce formal equality rights.[191] In contrast, a doctrine attentive to racial mismeasures would serve the critical purpose of re-empowering the judiciary to intervene on behalf of those who lack the power to remedy constitutional violations through the political branches or other extrajudicial processes.

## A.  *Reimagined Doctrine: The Case Studies*

To appreciate the impact of this doctrinal shift, I offer two short case studies, each of which revisits a well-known equal protection decision by reimagining the case through a racial mismeasures lens.

---

188. City of Richmond v. J. A. Croson Co., 488 U.S. 469, 490–91 (1989) (O'Connor, J., concurring); *see id.* at 490 ("Section 1 of the Fourteenth Amendment is an explicit *constraint* on state power, and the States must undertake any remedial efforts in accordance with that provision. To hold otherwise would be to cede control over the content of the Equal Protection Clause to the 50 state legislatures and their myriad political subdivisions. The mere recitation of a benign or compensatory purpose for the use of a racial classification would essentially entitle the States to exercise the full power of Congress under § 5 of the Fourteenth Amendment and insulate any racial classification from judicial scrutiny under § 1.").

189. Even under an originalist reading of the Fourteenth Amendment, there is little reason to believe that the Framers viewed racial classifications as constitutionally suspect. *See* Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427, 427, 430–32 (1997) (explaining that the Congress responsible for the Fourteenth Amendment "repeatedly enacted statutes allocating special benefits to blacks on the express basis of race").

190. *See generally* MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES 58 (3d ed. 2015) (outlining the accumulation of racial wealth gaps in the United States).

191. *Cf.* United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938) ("[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.").

1.    Reimagining *Washington v. Davis*

In *Washington v. Davis*, African American police officers challenged the constitutionality of Test 21, an employment test that the District of Columbia used to make promotion determinations.[192] The District's reliance on Test 21 produced a racially disparate impact, which the plaintiffs claimed violated their equal protection rights.[193] Consistent with this framing, much of the litigation centered on Test 21's job-relatedness.[194] The Supreme Court ultimately dismissed the plaintiffs' claims on the basis that disparate impact alone did not establish a constitutionally cognizable claim.[195]

But suppose the parties possessed evidence that Test 21 systematically underestimated the verbal skills of African American test takers[196] and that the District made no attempt to account for this race-dependent measurement error. Under such facts, the relevant equality concern is no longer only one of disparate impact at the level of the group. Rather, it also presents a paradigmatic racial mismeasures concern: the present and personal harm that arises when the government denies each applicant the opportunity to compete as an individual,

---

192.    Washington v. Davis, 426 U.S. 229, 234–35 (1976).

193.    *Id.* at 233, 236.

194.    *See id.* at 245 ("As an initial matter, we have difficulty understanding how a law establishing a racially neutral qualification for employment is nevertheless racially discriminatory and denies 'any person . . . equal protection of the laws' simply because a greater proportion of Negroes fail to qualify than members of other racial or ethnic groups." (omission in original)); Brief for Petitioner at *1, Washington v. Davis, 426 U.S. 229 (1976) (No. 74-1492), 1975 WL 173557 ("Questions Presented[:] 1. Whether the undisputed statistical data of record conclusively establishes the absence of an adverse racial impact in the Metropolitan Police Department's selection procedures and thus renders unnecessary a demonstration by the Department that its entrance test is job related. 2. Whether the Department's entrance test is demonstrably a rational measure of the verbal ability a police applicant must have to be trained in the Department's recruit school and, as such, is job related under established fair employment criteria."); Brief for Respondent at *1, Washington v. Davis, 426 U.S. 229 (1976) (No. 74-1492), 1975 WL 173558 ("Questions Presented[:] 1. Whether Test 21, administered by the District of Columbia Police Department to applicants for employment, has a substantial adverse impact on blacks? 2. Whether the Police Department has shown any legitimate justification for its use of Test 21?").

195.    *Davis*, 426 U.S. at 238–39 ("This is not the constitutional rule. We have never held that the constitutional standard for adjudicating claims of invidious racial discrimination is identical to the standards applicable under Title VII, and we decline to do so today."). Even had the Court accepted disparate impact theory, there is no guarantee that the plaintiffs would have prevailed. To the contrary, the majority appeared receptive to the government's desire to "modestly . . . upgrade the communicative abilities of its employees." *See id.* at 245–46 ("Test 21 . . . concededly seeks to ascertain whether those who take it have acquired a particular level of verbal skill; and it is untenable that the Constitution prevents the Government from seeking modestly to upgrade the communicative abilities of its employees rather than to be satisfied with some lower level of competence, particularly where the job requires special ability to communicate orally and in writing.").

196.    The requisite evidentiary standard could track that employed in systemic disparate treatment claims. *Cf.* Michael Selmi, *Theorizing Systemic Disparate Treatment Law: After* Wal-Mart v. Dukes, 32 BERKELEY J. EMP. & LAB. L. 477, 506–07 (2011) (contrasting testimony that "condemns all subjective decision making, and would apply to virtually any employer that relies on subjective assessments as part of its employment practices" and testimony that offers particular evidence "about the company's actual practices and explain[s] why those practices should be seen as influenced by gender stereotypes").

on their own merit, irrespective of race.[197] This harm remains even if all parties concur that Test 21 measures a job-related attribute.[198]

Imagine further that the District knows that Test 21 produces race-dependent measurement errors but argues that the plaintiffs lack standing because they cannot establish that they would have been hired but for the mismeasurement. The District's descriptive portrayal of the evidence is likely accurate, at least for some candidates. Moreover, even if existing research methods reveal that Test 21, on average, underestimates the talent of African American candidates, the plaintiffs likely would be unable to determine the degree to which any particular candidate has suffered.[199]

Assuming the plaintiffs are seeking prospective relief, the inability to establish direct causation between the measurement error and any individual plaintiff's rejection should not doom their claim. To begin, even if probabilistic, the harm is concrete and quantifiable.[200] Moreover, the plaintiffs could trade on case law that has recognized a constitutional injury in the mere existence of a selection process that denies every candidate the ability to compete on the basis of individual merit, irrespective of race.[201] Whether race played a role in their particular case is of no importance.[202]

---

197. Imagine further that the plaintiffs allege that the government's choice to rely on racial mismeasures, which will only harm Black people, stigmatizes Black candidates—who are marked with a badge of inferiority in the eyes of the state.

198. *See Davis*, 426 U.S. at 246 ("[P]roof that more Negroes than whites had been disqualified by Test 21 . . . would, alone, not demonstrate that respondents individually were being denied equal protection of the laws by the application of an otherwise valid qualifying test . . . . Nor on the facts of the case before us would the disproportionate impact of Test 21 warrant the conclusion that it is a purposeful device to discriminate against Negroes and hence an infringement of the constitutional rights of respondents as well as other black applicants.").

199. *Cf.* Erman & Walton, *supra* note 14, at 348 ("Individuals vary in their experience of stereotype threat, both because of individual differences in susceptibility to the same threat-inducing cues (two students in the same standardized testing environment may experience different levels of threat) and because of differences in the cues people are exposed to (students may attend different high schools that vary in their level of threat). If threat reduces black students' scores on a test by an average of twenty-five points, it will reduce the scores of some black students by more than twenty-five points and others by less.").

200. *See* Kang & Lane, *supra* note 112, at 520 ("Now, the convenient story is also being contested with something more—the modern authority of empirical evidence from the mind sciences. We now have accumulated hard data, collected from scientific experiments, with all their mathematical precisions, objective measurements, and statistical dissections—for better and worse. The data force us to see through the facile assumptions of colorblindness.").

201. *See* Ne. Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville (*Northeastern Florida*), 508 U.S. 656, 666 (1993) ("When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing. The 'injury in fact' in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit.").

202. *See id.* at 665 ("[In *Bakke*,] Justice Powell concluded that the 'constitutional requirements of Art. III' had been satisfied, because the requisite 'injury' was the medical school's 'decision not to permit Bakke to *compete* for all 100 places in the class, simply because of his race.' Thus, 'even if Bakke had been unable to prove that he would have been *admitted* in the absence of the special

Lastly, challenging the use of a racial mismeasure would align with the Supreme Court's hostility to racial classifications that consider race as part of a holistic assessment of each candidate.[203] Given the nature of such policies, it is often difficult—if not impossible—to determine the precise degree to which a university considered a given applicant's race. Yet the Court has never cited this imprecision as precluding a plaintiff from establishing constitutional standing or causation.[204] And while it is true that the Supreme Court is more receptive to policies that consider race in a holistic fashion, such policies remain constitutionally suspect; plaintiffs need only show that the defendant considers race to establish constitutional standing.[205] Thus, the probabilistic and imprecise nature of racial mismeasures should not, consistent with prevailing doctrine, undermine our hypothetical plaintiffs' ability to bring a cognizable equal protection challenge against Test 21.

### 2.    Reimagining *Gratz v. Bollinger*

In *Gratz v. Bollinger*, the Supreme Court struck down the University of Michigan's undergraduate admissions policy, which automatically awarded a fixed number of points to applicants from "an underrepresented racial or ethnic minority group."[206] Although it was not the case, one could reimagine *Gratz* as a case in which the University of Michigan employed racial classifications to mitigate race-based measurement errors embedded in the SAT. Michigan did not make this argument. But imagine if it had.

What if, armed with decades of social science demonstrating that standardized tests systemically underestimate the actual talent of students from negatively stereotyped groups, Michigan explained that it considered an applicant's race in order to account for measurement defects in the SAT.[207] Michigan could then explain that failure to do so would naturalize into its admissions process racial mismeasures that confer a racial preference upon white

---

program, it would not follow that he lacked standing.'" (citation omitted) (quoting Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 280–81 n.14 (1978) (plurality opinion))).

203.    *Compare* Grutter v. Bollinger, 539 U.S. 306 (2003) (applying strict scrutiny to an admissions policy that permitted admissions officers to consider an applicant's race as one factor in a holistic review), *with* Gratz v. Bollinger, 539 U.S. 244 (2003) (applying strict scrutiny to an admissions policy that assigned points on the basis of an applicant's race).

204.    *See Northeastern Florida*, 508 U.S. at 666.

205.    *See id.*

206.    *See Gratz*, 539 U.S. at 255, 275–76.

207.    The nation's leading stereotype threat experts made this very argument in *Fisher II*. *See* Experimental Psychologists' Brief II, *supra* note 159, at 4 ("It is the view of *amici* that admissions that are allowed to consider every factor except race not only undermine diversity goals but also mismeasure the true merits of minority candidates."); *see also* Selmi, *Testing for Equality*, *supra* note 113, at 1314 ("Rather than assuming that affirmative action is inefficient and antimeritocratic, we can see by exploring the underlying assumptions how affirmative action may be a rational response to the persistence of discrimination . . . ."). Michigan would not be claiming that the SAT is, as a general matter, a poor proxy for merit. Though maybe it should be. *See* Michelle Richardson et al., *Psychological Correlates of University Students' Academic Performance: A Systematic Review and Meta-Analysis*, 138 PSYCHOL. BULL. 353, 354 (2012) (explaining that "high school GPA is a stronger predictor of university GPA than is either the SAT or the ACT").

applicants unburdened by stereotype threat.[208] In other words, Michigan could have argued that it considered applicant race in order to avoid—or at least combat—the "principal evil" that Justice Powell identified in *Bakke*: a review process that denies each student an individualized assessment of their existing merit, irrespective of race.[209]

In fact, Michigan could point to a different—and often overlooked—portion of Justice Powell's opinion, in which he observed that "[r]acial classifications in admissions conceivably could serve a fifth purpose . . . : fair appraisal of each individual's academic promise in the light of some cultural bias in grading or testing procedures."[210] Justice Powell explained that "[t]o the extent that race and ethnic background were considered only to the extent of curing established inaccuracies in predicting academic performance, it might be argued that there is no 'preference' at all."[211] Consistent with Justice Powell's observation, when a decisionmaker considers race to eliminate preferences embedded in the status quo, the equality harm so often associated with racial classifications is exposed as illusory.[212] Rather than constituting a deviation from neutrality, the racial classification is necessary to move closer toward a selection process that turns on individual merit, irrespective of one's race.

---

208.   *See* Experimental Psychologists' Brief II, *supra* note 159, at 5 ("A genuine merit-based admission policy therefore cannot rely on these numbers alone. An admissions policy that takes proper account of stereotype threat is not a *departure* from merit-based admissions, but is rather an effort to achieve *more accurate* merit-based admissions."); Feingold, *Racing Towards Color-Blindness*, *supra* note 111, at 259–60.

209.   Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 318 n.52 (1978) (plurality opinion) ("The denial to respondent of this right to individualized consideration without regard to his race is the principal evil of petitioner's special admissions program.").

210.   *Id.* at 306 n.43.

211.   *Id.* Although beyond the scope of this Article, Justice Powell's observation begs the question of whether strict scrutiny should apply to racial classifications designed to mitigate race-based mismeasurements. *Cf.* Richard J. Herrnstein & Charles Murray, The Bell Curve: Intelligence and Class Structure in American Life 280 (1994) ("If the SAT is biased against blacks, it will *underpredict* their college performance. . . . It would be as if the test underestimated the 'true' SAT score of the blacks, so the natural remedy for this kind of bias would be to compensate the black applicants by, for example, adding the appropriate number of points onto their scores."); Erman & Walton, *supra* note 14, at 378 (discussing the possibility of recalibrating test scores based on race); Paul R. Sackett & Steffanie L. Wilk, *Within-Group Norming and Other Forms of Score Adjustment in Preemployment Testing*, 49 Am. Psychologist 929, 933 (1994) (calling "score adjustment[s]" "a technically appropriate solution" in response to a finding of latent ability).

212.   In a sense, race-conscious policies designed to reduce racial preferences in the present are arguably more compelling than those designed to remedy an entity's prior discrimination—which itself remains the least controversial justification for racial classifications. *See* Grutter v. Bollinger, 539 U.S. 306, 328 (2003) ("It is true that some language in those opinions [decided since *Bakke*] might be read to suggest that remedying past discrimination is the only permissible justification for race-based governmental action.").

B. *Engaging Predictable Objections*

1. Judicial Incompetence

When confronted by the foregoing social science, one can expect several objections. First, as reflected in Justice Alito's dissent in *Fisher v. University of Texas at Austin* (*Fisher II*),[213] individual Justices may claim that they are incompetent to evaluate the underlying data.[214] *Fisher II* involved the University of Texas's (UT) admissions program, which engaged in a holistic review (including race) of a subset of applicants.[215] In a 4-3 decision authored by Justice Kennedy, the Supreme Court held that UT's consideration of race satisfied constitutional requirements.[216] In dissent, Justice Alito suggested that it was "more than a little ironic that UT uses the SAT, which has often been accused of reflecting racial and cultural bias."[217] Yet, in so stating, Justice Alito did not question whether UT's reliance on the SAT compromised commitments to meritocracy, nor did he otherwise engage the underlying social science on the merits. Instead, he sidestepped the claim's substance by suggesting that even if the SAT were racially biased, he was "ill equipped to express a view on that subject."[218]

It may seem odd for a Justice to publicly question his or her own competence to interrogate and evaluate social science. The Supreme Court has an extended history of mobilizing science to inform questions of constitutional equality. *Brown v. Board of Education*[219] offers one notable example.[220] This is not to suggest that the Supreme Court, or individual Justices, always exhibit a principled or consistent engagement with social science.[221] Nonetheless, Justices across the ideological spectrum have invoked, and continue to invoke, social science to dispute and champion contested empirical positions.[222]

---

213.    136 S. Ct. 2198 (2016).

214.    *Fisher II*, 136 S. Ct. at 2234 (Alito, J., dissenting).

215.    *Id.* at 2205–07 (majority opinion).

216.    *Id.* at 2214–15.

217.    *Id.* at 2234 & n.11 (Alito, J., dissenting). Interestingly, the stereotype threat brief discussed above is among the scholarship that Justice Alito offers to ground this point. *See id.* at 2234 n.11.

218.    *Id.* at 2234.

219.    347 U.S. 483 (1954).

220.    *See Brown*, 347 U.S. at 494 & n.11 (citing psychological studies to support the contention that segregated schooling harmed Black children).

221.    *See generally* Feingold & Carter, *supra* note 74 (exploring the Court's inconsistent treatment of social science and empirical evidence of discrimination in the equal protection context).

222.    *Compare Fisher I*, 570 U.S. 297, 331–33 (2013) (Thomas, J., concurring) (invoking research to suggest that affirmative action harms its beneficiaries who become "mismatch[ed]" at elite institutions), *with Fisher II*, 136 S. Ct. at 2212 (citing quantitative and qualitative evidence that racial diversity has pedagogical benefits), *and* Grutter v. Bollinger, 539 U.S. 306, 330 (2003) (invoking amici briefs describing research on the pedagogical benefits of racial diversity), *and* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 273–74 (1995) (Ginsburg, J., dissenting) ("Job applicants with identical resumés, qualifications, and interview styles still experience different receptions, depending on their race. White and African-American consumers still encounter different deals. People of color looking for housing still face discriminatory treatment by landlords, real estate agents, and mortgage lenders.

Given this backdrop, Justice Alito's comment in *Fisher II* appears out of place. Moreover, notwithstanding this selective avoidance, Justice Alito invoked multiple empirical claims within the same opinion that reflect precisely the sort of literacy he discounts.[223] If Justice Alito is ill equipped to express a view about social science that reveals *bias* within facially neutral metrics, it is difficult to identify the source of his authority to propound other empirical opinions and objections concerning the neutrality and *unbiased* nature of standardized tests such as the SAT.

In short, any claim of judicial incompetence proves too much. Although often unstated, equal protection doctrine is anchored to a constellation of empirical assumptions about the descriptive state of the world. To abdicate judicial authority to evaluate empirical claims that contravene lay theories embedded in doctrine is not a neutral or impartial act; but rather one that privileges a status quo that may itself lack any principled empirical foundation.

### 2.    Scientific Shortcomings

A separate objection is that the science is itself uncompelling, a claim that could occur at two levels of analysis. Broadly, the Supreme Court could reject social science's observations that racial mismeasures exist and predictably disfavor individuals from negatively stereotyped groups. The narrower objection is that, even if the science is valid and compelling, the science and technology is insufficient to establish a cognizable discrimination claim for an individual plaintiff.

Multiple factors mute the force of an objection to the social science generally. To begin, even the Supreme Court's most conservative Justices have recognized the existence of conscious and unconscious racial biases. *McCleskey v. Kemp*[224] offers a compelling illustration. In *McCleskey*, the Court confronted empirical evidence that Georgia's capital punishment regime discriminated against Black defendants.[225] A conservative majority rejected Warren McCleskey's constitutional claim, but not because the evidence was insufficient to establish systemic disparate treatment.[226] To the contrary, Justice Scalia's conference memorandum revealed no misgivings regarding the prevalence of racial bias: "[I]t is my view that the unconscious operation of irrational sympathies and antipathies, including racial, upon jury decisions and (hence) prosecutorial [ones], is real, acknowledged [by the cases] of this court,

---

Minority entrepreneurs sometimes fail to gain contracts though they are the low bidders, and they are sometimes refused work even after winning contracts. Bias both conscious and unconscious, reflecting traditional and unexamined habits of thought, keeps up barriers that must come down if equal opportunity and nondiscrimination are ever genuinely to become this country's law and practice." (footnotes omitted)).

223.  *Fisher II*, 136 S. Ct. at 2216–19, 2226–30 (Alito, J., dissenting).

224.  481 U.S. 279 (1987).

225.  *See McCleskey*, 481 U.S. at 286–91 (reviewing the Baldus study, which examined "over 2,000 murder cases that occurred in Georgia during the 1970's").

226.  *See id.* at 292–99.

and ineradicable, I cannot honestly say that all I need is more proof."[227] This disconcerting statement reveals that, at least for Justice Scalia, the descriptive reality of implicit bias and its impact on human judgment was a given.[228]

The state of the science buttresses Justice Scalia's personal account. Support can be found in competing meta-analyses that analyzed the correlation between implicit bias and discriminatory behavior. A meta-analysis authored by the creators of the Implicit Association Test found that implicit bias is systemic and predictably leads to discriminatory treatment in socially sensitive domains.[229] Coming from the IAT's creators, one might be wary of such results. As such, an even stronger case for implicit bias's real world impact arguably comes from an unexpected source: a meta-analysis authored by experts commonly hired to contest the impact of implicit bias.[230] This competing study also observed a correlation between bias and behavior.[231]

Stereotype threat, moreover, comprises one of the most widely studied psychological phenomena of the past thirty years.[232] Meta-analyses and hundreds of laboratory and real-world studies have documented stereotype threat's widespread impact.[233] Support for stereotype threat also comes from an unlikely source: scholars from the team that authored the anti-implicit-bias meta-analysis. Specifically, Gregory Mitchell and Philip Tetlock have both invoked the stereotype threat research to support their critique of implicit bias.[234] Ultimately, even if the science of racial mismeasures has not reached "metaphysical certitude," it offers demonstrably more than the evidence—or lack thereof—that underlies multiple empirical assumptions that continue to govern constitutional doctrine.[235]

---

227. Memorandum from Justice Antonin Scalia to the Conference (Jan. 6, 1987) (on file with the Library of Congress, Thurgood Marshall Papers).

228. *See id.*; *see also* Grutter v. Bollinger, 539 U.S. 306, 345 (2003) (Ginsburg, J., concurring) ("It is well documented that conscious and unconscious race bias, even rank discrimination based on race, remain alive in our land, impeding realization of our highest values and ideals.").

229. *See* Greenwald et al., *Meta-Analysis of Predictive Validity*, *supra* note 124, at 24 (observing average predictive validity correlation of r = .236 on racially discriminatory behavior); *see also* John T. Jost et al., *The Existence of Implicit Bias Is Beyond Reasonable Doubt: A Refutation of Ideological and Methodological Objections and Executive Summary of Ten Studies That No Manager Should Ignore*, 29 RES. ORGANIZATIONAL BEHAV. 39 (2009) (responding to critiques of the research on implicit bias).

230. *See* Oswald et al., *supra* note 125, at 171, 178 (observing estimated population correlation of 0.15 for the "race domain").

231. *See* Kang, *Rethinking Intent and Impact*, *supra* note 119, at 631.

232. *See* Schmader et al., *supra* note 152, at 336 ("Stereotype threat has become one of the most widely studied topics of the past decade in social psychology.").

233. *See supra* Part II.B.

234. *See* Gregory Mitchell & Philip E. Tetlock, *Antidiscrimination Law and the Perils of Mindreading*, 67 OHIO ST. L.J. 1023, 1119 & n.298 (2006) ("[M]aking African American participants vulnerable to judgment by negative stereotypes about their group's intellectual ability depressed their standardized test performance relative to White participants, while conditions designed to alleviate this threat, improved their performance." (alteration in original) (quoting Steele & Aronson, *supra* note 153, at 808)).

235. *See* Kang, *Rethinking Intent and Impact*, *supra* note 119, at 634–35 ("[S]kepticism should be even-handed. It should not be naïvely and selectively trotted out against politically inconvenient

But even if Supreme Court Justices accept racial mismeasures as a generalizable phenomenon, they may nonetheless challenge the relevance of such evidence to an individual plaintiff's discrimination claim. Such a move—accepting the social science but minimizing its doctrinal relevance—would parallel *McCleskey*, in which a conservative majority deemed evidence of systemic discrimination constitutionally irrelevant.[236] Notwithstanding *McCleskey*, a selection process that employs racial mismeasures contravenes a commitment to every individual's right to compete. Moreover, constitutional precedent spanning *Bakke* to *Croson* and *Lesage* to *Fisher II* identifies a constitutional harm in the presence of a selection process that compromises this commitment, whether or not the plaintiff would have realized the desired benefit in its absence.

CONCLUSION

If one takes the science seriously, it becomes apparent that equal protection doctrine incentivizes the government to adopt decisionmaking processes that will contravene the right to compete. Nonetheless, there is little reason to believe the Supreme Court, particularly its conservative members, will do anything about it. If this proves accurate, and the Supreme Court ignores evidence that equal protection doctrine undermines the normative values it is ostensibly designed to uplift, one is forced to ask what is actually driving the Supreme Court's adjudication of equal protection cases.

If not the right to compete, then what? At a minimum, ongoing judicial indifference to the science of racial mismeasures suggests that the Supreme Court's commitment to individual meritocracy is more conditional and contingent than the Justices would suggest. Thus, even were one to accept the right to compete as a genuine normative commitment, it is difficult to ignore that the Supreme Court's once uncompromising commitment to this principle has eroded as the principle no longer justifies prevailing doctrinal arrangements. Taken one step further, one may ask whether individual meritocracy has historically functioned not as an end to realize but rather as a means to justify and rationalize a doctrinal regime that foreseeably reproduces and reaffirms racial hierarchy and inequality in the United States.

---

findings and not against, for example, the psychological 'common sense' assumptions littered throughout the status quo, most of which have never been empirically tested. . . . [I]f we demand metaphysical certitude of one set of empirical claims, we should demand the same certitude of all comparable empirical claims." (footnote omitted)).

236.   *See* McCleskey v. Kemp, 481 U.S. 279, 297 (1987) ("The unique nature of the decisions at issue in this case also counsels against adopting such an inference from the disparities indicated by the Baldus study. Accordingly, we hold that the Baldus study is clearly insufficient to support an inference that any of the decisionmakers in McCleskey's case acted with discriminatory purpose.").