Othering & Belonging Institute

Advancing Racial Equity

Legal Guidance for Advocates

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I. Introduction

In the last decade or so, there has not only been growing public awareness of the persistence of racial inequality in American society, but more organized efforts and programmatic initiatives launched to address it. An array of corporations, community groups, philanthropic organizations, and local governments committed themselves to advancing the cause of racial justice, putting forth grants and investments, ambitious policy proposals, and new programs. We cataloged over a 1,000 policy proposals and general recommendations in our "**structural racism remedies project,"** and analyzed the scope and similarities across these various proposals. Our compendium demonstrates the diversity and breadth of ideas and methods to address this trenchant problem.

In spite of these efforts and investments, this is a challenging and confusing time for advocates for racial equity and supporters of racial justice. There are political, cultural, and legal headwinds. State legislatures in more than two dozen states have targeted both "DEI" ("diversity, equity, and inclusion") programs and initiatives within their jurisdictions while also drawing stricter regulations or prohibitions on the teaching of race in the classroom, including history and concepts like "systemic" and "structural racism."[1] The federal government, spearheaded by the Trump administration, is actively dismantling programs across federal institutions, and threatening to withhold funds from public and private entities that receive federal funding.[2] And the federal courts, under the direction of the US Supreme Court, has severely curtailed the ways that public institutions can consider race to advance these goals.[3]

In particular, prevailing interpretations of US constitutional law as well as other state and federal laws present significant challenges and impediments to the successful implementation of racial equity policies and programs. These provisions have been used by opponents to challenge or overturn many of these policies or initiatives.

Legal compliance may significantly constrain or foreclose forthright and direct approaches to equitable policy and program design or implementation. Legal challenges can reverse or stymie years of careful planning and effort. Even the threat of meritless litigation can chill the development and enthusiasm for such efforts. At the conception or design stage, risk-averse or liability-avoidant guidance by counsel or partners may narrow a range of possibilities.

This guidance is designed to help advocates and institutional leaders understand prevailing interpretations of law with a greater degree of nuance and precision than is typically available. It clarifies what is permissible and what is generally prohibited, and provides many examples to illustrate these ideas.

In the face of these legal constraints and political attacks, there are three broad orientations which racial equity advocacy groups and organizations with race-conscious programs tend to adopt. The **first** orientation is courageous defiance. This is an approach that boldly seeks to promote racial equity unabashedly and directly even in the face of possible legal challenge or contrary to prevailing law. This approach is not intimidated by a hostile judiciary, political threats, or fears that stimulating race-consciousness in policy debates might engender backlash. This is an approach that regards much of our prevailing jurisprudence or law (like the anti-CRT bills[4] or Ward Connerly's anti-affirmative action ballot initiatives[5]) as a product of a reactionary, racist backlash, similar to the sensibility that undergirded *Plessy v. Ferguson*,[6] and refuses to acquiesce.

The **second** possibility is the opposite: given the legal constraints and risk of liability, this orientation completely abandons any forthright attempt to address racial inequality or inequity, and relies entirely on universalistic, class-based, or wholly race-neutral approaches that may ultimately help reduce racial disparities or inequities, while disguising the racial purpose or goal. This timid approach is not only risk avoidant, it cedes the symbolic and narrative importance of centering racial equity in policy and programming debates.

The **third** possibility charts a middle course: it seeks to forthrightly advance racial equity objectives while hewing as closely as possible to prevailing legal constraints and limitations. It is risk avoidant, but not risk averse. It seeks to place carefully designed racial equity efforts onto a firmer legal foundation and avoids obvious legal pitfalls, but it is not so fearful that it believes it must avoid any possible legal challenge. This approach takes an honest assessment of legal risks and seeks to avoid them, while nonetheless acknowledging that no serious effort can be entirely risk-free.

Frivolous lawsuits and meritless legal challenges can be brought regardless of how strong the legal basis or faithful the effort to comply with existing law may be. Furthermore, the law continually evolves, and there are always indeterminacies and ambiguities that remain unresolved. No matter how clear a legal rule or precedent may seem, a future iteration of the Supreme Court may overturn it or take a different approach in future cases. Relatedly, lower courts do not always accurately or faithfully apply prevailing legal standards, and even meritless suits may require litigation to defend well-designed good faith policies.

This memorandum has been developed for advocates willing to take this middle course. It also seeks to clarify a few common but unfortunately pervasive misunderstandings that prevail in existing guidance for racial equity advocates. Accordingly, the next section of this memo attempts to clarify terms and key ideas. It differentiates between types of race-conscious policy design, which are too often conflated in ways that undermine the development of high-quality policies and initiatives.

The third section of this memo summarizes current legal doctrine on race-consciousness, with specific examples of how that doctrine is understood and applied.

The fourth section sets out possible ways to advance race-conscious policy objectives and pursue greater racial equity within prevailing doctrine. This memo is replete with examples of a variety of race-conscious policies in order to help readers understand what these nuanced differences mean in practice.

Because it is long and complex, **we have added an FAQ to accompany this guidance**. Please feel free to consult that if you find yourself getting lost in the weeds here.

II. Terms and Key Ideas

Unfortunately, the terminology and common vernacular used to describe these various policies is generally unhelpful because it tends to obscure or conflate critical and meaningful distinctions between policy types and forms. Nowhere is this more often the case than with the concept of "**race-consciousness**."

1) Race-Conscious Policies

Definition

Race-consciousness is the idea of designing a policy, program, initiative, or taking action with either a racial purpose, goal *or* objective or with awareness of racial effects or racial conditions that inform the policy. Race-conscious policymaking encompasses an enormous range of possible activity. The key is awareness of race, either as to an action or policy's purpose or in terms of possible or likely effects.

Examples

- The Poll Tax Amendment:[7] The 24th Amendment to the Constitution prohibits the use of poll taxes, which were used as a mechanism to specifically disenfranchise Black voters in the south.

- Racial data collection and tracking: This includes the collection and reporting of racial statistics (like the decennial census[8]) which track population composition, population trends, the distribution of people by race, and various characteristics of racial groups, including rates of unemployment, homeownership, income, wealth, life expectancy, and rates of infectious disease (often collected at the state level).

- Affirmative Action: Hiring or admissions policies designed to give a boost to members of underrepresented or historically disadvantaged racial groups.

- The Texas Ten Percent Plan: The Texas legislature adopted this policy in 1997, which guaranteed admission to the University of Texas-Austin to the top 10 percent of every public high school graduating class (since amended to cap at 75 percent of the undergraduate body).[9] The policy was designed and adopted after courts struck down affirmative action in *Hopwood v. Texas*,[10] and so it was designed to promote racial diversity in the UT undergraduate body.

- "Affirmatively Furthering Fair Housing":[11] a policy instructing federal agencies, states, and localities to promote racial residential integration by devising policies that reduce segregation and create more opportunities for integrative housing choices.

- State-level drawing of political district boundaries in ways that preserve, rather than carve up, majority-minority districts to comply with the 1965 Voting Rights Act.

Misunderstanding

Since race-consciousness refers to virtually all racially-aware policymaking, it can be confusing and misleading when it is more specifically used to refer to a subset of policies that are racially-targeted, race-specific or race-based.

2) Race-Based Policies

Definition

Race-based policy is the Supreme Court's prevailing vernacular for describing policies that are more than merely race-conscious: they are policies that use race as a decision or selection criterion, generally at the individual level (aka the "retail-level" use of race).[12]

Examples

- University-based Affirmative Action Policies: University admissions policies which consider the race of the individual applicant (if they indicate their race by checking a box) and may use that fact as a potential boost or benefit in the admissions process.[13]

- Minority-Business Set-Asides: Municipal or state-based contracting or procurement policies which set aside a certain portion of contracts, sub-contracts or contracting dollars for businesses certified as minority-owned or owned by members of underrepresented racial groups (URMs).

- Government Imposed Racial segregation: Jim Crow laws that segregated people in public accommodations, schools, or transit on the basis of race. These laws were race-conscious, meaning they were designed with a racial purpose.

Misunderstanding

All race-based policies are also race-conscious, but not all race-conscious policies are race-based. This is a source of tremendous confusion and conflation. And since there is a legally relevant difference between them, it will be discussed below.

3) Universalistic Policies

Definition

Universal policies are those that aspire to serve everyone without regard to group membership, identity, status, or income.[14] They often establish a goal or minimum protection for the general population. Accordingly, universal policies generally apply to everyone and to all groups within the policymaker's or administrator's jurisdiction. They tend to treat all people the same. Thus, they are universalistic in both their intended scope and in terms of their implementation or operation.

Examples

- Free, universal public education: The provision of public educational services to all people of a certain age (generally 5-18) irrespective of gender, sex, race, ethnicity, religion, or national origin.

- Universal suffrage: A basic principle of modern democracy, these are policies that extend voting rights or protect them irrespective of gender, race, or religion. Nonetheless, universal suffrage is generally restricted to adults attaining some age of majority, such as 18 or 21.

- Universal basic income: Policies that provide an income subsidy or supplement irrespective of income, employment, race, gender, ability or age (above some minimum). Similarly, baby bonds proposals for dealing with wealth gaps are universal, if they apply to every newborn.[15]

- Minimum wage laws: Laws or safety standards that prescribe a minimum condition, wage or uniform floor of benefits irrespective of occupation, race, gender, etc.

- Universal health care programs: Health care provision systems, such as single-payer systems, which apply to everyone in the jurisdiction. There are no other qualifying standards that must be met, besides, possibly, citizenship and/or residence in that jurisdiction.

Misunderstanding

Nominally accurate, no universal policies are truly "universal." They all have some limiting condition (such as residency, citizenship or age), or a set of exceptions. For classification purposes, however, they are regarded as universalistic.

Another misunderstanding is that some, but not all, universalistic policies may be considered race-conscious. The Poll Tax Amendment, for example, is universalistic, but also race-conscious. The framers of that amendment considered a race-targeted version of that amendment, but decided on a universalistic approach instead.[16]

As president, Barack Obama claimed that "a plan for universal health-care coverage would do more to eliminate health disparities between whites and minorities than any race-specific programs we might design."[17] The purposes section of the text of the Affordable Care Act, his subsequent legislative priority, states that "The purpose of this title is to improve access to and the delivery of health care services for all individuals, particularly low income, underserved, uninsured, minority, health disparity, and rural populations."[18] In this regard, we can consider the Affordable Care Act (also known as Obamacare) to be a race-conscious policy. One of the explicit objectives was to improve access to minority groups, even though it also has the universalistic language of "all individuals."

4) Targeted Policies

Definition

Targeted policies are those that extend their benefits or protections only to members of a targeted group. Targeted policies single out specific populations or make provisions for selected groups, generally, to the exclusion of others. Benefits or protections based on targeted policies depend on group membership or another categorical basis of eligibility, such as status or income.

Examples

- The Servicemen's Readjustment Act of 1944, also known as the G.I. Bill.[19] This law targeted military servicemen and provided subsidized education, loans, and health care to veterans returning from World War II.

- The Food Stamp Program (now redesigned as the Supplemental Nutritional Assistance Program, or SNAP).[20] This program provides food to low-income families that might be at risk of hunger or malnutrition.

- The Age Discrimination in Employment Act (ADEA) of 1967. This bill specifically extended its protections to workers "over the age of 40" based upon a finding that "older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment, when displaced from jobs."[21]

- Some reparations proposals: Reparations proposals aimed at specific racial or ethnic groups or a subset of members of those groups, such as reparations for

the Japanese internment or for American slavery, can be considered "targeted" policies as those benefits only extend to members of those groups or subgroups or their descendants.[22]

- Remedial affirmative action policies: Affirmative action policies based upon remedying past discrimination or rectifying past harms (as opposed to those that are based upon promoting diversity) can be considered targeted policies, in the sense that they provide a specific boost or benefit to members of formerly disadvantaged groups.

Misunderstanding

Not all race-targeted policies treat all members of a single racial group the same. A reparations policy that targets descendants of American slaves, for example, is race-targeted and race-based, but it would limit its benefits in a way that excludes many Black Americans, particularly those that are not descendants of American slaves, such as children or grandchildren of African or Caribbean immigrants.

A reasonable nuance would be to characterize such policies as *race-specific* instead of race-targeted, since they are sensitive and particular to race, but don't treat members of the same race categorically the same.

Another point of confusion is that not all race-based policy is racially targeted, but most race-targeted policies are race-based.

5) Race-Neutral Policies

Definition

Race "neutral" policies are the Supreme Court's short-hand way of describing policies that lack racial (or gender) classifications.[23] They may or may not be race-conscious.

Examples

- The Affordable Care Act: This policy does not differentiate between beneficiaries on the basis of race.

- The Texas Ten Percent Plan: This policy awards automatic admission to the University of Texas based on graduating within the top 10 percent of a high

school class. The classification is race-neutral, as it classifies high school class-rank, not racial identity, as the admissions criterion.[24]

- Qualification or Promotion Examinations and Tests: In 2009, the city of New Haven's firefighter examination was described as race-neutral, as there was no reason to believe that members of different racial groups would perform differently based upon the content, even though it had a racially disparate statistical outcome among test-takers.[25]

Misunderstanding

Race-neutrality as a technical legal characterization does not mean that a policy is neither race-conscious nor lacks an observable (perhaps significant) racial effect. Many policies that are ostensibly race-neutral have disparate racial effects. Neutrality refers to the intended design of the policy, and specifically that it does not use race as a decision or selection criterion.

The reason this is confusing is because race-neutral implementation mechanisms (processes) are sometimes deployed in service of race-conscious objectives (purposes). The prevailing and current interpretation of the Constitution permits – and even encourages or requires – such race-neutral means in pursuit race-conscious objectives.[26]

This distinction is a source of considerable confusion. Even Supreme Court justices have pointed out how the technical legal characterization here may contravene more common-sense understandings, as when Justice Ruth Bader Ginsburg bitingly observed that "only an ostrich could regard the supposedly neutral alternatives [considered or used by the University of Texas, including the Texas Ten Percent Plan] as race unconscious."[27]

Only by observing the distinction between *purpose* and *process* in policy design can we maintain clarity and make sense of the Supreme Court's precedent on what is meant by "race-neutrality." Not only can race-neutral processes be deployed in service of race-conscious objectives, but the court's jurisprudence explicitly encourages this, as described below.

III. The Law

Now that we have a basic grasp of the key distinctions and nuances between different policy types, we can now explain the legal relevance of these distinctions under American constitutional law.

A. The Presumption Against the Use of Racial Classifications

The equal protection clause of the 14th Amendment states that "No state shall […] deny to any person within its jurisdiction the equal protection of the laws."[28] Although textually aimed at states, this provision has been interpreted to extend and apply to the federal government, as well as all public entities (public schools and universities, agencies, departments, local governments, military institutions, etc.).[29] The main limitation is that it does not apply to private entities, individuals or institutions.[30] Title VI of the 1964 Civil Rights Act, however, has been interpreted similarly, and does extend to private entities (such as private universities or corporations) that receive federal funding.[31]

To simplify this, the Supreme Court has essentially interpreted the equal protection clause to prohibit **A) proven intentional discrimination based upon invidious motives** and **B) the use of racial classifications.**[32] As the court explained in *Washington v. Davis*, 426 U.S. 229 (1976), "The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race."[33]

One way to establish impermissible racial discrimination is to demonstrate a discriminatory purpose or intentionality. As the court explained in *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252 (1977), plaintiffs must prove that a "discriminatory purpose was a motivating factor" behind the policy.[34] To do this, courts may examine "such circumstantial and direct evidence of intent as may be available."[35] This includes the "historical background of the decision as one evidentiary source, particularly if it reveals a series of official actions taken for invidious purpose," and the "legislative or administrative history … ,especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports."[36] The Supreme Court's precedent over the past 50 years has established that proving discriminatory intent is not easy under the equal protection clause. Many policies that were superficially race-neutral, but seemed motivated by racial considerations, survived challenge. The fact that a policy or government action has a disparate racial impact will not suffice; nor is awareness of possible racial effects. This is why most of the Supreme Court's constitutional jurisprudence of race in the last 50 years has tended to focus on a different, but related doctrine.

Alternatively to the "intentional discrimination" framework, the court has established that race-based policy—the use of racial classifications—is a presumptive constitutional violation. As the court summarized in *Parents Involved in Community Schools v. Seattle School District* No. 1, 551 U.S. 701 (2007):

"It is well established that **when the government distributes burdens or benefits on the basis of individual racial classifications, that action is reviewed under strict scrutiny.** Johnson v. California, 543 U. S. 499, 505–506 (2005) ; Grutter v. Bollinger, 539 U. S. 306, 326 (2003) ; Adarand, supra, at 224. As the Court recently reaffirmed, " 'racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification.' " Gratz v. Bollinger, 539 U. S. 244, 270 (2003) (quoting Fullilove v. Klutznick, 448 U. S. 448, 537 (1980) (Stevens, J., dissenting); brackets omitted). In order to satisfy this searching standard of review, the school districts must demonstrate that the use of individual racial classifications in the assignment plans here under review is "narrowly tailored" to achieve a "compelling" government interest. Adarand, supra, at 227."[37]

Equal protection challenges to equity policy development and implementation will generally be based on the general prohibition against the use of racial classifications, or anti-classification jurisprudence. Therefore, it is important to understand what constitutes a racial classification. In practice, very few policies will survive this standard of review. Once the presence of a racial classification has been established, the challenged policy will likely be overturned or struck down.

A careful review of the Supreme Court's racial classifications reveals five elements. A "racial classification" is:[38]

1. an official government label or designation
2. proclaiming, identifying or specifying the race
3. of a particular individual,
4. which is then the basis for allocating or differentially distributing benefits or imposing burdens,
5. on the person or individual classified.

There are nuances to each of these elements, and possible exceptions found in federal jurisprudence, but in general, they each hold. The critical feature, however, is the fourth element. This is why the decennial census, which asks individuals to identify their race and/or ethnicity, is not an unconstitutional government policy. Although the aggregate census count is used to distribute federal funds and congressional seats, no individual is treated differently because of their responses on the census form.

A few other examples may help illustrate what is, and what is not, a racial classification.

Example 1

Suppose a city adopts a contracting scheme designed to help Black-owned businesses. It decides that 15 percent of all city contracts should go to Black-owned businesses and at least 12 percent of all contract dollars. Would this policy be vulnerable to an equal protection challenge?

Answer: Yes. The city would have to determine which businesses are Black-owned, and then label them as such. In that sense, it is both a race-label and an official one, satisfying the first two elements. Although the *business* may be designated as Black-owned, the individual *owner* is also designated as Black (element 3). That owner, and the business they own, are then receiving an advantage or benefit in the administration of public contracting, satisfying elements 4 and 5. The benefit or advantage is that in the competition for contracts, Black business owners are more likely to receive that award. This policy would likely be held unconstitutional.

Example 2

Suppose a school district wants to hire more Black teachers. To do that, suppose the school board adopts a policy that directs additional outreach to Historically Black Colleges and Universities (HBCUs) to increase the number of Black teachers in the applicant pool. One way of doing this is to send more recruitment staff or letters to those universities encouraging students to apply. Would this policy be vulnerable to an equal protection challenge?

Answer: Probably not. Just because the district is conducting targeted outreach to HBCUs does not necessarily mean that they are classifying individuals (let alone teaching applicants) on the basis of their race, and giving them an unequal advantage or benefit. No applicant who subsequently applies is necessarily being labeled. There are white and other non-Black students who attend and graduate from HBCUs, and the racial identity of the applicant is not being considered in the application review, interview, or selection process as a result of this policy. The elements of racial classification are absent from this race-conscious policy.

It is important to emphasize that the racial classification test is an objective one: it is whether the race of an individual is actually being considered or not; not the intent of the policy-maker, admissions committee or hiring manager, nor the aggregate or cumulative effect of the decisions of those actors.

Example 3

Suppose a state agency designs a diversity policy and establishes aspirational hiring targets for members of certain under-represented racial groups. It seeks to reach these targets by broadening the applicant pool, conducting deeper and more extensive outreach, and more widely advertising open positions. Moreover, the hiring managers are strictly instructed, and trained, *not* to consider the race of individual applicants in pursuing those goals, and they appear to be following this direction. Would this policy be race-conscious? Would it entail racial classification?

Answer: The policy is clearly race conscious, but it does not entail racial classification. This kind of policy is perfectly permissible.

Example 4

Suppose a state agency operationalizes a diversity policy by creating, as a new hiring criterion, the factor of "lived experience" in hiring processes. Would this be race-based?

Answer: It depends on how this is operationalized. This factor is more likely to survive a legal challenge if it is broad and multi-faceted rather than narrow and single-dimensional. If it is used to boost the applications of people from a variety of backgrounds, not just people of certain racial identities, then it would probably not be regarded as a race factor. On the other hand, the greater the extent to which an identity category corresponds to a form of "lived experience," the more likely it could be regarded as a racial proxy or cover for consideration of prohibited identities or identity categories.

In an ordinary case of a racial classification, the applicant for a job, contract, or educational opportunity is being evaluated, and their race is a factor in that decision. If the race of a contractor, student or applicant is considered, strict scrutiny is triggered, and the policy or action is presumptively unconstitutional. If the race of that person is not being considered, then strict scrutiny does not trigger, even if the intent or effect is racial.

If the race of that person was not considered, but the policy is still being challenged, then the plaintiff suing the institution will be claiming, in essence, that their race actually was considered, even if the institution claims it wasn't. In other words, the plaintiff is accusing the institution or hiring manager, in that case, of lying or deception.[39]

If race was considered, even if the defendant claims it wasn't, then the defendant would be liable. If the race of the individual was not considered, then the defendant should not be liable. The next part of this memo (section IV) will show how this can work, with a variety of race-correlated indicators.

B. Surviving Strict Scrutiny Review

The use of racial classifications is not automatically unconstitutional. It is merely *presumptively* so. The reason for this nuanced distinction is that it is possible to survive a challenge under strict scrutiny review. To do so, however, the government authority which adopted the policy must have 1) a compelling government interest to justify the policy, and 2) they must have devised the policy in a way that is "narrowly tailored."[40]

The Supreme Court has not provided unambiguous and unequivocal guidance on how this may be accomplished, but there are some general principles that can be discerned.

1) Compelling Government Interests

Thus far, the Supreme Court has only identified a handful of "government interests" it deems so compelling that they can justify the use of individual racial classifications in policymaking and administration. Foremost among them is remedying past intentional discrimination.[41] Where courts have found government entities responsible for past harm, they are permitted to remedy that harm with the use of racial classifications. But the remedy must be narrowly tailored to past proven harm.

Another prominently identified compelling interest is the goal of "promoting diversity."[42] This conception of diversity is a holistic one that includes, but is not limited to, racial diversity. Thus, in selecting student bodies, universities may consider an applicant's contribution to the diversity of the student body, including, but not limited to, their religion, ethnicity, race, sexual identity, and so forth. Although technically good precedent, the Supreme Court's recent decision ruling against Harvard University and the University of North Carolina's race-based admissions policies makes this an unreliable ground upon which to base a race-conscious policy.[43]

Another interest that has been articulated, but has not yet been endorsed by a majority of the court, is an interest in avoiding "racial isolation," and the harms that flow therefrom, at least in the K-12 context.[44] It is unclear to what extent courts will permit racial classifications in support of this interest.

Some members of the court have been open to other government interests, including a penological interest in safety within prisons and jails, although a majority of the court rejected this.[45] It is likely, however, that the court would find that an overall interest in public safety could justify the use of narrowly tailored racial classifications, especially in the context of a public emergency.[46]

2) Narrow Tailoring Requirements

Similarly, there is a lack of complete clarity regarding the precise ways in which a policy must be designed to be considered "narrowly tailored." Some commentators have discerned five elements of narrow tailoring from Justice O'Connor's *Grutter* decision.[47] Others see less.[48] In general, however, a few key principles appear to be clear.

First, a narrowly tailored policy employing racial classifications is a policy that has been adopted after considering race-neutral alternatives.[49] It is unclear whether those alternatives must have been attempted and tried, or whether they merely need to have been seriously entertained and evaluated (that is, exhausted and found wanting versus merely considered).[50] But the consideration of race-neutral alternatives appears to be a critical aspect of narrow tailoring.

Second, a narrowly tailored policy is one that is limited in certain ways to minimize any harms that may result from the use of racial classifications. The Supreme Court has made clear that the use of race is a dangerous business in policymaking, and "narrowly tailored" policies are those that are carefully limited to minimize potential harms. Policies that are narrowly tailored may have a more limited scope or reach than a more broadly tailored one. They may also have a sunset provision or a trigger for periodic review or reconsideration. Those elements make it more likely that a court will find a policy to be "narrowly tailored."

In recent decades, the Supreme Court has only upheld the use of racial classifications under strict scrutiny review a few times.[51] In general, the main issue was whether the policy was "narrowly tailored." Because it is so difficult to survive strict scrutiny review, race-conscious policies designed to advance equity are often going to be less vulnerable to legal challenge and more secure if they avoid the use of racial classifications altogether.

Example 1

Suppose a state agency empowered to promote homeownership through various subsidy programs sets as a goal to reduce the Black-white disparity in homeownership rates. It seeks to achieve this goal by specifically increasing Black rates of homeownership by awarding those subsidies only to Black recipients. Would this policy survive an equal protection challenge?

Answer: No. Because beneficiaries will be classified by race through the natural operation of the program, this policy will be subject to strict scrutiny review. Even if a compelling governmental interest could be articulated, it is unlikely that this would be considered a narrowly tailored policy.

Example 2

Suppose the same state agency establishes a public goal of reducing the Black-white disparity in homeownership rates, but seeks to achieve this goal by prioritizing investments in historically disadvantaged neighborhoods, neighborhoods with lower rates of homeownership, or other geographic factors. Would this policy survive an equal protection challenge?

Answer: Yes. Although there is an explicit race-conscious objective, it is specifically pursued by race-neutral selection criteria. Therefore, this policy need not be supported by a compelling government interest nor narrowly tailored because it will not even be subject to strict scrutiny review in the first place. Nor should it make a difference whether the goal of reducing Black-white disparities in homeownership rates is internal or part of the public plan. The Supreme Court's precedent repeatedly affirms not only that "facially neutral, racially allocative state action that benefits subordinate groups is constitutionally permissible," it is encouraged as an alternative to the use of racial classifications.[52]

IV. Race-Conscious Policies Without Racial Classification

The law broadly permits government entities, including states, federal agencies, and even local governments to try to reduce racial disparities in their jurisdictions or within their cognizance. Policymakers are not required to sit by and allow such disparities to fester or metastasize. But the key to the legal viability, security and sustainability of most equity policies will be to design race-conscious policies without racial classification. There are many ways to achieve this. In general, the basic idea will be to select proxies or race-neutral alternatives to accomplish race-conscious policy objectives.

A. Data Collection, Analysis, and Monitoring

The gathering, collection, collating, analyzing, tracking and monitoring of data or statistics dealing with race is not going to constitute a racial classification.[53] Recall that a racial classification arises only when there is a benefit or burden awarded to individuals who are labeled on the basis of race, not the mere fact of being labeled. Otherwise, the census would be unconstitutional.

Example 1

Suppose a state agency decides it wishes to analyze its workforce and employee performance for any possible racial disparities. Suppose it decides to begin tracking performance by race. A white employee sues, claiming that they are being racial classified. Does this suit have merit?

Answer: No. This suit will most likely be dismissed because there is no benefit or burden being imposed or extended as a direct result of the data collection and analysis.

Example 2

Suppose the state agency is collecting and analyzing workforce data for possible racial disparities because it has set a goal of reducing those disparities by one-half over 10 years. Does the presence of a racially explicit objective make a difference?

Answer: No. Again, any challenge will most likely be dismissed because there is no benefit or burden being imposed or extended as a direct result of the data collection and analysis.

Part of the purpose behind the data collection and analysis might be the public education function that such processes serve as well as helping with evaluation and monitoring of the effects of various policies, engendering greater policymaker sensitivity towards possible impacts of policy on racial disparities. These purposes are race-conscious, but they do not entail racial classifications.

B. Process-Based Policies

In general, all process-based recommendations, including, but not limited to trainings, lectures, readings and the like are not going to entail the use of racial classifications. Required DEI or implicit bias trainings do not label individuals on the basis of race and then award or deny a benefit as a result. These “process”-based policies are unlikely to result in successful legal challenges.

Example

Suppose a utility district mandates DEI trainings for all new employees. An employee sues claiming that they are being disadvantaged for being "white." Does the suit have merit?

Answer: No. The training does not differentiate between any participants on the basis of their race in any way. The training is required only of new employees, and the classification is whether the employee is new.

C. Race-Proxies: Demographic and SES indicators

The use of proxies for racial identity, including, but not limited to, income, educational attainment, wealth/poverty, housing tenure, or neighborhood residency, among other factors, by definition does not entail racial classification. Even if these factors are explicitly being used because they are, individually, or in combination, highly correlated with race and racial group identity, they do not label an individual because of their race. In fact, they avoid doing that.

The use of race-proxies in the form of demographic or socio-economic factors will survive an equal protection clause challenge based on anti-classification jurisprudence, even if the particular objective or goal is race-conscious. Instead, a plaintiff challenging the policy will need to claim that the policy is intentionally discriminatory, a much more difficult claim to advance,[54] especially if the goal is one that courts have said constitute a compelling government interest, such as promoting racial diversity.

Example 1

Suppose a school district wishes to devise an attendance policy based upon zones created from three factors: parental education, the number of students qualifying for free and reduced-price lunch, and the median home value in the neighborhood. The goal of the policy is to promote economic diversity in each school and to reduce racial isolation. Would this policy survive an equal protection clause challenge?

Answer: Yes, and in fact this is very similar to a policy that the Berkeley Unified School District adopted, although it went further and even considered the racial demographics of the neighborhoods.[55] As the reviewing court noted, no student is classified on the basis of race in the administration of this policy.[56]

In the business context, factors such as capital requirements, bonding requirements, and size or experience of the firm could be used as race-proxies. Thus, an equity contracting policy that waived bonding or capital requirements for small firms could advance racial equity without creating a legal vulnerability to challenge as a racial classification.

Some equity advocates now caution against using "proxies" or the term. This may be based upon the dicta found in the recent Supreme Court decision warning that "[W]hat cannot be done directly cannot be done indirectly." Some interpret this to mean a warning shot from the Court to avoid the use of indirect racial indicators or proxies. Although that interpretation cannot be entirely foreclosed, given the ambiguity of the phrase, that does not appear to be the primary intended meaning. The remainder of the paragraph clarifies:

"A benefit to a student who overcame racial discrimination, for example, must be tied to that student's courage and determination. Or a benefit to a student whose heritage or culture motivated him or her to assume a leadership role or attain a particular goal must be tied to that student's unique ability to contribute to the university. In other words, the student must be treated based on his or her experiences as an individual—not on the basis of race."

In other words, the Court is saying, once again, that even if institutions want to credit factors that are correlated with race, racial identity or racial experience, they may, so long as they are not directly evaluating a person based upon their race. This accords with the general view among conservative jurists that the harm of racial classification is an autonomy harm – to be judged or evaluated on the basis of a forbidden characteristic. Proxies or correlates, such as geography, socioeconomic status, educational attainment, and the like, are not race, and therefore may be considered, even in the context of a policy intended to generate or promote racial diversity.

The term "proxy" itself is somewhat ambiguous here. In general, it means using one thing to stand in for another. If any indicator is used here merely as a subterfuge, a cover to allow the race of an individual to be considered in fact, then that would be forbidden. But if a factor--which correlates with race--is considered, that would be permissible as long as the race of that individual is not considered.

Example 2

Suppose a state creates a public bank or similar agency with a mandate to reduce the racial wealth gap. To achieve this goal, the bank creates a pool of capital for applicants using a set of predetermined criteria. The bank knows it cannot select applicants by race, so it asks questions of applicants, along with a request to provide documentary proof, that includes:

- Previous denial of loan applications
- Being informed that personal collateral was insufficient
- Being offered higher interest rates or unfavorable loan terms compared to peer borrowers

Would such criteria be allowed?

Answer: Yes. None of these criteria are race-specific or race-based, although they may be correlated with race. As long as such criteria are authenticity and consistently applied, it should pass legal muster.

D. Geographic Considerations

Because racial groups are unevenly distributed across space (due to racial residential segregation), geography can serve as another permissible race-proxy to advance equity. Geographic considerations can show up in many ways. One approach is to provide advantages to applicants who reside in certain neighborhoods. Another is to adopt local hiring policies. A third would be to try to balance representation across geographies. The so-called Texas Ten Percent Plan would be an example of the latter. Geographic plans have also been devised at the K-12 level based upon similar principles, and have recently been upheld by federal appellate courts.[57]

Example 1

Suppose a city wishes to devise an equity-based marijuana licensing scheme. But instead of using the race of applicants, it uses as a consideration the total number of past convictions among residents by *neighborhood*. In this scheme, applicants for licenses residing in neighborhoods that have had a higher number of past convictions for marijuana-related offenses would get an advantage. Would this scheme survive a challenge based on racial classification?

Answer: Yes, it does not label any individual on the basis of their race nor use race as a selection criterion. The classification is based upon past level of convictions at the neighborhood level and neighborhood residency.

Example 2

A real world racial equity policy that brings together a few of these approaches is **Berkeley's recent affordable housing policy**. The policy prioritizes:

- Those who lost a home in Berkeley to foreclosure since 2005.
- Renters who lost a home in Berkeley because of a "no-fault" eviction, or who were evicted for failing to pay rent, within the past seven years.
- Families with children under 17.
- Unhoused residents who are not eligible for permanent supportive housing, or residents who have a current or former address in Berkeley and are at risk of becoming homeless.
- Current and former residents, as well as descendants of residents, of South and West Berkeley neighborhoods that were once deemed "hazardous" by federal housing officials in the practice known as redlining. Gentrification in those areas has driven dramatic increases in housing costs, and steep declines in their share of Black residents.

Many of these factors, but especially the last one, are race-conscious, but none are race-specific. There are presumably many people of all races who meet these criteria. These priorities do not constitute racial classifications, and should survival judicial review under prevailing interpretation of the law.

A more interesting case arises if the geography is racially considered:

Example 3

Suppose a state department decided to consider as a hiring criterion whether an applicant lives in a predominantly or plurality Black or Latino neighborhood based upon an assessment that use of this selection criterion would increase racial diversity. Would this be permissible?

Answer: Surprisingly, this is probably legally compliant, at least under the US Constitution. As long as the individual race of the applicant is not considered, it is equally possible (although not necessarily equally probable) for a non-Black applicant to be *selected* for residing in a predominantly Black neighborhood or census tract as a Black applicant. This extends to different racial identities or other covered identities.

It would be difficult to prove that this policy was motivated by a discriminatory purpose under the equal protection clause, and the Supreme Court has made clear that "disparate impact" claims are not cognizable under the US Constitution. However, this hiring criteria could be challenged under Title VII as a disparate impact claim, if it were established that this criterion resulted in a statistically significant disparate racial impact. Even then, it is unclear whether such a suit would succeed. The agency would need to evaluate that possible risk.

As a practical consideration, it could make a difference precisely how "predominant" such neighborhoods are. A "predominantly" Black neighborhood in California is probably not much more than 40 percent Black. In Chicago or Detroit, it could be north of 80 percent Black. That contextual percentage could make a statistically significant difference in the operational effect of the policy, and therefore the likelihood of a viable Title VII disparate impact challenge.

E. The General Use of Race

The preceding strategies are highly unlikely to sustain a successful legal challenge based on racial classifications or a claim of racial discrimination. It is possible, however, to also use race in a more general way that does not entail racial classification. The general use of race is consideration of race in policy in a way that does not entail any individual classification.[58]

One way of doing this would be to consider the racial demographics of the neighborhood. Thus, a policy could be devised that advantages residents of a neighborhood that has a different racial composition. So, for example, if one neighborhood is 70 percent Black and Latino, a policy could be devised that creates a slight hiring preference for that neighborhood over one that is only 2 percent Black and Latino. Such a policy would not entail racial classification, since no individual is being labeled on the basis of their race. It is possible that an applicant from the first neighborhood could be white, and one from the latter neighborhood is Black.

A similar or related approach would be to look at RECAPS or RECAAs. RECAPS are racially concentrated areas of poverty, and RECAAs are racially concentrated areas of affluence. Much like the multi-factor proxies mentioned earlier, this approach combines economics with a general use of race. The policy purposes of the use of these categories are intuitive: they are trying to compensate residents of certain neighborhoods for their disadvantage, perhaps in awarded transportation investments or in prioritizing public safety or recreational expenses.

Example

Suppose a city wished to help residents of its most disadvantaged neighborhoods by prioritizing the development of new green spaces and parks and recreation infrastructure for recreational opportunities in RECAPs. Would such a policy be vulnerable to an equal protection challenge based on anti-classification jurisprudence?

Answer: No, such a policy would be safely insulated because no individual is being classified and given a benefit: only tracts of land.

Another similar approach would be to look at the observed level and/or type of racial residential segregation. A city or a state could theoretically provide benefits or awards based upon a type or level of segregation, in an effort to compensate or remediate for past or current harms or conditions.

The use of race in this way (making it more explicitly race-conscious), however, does make it slightly more likely that an intentional discrimination claim could find a receptive ear in court. Nonetheless, following the black letter rule of law, the general use of race should not only survive a legal challenge, it would not even be subject to strict scrutiny review.

V. Conclusion

There is enormous confusion among racial justice and racial equity advocates around what is permissible and what is not. Unfortunately, prevailing guidance is lacking in critical respects, often conflating categories or eliding critical nuances. The most significant misunderstanding is the difference between race-conscious policies that do not entail racial classification and race-based policies which do entail racial classification or use race as a selection or decision criterion. The latter are presumptively unconstitutional while the former should not even trigger strict scrutiny review.

To be clear, the use of race in policymaking as a decision or selection criterion is not strictly unconstitutional, only presumptively so. That means race-based policies could, in theory, be upheld if they are narrowly tailored in support of a compelling governmental interest. In practice, very few race-based policies will survive constitutional challenge, especially given the composition of the current Supreme Court.

This memorandum has been written to dispel many areas of confusion and to provide clear practical guidance for advocates, with the caveat that future Supreme Court decisions could further change the law. But for the near term, the law is clear that policies that use racial classification is generally unconstitutional while race-conscious policies pursued for noble purposes, including the promotion of racial diversity, but which do not use racial classifications, will not even be subject to strict scrutiny review.

Nonetheless, designing more sophisticated or complex policies to comply with prevailing constitutional law may be frustrating to advocates for several reasons. In general, compliance will require both more sophistication, including data collection capacity and analysis to design and implement viable, legally-compliant policies, and more indirect consideration of race. The more indirect route to racial equity is frustrating, especially among advocates, as race loses some symbolic and narrative centrality when it is replaced with a list of proxies and correlates.

Nonetheless, the more sophisticated and complex approaches outlined here are not entirely impediments to the goal of promoting racial equity and fostering a more just and fair society. Not only are the multi-factor or geographic "race-neutral, but race-conscious" policy approaches outlined here far more likely to survive legal challenge, but they are less likely to stoke backlash and more likely to reach the most disadvantaged members of the targeted group. In the long-run, they may inadvertently produce more sustainable, durable, and efficacious policy.

VI. Citations

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23 Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256 (1979).

24 Top 10 Percent Law, supra note 6.

25 Ricci v. DeStefano, 557 U.S. 557 (2009).

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27 570 U.S. 529, 590 (2013) (Ginsburg J., dissenting).

28 U.S. Const., amend. XIV, § 1.

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31 Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964).

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33 Wash. v. Davis, 426 U.S. 229, 239 (1976)

34 The emphasis on those two opinions was clarifying that, outside of exceptional circumstances, racially "neutral" policies that have disparate or disproportionate racial effects are not violative of the equal protection clause. As the court explained, "Absent a pattern as stark as that in Gomillion or Yick Wo, impact alone is not determinative, and the court must look to other evidence [of a discriminatory purpose]." Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977).

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