Fair Housing Act — Disparate Impact and Racial Equality — Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.

Over the last decade, the Supreme Court has repeatedly restricted the ability of public actors to consider race when taking remedial steps to repair racial disparities in society.[1] One case, *Ricci v. DeStefano*,[2] limited Title VII's disparate-impact doctrine[3] — which directs courts to consider the racial effects of facially neutral practices — and left many wondering how long the doctrine could withstand constitutional scrutiny.[4] In particular, observers wondered whether the Court would reject recognition of disparate-impact claims under the Fair Housing Act[5] (FHA),[6] despite the unanimous recognition of such claims in the circuits.[7] Last Term, in *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.*,[8] the Supreme Court held that "disparate-impact claims are cognizable under the Fair Housing Act."[9] While the opinion's doctrinal analysis focused on traditional canons of statutory interpretation, its substantive justification for applying disparate-impact doctrine relied on a particular view of racial-equality doctrine. Careful attention to the opinion's restrictions on disparate impact reveals a bold conception of race's relationship with the law — an aspiration to deconstruct the concept of race by recognizing its harmful, illegitimate relationships with social institutions, and to dismantle these relationships by consciously eschewing further racial entanglements.

The federal government provides tax credits through the states to promote low-income housing development.[10] In Texas, the state's De-

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[1] *See, e.g.*, Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411 (2013); Ricci v. DeStefano, 557 U.S. 557 (2009); Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007).

[2] 557 U.S. 557.

[3] *Id.* at 585. First established in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), disparate-impact doctrine prohibits facially neutral practices that have discriminatory effects on protected classes if the defendant cannot show a legitimate interest in pursuing the practice. *See id.* at 431; *see also Ricci*, 557 U.S. at 578.

[4] *See* Lawrence Rosenthal, *Saving Disparate Impact*, 34 CARDOZO L. REV. 2157, 2161–65 (2013). *See generally* Richard Primus, *The Future of Disparate Impact*, 108 MICH. L. REV. 1341 (2010).

[5] 42 U.S.C. §§ 3601–3619 (2012).

[6] *See, e.g.*, Olatunde C.A. Johnson, *The Agency Roots of Disparate Impact*, 49 HARV. C.R.-C.L. L. REV. 125, 128 (2014); Valerie Schneider, *In Defense of Disparate Impact: Urban Redevelopment and the Supreme Court's Recent Interest in the Fair Housing Act*, 79 MO. L. REV. 539, 583 (2014).

[7] *See* Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2519 (2015) (collecting cases).

[8] 135 S. Ct. 2507.

[9] *Id.* at 2525.

[10] *See* 26 U.S.C. § 42 (2012).

partment of Housing and Community Affairs (the Department) distributes these credits directly to developers based on a number of criteria articulated in federal and state statutes.[11] Housing developments financed in any part by these tax credits cannot deny an individual housing solely because he or she uses low-income housing vouchers.[12]

From 1999 to 2008, the Department approved tax credits for 49.7% of proposed non-elderly, low-income housing developments in areas where whites made up less than 10% of the population.[13] During the same period, the agency approved tax credits for only 37.4% of non-elderly, low-income housing development in areas where 90% or more of the population was white.[14] In Dallas, 92.29% of all housing units built using low-income tax credits were located in majority-minority census tracts.[15] Concerned that the Department's practices had the effect of denying minorities opportunities to live in white neighborhoods and thus perpetuated housing segregation in the Dallas metropolitan area, the Inclusive Communities Project (ICP), a nonprofit organization that helps predominantly African American voucher recipients find affordable housing, sued the Department.[16] ICP alleged that the Department intentionally discriminated against African Americans in violation of the Fourteenth Amendment and 42 U.S.C. § 1982, and that its practices created a disparate impact in violation of the FHA.[17]

The district court held that ICP failed to prove its intentional-discrimination claims.[18] The court nevertheless ruled in favor of ICP on its disparate-impact claim.[19] Having previously ruled that the disparity in tax-credit approvals established a prima facie case of disparate impact,[20] the trial court examined the agency's defense that it had pursued the legitimate government interest of distributing tax credits in an "objective, transparent, predictable, and race-neutral manner."[21] The court assumed the legitimacy of the agency's interests[22] but determined — after presenting several courses of action that would likely have yielded less discriminatory effects[23] — that the Department

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[11] Inclusive Cmtys. Project, Inc. v. Tex. Dep't of Hous. & Cmty. Affairs, 860 F. Supp. 2d 312, 314–16 (N.D. Tex. 2012).

[12] *Id.* at 314.

[13] Inclusive Cmtys. Project, Inc. v. Tex. Dep't of Hous. & Cmty. Affairs, 749 F. Supp. 2d 486, 499 (N.D. Tex. 2010).

[14] *Id.*

[15] *Id.*

[16] *See id.* at 492–93.

[17] *Inclusive Cmtys. Project*, 860 F. Supp. 2d at 317.

[18] *Id.* at 321.

[19] *Id.* at 331.

[20] *Inclusive Cmtys. Project*, 749 F. Supp. 2d at 486, 499–500.

[21] *Inclusive Cmtys. Project*, 860 F. Supp. 2d at 323.

[22] *Id.* at 326.

[23] *Id.* at 326–30.

"failed to meet [its] burden of proving that there are no less discriminatory alternatives."[24]

The Fifth Circuit reversed and remanded but declined to revisit the circuit's well-established[25] and recently affirmed[26] precedent recognizing disparate-impact liability under the FHA. Adopting the burden-shifting framework that the U.S. Department of Housing and Urban Development (HUD) had released after the district court's ruling, Judge Graves[27] held that the district court should have required ICP to show that an alternative practice with less discriminatory effects was available.[28] The court remanded the case with instructions to determine whether ICP had satisfied this burden.[29] Judge Jones, specially concurring, stated that she believed that the claimants "could not rely on statistical evidence of disparity alone" to establish a prima facie case.[30] Instead, a prima facie case requires proving causation by "isolat[ing] the policy that caused the disparity."[31]

The Supreme Court affirmed, holding that disparate-impact claims are cognizable under the FHA. Writing for the Court, Justice Kennedy[32] prefaced his analysis with three paragraphs surveying the tumultuous history preceding the FHA's passage. He summarized decades of discriminatory housing practices by state and private actors alike,[33] described President Johnson's establishment of the Kerner Commission to investigate the causes of urban riots and the Commission's call for a fair housing law,[34] and observed that Congress passed the FHA in response to "a new urgency to resolve the social unrest in the inner cities" shortly after the assassination of Dr. Martin Luther King, Jr.[35]

Delving into the Court's precedent, Justice Kennedy examined *Griggs v. Duke Power Co.*[36] and *Smith v. City of Jackson*,[37] which held disparate-impact claims cognizable under, respectively, Title VII of the

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[24] *Id.* at 331.

[25] *See* Hanson v. Veterans Admin., 800 F.2d 1381, 1386 (5th Cir. 1986).

[26] *See* Artisan/Am. Corp. v. City of Alvin, 588 F.3d 291, 295 (5th Cir. 2009).

[27] Judge Graves was joined by Judge Wiener.

[28] *See* Inclusive Cmtys. Project, Inc. v. Tex. Dep't of Hous. & Cmty. Affairs, 747 F.3d 275, 282–83 (5th Cir. 2014). After the district court issued its order, but before the Fifth Circuit's decision, HUD released new regulations governing disparate-impact claims under the FHA. *See* Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11460, 11482 (Feb. 15, 2013) (codified at 24 C.F.R. § 100.500 (2014)).

[29] *Inclusive Cmtys. Project*, 747 F.3d at 283.

[30] *Id.* (Jones, J., specially concurring).

[31] *Id.* at 284.

[32] Justice Kennedy was joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan.

[33] *Inclusive Cmtys. Project*, 135 S. Ct. at 2515.

[34] *Id.*

[35] *Id.* at 2516.

[36] 401 U.S. 424 (1971).

[37] 544 U.S. 228 (2005).

Civil Rights Act of 1964[38] and the Age Discrimination in Employment Act[39] (ADEA). He read these cases as establishing that "antidiscrimination laws must be construed to encompass disparate-impact claims when their text refers to the consequences of actions."[40] The Justice then argued that the FHA provision barring actions that "otherwise make unavailable" housing because of race served the same purpose as Title VII's and ADEA's shared language forbidding actions that "otherwise adversely affect" an individual's employment opportunities.[41] Like the Title VII and ADEA language, "otherwise make unavailable" followed phrases prohibiting disparate treatment and marked a shift to disparate-impact liability, as evidenced by the consequence-based phrasing ("adversely affect" or "make unavailable"), with the word "otherwise" signaling a logical transition.[42]

Justice Kennedy contended that the FHA's 1988 amendments supported this interpretation. First, he considered the context under which the amendments had passed. At the time of passage, all nine appellate courts to examine the issue had determined that the FHA created disparate-impact liability.[43] By leaving the FHA's "operative language" untouched, Congress had "accepted and ratified" this unanimous interpretation.[44] Next, Justice Kennedy considered the substance of the amendments. Because the amendments created "exemptions" to disparate-impact liability, reading the FHA as not creating disparate-impact liability would make these provisions "superfluous."[45]

The opinion then explained two ways in which disparate-impact liability serves the FHA's purpose "to eradicate discriminatory practices within a sector of our Nation's economy."[46] First, disparate-impact liability roots out systemic problems that have the effect of perpetuating segregation. For instance, it might strip away "zoning laws and other housing restrictions that function unfairly to exclude minorities from certain neighborhoods without any sufficient justification."[47] Second, disparate-impact claims "uncover[] discriminatory intent" and "counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment."[48]

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[38] 42 U.S.C. §§ 2000e to 2000e-17 (2012).
[39] 29 U.S.C. §§ 621–634 (2012).
[40] *Inclusive Cmtys. Project*, 135 S. Ct. at 2518.
[41] *Id.* at 2519.
[42] *Id.*
[43] *Id.*
[44] *Id.* at 2520.
[45] *Id.*; *see also id.* at 2521.
[46] *Id.* at 2521.
[47] *Id.* at 2521–22.
[48] *Id.* at 2522.

After recognizing the importance of disparate-impact liability, Justice Kennedy strictly limited the doctrine to "avoid the serious constitutional questions that might [otherwise] arise."[49] He noted that potential defendants may assert a variety of legitimate reasons to justify their policies, including objective factors such as cost and traffic patterns, and subjective factors such as historical preservation.[50] He also echoed Judge Jones's concurrence in clarifying that a "statistical disparity" does not establish a prima facie case; rather, a claimant must identify "a policy or policies causing that disparity."[51]

Finally, the opinion warned both government and private actors that they must not allow the specter of disparate-impact liability to "perpetuate race-based considerations rather than move beyond them."[52] Disparate-impact doctrine, Justice Kennedy said, must not set the "Nation back in its quest to reduce the salience of race in our social and economic system."[53] Courts adopting remedies to disparate impact "should strive to design them to eliminate racial disparities through race-neutral means."[54] Still, he also made clear that local government administrators could choose to "foster diversity and combat racial isolation with race-neutral tools, and mere awareness of race in attempting to solve the problems facing inner cities does not doom that endeavor at the outset."[55]

In the principal dissent, Justice Alito[56] first argued that the text of the FHA unambiguously bans disparate *treatment* only. His construction of the FHA turned on what he characterized as the plain meaning of "because of," the statute's "key phrase," which requires proof of an actor's discriminatory intent to prevail.[57] Instead of construing the phrase "otherwise make unavailable" as a transition from action-based prohibition to effects-based prohibition, Justice Alito applied the *ejusdem generis* canon to read the phrase as a "catchall" for other actions constituting discriminatory treatment.[58] Rather than seeing the 1988 amendments as ratifying a uniform understanding of the law, he objected that no such consensus existed in 1988: the official interpretation of the United States at the time, as expressed by the Reagan Administration, disclaimed disparate-impact claims under the FHA.[59]

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[49] *Id.*
[50] *Id.* at 2522–23.
[51] *Id.* at 2523.
[52] *Id.* at 2524.
[53] *Id.*
[54] *Id.*
[55] *Id.* at 2525.
[56] Justice Alito was joined by Chief Justice Roberts and Justices Scalia and Thomas.
[57] *Id.* at 2533 (Alito, J., dissenting).
[58] *Id.* at 2536.
[59] *Id.* at 2537–40.

Furthermore, the supposed smoking-gun "exemptions" relied on by the majority were nothing more than "safe-harbor provisions" — a sign of extra caution by legislators.[60] Finally, Justice Alito warned that the Court's decision would put local authorities in constant, crippling fear of being sued, and then closed by attacking the majority's allegiance to purpose over text.[61]

Justice Thomas also filed a dissenting opinion, in which he lambasted disparate-impact doctrine in general and *Griggs* in particular.[62] Exhorting the Court to "drop the pretense that *Griggs*' interpretation of Title VII was legitimate,"[63] he explained why disparate-treatment provisions did not contemplate disparate impact before providing a brief history of the Equal Employment Opportunity Commission's efforts to expand the scope of Title VII beyond the statutory language.[64] Blindly following these past missteps, Justice Thomas declared, merely "furthers error."[65]

Despite exhaustive case law on the subject, the Court has not definitively declared to what extent the government may consider race when crafting remedies to repair racial disparities in American society. Since disparate-impact liability, a creature of legislative enactment,[66] compels individual actors to consider race when evaluating the legitimacy of certain practices, the Court's explorations of the doctrine have necessarily considered the extent to which these racial considerations conflict with the Court's reading of the Fourteenth Amendment.[67] Traditionally, two different theories have informed the Court's decisions in this arena: Under antisubordination theory, even the most explicit racial considerations are constitutional if they are used to benefit a marginalized racial class.[68] By contrast, colorblind theory views all

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[60] *Id.* at 2541. Justice Alito also argued that HUD's FHA guidance recognizing disparate-impact liability deserved no deference, since the FHA unambiguously bans only disparate treatment, *id.* at 2543, and that the Court's analysis of precedent was wrongheaded, since the FHA's language meaningfully diverged from the relevant clauses of Title VII and the ADEA, *see id.* at 2543–48.

[61] *Id.* at 2548–51.

[62] *Id.* at 2526 (Thomas, J., dissenting).

[63] *Id.*

[64] *Id.* at 2526–29. Justice Thomas also attacked the rationale behind disparate-impact doctrine, arguing that it "defies . . . reality itself," *id.* at 2529, because it rests on a likely erroneous assumption that a distribution of outcomes should mirror the makeup of a society despite this being "the exception, not the rule" throughout multiethnic societies, *id.* at 2530.

[65] *Id.* at 2531.

[66] Although the Fourteenth Amendment does not require disparate-impact liability, Congress may create it through statute. *See* Washington v. Davis, 426 U.S. 229, 248 (1976).

[67] *See generally* Ricci v. DeStefano, 557 U.S. 557 (2009).

[68] *See* Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278, 1281 (2011).

explicit racial considerations as presumptively unconstitutional.[69] Justice Kennedy's opinion in *Inclusive Communities Project* attempted to reconcile these two approaches, espousing the pragmatic antisubordination view of racial equality while retaining colorblindness's renunciation of explicit racial categorizations in the law. In this way, the opinion provides the groundwork for a new theory, which might be termed "racial deconstruction." This new theory avoids the "magic-word"[70] racial formalism of colorblind theory while retaining its aspirational view of a future society that deemphasizes racial differences.

To better see the nuances of racial deconstruction, it is useful to understand how it differs from colorblindness. Chief Justice Roberts pointedly expressed the essence of colorblindness in *Parents Involved in Community Schools v. Seattle School District No. 1*,[71] declaring: "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[72] Notably, the dissenting Justices in *Inclusive Communities Project* all endorsed the Chief Justice's view in *Parents Involved* and declined to join Justice Kennedy's *Parents Involved* concurrence, which disavowed this language and endorsed certain racial considerations, including racial proxies.[73] This is likely because the logic of colorblind theory, expressed so sharply by the Chief Justice, leads inexorably to finding *all* racial considerations — including disparate-impact doctrine itself — constitutionally suspect, as Justice Scalia recognized in his *Ricci* concurrence.[74]

Racial deconstruction, however, distinguishes between official *expressions* of racial considerations in explicit terms and racial considerations that can be characterized only as *thought*.[75] As *Inclusive Communities Project* makes clear, "race may be considered in certain circumstances and in a proper fashion," but these considerations should be *expressed* using "race-neutral tools."[76] Justice Kennedy

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[69] *See id.*; *see also, e.g.*, Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411, 2418–19 (2013); Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 720 (2007).

[70] IAN HANEY LÓPEZ, WHITE BY LAW 161 (10th anniversary ed. 2006). This criticism of colorblindness claims that the theory views race and racism as "exist[ing] only when mentioned," *id.* at 160, and "strips race and racism of all social meaning and of any connection to social practices of group conflict and subordination," *id.* at 161.

[71] 551 U.S. 701 (holding that a school district could not voluntarily adopt a policy that used race as the decisive factor in determining what school a child would attend).

[72] *Id.* at 748 (opinion of Roberts, C.J.).

[73] *See id.* at 782–83, 787–89 (Kennedy, J., concurring in part and concurring in the judgment).

[74] *See* Ricci v. DeStefano, 557 U.S. 557, 594–96 (2009) (Scalia, J., concurring); *see also* Primus, *supra* note 4, at 1344; Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 496 (2003); Rosenthal, *supra* note 4, at 2163.

[75] *Cf.* THE VELVET UNDERGROUND, *Some Kinda Love*, *on* THE VELVET UNDERGROUND (MGM Records 1969) ("Between thought and expression lies a lifetime.").

[76] *Inclusive Cmtys. Project*, 135 S. Ct. at 2525. Justice Kennedy also cautioned, more vaguely, that courts must not let disparate-impact doctrine get "so expansive as to inject racial considera-

voiced a similar concern in *Fisher v. University of Texas at Austin*[77] and in his concurrence in *Parents Involved*. In both cases, he maintained that explicit racial criteria should be avoided in school admissions decisions but suggested that proxies for race would be permissible.[78] Cynics might see this move as a ruse designed to dupe a public wary of the tension caused by explicitly race-based policies into accepting practices aimed specifically at benefiting minorities.[79] However, *Inclusive Communities Project* suggests that Justice Kennedy's concern for facial neutrality evinces a commitment to understanding and deconstructing race as a social concept perpetuated by the law.

Professor Nell Irvin Painter has characterized race as "an idea, not a fact."[80] Indeed, biologists and geneticists have disavowed any physical existence of racial difference.[81] Nevertheless, race exists as a powerful social institution constructed by humans and intricately interwoven into the social fabric.[82] Because of this, race has been inevitably bound up in the law — another social institution that has reified racial identities.[83] *Inclusive Community Project*'s repeated insistence on the

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tions into every housing decision." *Id.* at 2524. It is not fully clear what concrete limitations this language supposes.

77 133 S. Ct. 2411 (2013) (holding that courts must apply strict scrutiny to a public university's policy that explicitly used race as one factor among many in one track of its admissions process).

78 *Id.* at 2420 ("Narrow tailoring also requires that the reviewing court verify that it is 'necessary' for a university to use race to achieve the educational benefits of diversity. This involves a careful judicial inquiry into whether a university could achieve sufficient diversity without using racial classifications." (citation omitted) (quoting Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 305 (1978))); *Parents Involved*, 551 U.S. at 789 (Kennedy, J., concurring in part and concurring in the judgment) ("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.").

79 Professor Reva B. Siegel has argued persuasively that the use of racial proxies in other legal contexts reflects a desire to promote social cohesion. *See* Siegel, *supra* note 68, at 1300–02. Under this theory, the moderate Justices' concern with racial appearances is not unprincipled, but represents an awareness that racially explicit measures might erode social cohesion — in part by causing resentment among white people. *See id.* at 1334–37. But substituting racial proxies for explicit racial criteria is not as likely to salve tensions in housing cases as it is, say, when an aggrieved white applicant fails to gain acceptance to a university or earn a promotion. To the extent that a housing claim directly affects an individual — that is, a liable defendant — it seems unlikely that a party found guilty of perpetuating racial disparities would feel less resentment because a judge crafts a remedy using racial proxies.

80 NELL IRVIN PAINTER, THE HISTORY OF WHITE PEOPLE ix (2010).

81 *See id.* at xii.

82 *See* Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 27–28 (1994). Although some claim that race may have a genealogical component, they have not denied that race remains a social construct to a large extent. *See generally, e.g.*, Robin O. Andreasen, *Race: Biological Reality or Social Construct?*, 67 PHIL. SCI. (SUPP.) S653 (2000).

83 *See* Haney López, *supra* note 82, at 3.

illegitimacy of racial classifications suggests an understanding of race's fabricated nature and a commitment to disentangling its illegitimate, contingent relationship with other social institutions, including the law.

This suspicion of the facticity of race permeated Justice Kennedy's description of pre-FHA history where he noted that racial segregation remains "intertwined with the country's economic and social life."[84] Throughout this section, Justice Kennedy explained how a variety of housing practices, like private steering by real estate agents, and social ills, such as concentrations of poverty in the inner cities, revolved around race.[85] In Justice Kennedy's opinion, the FHA sought to "eradicate" these improper, race-infused practices in the housing industry.[86] By abruptly juxtaposing a careful discussion of the importance of race in the past and present alongside an absolute prohibition on the expression of explicit racial factors in the future, the opinion creates a clanging dissonance that resolves when seen as a frontal assault on the factless conception of race itself. Disparate impact, as constructed in *Inclusive Communities Project*, requires individual actors to consider the ways in which the idea of race has spilled out into race-neutral policies and practices. At the same time, it challenges individuals and courts to construct remedies that hammer away at the contingent social and institutional structure that has built up around the empty hull of race throughout American history. Only through this process, the opinion suggests, can Americans eradicate race's grave significance in American life.

Despite this promise, racial deconstruction raises two constitutional issues: First, as the Court and others have argued, a constitutional principle that allows favored treatment for protected classes seems to lack any logical stopping point because efforts to remedy past discrimination might be indistinguishable from pure discrimination in favor of minority groups.[87] Although the requirement of race-neutral expression might provide a practical limit on race favoritism,[88] it does little to solve the core logical problem. Second, the Court has recognized that even a race-neutral measure might violate the Fourteenth Amendment if the measure were undertaken with discriminatory intent and had disparate effects across racial groups.[89] To be effective,

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[84] *Inclusive Cmtys. Project*, 135 S. Ct. at 2515.

[85] *See id.*

[86] *Id.* at 2521.

[87] *See* Rosenthal, *supra* note 4, at 2208 & n.232 (collecting cases).

[88] For example, a policy that uses proxies for race certainly differs to *some* degree — even if a minor one — from a practice that explicitly recognizes race. And requiring courts to apply rationality review could ensure that policymakers select proxies that maintain at least this minimal distance from purely race-based decisionmaking.

[89] *See* Washington v. Davis, 426 U.S. 229, 241 (1976) ("A statute, otherwise neutral on its face, must not be applied so as invidiously to discriminate on the basis of race.").

any measure taken to enhance racial equality must inevitably result in disparate effects across racial groups.[90] Even if racial deconstruction does not completely resolve these constitutional issues, it at least mitigates them more effectively than antisubordination theory does. The deliberative mood required to identify past discriminatory policies and craft race-neutral remedies, if properly applied, would also not fall prey to claims of knee-jerk racial favoritism in the same way as race-specific policies.

If racial deconstruction were to persist as the principle defining the Court's racial equality jurisprudence, it would address several concerns that have dogged traditional colorblindness doctrine as it has come to represent the view of the Court's majority over the past several decades. By recognizing the way in which the concept of race has become entangled with other social institutions, racial deconstruction avoids the criticism that colorblindness functions merely as "magic-word formalism,"[91] that it ignores the continuing presence of veiled racial discrimination. Racial deconstruction also carries the promise of at least addressing a problem common to both colorblindness and antisubordination theory. Professor Martha Minow has identified this problem as "the dilemma of difference": the puzzle of when treating people differently based upon "assigned traits . . . run[s] up against the danger either of recreating differences by focusing upon them or of denying their enduring influence in people's lives."[92] Indeed, racial deconstruction as practiced in *Inclusive Communities Project* examines the problems of difference created by housing segregation, recognizes the damage that racial labeling has created in the law and society, and aspires to repair this damage in a way that dismantles this difference.[93]

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[90] The racial deconstruction principle may also be criticized for failure to occupy the field of racial equal protection claims. As both *Washington v. Davis*, 426 U.S. 229, and *Inclusive Communities Project* instruct, the concern with racial entanglements throughout social institutions springs from a policy determination by Congress and not the Fourteenth Amendment. *Inclusive Cmtys. Project*, 135 S. Ct. at 2521 ("The FHA, like Title VII and the ADEA, was enacted to eradicate discriminatory practices within a sector of our Nation's economy."); *Davis*, 426 U.S. at 248. This criticism, however, merely lessens the force of the legal obligation to the racial deconstruction principle. It does not prevent any public or private individual from pursuing the racial deconstruction principle in the absence of a disparate-impact provision.

[91] HANEY LÓPEZ, *supra* note 70, at 161.

[92] MARTHA MINOW, MAKING ALL THE DIFFERENCE 47 (1990).

[93] This framework exemplifies the "relational" aspiration — as described by Minow — that "[n]otions of difference will no longer be the end but rather the beginning of an inquiry about how all people, with their differences, should live." *Id.* at 213.