THE EQUAL PROTECTION-FOURTH AMENDMENT SHELL GAME: AN ESSAY ON THE LIMITED REACH OF THE 2023 AFFIRMATIVE ACTION CASES, THE FOURTH AMENDMENT, AND RACE BEYOND SKIN COLOR

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ABSTRACT

In striking down race-conscious admissions at Harvard and the University of North Carolina, the Supreme Court used lofty rhetoric about the importance of ending race discrimination, even calling the command of Equal Protection "universal." In two ways, this Essay explores the legal and practical limits of the affirmative action cases and illustrates how the Court's claimed concern about race discrimination rings hollow. First, this Essay discusses state actors permitted to use race in their decision-making: the police. Unlike elite universities whose policies are subject to exacting scrutiny, the Supreme Court permits police to use race when deciding whom to seize under the Fourth Amendment under deferential forms of review. In fact, Fourth Amendment doctrine is so deferential it largely forbids race-based challenges to race-based policing and requires such arguments be raised under the Equal Protection Clause. Then, the kicker: under the version of Equal Protection Clause applied to the police, even admittedly race-based actions do not necessarily violate equal protection. The result is a shell game between the Equal Protection Clause and the Fourth Amendment where claims of racial bias cannot be effectively challenged under either provision. Second, to show the limits of the affirmative action cases from another angle, this Essay offers a reflection on the Court's arguments about "stereotyping" and suggest they erroneously reduce the concept of race to skin color. Both as an empirical fact and matter of lived experience, race is far more skin color. The Court's contrary assessment of stereotyping cannot be squared with the realities facing people of color, no matter their faith, creed, politics, hobbies, or upbringing. In the end, race matters because it permeates the fabric of our lives even if the constitution—in the affirmative action context but not for the police—is now supposed to be "colorblind."

INTRODUCTION

Invoking the Equal Protection Clause of the Fourteenth Amendment, the Supreme Court's decision in *Fair Admissions v. Harvard* and *Students for Fair Admissions v. University of North Carolina* (the *Harvard–UNC Cases*) has formally forbidden the use of race in college admissions, at least as a basis for obtaining diversity-related goals in both education and society.[1] The bottom-line result is unsurprising.[2] Scholars have already begun to parse the decision in terms of what it means for Equal Protection doctrine, race-and-the-law issues, and more.[3]

I am not a race scholar and I have not written about the Equal Protection Clause in any serious fashion. I will stay in my lane. In this Essay, I hope to offer some thoughts on the affirmative action cases from my vantage point of a civil rights litigator whose job has been to bring lawsuits against police officers alleging constitutional-rights violations. These suits include claims against police officers who have shot and killed Black men and have involved alleging violations of the Equal Protection Clause on account of race.[4] I am also a person who has the lived experience of being a perceived Black male who has lived in the South, the West

1. Students for Fair Admissions v. Harvard,143 S. Ct. 2141, 2175 (2023) [hereinafter, *Harvard-UNC Cases*].

2. Will Baude, *The Unsurprising Affirmative Action Decision in* Students for Fair Admissions v. Harvard, THE VOLOKH CONSPIRACY (June 29, 2023, 12:36 PM), https://reason.com/volokh/2023/06/29/the-unsurprising-affirmative-action-decision-in-students-for-fair-admissions-v-harvard/ [https://perma.cc/GTF9-JJCG]; Richard Lempert, *The Supreme Court Is Poised to Reverse Affirmative Action: Here's What You Need to Know*, BROOKINGS INST. (June 5, 2023), https://www.brookings.edu/articles/the-supreme-court-is-poised-to-reverse-affirmative-action-heres-what-you-need-to-know/ [https://perma.cc/XQH3-RUE8].

3. *See, e.g.*, Uma Mazyck Jayakumar & Ibram X. Kendi, '*Race Neutral' Is the New 'Separate but Equal'*, THE ATLANTIC (June 29, 2023), https://www.theatlantic.com/ideas/archive/2023/06/supreme-court-affirmative-action-race-neutral-admissions/674565/ [https://perma.cc/9E9H-R579].

4. In mind as I write this are people killed by police many have never heard of, including Sylville Smith (Milwaukee, Wisconsin, 2016), Tony Robinson (Madison, Wisconsin, 2015), Isaiah Obet (Auburn, Washington 2017), Mi'Chance Dunlap-Gittens (Des Moines, Washington, 2017), and Jordan Baker (Houston, Texas, 2014).

Coast (California and the Pacific Northwest), and the Midwest.[5] I have experienced racism in every place I have lived and continue to experience it as a lawyer and professor today.

From these experiences, I offer an alternative perspective (and reflection) on the upshot of the affirmative action cases and explore how aspects of the *Harvard-UNC* affirmative action cases are of limited reach—as a matter of law, as a matter of empirical fact, and in practice. First, despite the lofty rhetoric about the necessity of ending race discrimination in the affirmative action decisions, and rare moments where the Court has found racial bias,[6] other doctrines under the Fourth Amendment and Equal Protection Clause powerfully permit race-based state action by the police. Thus, despite the strong language about a prohibition on state actors making race-based decisions in the affirmative action cases—where the Court focused on eliminating *all* racial considerations and called the equal-protection mandate "universal"—the Court's Fourth Amendment cases involving the police say otherwise. In stark contrast to the notion that the Court has "time and again forcefully rejected the notion that government actors may intentionally allocate preference to those 'who may have little in common with one another but the color of their skin'" stands the Court's blessing of police use of race in determining who to seize.[7] Police are permitted to use race in considering people suspicious, making stops, making arrests, and in seizing evidence.[8] In both civil and criminal contexts, the Supreme Court's decisions hamstring someone from arguing that the use of their race (or perceived gender) motivated state action.[9] In short, race is impermissible when considering whether a student should be admitted but *very* permissible as a basis of determining whether someone should go to jail or prison.

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5. The word "perceived" here is intentional. Like Barack Obama, Fredrick Douglass, and other "Black" leaders, I am bi-racial. *See* Steve Bumbaugh, *Barack Obama: Next in a Long Line of Bi-Cultural Black Leaders*, WASH. POST (Dec. 7, 2012, 2:31 PM), https://www.washingtonpost.com/local/therootdc/barack-obama-next-in-a-long-line-of-bi-cultural-black-leaders/2012/12/07/647123ca-3fbe-11e2-a2d9-822f58ac9fd5_story.html [https://perma.cc/WS4A-M96G]. My mother is white (mostly Scottish), and my father is Nigerian. Despite the fact that I am as white as I am Black and was raised by my mother in *entirely* culturally and demographically white places, my experience in the world—as a person *of color*—has been that of a Black male.

6. *See, e.g.*, Buck v. Davis, 580 U.S. 100, 124 (2017) (use of Black race to seek death penalty is unconstitutional); Peña-Rodriguez v. Colorado, 580 U.S. 206, 223 (2017) (noting that courts are permitted to inquire whether jurors have explicit racial bias that would impact their deliberations or verdict).

7. *Harvard-UNC Cases*, 143 S. Ct. at 2170 (quoting Shaw v. Reno, 509 U.S. 630, 657 (1993)); *see, e.g.*, United States v. Martinez-Fuerte, 428 U.S. 543, 563 (1976) (permitting use of race in police seizures); United States v. Brignoni-Ponce, 422 U.S. 873, 885 (1975) (same).

8. *See infra* I.D.

9. *See* Washington v. Davis, 426 U.S. 229, 239-40 (1976) (proof of equal protection violation requires evidence of discriminatory intent); Pers. Adm'r of Massachusetts v. Feeney, 442 U.S. 256, 273 (1979) (applying *Davis* to claims of gender discrimination).

To make things worse, the levels of review and deference are on opposite ends of the spectrum. The Court's affirmative action cases and other Equal Protection precedent nominally forbid nearly all race-based decisions and have a narrow exception for decisions that satisfy the "daunting" standard called "strict scrutiny."[10] In this area, state actors must identify a compelling state interest and pursue it through means so narrow as to be essentially necessary to achieve that interest.[11] By contrast, in the Fourth Amendment context—where the police can seize you and conduct an invasive search of your body, including your genitals—the standards are vastly more relaxed. To stop and frisk an individual, police only need "reasonable suspicion"; to make an arrest, police only need "probable cause." The Fourth Amendment's general "objective reasonableness" standard is the governing rule for most state action.[12] These rules, by explicit language and design, are deferential to the police.[13] And there is no narrow tailoring, necessity rule, or anything like that.

Particularly given the vast over-policing of people of color, the Supreme Court's permissive attitude toward race in the context of policing is a powerful illustration that the *Harvard–UNC* cases do not sweep so broadly as to be "universal" or mandate eliminating *all* race discrimination, as the Court claims. Indeed, this Essay posits, the Court's doctrine channels claims of racial bias from the Fourth Amendment to the Equal Protection Clause as if the latter might offer relief. It does not. Instead, comparing Equal Protection and Fourth Amendment cases involving police illustrates a racial "shell game where the Court discusses the availability of an alternative remedy in one arena but simultaneously

10. 143 S. Ct. at 2162.

11. *Id.*

12. *See infra* I.B.

13. Police deference is a main thrust of excessive force doctrine, where even judges are told not to scrutinize the police too seriously. *E.g.*, Graham v. Connor, 490 U.S. 386, 396-97 (1989) ("With respect to a claim of excessive force, the same standard of reasonableness at the moment applies: 'Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers,' violates the Fourth Amendment. The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.") (quoting Johnson v. Glick, 481 F.2d, 1028, 1033 (2d. Cir. 1973). Qualified immunity applies deference upon deference. *See, e.g.*, Ashcroft v. al-Kidd, 563 U.S. 731, 743 (2011) ("Qualified immunity gives government officials breathing room to make reasonable but mistaken judgments about open legal questions. When properly applied, it protects all but the plainly incompetent or those who knowingly violate the law.") (internal quotes and citation omitted). As I and others have elsewhere described, qualified immunity imposes a strange, troubling form of deference because even unconstitutional acts are immunized if a court does not believe the violation was "clearly established" at the time of the conduct and, making things worse, the law might never become clearly established because courts can hopscotch the constitutional question altogether when granting immunity. *See generally* David B. Owens, *Violence Everywhere: How the Current Spectacle of Black Suffering, Police Violence, and the Violence of Judicial Interpretation Undermine the Rule of Law*, 17 STAN. J. C.R. & C.L. 475 (2022); Pamela S. Karlan, *The Paradoxical Structure of Constitutional Litigation*, 75 FORDHAM L. REV. 1913 (2007).

undermines the availability of that remedy in another.[14] There is often no remedy under either constitutional provision. In the fashion of "heads" the police win and "tails" you lose, racialized policing persists and is incredibly difficult to challenge. As a result, the Court's high language about eliminating "all" race discrimination or making this command "universal" in the affirmative action context rings entirely hollow.

Second, this Essay addresses a different sort of limit found in the *Harvard-UNC Cases* and in the discussion of stereotyping in particular. To the Court, Equal Protection precludes stereotyping because it is harmful to view people with the same skin color as a monolith. This is undoubtedly correct. But the Court has missed the fact that race extends beyond skin color into the everyday lives of all Americans. This is true as an empirical matter. And it has also been true as a matter of my own lived experience. As a result, by ignoring the ways that race extends beyond skin color, the Court's affirmative action cases miss so much of how and why "race still matters to the lived experiences of all Americans in innumerable ways," as Justice Jackson pointed out in dissent.[15] Indeed, as shown in both social science and my own lived experience, "deeming race irrelevant in law does not make it so in life."[16] Black men are more likely to be stopped by the police; we are more likely to be seen as threatening and, thereby, killed in police encounters that are occasioned by the color of our skin; and, no matter how high the accolades we might achieve, we are unable to overcome our Blackness *even if we do not personally want to identify ourselves based upon this trait*. In this way, what the "color of my skin" version of stereotyping misses—and what the Supreme Court was wrong about in 2023, just as they were when the issue first made it to the Court in 1978—is the fact that it is impossible for one's perspective not to be impacted by race.[17] Race transcends. That is why race matters despite any effort to call the Constitution "colorblind."

I. THE COURT'S LOFTY LANGUAGE ABOUT UNIVERSAL EQUALITY FALLS FLAT IN THE FACE OF THE FOURTH AMENDMENT'S RACE-BASED POLICING REGIME

A. "Universal" Commitment to Ending Race Discrimination?

Though this Essay assumes familiarity with the Court's decision in the *Harvard–UNC Cases*, this Part briefly sketches out some of the majority's strong language about race and the Equal Protection Clause. After a short, if hollow,

14. The "shell game" concept is borrowed from my mentor Pam Karlan, whose work inspired much of this writing. *See, e.g.*, Pamela S. Karlan, *Shoe-Horning, Shell Games, and Enforcing Constitutional Rights in the Twenty-First Century*, 78 UMKC L. REV. 875, 882–88 (2010); Pamela S. Karlan & Daryl J. Levinson, *Why Voting Is Different*, 84 CAL. L. REV. 1201, 1220 (1996) (discussing the "heads you lose, tails we win" shell game of race in politics and election law).

15. 143 S. Ct. at 2277 (Jackson, J., dissenting).

16. *Id.*

17. Regents of Univ. of California v. Bakke, 438 U.S. 265 (1978).

admission that the Supreme Court itself has played a hand in permitting white supremacy and racism to permeate society, particularly after the Civil War, and quickly moving to the post-*Brown v. Board of Education* era,[18] the Court emphasized that the "core purpose of the Equal Protection Clause" is "'doing away with *all* governmentally imposed discrimination based on race."[19] Indeed, we are told, the clear and central purpose of the Fourteenth Amendment—having been imposed on the southern states at the resolution of the Civil War—was to "eliminate *all* official state sources of invidious racial discrimination in the States.'"[20] Chief Justice Roberts repeats the point: "[e]liminating racial discrimination means eliminating *all* of it," even declaring the Equal Protection clause to be "universal in its application."[21]

With these pronouncements in the background, the Court confirmed that "[a]ny exception to the Constitution's demand for equal protection must survive a daunting two-step examination" known as "strict scrutiny."[22] Under this standard, race-based state action must further a compelling state interest and the use of race must be "narrowly tailored"—that is, "necessary."[23] Strict scrutiny is thus required for any "race-based state action," and the Court has only identified two interests that meet this standard: (1) "remediating specific, identified instances of past discrimination," and (2) "avoiding imminent and serious risks to human safety in prisons" (like a race riot).[24] Surprisingly, the universities eschewed any notion that their current admissions practices were meant to remedy any form of past discrimination.[25] And there is no immediate safety issue in elite college admissions. That being the case, quite unsurprisingly, general diversity-related goals in colleges are not a third category the Court added to the short "survives strict scrutiny" list. Among other cited reasons, the Court found that racial preferences in admissions operate on racial stereotyping.[26] In the Court's understanding, impermissible stereotyping includes the idea that certain racial groups or "minority students" will "always (or even consistently) express some characteristic minority viewpoint on any issue."[27] The universities' admissions programs are unconstitutional because the schools posit there is "an inherent benefit in race *qua race*—in

18. 143 S. Ct. at 2159–60 (acknowledging that "this Court—alongside the country—quickly failed to live up to the [Equal Protection] Clause's core commitments," but declaring that the "inherent folly" of the "separate but equal" doctrine "soon became apparent" and "culminated" in the *Brown* decision).

19. *Id.* at 2161 (quoting Palmore v. Sidoti, 466 U.S. 429, 432 (1984) (emphasis added)).

20. *Id.* (quoting Loving v. Virginia, 388 U.S. 1, 10 (1967)).

21. *Id.* at 2161–62 (quoting Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886)).

22. *Id.* at 2162.

23. *Id.*

24. *Id.*

25. *Id.* at 2174 n.8.

26. *Id.* at 2175.

27. *Id.* at 2169 (quoting Grutter v. Bollinger, 539 U.S. 306, 333 (2003)).

race for race's sake,"[28] and because they are premised on the notion that "race in itself says [something] about who you are."[29] In the words of the majority:

> We have time and again forcefully rejected the notion that government actors may intentionally allocate preference to those "who may have little in common with one another but the color of their skin." The entire point of the Equal Protection Clause is that treating someone differently because of their skin color is *not* like treating them differently because they are from a city or from a suburb, or because they play the violin poorly or well.[30]

Considering someone a unique contributor to a college campus because of their race, then, denies them equal dignity.[31]

The lofty ideals of equality are so powerful, we are told, that remedying past societal discrimination—discrimination endorsed by the Supreme Court itself—is insufficient to constitute a "compelling interest."[32] The majority opinion triples down on this point, repeating that "ameliorating societal discrimination does not constitute a compelling interest that justifies race-based state action," and adding that "[p]ermitting 'past societal discrimination' to 'serve as the basis for rigid racial preferences would be to open the door to competing claims for remedial relief for every disadvantaged group."[33] The Court—having just described very tangible social discrimination like Jim Crow, formal segregation after the Civil War under *Plessy*, and the internment of Japanese people under *Korematsu*—suddenly finds the notion of remedies incalculable.[34] As Chief Justice Roberts put it: "Opening that door would shutter another—'[t]he dream of a Nation of equal citizens . . . would be lost . . . in a mosaic of shifting preferences based on inherently unmeasurable claims of past wrongs.'"[35] In the end, considering race in college admissions is "[m]ost troubling" because it means that the judiciary will "pick winners and losers based on the color of their skin."[36]

In the end, universities are free to consider information from college applicants about how they have overcome racial discrimination or other adversity. Universities may consider challenges people have faced *due to* the color of their skin. However, Chief Justice Roberts reasons, universities have wrongly concluded

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28. *Id.* at 2170.

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

30. *Id.* (citation omitted).

31. *Id.*

32. *Id.* at 2173.

33. *Id.* (quoting Richmond v. J.A. Croson Co., 488 U.S. 469, 505 (1989) (internal quotation marks omitted)).

34. Plessy v. Ferguson, 163 U.S. 537 (1896) (permitting racial segregation); Korematsu v. United States, 323 U.S. 214 (1944) (permitting forced interment and property takings of Japanese people on account of their race alone).

35. *Harvard-UNC Cases*, 143 S. Ct. at 2173–74 (quoting *Croson*, 488 U.S. at 505–56).

36. *Id.* at 2175.

"that the touchtone of an individual's identity is not challenges bested, skills built, or lessons learned but the color of their skin."[37] So, these versions of race-conscious admissions programs are no more.

B. In Reality, Race-Based Policing Under the Fourth Amendment

The Court majority's bold claims that "[e]liminating racial discrimination means eliminating all of it" and that the Equal Protection Clause is "universal in its application" are simply untrue. In dissent, Justice Sotomayor pointed out that the Supreme Court has "allowed the use of race when that use burdens minority populations," citing two cases from the mid-1970s.[38] Both of these cases, *United States v. Brignoni-Ponce*[39] and *United States v. Martinez-Fuerte*,[40] concern racial profiling by law enforcement of brown people along the U.S. southern border. Chief Justice Roberts rejects Sotomayor's point on the basis that these two cases "have nothing to do with the Equal Protection Clause" because they are Fourth Amendment cases.[41] But, Honorable Chief Justice, they are Fourth Amendment cases about race.

In these cases, the Supreme Court accepted the use of race as a consideration that is reasonable under the totality of circumstances under the Fourth Amendment, thereby permitting police to take race into account when it comes to the police making arrests or putting people in jail or prison. And it is perhaps worth emphasizing that these two Fourth Amendment cases are not "about race" in some indirect way. They are about race *simpliciter*. Decided in 1975, the question in *Brigioni-Ponce* was whether cars could be legally stopped by "roving patrols" near the San Diego border for one reason: "the apparent Mexican ancestry of the occupants."[42] The Court held that apparent race, standing alone, could not justify a stop, at least for roving patrols. However, the Court specifically found "Mexican appearance [to be] a relevant factor" in determining whom to seize and search

37. *Id.* at 2176.

38. *Id.* at 2246 (Sotomayor, J., dissenting).

39. 422 U.S. 873 (1975).

40. 428 U.S. 543 (1976).

41. *Harvard-UNC Cases*, 143 S. Ct. at 2162 n.3.

42. *Brignoni-Ponce*, 422 U.S. at 885. As *Brignoni-Ponce* illustrates, federal law enforcement officers specializing in immigration-related monitoring have long used the "roving patrol" tactic to search for immigration offenses by stopping people a few miles away from a border for some (often pretextual) reason, where their real motivation is to investigate things like drug smuggling and actions deemed crimes under federal immigration law. The questionable constitutionality of these tactics and their expansion to other contexts have been discussed elsewhere. *See, e.g.*, Philip Mayor, *Borderline Constitutionalism: Reconstructing and Deconstructing Judicial Justifications for Constitutional Distortion in the Border Region*, 46 HARV. C.R.-C.L. L. REV. 647, 650–52 (2011) (describing constitutional problems with roving patrols); Deborah Anthony, *The U.S. Border Patrol's Constitutional Erosion in the "100-Mile Zone"*, 124 PENN ST. L. REV. 391, 408 (2020) (similar); Pablo Chapablanco, "*Traveling While Hispanic": Border Patrol Immigration Investigatory Stops at TSA Checkpoints and Hispanic Appearance*, 104 CORNELL L. REV. 1401, 1421–24, 1433–37 (2019) (analogizing TSA checkpoints to roving patrols).

even if stops were not justified on the basis of race alone.[43] The next year, in 1976, the *Martinez-Fuerte* decision doubled down on the permissive use of race in performing immigration searches, though at a fixed checkpoint. On the question of whether perceived race could justify additional screening, the answer was yes: "It is constitutional to refer motorists selectively to the secondary inspection area at the San Clemente checkpoint on the basis of criteria that would not sustain a roving-patrol stop."[44] And "even if it be assumed that such referrals are made largely on the basis of apparent Mexican ancestry," the Court perceived "no constitutional violation."[45]

The lack of perceived Fourth Amendment violations from race-based policing decisions are not just vestiges of the 1970s, either. Instead, as recently as 2021, albeit in a different context, the Supreme Court again approved the use of race-based considerations by police in making stops in *United States v. Cooley*.[46] The Cooley decision upheld the rights of Indian tribes to "search non-Indians traveling on public rights-of-way running through a reservation for potential violations of state or federal law."[47] While recognizing the difference between tribal membership and race, the initial stop in that case—which no one questioned as unlawful on account of race—was made by the tribal police officer who observed that the driver "appeared to be non-native."[48] Other Fourth Amendment cases have blessed the use of race in permitting law enforcement seizures, both directly and indirectly.[49]

Most importantly, the Supreme Court's decision in *Whren v. United States*, where the Court blessed pretextual traffic stops under the Fourth Amendment, is paramount to the discussion.[50] *Whren* arose from the pretextual stops of two Black men whom the police really wanted to apprehend for drug-related offenses (which they succeeded in doing).[51] When it comes to the race-based "war on drugs" by the federal government, the racial reality on the ground involves racial bias.[52] Black people do drugs at roughly the same rates as folks of other races but are

43. *Brignoni-Ponce*, 422 U.S. at 873.

44. *Martinez-Fuerte*, 428 U.S. at 563.

45. *Id.*

46. 141 S. Ct. 1638 (2021).

47. *Id.* at 1642.

48. *Id.*

49. *See, e.g.*, Florida v. Bostick, 501 U.S. 429, 431 (1991) (permitting police searches on buses where, as Justice Marshall pointed out in dissent, the agents use race as a factor for determining who to stop); *id.* at 442 n.1 (Marshall, J., dissenting).

50. 517 U.S. 806 (1996).

51. *Id.* at 808.

52. *See generally* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010); ANGELA DAVIS, POLICING THE BLACK MAN: ARREST, PROSECUTION, AND IMPRISONMENT (2017).

disproportionately targeted for arrest and prosecution.[53] Black Americans have long been arrested at higher rates than white Americans, even if they have committed fewer crimes.[54] Black Americans are more likely to be killed by the police during arrests or other encounters with officers.[55] The disparities continue beyond the streets and extend to prosecutions and wrongful convictions of the innocent. We have long known that Black Americans are more likely than others to be prosecuted following arrest. And they are 19 times more likely than white people to be the victim of wrongful conviction for drug crimes when they are prosecuted.56 Then, Black Americans are sentenced more harshly than others for similar offenses in many jurisdictions.[57]

Whren both permitted these race-based disparities to exist and perpetuated them.[58] And, interestingly enough, the Court did so in a way analogous to the *Harvard-UNC Cases*: by imposing its view of a "colorblind constitution." Both approaches ignore the realities on the ground that undermine the lofty language they espouse. *Whren*'s controlling passage provides:

> We of course agree with petitioners that the Constitution prohibits selective enforcement of the law based on considerations such as race. But the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause,

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53. *See, e.g.*, German Lopez, *Black and White Americans Use Drugs at Similar Rates. One Group Is Punished More for It.*, VOX.COM (Oct 1, 2015, 9:05 AM), https://www.vox.com/2015/3/17/8227569/war-on-drugs-racism [https://perma.cc/X6QS-K6CY]; Patrick A. Langan, Bureau of Just. Stat., U.S. Dep't of Just., *The Racial Disparity in U.S. Drug Arrests* (Oct. 1, 1995), https://bjs.ojp.gov/content/pub/pdf/rdusda.pdf [https://perma.cc/SK8H-8XUR].

54. *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-94-29R, RACIAL DIFFERENCES IN ARRESTS (Jan. 20, 1994), https://www.gao.gov/assets/ggd-94-29r.pdf **[**https://perma.cc/85TG-Q4W3]**;** *see also* sources cited *infra* note 59.

55. Frank Edwards, Hedwig Lee, & Michael Esposito, *Risk of Being Killed by Police Use of Force in the United States By Age, Race-Ethnicity, and Sex*, 116 PROC. OF THE NAT'L ACA. OF SCI. 16793, 16794 (Aug. 20, 2019); Gabriel L. Schwartz & Jacquelyn L. Jahn, *Mapping Fatal Police Violence Across U.S. Metropolitan Areas: Overall Rates and Racial/Ethnic Inequities, 2013-2017*, PLOS ONE (June 24, 2020), https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0229686 [https://perma.cc/89VH-7HTQ].

56. SAMUEL R. GROSS, MAURICE POSSLEY, KEN OTTERBOURG, KLARA STEPHENS, JESSICA WEINSTOCK PAREDES, & BARBARA O'BRIEN, NAT'L REGISTRY OF EXONERATIONS, RACE AND WRONGFUL CONVICTIONS IN THE UNITED STATES 27 (2022), https://www.law.umich.edu/special/exoneration/Documents/Race%20Report%20Preview.pdf [https://perma.cc/FUC4-ZH4C].

57. *See generally* PAUL BUTLER, CHOKEHOLD: POLICING BLACK MEN (2017).

58. *See, e.g.*, Angela Davis, *Race, Cops, and Traffic Stops*, 51 U. MIAMI L. REV. 425 (1997) (pointing out ways in which *Whren* occasions more pretextual traffic stops for people of color and reflecting on the trauma imposed as a result); David Alan Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, 1997 S. CT. REV. 271 (1997) (examining the impact of *Whren* on racially diverse groups and its implications for undermining the Fourth Amendment generally); Stephen Rushin & Griffin Edwards, *An Empirical Assessment of Pretextual Stops and Racial Profiling*, 73 STAN. L. REV. 637, 643 (2021) (arguing that empirical study supports conclusion that *Whren* permits racially biased policing and profiling).

> not the Fourth Amendment. Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.[59]

At first blush, like some of the lofty language in the *Harvard–UNC Cases* itself, this passage may not seem very concerning. After all, the decision nominally indicates a prohibition on racialized law enforcement and it repeats the holding of *Graham*, a landmark police violence case which at the time was a victory for the Black plaintiff beaten by white officers. There, the Court held the "Fourth Amendment inquiry is one of 'objective reasonableness' under the circumstances, and subjective concepts like 'malice' and 'sadism' have no proper place in that inquiry."[60] At the time, this was a victory because the "objective reasonableness" standard is a lower burden than showing that a police officer acted with malice or bad faith in perpetrating acts of violence, and the courts below had directed a verdict for the officer due to a lack of showing of malice.[61]

Note, however, the crucial move in *Whren*: to frame the issue of selective race-based law enforcement as one of subjective intention and intentional discrimination. Why does this matter? The answer lies in another Supreme Court decision decided in 1976, the same year as *Martinez-Fuerte* and the year after *Brignoni-Ponce* permitted police to use race as a factor in making stops. That decision, *Washington v. Davis*, held that the Equal Protection Clause is not violated by actions that have a racially disparate impact, but only by actions with a racially discriminatory purpose.[62] Under *Washington*, statistical disparities alone are not sufficient to violate Equal Protection, even if the state actor is aware of the racially disparate outcomes.[63] *Whren* does not mention *Washington* or this rule, but this doctrine serves as important bedrock for how *Whren* has encouraged biased policing. Race can support suspicion for a stop or other action; actions often cannot be challenged as unconstitutionally race-based under the Fourth Amendment; and—the kicker—bringing an Equal Protection Clause challenge to even admittedly race-based action is extremely difficult because of *Washington* and subsequent law. As I discuss below, since *Washington* was decided, the barriers to bringing an Equal Protection claim in the context of a civil lawsuit related to a traffic stop or use of force have become extremely exacting.[64]

It is worth emphasizing that the proof is in the pudding here as a practical reality on the ground. In addition to the arrests, prosecutions, and wrongful convictions noted above, police violence against Black communities, and other

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59. *Whren*, 517 U.S. at 813 (1996).

60. Graham v. Connor, 490 U.S. 386, 399 (1989).

61. *See* Graham v. City of Charlotte, 827 F.2d 945, 950 (4th Cir. 1987) (affirming directed verdict for officer); Graham v. City of Charlotte, 644 F. Supp. 246, 247 (W.D.N.C. 1986) (entering directed verdict for officer).

62. 426 U.S. 229 (1976).

63. *Id.* at 240-41.

64. *See infra* at I.C.

communities of color, occurs in staggeringly racially disparate ways.[65] As noted, police are more likely to shoot and kill people of color, and these results continue even when they are unarmed.[66] When confronted with the racial realities of current doctrine, the Supreme Court has permitted factors like being in a "high crime" area to justify over-policing; more recently, the Roberts Court turned a blind eye to racialized policing on the ground and the over-policing of certain communities by permitting searches to be excused even if they were completely unlawful.[67] While some state courts have taken a different tack, allowing constitutional analysis under state analogues to the Fourth Amendment to consider these racial realities, the Supreme Court has been mum on the topic.[68]

C. Different Scrutiny, Different Consequences

The *Harvard–UNC Cases* further illustrate the differing ways the Court chooses to defer to certain actors or impost exacting scrutiny on others. Universities must satisfy the daunting gauntlet of strict scrutiny, and to do so they must offer reasons that the Court can measure sufficiently to review.[69] Part of the problem, the Court held, was that the diversity-related goals cannot be sufficiently quantified, which is usually a reason for courts not to intervene.[70] In this context,

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65. *See* DAVID ALAN SKLANSKY, A PATTERN OF VIOLENCE: HOW THE LAW CLASSIFIES CRIMES AND WHAT IT MEANS FOR JUSTICE, ch. 3 (2021).

66. *See, e.g.*, Marilyn D. Thomas, Nicholas P. Jewell & Amani M Allen, *Black and Unarmed: Statistical Interaction Between Age, Perceived Mental Illness, and Geographic Region Among Males Fatally Shot by Police Using Case-Only Design*, 22 ANN EPIDEMIOL 42 (2020) (finding increased risk of being shot by police for Black men even when unarmed and collecting sources from other studies reaching similar conclusions); E. Ashby Plant, Joanna Goplen, & Jonathan W. Kunstman, *Selective Responses to Threat: The Roles of Race and Gender in Decisions to Shoot*, 37 PERSONALITY & SOC. PSYCH. BULL. 1274 (2011) (similar results using statistical simulation data).

67. *See* Illinois v. Wardlow, 528 U.S. 119 (2000) (on "high crime" areas); Utah v. Strieff, 579 U.S. 232 (2016) (holding that evidence derived from an unlawful search need not be suppressed if police later learned of a valid arrest warrant for the individual they had searched).

68. *See, e.g.*, State v. Sum, 199 Wash. 2d 627 (2022) (race of person interacting with the police is relevant to the question of whether they have been seized); Commonwealth v. Warren, 475 Mass. 530, 58 N.E.3d 333 (2016) (Black man fleeing from the police cannot be considered inherently suspicious or criminal due to over policing and killing of Black men).

69. *Harvard-UNC Cases*, 143 S. Ct. 2141, 2166 (2023).

70. There is an irony in the Court's decision rejecting the rationales offered by the universities. The majority rejects the school's goals—promoting a robust exchange of ideas, creating diverse leaders, and breaking down racial stereotypes—because they "cannot be subjected to meaningful judicial review," in part because it is "unclear how courts are to measure any of these goals." *Id.* I say this is ironic because typically the job of addressing big, political goals that cannot be meaningfully subjected to judicial review is a reason the Court will not get involved. Indeed, in an area where there are meaningful ways to create statistical models involving the impact of government action—political gerrymandering—the Court has gone so far in eschewing judicial review that it holds these questions are "nonjusticiable." Rucho v. Common Cause, 139 S. Ct. 2484 (2019). The brand new "major questions doctrine" is also meant to preclude courts from weighing in on big social issues. West Virginia v. EPA, 142 S. Ct. 2587 (2022). It seems that if the problems facing our society—racial reconciliation, justice, and equality—are too big for a court to meaningfully measure, perhaps

though, the Court rejects deference to the schools' stated reasons for their race-conscious admissions programs.[71]

Part of the reason for this strenuous level of scrutiny, it seems, is a certain amount of by the majority members of the Court for the universities who have themselves previously sanctioned race discrimination. How can the universities claim to be specialists in resolving discrimination when they themselves have condoned it? For example, Justice Thomas wrote in concurrence that a "court must be able to measure" diversity-related goals and "determine when they have been reached," and that "it is error for a court to defer to the views of an alleged discriminator while assessing claims of racial discrimination."[72] As a result, Justice Thomas reasons, "judicial skepticism is vital."[73]

Justice Thomas even boldly claims "[w]e would not offer such deference in any other context."[74] But, as we have seen, this claim is untrue. Police officers' decisions about whom to stop and arrest are not at all limited to the "daunting" standards of "strict scrutiny," requiring that any race-based decision-making be so narrow that it is necessary and the justification for it compelling. Instead, police need only to articulate what is called "reasonable suspicion," one of the lowest possible standards known in the law.[75] While a "hunch" is not enough, reasonable suspicion is less demanding than the probable cause standard and Courts are cautioned not to demand "scientific certainty . . . where none exists."[76] Though it has more teeth, probable cause necessary for an arrest is also "not a high bar."[77] Indeed, the Court has focused on abstract probabilistic assessments police may make (even if based in racial bias), a "fluid" concept not subjected to any meaningful legal rules or requirements.[78] In sum, unlike the exacting scrutiny that they apply to schools, courts defer to the police—to their acts of violence under *Graham*, to

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the Courts should not be in the business of regulating that political question—or must at least provide some play in the joints, as they do with police, in achieving permissible goals. Though some on the Court have defended the strength of this new doctrine on textualist grounds, the basis for such a claim seems dubious. For a critical discussion of this new doctrine as a pragmatic ends-based form of judicial intervention, not one compelled by the text or history of the constitution, *see* Anita S. Krishnakumar, *What the New Major Questions Doctrine Is Not*, 92 GEO. WASH. L. REV. 1117 (2024).

71. *Harvard-UNC Cases*, 143 S. Ct. at 2168.

72. *Id.* at 2190 (Thomas, J., concurring).

73. *Id.* at 2191. There is a certain irony here. While judicial scrutiny *is* necessary to evaluate pretext, the Supreme Court's doctrine largely limiting the reach of the Equal Protection Clause to intentional discrimination has itself removed wide swaths of discriminatory conduct from judicial scrutiny (and done so at the behest of an institution—the Supreme Court—that has also formally sanctioned discrimination at the same time other institutions like universities did as well).

74. *Id.* at 2190.

75. *See* Kansas v. Glover, 140 S. Ct. 1183, 1188 (2020); Terry v. Ohio, 392 U.S. 1, 21–22 (1968).

76. Illinois v. Wardlow, 528 U.S. 119, 125 (2000).

77. Kaley v. United States, 134 S. Ct. 1090, 1103 (2014).

78. *See* D.C. v. Wesby, 138 S. Ct. 577, 586 (2018) (citing Illinois v. Gates, 462 U.S. 213, 232 (1983)).

an officer's assertion that reasonable suspicion exists for a seizure, and to an officer's claim that they have probable cause to make an arrest.[79]

The stakes and consequences of the two sets of decisions are vastly different. For affirmative action, the stakes are smaller than one might think. The *Harvard–UNC Cases* exempt military academies,[80] and the Court did not formally overrule its decisions in prior *sui generis* cases from Texas that used a "critical mass" concept, whereby schools focus on a critical mass of people of color.[81] While the current Court is (very) hostile to this concept, the door may still be open to a regime that focuses on a critical mass, if appropriately tailored. The Court's language also leaves room for the minority of schools that do consider race in admissions to admit their prior acts of racial exclusion, quantify their impact, and use race as a specific remedy for their own prior acts.[82]

In the end, as the Court noted, "[t]hree out of every five American universities do not consider race in their admissions decisions."[83] Many universities are not impacted by this decision at all. That includes all universities in California, Washington, and Michigan, where state law has already barred consideration of race in admissions.[84] To put that in some rough (albeit imperfect) context, over the past few years college enrollment has hovered between 19 and 20 million students nationally and three out of five would be just under 12 million students.[85] In the subset of schools that consider race in admissions, the question is whether schools are permitted to try to create educational equality by acknowledging that the race

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79. *See* Graham v. Connor, 490 U.S. 386, 396-97 (1989) (requiring deference to police in excessive force cases); *see also* Saucier v. Katz, 533 U.S. 194, 206 (2001) (noting that the "deference owed officers facing suits for alleged excessive force is not different in some qualitative respect from the probable-cause inquiry").

80. *Harvard-UNC Cases*, 143 S. Ct. 2141, 2166 n.4 (2023).

81. *Id.* at 2174.

82. The Court formally and explicitly held that remedying specific acts of race discrimination still satisfies the Equal Protection Clause. Thus:

> When it comes to workplace discrimination, courts can ask whether a race-based benefit makes members of the discriminated class 'whole for the injuries they suffered.' And in school segregation cases, courts can determine whether any race-based remedial action produces a distribution of students 'comparable to what it would have been in the absence of such constitutional violations.'

Id. at 2162, 2167 (respectively citing Johnson v. California, 543 U.S. 499, 512-513 (2005), quoting Franks v. Bowman Transp. Co., 424 U. S. 747, 763 (1976) (internal quotation marks omitted), and quoting Dayton Bd. of Educ. v. Brinkman, 433 U. S. 406, 420 (1977) (cleaned up)). Despite the availability of this option, "neither university defend[ed] its admissions system as a remedy for past discrimination—their own or anyone else's," and so the schools were left looking for other justifications to try to salvage their policies. *Id.* at 2174 n.8.

83. *Id.* at 2175 n.9.

84. WASH. REV. CODE 49.60.400; CAL. CONST. ART. 1, §31; MICH. CONST. ART. I, § 26.

85. Melanie Hanson, *College Enrollment & Student Demographic Statistics*, EDUC. DATA INITIATIVE (Oct 1, 2023), https://educationdata.org/college-enrollment-statistics [https://perma.cc/X8VZ-GUX4].

of the students is one consideration in remedying the impacts of past discrimination (many of which persist today).

The stakes in the policing context are dramatically higher, and the potential consequences are broader. Police contacts include individual, often unmonitored decisions of thousands of police officers across the country every hour of every day. Despite the pandemic, the Department of Justice estimates that 21% of U.S. residents aged 16 or older—about 53.8 million persons—had police contacts in 2020 alone.[86] At least 20 million traffic stops are made each year.[87] Without minimizing the importance of a college education, the potential consequences involved in police contacts are of a different character; liberty and life are literally on the line. Acts of police violence can leave people mangled, paralyzed, and with their lives truly upended. Indeed, U.S. police are more likely to kill people they encounter than police anywhere else in the world; more than 1,000 people are usually killed in police shootings each year.[88]

For the subset of universities invoking race in admissions, the Supreme Court has tough medicine, skepticism, and even a sense of hubris. By contrast, for the police—where contacts are more frequent and can lead to the death of civilians—there is deference, defense, and even the insulation of unlawful conduct. In an alternative reality, one could imagine the difference in deference being exactly the opposite. Those who are uniquely empowered to seize your body might be subject to exacting scrutiny whereby, for example, the decision to shoot a civilian must be justified by the most compelling interest and only constitutionally permitted where absolutely necessary. By contrast, in this alternative universe, efforts at remediating actual known discrimination—e.g. the ongoing vestiges of slavery that have never been even remotely adequately redressed—might be subject to more deference. Yet here we are.

D. The Equal Protection-Fourth Amendment Shell Game

Examining Equal Protection Clause cases against Fourth Amendment doctrine illustrates that the Court has engaged in what Pam Karlan calls a "shell game"

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86. Press Release, Contacts Between Police and the Public, 2020, Bureau of Justice Statistics (Nov. 18, 2022), https://bjs.ojp.gov/press-release/contacts-between-police-and-public-2020 [https://perma.cc/LX25-X5RB]. *See also* SUSANNAH N. TAPP & ELIZABETH J. DAVIS, CONTACTS BETWEEN POLICE AND THE PUBLIC 2020 at 1 (Bureau of Justice Statistics Nov. 2022), https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/cbpp20.pdf [https://perma.cc/U7JR-XBUK].

87. *See Findings*, OPENPOLICING, https://openpolicing.stanford.edu/findings/ [https://perma.cc/6DBY-P8MP] (last visited July 14, 2023) ("Police pull over more than 50,000 drivers on a typical day, more than 20 million motorists every year.").

88. *See generally* SKLANSKY, *supra* note 65 at ch. 3; *Fatal Force*, WASH. POST, https://www.washingtonpost.com/graphics/investigations/police-shootings-database/ [https://perma.cc/E57Z-YUUB] (last updated Apr. 4, 2024) (reporting police shot and killed at least 1,050 people nationwide in 2021, 1,020 via shootings in 2020, and 997 in 2019).

when it comes to the consideration of race and police.[89] Roughly stated, a shell game is where the Court weakens constitutional protections or enforcement in one area by talking about the availability of a right or remedy in another area. And then, when you get to that other area, the court weakens your constitutional protection in that area by pointing you back to where you started. For example, in the "ordinary" Fourth Amendment context, typical remedies for a violation include suppression of evidence in a criminal case or filing a civil lawsuit. As part of this shell game, the Court will weaken the exclusionary rule in an opinion arising from a criminal case, including by pointing to the viability of a civil rights lawsuit under 42 U.S.C. § 1983. Then, in its § 1983 cases the Court will strengthen qualified immunity or weaken rights protections by pointing to the availability of exclusion in a criminal case as if it had not just weakened the exclusionary rule.[90]

The affirmative action decision's rejection of the cases permitting race-based policing as decisions about the "Fourth Amendment," on one hand, and deferral of race to intentional race discrimination under the court's Equal Protection clause, on the other, presents a terrifying shell game. The shell game serves to provide zero accountability for the race-based decisions of a police officer, even when the officer has made race and gender specifically part of the calculus.

The events surrounding the shooting of Jordan Baker are illustrative. Jordan Baker was killed by a Houston Police Department officer on a January night in 2014. Baker had left his home on his bicycle while wearing a hooded sweatshirt and slippers and rode to a strip mall a few blocks from his home. Jordan rode his bike through the parking lot and drew the attention of a police officer in an unmarked car who was there to respond to a number of robberies in the area. The officer was explicit about his consideration of whether to stop Baker: He was Black, he was a man, and he was wearing a hooded sweatshirt.[91] With this in mind, the officer nearly ran Jordan Baker over with his car and initiated a stop as Jordan was simply leaving the parking lot on a bicycle. Things escalated when Baker's compliance with the officer's commands was imperfect; Jordan went from riding his bike and committing no crime to having been almost run over and having a gun pointed at his head in seconds. At this point, the officer pointed his gun at Baker, half-naked and shoeless, and so Baker fled. The officer eventually gave

89. Karlan, *Shoe-Horning, supra* note 14, at 877.

90. *See generally* David B. Owens, *Fourth Amendment Remedial Equilibration: A Comment on* Herring v. United States *and* Pearson v. Callahan, 65 STAN. L. REV. 563 (2010). Just recently, the Supreme Court did this in its *Vega v. Tekoh* decision, which held that *Miranda* was not a right enforceable under § 1983, partially because a suppression remedy is available elsewhere. Vega v. Tekoh, 597 U.S. 134 (2022). But the Court has been consistent in weakening the Fifth Amendment suppression remedies in other cases. *E.g.*, United States v. Patane, 542 U.S. 630 (2004).

91. *See* R. & R., Est. of Baker by & through Baker v. Castro, No. CV H-15-3495, 2018 WL 4762984, at *1 (S.D. Tex. Aug. 31, 2018); Order, No. CV H-15-3495, 2018 WL 4762958 (S.D. Tex. Oct. 2, 2018).

chase and shot and killed Baker in an alley behind the strip mall.[92] He is survived by his small child and mother, Janet Baker, who must now raise her grandson.

The family filed a civil suit against the officer and the City of Houston.[93] Apart from the shooting itself, the suit separately challenged the initial decision to stop Jordan under both the Fourth Amendment, arguing that there was not "reasonable suspicion" for the seizure and under the Equal Protection Clause, arguing that using Jordan's race (Black) and sex (male) as a basis for the stop violated the Fourteenth Amendment. Predictably, the court dismissed the Fourth Amendment claim related to the decision to seize Baker by pointing to factors supporting reasonable suspicion, despite Jordan's innocence.[94] Among other things, because other robberies that had happened at the grocery stores nearby where Jordan lived had been by Black men wearing hoodies, it was permissible as a matter of law to at least detain an innocent person for questioning. As the Court put it, "race was one of many factors used "in the officer's decision to stop Baker, and "race was only a factor because [Baker] was the same race as the suspects in almost all of the armed robberies in the area."[95] In other words, if other Black men commit crimes near where you live and wear clothing ubiquitous in the winter, the police can stop you under the Fourth Amendment.

Now, the shell game. Turning to the Equal Protection claim, the Court acknowledged that Baker was stopped at least in part due to his race. The record also included statistically significant evidence of systemic racial disparities in Houston. For example, between 2009 and 2013, Black motorists were 57% more likely to be stopped than non-Black drivers and ranked high on the "disparity index," a widely used metric for statistical evaluation of racial disparities.[96] Yet because of *Washington* and its applications, the claim failed.[97] It is perhaps worth reiterating: Invocation of race and even statistical evidence of racial disparities supporting a further inference of intentional action by the municipality was not enough to bring a claim against the officer or police department.[98] Precedent derived from *Washington v. Davis* precluded it, as the court reasoned that Baker was required not only to show race-conscious decision-making about *himself* but had to further prove "'that two or more classifications of similarly situated persons

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.* at *12.

96. *See* Pl.'s Resp. in Opp'n to City of Houston's Mot. for Summ. J. at 10–12, *Baker*, No. 4:15-CV-3495, ECF No. 162.

97. *Baker*, 2018 WL 4762984, at *12–*13 (citing Gallegos-Hernandez v. United States, 688 F.3d 190, 195 (5th Cir. 2012) (citing Stefanoff v. Hays County, Tex., 154 F.3d 523, 525–26 (5th Cir. 1998) (citing Johnson v. Rodriguez, 110 F.3d 299, 307 (5th Cir. 1997) (citing Washington v. Davis, 426 U.S. 229, 246–50 (1976)))).

98. *Id.*

were treated differently' by a state actor."[99] This is exceedingly hard to do. How was Jordan Baker's family supposed to show, for example, that white men wearing hoodies near the strip mall were not stopped, and not stopped by this particular officer? Why is it not sufficient to at least have a trial on the matter, given statistical disparities plus the fact the decision to stop and perceive Jordan as dangerous, though he was innocent, undisputedly involved race?

Because, for many people of color challenging racialized policing, more than racial consideration is required to state an Equal Protection claim. However, when the Court chooses to ratchet up the level of scrutiny, the consideration of race is dispositive. And, as the *Harvard–UNC Cases* themselves show, statistical trends do support an inference of race-based action.[100] In the *Harvard-UNC Cases*, the Court inferred racial discrimination from the consistent numbers across years, finding that the race-based policies "operate like clockwork."[101] But when statistical evidence of racial disparities is presented by someone like Jordan Baker showing that the Houston Police Department's racial profiling of Black residents operates like clockwork, there is no claim.

In the end, despite following *Whren*'s command to bring the race-based policing claim under the Equal Protection Clause instead of the Fourth Amendment, and despite the fact that Jordan Baker was stopped, at least in part, on account of his race and gender, Baker's family had neither an equal protection remedy nor one under the Fourth Amendment. The shell game prevails.

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All of that being the case, one might wonder whether the *Harvard–UNC Cases* present a new opportunity to attack *Whren* or the requirement of purposeful discrimination under the Equal Protection clause. If the capacious language of the decision is to be believed, then it should hypothetically have that effect. Yet history has shown the capacious language cannot be believed. The racial reality on the ground—which has persisted through the pandemic, international protests for months following the murder of George Floyd—compels the conclusion otherwise. If anything, the Supreme Court's other decisions about policing from this term, both of which let stand lower decisions giving police immunity for killing unarmed people, suggest that no sea change will be occasioned in the Fourth Amendment waters from the *Harvard–UNC Cases*.[102] Instead, the duality—and the shell game—appear here to stay.

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99. *Id.* at *12 (quoting Gallegos-Hernandez v. United States, 688 F.3d 190, 195 (5th Cir. 2012)).

100. 143 S. Ct. 2141, 2168–71 (2023) (evaluating the admissions statistics by race).

101. *Id.* at 2171 n.7.

102. *See* Lombardo v. St. Louis, No. 22-510, 2023 WL 4278467, at *1 (U.S. June 30, 2023) (Sotomayor, J., dissenting from denial of grant of certiorari); N. S. v. Bd. of Police Commissioners, No. 22-556, 2023 WL 4278468, at *1 (U.S. June 30, 2023) (Sotomayor, J., dissenting from denial of grant of certiorari).

E. The Disparity Between Rhetoric and Reality Persists Elsewhere Too

The *Harvard–UNC Cases* have a familiar feel. The Court goes on at length to describe the evils of race discrimination, and how "universal" rules prohibiting such discrimination are understood while at the same time imposing a new rule that in reality undermines efforts at racial justice and equality. To the Court, the way to remedy racism is not taking remedial steps at ending disparities; it is pretending that race never meaningfully existed via imposed colorblindness. This obviously makes no sense. If we were to imagine a track meet where one group of people were literally shackled with chains while trying to run life's race while another group were not only unshackled but also got a head start, no one would think the race became fair simply when one group's shackles were removed. The group who had a head start without shackles would still have many advantages, and those advantages would not disappear or be remedied by simply pretending the shackles never existed. That, however, is essentially what colorblindness necessitates. And it is absurd.

To be sure, the Court welcomes the opportunity to discuss racial discrimination as an inherent evil, but falls short when it comes to doing meaningful things that would actually solve the problem, frequently imposing rules (like the one permitting conscious racially disparate actions in *Washington*) that dilute the rights it has deemed important.[103] In the context of eliminating racial bias in peremptory strikes, where the Court has also declared racism to be illegal using lofty universalist language, the Court's procedure developed for handling this evil in *Batson v. Kentucky*[104] has been widely viewed as a failure requiring reform or abolition.[105] A core problem, analogous to deference to police in articulating "reasonable suspicion," is that pretext is often difficult, or near impossible, to overcome because of the wide latitude prosecutors might have for striking a juror, even when everyone reasonably observing knows that race impacted the decision in some way.[106]

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103. This is part of a broader trend of "rights essentialism." *See* Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857 (1999). Under this approach, the Supreme Court treats rights as if they have nothing to do with the actual remedies that exist when they are violated. The Court's duality, in effect, permits the Court to limit the practical value of constitutional rights both in theory and practice. For a broader discussion applying Levinson's article to the Fourth Amendment, see David B. Owens, *Fourth Amendment Remedial Equilibration: A Comment on* Herring v. United States *and* Pearson v. Callahan, 62 STAN. L. REV. 563 (2010).

104. 476 U.S. 79 (1986).

105. For an exhaustive catalogue on efforts on reform in the states, *see generally* Thomas Frampton & Brandon Osowski, *The End of* Batson? *Rulemaking, Race, and Criminal Procedure Reform*, 124 COLUM. L. REV. 1 (2024).

106. *See* Miller-El v. Dretke, 545 U.S. 231, 267–68 (2005) (Breyer, J., concurring) (explaining that studies and other reports continue to show that "the discriminatory use of peremptory challenges remains a problem" despite *Batson*).

Chief Justice Roberts' decision in *Shelby County v. Holder*, striking down key parts of the Voting Rights Act, is a bird from the same flock.[107] There the Court described the failure to provide equal voting rights for freed slaves (and others) following the Civil War, just as it had in the *Harvard-UNC Cases*.[108] Then, in analogous fashion to the affirmative action case, the Court heralded acts taken to seek equality (with Congress' passage of the Voting Rights Act playing a functional role similar to that which *Brown v. Board of Education* played in the *Harvard-UNC Cases*).[109] As with prior challenges to the Voting Rights Act by Southern states, Chief Justice Roberts described the history of the Court upholding portions of the Act that required certain Confederate states to ensure their voting maps were not racially discriminatory by having their maps precleared before going into effect.[110] This was permissible in 1966.[111] It was impermissible in 2013 because, despite extensive findings of fact in the trial court record showing continuing racial disparities in voting districts in Alabama, the Court declared that our "country has changed."[112]

As a result, Chief Justice Roberts rejected the argument that Shelby County could not complain about preclearance or render a Fifteenth Amendment challenge "in light of voting discrimination in Shelby County."[113] Here is the telling passage:

> But that is like saying that a driver pulled over pursuant to a policy of stopping all redheads cannot complain about that policy, if it turns out his license has expired.[114]

Yet, as we have seen, a Black driver pulled over in Houston pursuant to a policy of over-policing Black drivers cannot complaint about that policy "if it turns out" they were stopped for a broken taillight or some other pretext as a result of *Whren* and *Washington*.

Other aspects of Fourth Amendment adjudication operate in the same structure purportedly rejected in the redhead hypothetical from *Shelby County*. For example, the exclusionary rule does not apply to unconstitutional searches or seizures "if it turns out" the police acted in "good faith" when violating someone's constitutional rights.[115] Likewise, qualified immunity permits unconstitutional actions—and prevents challenges to unconstitutional police violence under the Fourth Amendment—"if it turns out" there was not a sufficient level of "clearly

107. Shelby County v. Holder, 570 U.S. 529, 553 (2013).
108. *Id.*
109. 347 U.S. 483 (1954).
110. *Shelby County*, 570 U.S. at 553.
111. *Id.* (citing South Carolina v. Katzenbach, 383 U.S. 301 (1966)).
112. *Id.* at 557.
113. *Id.* at 554.
114. *Id.* (emphasis added).
115. Herring v. United States, 555 U.S. 135, 142–143, 145 (2009).

established law" at the time of the action. The doctrine is so strong that an action can be unconstitutional but a plaintiff is not even permitted a trial if it turns out the constitutional violation was not deemed to be "clearly established."[116] The pattern persists: State actors seeking to redress race discrimination in Shelby County are rebuffed under exacting forms of scrutiny, while under the Fourth Amendment, police can make unconstitutional, fatal mistakes and receive deference rather than any scrutiny at all.

II. REDUCING RACE TO THE "COLOR OF YOUR SKIN" MISSES THE FACT THAT RACE MATTERS

The *Harvard–UNC Cases* often use the phrase "color of their skin" to talk about race discrimination, and particularly the issue of "stereotyping."[117] As a result, to Chief Justice Roberts, the "most troubling" part of defending affirmative action is "a judiciary that picks winners and losers based on the color of their skin."[118]

This statement is puzzling to me. For one, the Supreme Court has picked winners and losers based upon the color of their skin. The Court has done this directly–although the majority tries to downplay, and apologize for, the most egregious actions. The Court has also done this indirectly, by rejecting the importance of disparate impact or statistical disparity. In reality, the Supreme Court picks winners and losers based upon race all the time. Black folks challenging police stops as racially discriminatory are often left with no option even when statistically significant evidence of racial profiling exists.

And, recall, police are just straight-up permitted to consider perceived race when making traffic stops or apprehending suspects. Jordan Baker's claims failed because he was a Black man in a hooded sweatshirt living in a neighborhood where Black men in hooded sweatshirts committed crimes and was, for purposes of state-action, interchangeable with people he had nothing in common with other than his race and gender. So if it is wrong to treat people as stereotypes based upon their skin color in college admissions, why are Black men in hoodies permitted to be subjects of police violence based upon stereotypes and assumptions about who they are because of their skin color?

But that is only the beginning. The majority also uses the color-of-your-skin language in this passage:

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116. *See generally* Pearson v. Callahan, 555 U.S. 223 (2009) (discussing qualified immunity and permitting courts to decide constitutional questions and assess whether law was "clearly established" or simply finding the law was not clearly established without addressing the constitutional issue). For an example of the way the doctrine plays out in this fashion, *see* Wilson v. Layne, 526 U.S. 603 (1999), where the Court unanimously found a Fourth Amendment violation but then found, eight-to-one, that the violation was not "clearly established" at the time.

117. *E.g.*, *Harvard-UNC Cases*, 143 S. Ct 2141, 2159, 2170, 2175–76 (2023).

118. *Id.* at 2175.

> [t]he entire point of the Equal Protection Clause is that treating someone differently because of their skin color is not like treating them differently because they are from a city or from a suburb, or because they play the violin poorly or well.[119]

The idea that race is different than where you were raised or how well you play the violin is correct, both (1) empirically, and (2) as a matter of lived experience. Yet what social science and lived experience show is that the Court has drawn the wrong the Equal Protection lesson from these truths, because the court has misunderstood the importance of race beyond mere skin color.

First, social science confirms that race matters because one cannot discount the manner in which it impacts their life *despite* other demographics, backgrounds, politics, or musical skills. [120] No one cares if you have an Ivy League degree or are a fancy lawyer when you are perceived as a Black man wearing a hooded sweatshirt. Likewise, Black men who have done drugs are perceived as violent and dangerous and *treated that way*. Or, worse, with a Black man holding a gun, even lawfully. A Black man showing a gun in a careless video is seen as dangerous, and worthy of sanction by his employer.[121] Meanwhile, in classic hypocrisy, white elected officials pose with their guns on Christmas cards.[122] The truth of the matter is that Black men, with or without firearms, are perceived as dangerous and then *treated that way*.

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119. *Id*. at 2170.

120. *See* Allison L. Skinner & Ingrid J. Hass, *Perceived Threat Associated with Police officers and Black Men Predicts Support for Policing Policy Reform*, 7 FRONT. PSYCH. 1, 2 (2016) ("There is considerable evidence that in the U.S. Black men are stereotyped as hostile and aggressive, and tend to be associated with threat. For example, priming participants with the concept of crime brings Black faces to mind, whereas priming participants with Black faces increases the cognitive accessibility of threatening objects (e.g., guns). Moreover, people tend to misidentify objects held by Black targets (relative to white targets) as threatening and are quicker to "shoot" Black vs. white targets in laboratory simulations, an effect that is particularly pronounced for Black male targets.") (citing, among other things, Plant et. al., *supra* note 66).

121. Teresa M. Walker, *NBA Suspends Ja Morant 25 Games for 2nd Social Media Video Involving a Gun,* ASSOCIATED PRESS (June 16, 2023, 11:06 AM), https://apnews.com/article/nba-suspension-ja-morant-grizzlies-silver-b41cba5fd2225eace4a586d7c641a190 [https://perma.cc/5FPF-PWT3].

122. *See, e.g.*, Christina Wyman, *A Christmas Card with Guns? Lauren Boebert and Thomas Massie Start a New Culture War*, NBC NEWS (Dec. 10, 2021, 4:31 AM), https://www.nbcnews.com/think/opinion/christmas-card-guns-lauren-boebert-thomas-massie-start-new-culture-ncna1285709 [https://perma.cc/4QYA-4RJK] (describing and depicting elected officials making Christmas posts with assault style weapons, including having those weapons be wielded by children); Dave Zirin, *Ja Morant and This Country's Sick, Hypocritical, and Racist Relationship to the Gun*, THE NATION (May 16, 2023), https://www.thenation.com/article/society/ja-morant-gun-nba/ [https://perma.cc/VVR9-436U] (discussing the hypocrisy of gun culture in the United States); Michael Paul Williams, *The Response to an NBA Star's Firearm Flaunting Shows Hypocrisy on Gun Rights*, RICHMOND TIMES DISPATCH (May 20, 2023), https://richmond.com/news/nation-world/williams-the-response-to-an-nba-stars-firearm-flaunting-shows-hypocrisy-on-gun-rights/article_b5169fdc-f5dc-11ed-9dc8-57863e5f0c65.html [https://perma.cc/CY55-PBAC].

The literature on implicit unconscious bias also confirms the pervasive importance of race.[123] As one commentator put it, the upshot of this research—a result of our own social conditioning—is that "we're all probably at least a little racist."[124] The basic premise is that racialized assumptions and actions impact our lives even if we're not consciously making race-based decisions. This is true for the police. And it is true for judges as well—they may pick winners and losers based upon the color of their skin without saying it explicitly or even knowing it at all.[125] Many employers have tried to implement racial bias training, which often fails. Indeed, many courts have created videos concerning unconscious bias for jurors.[126] While some folks may tinker with training design, there is an obvious reason these trainings hit speedbumps: these biases are too well-entrenched and deeply rooted to be overcome by a few hours of training; otherwise, they would not be so influential. In short, whatever may be said about the "colorblind constitution" from a legal perspective, the Court's affirmative action decisions contradict established social science—including social science invoked by other federal judges around the country concerning unconscious bias.[127]

Second, equating race with the color of one's skin also cannot be squared with my own lived experience. I have lived in towns of various sizes and

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123. *See, e.g.*, MAHZARIN BANAJI & ANTHONY G. GREENWALD, BLINDSPOT: HIDDEN BIASES OF GOOD PEOPLE (2013).

124. Jenée Desmond-Harris, *Implicit Bias Means We're All Probably at Least a Little Bit Racist*, VOX.COM (Aug. 15, 2016, 12:00 PM EDT), https://www.vox.com/2014/12/26/7443979/racism-implicit-racial-bias [https://perma.cc/3S92-PBHW].

125. Judicial decisions on pretrial release and bond amounts reflect these racial disparities. Black and Brown defendants are less likely to be permitted release awaiting trial and more likely to have to pay vastly more than white defendants. *See, e.g.*, ALISON SIEGLER, FREEDOM DENIED: HOW THE CULTURE OF DETENTION CREATED A FEDERAL JAILING CRISIS (2022); David Arnold, Will Dobbie, & Peter Hull, *Measuring Racial Discrimination in Bail Decisions*, 112 AM. ECON. REV. 2992 (2022); David Arnold, Will Dobbie, & Crystal S Yang, *Racial Bias in Bail Decisions*, 113 Q. J. OF ECON. 1885 (2018); Wendy Sawyer, *How Race Impacts Who is Detained,* PRISON POL'Y INITIATIVE, (Oct. 9, 2019), https://www.prisonpolicy.org/blog/2019/10/09/pretrial_race/ [https://perma.cc/PD6L-4UPH].

126. *See, e.g.*, *Unconscious Bias Juror Video*, U.S. DIST. CT., W. DIST. OF WASH., https://www.wawd.uscourts.gov/jury/unconscious-bias [https://perma.cc/7X87-853C] (last visited Mar. 31, 2024); *Unconscious Bias Video for Potential Jurors*, U.S. DIST. CT., N. DIST. OF CAL., https://cand.uscourts.gov/unconscious-bias-video-for-potential-jurors/ [https://perma.cc/HW35-QNQB] (last visited Mar. 31, 2024); *Juror Orientation Video Updated to Address Unconscious Bias*, MICH. CTS. (Dec. 8, 2021), https://www.courts.michigan.gov/news-releases/2021/december/juror-orientation-video-updated-to-address-unconscious-bias/ [https://perma.cc/32F9-G29A].

127. *See, e.g.*, Shirley v. Yates, 807 F.3d 1090, 1111 n.26 (9th Cir. 2015), as amended (Mar. 21, 2016) (commenting on implicit bias as recognized by the District Court, discussing the failures of *Batson* to recognize implicit bias as noted by Justices Marshall and Breyer, and collecting other sources); State v. Berhe, 193 Wash. 2d 647, 657 (2019) ("However, we also recognize that when explicit or implicit racial bias is a factor in a jury's verdict, the defendant is deprived of the constitutional right to a fair trial by an impartial jury. In addition, identifying the influence of racial bias generally, and implicit racial bias specifically, presents unique challenges. Courts must account for all of these considerations when confronted with allegations that explicit or implicit racial bias was a factor in the jury's verdict.").

demographics—from Chicago, Los Angeles, and San Francisco to a 2,000-person fishing town in rural Washington State. I have taught elementary school students in the inner-city as well as law students at elite universities like Stanford and the University of Chicago. I grew up with a single-parent white mother and was essentially raised in an overwhelmingly white Evangelical mega-church throughout my formative years. My habits, hobbies, culture, and *identity* are steeped in traditionally white culture. But life has taught me time and again it does not matter. To the world, I am a Black man. As a result, despite my best efforts—whether conscious or not—to identify or act in a manner that exemplifies "whiteness" even as a means of trying to render my perceived race irrelevant, it cannot be overcome. I have experienced racism in every place I've lived, every job I can remember having as an adult, and continue to experience it as a lawyer and professor today. As a result, despite being raised as a conservative evangelical, where my early political and philosophical views trended toward books like an anthology of Scalia's dissents[128] or by categorical moral theorists like Immanuel Kant,[129] lived experience has trumped any theory of equal justice that perceives American society as "colorblind."

Speaking for myself, race impacts life every single day, despite the fact I wish it might not. It is inescapable. There are too many examples to list, including being racially profiled riding my bike; walking home from a bar; being routinely stopped by police in traffic stops in Palo Alto, California (something I was able to predict and that was unsurprising given the police department's racial profiling regime[130]); being strip-searched as a child for allegedly shoplifting after bringing an item from a sidewalk sale *into* the store; being accused of being a car thief, as opposed to a lost child, at a large public event in Seattle when I was in second grade; being attacked by people using the N-word; the list goes on. I have seen how my own race—as the single differentiating factor among my white friends and family growing up—has changed the collective lived experience of everyone in this group. None of these things were prevented from happening because I grew up in a small town or played in the school orchestra (double bass, not violin).

Race has impacted my lived experience as an attorney, too. It does not matter if I'm in a suit, with legal documents in hand, in a criminal court building; I have several times been presumed to be the defendant, even where I have been

128. ANTONIN SCALIA & KEVIN A. RING, SCALIA DISSENTS: WRITINGS OF THE SUPREME COURT'S WITTIEST, MOST OUTSPOKEN JUSTICE (2004).

129. *See* IMMANUEL KANT, GROUNDWORK OF THE METAPHYSICS OF MORALS (1785) (proposing the categorical imperative, a universalist deontology, for evaluating moral action).

130. *See* Jessie Mangaliman, *Palo Alto Police Chief Retires After Firestorm on Racial Profiling Remarks*, MERCURY NEWS (Nov. 10, 2008) (describing how the Palo Alto chief of police ordered officers to stop Black motorists).

practicing in front of the same judge and deputy for years.[131] Judges, including Black judges, have treated me differently than the white attorneys opposing me, often interrupting and holding me to different standards than others.

With all that in the background, I would suggest it is a fundamental defect of constitutional colorblindness to erroneously confine race to mere skin color and to equate racial considerations with "stereotyping." To the majority, the "color of your skin" equates to stereotyping because it presumes all people from a racial group have the same opinion. This is a red herring, or just wrong. Instead, history and lived experience teach that race is more than just skin color. It is about social treatment, regardless of class, education, station in life, the type of town you grew up in, or a host of other factors. That is, race is so ubiquitous and so important to how an individual interacts with the world that they cannot avoid having different perspectives. Encouraging racial diversity *as* racial diversity does not stereotype; it does the opposite. It is an acknowledgement that lived reality, on account of race, impacts how people operate in the world regardless of their station of life or perspective in the world. One could be as conservative as Clarence Thomas or as radical as Cornel West, but both of these men have lived lives *as Black men.* Like mine, their racialized life experiences—which cannot be substituted on account of where they grew up, or how poor they were (or were not), or what instruments they might play—necessarily informs their personal perspective in the world. Put differently, though differences in places we grew up, how we were raised, our economic class, or other demographics certainly matter, none of these things substitute for the unique experience in people's lives based upon their race (or perceived race) on its own. To paraphrase West: Race matters whether we want it to or not and regardless of other forms of privilege that someone may have or lack.[132]

So, the notion of prohibiting "stereotyping" may be easy to invoke when the Court, as in the affirmative action cases, talks about people in reference to their skin color alone. The notion that considering race equates to stereotyping falls apart if we look beyond skin color and recognize the racial reality (validated in the social science) that having a particular skin color impacts one's everyday life. You can be urban, rural, rich, poor, educated, illiterate, liberal, conservative, or any number of things and still not escape the fact that one's skin color matters to that life *every single day.* The colleges should be frank that it is this lived experience that justifies the idea of a "critical mass" of people of color, and it is this idea that motivates their race-conscious diversity initiatives. Simply put, diversity is important because, like it or not, race still matters.

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131. Of course, I am not alone in this. Bryan Stevenson has shared his similar experience, long before I began practicing and, Brooklyn Crockton reported the same more recently. *See* BRYAN STEVENSON, JUST MERCY: A STORY OF JUSTICE AND REDEMPTION (2014); Edward Fitzpatrick, *Black Law Student in Rhode Island Says Deputy Mistook Her for a Defendant*, BOS. GLOBE (Mar. 7, 2022, 5:10 PM), https://www.bostonglobe.com/2022/03/07/metro/black-law-student-says-deputy-mistook-her-defendant/ [https://perma.cc/Z2JM-4EYX].

132. CORNEL WEST, RACE MATTERS (1993).

CONCLUSION

The Supreme Court's rejection of the current regime of race-conscious admissions uses broad language, but the holding of the Court's decision is narrow, both practically and formally. The major practical reality—far more significant to everyday lives than college admissions—is the fact that police may, and do, use race when determining who to stop or seize. In policing, the shell game between the Fourth Amendment and Equal Protection Clause undermines remedial efforts, sometimes almost entirely. At the end of the day, and consistent with the Court's historical and continued ignorance with respect to the racial realities on the ground, confining race to the "color of one's skin" is not only a misstep but a harmful one. For me; for other Black men in hoodies, like Jordan Baker or Trayvon Martin; and for millions of Americans, being "colorblind" is not an option. Instead, race matters regardless of whether or not the Constitution acknowledges these racialized experiences. And we must be attentive to the fact that race—including its perception and how it implicates our treatment by the State—matters. Our lives depend on it.