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Can the Blind Lead the Blind? Rethinking Equal Protection Jurisprudence Through an Empirical Examination of Blind People's Understanding of Race

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ARTICLES

CAN THE BLIND LEAD THE BLIND? RETHINKING EQUAL PROTECTION JURISPRUDENCE THROUGH AN EMPIRICAL EXAMINATION OF BLIND PEOPLE'S UNDERSTANDING OF RACE

Osagie K. Obasogie*

ABSTRACT

Lay understandings of race largely attribute its salience—why race is a noticeable, conspicuous, and striking aspect of human relations—to its visual obviousness. To the extent that law often reflects lay understandings of social phenomena, I show in this Article that equal protection jurisprudence has similarly come to orient around the idea that the salience, coherence, and perceptibility of race stems from visually obvious cues (skin color, facial features, etc.) that are self-evidently known and exist apart from any broader social or legal process. I call this equal protection's "race" ipsa loquitur trope; race is thought to speak for itself. For courts, the moral, legal, and conceptual salience of race stems from a reductionist account that largely treats it as a visually obvious attribute that is self-evidently known by simple observation.

"Race" ipsa loquitur has influenced the Court's administration of equal protection in at least three areas. First, the tiered system of scrutiny used to determine the appropriate level of review (strict scrutiny, intermediate scrutiny, or rational basis review) for laws burdening particular groups' privileges, in large part, racial minorities and groups with visible race-like traits while affording lesser scrutiny to others. The presumably self-evident nature of race largely justifies the Court's heightened judicial solicitude for racial minorities. Second, the Court's embracing of colorblindness as a normative framework for understanding equal protection's boundaries is driven by a visual metaphor that frames race and discrimination as quintessentially visual experiences. Since it is largely believed that blindness or not being able to see distinctions in color diminishes a person's ability to understand race, the Court's colorblind approach attempts to transcend racial antagonisms through a jurisprudence of racial non-recognition that, by being "blind" to color, is thought to mimic blind people's racially utopian experiences. Third, the post-Washington v. Davis intent doctrine that has come to stand for the need to demonstrate individual malice to sustain claims of discrimination similarly frames race as a self-evident trait whose salience is thought to exist on its own terms (apart from social structure and racial

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hierarchy) to render a reductionist conception where race is simply visually obvious.

The centrality of “race” ipsa loquitur to equal protection jurisprudence raises a critical question that has yet to be addressed by the literature: does the salience of race—the ability to see and differentiate among human groups—turn on obvious visual cues? This Article presents an alternative viewpoint that critiques equal protection’s emphasis on visibility by empirically examining the experiences and understanding of race among people without vision, i.e. blind people. The data collected from these respondents empirically isolates the significance of vision to the salience of race as a sociological manner, which provides empirical data to critically assess this theory of race in equal protection law. I find not only that blind people’s conception of race is as robust as those with vision, but that they also understand race visually. Moreover, I also find that institutional and interpersonal interactions produce blind people’s visual sensibility regarding race. This evidence suggests that the visual salience of race is not merely an ocular phenomenon but a social one, which belies the “race” ipsa loquitur understanding of race embedded in equal protection doctrine and scholarship.

This research and its findings are important for equal protection in that they empirically destabilize the “race” ipsa loquitur trope enmeshed in this jurisprudence. It also offers data demonstrating how the embedded assumption throughout these three areas of equal protection fails to appreciate the ways in which this salience is produced by constitutive social practices that make human difference visible in particular ways. I argue, as a normative matter, that “race” ipsa loquitur must be thoroughly eviscerated from equal protection; it is simply an inaccurate and therefore inappropriate framework from which to understand race. The theory of race driving equal protection must be reconstructed around the social practices shown by this Article to produce the salience of race that has been mistakenly assumed to be self-evident for far too long. I conclude by discussing why it is important for the Court to have an empirically accurate understanding of how race becomes salient and how re-orienting equal protection’s theory of race around social practices can re-introduce the important roles of social context and racial hierarchy in generating a just and equitable jurisprudence.

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I. INTRODUCTION: LAW AND THE VISUAL SALIENCE OF RACE

Leonard Rhinelander was the socialite son of a wealthy New York family. In the fall of 1921, he met Alice Jones through her sister Grace and the couple quickly became quite fond of each other. On at least two occasions during their first few months together, the couple—Alice was then twenty-two, four years Leonard’s senior—secluded themselves for days in New York City hotels where they were intimate.¹ Over the next few years, Leonard took several extended trips at his father’s request that separated the couple, but they remained in touch through frequent letters proclaiming their love for one another. Leonard returned to New York in May of 1924, and the couple secretly married that October, as Leonard’s family was not fond of the former Ms. Jones. The couple lived in secret with Alice’s family for about a month, until a story appeared in the *Standard Star*, a local paper in New Rochelle, titled: “Rhinelanders’ Son Marries the Daughter of a Colored Man.”² Thus, a wealthy White man from 1920s New York high society was exposed as having committed one of the biggest social faux pas one could imagine at the time: marrying a Black woman.

1 Angela Onwuachi-Willig, *A Beautiful Lie: Exploring Rhinelander v. Rhinelander as a Formative Lesson on Race, Identity, Marriage, and Family*, 95 CALIF. L. REV. 2393, 2408 (2007).

2 *Id.* at 2409.



*Alice Jones with her mother and father.*³

Alice was the biracial daughter of an English mother and a father described as “a bent, dark complexioned man who is bald, except for a fringe of curly white hair.”⁴ A few days after the story broke, Leonard was shown a copy of Alice’s birth certificate that documented her race as Black. Two weeks later, Leonard filed suit for an annulment.⁵ The reason? Fraud: Leonard alleged that Alice misrepresented that she was not colored to trick him into marrying her. The stage was now set for what some might characterize as, up until then, the race trial of the century: a legal determination of whether Alice committed fraud by “passing” as White or if Leonard knew Alice’s race before their marriage. Put differently, the question became what did Leonard know and, more importantly, what *should* he have known?

The strategy developed by Isaac Mills, Leonard’s attorney, portrayed him as mentally challenged and Alice’s physical features as racially ambiguous. The defense from Alice’s counsel, Lee Parsons Davis, was quite simple:

³ *Alice Rhinelander with her Mother and Father*, 1925 (© Bettmann/CORBIS).

⁴ EARL LEWIS & HEIDI ARDIZZONE, *LOVE ON TRIAL: AN AMERICAN SCANDAL IN BLACK AND WHITE* 25 (2001).

⁵ Angela Onwuachi-Willig notes that:

An annulment, as opposed to a divorce, would sever ties completely between the Rhinelanders and Joneses because it would place Leonard and Alice back into their original positions as unmarried persons and, by law, would entirely erase their marital union. Also, in many cases, an annulment importantly left the fraudulent party with no claim to alimony or property and thereby was essential if the Rhinelander family wanted Alice to have no, or at least very little, access to Leonard’s or the family’s assets. Finally, an annulment was critical because finding that Alice was a colored woman without obtaining an annulment would forever mark Leonard as unmarriageable for a more “suitable” wife, meaning a white woman of the same socioeconomic station and background, and also as unsuitable for the Rhinelander family name.

Onwuachi-Willig, *supra* note 1, at 2411.

there was no fraud as Alice's blackness was visually obvious. Davis mockingly said to the jury:

I think the issue that Judge Mills should have presented to you was not mental unsoundness but blindness. Blindness . . . [Y]ou are here to determine whether Alice Rhineland before her marriage told this man Rhineland that she was white and had no colored blood. You are here to determine next whether or not that fooled him. Whether or not he could not see with his own eyes that he was marrying into a colored family.⁶

After raising serious doubts about Leonard's cognitive disability, much of Davis' defense rested on showing that Alice's race could be known by simply looking at her body. This became a central theme in Davis' argument; he repeatedly asked Alice and her sisters to stand up and show the jury their hands and arms. But to hammer home this point, Davis wanted the jury to see all of Alice's body—not just hands and arms that might darken over time with routine exposure to sunlight. Given the couple's pre-marital relations, Davis argued that Leonard had seen all of Alice before being married, and that it was crucial for the jury to see the same intimate details of Alice's body that Leonard did before marrying her. Against objections from Leonard's attorneys, the judge allowed it. And what transpired was one of the biggest race spectacles of the twentieth century. From the Court record:

The Court, Mr. Mills, Mr. Davis, Mr. Swinburne, the jury, the plaintiff, the defendant, her mother, Mrs. George Jones, and the stenographer left the courtroom and entered the jury room. The defendant and Mrs. Jones then withdrew to the lavatory adjoining the jury room and, after a short time, again entered the jury room. The defendant, who was weeping, had on her underwear and a long coat. At Mr. Davis' direction she let down her coat, so that the upper portion of her body, as far down as the breast, was exposed. She then, again at Mr. Davis' direction, covered the upper part of her body and showed to the jury her bare legs, up as far as her knees. The Court, counsel, the jury and the plaintiff then re-entered the court room.⁷

This dramatic revealing of Alice's body to the jury composed of all White married men was stunning, especially for 1920s sensibilities. Once back in the courtroom, Davis asked Leonard, "Your wife's body is the same shade as it was when you saw her in the Marie Antoinette [hotel] with all of her clothing removed?" Leonard responded affirmatively, to which Davis said "That is all."⁸

Shortly after this display of Alice's body to the jury and Leonard's acknowledgement, the jury returned with a verdict in favor of Alice, finding that there was no fraud. To put a finer point on this: an all White male jury

⁶ *Id.* at 2416 (emphasis omitted) (footnote omitted).

⁷ *Id.* at 2429.

⁸ *Id.*

in 1925 ruled against a wealthy White male socialite and in favor of a working class Black woman because her race was found to be so visually obvious that there could have been no deception. The jury found that Alice's body, and race in general, visually spoke for itself. Alice did not have to take the stand at any point during the trial. Her body, and the jury's ability to observe it, was all of the evidence that was needed.

* * *

This Article argues that the idea that race visually speaks for itself—a notion that I call “*race ipso loquitur*”⁹—is not something that is marginally relevant to law, or an idea that occasionally arises in cases such as *Rhineland v. Rhineland*. Rather, this notion that race is visually obvious and that its salience—in terms of its conspicuousness and striking nature—stems from self-evident visual distinctions fundamentally orients law's most robust mechanism for governing race and racial discrimination: equal protection. This jurisprudence has come to embrace a “*race ipso loquitur*” sensibility that shapes the Court's approach to race and discrimination in at least three regards: (1) its scrutiny inquiry to determine the standard of review (strict scrutiny, intermediate scrutiny, or rational basis) to apply to certain groups' claims of discrimination; (2) using colorblindness as a framework to conceptualize equal protection's normative boundaries; and (3) the intent doctrine, which requires a demonstration of discriminatory purpose or malice to sustain equal protection claims. In each instance, an implied theory of race that is common among lay conceptualizations also orients the Court's approach: that the salience of race turns on and/or can be reduced to its visual obviousness, and that this salience is self-evident in a manner that is exogenous to any broader social or legal practice. It simply is, and is known by merely looking. By framing the salience of race as an ocular phenomenon and disaggregating it from any social context or structural notion of racial hierarchy, modern equal protection jurisprudence has produced a sociologically thin understanding of race that reduces it to a series of discrete, visually obvious physical traits whose striking nature and conspicuousness are thought to emanate from mere observation.

⁹ *Res ipso loquitur* is a Latin term often used in tort law meaning “the thing speaks for itself.” I use the term “*race ipso loquitur*” to suggest that equal protection jurisprudence uses a similar concept to understand race as a visually obvious trait that is salient outside of any broader social or legal processes. Similarly, it simply “speaks for itself.” Others have used this phrase in different contexts. See generally Jody D. Armour, *Race Ipsa Loquitur: Of Reasonable Racists, Intelligent Bayesians, and Involuntary Negrophobes*, 46 STAN. L. REV. 781 (1994); Stephen Wolf, Note, *Race Ipsa: Vote Dilution, Racial Gerrymandering, and the Presumption of Racial Discrimination*, 11 NOTRE DAME J.L. ETHICS & PUB. POL'Y 225 (1997).

In this Article, I make a critical departure against the grain of this trend within equal protection jurisprudence by arguing that this influential—indeed, largely unquestioned—theory of race fundamentally misconstrues how race becomes salient, which deeply warps important aspects of this jurisprudence. I argue that the visual salience of race is not obvious or a self-evident observation that occurs anterior to any other social process. Rather, I contend that the very ability to see race is a social phenomenon: social practices *produce* the salience that allows us to discern racial differences in particular ways. This is the constitutive theory of race identified by this Article. The visual salience of race—why it is striking, how people are able to apprehend group difference—has little to do with individuals’ visual capacities or certain traits’ inherently striking nature. Rather, the salience and ability to see these differences is produced by social interactions.

My approach is theoretically informed by art history literature that examines how our visual experiences are not neutral engagements with the world, but are rather produced by social relations and forces.¹⁰ These scholars argue that what we see, how we see, and the very ability to see certain things—particularly race—are structured by social contexts that shape the way we pay attention to some things and not others. Art historian Martin Berger notes:

Despite the human propensity to privilege sight, and the long-standing Western tendency to root racial designations in observable traits, images do not persuade us to internalize racial values embedded within them, so much as they confirm meanings for which the discourses and structures of our society have predisposed us. Instead of selling us on racial systems we do not already own, the visual field powerfully confirms previously internalized beliefs.¹¹

I draw upon this literature to argue that the visual salience of race—why it is noticeable, why it stands out—has little to do with individuals’ visual capacities or certain traits’ inherently striking nature. Rather, this salience is produced by social interactions. I empirically demonstrate the socially productive rather than self-evident nature of this visual salience through an innovative research question that asks: how do blind people understand race?

It is largely assumed that individuals without vision have a diminished understanding of race. This assumption is inextricably tied to the “*race ipsa*

¹⁰ See, e.g., JONATHAN CRARY, *SUSPENSIONS OF PERCEPTION: ATTENTION, SPECTACLE, AND MODERN CULTURE* (1999); JONATHAN CRARY, *TECHNIQUES OF THE OBSERVER: ON VISION AND MODERNITY IN THE NINETEENTH CENTURY* (1992); *RACE-ING ART HISTORY: CRITICAL READINGS IN RACE AND ART HISTORY* (Kymberly N. Pinder ed. 2002); *SEEING HIGH & LOW: REPRESENTING SOCIAL CONFLICT IN AMERICAN VISUAL CULTURE* (Patricia Johnson ed. 2006).

¹¹ MARTIN A. BERGER, *SIGHT UNSEEN: WHITENESS AND AMERICAN VISUAL CULTURE I* (2005).

loquitur trope embedded in law and society; the inability to see the self-evident nature of race is thought to preclude any robust appreciation of its salience. But as a way to critique the dominant assumptions about race and vision in lay perspectives and doctrinal conversations, I engage in qualitative research with blind respondents concerning their understanding of and experiences with race. The findings from this research are both important and counterintuitive: not only do blind people have an understanding of race that is no less meaningful or substantive than sighted individuals', but they also understand it *visually*, i.e., in terms of facial features, skin complexion, and other visual attributes typically associated with race.

The doctrinal implications of this research are significant. These findings empirically destabilize the "*race*" *ipsa loquitur* theory of race at the heart of equal protection jurisprudence, which provides intellectual and doctrinal space to rethink the parameters of inclusion and exclusion for higher forms of scrutiny, colorblindness as a normative framework for the scope of equal protection, and modern fixations on intent as the touchstone for demonstrating the discriminatory nature of facially neutral laws. It is important to clearly articulate that the claim being made is *not one of cause and effect*; I do not assert that the scrutiny inquiry, colorblindness, or the intent requirement exist the way that they do primarily because of what I have identified as "*race*" *ipsa loquitur*. Each of these jurisprudential developments have a distinct genealogy better explained by various social, legal, and historical developments. Rather, I identify a conceptual trend within equal protection doctrine linked to lay understandings of race that highlights a common emphasis on visibility across these three areas that may warp important aspects of the jurisprudence. In each of these three realms, the assumption that the social and interpersonal salience of race turns upon self-evident visual differences is a central (yet at times hidden) organizing principle that gives coherence to the jurisprudence, both in their individual parts and as a whole. Therefore, the critical role of this Article's empirical contribution is that qualitative data on blind people's visual understanding of race disrupts this centrality of visibility, which may allow for a normative reconceptualization of equal protection in a manner that takes seriously the social practices that produce the salience of race to encourage a more equitable and inclusive jurisprudence. Put differently, this may be one instance where the blind can lead the blind; qualitative data on the life experiences of those without the ability to see might give insight to a legal system that privileges vision in a manner that blinds it to the social practices that produce the visual salience of race.

It is also important to mark this Article's conceptual boundaries. The purpose here is not to revisit the idea that race has multiple influences such as language, culture, and ancestry. Nor is its purpose to rearticulate the now common claim that race is a social construction, or that the *meanings* that we

attach to various human bodies do not stem from natural or inherent group differences, but rather grow out of broader social and political dynamics. Race scholarship in law, the social sciences, and the humanities have already eloquently and persuasively made these points.¹² Instead, this Article tries to critique a core aspect of race ideology that transcends almost all race scholarship and is embedded in equal protection jurisprudence: that “seeing race”—related to, yet apart from, any social construction that attaches meanings to bodies—is an unmediated visual experience whose salience is simply self-evident on its own terms. This paves the way for a constitutive understanding of race that, related to constructionist projects, draws attention to how social practices produce our ability to see society in particular ways. The qualitative portion of this Article provides empirical evidence that gives life to this critique. Although the salience of race is experienced as something that is visually obvious within the sighted community, blind respondents’ experiences highlight the extent to which this salience is constituted by various social practices. As such, this Article challenges the dominant lay and legal viewpoints that vision is a prerequisite for having a complete understanding of race. These findings empirically destabilize equal protection’s “*race ipso loquitur*” trope and raise important questions about its current role in the administration of this jurisprudence.

This Article is divided into five parts. Part II provides an overview of the “*race ipso loquitur*” trope in equal protection doctrine and scholarship, paying particular attention to its manifestations in the scrutiny inquiry, colorblindness, and the intent doctrine. Part III then describes the methodology and findings from the qualitative data collected through over 100 interviews with blind individuals about their understandings of and experiences with race. This Part provides robust qualitative data supporting my key argument: that the “*race ipso loquitur*” trope embedded in equal protection law mischaracterizes the visual salience of race as an ocular rather than social phenomenon. The visually striking nature of race is produced by social practices rather than self-evidently observed. Part IV discusses these empirical findings’ significance for three areas of equal protection jurisprudence—the scrutiny inquiry, colorblindness, and the intent doctrine—to offer preliminary thoughts on how equal protection might be reimaged along lines that are sensitive to the socially productive rather than self-evident conceptions of racial salience. I conclude in Part V with a brief discussion of why it is important for equal protection jurisprudence to work from theories of race that are empirically robust. I then suggest, as a

¹² See, e.g., IAN HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* (10th ed. 2006); MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990S* (2d ed. 1994); Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993).

normative matter, that equal protection rid itself of “race” *ipsa loquitur* and re-orient its theory of race around the social practices giving rise to the visibility of race. This can re-introduce the important roles of social context and racial hierarchy in equal protection deliberations, which can lead to a more equitable and just jurisprudence.

II. RACE IN EQUAL PROTECTION LAW AND SCHOLARSHIP

A. Context Giving Rise to Equal Protection’s “Race” *Ipsa Loquitur Trope*

Several areas of law have played a key role in defining race and shaping race relations, such as slave law,¹³ anti-miscegenation law,¹⁴ and naturalization law.¹⁵ Nevertheless, equal protection has played an important part in governing race in the United States, and is worthy of special attention in understanding how specific aspects of American jurisprudence have been shaped by the presumption that the salience of race stems primarily from self-evidently known visual cues.

Although the most significant shifts in equal protection law did not occur until the 1950s, subtle changes in how law approached its duty to

¹³ Legal historian Lawrence Friedman notes in his classic work, *A History of American Law*, that:

The most visible American pariah, before the Civil War, was the Negro slave. As we have seen, an indigenous system of law grew up to govern the “peculiar institution” of slavery. What was at first a law for the servant class developed deeper and deeper overtones of color. The slave laws then became laws about the fate of a race.

LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 192 (1973). See also ROBERT M. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* (1975); KENNETH M. STAMPP, *THE PECULIAR INSTITUTION: SLAVERY IN THE ANTE-BELLUM SOUTH* (1956); Adrienne D. Davis, *The Private Law of Race and Sex: An Antebellum Perspective*, 51 *STAN. L. REV.* 221 (1999); Wilbert E. Moore, *Slave Law and Social Structure*, 26 *J. NEGRO HIST.* 171 (1941); Mark Tushnet, *The American Law of Slavery, 1810–1860: A Study in the Persistence of Legal Autonomy*, 10 *LAW & SOC’Y REV.* 119 (1975).

¹⁴ Rachel Moran notes “antimiscegenation laws have played an integral role in defining racial identity and enforcing racial hierarchy. . . . For both blacks and Asians, segregation in sex, marriage, and family was a hallmark of intense racialization and entrenched inequality.” RACHEL MORAN, *INTERRACIAL INTIMACY: THE REGULATION OF RACE AND ROMANCE* 17–18 (2003). See also RANDALL KENNEDY, *INTERRACIAL INTIMACIES: SEX, MARRIAGE, IDENTITY, AND ADOPTION* (2003); SEX, LOVE, RACE: *CROSSING BOUNDARIES IN NORTH AMERICAN HISTORY* (Martha Hodes ed. 1999).

¹⁵ Ian Haney López draws a direct link between the United States’ racial make-up and its naturalization laws: “The racial composition of the U.S. citizenry reflects in part the accident of world migration patterns. More than this, however, it reflects the conscious design of U.S. immigration and naturalization laws.” LÓPEZ, *supra* note 13, at 27. See also, Mae M. Ngai, *Legacies of Exclusion: Illegal Chinese Immigration during The Cold War Years*, 18 *J. AMERICAN ETHNIC HIST.* 3 (1998); Mae M. Ngai, *The Strange Career of the Illegal Alien: Immigration Restriction and Deportation Policy in the United States, 1921–1965*, 21 *LAW & HIST. REV.* 69 (2003).

minorities began in the late 1930s with *United States v. Carolene Products*. The case is less significant for its holding (the Court upheld a federal statute forbidding the shipment of filled milk in interstate commerce) than it is for its fourth footnote. Justice Stone lays the foundation for modern equal protection conversations by writing that there might be a stricter standard of review for laws “directed at particular religious or national or racial minorities . . . [since] *prejudice against discrete and insular minorities* may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities.”¹⁶

Called “the most celebrated footnote in constitutional law,”¹⁷ it has spurred a lengthy and influential discussion within the legal academy. However, Footnote Four brought focus to a new question that the Court did not fully engage until almost twenty years later in *Brown*: how failed political processes can disproportionately affect racial minorities due to irrational prejudice that unconstitutionally bars them from majoritarian lawmaking.¹⁸ This draws attention to the importance of defending liberties that are essential to the proper functioning of a democratic political process, which recognizes the *procedural* challenges to democratic self-governance. Moreover, the Court’s role is not simply to give scrutiny to possible restrictions on the political process in general, but specifically those restrictions on the political process that hamper minorities’ ability to protect their interests through this very process. This new form of scrutiny was not to apply to any and all minorities; a key aspect of democratic self-governance is that some minorities who fail to gain majoritarian popularity must inevitably experience defeat. Rather, Footnote Four suggests special solicitude for minorities that are discrete and insular.

16 *United States v. Carolene Prods.*, 304 U.S. 144, 153 n.4 (1938) (emphasis added).

17 Lewis F. Powell, Jr., *Carolene Products Revisited*, 82 COLUM. L. REV. 1087, 1087 (1982).

18 Footnote Four sets a new agenda to protect minorities who are unable to protect themselves due to a failed political process. The footnote states, in full, that:

There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth. It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. . . . Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious . . . or national . . . or racial minorities . . . whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

Carolene Prods., 304 U.S. at 152 n.4 (internal citations omitted).

But what does this mean? Louis Lusky, law clerk to Justice Stone at the time *Carolene Products* was decided and largely credited as the author of Footnote Four, has written:

As a matter of language, “discrete” means separate or distinct and “insular” means isolated or detached. The words do not describe aliens as such; many of them, who are anglophones, *pass unnoticed*, and many if not most others fit into the social scene with little difficulty. . . . In my opinion, the phrase “discrete and insular” applies to groups that are not embraced within the bond of community kinship but are held at arm’s length by the group or groups that possess dominant political and economic power. . . . Justice Stone, I believe, would have agreed.¹⁹

What stands out in this passage is Lusky’s common sense application of the terms “discrete” and “insular.” To Lusky (and by inference Justice Stone and the *Carolene* Court), “discrete” largely means those who cannot pass by unnoticed, and “insular” means those who keep to themselves due to political or economic marginalization. The grammatical structure of the phrase—“discrete” as the primary descriptor further refined by “insular” with the conjunction “and”—suggests, as does Lusky’s explanation, that the *Carolene* Court was targeting those groups whose insularity stemmed from their discreteness. This puts the inability to pass unnoticed—a nod towards visibility—at the heart of the influential Footnote Four.

B. “Race” *Ipsa Loquitur* and Its Doctrinal Manifestations

Equal protection’s post-*Carolene* transition to having a heightened concern for minority groups’ experiences has led the “*race ipsa loquitur*” trope to, over time, become embedded in the resulting jurisprudence in at least three different ways: (1) the doctrinal considerations for which groups are eligible for higher forms of judicial scrutiny; (2) the Court’s normative claims concerning colorblindness as a guidepost for reading and applying the Equal Protection Clause; and (3) the requirement that discriminatory intent—not merely disparate impact—must be demonstrated to sustain claims that a facially neutral law or practice violates equal protection. This section will consider each of these in turn.

1. *Equal Protection’s Scrutiny Inquiry*

Just prior to the Supreme Court’s decision in *Brown v. Board of Education*, Footnote Four’s underlying sentiment—that stronger judicial oversight should be provided for minority groups—made its first appearance in the main body of a Supreme Court opinion in *Korematsu v. United States*, which

¹⁹ Louis Lusky, *Footnote Redux: A Carolene Products Reminiscence*, 82 COLUM. L. REV. 1093, 1105 n.72 (1982) (emphasis added).

concerned the constitutionality of Japanese internment during World War II.²⁰ This first articulation of what has become known as strict scrutiny nonetheless led the Court to uphold the executive order leading to the internment of Japanese Americans.²¹ *Korematsu* established the now familiar constitutional architecture where courts deploy strict scrutiny—where a law must be narrowly tailored to serve a compelling government interest—to laws implicating race, national origin, and alienage, while most other equal protection challenges (except those implicating sex, gender, or children born to parents that are not married, which receive intermediate scrutiny) are merely afforded rational basis review: courts will uphold their constitutionality as long as the law is rationally related to a legitimate purpose.

While equal protection's doctrinal development has been robust since *Korematsu* and *Brown*, not enough thought has been given to understanding precisely how courts understand race in fulfilling their constitutional duty to use judicial review to protect the rights of these groups. Moreover, there is even less coherency in the Court's jurisprudence on the principles that justify treating racial discrimination differently from other forms of group-based subordination. This is important since equal protection jurisprudence dictates that a plaintiff's group membership shapes the level of review used to determine whether the state's categorization is permissible. The Court has extended stricter forms of scrutiny beyond mere rational

²⁰ The *Korematsu* Court wrote "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. . . . [C]ourts must subject them to the most rigid scrutiny." *Korematsu v. United States*, 323 U.S. 214, 216 (1944).

²¹ Justice Black concludes the majority opinion upholding Japanese internment by stating: It is said that we are dealing here with the case of imprisonment of a citizen in a concentration camp solely because of his ancestry, without evidence or inquiry concerning his loyalty and good disposition towards the United States. Our task would be simple, our duty clear, were this a case involving the imprisonment of a loyal citizen in a concentration camp because of racial prejudice. Regardless of the true nature of the assembly and relocation centers—and we deem it unjustifiable to call them concentration camps with all the ugly connotations that term implies—we are dealing specifically with nothing but an exclusion order. To cast this case into outlines of racial prejudice, without reference to the real military dangers which were presented, merely confuses the issue. *Korematsu* was not excluded from the Military Area because of hostility to him or his race. He was excluded because we are at war with the Japanese Empire, because the properly constituted military authorities feared an invasion of our West Coast and felt constrained to take proper security measures, because they decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily, and finally, because Congress, reposing its confidence in this time of war in our military leaders—as inevitably it must—determined that they should have the power to do just this. There was evidence of disloyalty on the part of some, the military authorities considered that the need for action was great, and time was short. We cannot—by availing ourselves of the calm perspective of hindsight—now say that at that time these actions were unjustified.

Korematsu, 323 U.S. at 223–24 (emphasis omitted).

basis review to classifications “based on race, sex, national origin, alienage, and illegitimacy . . . [without] provid[ing] a clear overarching rationale for why these five classifications, and not others, are particularly deserving of judicial solicitude.”²² Rather, the Court takes three factors (not requirements) into consideration: whether the person bringing a claim is part of a group that (1) has historically been subjected to discrimination; (2) is a politically powerless minority; and (3) “exhibit[s] obvious, immutable, or distinguishing characteristics that define them as a discrete group.”²³

What appears first as a rather parsimonious three-prong test is actually the product of several divergent jurisprudential threads coalescing around modern equal protection commitments. The first prong’s concern with a group’s history of discrimination stems from the Court’s post-*Brown* commitments to affirmatively use judicial review to go beyond *Plessy*’s formal equality to engage in a more pragmatic understanding of how the social histories intertwined with legally-enforced discriminations can lead to apartheid. The second prong’s concern for protecting politically powerless groups is an offshoot of the second paragraph in Footnote Four. The Court discusses the relevance of these first two prongs in *San Antonio Independent School District v. Rodriguez*, which concerns the constitutionality of funding schools through tax bases that systemically favored the wealthy.²⁴ The Court held that the appellees residing in underfunded areas did not constitute a suspect class that could elicit a strict scrutiny analysis since they constituted “a large, diverse, and amorphous class, unified only by the common factor of residence in districts that happen to have less taxable wealth than other districts.”²⁵ As such, the Court declined to exert its highest form of review typically reserved for claims of racial discrimination since:

The system of alleged discrimination and the class it defines have none of the traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.²⁶

22 Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of “Don’t Ask, Don’t Tell,”* 108 YALE L.J. 485, 489 (1998) (citing Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410, 2441 (1994)) [hereinafter Yoshino, *Assimilationist Bias in Equal Protection*].

23 *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987) (citing *Lyng v. Castillo*, 477 U.S. 635, 638 (1986)).

24 *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

25 *Id.* at 28.

26 *Id.*

The third prong's emphasis on obvious, immutable,²⁷ or distinguishing characteristics provides the most direct articulation of how groups deemed visually distinct are granted the highest form of protection. Yet there is doctrinal evidence that this prong's emphasis on granting groups with visually distinguishable markers higher protections orients how the Court thinks about the other two prongs. For example, in *Mathews v. Lucas*, the Court said that while law often treats children born to parents that are not married differently than those born in traditional families, "this discrimination against illegitimates has never approached the severity or pervasiveness of the historic legal and political discrimination against women and Negroes . . . perhaps in part because illegitimacy does not carry an obvious badge, as race or sex do."²⁸ Moreover, in *Frontiero v. Richardson*, the plurality extended strict scrutiny (later revised to intermediate scrutiny in *Craig v. Boren*) to sex-based discrimination based, in part, on a theory of political powerlessness linked to the visibility of women's sex difference: "it can hardly be doubted that, in part because of the high visibility of the sex characteristic, women still face pervasive, although at times more subtle, discrimination in our educational institutions, in the job market and, perhaps most conspicuously, in the political arena."²⁹ Therefore, the third prong's bluntness can be largely seen as a constitutive element of the other two prongs in terms of how visibility orients the way the Court understands the severity of groups' political powerlessness and history of discrimination. It can be argued that the visibility component was always already a prerequisite for higher judicial scrutiny, but only became articulated as a "prong" as a way to justify extending heightened scrutiny to sex-based classifications. That is, the doctrinal justification for treating sex-based classifications more like race classifications in *Frontiero* is that sex discrimination, like race discrimination, orients around visible physical differences that trigger prejudices that require stronger constitutional protections to mitigate. Thus, the explicit articulation of a visibility prong post-*Frontiero* without any deeper theoretical or structural consideration of what race is and how it becomes salient can be reasonably seen as restating what was up to then part of the obvious in equal protection: that the theory

27 I emphasize the importance of visibility over immutability since critiques of the latter have been exhaustive and the Court has effectively subsumed immutability under visibility. As such, immutability will only be discussed to the extent that it is an implicit part of the visibility prong. See generally Donald Braman, *Of Race and Immutability*, 46 UCLA L. REV. 1375 (1999). See also Yoshino, *Assimilationist Bias in Equal Protection*, *supra* note 23, at 498–99.

28 *Mathews v. Lucas*, 427 U.S. 495, 506 (1976). See also Yoshino, *Assimilationist Bias in Equal Protection*, *supra* note 23, at 496–98.

29 *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973). See also Yoshino, *Assimilationist Bias in Equal Protection*, *supra* note 23, at 496–98.

of race embedded in this jurisprudence is one that treats phenotype and other human markers as visually obvious and self-evident triggers of antagonistic social relations.³⁰ The implication is that these markers' visibility and salience exist *anterior to* law and society rather than *produced by* social and legal relations. That is, "*race*" *ipsa loquitur*: race, and its salience, simply speak for themselves.

2. *The Coherence of Colorblindness*

"*Race*" *ipsa loquitur* is a significant part of equal protection jurisprudence beyond serving as a gateway concept that arbitrates the level of scrutiny afforded to various groups' claims of discrimination. It also shapes the Court's normative vision for the appropriate role of government in using racial categories. This increasingly dominant perspective, known as colorblindness, reflects a legal ideology of racial non-recognition; equal protection is conceived as substantially limiting the State's ability to take race into consideration when allocating resources or benefits, even when done to remedy ongoing disadvantages linked to past harms.³¹ To put a finer point on it, colorblindness yields "an anticlassification understanding of the Equal Protection Clause that accords race-conscious remedies and racial subjugation the same level of constitutional hostility."³²

While some have argued that contemporary colorblindness reflects a good faith application of its intellectual antecedents,³³ scholars have

³⁰ Yoshino attributes the birth of the visibility and immutability factors to: [A]n attempt to isolate the commonalities between the paradigm groups of race and sex in the early 1970s. . . . Rather than operating from a priori principles, the equal protection jurisprudence has been driven by the groups asking for protection. Generally, the inquiry has not been, "What principles define groups that are worthy of judicial protection?" but rather, "Is group X in or out?" . . . Under this group-driven analysis, new groups are admitted by showing that they are like groups that have already established their claim to protection.

Yoshino, *Assimilationist Bias in Equal Protection*, *supra* note 23, at 559.

³¹ See, e.g., Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 STAN. L. REV. 1, 16 (1991) ("Advocates of the color-blind model argue that nonrecognition by government is a decision-making technique that is clearly superior to any race-conscious process. Indeed, nonrecognition advocates apparently find the political and moral superiority of this technique so self-evident that they think little or no justification is necessary.").

³² Ian F. Haney López, "A Nation of Minorities": *Race, Ethnicity, and Reactionary Colorblindness*, 59 STAN L. REV. 985, 988 (2007) [hereinafter López, "A Nation of Minorities"].

³³ See generally ANDREW KULL, *THE COLOR-BLIND CONSTITUTION* (1992). Contemporary articulations of colorblindness have at least two intellectual origins. John Marshall Harlan gave the idea its first public articulation in his dissenting opinion in *Plessy v. Ferguson*. In *Plessy*, Harlan famously broke from the majority, declaring, "[o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens." *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896). As a second intellectual influence, advocates of colorblindness often point to Martin Luther King, Jr.'s "March on Washington Address" in 1963, where he famously remarked "I have a dream that my four

persuasively traced the birth of modern colorblindness to the unique racial politics of the post-Civil Rights Era that generated a backlash against efforts to use law and public policy to atone for the racial apartheid stemming from centuries of racial subordination.³⁴ This reaction has given rise to what Lani Guinier and Gerald Torres call the “colorblind universe”—a general theory of race and discrimination that has informed the Court’s understanding of its commitment to racial equality in general and, more specifically, the normative boundaries of equal protection remedies. Guinier and Torres argue that this ideology is governed by three different claims about race. First, rather than being a complex matrix of power relations, social status, and historical relationships, “race is all about skin color . . . [or] a false construction of phenotype that relies improperly on ascriptive physical identifiers of ‘blood’ or ancestry.”³⁵ That is, colorblindness frames race as a series of superficial visual cues that mark human difference—skin color, facial features, etc.—without attributing any inherent meaning to them. This gives race and discrimination a theoretical symmetry that belies any sensitivity to the existence of racial hierarchy.³⁶ Second, colorblindness frames race consciousness as the equivalent of being racist. This is an odd twist on the social constructionist perspective on race. While social constructionism and colorblindness share a perspective that race does not reflect inherent meanings, colorblindness advocates racial equality by encouraging the state to abandon such categories while social constructionists typically encourage race consciousness in order to ameliorate the social conditions that perpetuate inequality. From the colorblind perspective, “when one notices race, one is implicitly manifesting

little children will one day live in a nation where they will not be judged by the color of their skin but by the content of their character.” Martin Luther King, Jr., *The March on Washington Address* (Aug. 28, 1963), in *GREAT AMERICAN SPEECHES* 239, 242 (Gregory R. Suriano ed., 1993).

34 The writings of Nathan Glazer and Patrick Moynihan, along with scholarship from the legal academy, challenged the wisdom of affirmative action as public policy during this period while also reconceptualizing the sociology of racial inequality as a phenomenon linked to personal or group failures rather than racial hierarchy. See generally López, “A Nation of Minorities,” *supra* note 33. Eduardo Bonilla-Silva similarly argues that colorblindness “became the dominant racial ideology as the mechanisms and practices for keeping blacks and other racial minorities ‘at the bottom of the well’ changed . . . [whereas] contemporary racial inequality is reproduced through ‘new racism’ practices that are subtle, institutional, and apparently nonracial.” EDUARDO BONILLA-SILVA, *RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN THE UNITED STATES* 2–3 (2006).

35 LANI GUINIER & GERALD TORRES, *THE MINER’S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY* 38 (2002).

36 *Id.* (“When race is only pigmentation, all racial classifications are equally bad, despite hierarchies of privilege or disadvantage that accompany the racial assignment.”).

racial enmity or racial preference,³⁷ which poses “blindness” to race or non-recognition as the only appropriate role for government. Lastly, colorblindness frames racism as a problem that bad individuals have rather than a system of hierarchy that all individuals participate in. Guinier and Torres note that from this perspective, “racism lacks any necessary nexus to power or privilege, and any observed connection is incidental, merely a result of the actions of people with a bad heart.”³⁸

Colorblindness has been an influential aspect of modern equal protection jurisprudence since *Regents of University of California v. Bakke*, where an unsuccessful White applicant to the University of California, Davis School of Medicine (“UC Davis”) sued the University for excluding him from consideration for one of the sixteen seats reserved for minority applicants. In *Bakke*, two sets of four Justices each argued for and against an anti-classification approach to the government’s use of race. This judicial fragmentation led to the rather narrow holding that UC Davis’s admissions program was unlawful but that race may continue to be a consideration. One of the most significant parts of this case was Justice Powell’s opinion, which sowed the seeds for constitutional colorblindness by concluding that strict scrutiny applied to all racial categorizations, regardless of whether the person is a member of a “discrete and insular minority.” Powell’s declaration that “[r]acial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination”³⁹ stripped the affirmative action debate of the very context that gives legitimacy to such programs. Therefore, “[i]n advocating the same standard in all cases, Powell effectively argued that for constitutional purposes, preferential treatment and Jim Crow laws amounted to the same thing—the central claim of reactionary colorblindness.”⁴⁰ This central claim is premised upon a particular understanding of race: that it is a superficial, “skin deep,” and merely descriptive characteristic that is inherently dubious for government consideration—regardless of whether such consideration is done to entrench existing racial privilege or remedy past subordination. Race is sociologically and theoretically flat; it is thought to only describe an individual’s physical traits or group membership rather than confer any benefits or burdens. The lack of conceptual depth accorded to understanding precisely what race is and how it impacts individuals’ lives leads to a reductionist understanding that draws heavily upon common sense perspectives that (1) as a mere descriptive category, the salience of race stems from its visually obvious character and that (2) blindness or non-

37 *Id.*

38 *Id.* at 39.

39 *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 291 (1978).

40 López, “*A Nation of Minorities*,” *supra* note 33, at 1034.

recognition, in terms of an inability or unwillingness to see race, necessarily leads to racial equality.⁴¹

Powell's language has had a resounding effect on equal protection jurisprudence beyond *Bakke's* holding that race can continue to have limited consideration in university admissions. Powell did not side with the Justices in *Bakke* that explicitly advocated colorblindness through forgoing constitutional deliberations and instead argued that Title VI prevented such race-conscious university admissions. But Powell's opinion greased the wheels for subsequent successful claims of *constitutional colorblindness*, where the Fourteenth Amendment itself was read to bar race-conscious decision making. This was first fully developed in *Richmond v. Croson*, which entailed a program that gave preferences for municipal contracts to minority-owned businesses in Richmond, Virginia. Drawing upon many of the same sentiments articulated by Justice Powell in *Bakke*, the Court held this scheme to violate the Equal Protection Clause—but through using a jurisprudential lens of colorblindness. There is an important link between Powell's dicta in *Bakke* and O'Connor's reasoning in *Croson*:

Like Powell, O'Connor used the version of ethnicity picturing whites as black to mandate strict scrutiny. Then, just as Powell did, in considering whether structural disadvantage justified affirmative action, O'Connor reverted to the version of ethnicity depicting all groups as the masters of their own destiny, none suffering particular disadvantage. . . . *Croson* posited a veritable tug of war between various identically situated ethnic groups competing for the spoils of government largess. O'Connor

41 Powell argues:

Petitioner urges us to adopt for the first time a more restrictive view of the Equal Protection Clause and hold that discrimination against members of the white "majority" cannot be suspect if its purpose can be characterized as "benign." The clock of our liberties, however, cannot be turned back to 1868. It is far too late to argue that the guarantee of equal protection to all persons permits the recognition of special wards entitled to a degree of protection greater than that accorded others. The Fourteenth Amendment is not directed solely against discrimination due to a "two-class theory"—that is, based upon differences between "white" and Negro.

Once the artificial line of a "two-class theory" of the Fourteenth Amendment is put aside, the difficulties entailed in varying the level of judicial review according to a perceived "preferred" status of a particular racial or ethnic minority are intractable. The concepts of "majority" and "minority" necessarily reflect temporary arrangements and political judgments. . . . [T]he white "majority" itself is composed of various minority groups, most of which can lay claim to a history of prior discrimination at the hands of the State and private individuals. Not all of these groups can receive preferential treatment and corresponding judicial tolerance of distinctions drawn in terms of race and nationality, for then the only "majority" left would be a new minority of white Anglo-Saxon Protestants. There is no principled basis for deciding which groups would merit "heightened judicial solicitude" and which would not. . . . The kind of variable sociological and political analysis necessary to produce such rankings simply does not lie within the judicial competence—even if they otherwise were politically feasible and socially desirable.

Bakke, 438 U.S. at 294–97.

wrapped her opinion in the moral legitimacy afforded by the “dream of a Nation of equal citizens in a society where race is irrelevant.” But by drawing blacks as white, she in effect reasoned as if this end state even now existed: race was ostensibly *already* irrelevant to the life chances of minorities in America. In this context, not only was affirmative action unnecessary, but it threatened the American racial paradise by victimizing whites, making them the new minority. In its first instantiation as Equal Protection law, colorblindness drew heavily on the redescription of race constitutionally pioneered by Powell in *Bakke*, positing whites as black to justify heightened review, but blacks as white to deny the persistence of racial hierarchy and the necessity of racial reconstruction.⁴²

Conceptualizing Blacks and Whites as equally advantaged and disadvantaged groups is key to legitimizing colorblindness and its jurisprudence of non-recognition as an appropriate norm for applying equal protection principles. Moreover, it draws attention to the “*race*” *ipsa loquitur* sensibility bubbling underneath colorblindness. Depicting race as a series of conflicting ethnic groups elides the existence of racial hierarchy and makes racial conflict appear episodic rather than entrenched. But the superficial rendering of race that this vision of equal protection is based upon is one that is thoroughly imbued by the lay presumption that race is a visually obvious and trivial characteristic that only “marks” group membership and cannot—indeed, should not—be used to acknowledge and resolve inequality linked to persistent forms of racial subordination. We see this clearly in a recent episode of constitutional colorblindness in *Parents Involved in Community Schools v. Seattle School District No. 1*. There, the Court struck down two different public school district schemes that used race as a factor to assign students to particular schools to diversify learning environments.⁴³ The Court was critical of the notion of diversity pursued by each district,⁴⁴

⁴² López, “*A Nation of Minorities*,” *supra* note 33, at 1050–51.

⁴³ The Court noted that:

The school districts in these cases voluntarily adopted student assignment plans that rely upon race to determine which public schools certain children may attend. The Seattle school district classifies children as white or nonwhite; the Jefferson County school district as black or “other.” In Seattle, this racial classification is used to allocate slots in oversubscribed high schools. In Jefferson County, it is used to make certain elementary school assignments and to rule on transfer requests. In each case, the school district relies upon an individual student’s race in assigning that student to a particular school, so that the racial balance at the school falls within a predetermined range based on the racial composition of the school district as a whole.

Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 709–10 (2007).

⁴⁴ The Court’s equal protection jurisprudence acknowledges diversity as a compelling government interest that permits the usage of racial categories. However, the Court notes in *Parents Involved* that:

The plans here are not tailored to achieving a degree of diversity necessary to realize the asserted educational benefits; instead the plans are tailored . . . to “the goal established by the school board of attaining a level of diversity within the

holding that the plans violated equal protection. In closing his majority opinion, Chief Justice Roberts endorses colorblindness with remarkable flair: “Before *Brown*, schoolchildren were told where they could and could not go to school based on the color of their skin. . . . The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”⁴⁵ Government efforts to use race-as-color as a mechanism to entrench Jim Crow segregation is morally and constitutionally equated with government efforts to diversify racially homogenous school districts, where blindness—rearticulated by Justice Roberts as “stop discriminating on the basis of race”—is the primary means through which the racial utopia of “stop[ped] discrimination” is thought to be achieved.

But what makes this colorblind worldview—in particular, a colorblind understanding of equal protection’s normative boundaries—seem so self-evidently coherent that *Brown* and *Parents Involved* can be read as companion cases separated by a mere five decades when they actually address fundamentally different questions of state-enforced racial subordination and government use of race for remedial purposes? While the post-Civil Rights social and political contexts are absolutely essential to understanding the rise of colorblindness,⁴⁶ existing scholarship has largely ignored the cognitive influence of colorblindness as a metaphor in shaping the social, legal, and political coherence of this approach. Equal protection scholars have mostly limited the metaphorical significance of colorblindness to mere rhetorical flourish; colorful language that cleverly characterizes a particular ideology. For example, Reva Siegel writes that “[t]he rhetoric of colorblind constitutionalism is but another mode of talking about race, invoking the social fact of racial stratification in the course of denying its normative significance.”⁴⁷ From this perspective, Siegel limits the colorblind metaphor to doing specific *linguistic* work in smoothing over otherwise inconsistent

schools that approximates the district’s overall demographics.” The districts offer no evidence that the level of racial diversity necessary to achieve the asserted educational benefits happens to coincide with the racial demographics of the respective school districts—or rather the white/nonwhite or black/“other” balance of the districts, since that is the only diversity addressed by the plans. Indeed, in its brief Seattle simply assumes that the educational benefits track the racial breakdown of the district. . . .

This working backward to achieve a particular type of racial balance, rather than working forward from some demonstration of the level of diversity that provides the purported benefits, is a fatal flaw under our existing precedent.

Parents Involved, 551 U.S. at 727, 729.

⁴⁵ *Id.* at 747–48.

⁴⁶ See generally López, “A Nation of Minorities,” *supra* note 33 (reviewing historical evolution of the demand of colorblindness); Julie Novkov, *Toward a Legal Genealogy of Color Blindness*, MIDWEST POL. SCI. ASS’N, 2007, available at http://works.bepress.com/julie_novkov/3.

⁴⁷ Reva B. Siegel, *The Racial Rhetorics of Colorblind Constitutionalism: The Case of Hopwood v. Texas*, in RACE AND REPRESENTATION: AFFIRMATIVE ACTION 29, 30 (Robert Post & Michael Rogin eds., 1998) [hereinafter Siegel, *The Racial Rhetorics of Colorblind Constitutionalism*].

understandings of race.⁴⁸ Thus, in explaining the Fifth Circuit's decision in *Hopwood v. Texas*, holding that the University of Texas cannot use race in law school admissions, Siegel largely frames the metaphorical significance of colorblindness as a function of its rhetorical ability to allow conflicting ideas of race to rest comfortably together in a manner that maintains racial subordination under seemingly neutral terms.⁴⁹ In another article, Siegel notes that "colorblindness discourse functions as a semantic code [that] . . . can be used to characterize practices in ways that may either disrupt or rationalize social stratification [in a manner that] . . . may offer *symbolic or expressive testimony* of this society's desire to achieve neutrality in matter of race relations."⁵⁰

But this understanding of metaphors—where its significance is seen primarily as rhetorical—is inconsistent with contemporary research on metaphors' cognitive impacts. Metaphors are traditionally conceived as being matters of figurative language, where a figure of speech is used to convey an idea rather than expressing it literally. From this perspective, metaphors as literary devices allow individuals to understand abstract, intangible things or experiences in terms of concrete and known entities. For example, the phrase "time is money" allows us to understand time, as an

48 Siegel notes:

[S]ince Reconstruction, white Americans have frequently coupled talk of colorblindness with racial privacy rhetoric that seeks to protect relations of racial status from government interference. As this historical analysis reveals, current affirmative action law does not rest solely on values of colorblindness or racial "nonrecognition"; it also draws on a normative discourse about the racial private sphere, a domain of racial differences that the state may not disturb. If we read the contradictory racial rhetorics structuring affirmative action jurisprudence in light of this historical tradition, it is easier to understand their underlying preoccupations and considerable persuasive power.

Id. at 31.

49 For example, Siegel argues that:

[T]he diversity and remedial holdings of the *Hopwood* opinion are premised on two conflicting and irreconcilable conceptions of race, and so expose contradictions in the larger body of equal protection jurisprudence on which the case draws. Quoting liberally from the Supreme Court's recent opinions, the Fifth Circuit invokes both "thin" and "thick" conceptions of race. Sometimes the *Hopwood* opinion insists that race is but a morphological accident, a matter of skin color, no more. At other times, *Hopwood* discusses race as a substantive social phenomenon, marking off real cultural differences amongst groups. These conceptual inconsistencies are not incidental to the opinion, but instead arise out of the conflicting justifications the Supreme Court has offered for imposing constitutional restrictions on race-conscious regulation. Invoking these contradictory conceptions of race, *Hopwood* construes the Constitution to restrict government from regulating on the basis of race *and* construes the Constitution to protect the existing racial order.

Id. at 30–31.

50 Reva B. Siegel, *Discrimination in the Eyes of the Law: How "Color Blindness" Discourse Disrupts and Rationalizes Social Stratification*, 88 CALIF. L. REV. 77, 78 (2000) (emphasis added) [hereinafter Siegel, *Discrimination in the Eyes of the Law*].

intangible and amorphous entity, in terms of the rather tangible value society places on monetary currency.⁵¹ This traditional understanding is consistent with how legal scholars have framed the metaphorical significance of colorblindness. Yet, limiting the significance of metaphor to mere rhetoric is becoming increasingly disfavored; research is beginning to show how metaphors have a much deeper impact on cognition in filtering how individuals understand and interpret the social and political world around them. Cognitive scientists are now arguing that “the locus of metaphor is thought, not language[;] metaphor is a major and indispensable part of our ordinary conventional way of conceptualizing the world, and that *our everyday behavior reflects our metaphorical understanding of experience*.”⁵² To the extent that “[t]he essence of metaphor is understanding and experiencing one kind of thing in terms of another,”⁵³ metaphors are central to human cognition rather than periphery speech acts. Metaphors’ commonsensical salience—such as an old joke or a stable economy—come from their ability to leverage fundamental aspects of human cognition that enable us to experience intangible concepts through tangible ones, giving abstract concepts materiality. This transfer of materiality then comes to orient much of how we understand and experience intangibilities in the social world, from boiling anger to sunny happiness.

Thus, metaphors shape human perception of social reality at a deeply cognitive rather than merely textual level. They filter how information is processed and understood, and thus how reality subjectively appears. Metaphors play upon the underlying architecture of our cognitive systems to give cohesive force to individuals’ ability to experience abstract concepts in terms of known tangible entities in a manner that organizes entire thought patterns.⁵⁴ Thus, metaphors allow us to seamlessly project one area of experiential knowledge that is directly perceptible to other areas that are merely conceptual or theoretical so as to give them substance.⁵⁵ In short,

51 GEORGE LAKOFF & MARK JOHNSON, *METAPHORS WE LIVE BY* 7–9 (1980).

52 GEORGE LAKOFF, *THE CONTEMPORARY THEORY OF METAPHOR, METAPHOR AND THOUGHT* (Andrew Ortony ed., 2d ed 1992) (emphasis added).

53 LAKOFF & JOHNSON, *supra* note 52, at 5 (emphasis omitted).

54 *See generally*, Diana Ponterotto, *The cohesive role of cognitive metaphor in discourse and Conversation*, in *METAPHOR AND METONYMY AT THE CROSSROADS: A COGNITIVE PERSPECTIVE* (Antonio Barcelona ed., 2000) (summarizing a shift in focus of research studies on metaphors from strictly linguistic to cognitive).

55 As David Allbritton notes:

Metaphor has been shown to serve a number of important cognitive functions, including that of making new conceptual domains accessible through metaphorical “scaffolds” imported from better known domains, such as in the case of metaphors in science, and providing a coherent framework or schema for understanding such everyday topics as time, arguments, and emotions. In addition, schemas derived from conceptual metaphors are capable of forming connections between elements within a text representation, suggesting that

metaphors allow certain ideas about the world to become thinkable. Neuroscientific studies⁵⁶ are beginning to show how certain aspects of our brains' structure and cognitive functioning allow metaphors to shape the way we think about the world to make certain concepts thinkable⁵⁷ in a much more constitutive fashion than what is represented in legal scholarship. For example, Lera Boroditsky and her colleagues have examined how different metaphorical systems regarding crime can lead people to have fundamentally different ways of thinking about solving social issues.⁵⁸ Their experiment involved exposing participants to descriptions of otherwise neutral crime reports that were embedded with language either describing crime as a predator (stalking victims, hiding in shadows) or as a virus (an infection that spreads, risk factors that lead to disease, a containable problem).⁵⁹ They found that

metaphor may play an important role in text comprehension. The most interesting things that we learn about metaphor may turn out to be not the mechanisms through which metaphors are understood but, rather, the things that metaphor allows us to do.

David W. Allbritton, *When Metaphors Function As Schemas: Some Cognitive Effects of Conceptual Metaphors*, 10 METAPHOR & SYMBOLIC ACTIVITY 33, 43 (1995).

56 See generally Lera Boroditsky et al., *Sex, Syntax, and Semantics*, in LANGUAGE IN MIND: ADVANCES IN THE STUDY OF LANGUAGE & THOUGHT 61 (Dedre Gentner & Susan Goldin-Meadow eds., 2003) (noting the way thought may be shaped by language); Ponterotto, *supra* note 55, (noting the central role of metaphor in discourse); Gwenda L. Schmidt et al., *Beyond Laterality: A Critical Assessment of Research on the Neural Basis of Metaphor*, 16 J. INT'L NEUROPSYCHOLOGICAL SOC'Y 1 (2010) (noting the pervasive and unique use of metaphors in human communication); Catherine Mackenzie et al., *The communication effects of right brain damage on the very old and the not so old*, 12 J. NEUROLINGUISTICS 79 (1999) (noting the inabilities to comprehend metaphor in research into brain damage); Hiram H. Brownell et al., *Appreciation of Metaphoric Alternative Word Meanings By Left and Right Brain-Damaged Patients*, 28 NEUROPSYCHOLOGIA 375 (1990) (same); Heath A. Demaree et al., *Brain Lateralization of Emotional Processing: Historical Roots and a Future of Incorporating "Dominance"*, 4 BEHAV. & COGNITIVE NEUROSCIENCE REVIEWS 3 (2005) (reviewing research on the interrelation between brain damage and lexical emotion).

57 Allbritton, *supra* note 56.

58 See, e.g., Paul H. Thibodeau & Lera Boroditsky, *Metaphors We Think With: The Role of Metaphor in Reasoning*, 6 PLOS ONE, Feb. 2011, at 1 (investigating the role metaphor plays in social reasoning); Paul Thibodeau et al., *When a bad metaphor may not be a victimless crime: The role of metaphor in social policy*, in PROCEEDINGS OF THE THIRTY-FIRST ANNUAL CONFERENCE OF THE COGNITIVE SCIENCE SOCIETY 809 (Niels Taatgen & Hedderik van Rijn eds., 2009) (same).

59 The researchers noted that:

The experiment was designed to explore whether simply embedding a common metaphor in an otherwise neutral report about crime can systematically influence people's approach to solving the crime problem. In the task, participants read a report about crime in a fictional city and then answered questions about the city. The report contained mostly crime-relevant statistics, and also two brief instances of either the crime as predator metaphor or the crime as virus metaphor. After reading the report, participants answered questions relating to crime in the city. Critically, in one of these questions, participants were asked to propose a solution to the crime problem. If metaphors in fact have psychological weight, then being exposed to different metaphors for crime may lead people to propose different solutions to the city's crime problem. For example, people exposed to the crime

“[w]hen crime was compared to a virus, participants were more likely to suggest reforming the social environment of the infected community. When crime was compared to a predator, participants were more likely to suggest attacking the problem head on—hiring more police officers and building jails.”⁶⁰ The authors also note that these experimental results:

[S]uggest that metaphors can influence how people conceptualize and in turn hope to solve important social issues. It appears that even casually encountering one metaphor or another in discourse about crime can lead people to unwittingly propose different types of solutions for the crime problem. Importantly, it appears that the metaphors had a subconscious effect on people’s reasoning. Very few of our participants thought that the metaphors influenced their crime-reducing suggestion.⁶¹

This is rather remarkable experimental evidence of how metaphors matter in *shaping* policy preferences and notions of justice rather than merely reflecting otherwise established preferences through a coat of superficial rhetoric.

In short, metaphors orient and organize the very ways in which we perceive and think about the world. The significance of metaphors is not simply about rhetorical flourish, but rather making certain abstract ideas about the world *thinkable* by experiencing them through more tangible concepts. Therefore, to limit the metaphorical significance of colorblindness to being rhetorical polish or to see its role as simply obscuring the inconsistencies between various perspectives on race is to not fully appreciate the constitutive role metaphors play in orienting normative conceptions pertaining to the social and legal world. For example, Siegel argues that “one needs a concept of social stratification—of status inequality among groups arising out of the interaction of social structure and social meaning—in order to make sense of the blindness trope at the heart of antidiscrimination law.”⁶² This is undoubtedly true. Yet, the converse is equally important: we need to think seriously about how colorblindness operates as a metaphor to make sense of how it becomes a coherent perspective from which to understand social structure. The colorblind metaphor facilitates a much deeper cognitive ordering beyond mere

as a predator metaphor might propose toughening law enforcement, while people exposed to the crime as disease metaphor might think about dealing with problems in the community and improving the social environment to prevent future crime. Of course, it is also possible that such metaphors are simply ornamental flourishes of language, and do not influence how people conceive of important social issues like crime.

Thibodeau et al., *supra* note 59, at 810.

60 *Id.* at 814.

61 *Id.* at 811.

62 Siegel, *Discrimination in the Eyes of the Law*, *supra* note 51, at 77–78.

rhetoric that makes certain normative ideas about social relations seem natural and unproblematic. Therefore, to fully understand and critique this worldview, the metaphor itself must be taken seriously rather than continuing in the fashion of most equal protection scholarship where the colorblind metaphor is treated as superficial language. A more modern and empirically-grounded understanding of the role of metaphors in orienting social and political worldviews suggests that we should pay more attention to its constitutive role in making colorblindness seem like a coherent ideology.

Taking the colorblind metaphor seriously in relation to the jurisprudence it elicits means, as a first step, examining the claims put forth by the term itself to understand the cognitive effect it may have on how individuals experience the world. Recall that the cognitive impacts of metaphors work by allowing individuals to understand and experience intangible concepts (such as time) through those that are seemingly tangible (such as money), allowing them to transfer the emotive and cognitive experience of the latter onto the former: time is money. Colorblindness, as a metaphor, suggests: (a) that race is largely about color or visually obvious differences; (b) that blindness, in terms of not being able to see or distinguish between racial groups, prevents one from understanding racial differences in any meaningful way and therefore leads to a diminished understanding of race that reflects true equality; and (c) that society can partake in this racial paradise through legal and political means that mimic this experience of blindness through a jurisprudence of racial non-recognition. (While the social experience of being blind—i.e., not having any vision—is not the same as the experience of being colorblind—i.e., not being able to properly distinguish colors—the two concepts, in this context, share an overall framing that not being able to visually recognize or distinguish between racial groups fosters racial equality.) In short, the colorblind metaphor gains its coherence from a particular assumption about race—that it is primarily a visual experience of engaging with self-evident markers of human difference. This metaphor is further motivated by a particular assumption regarding the way race plays out among people with diminished visual capabilities—that it is irrelevant—to make a normative assertion about how the state *ought* to approach race, treating non-recognition as a predicate for achieving a racial utopia that justifies this move in the doctrinal hermeneutics of equal protection. For example, *Bakke* and *Richmond* turn on eliminating discourses of privilege and advantage from Whiteness and reframing Whites as a composition of competing groups whose social experiences are not unlike any other racial minority; sometimes they win in jockeying for political power, sometimes they lose. But what makes this “move” possible is a particular theoretical approach that at once limits race to its most superficial characteristics—visual cues—that makes the metaphor of blindness through a jurisprudence

of non-recognition coherent. The embedded “*race*” *ipsa loquitur* trope plays an important cognitive role in allowing race to be conceptualized this way.

To be sure, paying closer attention to colorblindness as a metaphor is not to say that the social and political transformations in the post Civil Rights Era are unimportant, nor is it to suggest that the literal phraseology of colorblindness caused them. Rather, it is to suggest that contemporary conversations on colorblindness have not taken the metaphor seriously in terms of the “work” that it does at a cognitive level in giving coherence to this worldview. We can perhaps better understand the self-evident coherence that colorblindness has assumed in equal protection analysis after *Richmond v. Croson*⁶³ as the product of an iterative process between metaphors’ cognitive impact and the aforementioned shifting social and political contexts that, taken together, (re)create a theory of race that prioritizes its visual significance en route to a broader jurisprudence of non-recognition. This approach suggests that sufficient attention has not been given to fleshing out and critiquing the theory of race that colorblindness operates from and reproduces: “*race*” *ipsa loquitur*.

3. *The Intent Doctrine*

The intent doctrine is traditionally understood as emerging from the Supreme Court’s 1976 decision in *Washington v. Davis* to require a demonstration of discriminatory purpose or “bad intent” to sustain claims that a facially neutral law or practice violates equal protection.⁶⁴ This doctrine has made it extremely difficult for plaintiffs to maintain claims of discrimination; demonstration of disparate impact is not sufficient in and of itself, and direct evidence of individual decisionmakers’ specific intent to produce bad outcomes is rare except in the most extraordinary cases.

Yet, this traditional genealogy has recently come under scrutiny for offering an incomplete understanding of the role of intent analyses in equal protection race jurisprudence. Moreover, this standard narrative of the intent doctrine springing out of *Washington v. Davis* may obscure the critical role of colorblindness in giving rise to its current incarnation as requiring a specific demonstration of ‘bad intent.’⁶⁵ Ian Haney López argues that what is missing from the conventional story about the intent doctrine’s origins is that the judicial examination of intent existed before *Washington v. Davis*, but in a different form where social context was used to *infer* inappropriate

⁶³ *City of Richmond v. J.A. Croson*, 488 U.S. 469 (1989).

⁶⁴ See generally Ian Haney López, *Intentional Blindness*, 87 N.Y.U. L. REV. (forthcoming Dec. 2012) (manuscript at 3), available at <http://ssrn.com/abstract=1920418> [hereinafter López, *Intentional Blindness*] (challenging the notion of a divided equal protection).

⁶⁵ For a persuasive reconsideration of the intent doctrine’s genealogy, see *id.*

motives rather than requiring direct evidence of malice.⁶⁶ *Davis* itself drew attention to this contextual approach to discerning intent. The *Davis* Court found that there was no discrimination in the administration of Test 21 as an examination for promotion within Washington D.C.'s police department and held that government action is not unconstitutional "solely because it has a racially disproportionate impact."⁶⁷ Yet, context still mattered for the *Davis* Court in inferring whether or not an unconstitutional purpose existed.⁶⁸ Thus, the Court "did not just extol [this] contextual [method for inferring] intent, [it] employed it, albeit to find no discrimination."⁶⁹

From this standpoint, *Davis* did not usher in a jurisprudence fixated on individual malice. This turn towards malice has been shown to be a post-*Bakke* development in equal protection analysis. Recall that Powell's opinion in *Bakke* encouraged deemphasizing context in affirmative action cases in a manner that subjects all uses of race—remedial or discriminatory—to strict scrutiny and promoted an ethos of non-recognition.⁷⁰ While this position was not signed onto by the other Justices in *Bakke*, it has become a formidable influence in equal protection analysis—particularly in transforming intent doctrine.⁷¹ The year following *Bakke*, the Court in

66 López notes:

Returning to the civil rights era, the Court stayed true to this balance between investigating general motives while eschewing a concern for individual intentions. It repeatedly drew inferences about governmental purposes from the larger context, while avoiding direct inquiries into individual mindsets. Sometimes this inferential process reflected little more than judicial notice of race relations. . . . At other times, the Justices relied on a more focused examination of surrounding racial patterns, including through the invocation of social science. Perhaps the quintessential example is *Brown* itself, in its famous footnote 12. Whatever the combination of judicial notice and focused study, the point is that the Court did not demand direct proof of subjective mindsets. Instead, findings of discriminatory purpose reflected inferences drawn from the challenged action as well as the surrounding context—in a phrase popular with the Court, from the "totality of the circumstances."

Id. at 18–19 (internal footnotes omitted).

67 *Washington v. Davis*, 426 U.S. 229, 239 (1976) (emphasis in original).

68 "Necessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another. . . . Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution." *Id.* at 242.

69 López, *Intentional Blindness*, *supra* note 65 at 29. Justice White wrote in *Davis*:
Even agreeing with the District Court that the differential racial effect of Test 21 called for further inquiry, we think the District Court correctly held that the affirmative efforts of the Metropolitan Police Department to recruit black officers, the changing racial composition of the recruit classes and of the force in general, and the relationship of the test to the training program negated any inference that the Department discriminated on the basis of race or that "a police officer qualifies on the color of his skin rather than ability."

Davis, 426 U.S. at 246 (internal citations omitted).

70 *See infra* Part IIB.2.

71 *See generally* López, *Intentional Blindness*, *supra* note 65.

Personnel Administrator of Massachusetts v. Feeney relied heavily upon Powell's colorblind logic to assert—in a case that was actually about gender discrimination—that “a racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification.”⁷² *Feeney* shifted the constitutional problem to that of classification itself; the context that mattered so much up through and past *Davis* was now reduced to an immediately suspect act of government classifying or “seeing” individuals' ostensibly superficial traits, where the Court asserted that “[r]ace is the paradigm.”⁷³ But *Feeney* also reconfigured the meaning of discriminatory purpose or intent:

Discriminatory purpose . . . implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part “because of,” not merely “in spite of,” its adverse effects upon an *identifiable group*.⁷⁴

This has led several commentators to conclude that *Feeney* initiated a doctrinal requirement of demonstrating “bad intent” to sustain claims that equal protection has been violated.⁷⁵ But what has been underappreciated until recently is the extent to which the shift in equal protection analysis from contextual inquiries to an acontextual emphasis on categorization and malice stems from the Court embracing colorblindness; framing the equal protection problem as one of classification or merely “seeing” race is to embrace and extend blindness as an interpretive model. Thus, the intent doctrine as we currently know it is conceptually linked to colorblindness;⁷⁶ its current iteration and emphasis on malice is fruit from the poisonous colorblind tree. What occurs is an increasingly decontextualized understanding of race and racism that moves them from being understood through contextual interactions between human difference and social structure to a reductionist emphasis on physical traits—the *Feeney* Court's “adverse effects upon an identifiable group”—whereby categorization in bad faith is privileged yet race itself remains undertheorized and conceptually flattened to something that is presumptively self-evident or obvious. Put differently, in disaggregating race from context or social structure, the Court effectively embraces “*race ipso loquitur*” as its theory of race. Race needs no contextual explanation or investigation. It simply speaks for itself.

72 Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 272 (1979) (citing *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954)).

73 *Feeney*, 442 U.S. at 272.

74 *Id.* at 279 (emphasis added) (footnote omitted).

75 See e.g., Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1135 (1997) [hereinafter Siegel, *Why Equal Protection No Longer Protects*].

76 See López, *Intentional Blindness*, *supra* note 65.

Taken together, this Part's main doctrinal point is that the Court's equal protection jurisprudence has evolved in a manner where race is conceptually reduced to a series of discrete, self-evidently "identifiable" categories that are salient on their own terms that are known by mere visual observation. What happens across all three areas—the scrutiny inquiry, colorblindness, and the intent doctrine—is the development of a reductionist account of race that promotes a sociologically "thin" understanding of how and why race becomes salient. By removing context, all that is left is mere visual difference; categories based on such seemingly self-evident differences become the bulk of inquiry rather than the context and social practices that make difference visible in the first place. I challenge this notion that racial difference is self-evidently salient or knowable through an empirical model that asks "How do blind people understand race?" By doing this, we can empirically explore the accuracy of the "*race*" *ipsa loquitur* claim. The empirical inquiry allows for examining how and why social practices become key to understanding the salience of race and thus why context must be put back into the mix not simply as a matter of justice, but also for the Court to work with empirically robust understandings of race. However, before discussing the empirical findings, it is useful to examine how the "*race*" *ipsa loquitur* understanding of race has also affected equal protection scholarship.

C. *Scholarly Approaches to Modern Equal Protection Law*

Part IV will discuss some of the existing scholarly critiques pertaining to the scrutiny inquiry, colorblindness, and the intent doctrine to situate the contribution made by this Article's empirical critique of the "*race*" *ipsa loquitur* trope in equal protection law. This section, however, will take a step back to examine how equal protection scholars have broadly conceived of race in order to highlight the synergies between equal protection scholarship and doctrine: both embrace "*race*" *ipsa loquitur*, or the idea that the salience of race stems from its self-evident visual character. The small set of articles examined in this section are by no means representative of the vast equal protection literature. Rather, I briefly look at a limited number of influential equal protection articles to broadly sketch how race has been traditionally theorized in this literature.

The modern scholarly conversation surrounding equal protection has most famously been an appendage of what Alexander Bickel called the countermajoritarian difficulty,⁷⁷ or the concern created when judicial review is used by individuals that are not democratically elected to ostensibly thwart

⁷⁷ See generally ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1962) (assessing the merits of the Court's decisions and analyzing the role of the Court).

the majoritarian will of the governed.⁷⁸ The countermajoritarian difficulty is far from only an equal protection problem; the debates go back to the very founding of this country in terms of figuring out the appropriate role of unelected judges in a democratic society. Yet the tension between the countermajoritarian difficulty and equal protection has led to scholarship that fleshes out how race has been conceptualized among equal protection scholars.

To describe the vast and rich scholarship on the countermajoritarian difficulty is beyond this Article's scope. But, it is useful to sketch some of the key arguments made by influential scholars to use as guideposts to gauge how equal protection scholarship has theorized race and discrimination as primarily visual phenomena and the impact this has for the underlying architecture of the jurisprudence. Probably the most celebrated post-Bickel engagement with issues pertaining to judicial review, equal protection, and countermajoritarianism is John Hart Ely's *Democracy and Distrust*. Here, Ely riffs off of Footnote Four in *Carolene Products* to advance a theory of judicial review that focuses on process rather than substantive values. In other words, he frames "the court as referee."⁷⁹ While Ely provides an eloquent discussion of how his process theory of judicial review interacts with the challenges posed by equal protection, his engagement with the moral imperative driving modern equal protection jurisprudence—that discrimination against discrete and insular minorities is particularly troublesome—is less than robust. Ely argues that "only 'racelike' classifications should be regarded as suspect,"⁸⁰ without providing a complete concept of what race is (outside of equal protection's historical commitment to protecting Blacks) before exploring the traits that make a characteristic sufficiently similar. Put differently, race goes without meaningful definition. As a result, the implication is that Ely draws upon a

78 Barry Friedman argues that "[t]he 'countermajoritarian difficulty' [is] the central obsession of modern constitutional scholarship." Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333, 334 (1998) [hereinafter Friedman, *The History of the Countermajoritarian Difficulty*] (footnote omitted). He sums up the concerns surrounding this concept as "the problem of justifying the exercise of judicial review by unelected and ostensibly unaccountable judges in what we otherwise deem to be a political democracy." Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153, 155 (2002) [hereinafter Friedman, *The Birth of an Academic Obsession*]. "[T]o the extent that democracy entails responsiveness to popular will, how to explain a branch of government whose members are unaccountable to the people, yet have the power to overturn popular decisions?" Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, *supra* note 79, at 335 (footnote omitted).

79 See generally, JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW*, chapter 4 (1980).

80 *Id.* at 149.

lay understanding that race is visually obvious (suggesting that it needs no meaningful discussion outside of what is seen) to then theoretically explore what makes a potential classification race-like. Ely sees problems with both the traditional “discrete and insular”⁸¹ and immutability⁸² approaches to understanding which classifications are suspect. Rather, Ely argues that we should shift our focus to how prejudice “is a lens that distorts reality”⁸³ and thus unduly alters the political process in a way that justifies judicial review. By this reasoning, prejudice is an exogenous social factor anterior to the political process rather than something embedded within; the process itself is presumptively pure. The role of courts through judicial review then is to “look not simply to the legislative product here, but to the process that generated it, to see whether it can identify some factor or factors that suggest the likelihood of such legislative misapprehension.”⁸⁴

Bruce Ackerman’s *Beyond Carolene Products* pursues a close reading of *Carolene Products* (without substantively engaging other cases) to take another look at the countermajoritarian difficulty through the lens of equal protection. For Ackerman, the brilliance of *Carolene Products* is that it “reverse[s] the spin of the countermajoritarian difficulty” by showing that “the original legislative decision, not the judicial invalidation, suffers the greater legitimacy deficit.”⁸⁵ Nevertheless, Ackerman finds that “a reappraisal of *Carolene* is a pressing necessity [since] its approach to minority

81 Ely interprets Justice Stone’s use of discrete and insular minorities in footnote four of *Carolene Products* to reference:

[T]he sort of “pluralist” wheeling and dealing by which the various minorities that make up our society typically interact to protect their interests, and constituted an attempt to denote those minorities for which such a system of “mutual defense pacts” will prove recurrently unavailing. But even understood thus, a “discrete and insular minorities” approach, at least one that refuses to attend to *why* the minority in question is discrete and insular, also turns out to be less than entirely tenable. Perhaps the most obvious objection is one it is always easy to make, that courts aren’t qualified to engage in this kind of practical political analysis.

Id. at 151.

82 Ely notes:

[N]o one has bothered to build the logical bridge, to tell us exactly *why* we should be suspicious of legislatures that classify on the basis of immutable characteristics. Surely one has to feel sorry for a person disabled by something that he or she can’t do anything about, but I’m not aware of any reason to suppose that elected officials are unusually unlikely to share that feeling.

Id. at 150. But see *id.* at 154–55, where he concedes that:

The ability to frame the point of a classification harming (or subsidizing) a certain group in terms of a desire to discourage people from joining (or encourage people to join) that group obviously depends on the mutability of the characteristic that forms the basis of classification. . . . Immutability thus cannot be the talisman that some have tried to make it, but it isn’t entirely irrelevant either. . . .

83 *Id.* at 153.

84 *Id.* at 157.

85 Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 715 (1985).

rights is profoundly shaped by the old politics of exclusion and yields systematically misleading cues within the new participatory paradigm.”⁸⁶ Key to this argument is Ackerman’s belief that being a member of a discrete and insular minority is actually advantageous within a democratic political system, suggesting that the moral impetus of *Carolene Products* is at best outdated and at worst theoretically misguided.⁸⁷

Although Ackerman recognizes that Blacks are the “paradigmatic *Carolene* group,” he offers neither a theory of race nor a broader understanding of why *Carolene* groups are particularly important outside of history and the persistence of prejudice against minorities. He defines “a minority as ‘discrete’ when its members are *marked out* in ways that make it relatively easy for others to identify them. For instance, there is nothing a black woman may plausibly do to hide the fact that she is black or female.”⁸⁸ It is from this visual understanding of race that Ackerman argues that Blacks are in a strong position to leverage the machinery of pluralist politics to their advantage.⁸⁹ The real focus of judicial review from his perspective should be “the anonymous and diffuse victims of poverty and sexual discrimination who find it most difficult to protect their fundamental interests through effective political organization.”⁹⁰ Similar to Ely, the implied theory driving this perspective is that race *is a visually obvious fact*,

86 *Id.* at 717.

87 Ackerman argues:

Carolene is utterly wrongheaded in its diagnosis. Other things being equal, “discreteness and insularity” will normally be a source of enormous bargaining advantage, not disadvantage, for a group engaged in pluralist American politics. Except for special cases, the concerns that underlie *Carolene* should lead judges to protect groups that possess the opposite characteristics from the ones *Carolene* emphasizes—groups that are “anonymous and diffuse” rather than “discrete and insular.” It is these groups that both political science and American history indicate are systematically disadvantaged in a pluralist democracy.

Id. at 723–24.

88 *Id.* at 729 (emphasis added).

89 Ackerman notes that:

[A]s long as we use *Carolene* rhetoric to express our constitutional concerns with racial equality . . . we will find ourselves saying things that are increasingly belied by political reality. While constitutional lawyers decry the political powerlessness of discrete and insular groups, representatives of these interests will be wheeling and dealing in the ongoing pluralist exchange—winning some battles, losing others, but plainly numbering among the organized interests whose electoral power must be treated with respect by their bargaining partners and competitors. Gradually, this clash between constitutional rhetoric and political reality can have only one result. As time goes by, the constitutional center will not hold: the longer *Carolene* remains at the core of the constitutional case for judicial review, the harder lawyers will find it to convince themselves, let alone others, that judicial protection for the rights of “discrete and insular minorities” makes constitutional sense.

Id. at 745.

90 *Id.*

nothing, especially not law, constitutes the ability to see racial difference. It simply is.

In another law review article that focuses its attention on a close reading of *Carolene Products*, Robert Cover's *The Origins of Judicial Activism in the Protection of Minorities* provides an insightful discussion of the relationship between race, equal protection, and countermajoritarianism. Yet Cover also fails to provide a substantive theory of vision as applied to race to understand what it is about discreteness (and to a lesser extent insularity) that justifies giving these groups special protections. Rather than exploring the theoretical implications of being a group that visually stands out for majoritarianism, the experiences of minorities are used to justify judicial review as a check upon apartheid. Cover frames racism as what is done to a group of people whereby race—largely characterized as the visually obvious human differences between minority and majority groups—is seen as the motivating factor, the so-called trigger for group conflict. Cover notes:

Apartheid was not, however, hysteria. It was the governing system that pervaded half the country, and like any such system it was implicitly and explicitly supported by the Constitution. It is clear to me that when Stone wrote [F]ootnote [F]our he intended to protect against transitory hysteria. It is not clear to me whether he knew he had also embarked on a program to rewrite the Constitution. . . . [W]hether or not the [F]ootnote is a wholly coherent theory, it captures the constitutional experience of the period from 1954 to 1964. And that experience, more than the logic of any theory, is the validating force in law.⁹¹

Cover's pragmatic or experience-based view of *Carolene Products*' influence is certainly convincing; the urgent social contexts of the period did not lend themselves to a moment of deep reflection and theoretical ruminations. Rather, people were being slaughtered abroad, and Jim Crow was entrenching itself at home. Discrete and insular minorities, in this sense, are what they do.⁹² Yet the effect is still nonetheless important: emphasizing the pragmatic concerns of the debate between race, judicial

91 Robert M. Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 YALE L.J. 1287, 1316 (1982).

92 Cover argues that:

“[D]iscrete and insular” minorities are not simply losers in the political arena, they are perpetual losers. Indeed, to say that they lose in the majoritarian political process is seriously to distort the facts: they are scapegoats in the real political struggles between other groups. Moreover, in their “insularity” such groups may be characteristically helpless, passive victims of the political process. It is, therefore, because of the discreteness and insularity of certain minorities (objects of prejudice) that we cannot trust “the operation of those political processes ordinarily to be relied upon to protect minorities.” A more searching judicial scrutiny is thus superimposed upon the structural protections against “factions” relied on by the original Constitution—the diffusion of political power and checks and balances.

Id. at 1296.

review, and countermajoritarianism reifies lay renditions of the presumed visual obviousness of race as unproblematic. In the absence of a more substantive theory of race, we are left to fall back on its lay significance as the obvious visible divisions between humans known by phenotype.

Another string of relevant scholarship looks descriptively and normatively at the underlying theories motivating judicial review of “discrete and insular” minorities, skirting the broader issues that make the judicial review of certain types of legislative classifications particularly important. Paul Brest set out a passionate defense of the antidiscrimination principle in a 1977 *Harvard Law Review* piece, a principle that he describes as “disfavor[ing] race-dependent decisions and conduct—at least when they selectively disadvantage the members of a minority group.”⁹³ Race-dependent decisions are those that “would have been different but for the race of those benefited or disadvantaged by them . . . including overt racial classifications on the face of statutes and covert decisions by officials.”⁹⁴ This principle embraces a mainstream process theory of judicial review that supports incremental approaches to resolving discrimination that focus on individuals and classifications while being skeptical of reasoning backwards from racial groups’ disparate outcomes to infer unconstitutional discrimination. From this perspective, race is only important in as far as it affects how *individuals* treat one another, not *group* status dynamics.⁹⁵

From this antidiscrimination perspective of the engagement of judicial review with equal protection doctrine,⁹⁶ race is merely a trait that individuals possess. Indeed, Brest tautologically defines his usage of race in this essay as “a shorthand for race and ethnic origin . . . [reserving the argument that] the antidiscrimination principle can be and has been extended to encompass a variety of other traits.”⁹⁷ Thus, the unarticulated theory of race

⁹³ Paul Brest, *The Supreme Court, 1975 Term, Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 6 (1976).

⁹⁴ *Id.*

⁹⁵ Brest asserts that:

[T]he fact is that most injuries of discrimination . . . were inflicted on particular persons and only they are entitled to compensation. Where discrimination has undermined the unity or culture of a group, it may be appropriate to characterize the injury as one to the group; but the appropriate remedy then is one that reestablishes the group, an end that is not promoted by the fiction of treating individual members as its agents.

Id. at 52.

⁹⁶ Brest notes:

The antidiscrimination principle rests on fundamental moral values that are widely shared in our society. Although the text and legislative history of laws that incorporate this principle can inform our understanding of it, the principle itself is at least as likely to inform our interpretations of the laws. *This is especially true with respect to the [E]qual [P]rotection [C]lause of the [F]ourteenth [A]mendment.*

Id. at 5 (emphasis added).

⁹⁷ *Id.*

used here reflects what can be seen across doctrinal and scholarly race conversations: lay understandings of race based primarily on visual cues can be unproblematically imported into legal discussions in a manner that reifies its presumed visually obvious characteristics.

Owen Fiss provides an alternative principle to guide judicial review of equal protection cases that implicate race: a group disadvantaging principle, also described as anti-subordination. Fiss offers this approach in the context of a philosophical engagement rather than doctrinal discussion⁹⁸ as both an alternative to and critique of the mainstream antidiscrimination principle that largely reflects the Court's approach.⁹⁹ Fiss argues that:

[T]he antidiscrimination principle embodies a very limited conception of equality, one that is highly individualistic and confined to assessing the rationality of means . . . [in contrast to an anti-subordination approach, which] takes a fuller account of social reality, and . . . more clearly focuses the issues that must be decided in equal protection cases.¹⁰⁰

One of Fiss's central arguments is that "[u]nder the antidiscrimination principle, the constitutional flaw inheres in the structure of the statute or the conduct of the administrator, not in its impact on any group or class."¹⁰¹ This preoccupation with individual transactions and classificatory burdens on persons rather than groups bothers Fiss, leading to the development of a group disadvantaging principle to guide constitutional thought. Fiss is careful to articulate that "[t]he overarching idea of the antisubordination principle is that certain social practices . . . should be condemned not

⁹⁸ Fiss published this article in a philosophy journal, not a law review. Therefore, the discussion of case law is scant, with a heavier emphasis on having a more nuanced discussion of the underlying theories of antidiscrimination and anti-subordination. Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107 (1976).

⁹⁹ Fiss argues that "[a]ntidiscrimination has been the predominant interpretation of the Equal Protection Clause. The examples I have given are cast primarily in terms of race, but the principle also controls cases that do not involve race. It is the general interpretation of the Equal Protection Clause . . ." Fiss, *supra* note 99, at 118. *But see* Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9, 10 (2003), in which the authors argue that the presumed jurisprudential dominance of the antidiscrimination or anticlassification approach is not all that clear:

[W]e challenge the common assumption that . . . the anticlassification principle triumphed over the antisubordination principle. We argue instead that the scope of the two principles overlap, that their application shifts over time in response to social contestation and social struggle, and that antisubordination values have shaped the historical development of anticlassification understandings.

¹⁰⁰ Fiss, *supra* note 99, at 108.

¹⁰¹ *Id.* at 127. Fiss continues on to say:

Any individual who happens to be burdened by a statute or practice, or any individual excluded from the benefits, can complain of the wrong. . . . But, the individual's entitlement to relief is not dependent on the interests or desires of others similarly subject to or excluded from the statute or practice.

Id.

because of any unfairness in the transaction attributable to the poor fit between means and ends, but rather because such practices create or perpetuate the subordination of the group of which the individual excluded or rejected is a member."¹⁰²

While Fiss provides a more theoretically compelling understanding¹⁰³ of how judicial review should approach racial discrimination and its group impact, his *theory of race* is similar to those he criticizes. Race as a social and legal concept deserves no special theoretical attention outside of lay understandings that it reflects human differences known primarily through observing phenotypical variation and visual observation. Indeed, Fiss notes that:

[T]here are *natural classes*, or social groups, in American society and blacks are such a group. Blacks are viewed as a group; they view themselves as a group; their identity is in large part determined by membership in the group; their social status is linked to the status of the group; and much of our action, institutional and personal, is based on these perspectives.¹⁰⁴

This understanding of natural classes does not explicitly articulate a visual understanding of race. However, in the absence of specifying a theory of race, Fiss's argument presumptively works from lay understandings of race that take visual distinctions as a common sense boundary between racial groups. It goes without saying only because it is a deeply ingrained belief in our society. What Fiss sees as "natural classes"—human divisions that exist apart from any social influences—speaks to an unarticulated theory of how he primarily knows these divisions or what makes them salient: visual cues. This is not to conflate natural understandings of race with visual ones or wed them too strongly. Rather, it is to point out their relationship and how visual understandings of race are often implied without an explicit articulation. Such "*race*" *ipsa loquitur* approaches where race speaks for itself are not uncommon in equal protection discussions; in many ways, they reflect the norm. It is a shared assumption across equal protection doctrine

¹⁰² Owen Fiss, *Another Equality*, 2 ISSUES IN LEGAL SCHOLARSHIP 3–4 (2004).

¹⁰³ Fiss's group disadvantaging principle as a way to rethink equal protection is strongly grounded in Blacks' social reality:

The conception of blacks as a social group is only the first step in constructing a mediating principle. We must also realize they are a very special type of social group. They have two other characteristics as a group that are critical in understanding the function and reach of the Equal Protection Clause. One is that blacks are very badly off, probably our worst-off class (in terms of material well-being second only to the American Indians), and in addition they have occupied the lowest rung for several centuries. In a sense, they are America's perpetual underclass. It is both of these characteristics—the relative position of the group and the duration of the position—that make efforts to improve the status of the group defensible.

Fiss, *supra* note 93, at 150.

¹⁰⁴ *Id.* at 148 (emphasis added).

and most scholarly conversations that race reflects a series of discrete categories of human difference that are external to legal processes and are known simply by looking out into the world.

Other scholars have presented additional guiding principles for the judicial review of equal protection cases implicating race—all with the undertone of how to effectively manage countermajoritarian concerns. Cass Sunstein presents an anticaste principle—somewhat similar to Fiss’s group disadvantaging principle—that “forbids social and legal practices from translating *highly visible* and morally irrelevant differences into systemic social disadvantage, unless there is a very good reason for society to do so.”¹⁰⁵ Taking race as his paradigmatic example, Sunstein does not provide further theoretical elucidation on his conception of race and its relevance to this anticaste principle other than to say “a special problem of inequality arises when members of a group suffer from a range of disadvantages because of a group-based characteristic that is both *visible for all to see* and irrelevant from a moral point of view.”¹⁰⁶ This approach to race, which frames its legal significance in the visual cues that trigger certain discriminatory responses that are unconstitutional, is par for the course with regards to scholarly and doctrinal conversations on race and equal protection. Race and discrimination are seen as problems inhering in bodies that, when visually observed, can spark discriminatory responses. For example, Sunstein argues that:

Because the stigmatizing characteristic is highly visible, it will probably trigger reactions from others in a wide variety of spheres, even in the interstices of everyday life. Highly visible characteristics are especially likely to be a basis for statistical discrimination and to fuel prejudice from third parties. . . . It is for this reason that the argument I am making works best when the morally irrelevant characteristic is highly visible. When the characteristic is not highly visible, we cannot have a caste system as I understand it here, though the translation into disadvantage

¹⁰⁵ Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410, 2412 (1994) (emphasis added). Sunstein further describes this principle:

This principle grows out of the original rejection of the monarchical legacy and the explicit constitutional ban on titles of nobility. The principle was fueled by the Civil War Amendments and the New Deal. The opposition should be understood as an effort to eliminate, in places large and small, the caste system rooted in race and gender. A law is therefore objectionable on grounds of equality if it contributes to such a caste system. The controlling principle is that no group may be made into second-class citizens. Instead of asking “Are blacks or women similarly situated to whites or men, and if so have they been treated differently?” we should ask “Does the law or practice in question contribute to the maintenance of second-class citizenship, or lower-caste status, for blacks or women?”

Id. at 2428–29 (emphasis added) (footnotes omitted).

¹⁰⁶ *Id.* at 2411–12 (emphasis added).

of a morally irrelevant but invisible characteristic can raise important equality concerns as well.¹⁰⁷

This analysis highlights how much of the conversation around judicial review's approach to race and equal protection not only embraces a lay theory of race largely defined by visual cues, but works from a concept where the moral justification for stronger forms of judicial solicitude largely *depends upon the notion that race is what we see*. If any one component has come to structure how courts define race and understand their moral and legal obligations to remedy racial discrimination, it is the visual aspect of race (skin color, hair texture, facial features, etc.), if only because the conception of race in law reflects that of society.

Other scholars—notably critical race theorists—have critiqued this mainstream conversation concerning race and equal protection law and have given race a complexity and thoughtfulness that is often missing within the equal protection orthodoxy. Critical race theory's ("CRT") main contribution has been to challenge mainstream legal narratives that frame race and racism as aberrational social experiences and to highlight the ways that racial subordination is central to law. Part of this approach includes examining the previously widespread notion that race reflects natural or biological differences between groups by demonstrating how social and legal forces construct racial meanings. In this vein, this scholarship has shed light on law's role in constructing race and racial meanings and, moreover, how the failure to take this perspective seriously can further entrench inequality. Neil Gotanda's *A Critique of "Our Constitution is Color-Blind"* exemplifies this scholarship. Gotanda unpacks colorblindness as an ideology perpetrated by the Court to reveal four distinct meanings: status race (race representing status in society), formal race (socially constructed formal categories, such as "Black" and "White"), historical race (subordinating relationship between races, both past and present), and culture race (race as culture, community, and consciousness).¹⁰⁸ Gotanda notes that "American racial classifications follow two formal rules: 1) Rule of *recognition*: any person whose Black-African ancestry is visible is Black [and] 2) Rule of *descent*."¹⁰⁹ Gotanda does not provide an extended critique of this first rule (which reflects this project's "*race ipso loquitur*" thesis), but does highlight the difficulty of finding explicit articulations (doctrinal, scholarly, or otherwise) where he discusses the significance of visual cues to discussions of race and law:

One way to begin a critique of the American system of racial classification is to ask "Who is Black?" This question rarely provokes analysis; its answer is seen as so self-evident that challenges are novel and noteworthy.

107 *Id.* at 2432–33.

108 *See generally* Gotanda, *supra* note 32.

109 *Id.* at 24 (emphasis altered).

Americans no longer have need of a system of judicial screening to decide a person's race; the rules are simply absorbed without explicit articulation.¹¹⁰

Yet, like much scholarship in this area, there are no further thoughts on how race *becomes* visually salient.

D. Theory of Race Emanating from Equal Protection Doctrine and Scholarship

The review of the doctrinal development of equal protection law and its surrounding scholarship suggests an important yet largely unarticulated trend. In relation to the inordinate attention paid to thinking through the difficulties and appropriate relationship between equal protection and judicial review, race has been conceptually reduced to its lowest common denominator: a set of discrete and visually obvious categories primarily known by phenotype and other visual cues. Thus, an important theory of race embedded throughout equal protection jurisprudence is that race speaks for itself; *race is what you see, and what you see is salient and striking for self-evident reasons*. “Seeing” race is understood as a fact of life that is exogenous to any broader social, legal, or political process. Moreover, this exogenous variable is thought to be the trigger giving rise to equal protection conversations.

By saying that equal protection doctrine and mainstream scholarship have a reductionist theory of race, I do not mean to simply reassert that race is socially or legally constructed, a point that has already been eloquently made.¹¹¹ Instead, I want to extend this conversation by questioning the extent to which visual distinctions between racial groups are thought to be self-evident boundaries of difference. Law's focus on visibility might privilege a certain way of thinking about race that historically has been intertwined with racial subordination, i.e., that racial differences are real, tangible, and obvious rather than a product of social practices. Thus, the “*race ipso loquitur*” trope in equal protection doctrine may very well limit discussions of what race is and, more importantly, might obscure the most effective way to use racial categorizations in a thoughtful, non-discriminatory manner. Given these stakes, an empirical examination might provide insight into the relationship between race and vision, drawing attention to

¹¹⁰ *Id.* at 23–24.

¹¹¹ See, e.g., 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 (1994) [hereinafter López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*]; LAURA E. GÓMEZ, *MANIFEST DESTINIES: THE MAKING OF THE MEXICAN AMERICAN RACE* (2007); Aliya Saperstein & Andrew M. Penner, *The Race of a Criminal Record: How Incarceration Colors Racial Perceptions*, 57 SOC. PROBS. 92 (2010).

the extent that visual understandings of race may not arise out of their obviousness but from constitutive social practices that create their salience. The results from this empirical research that flesh out this concept are discussed in Part III.

III. EMPIRICAL FINDINGS¹¹²

A. *Research Design*

The purpose of this research is to determine whether the theory of race embedded in equal protection doctrine is empirically defensible: that the salience of race, and the legally cognizable trigger for discriminatory behavior, stems from its self-evident visual significance. Put differently, is race salient on the terms articulated by the Court, i.e., because it is visually obvious? Or does this visual understanding of race (and the discriminatory behavior that equal protection sees as tightly connected with it) emanate from something else, which might suggest that the Court's understanding of the salience of race with regards to the scrutiny inquiry, colorblindness, and the intent doctrine is inherently flawed? To test whether the visual salience of race comes from its purported obviousness, we can use qualitative methods to examine the experiences of those without vision or the ability to visually distinguish between racial groups: people who are totally blind, and have been so since birth. Focusing on this population (as opposed to including those who are partially sighted or lost their vision later in life) is conceptually important; it allows for a particular understanding of whether the absence of vision affects individuals' perceptions of race. Individuals with partial sight can sometimes see certain physical traits while those who lose their sight as a child, adolescent, or adult may have residual visual memories of race that may confound the research results. Talking to people who have never been capable of seeing the physical attributes associated with race and comparing these experiences to those of sighted people offers the best way to examine whether there are influences beyond the presumed self-evident character of race that lead it to be primarily understood in visual terms. *This aspect of the methodological design is key:* since blind and sighted individuals live in similar social contexts, the environment or social practices

¹¹² The dataset presented in this section differs significantly from the dataset presented in a previous article. Here, I have substantially expanded the number of blind and sighted respondents to offer findings that draw upon a richer set of data. This Article is also distinguished in that I discuss and apply the findings from this expanded dataset to a *specific* constitutional discussion regarding the "*race*" *ipsa loquitur* idea embedded in equal protection jurisprudence and scholarship. See generally Osagie K. Obasogie, *Do Blind People See Race? Social, Legal, and Theoretical Considerations*, 44 LAW & SOC'Y REV. 585 (2010).

can be held constant so as to empirically test the relevance of the main variable—vision—in relation to the visual salience of race.

For this Article, interviews with sighted individuals help empirically ground the motivating hypothesis—that sighted people primarily think visually about race—in order to draw similarities to the experiences of the main group under study, i.e., blind individuals. This comparison, and the use of sighted people in particular, allows this Article to unearth thoroughly unexamined and unchallenged assumptions throughout society that are reflected in equal protection law: that race is uniquely salient because of visual distinctions, that this visual significance is self-evident and exogenous to social forces, and that race therefore has diminished or even no importance for blind people.

I conducted 161 interviews with blind respondents,¹¹³ with 106 qualifying as totally blind since birth.¹¹⁴ The fifty-five non-qualifying interviews with people who had some sight or lost their vision as a child, adolescent, or adult were not included in the results.¹¹⁵

113 These interviews were primarily conducted by telephone for three reasons. First, it significantly diversified the sample. Second, many of the blind respondents do not live independently; talking by phone increased their comfort and ability to participate. Third, conducting all of the interviews by phone meant that sighted respondents could not see the interviewer, which reduced the chance that their visual perception of me would introduce interviewer bias. If any bias was transmitted over the phone by the perception of having a racialized voice or surname, such bias would likely be uniform across blind and sighted respondents, making the data more comparable.

114 Interviews with both blind and sighted respondents were semi-structured. The interview questions were largely the same for both groups, but additional questions were occasionally asked to follow up on points made by the respondents or to allow them to clarify their answers. Both sets of respondents were identified through snowball sampling. For example, I started with three blind respondents identified through personal contacts and asked each of them to put me in contact with three additional blind people, and then repeated this process. Blind respondents were also identified through Internet listserv postings.

115 So that the experiences between the two groups were comparable, I tried to roughly balance various demographic categories such as respondents' average age (44.5 years for blind respondents versus 47.1 years for sighted respondents) and proportions of White to non-White respondents (83.9% of the blind respondents identified as White and 16% identified as non-White, compared to 68% of the sighted respondents that identified as White and 32% that identified as non-White).

TABLE 1: SAMPLE INFORMATION

	Total In- terviewed	Qualifying Respond- ents	White	Non-White	Avg. Age	Male/ Female	States
Blind	161	106	89 (83.9%)*	17 (16%)*	44.5	51/55 (48.1%/ 51.8%)	34
Sight- ed	25	25	17 (68%)*	8 (32%)*	47.1	7/18 (28%/ 72%)	6

*of qualifying respondents

The telephone interviews were recorded (with consent from each respondent) and transcribed by a third party. HyperResearch qualitative research software was used to code and analyze the data.

B. Results¹¹⁶

Two specific questions frame the findings from this research. First, how do blind and sighted individuals understand race? Secondly, if blind people understand race visually, how does this occur?

1. Sighted and Blind Respondents' Visual Understanding of Race

Sighted individuals largely have a visual understanding of race, meaning that visually obvious physical differences—skin color, facial features, etc.—shape how they understand the boundaries that give salience to racial groupings. This finding is strongly supported by the qualitative data

¹¹⁶ Pseudonyms are used throughout the reporting of this data to conceal the respondents' identities. Qualitative researchers, particularly those using interview methodologies, often report their data using quasi-quantitative descriptors, e.g., "many," "most," "few," etc., as opposed to numerical counts or proportions. This is done to resist the overquantification of human dynamics that can undermine the richness of qualitative data. I follow this approach in reporting the results in this Article. See ROBERT S. WEISS, *LEARNING FROM STRANGERS: THE ART AND METHOD OF QUALITATIVE INTERVIEW STUDIES* (1994). See also, e.g., MARY C. WATERS, *ETHNIC OPTIONS: CHOOSING IDENTITIES IN AMERICA* (1990); RUTH FRANKENBERG, *WHITE WOMEN, RACE MATTERS: THE SOCIAL CONSTRUCTION OF WHITENESS* (1993); KRISTIN BUMILLER, *THE CIVIL RIGHTS SOCIETY: THE SOCIAL CONSTRUCTION OF VICTIMS* (1988); PATRICIA EWICK & SUSAN S. SILBEY, *THE COMMON PLACE OF LAW: STORIES FROM EVERYDAY LIFE* (1998).

collected for this Article,¹¹⁷ and should not be surprising. Similarly, sighted respondents' almost uniform belief that blind people have a diminished understanding of race due to their inability to see should not be particularly perplexing.¹¹⁸ But what is surprising is that blind and sighted people understand and experience race in a similar fashion: visually.

The data overwhelmingly show that, contrary to beliefs within the sighted community, race is not only significant to blind people, but is visually salient as a marker of visually distinguishable physical traits such as skin color and facial features. Put differently, the visual aspects of race are what give it conceptual salience and significance to blind people—just as much as it does to their sighted counterparts. The qualitative data conclusively bears this out. For example, when asked what race is, blind respondent Amy notes that it “is physical attributes that are inherently unique to a group of people.” Other blind respondents put a finer point on this idea. Denny said, “race [is] skin color—color of one’s pigmentation,” while Brian said that for him, “race [is used] to distinguish Black, White, Asian, Hispanic . . . [based on] skin color.” Carrie similarly said “I think of colors. Varying colors in people’s skin colors.” Several blind respondents acknowledged the irony in their emphasis on visual cues in conceptualizing racial difference. Tyrone responded by saying race is “color. Even though I can’t see, that is what I tend to think of.” When asked what is the first thing that comes to mind when she hears the word “race,” Ginny said, “oddly I guess I would say skin color. Even though that’s not really relevant to me. But that’s the first thing that comes to mind.”

117 When asked how to define race, almost every sighted respondent emphasized visual differences as the key distinguishing factor. One sighted respondent, Mallory, noted, “there are lots of different races, although when I say race [I mean] different colors of people.” Another sighted respondent, Angie, said “obviously color of skin can come into play. Just physical characteristics of race. Hispanics typically have jet black hair. Asians have . . . the almond slanted eye. Just those type of things. Again, dark hair. Black, obviously color of skin.”

118 When asked about their thoughts on blind people’s ability to comprehend race, one sighted respondent, Sarah, said if “they’ve been blind all their life, they probably don’t have any idea what [sighted people are] talking about when we say [race]. I don’t think they have any concept of it.” When asked if she thought race is a problem for blind people, another sighted respondent, Jenny, said, “It shouldn’t be. I don’t think so. I don’t see how it could be.” Even those few sighted respondents who thought blind people might understand race thought that this understanding would be impoverished, or at least not visually significant to them. For example, sighted respondent Donny said that he thought race might be important to blind people since “yes there is a physical difference there but at the same time there is a cultural difference that can be identified more so than pure color.” Similarly, Jamie thought that race might be significant to blind people despite their inability to see “because people sound different, and people act differently. [If] they’ve been taught to fear [these distinctions], then they’ll fear it.”

This visual understanding of race also affects blind individuals' own racial identities. That is, blind people's racial identities are shaped by a visual understanding of their own physical features that they cannot directly perceive. For example, when asked if he racially identified a particular way, Nelson replied "I know that I was created with white skin, and that I'm White, but that's just a fact of life." Mark said that he identified as White because "I know who I am, I know what I look like, so I'm White." Tara similarly noted that "I am Caucasian, but I don't know if that has anything but skin, meaning to me. Only the fact that I am." These types of answers were not unique to White blind respondents as the racial identity of blind racial minorities also revolved around an awareness of how they are visually perceived. For example, Alex said that he identified as African American because "I [am] a little dark-skinned." Larry, another blind Black respondent, said he identified as Black because "I'm a dark skinned guy. . . . I'm a dark skinned brother with kinky hair and all the other basic Negroid features and all that good stuff." Amy says she identifies as African American because "I have the attributes . . . you know, I definitely have the thick hair and dark skin myself." When asked why he identified as Black, Tim laughed in acknowledging the irony of his response, and said "skin color."

This data begins to demonstrate the visual salience that race has for blind individuals, both in terms of how they racially identify others and themselves. It is tempting to conclude that these responses only reflect a relatively superficial understanding of race among blind people that is indicative of a general awareness that people come in different colors. But, the visual understanding of race within the blind community is, as it is in the sighted community, more complicated than this. Race is not simply about skin color. Rather, the blind respondents displayed a sophisticated appreciation for the constellation of cues—some non-visual—that nonetheless give race its visual salience. For example, blind respondent Lia said that it is:

[N]ot only skin color because it's also [other] characteristics. . . . I know that various races like the Negroid race have the characteristic of [different] bone structure [and] facial structure. Asians [also] have [different] facial structure [and] body structure. I know that each race has its own set of characteristics to go with it. Color can be a defining characteristic. But [race] is not only based on color.

The visual significance of race becomes a primary filter through which to understand other aspects tied to race. That is, the visual aspects of race take cognitive precedence over others, even for those who cannot see. An example of this can be seen with how blind respondents understand the relationship between the visual cues tied to race and what they deemed to be secondary racial characteristics. Sighted individuals often intuit that if blind people understand race, they can only appreciate it to the extent that it can

be experienced through non-visual senses, such as racialized differences in speech patterns or accents. Sighted respondent Tamia highlights this common assumption when she said that race might be perceptible to blind people because “even though they can’t see, they can tell by a person’s voice. When your eyes are [not working], your other senses become stronger. So, just because they can’t see, they *can still tell by the voice* whether they’re a black person or white person or Japanese or Chinese.” But what is interesting is that the data suggest voice and accent do not become the primary mechanism for understanding racial difference. Rather, it remains a secondary measure whose ultimate meaning is only relevant to blind respondents’ visual understanding of race, which remains primary. For example, blind respondent Sandy said that vocal and linguistic differences do not “mean anything to me, except that I know that [the person has] a different skin color. Jenny felt the same way, noting that hearing a person’s voice is only useful to her in as far as it helps her answer the question: “What would I see if I looked at you?” This phenomenon of understanding the significance of secondary, non-visual racialized traits through the primacy of race’s visual salience repeats itself in other areas.

The extent to which voice, surnames, and other seemingly racialized cues are secondary to blind people’s understanding of race draws further attention to the centrality of visual difference to their conceptions. A skeptic may concede that the data presented thus far might support the conclusion that blind people have a visual understanding of race but that it is necessarily superficial; a cognitive awareness of the visual salience of race does not necessarily mean that visual understandings of race have a substantive impact on blind people’s day to day lives as it does for the sighted. From this skeptical perspective, blind people are merely repeating the visual character of race that they hear about from their sighted colleagues without this visual aspect of race having any “real” meaning for their lives. But such a conclusion underestimates the deep cognitive penetrance that visual understandings of race have for blind people. Dating is one area that exemplifies how decisions and relationships are influenced by visual understandings of race that are as salient to blind people as they are to those who are sighted. For example, blind respondent Davey described a blind White friend’s dating experience in college:

He was going to college and he had started working with a reader. She was very attractive to him, and he started seeing her. Then, somebody told him that she was Black, and he broke it off. He broke off the relationship. He justified it by saying that it would not have worked, in the South, for a White man to be involved with a Black woman. But that’s an incident that shows [how] once he learned that she was Black, the prejudice set in.

Kenny, a younger blind black male, offered an illuminating description about how such racial preferences in dating may be more prevalent than one might initially think:

A lot of my black blind friends have sort of a joke because when someone doesn't know our race—especially the males—they'll find some way to reach out and touch our hair. People want to know, and that's the one [racial clue] they can always get . . . It's a way for them to figure out [your race] if they don't know . . . I think [this happens] mostly in dating. You know, if they're going to make some decisions. I've seen people that seem sort of interested in someone and then discover that they're Black and change their intentions. I go to a lot of the conventions now, the national conventions [for the blind]. And there are people trying to meet somebody [to date]. You can see that they're kind of pursuing somebody [that they find attractive]. And they'll go for the hair and then they'll change their mind. They're always still friendly. I've never known anybody who just stopped talking to anybody altogether. They'll give themselves some time. But you're Black.

This example highlights how a non-visual trait that is directly perceptible to a blind person through other means—here, hair texture—is sought out as a proxy for the visual cues associated with race as a way to determine the terms, limits, and boundaries of social interactions.

The data presented thus far regarding blind people's visual understanding of race begins to articulate this Article's key finding. If blind people understand race visually and orient their lives (such as dating) primarily around visual understandings of race just as much as sighted people do, then it is difficult to maintain, as equal protection jurisprudence strongly implies, that the salience of group characteristics stems from its visual obviousness. Rather, it is becoming clear that this visual salience is produced by something else, which might be the more socially and legally relevant factor. But if the salience is not merely self-evident, where does it come from?

2. Social Practices Produce Visual Understandings of Race

The qualitative data show that rather than being obvious or self-evident, race becomes visually salient to blind (and sighted) individuals through social practices that train people to perceive human differences in particular ways. For sighted people this socialization process is entwined with their visual engagement with the world, making it difficult to disentangle what is obvious and what is produced. Blind people, on the other hand, are subject to the same social practices without the confounding visual stimuli and can thus detail the ways in which their visual understanding of race develops.

Several blind respondents offered detailed explanations of how they were subjected to social practices that created their visual understanding of

racial differences. For example, Mason described how he began to become attuned to the visual significance accorded to race:

I began to be educated by people around me. For example, I might be talking to someone, and I would not necessarily know [their race] because I'm not looking at them. As far as I was concerned this was just a person, and someone would then come to me, and let me know that this person had been of a certain race, or color, or obvious ethnic origin which I would not have known. Sometimes [they would] impart information about their assumptions about that person, and how I should or should not behave, or who I should or should not be talking to.

Mason's insights describe the racial rules of engagement that many people, blind and sighted, are subjected to in terms of how to interact with people from various racial groups. But what is important to understand is that visual understandings of race are created by social exchanges that are not necessarily dramatic. Rather, it is the routine description of everyday life through a racial lens that prioritizes the significance of human physical variation as an explanation for social order. Blind respondent Gerald describes this dynamic:

I was brought up to learn that I was White of course. And unfortunately I learned that I was White so that White could be contrasted with Black. One of the first memories I have of learning about race was driving with my father downtown. And he said "do you smell that smell?" and indeed there was a smell. And I said yes. And he said, "That's the smell of nigger town." And I didn't know what that meant. But he was perfectly glad to tell me. That is where the Negro lived. And then he began to describe all the stereotypes with being a nigger or Negro. At that time, there was supposed to be this difference. If you were pretty good, you were a Negro. Otherwise you were a nigger. But it didn't matter. You still weren't a White person and that's the way it was. He would say things like "you know what you smell is partly the way that they keep their houses and their yards and there's just trash laying all around. But then part of what you smell is just them. They can't help it." And then he would go on: "well, they talk differently because they're less educated and they're less educated because they're less capable of being educated." So pretty soon you begin to develop a race identity that kind of says wow, this is sad for them and sad for us too.

This passage highlights a common theme throughout the qualitative data collected from blind respondents: social interactions structure a particular understanding about the visual obviousness of race that is just as significant as that experienced by sighted individuals but is less accessible to them given their fixation on visual fields and their ability to portray some self-evident truth. Sighted individuals are unable to "see" how social practices lead them to perceive human difference in particular ways. Social practices shape the visual understandings of blind and sighted alike, training them to seek out and give meaning to visual distinctions that align with

social understandings of racial difference. Blind people are just more capable of articulating the contours of these practices since they cannot be seduced by the appeal of vision as objective truth. Jenny describes how these social practices that produce visual understanding of race can filter blind people's other senses so as to give effect to an ostensible ability to "smell" racial differences:

We had a babysitter named [Ellen], who is Black, and my stereotype of Black people, when I was growing up was that they sweated a lot. Now, I don't know why I learned that, but supposedly that was the truth. And they were overweight, generally. We had this babysitter, and I came down one morning and said [to my Mother], "What are you doing?" She said, "I'm washing the counters" and I asked, "Why are you washing the counters?" She said, "Well, because Black people smell, and your babysitter was here last night." And I said, "That's interesting" and filed that away. So, [Ellen] came the next week, and she was standing with her arm on the counter, and I walked up to the counter, and I sniffed it, and [Ellen] said, "What are you doing?" and I said, "Oh, I'm sniffing the counter, because my mom said you guys smell, and she's right. There's a smell that's different from ours on the counter."

Jenny is far from the only respondent in this sample to have professed an ability to smell differences between racial groups.¹¹⁹ But this passage highlights a common interaction that all people endure yet can be uniquely articulated by blind people, in terms of how human difference does not make a difference until that perceived line of difference is *highlighted as a distinctly racial difference*.

It is important to reiterate that the social practices that produced the visual understanding of race among blind respondents did not only shape their racial perceptions in a cognitive manner, but also influenced how the

119 For example, Christopher recalled this story:

People from different races to me tend to smell different. Now, usually the way I can identify someone of a different race is that they smell different than a Caucasian person. Hispanic people smell different than Black people. And Asians have their own odor. But I'm not as familiar with it because I haven't really been exposed to that many Asians. But I'm sure if I had been that I'd be able to distinguish between the various Asians. But what most comes to mind is Hispanic people smell very different than Caucasian people and Black people. But Hispanics to me and even amongst the different Hispanics, like the Central American group tends to smell different from Mexicans. But it's a distinct odor. And I don't think it's related to diet either because...second and third generation Hispanics smell more similar to the first generation ones than White people would. And they're following an American diet. There's one particular case that I distinctly remember when I was in high school. We had this one girl who was blonde and blue-eyed. And she spoke perfect English. And everybody thought that she was Caucasian. And I would say no, she is Mexican obviously. And then it came up in conversation that her father was born in Mexico. And even though she was blonde and blue-eyed, she was half Hispanic. To me she smelled Hispanic. So I knew she was Hispanic even though everybody else thought she was completely Caucasian.

respondents lived their day-to-day lives. As previously mentioned, dating is a prime area to see how visual understandings of racial difference often affects blind people's ability to date across the color line. For example, Tim, a blind Black male, discussed his difficulties with interracial dating:

I just love African-American women. I don't know why. I had White friends that I hung out with, and we went to class together, and worked on projects together. I just never had a desire to do that. . . . I tried it, but I just couldn't gravitate to it. I think I did it for about a week, and I was just like, "No, I can't do this."

In the context of dating, race is often actively sought out by blind people to determine the nature and feasibility of any ongoing relationship—in part because social practices produce an awareness of the ways in which interracial relationships visually disrupt social norms pertaining to appropriate romantic and sexual partnering. For example, Madge, a blind White female respondent, said:

Race is important in terms of a date. I remember meeting this guy at a program for the blind at the university. And most of the guys there I wasn't really that impressed with. But this one guy, he really stood out. And I liked him and I enjoyed talking to him and stuff. And when I found out that he was Black, I knew it wasn't going to work for me. But I felt kind of bad then, because I was hoping that it would [work out]. But that's where [race] usually makes the most difference in my life.

But race plays this important role of structuring the terms of human interactions beyond the realm of dating. For example, blind respondent Tammy said that she finds information about a person's race valuable since:

[I]t makes it easier to interact with them [so] I won't say a stupid thing . . . something like a statement that would be assuming that they're White. [It's also important] just so that I can have equal access to information. I can say it matches the information that the sighted person has. It's really important to me.

Taken as a whole, the findings from this empirical research show that race is understood and experienced visually for both blind and sighted people. This points to a shared social experience that makes race visually identifiable rather than it simply being known by visual observation—empirical evidence that belies both the social and legal emphasis on visibility as the touchstone for race becoming salient. In addition to showing that blind people understand race visually, the qualitative data exposes how the strong visual sensibility attached to race is produced by constitutive social practices that shape the social interactions of blind and sighted in almost indistinguishable ways.

Although the "*race*" *ipsa loquitur* trope embedded in various aspects of law and society relies heavily on the idea that race visually speaks for itself, the data provide evidence that race is not merely a visually obvious phenomenon; its visual significance is produced, not simply observed. Since these constitutive social practices come to light through examining blind

people's experiences yet structure both blind and sighted people's racial consciousness, this data suggests that it may be time to rethink the assumption embedded throughout equal protection jurisprudence that the salience of race stems from its visual obviousness. In short, the empirical evidence suggests that "seeing race" has less to do with anything visually obvious about human bodies and more about the social practices that train us to look a certain way at them. This suggests that the "*race ipsa loquitur*" trope that orients the scrutiny inquiry, colorblindness, and the intent doctrine may not only be misinformed, but may also fundamentally warp the Court's understanding of how race becomes salient in a manner that can lead to remarkable injustices. This will be further explored in the next section.

IV. WHY EMPIRICALLY DESTABILIZING THE "*RACE*" *IPSA LOQUITUR* TROPE MATTERS: REORIENTING EQUAL PROTECTION AROUND SOCIAL PRACTICES

This Article's contribution is its empirical demonstration that visual understandings of race are created largely by social practices rather than mere observation—a contribution that is related to yet extends social constructionists' demonstration of how meanings attach to bodies. These findings suggest that visual understandings of race flourish regardless of vision; social practices produce a visual understanding of race that compels even blind people to "see" race and live their lives around the existence and social significance of racial boundaries. Sighted people's vision prevents them from grasping the role of social practices in producing the salience of race. Blind people's inability to be misled by the seemingly self-evident nature of race brings the production of race's visual salience into focus, which allows us to understand the significance of social practices to the perceptibility of group differences in race and beyond. Gerald, a blind respondent, nicely summarizes this concept:

Race is very often not a mystery to blind people. Which is in a sense kind of sad. I think that sometimes [sighted] people look at blind folks and they think [that] these people can show us the way to a kind of Star Trek race blind society. And it would be great if we could do that. But we're just as much a victim of racial prejudice, stereotypes, and misconceptions as anybody else. And the fact that we're not clued to it directly by vision doesn't, in my mind, change that a bit. I think that I suffer all of the unfortunate characteristics of my upbringing regarding race that my [sighted] brothers and sisters do.

Ginny echoes this sentiment: "I really don't think it's a matter of vision truthfully. . . . I was so amazed when this professor of mine had the premise [that blind people do not understand race.] . . . He said 'well then you're not prejudiced at all, are you?' I thought [it's] so odd that he thinks that

[it] is all about vision.” Mason also corroborated this thought, noting that race is “very much a learned thinking and behavior that doesn’t have much to do with what you can see or not.”

This empirical study of blind people’s understandings and experiences with race is relevant to equal protection to the extent that it calls into question the “*race*” *ipsa loquitur* sensibility embedded in this jurisprudence and suggests that it may distort important aspects of this area of law. This section reviews some of the existing critiques of the scrutiny inquiry, colorblindness, and the intent doctrine to situate the contribution made by this Article’s *normative claim*: that “*race*” *ipsa loquitur* must be thoroughly eviscerated from equal protection in order to pursue a new orienting theory of race that is sensitive to the ways in which social practices produce its salience. This section will discuss how reorienting equal protection along these lines will lead to a more just and equitable jurisprudence.

A. *The Scrutiny Inquiry*

Kenji Yoshino offers the most critical assessment of how the visibility of groups’ traits shapes the Court’s determination of whether a plaintiff is a member of a suspect class for equal protection purposes. Yoshino is primarily concerned with what he calls equal protection’s assimilationist bias in which there is a presumption that groups distinguished by visible traits are particularly deserving of heightened scrutiny; subjugating groups without visually distinguishing traits to rational basis review effectively encourages them to assimilate to avoid discrimination.¹²⁰ Yoshino sees this as an illegitimate response to discrimination deserving of greater constitutional protection—such as measures that discriminate against gays and lesbians—and therefore argues that the immutability/visibility prong should be eliminated since it “[is a] bad prox[y] for either substantive inequality or processual powerlessness.”¹²¹

But in critiquing the limits of the visibility prong to adequately capture which groups should be in or out, Yoshino’s perspective still lends itself to

¹²⁰ This is different from the “*race*” *ipsa loquitur* critique offered by this Article in that my focus is on how a *particular theory of race* shapes the Court’s equal protection inquiry. Yoshino’s visibility presumption is part of a discussion of the normative implications of how law thinks groups other than women and racial minorities should respond to discrimination, i.e. hiding or covering. See Kenji Yoshino, *Covering*, 111 YALE L.J. 769 (2002) [hereinafter Yoshino, *Covering*].

¹²¹ Yoshino, *Assimilationist Bias in Equal Protection*, *supra* note 23, at 570. Yoshino argues that equal protection’s heightened scrutiny inquiry should be reconstituted on a process basis. He “propose[s] that the limiting principle should be a refined analysis of political powerlessness. . . . [A] multifactor determination of political powerlessness should perform the gatekeeping function performed by the immutability and visibility factors.” *Id.* at 565.

reifying the dividing line between “visible” and “invisible”—at least to the extent that this boundary is not the subject of critique and remains coherent in his formulation.¹²² Yoshino aptly notes the socially constructed notion of race—in terms of the way social meanings attach to bodies—and questions the stability of the Court’s distinction between corporeal and social traits in privileging the former for heightened scrutiny. He argues that “there is no such thing as a purely biologically visible trait, for visibility is always relational, requiring a performer and an observer.”¹²³ This acknowledgement of visibility’s social context is more sophisticated than other equal protection discussions on the visibility of group traits. But, Yoshino’s emphasis on relationality and social context can and should be pushed further, especially given the empirical data discussed in Part III. Visibility, and specifically the salience of particular group traits, is not simply relationally known, ping ponging between the dichotomous categories of “visible” and “invisible” depending on context and audience. This account does not sufficiently critique the coherency of “visibility” and “invisibility” as categories that capture race as not only something that is merely visible but salient. Here lies the danger of reification; “visibility” and “invisibility,” though conceptualized as relational, can nonetheless sediment as an objectively known reality. To the contrary, it is important to emphasize that there is a productive genealogy behind the salience of certain group traits that embed themselves in social structure that constitutes our ability to think, see, and be struck by what we see in certain ways. Thus, the constitutive understanding of vision offered by this Article provides a richer account that goes beyond a discussion of the contexts that allow *individuals* to see in particular settings or relations and draws attention to the structural capacities that orient the way *entire societies* visually engage with the world. It is the broader, structural understanding of race and vision that this Article identifies as a constitutive theory of race that complements yet extends existing social constructionist discourses.

This matters because the lack of sociological nuance in the current three-prong approach inhibits a robust, and arguably more faithful, application of equal protection principles. By demonstrating the social practices that produce the visual salience of race, the empirical data allow us to transcend the fragmented constitutional remedies that orient around the

122 Yoshino notes that “the distinction between social and corporeal visibility is retained not because it is accurate, but because it accurately describes the intuition of the courts.” *Id.* at 498. This explicitly questions the dividing line between what he terms “social” (e.g., religion) and “corporeal” (e.g., skin color) visibility found in the Court’s jurisprudence, but does not similarly critique the dichotomous categories “visible” and “invisible”—or, to put it differently, *how certain bodies become visible*—which retain some level of coherency.

123 *Id.* at 498.

visibility of group traits to have a greater appreciation of how discriminatory social practices produce visible lines of group difference. Thus, changing the directionality of this relationship—from visible traits → race salience to a different model where race salience (socially produced) → visibility of traits—allows for a more flexible understanding of how shifting social attitudes can produce, highlight, or minimize the visibility of certain groups depending on social contexts.

Therefore, the take-home doctrinal point from putting these empirical findings in conversation with equal protection's scrutiny inquiry is that treating race as self-evidently known and salient traits that justify the Court's special solicitude trivializes equal protection by framing constitutionally impermissible discrimination as something that starts from the visual perception of obvious human difference. Instead, the empirical findings discussed in Part III suggest that courts should examine the social practices that make certain human traits salient in the first place. Re-orienting the scrutiny inquiry to focus on these social practices as a constitutional problem of first concern opens up a jurisprudential discussion of how the discriminatory treatment of certain groups currently not considered to be a suspect class—such as homosexuals and poor people—may nevertheless merit more than mere rational basis review due to the history of discrimination and current practices that produce their social salience (at times visible, and at times not) as targets for state-sponsored classifications that work against their group interest.¹²⁴ Such an approach would alter the equal protection inquiry to be sensitive to the social practices of homophobia and classism that repeatedly make homosexuals and poor people the subject of discriminatory state actions, leading to a more sociologically robust jurisprudence. This might engender a more coherent and consistent equal protection jurisprudence that places justice rather than deceptively self-evident categories of “visible” and “invisible” at the heart of the inquiry.

B. Colorblindness

Part II.B.2. discusses the current literature critical of colorblindness, where several scholars have identified the social and political circumstances giving rise to a new form of politics and constitutionalism that discourages race consciousness in equal protection jurisprudence, even when done to

¹²⁴ For a discussion on homosexuals and poor people as putative suspect classes for equal protection purposes, see Renee Culverhouse & Christine Lewis, *Homosexuality as a Suspect Class*, 34 S. TEX. L. REV. 205 (1993); Julie A. Nice, *No Scrutiny Whatsoever: Deconstitutionalization of Poverty Law, Dual Rules of Law, & Dialogic Default*, 35 FORDHAM URB. L.J. 629 (2008).

remedy ongoing inequality linked to past harms. In this Article, I have taken colorblindness as a metaphor seriously in drawing attention to how its coherence turns upon a theory of race that frames its salience as a function of visual cues to imply that blindness or non-recognition can lead to a racial utopia. The significance of this metaphorical coherence is not merely literary or rhetorical; empirical studies demonstrate how metaphors play upon our brains' cognitive structure to fundamentally shape how we understand the world and our sense of justice. Therefore, the data discussed in Part III disrupt the seemingly intuitive nature of the colorblind metaphor by demonstrating that its central organizing principle—that the salience of race is primarily a visual phenomenon and that non-recognition in and of itself facilitates equality—is empirically inaccurate. As the many blind respondents report, race is experienced and understood as a visually salient characteristic in a manner that is no less complicated or fraught than it is for their sighted counterparts.

Disrupting the colorblind metaphor's coherence through empirical methods is important. By offering qualitative data showing that the operating assumption behind the metaphor is simply inaccurate, the metaphor is rendered incoherent in a manner that raises piercing questions for the ideology and jurisprudence it supports. This is not to say that the metaphor, in and of itself, is a primary driver of the ideology and jurisprudence. Rather, it is to acknowledge that the metaphor leverages our cognitive abilities to shape our worldviews in a manner that gives undue legitimacy to an approach that can and should be disrupted by the available empirical evidence. By focusing on the social practices that produce individuals' ability to see the world in particular ways, this disruption draws attention to the need for alternative conceptions of society and human relationships that reflect reality. Reorienting the normative commitments to equal protection around constitutive social practices rather than "*race*" *ipsa loquitur* suggests that colorblindness and its concomitant jurisprudence of non-recognition given coherence through the metaphor should be retired. Taking social practices seriously as the stimulant of race becoming visually salient suggests a new understanding of race that might inform this jurisprudence in a manner that fully engages context and racial hierarchy in fulfilling equal protection's mandate.

C. *Intent Doctrine*

Legal scholars have used theories of unconscious bias to critique the discriminatory intent requirement since the late 1980s.¹²⁵ Implicit bias

¹²⁵ See Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning With Unconscious Racism*, 39 STAN. L. REV. 317 (1987) (examining the discriminatory intent doctrine

research has resurrected the critique that requiring a legal finding of intent misses how racism operates in real life.¹²⁶ By providing quantitative measures of bias through experimental measures such as the Implicit Association Test (“IAT”), this area of research has given greater empirical credence to notions that individuals often harbor unintentional sentiments that affect their human interactions—a perspective that raises severe if not fatal challenges for legal standards requiring direct proof of malice.

The prospects of using these findings to inform law has stirred a zealous debate over whether courts and legislatures should give credence to studies based upon unconscious or implicit bias. Not everyone agrees that implicit bias research is ripe enough to justify broad sweeping changes. For example, Gregory Mitchell and Philip Tetlock argue¹²⁷ that implicit bias measures suffer from serious methodological shortcomings pertaining to measurement,¹²⁸ association,¹²⁹ and predictability in real world settings.¹³⁰

through the lens of unconscious motivation analysis). Barbara Flagg develops a corollary theory of White transparency:

The imposition of transparently white norms is a unique form of unconscious discrimination, one that cannot be assimilated to the notion of irrationalism that is central to the liberal ideology of racism. While racial stereotyping can be condemned as the failure accurately to perceive the individual for who he really is, and bias as the inability to exclude subjective misconceptions or hostilities, or both, from one’s decisionmaking processes, transparency exemplifies the structural aspect of white supremacy. Beyond the individual forms of racism that stereotyping, bias, and hostility represent lie the vast terrains of institutional racism—the maintenance of institutions that systematically advantage whites—and cultural racism—the usually unstated assumption that white culture is superior to all others. Because the liberal gravitates toward abstract individualism and its predicates, she generally fails to recognize or to address the more pervasive harms that institutional and cultural white supremacy inflict. The exercise of focusing exclusively on the transparency phenomenon as an exemplar of structural racism, then, has transformative potential for the white liberal, both on the personal level and as a springboard for reflection on what it means for government genuinely to provide the equal protection of the laws.

Barbara J. Flagg, “*Was Blind, But Now I See*”: *White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 959 (1993)

126 Jerry Kang and Mahzarin Banaji note:

The science of [implicit social cognition] examines those mental processes that operate without conscious awareness or conscious control but nevertheless influence fundamental evaluations of individuals and groups. . . . [E]vidence from hundreds of thousands of individuals [who have taken the IAT] across the globe shows that (1) the magnitude of implicit bias toward members of outgroups or disadvantaged groups is large, (2) implicit bias often conflicts with conscious attitudes, endorsed beliefs, and intentional behavior, (3) implicit bias influences evaluations of and behavior toward those who are the subject of the bias, and (4) self, situational, or broader cultural interventions can correct systematic and consensually shared implicit bias.

Jerry Kang & Mahzarin Banaji, *Fair Measures: A Behavioral Realist Revision of “Affirmative Action”*, 94 CALIF. L. REV. 1063, 1064 (2006).

127 See Gregory Mitchell & Philip E. Tetlock, *Antidiscrimination Law and the Perils of Mindreading*, 67 OHIO ST. L.J. 1023 (2006).

128 Mitchell and Tetlock point to psychologists’ sharp disagreement over what the IAT measures. *Id.* at 1086. For example, mere familiarity with social norms linking race and

These concerns are not entirely without merit. But, for the purposes of this Article, the IAT and other critiques of discriminatory intent based upon unconscious bias may also be limited to the extent that they largely speak to the social construction of race—how meanings come to attach to particular bodies—and not how race comes to be experienced and understood as a salient part of the social and legal world. While it is crucially important to flesh out the cognitive biases that lead meanings to unconsciously attach to certain bodies in a manner that reflects social constructionism, it is equally important to understand the constitutive nature of how social practices produce the very visibility and coherence surrounding individuals' experiences with racial difference. Much of the intent inquiry—*theoretically, historically, and doctrinally entangled with colorblindness*¹³¹—

pejorative group meanings (e.g., being aware of them without endorsing them) can lead to IAT scores indistinguishable from those harboring bona fide animus (e.g., those who are both aware and endorse applying pejorative meanings to certain groups). See Sachiko Kinoshita & Marie Peek-O'Leary, *Does the compatibility effect in the race Implicit Association Test reflect familiarity or affect?*, 12 *PSYCHONOMIC BULL. & REV.* 442, 450–51 (2005). Other demonstrated explanations for poor IAT scores are feelings of empathy for minority groups and test anxiety linked to the fear of being called a bigot. See Eric Luis Uhlmann et al., *Are members of low status groups perceived as bad, or badly off? Egalitarian negative associations and automatic prejudice*, 42 *J. EXPERIMENTAL SOC. PSYCHOL.* 491 (2006) (arguing that many negative reactions to other races may be rooted in egalitarian feelings); Cynthia M. Frantz et al., *A Threat in the Computer: The Race Implicit Association Test as a Stereotype Threat Experience*, 30 *PERSONALITY & SOC. PSYCHOL. BULL.* 1611 (2004) (discussing how a test-taker's fear of confirming racial stereotypes may affect how the test-taker answers IAT questions). Mitchell and Tetlock argue that implicit bias methodology has not been able to hash out unconscious bias from other variables that can produce depressed IAT scores. Mitchell & Tetlock, *supra* note 128, at 1086. As a matter of science, this makes it difficult to definitively state that implicit bias is as widespread as IAT proponents make it out to be.

129 The IAT relies upon individuals' reaction times in tasks where they associate positive or negative words with group attributes. Quicker reactions are understood as having a stronger association between, for example, "Blacks" and "lazy" or "Asian" and "smart." However, Mitchell and Tetlock argue "psychometric studies have shown that a host of factors other than association strength can affect reaction time (e.g. cognitive flexibility, asymmetries in stimuli familiarity, and evaluation apprehension)." Mitchell & Tetlock, *supra* note 128, at 1033. By assuming that different reaction times only reflect attitudes and biases, Mitchell and Tetlock suggest that IAT proponents have not adequately designed their studies to take into account the effects of other variables.

130 Mitchell and Tetlock argue that even if these measurement and association issues were resolved, proponents of using implicit bias research to redesign law have yet to demonstrate that "discriminatory conduct found in artificial laboratory settings reliably predict behavior in real-world settings that often have institutionalized layers of safeguards against the expression of prejudice." *Id.* at 1033. The authors argue that in virtually every aspect of scientific research, laboratory findings do not necessarily express themselves in the real world. Thus, to suggest legal change before any connection is made between laboratory IAT scores and discriminatory behavior in daily life is arguably premature.

131 See generally López, *Intentional Blindness*, *supra* note 65.

orients around a particular reductionist understanding that disaggregates race from social context and hierarchy to recast it as a discrete trait that is purposefully targeted and presumptively self-evidently known. The intent doctrine replicates a discreteness regarding race and how it is apprehended as well as comprehended that is sociologically inaccurate; social practices, not merely discrete, acontextual racial markers of human difference, give rise to the visual salience of race that often leads to discriminatory actions and experiences. To the extent that the findings from the empirical components of this Article draw attention to the role of social practices in producing the visual salience of race, I argue that the intent doctrine also needs to be substantially revisited in favor of an approach that takes social practices, context, and racial hierarchy seriously.

V. CONCLUSION

Taken together, I conclude by arguing that the “*race*” *ipso loquitur* thread of reasoning embedded in equal protection’s scrutiny inquiry, colorblindness, and intent doctrine must be thoroughly eviscerated. The “*race*” *ipso loquitur* sensibility reproduces a troubling typological conception of race and discrimination that overemphasizes what people look like to the detriment of having a more sophisticated understanding of the social practices that make certain groups visible targets of discrimination to begin with. By emphasizing the productive genealogy of groups’ visual salience, I suggest a stronger engagement with the discriminatory social practices that produce the coherency of certain groups’ visibility—whether it be by race, class, religion, or any other characteristic central to individual and/or group identity. The point here is not that vision does not matter. Rather, the constitutionally relevant issue should be the social practices that make race a salient line of human difference.

Equal protection’s emphasis on visibility distorts discussions on the nature of race and, more importantly, may obscure judicial deliberations of the most effective way to use racial categorizations thoughtfully. Focusing on visibility privileges a certain way of thinking about race that historically has been intertwined with racial subordination, i.e., that race differences are real, tangible, and obvious rather than a product of social practices. This not only hurts other groups facing discrimination, but creates an impoverished understanding of racial discrimination that ultimately disserves racial minorities and inhibits any true effort at creating a fair society. Law must address the ways in which society trains us to think racially along typological lines of human difference that ultimately foster the very type of subordination that we must commit ourselves to eradicating.

The point of the qualitative analysis and doctrinal critique presented in this Article is not to simply make sure law conforms to the empirical realities

of social life on the ground, but to encourage more sophisticated and responsible conceptions of race by legal actors and legal scholars. It is time to begin a series of conversations about the future relationship between race and law, focusing in particular on what can be done to escape the reductionist theoretical quagmire that has defined race in American jurisprudence for the past four hundred years. Thinking empirically about equal protection is an important first step.

