

EQUAL PROTECTION INVERSIONS

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INTRODUCTION

[1] What is the appropriate standard for determining the constitutionality of race-conscious state action? Scholars have debated this question for more than four decades. Roughly, this debate tracks two models of equal protection. Under one model, race is a disfavored category and race consciousness is presumptively unconstitutional. We call this model *race per se*; it treats intentional racial consciousness—per se—as constitutionally suspect. Because of this model's indiscriminate suspicion, all race-conscious state action, whether overt or covert, whether commonly believed to be invidious or benign, must survive *strict scrutiny*. This scrutiny in turn demands that the state action be narrowly tailored (the "means" requirement) to achieving a compelling state interest (the "ends" requirement). Current equal protection doctrine reflects this approach. Indeed, the Supreme Court rendered this model even more stringent in its most recent affirmative action case, *Fisher v. United of Texas*.

[2] An alternative model, which we call *race per context*, does not assume that employing race is either always good or always bad. Informing this model is the idea that race consciousness can be good in some contexts and bad in others. Only bad or suspect uses of race (as determined by some method and in accordance with some normative metric) warrant strict scrutiny. If the government's use of race is determined to be otherwise, strict scrutiny should not apply. Current equal protection doctrine explicitly rejects this model. Thus, notwithstanding the range of controversies the *Fisher* case presented, whether the Court would apply the race per context model was not one of them.

[3] But the race per se model did not always have this hold on equal protection law. Indeed, for much of the 20th Century, equal protection jurisprudence reflected the *race per context* model. That is, these early cases reflect an explicit investment in

determining the substantive content of race conscious state action. More specifically, they sought to ascertain whether, in a given context, governmental race consciousness was good or bad, acceptable or inappropriate. In applying this model, the Supreme Court may have reached the wrong outcomes, as judged by current constitutional norms about equality. The point is that *race per context*, and not *race per se*, was the model the Court employed.

[4] If at some prior moment equal protection jurisprudence reflected the *race per context* model, when and how did the *race per se* model take hold? Surprisingly, scholars have paid scant attention to this question. There is, of course, a robust literature bemoaning the current state of equal protection law. But, for the most part, that body of scholarship has not marked the specific jurisprudential techniques the Supreme Court has employed to move us from a race per context model of equal protection to a race per se model.

[5] This essay describes those techniques. It does so in the context of articulating a broader account of the ways in which the Supreme Court has inverted equal protection jurisprudence. As will become clear, the story we will tell is not just about colorblindness, though the ascendancy of that ideology is relevant to our analysis. Nor is our story just about race, though race remains the focus on our concern. We situate our discussion of strict scrutiny, and the race per model that underwrites it, against the backdrop of shifts in the Court's gender and sexual orientation equal protection case law. We do so to show that as strict scrutiny developed to leave people of color effectively unprotected by equal protection law, rational basis and intermediate scrutiny developed to provide at least some protections for women and gay and lesbians.¹

¹ We do not mean to suggest that the Court's equal protection gender jurisprudence and its sexual

The end result is that, under current equal protection doctrine, people of color are the most difficult social group around which judges can remedially intervene. Given the historically privileged position racially subordinated groups have occupied in equal protection jurisprudence as members of a protected class, their unprotected status as remedial subjects under the race per se model deserves explanation. We offer that explanation by describing four significant equal protection inversions, indicating the role each has played either establishing or entrenching the race per se model.

[6] Part I describes the inversion of equal protection precedent. Our approach here is twofold. First, we show the specific ways in which the Supreme Court employs the race per se model to explain cases that were decided under, or included elements of, a race per context approach. Significantly, our archive includes but transcends *Brown v. Board of Education*. Second, we attribute the race per context model to two cases that scholars across the ideological spectrum universally condemn: *Plessy v. Ferguson* and *Korematsu v. United States*. Our aim is certainly not to rehabilitate these troubling opinions but rather to show that the Court decided them by asking a series of contextual questions about race. Neither case fashioned its equal protection analysis simply in terms of whether the government engaged in racial consciousness. Both asked more probing questions about race and racial inequality. These questions included whether governmental action was motivated by ill will or

orientation case law are pro-feminist and pro gay rights, respectively. That would be putting the point too strongly. We simply mean to note that whereas the Court's race jurisprudence reflects a race per se approach, the Court's gender and sexual orientation jurisprudence are more contextual.

racial hatred; whether that action was intended to racially subordinate an identifiable and vulnerable racial group; and whether the government's conduct communicated a message of racial inferiority. Needless to say, in both *Plessy* and *Korematsu* the Court's answers to these questions were horribly wrong: We emphatically do not want to be misread. But the Court asked a set of substantive questions about race, or put another way, employed the right model: *race per context*.

[7] Part II highlights a second equal protection inversion: the inversion of the initial doctrinal articulation of strict scrutiny. Most scholars trace the doctrinal genesis of strict scrutiny to *Korematsu*. But they do so without importing the formulation of strict scrutiny the *Korematsu* Court articulates. Unlike the current iteration of strict scrutiny in which race per se triggers the regime, the *Korematsu* standard is predicated on governmental uses of race that curtail civil rights. Yet, almost every scholar in the field, most of the major Constitutional Law textbooks, and the central equal protection race cases, cite *Korematsu* for the proposition that race per se triggers strict scrutiny. The inversion of the strict scrutiny standard *Korematsu* sets forth not only entrenches the race per se model of equal protection: it makes that model appear doctrinally more inexorable and less contestable than it is.

[8] Part III sets forth a third inversion. Our focus here is on the failure by courts and legal academics to disaggregate two functions of strict scrutiny: "detection" and "justification." The detection function of strict scrutiny "smokes out" something that may not be readily visible, such as invidious motivations; the "justification" function determines whether the harm caused by the state action is outweighed by a compelling state interest and also whether the harm has been adequately and thoughtfully minimized.

[9] As a general matter, but particularly in the context of affirmative action cases, the Court gets normative buy-in for its race per se approach in part

by performing a bait-and-switch. Specifically, the Court rhetorically "baits" us into thinking that it will deploy strict to detect *invidious racial discrimination* and then "switches" to apply the regime as justification for intentional *racial consciousness*. Inverting the detection function of strict scrutiny to the justification function makes race per se, or any use of race, the strict scrutiny trigger. *Adarand v. Peña* manifests the Supreme Court's most significant deployment of bait-and-switch. There, the Court employs the strategy to extend the race per se model to the federal government's utilization of affirmative, significantly restricting Congress's remedial powers under Section 4 of the Fourteen Amendment.

[10] Part IV focuses on equal protection's standards of review. This part highlights the inversion of strict scrutiny from the superior position it occupied vis-à-vis intermediate scrutiny and rational basis as a remedial framework for people of color to the more limited role the doctrine now plays in combating racial inequality. In the context of advancing this claim, we show that two recent Supreme Court decision—*United States v. Windsor* (in which the Court ruled that the Defense of Marriage Act was unconstitutional) and *Fisher v. Texas* (in which the Court heightened the standard universities must meet to utilize affirmative action)—are part of a broader doctrinal phenomenon in which rational basis and intermediate scrutiny perform more remedial work than strict scrutiny.