

MADISONIAN MULTICULTURALISM

ALEXANDRA NATAPOFF*

I. A MADISONIAN APPROACH TO RACE

In 1788, James Madison mulled over the enormous burdens that diversity imposes on a nation's ability to forge political harmony.¹ After mourning the destructive impact of competing political factions, Madison offered his now-classic diagnosis:

There are again two methods of removing the causes of faction: the one, by destroying the liberty which is essential to its existence; the other, by giving to every citizen the same opinions, the same passions, and the same interests.

It could never be more truly said than of the first remedy, that it is worse than the disease. . . . The second expedient is as impracticable as the first would be unwise. . . . The latent causes of faction are thus sown in the nature of man.²

Madison concluded that diversity and difference, or in his words, factionalism, were inevitable characteristics of a free society. "The inference to which we are brought," he reasoned, "is, that the causes of faction cannot be removed, and that relief is only to be sought in the means of controlling its effects,"³ and that factionalism lies at the heart of politics itself. "The regulation of these various and interfering interests forms the principal task of modern legislation, and involves the spirit of party and faction in the necessary and ordinary operations of the government."⁴

* Attorney, Washington, D.C.; J.D., *Stanford Law School*, 1995. Special thanks to Dean Jamin Raskin, Professor Mark Kelman, and Caitlin Halligan.

This Essay is based in part on an article by the same author, *Trouble in Paradise: Equal Protection and the Dilemma of Interminority Group Conflict*, 47 *STAN. L. REV.* 1059 (1995), and on comments made at the Washington College of Law Conference.

1. *THE FEDERALIST* NO. 10, at 16-17 (James Madison) (Ray Fairfield ed., 1987).

2. *Id.* at 17-18.

3. *Id.* at 19 (emphasis omitted).

4. *Id.* at 18.

Madison's theory of faction contains a valuable lesson for modern-day racial politics about the importance of accommodating the political expression of minority group interests. There are at least thirty recognized racial minority groups that currently make up twenty-five percent of the United States' population, and at least eleven major U.S. cities are already majority-minority.⁵ By the year 2050, African Americans will no longer be the largest racial minority and the United States will be a majority-minority nation.⁶ While whites will still constitute the largest single racial group, and presumably continue to benefit from a legacy of economic and social hegemony, the very notions of "majority" and "minority" will necessarily evolve along with the changing racial makeup of the nation.⁷

Madison's analyses suggest that, given these burgeoning groups and shifting interests, race-based factionalism may be an inevitable part of this increasingly diverse American body politic. While Madison himself clearly did not contemplate race as a source of political factionalism and his insights may not map with perfect precision onto modern racial politics, race today is an important political determinant that inspires significant factional interest-group jockeying, not only between whites and minorities, but between different groups of color.⁸ This state of affairs poses a strong challenge to the Supreme Court's current color-blind position that all racially explicit legislation is an illegitimate expression of racial animus and, more fundamental-

5. See William P. O'Hare, *America's Minorities—The Demographics of Diversity*, POPULATION BULL., Dec. 1992, at 1, 9-25 (identifying sub-groups within minority populations and listing race and ethnicity statistics for 20 largest U.S. cities).

6. *Id.* at 2. Latinos are expected to surpass African Americans in number around the year 2010. *Id.*

7. See *id.* at 25 (noting that majority-minority ratios will shift in certain cities where whites will lose their majority status over next few years).

8. Theoretically speaking, race can be understood alternatively as a form of prepolitical, immutable identity or as a set of political, social, historical, and thus in some sense contingent, interests. The first approach underlies the Supreme Court's color-blind jurisprudence, which asserts that political classifications based on racial identity are nothing more than constitutionally illegitimate stereotypes. See, e.g., *Shaw v. Reno*, 113 S. Ct. 2816, 2827 (1993). The second anti-essentialist approach treats race as a historical, politicized aspect of identity whose character is tied to the distribution of power. See, e.g., MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES* 53-76 (2d ed. 1994); Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1993). This latter version most closely resembles Madison's concept of political faction because it posits the ability to change the power relationships and political interests associated with racial identity and recognizes that the meaning of group membership can change over time. This Essay adopts a somewhat intermediate approach by assuming that the meaning of racial categories can change but that, at a given moment, relatively determinate racial identities exist. The Essay takes this position in part because the Court relies on such categories, but more importantly because even if racial categories are socially constructed they are real for the people who experience them.

ly, that the purpose of the Equal Protection Clause is to eliminate or at least suppress the racial factionalism that spawns such legislation. If, as Madison suggests, some racial factionalism is bound to exist as long as there is racial difference, the Supreme Court's bar on explicit race-based politicking is not only unrealistic but disproportionately hurtful to minority groups for whom the possibility of victory in the legislative arena might well increase the majority's political responsiveness to minority concerns.

In Madisonian terms, then, our laws and system of governance should be grappling with how to accommodate the increasing diversity of the body politic by ensuring that all racial groups participate equally and without structural disability. In part, this entails acknowledging and controlling the effects of factional competition between different minority groups in light of the continued cultural and economic dominance of the white majority, precisely because factional competition among minority groups strengthens the power of the majority.⁹ The task demands not only a recognition of the role played by race in interest group politics¹⁰ but heightened sensitivity to racial differences beyond black and white.¹¹

Last Term, however, the Supreme Court ignored Madison's warning about the inevitability of faction and took aim at race itself as if to eliminate one of the great causes of faction in American history. In three major decisions, on voting rights,¹² affirmative action,¹³ and school desegregation,¹⁴ the Court reiterated its color-blind jurisprudential stance and its hostility to the ways in which legislation and

9. See THE FEDERALIST NO. 10, *supra* note 1, at 18-19 (charging government with duty of fostering coexistence of factions). Professor Charles Lawrence poses the question of accommodating diversity and mitigating factional competition in this way: "In what different, complex, and interrelated ways is the experience of each [minority] group related to the maintenance of white supremacy? . . . [This] is very different from asking whether one group has been more disadvantaged or more victimized than another." Charles R. Lawrence III, *Foreword: Race, Multiculturalism, and the Jurisprudence of Transformation*, 47 STAN. L. REV. 819, 826 (1995) (citations omitted).

10. The tension between the liberal, individual-rights-based model and more group-oriented representational theories is beyond the scope of this Essay, although it is a central theme in the longstanding debate over the meaning of the Equal Protection Clause for minority groups. See, e.g., William Van Alstyne, *Rites of Passage: Race, the Supreme Court, and the Constitution*, 46 U. CHI. L. REV. 775 (1979) (advocating an individualistic approach to race and affirmative action).

11. For analyses of many of the thorny issues raised by equal protection rights in a multiracial society, see *Symposium: Race and Remedy in a Multicultural Society*, 47 STAN. L. REV. 819 (1995).

12. *Miller v. Johnson*, 115 S. Ct. 2475, 2489-94 (1995) (holding that Georgia's congressional redistricting plan creating majority-black district violated Equal Protection Clause).

13. *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097, 2113 (1995) (holding that government contract awarded to disadvantaged business enterprise on basis of minority group racial classification warranted strict scrutiny).

14. *Missouri v. Jenkins*, 115 S. Ct. 2038, 2055-56 (1995) (holding that remedial measures seeking to desegregate Kansas City, Missouri schools were overbroad).

public policy speak overtly to racial inequality. The Court implied, for example, that alleviating racial inequality is an illegitimate basis for public collective action through legislation where such legislation reflects the majority's impulse to remedy past discrimination or where it embodies a disfavored minority's struggle for economic or political inclusion.¹⁵ The Court also reasserted its longstanding position that the equal protection mandate does not authorize the redistribution of economic and other social goods on the basis of race, even where such redistribution directly eases racial inequality.¹⁶

These decisions reflect a common theme of hostility toward the official recognition of race, racial difference, racial discrimination, or racial inequality. The Court has reasoned that race consciousness causes racial factionalism, and in particular, that racially sensitive legislation such as the Voting Rights Act¹⁷ and small business set-asides exacerbate and even create rather than alleviate racial divisiveness.¹⁸ Perhaps Justice Scalia best articulated the Court's desire to eliminate race consciousness when he denied racial difference altogether. "In the eyes of government," he wrote, "we are just one race here. It is American."¹⁹ More fundamentally, the Court's assertions taken together imply that *racial factionalism itself* is the evil at which the Equal Protection Clause is aimed, and not historic discrimination, exclusion, or inequality.²⁰

Madison's theory that factional differences are not only inevitable but that their interplay actually produces a vibrant body politic²¹ strongly undermines the Supreme Court's reasoning. In Madisonian

15. *Adarand*, 115 S. Ct. at 2113; *Miller*, 115 S. Ct. at 2491-92; *City of Richmond v. J.A. Croson, Co.*, 488 U.S. 469, 505-06 (1989). By contrast, John Hart Ely has argued that equal protection concerns are not implicated when majority chooses to disadvantage itself. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 170-71 (1980).

16. *Jenkins*, 115 S. Ct. at 2054; see also *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

17. Pub. L. No. 89-110, 79 Stat. 437 (1965) (codified as amended at 42 U.S.C. §§ 1971, 1973, to 1973bb-1 (1994)).

18. *Adarand*, 115 S. Ct. at 2113; *Miller*, 115 S. Ct. at 2486.

19. *Adarand*, 115 S. Ct. at 2119 (Scalia, J., concurring).

20. See *Miller*, 115 S. Ct. at 2486; *Shaw v. Reno*, 113 S. Ct. 2816, 2832 (1993).

It is important to note that while the Court's equal protection decisions ostensibly deal only with constitutional and not statutory remedies for racial inequality, they limit all forms of race-based legislation. The Court increasingly treats the Equal Protection Clause not as a floor for the protection of minority rights but as a ceiling on the scope of permissible remedies. Thus the Equal Protection Clause now limits the power of the state and federal government to institute affirmative action, the power of the federal district courts to desegregate public schools, and the scope of the Voting Rights Act. See *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097 (1995) (federal affirmative action); *City of Richmond v. J.A. Croson, Co.*, 488 U.S. 469 (1989) (state affirmative action); *Missouri v. Jenkins*, 115 S. Ct. 2038 (1995) (school desegregation); *Miller v. Johnson*, 115 S. Ct. 2475 (1995) (Voting Rights Act); see also *infra* text accompanying notes 39-51 (providing overview of Supreme Court jurisprudence as it relates to race and class).

21. See THE FEDERALIST NO. 10, *supra* note 1, at 18.

terms, the Court can no more eliminate race-based political interests than it can "giv[e] to every citizen the same opinions, the same passions, and the same interests."²² Instead, the task of the Court and legislators alike should be to ameliorate the *effects* of racial faction, which would mean restraining the ability of one faction to exclude and discriminate against another in ways that create structural inequality.²³ Madison believed that a successful system of republican government would

make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength and to act in unison with each other.²⁴

In an era where "playing the race card" has become a political term of art, Madison's prescriptions should be understood to apply to white racism as to other forms of pluralistic majoritarian tyranny.

Madison paid close attention to the special and dangerous role played by the majority faction:

If a faction consists of less than a majority, relief is supplied by the republican principle, which enables the majority to defeat its sinister views by regular vote. . . . When a majority is included in a faction, the form of popular government, on the other hand, enables it to sacrifice to its ruling passion or interest both the public good and the rights of other citizens.²⁵

The lesson here is that concerted political action by the majority is more fearsome than that of minority groups which, by virtue of the structure of the political system itself, can wreak only limited havoc on the rights of others. This suggests that, contrary to the Court's current position, it sometimes may be appropriate to treat whites as a group differently under an equal protection analysis, precisely because they constitute a numeric and historic majority with the ability to distort the political process and control the definition of the common good.²⁶ In this sense, then, the Voting Rights Act, race-

22. THE FEDERALIST NO. 10, *supra* note 1, at 17.

23. THE FEDERALIST NO. 10, *supra* note 1, at 18 (identifying regulation of competing interests as primary task of legislation).

24. THE FEDERALIST NO. 10, *supra* note 1, at 22; *see also* ELY, *supra* note 15, at 153 (equating white racial prejudice with Madison's majoritarian "common motive").

25. THE FEDERALIST NO. 10, *supra* note 1, at 19.

26. *See* United Jewish Org. v. Carey, 430 U.S. 144, 166 (1977) (finding that Hasidic Jews were part of white majority and therefore could not claim vote dilution when their community was split between voting districts). *But see* Shaw v. Reno, 113 S. Ct. 2816, 2829-30 (1993) (holding that whites are entitled to same rights under Equal Protection Clause as racial minorities and therefore that white voters could bring vote-dilution claim). The issue of white status will necessarily become more complex when, by mid-century, whites no longer constitute a numeric majority. *See* O'Hare, *supra* note 5, at 2.

based economic preferences, school desegregation measures, and antidiscrimination laws that aim to equalize the participatory power of racial minorities should be seen as Madisonian salve on this nation's factional wounds.

The Court's new voting rights cases, however, conclude otherwise. They hold that legislative increases in *minority* political power pursuant to the Voting Rights Act offend broader interests of political harmony.²⁷ Justice Kennedy, for example, asserted that "[r]ace-based assignments . . . cause society serious harm"²⁸ and that "[r]acial classifications with respect to voting carry particular dangers. Racial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters."²⁹ According to this reasoning, governmental racial classifications that empower minority groups should be rejected because they exacerbate latent factional tendencies. Madison teaches, however, that factional difference is a natural and inevitable aspect of a free society, and that governmental policies that mitigate its effects—such as giving minorities the power to counter majoritarian tyranny—are not only proper but actually necessary for the continued functioning of a diverse body politic.

In sum, the Court's commitment to a color-blind jurisprudence clashes with Madison's directive to accommodate factional diversity. As the nation grows increasingly diverse, the costs of this posture can only increase because it prevents our representative system from reflecting changes in the legitimate interests of its constituent groups. More fundamentally, it makes it even harder for minorities as individuals and in groups to participate in the political arena on a truly equal footing.

Another result of the Court's color-blind jurisprudence is that different minority groups are more likely to be forced to compete with each other, rather than with the white majority, for a shrinking pie of race-based goods and preferences.³⁰ In a recent voting rights

27. See, e.g., *Miller v. Johnson*, 115 S. Ct. 2475, 2486 (1995) (characterizing race-based assignments as harmful to society); *Shaw*, 113 S. Ct. at 2832 (criticizing racial classifications designed to increase minority voting power).

28. *Miller*, 115 S. Ct. at 2486.

29. *Id.* (quoting *Shaw v. Reno*, 113 S. Ct. 2297, 2832 (1993)).

30. Although an analysis of the economic, social, and political sources of such conflict is beyond the scope of this Essay, others have addressed the issue. See, e.g., Lawrence, *supra* note 9, at 826 (identifying white supremacy as source of inter-minority group conflict); James Jennings, *New Demographics and Ethnic Challenges to Racial Hierarchy in the United States*, 19 SAGE RACE REL. ABSTRACTS 19, 23, 26 (1994) (warning against mass media sensationalization of inter-minority group conflict and analyzing some of its structural sources).

case, for example, a federal district court in Dade County, Florida, found under the Voting Rights Act that African-American and Latino plaintiffs were each entitled to an additional voting district.³¹ Because only one such district—either African American or Latino—could be drawn, the federal district court found the remedies for the two communities to be mutually exclusive and left the offending districting plan in place.³² The very aim of the Voting Rights Act—to ameliorate minority vote dilution—was thus discarded, to the benefit of Florida's white majority.³³

In an even more complex case involving San Francisco's Lowell High School, Chinese Americans have been pitted against African Americans and Latinos for admission to the competitive magnet school.³⁴ Under the terms of a longstanding desegregation consent decree, Lowell High has repeatedly raised the admission standards for Chinese applicants in order to cap their enrollment numbers because their test scores are so high.³⁵ If the Chinese American student plaintiffs succeed in their current legal challenge to the consent decree, they will most likely eliminate an antidiscrimination remedy intended to benefit people of color and, more specifically, one to which African-American and Latino students are still legally entitled. In effect, the racial preference expressed in the consent decree has become a ceiling on minority group achievement, rather than a protective floor, because all groups of color, no matter how differently situated, are forced to compete with each other for the racially-designated places. This outcome appears jurisprudentially inevitable unless the Supreme Court was willing to recognize the different historical postures of whites and people of color with respect to the desegregation process and the possibility that different groups of color might have different desegregation needs. Because the Court's color-blind posture denies the relevance of interminority group difference and factional competition, however, we lack even the jurisprudential vocabulary to describe the complex political, historical, and economic conflicts between African American, Latino, Asian, and

31. *DeGrandy v. Wetherell*, 815 F. Supp. 1550 (N.D. Fla. 1992), *aff'd in part, rev'd in part sub nom.* 114 S. Ct. 2647 (1994).

32. *Id.* at 1579-80 (noting that creation of voting district in favor of either group would adversely affect other group).

33. *Id.* at 1572. The Supreme Court affirmed this aspect of the decision without comment because it found no vote dilution and thus no need for a remedy. *Johnson v. DeGrandy*, 114 S. Ct. 2647 (1994).

34. For an exhaustive analysis of the Lowell High School controversy and its constitutional implications, see Selena Dong, Note, "Too Many Asians": *The Challenge of Fighting Discrimination Against Asian-Americans And Preserving Affirmative Action*, 47 STAN. L. REV. 1027 (1995).

35. *Id.* at 1030-34.

white factions in a constitutionally meaningful and sensitive way. As a result, the initial concerns underlying the consent decree—the denial of quality education to students of color—falls by the wayside.

In a final example, efforts to desegregate San Francisco's public housing have turned the very concept of desegregation upside down. The San Francisco Housing Authority (SFHA) has been attempting to satisfy its obligation to eliminate racially identifiable housing projects by moving poor Southeast Asian and Latino tenants into predominantly African-American projects.³⁶ The results have included increased tension, reduced integration, and even violence by African Americans against Southeast Asians,³⁷ without improving the quality of life in public housing or increasing the political access of public housing tenants. One reason for this counterproductive development is that the Court's color-blind jurisprudence denies the constitutional relevance of the historical, political, and economic advantages held by the white majority; San Francisco's obligation to desegregate therefore can be constitutionally satisfied by, as one housing advocate described it, "moving different colored bodies from one side of town to the other,"³⁸ without ever asking whether white communities or resources should be involved.

In such cases of inter-minority group conflict and the failure of traditional remedies, a more Madisonian analysis would suggest that the claims of different minority factions should be assessed not only against each other but in light of an overall aim of reducing majoritarian factional tyranny.³⁹ Absent such an analysis, the competing claims of minority groups ironically may prevent the underlying harms of racial discrimination and exclusion from being addressed at all.

II. RACE, CLASS, AND THE PROBLEM WITH PROXIES

Despite the existence of growing African-American, Latino, and Asian-American middle classes, there is a well documented link

36. Bill Ong Hing, *In the Interest of Racial Harmony: Revisiting the Lawyer's Duty to Work for the Common Good*, 47 STAN. L. REV. 901, 947 (1995).

37. *Id.* at 947-49; Jim Doyle, *Asians File Rights Suit Against S.F.: Complaint Accuses Housing Authority of Ignoring Pleas for Help*, S.F. CHRON., Mar. 30, 1993, at A13.

38. Gen Fujioka, Staff Attorney, Asian Law Caucus, Presentation at San Francisco Human Rights Commission Public Hearing, *Integrating Public Housing: Fostering Positive Ethnic/Racial Relations* (Mar. 1, 1995) (on file with author); see also Gen Fujioka, *Turning the Tide of Terror and Indifference*, ASIAN LAW CAUCUS REP., Oct. 1994 1, 1-3 (describing efforts of community activists to improve conditions in San Francisco's public housing).

39. See THE FEDERALIST NO. 10, *supra* note 1, at 19 (characterizing challenge of republican form of government as securing public good and private rights against dangers of majoritarian factionalism while simultaneously preserving spirit of popular government).

between racial minority group status and poverty.⁴⁰ So much so that many scholars and politicians advocate income-based rather than race-based programs as a way of alleviating racial inequality, although others counter that class alone cannot account for the disadvantages experienced by racial minorities.⁴¹

In light of the debate over the relationship between race and class, it is instructive to note that Madison focused on wealth and the unequal distribution of property as the primary source of political factionalism.⁴² The Supreme Court has long held, however, that class is not a constitutionally cognizable category.⁴³ Indeed, the Court treats the distribution of wealth as the quintessential political issue about which the Constitution has nothing to say.⁴⁴ By contrast, the Court's recent cases identify race as an issue unfit for political resolution. Any law containing an explicit recognition of race, no matter how legitimately promulgated or beneficial to racial minorities, warrants the heaviest of judicial pressure—strict scrutiny.

This "strict scrutiny," and its "strict in theory but fatal in fact" application,⁴⁵ effectively prohibits minority racial groups from using traditional interest group politics to improve their lot. While farmers, teachers, cigarette companies, labor unions, and the National Rifle Association alike can, at least in theory, push facially self-serving legislation through Congress and local legislatures, African-Americans,

40. O'Hare, *supra* note 5, at 28-39 (documenting educational, occupational, and income disparities between whites and minority groups). For example, 14% of African Americans and 10% of Latinos are college graduates as compared with 28% of whites; the median net worth of whites is about 10 times that of blacks and Latinos; and 33% of African Americans live below the poverty line as compared to 9% of whites. *Id.*

41. Compare WILLIAM JULIUS WILSON, *THE DECLINING SIGNIFICANCE OF RACE: BLACKS AND CHANGING AMERICAN INSTITUTIONS* 1-2, 144-54 (2d ed. 1980) (attributing development of black underclass primarily to economic factors) with DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* 1-16 (1993) (arguing that urban segregation and accompanying economic disadvantage cannot be explained without acknowledging racism).

42. *THE FEDERALIST* NO. 10, *supra* note 1, at 18. Madison's great fear was that the unpropertied majority might seek to exercise its numeric power to redistribute wealth away from property holders. See *id.* at 19 (envisioning overtaxation of property holders for benefit of majority). His insights into majoritarian tyranny, however, are not limited to that particular scenario.

43. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28, 39 (1973) (holding that poverty is not suspect class and that differences in wealth do not trigger heightened scrutiny under Equal Protection Clause).

44. See *Lyng v. Castillo*, 477 U.S. 635, 642-43 (1986) (upholding decreases and denials of food stamps allotment); *Dandridge v. Williams*, 397 U.S. 471, 487 (1970) (holding that state may impose maximum limit on welfare benefits).

45. Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972); cf. *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097, 2117 (1995) ("[W]e wish to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.'" (citations omitted)).

Latinos, and Asian Americans may not. Justice Stevens bemoaned the irony of this particular legal development when he wrote that "racial minorities should not be *less* eligible than other groups to benefit from districting plans the majority designs to aid them."⁴⁶ Handicapped in the give-and-take of legislative bargaining, racial minorities must rely increasingly heavily on the courts in order to craft racially explicit remedies for the disadvantaged. By contrast, while the poor as a group do not operate under any such constitutional handicap, they must compete in the political marketplace with no help from the courts at all.

The effect of the Court's dual treatment of race and class is to burn the candle of racial inequality at both ends. On the one hand, cases such as *Adarand* and *City of Richmond v. J.A. Croson, Co.*⁴⁷ require people of color seeking beneficial legislation to find legislative proxies for race such as poverty, residence, educational attainment, or in the small business context, size.⁴⁸ Such decisions pressure people of color with common interests to express those interests legislatively in terms of these nonracial proxies, which are constitutionally permissible classifications, in order to mitigate the economic, political, and social manifestations of racism and racial exclusion.⁴⁹

Simultaneously, however, the Court asserts that these proxies cannot be used *judicially* to identify racial discrimination or to craft remedies. District courts battling school segregation, for example, may *not* use the proxies of poverty or educational attainment to alleviate racial inequality in education between cities and suburbs.⁵⁰ Courts may *not* use the proxy of *de facto* residential segregation to

46. *Miller v. Johnson*, 115 S. Ct. 2475, 2499 (1995) (Stevens, J., dissenting) (emphasis added).

47. 488 U.S. 469 (1989).

48. See *Adarand*, 115 S. Ct. at 2118 (instructing lower court to determine whether there was any consideration of "race-neutral" alternatives to set-aside); *City of Richmond v. J.A. Croson, Co.*, 488 U.S. 469, 471 (1989) (noting that city did not consider any "alternative, race-neutral means to minority participation").

Likewise, the Court in *Miller* determined that race by itself does not constitute a legitimate "communit[y] of interest." *Miller*, 115 S. Ct. at 2490. The Court cited the lower court's finding that "[t]he evidence was compelling that there are no tangible communities of interest spanning the hundreds of miles of the Eleventh District." *Id.* (citations and quotations omitted). The majority thus effectively denied that, as noted by the dissent, "ethnicity itself can tie people together." *Id.* at 2504 (Ginsburg, J., dissenting).

49. Of course, there is no constitutional prohibition against people of color forming political coalitions based on shared racial interests. Those coalitions, however, are prohibited from instantiating those interests in racially explicit legislation.

50. See *Missouri v. Jenkins*, 115 S. Ct. 2038, 2051 (1995) (noting that the district court cannot do indirectly what it lacks authority to do directly); see also *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973) (upholding local school funding scheme that resulted in lower quality schools for communities of color).

strike down racially exclusionary zoning laws.⁵¹ Courts cannot rely on the proxy of statistical disparities in the workplace to combat employment discrimination without a showing of discriminatory intent.⁵² In other words, the Court has declared racial proxies to be ineffective constitutional tools for racial equalization, even as the Court indicates in other ways that they may be the only tools left.

People of color, whose disadvantage is rooted both in racial discrimination and economic exclusion, have thus been thrown back into the political marketplace with a severe handicap. On the one hand, economic disadvantage and other proxies for race do not provide a basis for heightened *judicial* protection. On the other, the Court has identified race as an impermissible *legislative* tool with which to remedy the effects of discrimination. In other words, not only do the courts now offer less redress for manifest racial disadvantage, but the Equal Protection Clause now hampers people of color from using the representative process to forge beneficial legislation that might counter that disadvantage by other means.

III. CONCLUSION

The Supreme Court has imposed a color-blind mandate on an increasingly multicultural, racially diverse body politic. In so doing, it has curtailed the ability of people of color to use interest group politics as a way of lessening racial inequality, challenging discrimination, and crafting political compromise. Madison's theory of faction, however, suggests a more structural and potentially inclusive approach to managing our increasing diversity. Instead of insisting that any acknowledgement of racial difference represents a political and constitutional failure, the Court should incorporate Madison's pragmatic structural approach to faction and try to open up the political process to racial minorities, even while recognizing the persistent danger of white majoritarian tyranny. Ironically, as our nation grows increasingly diverse, the deeply flawed democratic process that once justified slavery and Jim Crow may turn out to be the only viable source of racial healing.

51. See *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 270-71 (1977) (upholding zoning scheme that functioned to exclude people of color).

52. See *Washington v. Davis*, 426 U.S. 229, 247-48 (1976) (requiring showing of discriminatory intent in constitutional challenge to use of employment test that effectively excluded African-American applicants). Statistical disparities may, however, be used as evidence of discriminatory intent and Title VII permits disparate impact claims. See, e.g., *Griggs v. Duke Power Co.*, 401 U.S. 424, 431-32 (1971) (recognizing disparate impact claim under Title VII).

