**Race on the Brain: Implicit Bias and the Conservative Frame of Law and Racial Justice**

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**Abstract:** This presentation is part of a larger project exploring some of the underappreciated implications of the widespread embrace and application of theories of implicit bias to address contemporary racial injustice in the United States. It will focus on the tendency of implicit bias theorists, also known as “behavioral realists,” to accept a fundamentally conservative frame for modern civil rights jurisprudence. It considers the relationship of behavioral realism to four key aspects of the conservative frame: time, color-blindness, diversity and intent.

*Time* involves the implications of casting explicit racism as largely a thing of the past. Behavioral realism’s focus on the “here and now-ness” of implicit bias in contrast to explicit racism tacitly reinforces conservative arguments that racism is largely a thing of the past and hence not a concern sufficient to justify policies such as affirmative action. The conservative embrace of a *color-blind* ideal as a rationale for striking down affirmative action similarly resonates with the implicit norm of the IAT that subjects should respond the same to black as to white faces – i.e. that they should be “blind” to the color of the target stimulus. Also embedded in this implicit norm is the idea that racial categories should not carry distinctive positive or negative valences so that subjects respond to them neutrally as just another attribute among many. While laudable in the abstract, this approach treats race in a manner similar to the conservative holdings in *Bakke* and *Grutter* that drain racial identity of its distinctive character and history by treating it as merely yet another “factor” among many to be considered in serving to promote “diversity” – the only interest recognized as sufficiently compelling to justify the use of racial categories in affirmative action. Finally, the focus on subjective “intent” so central to behavioral realist approaches to racial discrimination basically embraces the conservative disparate treatment framework of cases such as *Washington v. Davis* and *Personnel Administrator v. Feeney*. I argue that this approaches places an inordinate faith in the power of empirical data and quantitative measurement to do the heavy ideological lifting of making arguments for addressing structural discrimination, particularly in employment settings. The practical outcome is that conservative justices may pick and choose among the numbers and empirical methodologies that suit their purposes without having any of their underlying assumptions challenged by this strand of behavioral realism.